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An Undetectable Constitutional Violation

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An Undetectable Constitutional Violation

Jill Wieber Lens

ABSTRACT

In Philip Morris USA v. Williams, the Supreme Court mandated that lower courts implement procedural protections to ensure that the jury, when awarding punitive damages, properly considers evidence of the defendant’s harming nonparties. The jury can consider that evidence when determining the level of the defendant’s reprehensibility, but punishment for causing that nonparty harm would violate the defendant’s constitutional rights.

Ten years later, this Article is the first to examine lower courts’ attempts to comply with Philip Morris. The Article first seeks to clarify how evidence of nonparty harm can demonstrate reprehensibility, a clarification necessary before courts can even begin to try to apply Philip Morris’s reprehensibility-punishment distinction. The Article then both criticizes the protection most lower courts have used—vague limiting instructions—and suggests alternative protections. A new rule governing the admissibility of nonparty harm should be used because of the constitutional implications of the admission of the evidence. Courts should also include explanations within their limiting instructions and aggressively review awards for possible Philip Morris violations despite the use of limiting instructions.

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INTRODUCTION

Although we cannot know how the jury determines the amount of punitive damages, we do know that the way the jury does so can make the award unconstitutional. In Philip Morris USA v. Williams, the Supreme Court declared that a punitive damage award is unconstitutional if it punishes the defendant for harming nonparties.

Thus, if the jury hears evidence that the defendant hurt others than the named plaintiff, the jury cannot use the punitive damage award to punish the defendant for harming those others.

An additional nuance exists, however, because there is a way that the jury can permissibly consider evidence of the defendant’s harming nonparties. This possibility exists because, in the Court’s words, if “the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public,” it “was particularly reprehensible.” And the more reprehensible the conduct, the more severe the punishment.

Thus, it is permissible for the jury to consider evidence of nonparty harm to determine reprehensibility, but the jury cannot then punish the defendant for causing that nonparty harm. The jury must appreciate the distinction and not punish nonparty harm because to do so would violate the defendant’s constitutional rights. To help the jury, Philip Morris mandated that lower courts adopt procedural protections to “provide assurance that the jury will ask the right question, not the wrong one.” Ultimately, though, the jury decides whether to award punitive damages—and how much to award—during jury deliberations, and we can never know for sure the jury’s bases for its decision.

The Court decided Philip Morris ten years ago. The goal of this Article is to study the reprehensibility-punishment distinction both to see how it has been interpreted and implemented. This research revealed that ten years later, lower courts are, perhaps unsurprisingly, still struggling—in ways they might not even realize—with the distinction.

Part of that struggle is based on the reprehensibility-punishment distinction itself. Most lower courts have assumed that nonparty harm always demonstrates reprehensibility, an incorrect assumption that the majority in Philip Morris also made. Nonparty harm can just as easily demonstrate negligence and courts must recognize so and avoid unnecessarily enabling a Philip Morris violation.

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3 See id. at 355–57.
4 Id. at 355.
5 See id. at 357 (citing Witte v. United States, 515 U.S. 389, 400 (1995)).
6 Id. at 353.
7 Id. at 355.
8 See infra Section II.A.ii.
9 See id. at 355; see also infra Section II.A.i.
Lower courts are also struggling with what procedures to use to implement *Philip Morris*. The vast majority of courts still admit evidence of nonparty harm and use limiting instructions, presuming that the jury will follow the instructions. Many problems exist with this approach. Courts overestimate the relevance of nonparty harm to reprehensibility and thus only rarely exclude evidence under current rules, which mandate exclusion only when the evidence's prejudicial effect substantially outweighs its probative value. With respect to limiting instructions, many doubt whether jurors follow them. This doubt should make courts hesitant to use them to protect constitutional rights, especially because reliance on limiting instructions makes it difficult to detect *Philip Morris* violations.

The Supreme Court left it to lower courts to experiment with procedural protections to satisfy *Philip Morris* and lower courts should do so. One possible protection is a different balancing test to judge the admissibility of evidence of nonparty harm. The test would mandate exclusion if the prejudicial effect of the evidence merely outweighs the evidence's probative value. This is similar to the test courts use to evaluate the admissibility of prior convictions to impeach a criminal defendant. A second possibility is improved jury instructions, ones that provide jurors with explanations regarding how evidence of nonparty harm can demonstrate reprehensibility and why jurors cannot punish the defendant for causing nonparty harm. Finally, a third possibility is more aggressive judicial review that does not simply defer to jury instructions. The combination of these mechanisms will better guarantee that lower courts ensure that juries ask the right question, not the wrong one, as *Philip Morris* mandates.

Part I of this Article describes the Court's development of the reprehensibility-punishment distinction, allowing the jury to consider evidence of nonparty harm to determine reprehensibility, but not as a basis for punishment. Part II then turns to the results of the research on how *Philip Morris* has been interpreted and implemented in the past ten years. It describes that both the Supreme Court and lower courts are overestimating the relationship between nonparty harm and reprehensibility. It also explores and criticizes the procedural protections lower courts have used to attempt to implement *Philip Morris*, and it suggests other reforms.

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10 See infra Section II.B.ii.1.
11 See infra Section II.B.i.
12 See infra Section II.B.ii.2.
13 See infra Section II.B.iii.
14 See infra Section II.B.ii.3.
15 See *Philip Morris*, 549 U.S. at 355.
16 See *Philip Morris*, 549 U.S. at 355; see also infra Part II.
I. THE DISTINCTION BETWEEN REPREHENSIBILITY AND PUNISHMENT

In *Philip Morris USA v. Williams*, the Supreme Court declared that the jury could consider evidence of the defendant’s harming nonparties to determine the reprehensibility of the defendant’s conduct, but could not punish that nonparty harm.\(^{17}\) The Court had previously made the same distinction with respect to the defendant’s out-of-state conduct in *BMW of North America, Inc. v. Gore\(^{18}\)* and again in *State Farm Mutual Automobile Insurance Co. v. Campbell*.\(^{19}\)

Despite appearing in the three punitive damage cases, the reprehensibility-punishment distinction can still be puzzling. That was apparent early on—in Justice Stevens’s dissent to *Philip Morris*.\(^{20}\)

### A. Evidence of Defendant’s Harming Nonparties

In *Philip Morris*,\(^{21}\) the plaintiff—the widow of a man who died from lung cancer—brought negligence and fraud claims against the cigarette manufacturer.\(^{22}\) The fraud claims were based on the defendant’s false representations “that there was a legitimate controversy about whether there was a connection between cigarette smoking and human health.”\(^{23}\) Plaintiff alleged that the defendant made these representations “intend[ing] to encourage smokers to continue to smoke and not to make the necessary effort to stop smoking.”\(^{24}\)

In closing arguments, the plaintiff’s attorney mentioned that the defendant had made these misrepresentations to many more than the individual plaintiff: “It’s fair to think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been. It’s more than fair to think about how many more are out there in the future.”\(^{25}\) The attorney further asked the jury, “[H]ow many people do we see outside . . . smoking cigarettes? For every hundred, [sic] cigarettes that they smoke are going to kill ten through lung cancer.”\(^{26}\)

The jury found the defendant liable for negligence and fraud,\(^{27}\) and awarded $79.5 million in punitive damages.\(^{28}\) Philip Morris appealed, arguing that $79.5 million punitive damage award was unconstitutional because it “represented

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\(^{17}\) *Id.* at 355.


\(^{20}\) See *Philip Morris*, 549 U.S. at 360 (Stevens, J., dissenting).

\(^{21}\) 549 U.S. 346.


\(^{23}\) *Id.* at 332.

\(^{24}\) *Id.* at 332–33.

\(^{25}\) Joint Appendix at 197a, *Philip Morris*, 549 U.S. 346 (No. 05–1256).

\(^{26}\) *Id.* at 199a.

\(^{27}\) *Williams*, 48 P.3d at 828.

\(^{28}\) *Philip Morris*, 549 U.S. at 350. The trial court found the award excessive and reduced it to $32 million. *Id.* But, the Oregon Court of Appeals reinstated the $79.5 million punitive award. *Williams*, 48 P.3d at 842; see also *Philip Morris*, 549 U.S. at 350.
punishment for its having harmed others" and not just the plaintiff to the lawsuit. 29

The Supreme Court agreed: "We did not previously hold explicitly that a jury
may not punish for the harm caused others. But we do so hold now." 30 The Court
found that punishment for nonparty harm violates procedural due process in two
ways. 31 First, it deprives the defendant the opportunity to defend itself against the
claims of injured nonparties. 32 For instance, the defendant would not be liable if the
nonparties knew that smoking was dangerous, and thus, could not establish reliance
on the defendant's misrepresentations. 33 Without reliance, liability and punishment
would not be appropriate. Second, punishment for harm to nonparties would "add
a near standardless dimension to the punitive damages equation" based on the
amount of harmed nonparties, the extent of their injuries, and the circumstances of
those injuries. 34 These questions, which will likely not be answered in the trial,
heighten the "risks of arbitrariness, uncertainty, and lack of notice" inherent in
imposing punitive damages. 35

The plaintiff claimed that the jury's consideration of nonparty harm, however,
was proper because the evidence is relevant to the reprehensibility of the
defendant's conduct. 36 Both the defendant and the Supreme Court agreed with that
relevance. 37 As the Court explained, "harm to others shows more reprehensible
conduct," and conduct is "particularly reprehensible" if it "also posed a substantial
risk of harm to the general public." 38 Still, "a jury may not go further than this and
use a punitive damages verdict to punish a defendant directly on account of harms

29 Philip Morris, 549 U.S. at 351.
30 Id. at 356–57.
31 Id. at 353–54. Many, including myself, have questioned the procedural due process basis for the
holding. See, e.g., Jill Wieber Lens, Procedural Due Process and Predictable Punitive Damage Awards,
2012 BYU L. Rev. 1, 21 (2012); Vikram David Amar, Business and Constitutional Originalism in the
Roberts Court, 49 SANTA CLARA L. Rev. 979, 982–83 (2009) (explaining that he found the purported
procedural due process basis of Philip Morris as "not quite convincing," and suggesting its purpose was
to obtain Justices Roberts's and Alito's votes and allow them "to sleep a little easier"); Thomas B. Colby,
Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive
Damages, 118 YALE L.J. 392, 401–05 (2008) (explaining that the Court intentionally disguises
substantive due process decisions as procedural due process decisions because it is "ashamed of the
substantive due process doctrine's very existence"); David L. Franklin, What Kind of Business-Friendly
Court? Explaining the Chamber of Commerce's Success at the Roberts Court, 49 SANTA CLARA L.
Rev. 1019, 1038–39 (2009) ("Perhaps in order to keep the Chief Justice and Justice Alito from
defecting, Justice Breyer took [great] pains in Philip Morris to ground his opinion in the procedural
rather than the substantive aspect of the Due Process Clause . . . ."); see also Philip Morris, 549 U.S. at
361 (Thomas, J., dissenting) (explaining that a "procedural" rule is simply a confusing implementation
of the substantive due process regime this Court has created for punitive damages" (citing Pacific Mut.
32 Philip Morris, 549 U.S. at 353–54.
33 Id.
34 Id. at 354.
35 Id.
36 Id. at 355.
37 Id.
38 Id.
it is alleged to have visited on nonparties.\footnote{99}

Ultimately, the Court mandated that lower courts provide "some form of protection" to ensure that the jury considers the evidence of harm to nonparties in evaluating reprehensibility, but not in determining how much to punish the defendant.\footnote{40}

B. Evidence of the Defendant's Out-of-State Conduct

The reprehensibility-punishment distinction was not new in Philip Morris. It first appeared in \textit{BMW of North America, Inc. v. Gore} \footnote{41} and again in \textit{State Farm Mutual Automobile Insurance Co. v. Campbell}.\footnote{42} Those cases are usually remembered for the introduction of the "guideposts," or the factors courts are supposed to use to determine if an award is excessive.\footnote{43} They include the level of reprehensibility of the defendant's conduct,\footnote{44} whether the punitive damages "bear a 'reasonable relationship' to [the] compensatory damages" awarded,\footnote{45} and a comparison of the punitive damage award to the civil or criminal penalties imposed for comparable conduct.\footnote{46} Applying the guideposts to \textit{BMW}, the Court, for the first time, found a punitive damage award unconstitutionally excessive.\footnote{47}

But \textit{BMW} and \textit{State Farm} also included another limitation, a "contour[] of

\footnote{39} \textit{Id.}
\footnote{40} \textit{Id. at 357} (emphasis in original).
\footnote{44} BMW, 517 U.S. at 575. In \textit{State Farm}, the Court listed factors relevant to the level of reprehensibility: 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 conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." 538 U.S. at 419 (citing \textit{BMW}, 517 U.S. at 575–77).
\footnote{45} BMW, 517 U.S. at 580. The Court declined to define what constitutes a "reasonable relationship." \textit{Id.} at 580–83. But later, in \textit{State Farm}, clarified that "[s]ingle-digit multipliers are more likely to comply with due process." 538 U.S. at 425. Still, the Court acknowledged that a different ratio may be constitutionally permissible: "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." \textit{Id.}
\footnote{46} BMW, 517 U.S. at 583. For a thorough review of how lower courts have applied the guideposts, see Hines & Hines, \textit{supra} note 43.
punitive damages as a remedial device. That contour was that a punitive damage award cannot punish the defendant for out-of-state conduct. The Court also explained in State Farm that punitive damages cannot punish a defendant for "dissimilar acts, independent from the acts upon which liability was premised." Many were not surprised with the result of Philip Morris because of this.

Although the Court prohibited punishment for out-of-state conduct, it acknowledged that the jury could still consider evidence of out-of-state conduct to determine the reprehensibility of the defendant's conduct. "Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." And thus, the Court created the reprehensibility-punishment distinction, allowing consideration of out-of-state conduct to determine reprehensibility, but prohibiting punishment based on the same conduct.

In State Farm, the Court mandated that "[a] jury must be instructed . . . 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." This procedural protection to implement to the reprehensibility-punishment distinction was one of many procedural protections that the Court has mandated in the imposition of punitive damages. In Pacific Mutual Life Insurance Co. v. Haslip, the Court found that the combination of Alabama's jury instructions and judicial review sufficiently protected the defendant's procedural due process rights. Shortly after, in Honda Motor Co. v. Oberg, the Court confirmed that procedural due process requires judicial review because of "the possibility that a jury will not follow those instructions and may return a lawless, biased, or arbitrary verdict." And in Philip

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49 First, conduct could be legal in another state, making punishment inappropriate. See BMW, 517 U.S. at 572–73. And federalism principles prevent Texas from punishing conduct that occurred in Oklahoma. Id. at 572. ("We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.") (footnote omitted).
50 538 U.S. at 422–23. Factually, State Farm was a bad-faith failure to settle a claim brought by an insured against an insurer. The plaintiff, at trial, introduced evidence of State Farm's "national scheme to meet corporate fiscal goals by capping [insurance policy] payouts on claims company wide." Id. at 415 (quoting Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1143 (Utah 2001)). Other victims of the alleged scheme were not parties to the litigation, however, and most of the practices in the alleged scheme "bore no relation to third-party automobile insurance claims" like the plaintiff's. Id.
51 Id. at 422.
52 Id.
53 Id. (citing BMW of North America, Inc. v. Gore, 517 U.S. 559, 572–73 (1996)).
55 Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 433 (1994); see also id. at 432 (explaining that "[j]ury instructions typically leave the jury with wide discretion in choosing amounts," enabling juries to use punitive damages to express bias against big businesses, and that judicial review is "one of the few procedural safeguards which the common law provided against that danger"); State Farm, 538 U.S. at 418 ("Exacting appellate review ensures that an award of punitive damages is based upon 'an application
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Morris, the Court mandated that lower courts use some procedural protections—but not necessarily a jury instruction—to ensure that the punitive damage award does not punish the defendant for harming nonparties.56

C. Addressing Justice Stevens’s Concerns

Although the reprehensibility-punishment distinction was not new to Philip Morris, it was still controversial. The controversy started with Justice Stevens’s dissent.57 In his words, the “nuance”—between permissibly using nonparty harm to determine reprehensibility but not to punish for it—“eludes me.”58 He further explained, “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.”59 In short, Justice Stevens thought it impossible to consider the evidence for reprehensibility and not also punish based on it.

Justice Stevens was not alone in his criticism. Academics and commentators questioned both the distinction itself and the jury’s ability to make it. “Practically speaking, if the nuance eludes a Supreme Court Justice, it can be expected to elude the vast majority of jurors as well. This is not a minor point.”60 Similarly, “[o]ne would reasonably fear that the distinction will elude any jury that is directed to take

of law, rather than a decisionmaker’s caprice.” (quoting Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001)).


57 See, e.g., id. at 358–61 (Stevens, J., dissenting). Notably, Justice Stevens wrote the majority opinion in BMW, in which he discussed both a state’s inability to punish out-of-state conduct and that conduct’s relevance to reprehensibility. 517 U.S. at 572–73, 575–80. Justice Stevens also joined the majority opinion in State Farm, which further developed the reprehensibility-punishment distinction for out of state conduct. See generally State Farm, 538 U.S. 408.

58 Philip Morris, 549 U.S. at 360 (Stevens, J., dissenting).

59 Id. (footnote omitted). In her dissent, Justice Ginsburg expressed confusion at the jury instruction that Philip Morris offered. Id. at 363 (Ginsburg, J., dissenting). It instructed:

The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant’s punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

Id. In her words, the answer of how the jury was to consider “the extent of harm suffered by others . . . slips from [her] grasp. A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge.” Id.

60 Jim Gash, The End of an Era: The Supreme Court (Finally) Butts out of Punitive Damages for Good, 63 FLA. L. REV. 525, 590 (2011); see also F. Patrick Hubbard, Substantive Due Process Limits on Punitive Damages Awards: “Morals Without Technique?”, 60 FLA. L. REV. 349, 351 (2008) (explaining that Philip Morris “requires states either to do something that is virtually impossible—i.e., craft an instruction that enables lay persons to follow a distinction that is unclear to four Supreme Court Justices—or to give jury instructions that are, at best, empty formalistic incantations about a meaningless and potentially confusing distinction”).
into account harm to non-parties when deciding the appropriate level of a punitive award, but that is admonished not to punish the defendant for inflicting such harm.\textsuperscript{61} Another commentator believed that if the jury is still allowed to consider nonparty harm for reprehensibility purposes, the jury will still be asking "the wrong question . . . . Inevitably, juries will have to consider—whether indirectly or directly—the injury to nonparties in order to ascertain the constitutionally appropriate amount of punitive damages to award."\textsuperscript{62} Put more simply, in Professor Thomas Colby’s words, the distinction between reprehensibility and punishment "does indeed appear to be absurd."\textsuperscript{63}

Professor Scheuerman and Anthony Franze, leading scholars on punitive damage jury instructions, acknowledged Justice Stevens’s concern, but argued that the reprehensibility-punishment distinction was no different from any other evidentiary distinction the jury is asked to make.\textsuperscript{64} True, any evidentiary limiting instruction requires a jury to perform "a mental gymnastic"\textsuperscript{65} to some extent—to appreciate two concepts and decipher the ability to evaluate the evidence only in light of one context.

But it does seem that a Philip Morris jury instruction would be more difficult to apply than other limiting instructions. For comparison purposes, consider a hearsay example. Suppose evidence exists of someone’s out-of-court statement that the defendant was "out to get" the plaintiff. As hearsay, that evidence is not admissible to show its truth, that the defendant was actually out to get the plaintiff.\textsuperscript{66} But, if relevant, the evidence would be admissible to show that the plaintiff believed the defendant was out to get her; that would show her state of mind.\textsuperscript{67} The out-of-court statement is admissible, but a limiting instruction is necessary.\textsuperscript{68} That instruction would be something akin to: "you may not consider the statement for the truth of the matter asserted, but you may consider it to show the plaintiff’s state of mind.” This limiting instruction still involves mental gymnastics. But the distinction is also capable of being understood. The jury can understand that the

\textsuperscript{61} Amar, supra note 31, at 980.


\textsuperscript{63} Colby, supra note 31, at 465.

\textsuperscript{64} 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 (2008). Mock juror studies have shown that the effectiveness of limiting instructions can depend on the reason for the inadmissibility of the evidence. See generally Kerri L. Pickel, Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help, 19 LAW & HUM. BEHAV. 407 (1995) (discussing that studies have shown that juries are unable to disregard illegally obtained evidence and prior convictions, but can disregard settlement offers, remedial measures, liability insurance, and hearsay). Professor Pickel suggests that the different treatments may have something to do with the jurors’ inherent views of the fairness of considering the evidence. Id. at 421–23.

\textsuperscript{65} Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

\textsuperscript{66} E.g., FED. R. EVID. 801(c)(2), 802.

\textsuperscript{67} Id. at 803(3).

\textsuperscript{68} Id. at 105.
plaintiff felt scared after being told that the “defendant was out to get her” without also concluding that the defendant actually was out to get her. If the jury considers the hearsay to show the plaintiff’s state of mind, it is not necessarily also considering the hearsay for the truth of the matter asserted.

With *Philip Morris*, however, it is not as easy to separate reprehensibility and punishment because they are related. The level of reprehensibility should control the amount of punishment. Confusingly, fact A (nonparty harm) is relevant to purpose 1 (reprehensibility), but impermissible to consider for purpose 2 (punishment), but purpose 1 (reprehensibility) must also be considered for purpose 2 (punishment).69 No such overlap exists between the truth of the matter asserted and the state of mind, but it does between reprehensibility and punishment. If the jury considers the nonparty harm for purposes of reprehensibility and increases the punitive award because of it, the jury has arguably also used the nonparty harm as a basis for punishment: “[I]f harm to others determines reprehensibility, and reprehensibility determines punishment, then punishment is based upon harm to others, which is prohibited.”690

Despite the difficulty of juries actually applying the reprehensibility-punishment distinction, most academics agree—and disagree with Justice Stevens—that the distinction does exist.71 A distinction exists between 1) increasing a punishment for the defendant’s tenth incident, when the previous nine incidents demonstrate the elevated reprehensibility of that tenth incident, and 2) increasing a punishment because of the totality of the ten incidents. Thus, increasing a punishment due to reprehensibility based on nonparty harm is not the same as punishing for that nonparty harm.

II. *PHILIP MORRIS* TEN YEARS LATER

Ten years have passed since the Court cemented the reprehensibility-punishment distinction in *Philip Morris*.72 The research in this article examines the effect of *Philip Morris* by studying how lower federal and state courts have interpreted and applied it. The research began with reviewing all cases that have cited *Phip Monis*.73 As of December 2016, 269 federal and state court cases have cited *Philip Morris* although not all citations concerned punitive damages.74 The research also examined federal and state model jury instructions to see if any instructions had been adopted in response to *Philip Morris*.

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69 See Agle, supra note 62, at 1355.
73 The research was limited to cases available on either LexisNexis or Westlaw. Necessarily, the research did not capture all unpublished opinions.
74 According to Westlaw as of December 15, 2016, ten years after its issuance, *Philip Morris* has been cited in 269 cases. Many citations do not actually involve alleged *Philip Morris* violations. In fact,
The research had two purposes. The first was to see how lower courts are interpreting the reprehensibility-punishment distinction. The second was to see how lower courts are attempting to implement the distinction, ensuring that the jury asks the right question—considering evidence of nonparty harm to determine reprehensibility—and not the wrong one—punishing based on that nonparty harm.

The research revealed two results. First, a misunderstanding of how nonparty harm demonstrates reprehensibility persists. Second, lower courts are using likely insufficient methods to ensure the jury asks the right question. The Article suggests other procedural reforms to better ensure that the jury asks the right question and avoids imposing an unconstitutional punitive damage award.

A. The Relationship Between Nonparty Harm and Reprehensibility

Most academic commentary on the reprehensibility-punishment distinction has focused on Justice Stevens's mistaken criticism. But Justice Stevens is not the only one who misunderstood the distinction. The majority also incorrectly described that nonparty harm shows that the defendant's conduct was reprehensible. Lower courts have repeated that majority's mistake, increasing the chances that juries unintentionally violate *Philip Morris*—by increasing a punitive damage award

...
based on nonparty harm that does not actually demonstrate the defendant's reprehensible mental state.

i. The Majority's Mistaken Explanation of the Reprehensibility-Punishment Distinction

The *Philip Morris* majority implied that evidence of nonparty harm *automatically* demonstrates increased reprehensibility. 76 It explained that evidence of nonparty harm shows "that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." 77 Similarly, it less forcefully explained that "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." 78 Plainly, the defendant's conduct is more reprehensible simply because it hurt or endangered others.

If a defendant's conduct is automatically more reprehensible just because that same conduct injured or endangered both the plaintiff and nonparties, then the jury can increase the punitive damage award based on the existence of that nonparty harm. 79 That conception of the reprehensibility-punishment distinction differs little from Justice Stevens's position that increasing damages based on nonparty harm demonstrating reprehensibility is the same thing as punishing that nonparty harm. 80

Most agree that Justice Stevens was incorrect to deny the distinction, 81 and the *Philip Morris* majority is similarly incorrect to equal nonparty harm with reprehensibility. Nonparty harm does not automatically demonstrate reprehensibility because reprehensibility is ultimately a question about the defendant's mental state. 82 Punitive damages are available when the defendant's conduct is reprehensible, 83 meaning that the defendant acted either "with an evil

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76 *Philip Morris*, 549 U.S. at 355.
77 *Id.*
78 *Id.* at 357.
79 *Id.* at 355.
80 See *id.* at 360 (Stevens, J., dissenting) (explaining that "[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"). Justice Stevens likely believes that nonparty harm automatically demonstrates reprehensibility, meaning more severe punishment would also be appropriate for the defendant who tortiously injures multiple victims. Criminal law may work like that, but punitive damages do not. See infra notes 83–85 and accompanying text (discussing when punitive damages are available). Punitive damages are not available simply because the defendant injured many victims; instead, they are available only if the jury determines the defendant acted reprehensibly. *Philip Morris*, 549 U.S. at 357. Reprehensibility is not based on the amount of people hurt; it is about whether the defendant acted with evil intent. See infra notes 82–88 and accompanying text. Increasing the amount of victims does not necessarily translate to evil intent.
82 See *id.; see also infra* notes 83–88 and accompanying text.
motive" or "with reckless indifference to the rights of others."8 An defendant acts with reckless indifference when he consciously disregards the fact that his conduct creates a highly probable risk of death or substantial physical harm to another.85 Reckless conduct is thus more culpable than merely negligent conduct, which, if it involves knowledge of a risk, involves only disregarding a risk that a reasonable person would not have disregarded.86 Regardless, punitive damages are available if the defendant acts reprehensibly, meaning he either had an "evil" intent or acted recklessly.87 Either standard, as the Supreme Court itself has explained, depends on the defendant's mental state.88

The Court's original explanations of how repeated conduct can demonstrate reprehensibility explicitly recognized that reprehensibility is a mental state. In BMW, the Court explained that "[c]ertainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."89 The Court also analogized greater punitive damages based on repeated conduct to greater criminal punishment for a recidivist, meaning a convicted criminal who reoffends.90 The "repeated misconduct is more reprehensible than an individual instance of malfeasance."91 Again though, that increased reprehensibility exists because of the prior convictions, which show that the recidivist knew of the wrongfulness of his later conduct.

The Court did not, however, highlight that reprehensibility is a mental state when it described the factors relevant to the reprehensibility guidepost in State Farm. Those factors included whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others,"92 and whether "the conduct involved repeated actions or was an isolated incident."93 But

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84 RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (AM. LAW INST. 1979).
85 Id. § 500 cmt. b.
86 Id.
87 Id. § 908, § 908 cmt. b.
89 Id. (emphasis added).
90 Id.
91 Id. at 577 (citing Gryger v. Burke, 334 U.S. 728, 732 (1948)).
92 Id. (citing BMW, 517 U.S. at 576–77). This factor may not actually be about nonparty harm. This language is the common definition of recklessness, and this factor may just be about whether the defendant acted intentionally, recklessly, or negligently in injuring the plaintiff. See RESTATEMENT (SECOND) OF TORTS § 500 (AM. LAW INST. 1979). Supporting this possibility is that another factor asks whether the "harm was the result of intentional malice, trickery, or deceit, or mere accident," not mentioning the possibility that the injury was the result of recklessness, meaning another factor is needed to ask if the defendant's conduct was reckless. State Farm, 538 U.S. at 419 (citing BMW, 517 U.S. at 576–77). At the same time, the factor does refer to "others," and any injury to others would be nonparty harm. Id. (citing BMW, 517 U.S. at 576–77).
93 State Farm, 538 U.S. at 419 (citing BMW, 517 U.S. at 576–77). These factors about nonparty harm may or may not demonstrate reprehensibility. Two other factors, similarly, may or may not be relevant to reprehensibility—whether "the harm caused was physical as opposed to economic," and "the target of the conduct had financial vulnerability." Id. (citing BMW, 517 U.S. at 576–77). A defendant
the Court later made clear that nonparty harm does not necessarily demonstrate reprehensibility. To the contrary, the Court explained that “[l]awful out-of-state conduct,” which is also nonparty harm, “may be probative when it demonstrates the deliberateness and culpability of the defendant’s action in the State where it is tortious.” So the nonparty harm can demonstrate reprehensibility, but does not necessarily do so.

Factual examples also demonstrate that evidence of nonparty harm can demonstrate reprehensibility, but can just as easily demonstrate negligence. Use the facts of *State Farm* as an example. The plaintiff claimed that its insurer mishandled the plaintiff’s litigation, and the plaintiff sought to introduce evidence of other insureds who were similarly injured. It is possible the insurer’s employee could have just made poor decisions in defending many insureds’ legal claims. Again, many insureds were injured, but the insurer’s mental state was no more than negligent; it did not act reprehensibly. It is possible to negligently injure many without also acting reprehensibly.

What the plaintiff actually wanted to demonstrate from the evidence of nonparty harm, however, was the insurer’s “evil intent”—that the insurer sought to take advantage of its low-income insureds and systematically mishandled the legal claims against many of them. If true, this evidence of nonparty harm would show that the insurer had a plan to take advantage of its low-income insureds. That plan would be evidence of the insurer’s reprehensibility.

A product defect claim provides another good example. The plaintiff can establish that a handsaw lacking a guard is defective by showing the risks resulting from the design outweigh the costs of adding a guard. If available, the plaintiff will likely present evidence of nonparty harm to demonstrate the extent of risk resulting from the design without a guard, of which the defendant should have been aware. This evidence of nonparty harm shows that the product was defective and that the defendant, essentially, negligently injured many. Negligently injuring many, however, is negligently injuring many; it is not acting with evil intent or recklessly disregarding others’ safety.

The existence of that nonparty harm could show reprehensibility, however. Suppose that some of those nonparties complained to the defendant of severe injuries suffered while using the saw as designed. Still, the defendant continued to

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94 Id. (citing *BMW*, 517 U.S. at 576–77).
95 Id. at 422 (emphasis added).
96 Id. at 415.
97 See id. at 422–23.
98 See id.; see also supra notes 82–87 and accompanying text.
99 See *State Farm*, 538 U.S. at 415; see also supra notes 82–87 and accompanying text.
100 See *State Farm*, 538 U.S. at 422–24.
sell the saw as-is. The defendant’s still selling the saw as-is despite knowing of the high probability of severe injury is likely reckless and thus reprehensible.

In addition to the Court’s own original descriptions of reprehensibility and factual examples, theories supporting the imposition of punitive damages show that nonparty harm may or may not demonstrate reprehensibility. The current dominant theory justifying the imposition of punitive damages is private redress theory. Generally speaking, private redress theory concludes that punitive damage awards must be limited to redressing the defendant’s disrespect of the plaintiff. Thus, “[t]he reprehensibility inquiry does not examine the reprehensibility of the defendant’s conduct in the abstract. Rather, . . . the only ‘reprehensibility’ that matters is the reprehensibility of the private tort—the degree of reprehensibility of the defendant’s wrongful disregard of plaintiff’s rights.” For example, “evidence of previous, known harm to others helps to demonstrate the reprehensibility of the decision to go ahead and sell the defective product to the plaintiff.”

Harm to nonparties may make the defendant’s general conduct reprehensible, but the general conduct is not the conduct to be punished by punitive damages. Instead, punitive damages punish the private wrong committed to the plaintiff, and nonparty harm may or may not demonstrate the reprehensibility of that private wrong.

ii. Enabling Unintentional Philip Morris Violations


101 See Colby, supra note 100, at 674–77; Colby, supra note 31, at 441–43; Sebok, supra note 100, at 1028–29; Zipursky, Theory, supra note 100, at 156–57; Zipursky, Palsgraf, supra note 100, 1777–80.

102 Colby, supra note 31, at 465; see Zipursky, Palsgraf, supra note 100, at 1788 (“Admitting evidence of nonparty harm will generally be quite different from punishing for harm to nonparties when the court admits evidence of nonparty harm for its relevance to the reprehensibility of the defendant’s wrong to the plaintiff herself, but it will be virtually the same (as punishing for harm to nonparties) if admitted for its relevance to the reprehensibility of the defendant’s wrongs to nonparties.”); see also Sebok, supra note 100, at 1032–33 (explaining that evidence of nonparty harm should be introduced only to the extent that it can be connected to the disrespect that the plaintiff suffered).

103 Colby, supra note 31, at 466.

104 Id. at 465 (“Whether the defendant’s conduct harmed or threatened harm to the general public . . . is relevant only in determining the reprehensibility of the public wrong, which is not at issue in punitive damages cases.”).

105 See id. at 466.

The *Philip Morris* majority incorrectly equated nonparty harm and reprehensibility.\textsuperscript{[107]} Not surprisingly, lower courts have repeated that mistake.

For example, lower courts have generally admitted evidence of nonparty harm because of its assumed relevance to reprehensibility.\textsuperscript{[108]} Lower courts are also repeating the *Philip Morris* majority's mistake when instructing juries. Specifically, some states have adopted a *Philip Morris* punitive damage jury instruction that assumes relevance of nonparty harm and expressly gives the jury permission to consider nonparty harm as evidence of reprehensibility. For instance, Utah's instruction includes: "When determining the degree of reprehensibility, you may consider evidence of similar conduct by [name of defendant] toward other people who are not in this lawsuit."\textsuperscript{[109]} Similarly, Oregon's instruction explains that evidence of nonparty harm "may be considered in evaluating the reprehensibility of [the] defendant's conduct."\textsuperscript{[110]} These instructions are still permissive, as a jury has discretion whether to even award punitive damages.\textsuperscript{[111]} But should the jury choose to do so, these instructions tell the jury that the presence of nonparty harm increases the level of reprehensibility.

Some states have adopted a more toned-down instruction about nonparty harm and reprehensibility. Oklahoma's *Philip Morris* instruction, for example, states that "[c]onduct that risks harm to many may be more reprehensible than conduct that risks harm to only a few."\textsuperscript{[112]} But even the suggestion that nonparty harm can demonstrate reprehensibility is misleading; it does not also inform the jury that nonparty harm may not actually show reprehensibility. There is no greater chance that nonparty harm demonstrates reprehensibility than negligence, but the suggested jury instruction does not indicate so. Instead, the suggested jury

\begin{footnotesize}
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\item[\textsuperscript{107}] Id. at 355–57.
\item[\textsuperscript{110}] OR. STATE BAR, OREGON UNIF. CIVIL JURY INSTRUCTIONS § 75.02B, LEXIS (2016) [hereinafter OR. JURY INSTRUCTIONS].
\item[\textsuperscript{112}] Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 432 (1994).
\end{itemize}
\end{footnotesize}
instruction could easily mislead the jury into believing the evidence of nonparty harm demonstrates reprehensibility, even when it may not.

Incorrect assumptions that nonparty harm demonstrates reprehensibility increase the chance of unintentional Philo Morris violations. If the jury assumes nonparty harm demonstrates reprehensibility—even when it does not—and increases the award based on it, then the jury has likely punished for that nonparty harm. And punishing for nonparty harm, of course, violates Philo Morris. This type of Philo Morris is unintentional; the jury thinks it is following the law and increasing the award based on reprehensibility. Even if unintentional though, the resulting punitive damages award is unconstitutional.

Lower courts need to be conscious of possible unintentional violations of Philo Morris—violations that occur when the jury misunderstands that reprehensibility is a mental state: the same misunderstanding the Philo Morris majority made. Some lower courts have become more conscious of unintentional violations of Philo Morris. One example is Lompe v. Sunridge Partners, LLC, in which the Tenth Circuit acknowledged that nonparty harm can show reprehensibility, but excluded the evidence because the defendant did not know of the nonparty harm. Similarly, a Vermont trial court excluded evidence of abuse of nonparties which the defendant did not know about, but admitted evidence of abuse of nonparties which the defendant knew about. Other lower courts need to follow this lead in order to help the jury avoid unintentionally violating Philo Morris.

B. Ensuring the Jury Asks the Right Question

Problems in awarding punitive damages post-Philo Morris do not end, however, with a better understanding of the reprehensibility-punishment distinction. Courts have also struggled with how to implement Philo Morris—how to ensure that the jury considers evidence of nonparty harm only for reprehensibility purposes.

Although the Court had previously mandated procedural protections—judicial review and the Gore/State Farm out-of-state conduct jury instruction—the tone of the Court's mandate in Philo Morris was new:

Given the risks of unfairness that we have mentioned, it is constitutionally important for a court to provide assurance that the jury

113 Philo Morris, 549 U.S. at 356–57.
114 Id. at 354–55.
116 Keppler v. Roman Catholic Diocese of Burlington, No. S0930-05 CnC, 2009 WL 6557356, at *2–*4 (Vt. Super. Ct. Sept. 25, 2009). The unreported abuse had limited relevance, whereas the reported abuse was "highly relevant to whether the Diocese acted with reasonable care and/or recklessly in its supervision of" the priest. Id. at *2–*3.
An Undetectable Constitutional Violation

will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages can, in practice, impose one State's (or one jury's) policies (e.g., banning cigarettes) upon other States—all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries—it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance.\textsuperscript{119}

It is constitutionally important to provide an assurance, and to help juries understand the difference between reprehensibility and punishment. "[S]tate courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring."\textsuperscript{120} Moreover:

\begin{quote}
[W]here the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk. Although the States have some flexibility to determine what \textit{kind} of procedures they will implement, federal constitutional law obligates them to provide \textit{some} form of protection in appropriate cases.\textsuperscript{121}
\end{quote}

Both the extent of the explanation of the need for a procedural protection and the Court's tone were unprecedented.

Lower courts have not, however, been motivated to adopt unprecedented protections. Practically, only two options exist: "[T]rying to get juries to ask the right question[s] means either excluding potentially confusing evidence and argument, or expressly advising the jury on the right questions in the form of jury instructions."\textsuperscript{122}

The existing mechanisms to comply with \textit{Philip Morris} are insufficient. The current rule governing the exclusion of evidence is unlikely to lead to the exclusion of nonparty harm. And many reasons exist to doubt the efficacy of a limiting instruction. Plus, dependence on limiting instructions has hampered detection of possible \textit{Philip Morris} violations.

This section criticizes the mechanisms courts are currently using to provide the required assurance and suggests three alternative mechanisms\textsuperscript{123}—a more

\begin{footnotes}
\textsuperscript{119} \textit{Philip Morris}, 549 U.S. at 355 (emphasis added) (citing \textit{BMW}, 517 U.S. at 594–95 (1996) (Breyer, J., concurring)).
\textsuperscript{120} Id. at 357.
\textsuperscript{121} Id.
\textsuperscript{122} Scheuerman & Franze, supra note 64, at 1165 (footnote omitted).
\textsuperscript{123} I am not suggesting bifurcation as a possible mechanism. Bifurcation is a popular, supposed pro-defendant reform, but it likely would not protect defendants from \textit{Philip Morris}-related issues. \textit{But see} Wilson v. City of Hazelwood, 628 F. Supp. 2d 1063, 1070 (E.D. Mo. 2008) ("Bifurcation of the trial precluded the jury's hearing evidence which could have been prejudicial in the first phase and facilitated its hearing evidence in the second phase which was relevant to the jury's consideration of the amount of punitive damages."). In determining the amount of punitive damages, it is clear that the jury can
\end{footnotes}
exclusion-friendly rule to evaluate the admissibility of evidence of nonparty harm, explanatory jury instructions, and judicial review consistent with the required de novo standard of review for the constitutionality of punitive damage awards.

i. Excluding Evidence of Nonparty Harm

The current, applicable evidentiary rule does not sufficiently protect defendants from *Philip Morris* violations. This is because exclusion is unlikely under the admission-friendly Federal Rule of Evidence 403, which mandates exclusion only if the evidence’s prejudicial effect substantially outweighs its probative value. Courts should instead use a rule akin to Federal Rule of Evidence 609(a), under which evidence is inadmissible if the evidence’s prejudicial effect merely outweighs its probative value.

1. The Insufficiency of Rule 403

The current Rule under which defendants could seek to exclude evidence of nonparty harm is Federal Rule of Evidence 403. Evidence is relevant, and admissible, if “it has any tendency to make a fact more or less probable than it would be without the evidence,” assuming “the fact is of consequence in determining the action.” Still, relevant evidence is inadmissible under Rule 403 if the evidence’s “probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” *Philip Morris* explains the prejudicial effect of evidence of nonparty harm—that a jury may punish the defendant for causing nonparty harm and thus violate the defendant’s constitutional rights. Juror confusion is obviously possible too—attempting to distinguish between permissibly evaluating the reprehensibility of the defendant’s conduct versus punishing for nonparty harm is not simple.

The argument for exclusion under Rule 403 has worked only a handful of times. One example is a federal district court that found the “subtle distinction” consider evidence of nonparty harm assuming its relevance to reprehensibility. *Philip Morris*, 549 U.S. at 357. There is no possible separation of evidence that could thus protect defendants. Regardless, many have questioned whether bifurcation really provides any protections for defendants. See Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 Wis. L. Rev. 297, 335 (1998) (finding that “defendants who lose on liability substantially increase the risk that punitive damages will be assessed against them if the case is bifurcated[" and that “not only does the incidence of punitive liability increase, but the size of the punitive award grows substantially if the case is bifurcated”).

124 FED. R. EVID. 403.
125 See FED. R. EVID. 609(a).
126 FED. R. EVID. 401.
127 FED. R. EVID. 403.
129 See, e.g., id. at 360 (Stevens, J., dissenting).
between reprehensibility and punishment "difficult [to] implement in practice."\textsuperscript{30} The court found it "imprudent to admit the evidence proffered by plaintiff because of the practical difficulties raised by crafting a jury instruction that properly adheres to the Supreme Court's holding in \textit{Philip Morris}."\textsuperscript{131} The court also held that the evidence of nonparty harm was irrelevant to reprehensibility because of dissimilarities.\textsuperscript{132}

Another example is a Vermont trial court that recognized that nonparty harm does not always demonstrate reprehensibility.\textsuperscript{133} The court granted a church's motion in limine to exclude evidence of instances of child abuse not reported to the church because the evidence's prejudicial effect substantially outweighed its probative effect.\textsuperscript{134} The "emotional weight" made the evidence very prejudicial, and the probative value was limited due to the church's lack of awareness.\textsuperscript{135} The court also directly addressed \textit{Philip Morris}:

Although actual harm to others may be relevant to the issue of how reprehensible the Defendant's conduct was, that does not mean such evidence is necessary. As the court in \textit{Philip Morris} noted, the likelihood of a jury using the harm to non-parties as a basis of an award to punish for that harm is high. "Where the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence" at issue, "a court, upon request, must protect against that risk." The United States Supreme Court has directed that "courts cannot authorize procedures that create an \textit{unreasonable and unnecessary risk} of . . . confusion occurring" such that the jury awards punitive damages to punish for the acts against others. Given the emotional nature of the issues, the court concludes that presentation of evidence about the unreported abuse of other children would create an "unreasonable and unnecessary risk" of the jury making an award on an improper basis.\textsuperscript{136}


\textsuperscript{131} Dugan, 2013 WL 4479289, at *1.

\textsuperscript{132} Id.


\textsuperscript{134} Id. at *2–4.

\textsuperscript{135} Id.

\textsuperscript{136} Id. at *3–4 (citations omitted) (quoting Philip Morris USA v. Williams, 549 U.S. 346 (2007)).
Plus, the trial court found the evidence unnecessary to show reprehensibility. The risk to other children was “obvious without any need for such specific and emotionally charged evidence related to particular children,” and the evidence was essentially cumulative given that the court did admit evidence of incidents that were reported to the church. Evidence of abuse reported to the church was “highly relevant to whether the Diocese acted with reasonable care and/or recklessly in its supervision of” the priest. Although the prejudicial effect was similar to the prejudicial effect of evidence of instances not reported to the church, the probative value of the evidence of instances reported to the church outweighed their prejudicial effect.

But very few examples of exclusion under 403 exist despite ten years passing since Philip Morris. This is likely partly due to the Court’s broad declarations equating nonparty harm with reprehensibility. It is also likely partly due to the rule’s requiring “substantial outweigh[ing]” — exclusion is proper only if the prejudicial effect “substantially outweigh[s]” the probative value. It is difficult to substantially outweigh the probative value of nonparty harm given nonparty harm’s relevance to many issues. Reprehensibility is the obvious example of one such issue. But evidence of nonparty harm can also be relevant to demonstrate facts not relevant to punitive damages. It can help demonstrate the defendant’s intent, a necessary element of an intentional tort. Or, nonparty harm could demonstrate multiple elements in a claim based on a product defect, including a design defect, a warning defect, and causation. The probative value of evidence of nonparty harm is unlikely to be substantially outweighed by the prejudicial effect, making exclusion unlikely under 403.

137 Id.
138 Id. at *2, *4.
139 Id. at *2.
140 Id.
142 FED. R. EVID. 403.
144 See id.
2. A Better Balancing Test to Admissibility of Evidence of Nonparty Harm

Notably, not all evidence is evaluated under Rule 403. One exception is Rule 609(a), which governs the admission of prior convictions to impeach a criminal defendant.145 Former convictions for felonies are admissible against a criminal defendant only if the prosecution can demonstrate that “the probative value of the evidence . . . outweighs the prejudicial effect.”146 Although this balancing test does not guarantee that convictions will be inadmissible, it provides a better chance at exclusion than Rule 403 given that the prejudicial effect need only outweigh—instead of substantially outweigh—the probative value.

Many reasons exist for the more exclusion-friendly 609(a). Mainly, “juries may be inclined to overweigh character evidence.”147 For instance, “the jury may ignore the issues and convict because evidence of prior conviction suggests the accused is a bad person who, if not guilty of the crime charged, may be deserving of punishment for something else.”148 The evidence may also encourage the jury to “discount the burden of proof on the prosecution.”149 Or, the “jury might also use the evidence of past crimes to infer that the accused committed the crime charged in this case, an inference usually [otherwise] prohibited.”150

Of course, we could use jury instructions to try to prevent the jury’s impermissible considerations of past convictions. The court could instruct the jury to consider the evidence only to judge the defendant’s honesty. But “[j]ury instructions to refrain from drawing such improper inferences may be futile.”151 The futility of jury instructions is also concerning because of the potential constitutional implications of the jury’s improper consideration of prior felony convictions.152 This improper consideration itself would not actually violate the defendant’s constitutional rights.153 Rather, concern existed that, in order to avoid the introduction of his prior felony convictions, a defendant would choose not to testify despite his constitutional right to do so.154 Instead of using a limiting instruction that could disincentivize the exercise of a constitutional right, a balancing test more likely to lead to the exclusion of the evidence was created.

The reasons for a more exclusion-friendly rule for prior convictions to impeach a witness also apply to evidence of nonparty harm. The jury may give evidence of

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145 Fed. R. Evid. 609.
146 Id.
148 Id. Notably, if the evidence of prior convictions is introduced as evidence of a “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident,” exclusion would still be evaluated under Rule 403. Fed. R. Evid. 404(b)(2).
149 Gold, supra note 147, at 2313 (footnote omitted).
150 Id. at 2314 (footnotes omitted).
151 Id.
152 See id. at 2314–19.
153 Id. at 2314–15.
154 Id.
nonparty harm too much weight. For example, the jury may use the evidence to conclude that the defendant is a bad person or entity deserving of punishment regardless of its conduct in injuring the plaintiff who actually brought suit, which *State Farm* prohibits.155 Evidence of nonparty harm is arguably more prejudicial than a prior conviction, which involved an actual conviction. The defendant may not actually be liable in tort to nonparties, but the jury is able to consider his conduct and may conclude that the defendant should be punished regardless of how the defendant injured the actual plaintiff.

Further, the possible futility of a limiting instruction for the reprehensibility-punishment distinction has constitutional implications.156 If the jury instruction does not work and the jury punishes the defendant for causing nonparty harm, the award violates the defendant's constitutional rights.157 This is an actual constitutional violation.158 This is of greater concern than how the admission of prior convictions may disincentivize the exercise of a constitutional right.

Applying this modified balancing test to evidence of nonparty harm would also be more consistent with the Court’s language in *Philip Morris*. The Court mandated that the court must “provide some form of protection” if the jury’s “risk of that misunderstanding is a significant one.”159 A significant risk is likely less than a substantial risk. Thus, the prejudicial effect—here, the risk of punishment of nonparty harm—should not have to substantially outweigh the probative value for exclusion to be proper. Instead, exclusion should be proper if the prejudicial effect merely outweighs the evidence’s probative value.

Obviously, some evidence of nonparty harm will still be admissible under this modified balancing test because the probative value of evidence of nonparty harm is strong.160 But this test itself provides additional protection because the prejudicial effect no longer needs to substantially outweigh that strong probative value for exclusion to be proper. Instead, exclusion is proper even if the prejudicial effect—which will be strong, given the constitutional violation—merely outweighs that also strong probative value.

ii. Better Jury Instructions

Many courts have used jury instructions to comply with *Philip Morris*, with some states amending their model instructions to include a *Philip Morris* instruction. Many reasons exist, however, to question whether a limiting

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155 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003) (explaining that punitive damages should “punish[] for the conduct that harmed the plaintiff, not for [the defendant’s] being an unsavory individual or business”).
157 *See id.*
158 *Id.*
159 *Id.* at 357.
160 *See* Zipursky, *supra* note 144, at 147.
instruction provides the "assurance" that Philip Morris mandates. To improve the efficacy of a Philip Morris limiting instruction, courts should also explain to the jury how evidence of nonparty harm can demonstrate reprehensibility and why punishment for nonparty harm is impermissible.

1. Current Popularity

Just as many scholars predicted,161 most courts have turned to jury instructions to attempt to comply with the Court's Philip Morris mandate. In fact, fourteen states adopted a Philip Morris model jury instruction.162

Some states had already incorporated the guideposts into their instructions and then added a Philip Morris instruction. The resulting instructions then, possibly confusingly, combine the reprehensibility guidepost and the reprehensibility-
punishment distinction. For example, Utah’s model instructions explain the reprehensibility guidepost: “In determining the amount of punitive damages that should be awarded, you should consider the reprehensibility of [name of defendant]'s conduct. Greater reprehensibility may justify a higher punitive damage award while lesser reprehensibility may justify a lower amount.” Further, “[w]hen determining the degree of reprehensibility, you may consider evidence of similar conduct by [name of defendant] toward other people who are not in this lawsuit.” The instruction then includes the Philip Morris prohibition: “[H]owever, I caution you that this evidence is to be considered only to determine reprehensibility. The actual harm to other people is not the measure of punitive damages in this case.” Similarly, another instruction explains that the jury “may award punitive damages for the purpose of punishing [name of defendant] only for [harm] [attempted harm] [damage] to [name of plaintiff], [but] may not award punitive damages for the purpose of punishing harm or attempted harm to other people.”

Oregon’s instructions also include both the reprehensibility guidepost and the reprehensibility-punishment distinction:

There is no fixed standard for determining the amount of punitive damages . . . . If you decide to award punitive damages, you should consider all of the following . . . in determining the amount:

(a) How reprehensible was that defendant’s conduct, considering the nature of that conduct and the defendant’s motive?

Evidence has been received of harm suffered by persons other than the plaintiff as a result of the defendant’s conduct. This evidence may be considered in evaluating the reprehensibility of defendant’s conduct. However, you may not award punitive damages to punish the defendant for harm caused to persons other than the plaintiff.

Alabama’s, California’s, Iowa’s, Nevada’s, New York’s, North Dakota’s, Oklahoma’s, and the Eighth Circuit’s model instructions include both the reprehensibility guidepost and a Philip Morris instruction.

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163 UTAH JURY INSTRUCTIONS, supra note 109, § CV2030. (emphasis added).
164 Id. § CV2031.
165 Id.
166 Id. § CV2028.
167 OR. JURY INSTRUCTIONS, supra note 110, at § 75.02.
168 Id. § 75.02B.
169 ALA. JURY INSTRUCTIONS, supra note 162, at §§ 11.03–11.04 (instructing the jury to base the amount of punitive damages on “the character and degree of” the defendant’s “wrongful conduct,” and allowing the jury to consider non-party harm to determine the level of reprehensibility of that conduct, but prohibiting the award of punitive damages based on the defendant’s conduct to others than the plaintiff).
Other states' instructions lack the guideposts, but integrate Philip Morris. Arkansas courts, for example, instruct juries: evidence of nonparty harm "may be considered by you only for the purpose of determining the degree of reprehensibility of (defendant)'s conduct. You may not use evidence of harm to persons other than (plaintiff) to punish (defendant)." Minnesota, Missouri, and Ohio have similar Philip Morris instructions. Other states did not adopt a model instruction, but did include a note about Philip Morris within their model instructions. For instance, Texas's model instructions include commentary that if evidence of nonparty harm is introduced, "the jury should be instructed that it may

170 CAL. JURY INSTRUCTIONS, supra note 162, at §§ 14.71–14.72 (explaining the jury should consider the defendant's level of reprehensibility in determining the amount of punitive damages, and that the defendant's "practice of engaging in, and profiting from wrongful conduct (occurring in California) similar to that which injured the plaintiff" is relevant to that level of reprehensibility, but not to include any amount in the punitive damage award for injuries to any one other than the plaintiff).

171 IOWA JURY INSTRUCTIONS, supra note 162, at § 210.1 (explaining that the jury should consider "[t]he nature of the defendant's conduct" in determining the amount of punitive damages and allowing the jury to "consider harm to others in determining the nature of defendant's conduct," but prohibiting the jury from awarding "punitive damages to punish the defendant for harm caused to others").

172 NEV. JURY INSTRUCTIONS, supra note 162, at § 12PD.2 (instructing the jury that in determining the amount of punitive damages, it should consider "[t]he degree of reprehensibility of the defendant's conduct" and that nonparty harm is relevant to "the reprehensibility of the defendant's conduct," but that the jury cannot use evidence of nonparty harm to award punitive damages to the plaintiff for "conduct injuring others who are not parties to this litigation").

173 N.Y. JURY INSTRUCTIONS, supra note 162, at § 2:278 (instructing the jury to consider the "nature and reprehensibility of what [the defendant] did" in determining the amount of punitive damages and explaining that although the jury can "consider the harm to individuals or entities other than [the] plaintiff... in determining the extent to which [the defendant]'s conduct was reprehensible, [it] may not add a specific amount to [the] punitive damages award to punish [defendant] for the harm [defendant] caused to others").

174 N.D. JURY INSTRUCTIONS, supra note 162, at §§ C 72.00, C 72.07.

175 OKLA. JURY INSTRUCTIONS, supra note 112, at § 5.9 (allowing the jury to consider "[t]he seriousness of the hazard to the public arising from [Defendant]'s misconduct" in determining the amount of punitive damages and to "consider evidence of actual harm to others in determining the seriousness of the hazard to the public and thus whether the conduct that harmed the plaintiff was particularly reprehensible or bad" because "[c]onduct that risks harm to many may be more reprehensible than conduct that risks harm to only a few," but explaining that the jury cannot punish the defendant "directly on account of harms that [Defendant] may have caused to others").

176 EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS § 4.72 (2014).

177 Other states that have adopted a Philip Morris instruction do not instruct the jury that the reprehensibility of the defendant's conduct should determine the amount of punitive damages, despite the Supreme Court's first guidepost; regardless, those other states' instructions still direct jurors to consider nonparty harm in evaluating the defendant's reprehensibility but not as a basis for punishment. E.g., ARK. JURY INSTRUCTIONS, supra note 162, at §§ 2218–2218A; MO. JURY INSTRUCTIONS, supra note 162, at § 10.01; N.M. JURY INSTRUCTIONS, supra note 162, at §§ 13-1827–13-1827A; OHIO JURY INSTRUCTIONS, supra note 162, at § CV 315.37.

178 ARK. JURY INSTRUCTIONS, supra note 162, at § 2218A.

179 MINN. JURY INSTRUCTIONS, supra note 162, at § 94.10

180 MO. JURY INSTRUCTIONS, supra note 162, at § 10.01.

181 OHIO JURY INSTRUCTIONS, supra note 162, at § CV 315.37.
not punish a defendant for the harm the defendant's conduct allegedly caused to other persons who are not parties to the litigation.'

Whether the state adopted a model instruction or just included a note about *Philip Morris* in the commentary to their instructions, the language tends to copy the Court's broad language in *Philip Morris* itself—that the jury can consider the evidence for purposes of reprehensibility, but cannot punish the defendant for causing it.

2. Inherent Concerns About the Efficacy of Limiting Instructions

Although courts, including the Supreme Court, matter-of-factly presume that juries follow their instructions, doubts regarding the efficacy of limiting instructions are widespread. Justice Jackson famously expressed his doubt: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." Judge Learned Hand similarly noted, "[n]obody can indeed fail to doubt whether the caution is effective" and that limiting instructions require the jury to perform "mental

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182 STATE BAR COMM. ON PATTERN JURY CHARGES, TEXAS PATTERN JURY CHARGES—CIVIL § 28.7, LEXIS (2016); see also SUPREME COURT OF COLO., COLORADO JURY INSTRUCTIONS FOR CIVIL TRIALS § 5-4, LEXIS (2017) (explaining that jury should be instructed regarding reprehensibility-punishment distinction); KAN. JUDICIAL COUNCIL, JUDICIAL COUNCIL PATTERN INSTRUCTIONS FOR KAN., PATTERN INSTRUCTIONS FOR KANSAS—CIVIL § 171.44, LEXIS (4th ed. 2012) (explaining the reprehensibility-punishment distinction); 2-39 JOHN S. PALMORE & DONALD P. CETRULO, KENTUCKY INSTRUCTIONS TO JURIES—CIVIL § 39.15, LEXIS (2017) (explaining that punitive damages must reflect "the degree to which the defendant's conduct is found reprehensible, damaging the plaintiff himself as opposed to the public at large"); COMM. ON PATTERN JURY INSTRUCTIONS, NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES § 810.98, LEXIS (2016) (explaining the reprehensibility-punishment distinction); MICHIE CO., 2B-2B-1 INSTRUCTIONS FOR VIRGINIA AND WEST VIRGINIA § 26-132, LEXIS (2016) (same); WIS. CIVIL JURY INSTRUCTIONS COMM., WISCONSIN JURY INSTRUCTIONS—CIVIL §§ 1707.1–1707.2 (2015) (same).


184 E.g., Greer v. Miller, 483 U.S. 756, 766 n.8 (1987) ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it . . . ." (citing Richardson v. Marsh, 481 U.S. 200, 211 (1987))); United States v. Gardner, 396 F.3d 987, 993 (8th Cir. 2005) ("We presume the jury followed the court's instruction to disregard a comment by the prosecutor." (citing United States v. Flute, 363 F.3d 676, 678 (8th Cir. 2004))); United States v. Givan, 320 F.3d 452, 462 (3d Cir. 2003) ("[i]t is a basic tenet of our jurisprudence that a jury is presumed to have followed the instructions the court gave it . . . ." (citing United States v. Gilsenan, 949 F.2d 90, 96 (3d Cir. 1991))).

185 See, e.g., David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 408 (2013) ("There are two well-known facts about evidentiary instructions . . . . The second is that they do not work."); see also Linda J. DeMane, *In Search of an Anti-Elephant: Confronting the Human Inability to Forget Inadmissible Evidence*, 16 GEO. MASON L. REV. 99 (2008). Professor Sklansky summarizes the criticism of limiting instructions throughout his article. See Sklansky, supra, passim.


187 United States v. Gottfried, 165 F.2d 360, 367 (2d Cir. 1948).
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gymnastic[s] which is beyond, not only their powers, but anybody's else."¹⁸⁸ Scholars have presented three main reasons to doubt the efficacy of limiting instructions: common sense, the story model of how juries interpret evidence, and the results of mock juror studies. All three reasons to doubt also apply to a Philip Morris instruction.

Common sense dictates that it is difficult for a juror to hear evidence, but then consider it only for a limited purpose.¹⁹⁰ In short, you cannot unring a bell, uncrack the egg.¹⁹¹ This task itself, of using information for one purpose but not another, is “cognitively complex.”¹⁹² Limiting instructions “impose demands that are likely to be difficult for jurors . . . to apply as the law directs.”¹⁹³ That cognitively complex task could be even more difficult when the evidence is that the defendant’s conduct also harmed nonparties.¹⁹⁴ The punishment instinct is strong, and a limiting instruction may not be enough to quell it.¹⁹⁵ Academics specifically questioned jurors’ ability to follow the State Farm out-of-state conduct reprehensibility-punishment distinction; it “may be understandable, but using the evidence of injury to others appropriately probably demands superhuman capabilities that judges as well as jurors lack.”¹⁹⁶ The story model explains that “juries assess evidence holistically” and “reason recursively, with each piece of evidence influencing the constructed narrative.”¹⁹⁷ Arguably, it is difficult for jurors to follow later instructions to not evaluate a piece of evidence in a certain way, forcing them to reconstruct the narrative.¹⁹⁸ The story model also fits in well with Professors Daniel Kahneman, David Schkade, and Cass

¹⁸⁸ Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).
¹⁹⁰ ‘The jury is supposed to ignore the most obvious purpose of the evidence and consider it for a less obvious purpose.’ This task itself, of using information for one purpose but not another, is “cognitively complex.”¹⁹² Limiting instructions impose demands that are likely to be difficult for jurors . . . to apply as the law directs.”¹⁹³ That cognitively complex task could be even more difficult when the evidence is that the defendant’s conduct also harmed nonparties.¹⁹⁴ The punishment instinct is strong, and a limiting instruction may not be enough to quell it.¹⁹⁵ Academics specifically questioned jurors’ ability to follow the State Farm out-of-state conduct reprehensibility-punishment distinction; it “may be understandable, but using the evidence of injury to others appropriately probably demands superhuman capabilities that judges as well as jurors lack.”¹⁹⁶ The story model explains that “juries assess evidence holistically” and “reason recursively, with each piece of evidence influencing the constructed narrative.”¹⁹⁷ Arguably, it is difficult for jurors to follow later instructions to not evaluate a piece of evidence in a certain way, forcing them to reconstruct the narrative.¹⁹⁸ The story model also fits in well with Professors Daniel Kahneman, David Schkade, and Cass
R. Sunstein's outrage model of how jurors impose punitive damages.199 Under this theory, punitive "damages are considered an expression of an angry or indignant attitude toward a transgressor."200 Jurors evaluate their outrage, the harm suffered by the victim, and their relationship to the victim to form their punitive intent.201 Jurors then translate their punitive intent onto a dollar scale and determine the amount of punitive damages.202 Jurors who have already determined that punitive intent may have trouble recalibrating when they are instructed to not punish for some of the conduct that formed the basis of their punitive intent, especially if they do not hear about this limitation until after all of the evidence is presented.

Last, results of juror studies and mock juror studies purport to show that jurors do not follow limiting instructions. Professor David Sklansky recently summarized the results of thirty-three published studies on the effects of limiting instructions on mock jurors.203 Many of those studies indicated that jurors either disregarded the limiting instruction,204 or that the limiting instruction actually backfired, causing the jury to focus even more on the inadmissible evidence.205

A Philip Morris instruction has not been specifically studied, but substantive punitive damages jury instructions have been studied.206 This research is equally

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201 Kahneman et al., supra note 199, at 51–52.

202 See id. at 52–53.

203 See Sklansky, supra note 185, at 424–29 & nn.58–90.


205 Dale W. Broder, The University of Chicago Jury Project, 38 NEB. L. REV. 744, 754 (1959); Russell D. Clark, III, The Role of Censorship in Minority Influence, 24 EUR. J. SOCIAL PSYCHOL. 331, 335–36 (1994); see also Sklansky, supra note 185, at 425 & n.58, 427 & n.78.

applicable to a *Philip Morris* instruction, which is actually both a limiting instruction and a substantive instruction defining what punitive damages can punish. Professor Jennifer Robbennolt summarized the results of those studies and their implications: “[t]he empirical research demonstrates that jurors often have difficulty understanding and applying the judge’s instructions on the law.”207 Some studies showed that, after determining amounts of punitive damages, jurors could rarely recall the factors they were supposed to consider in determining those amounts.208 Studies also showed that jurors’ use of the instructions depended on the jurors’ inclinations about awarding or denying damages. “Juries choosing to impose punitive damages spent less time discussing the judge’s admonition to follow the instructions and were less likely to discuss each element of the instructions . . . .”209 Thus, if a juror wants to impose punitive damages, she is less likely to feel constrained by any limitations mentioned in the jury instructions—like a *Philip Morris* instruction.

Professor Sklansky recently set out to defend limiting instructions, including defenses against the three main reasons to doubt that limiting instructions work.210 But even Professor Sklansky did not argue that jurors actually follow limiting instructions. Rather, he argued that jury instructions do “work” by achieving purposes other than strict juror compliance.211 For example, one purpose of limiting instructions is to achieve accurate factfinding. Although “[d]ebiasing of any kind is unlikely to work perfectly,” a limiting instruction makes it “less likely that jurors will overrely [sic] on particular kinds of evidence or react emotionally to it.”212 He also explained that some evidentiary rules are intended “to influence the behavior of

207 Id. at 144 & n.177.
208 See id. at 144.
209 See id. at 145–46.
210 See Sklansky, supra note 185. Professor Sklansky addresses the arguments based on the story model, id. at 419–23, and the possible design flaws and the reporting/publication biases of the mock juror studies, id. at 431–39. One of Sklansky’s problems with mock juror studies is that they are studies of jurors as opposed to juries, who deliberate with each other. Id. at 433 (“[W]hen jurors have to reason aloud and to each other, they may find it easier to avoid prohibited inferences and harder to do what the judge has asked them not to do.”). In an extensive study of deliberations for punitive damages, however, researchers found that “deliberating juries tended to reach the liability result favored pre-deliberation by the majority of its members.” Robbennolt, supra note 206, at 137. This is consistent with psychological theory concerning “group polarization,” which “suggests that following group discussion, group members’ positions tend to become more extreme in the direction initially favored by the majority.” Id. at 137. Similarly, “once group members hear about the initial positions of their peers, they are likely to adjust their preferences in the direction of those initial norms.” Id. at 139. In fact, researchers found that “jurors whose pre-deliberation verdicts were lower were significantly less likely to introduce their pre-deliberation award as an option for discussion.” Id.
211 See Sklansky, supra note 185, passim.
212 Id.
parties before or after the trial."\textsuperscript{213} [I]nstructions implementing those rules can function effectively even if juries do not follow them with perfect fidelity."\textsuperscript{214}

This defense does not calm concerns about a \textit{Philip Morris} instruction, however, as the purpose of a reprehensibility-punishment limiting instruction is to prevent a violation of the defendant's constitutional rights. Juror compliance is needed to achieve this purpose.\textsuperscript{215} If juror compliance is in serious doubt, courts should be hesitant to rely on jury instructions to provide the "constitutionally important" assurance that juries evaluate nonparty harm only for purposes of reprehensibility.\textsuperscript{216}

3. Explaining the Reprehensibility-Punishment Distinction to the Jury

\textsuperscript{213} \textit{Id.} at 417–18. For example, evidence of subsequent remedial measures is inadmissible to show tortious conduct. \textit{Id.} at 418. The purpose of the rule to ensure that defendants are not disincentivized from remedial measures. \textit{See id.}

\textsuperscript{214} \textit{Id.}

\textsuperscript{215} \textit{See Gash, supra note 60, at 590–91 (explaining that a jury instruction solution to \textit{Philip Morris} "rests on the illusion that juries will be able to follow its proposed limiting instructions").}

\textsuperscript{216} \textit{See Allen, supra note 48, at 376 (quoting \textit{Philip Morris}, 549 U.S. at 355); id. at 378 ([N]one of the traditional devices mentioned above would actually give a court any real 'assurance' that the jury has asked the right question. If that is truly a constitutional requirement, pretending that an instruction or other traditional device will be sufficient is simply wishful thinking." (footnote omitted) (quoting \textit{Philip Morris}, 549 U.S. at 355)).

The Court has expressly recognized that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." \textit{Bruton v. United States}, 391 U.S. 123, 135 (1968). The first context was a jury instruction prohibiting a jury from considering an involuntary confession in determining guilt. \textit{See Jackson v. Denno}, 378 U.S. 368, 388–90 (1964). The second context was an instruction prohibiting a jury from considering a co-defendant's confession as evidence of another co-defendant's guilt. \textit{See Bruton}, 391 U.S. at 123–25, 136.

Whether possible punishment for causing nonparty harm is one of those contexts is unknown. The Supreme Court has certainly questioned the general efficacy of punitive damages jury instructions. \textit{In her Haslip dissent, Justice O'Connor explained that standard punitive damage jury instructions "are so fraught with uncertainty that they defy rational implementation. Instead they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections." Pacific Mut. Life Ins. Co. v. Haslip}, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting). More recently, a majority of the Court echoed these concerns, concluding that jury instructions would likely be unable to solve the unpredictability of punitive damage awards. \textit{See Exxon Shipping Co. v. Baker}, 554 U.S. 471, 504 (2008) ("These examples leave us skeptical that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers."). At the same time, a year before \textit{Bruton}, the Court found that a limiting instruction was constitutionally sufficient to protect the defendant when evidence of his prior convictions was admitted in the same proceeding to determine guilt on the charged crime. \textit{Spencer v. Texas}, 385 U.S. 554, 565–66 (1967). The Court distinguished \textit{Spencer from Denno} because \textit{Denno} involved the "protection of a specific constitutional right, and the . . . procedure was designed as a specific remedy to ensure that an involuntary confession was not in fact relied upon by the jury." \textit{Id.} at 564–65. In \textit{Spencer}, however, "no specific federal right—such as that dealing with confessions—[was] involved; reliance [was] placed solely on a general 'fairness' approach." \textit{Id.} at 565. The Court did, however, clarify a specific constitutional right in \textit{Philip Morris}—a defendant has a specific right to not be punished for harming nonparties. \textit{See Philip Morris}, 549 U.S. at 553–55.
Professor Sklansky correctly pointed out that the belief that limiting instructions are obviously ineffective has “made it unnecessary and pointless to ask what kinds of instructions jurors are apt to follow and what kinds they are apt to violate.”217 There are, of course, reasons to believe that some jury instructions work better than others. There is also reason to believe that lower courts should be the ones to experiment. Professor Brandon Garrett recently explained that the Supreme Court may not be the best entity to set evidentiary rules: “[E]vidence law requires knowledge of practice, and trial practice at that, together with practical challenges in obtaining evidence and presenting facts during litigation. Lower courts may often be better situated to assess conflict between evidence and constitutional rules and to define the scope of remedies pretrial and at trial.”218 Yet, most of the model instructions have simply echoed the Court’s language in Philip Morris consider evidence of nonparty harm for reprehensibility, but do not punish based on it.219

Experimentation can be based on things we know can improve jury instructions. For instance, Professor Sklansky explained that, “contrary to expectations, . . . instructions at the end of the trial are more effective than instructions right after the jury is exposed to the evidence.”220 Thus, maybe a Philip Morris instruction at the end does something right. Although, to ensure that the jury does not create a narrative based on the nonparty harm, a defense attorney should also request a Philip Morris instruction when the evidence of nonparty harm is first introduced.

Sklansky also suggests, although evidence exists to the contrary, “evidentiary instructions are more apt to be followed if the judge explains the reason for the underlying rule.”221 Professor Robbennolt similarly suggested, with respect to substantive punitive damage instructions, that “provid[ing] explanations and reasons for the legal rules in addition to the rules themselves” could help jurors determine punitive damage awards.222

Explaining two points would likely aid jurors in complying with Philip Morris. The first is an explanation of how nonparty harm may show the defendant’s conduct toward the plaintiff was reprehensible. Current model instructions do not bother to do so.223 Instead, they broadly state that nonparty harm can be considered

217 Sklansky, supra note 185, at 451.
218 Garrett, supra note 161, at 118 (footnotes omitted).
219 See supra Section II.B.ii.1.
220 Sklansky, supra note 185, at 452 (footnote omitted).
221 Id. But see Pickel, supra note 64, at 423 (summarizing the negative effects of offering a legal explanation to mock jurors).
222 Robbennolt, supra note 206, at 192.
223 For example, shortly after Philip Morris, Professor Zipursky criticized the Eighth Circuit’s instruction in Supreme Court Review because the court made “no effort . . . to specify the reasons” that the defendant’s past and subsequent conduct was “relevant to reprehensibility.” Zipursky, supra note 144, at 148.
as evidence of reprehensibility, without also explaining to the jury how it can demonstrate reprehensibility.

The provided explanations should be consistent with the clarified understanding of how nonparty harm is relevant to reprehensibility. One example: "In determining the reprehensibility of the defendant's injuring the plaintiff, you may consider evidence of the defendant similarly injuring nonparties as such evidence could show the defendant knew that its conduct could injure the plaintiff," or, "in determining the reprehensibility of the defendant's injuring the plaintiff, you may consider evidence of the defendant similarly injuring nonparties as such evidence could show the defendant's conduct was planned or deliberate." These types of explanations do more than just tell the jury that nonparty harm is relevant to reprehensibility, as most model instructions do. Instead, the explanations would help the jury to understand how nonparty harm is relevant to the level of reprehensibility. This understanding would also inherently dissuade the jury from punishing based on nonparty harm.

The second explanation that jurors would likely benefit from is why punishing nonparty harm is improper. Current model instructions lack this explanation, instead just telling the jury not to punish. But a simple additional explanation would help the jury understand why punishment would be improper. For example, "You may not, however, punish the defendant directly for injuring those nonparties. Any such punishment would be appropriate only in tort claims brought by such nonparties."

The explanations also would likely avoid the potential problems with explanatory instructions discovered in one study. In that study, some mock jurors heard evidence of prior convictions that was ruled inadmissible and received no explanation for the inadmissibility disregarded the evidence. Other jurors received an explanation from the judge that they were to disregard the evidence because it might have "improperly suggest[ed] . . . that the defendant ha[d] a bad character and tend[ed] to behave in the same negative way in all situations." Jurors receiving the explanation "weighted the critical evidence somewhat less, but they clearly did not ignore the evidence." The researcher suggested that the result

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224 E.g., ARK. JURY INSTRUCTIONS, supra note 162, at § 2218A; N.Y. JURY INSTRUCTIONS, supra note 162, at § 2:278; N.D. JURY INSTRUCTIONS, supra note 162, at § C 72.07; OR. JURY INSTRUCTIONS, supra note 110, at § 75.02B.
225 See supra note 224.
226 See Pickel, supra note 64, at 423. Professor Pickel conducted two experiments with inadmissible evidence. Id. at 422–23. She concluded that jurors disregarded inadmissible hearsay regardless of the legal explanation. Id. at 423. The result for evidence of prior convictions is discussed in the text. Ultimately, after conducting experiments, Professor Pickel concluded that "'(1) a legal explanation did not help mock jurors disregard inadmissible evidence; [and] (2) in some circumstances[,] a legal explanation might backfire, possibly due to increased salience of the critical evidence interacting with jurors' preconceptions of the fairness of using the evidence to determine guilt." Id.
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was potentially due to defiance or to "jurors' preconceptions of the fairness of using the evidence to determine guilt." 230

This study involved a limiting instruction that the jury should disregard evidence as opposed to limiting the jury's consideration of the evidence. 231 Jurors may very well react differently, less defiantly, to limited consideration than forced disregarding. Additionally, preconceptions of fairness may have less effect in a Philip Morris instruction because it is unlike a normal evidentiary explanation. Jurors will likely think it is fair to punish for causing nonparty harm. 232 The suggested explanation does not tell jurors that punishment would be unfair and cannot happen. Instead, it tells jurors that the punishment is possibly appropriate, but that another jury hearing the case brought by the nonparty must impose it.

Additional judicial explanations may assist jury deliberations. 233 One juror may bring up something about wanting to punish the defendant for also harming nonparties. A basic Philip Morris instruction should prompt another juror to explain that such punishment is improper. 234 But that juror has a stronger point when she could point out that the punishment is improper because such punishment would need to be decided by another jury, in the tort claim brought by the nonparty. These suggested explanations, while they would add only a couple more sentences, could provide clarity about how to comply with Philip Morris.

iii. Better Appellate Review

Professor Thomas Colby believed that Philip Morris would enable reviewing courts to "be more aggressive in striking down awards." 235 But, Professor Colby may have underestimated "the difficulty of probing juror reasoning" when reviewing punitive damage awards. 236 The jury decides whether to award punitive damages and how much to award. 237 And the jury is not required to explain its decision. Thus, all that is known on review is the amount of the award. The amount can sometimes indicate that the jury did not follow its instructions. 238 But a large award or a "high ratio of the punitive damages to the compensatory damages does not imply that the jury included harms done to others in the calculation of its

230 Id. at 423.
231 Id. at 407, 412.
232 See id. at 422 ("If [a jury] decide[s] . . . it is not necessarily unfair to consider [certain] . . . evidence, then [it] . . . will [probably] be unwilling to ignore it.").
233 See supra note 210 and accompanying text (discussing the impact of deliberation on a jury's decision).
235 Colby, supra note 31, at 467.
238 Sassaman v. Heart City Toyota, 879 F. Supp. 901, 912 (N.D. Ind. 1994) ("The court may determine that the jury failed to follow the instruction only if the jury's damage award is so high that it could have only been the product of passion or sympathy." (citing Haluschak v. Dodge City of Wauwatosa, 909 F.2d 254, 256 (7th Cir. 1990))).
award. To the contrary, a large award could indicate that the jury found the defendant's conduct especially reprehensible and thus deserving of a large award. Ironically, the result—a large award—can be the same when the jury asks either the right or the wrong question.

Even in Philip Morris itself, "[t]he Court technically did not reach the question of whether, in fact, the jury . . . punished Philip Morris for conduct directed at others" in awarding the plaintiff nearly $80 million. Such punishment was suspected because of the lack of a jury instruction precluding that use of the evidence, plaintiff's attorney's reference to other Oregonian smokers, and the size of the award. But none of these factors demonstrates that the jury violated Philip Morris, and the Court never actually found that the jury in Philip Morris punished for nonparty harm. Plainly, we do not know the jury's basis for the $80 million.

Because of the reliance on jury instructions, Professor Colby's prediction of aggressive judicial review has so far proven incorrect. If anything, appellate review has become less aggressive. Reviewing courts have looked at whether the trial court gave a Philip Morris instruction. If so, the award does not include punishment for nonparty harm and no violation occurred. This deferential review is inconsistent with the importance of judicial review of punitive damage awards.

Even though Professor Colby has not been correct so far, he still could be. Even when trial courts use Philip Morris instructions, more aggressive judicial review is possible and necessary.

1. How Reliance on Jury Instructions Affects Judicial Review

In February 2016, a jury in the famously plaintiff-friendly St. Louis City Court found Johnson & Johnson liable for fraud and negligence related to its insufficient warning about the possible link between ovarian cancer and the use of talc powder for feminine hygiene. This case is one of thousands that have been filed related to this alleged warning defect. The St. Louis City jury awarded the plaintiff $10 million in compensatory damages and $62 million in punitive damages.

240 Allen, supra note 48, at 355, 357.
242 The same was true in BMW of North America, Inc. v. Gore, 517 U.S. 559, 573–75 (1996). The Court first introduced the reprehensibility-punishment distinction with respect to out-of-state conduct. Id. We do not actually know if the jury in BMW awarded $4 million to punish the defendant for its out-of-state conduct. The Supreme Court assumed so because lower Alabama courts assumed so, id. at 573, but we cannot know.
243 Colby, supra note 31, at 467.
245 Id.
246 Id.
The appellate court overruled the case based on a lack of personal jurisdiction, but valid questions also existed concerning the constitutionality of the punitive damage award. The jury heard evidence that thousands of others had been injured by Johnson & Johnson's conduct. Did the jury find the defendant's conduct especially reprehensible, consistent with Philip Morris? Is that why it awarded $62 million? Or, does that $62 million violate Philip Morris because the jury also punished Johnson & Johnson for injuring others?

But the jury received a Philip Morris jury instruction. It received the Missouri pattern instruction, which tells the jury: "You may consider harm to others in determining whether defendant[s] . . . conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any punitive damages award, you must not include damages for harm to others who are not parties to this case." Thus, the jury was told not to include damages for harm to nonparties, yet the jury still awarded $62 million in punitive damages in a claim brought by one plaintiff.

The size of the award does not really indicate a violation. Plus, the jury was instructed not to violate Philip Morris, and the jury is presumed to have followed that instruction. Even if it wants to, there is little room for an appellate court to reverse a punitive damage award based on Philip Morris. Because juries are

248 Bell, supra note 244 (quoting the plaintiff's attorney that he was "able to prove that approximately 1,500 die each year because of the talc involvement").
250 Id.
251 One juror explained that the $62 million total was calculated at $1 million for each year of Fox's life." Bell, supra note 244. If this is true and was true for the jury as a group, then the $62 million may not include punishment for harming nonparties. Compliance with Philip Morris, however, does not mean this is a rational way to calculate punitive damages.
252 Remarkably, some courts doubt a possible Philip Morris violation even if the jury is not properly instructed. See Campbell v. Boston Sci. Corp., No. 2:12-cv-08633, 2016 WL 5796906, at *12 (S.D.W. Va. Oct. 3, 2016) (rejecting Philip Morris challenge because no evidence showed "that the jury did not follow the court's instruction to consider each claim separately [and] plaintiffs' counsel did not ask the jury to punish BSC for harm caused to other plaintiffs"); Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 506 (1st Cir. 2011); Alaniz v. Zamora-Quezada, 591 F.3d 761, 780 (5th Cir. 2009) (dismissing possibility of a Philip Morris violation because "[t]he jury instructions and questions clearly indicated that the jury was to assess punitive damages specifically as to each Appellee"); Oleszkowicz v. Exxon Mobil Corp., 129 So. 3d 1272, 1288 (La. Ct. App. 2013) (dismissing possibility of Philip Morris violation because jury was instructed "punitive damages could only be awarded if Plaintiff proved Exxon Mobil's wanton and reckless conduct threatened or endangered Plaintiff, and that Exxon Mobil knew or should have known probable harm to Plaintiff would result from its conduct").
254 Scott P. Stolley, The Elusive Nuance in Philip Morris USA v. Williamson [sic], APP. ADVOC., Summer 2007, at 23, 24 ("If a Philip Morris-type instruction is given and a big punitive-damages verdict still results, then it will be difficult for courts to determine whether the jury actually followed the instruction."). The title is slightly misleading in that the title of the case is incorrect, but the article discusses the Philip Morris USA v. Williams, 546 U.S. 346 (2007).
presumed to follow their instructions, judicial review is essentially limited to asking only if the jury was properly instructed. If so, the defendant's constitutional rights were not violated.

This rubber-stamp review is already apparent in the few courts that have evaluated a punitive damage award for compliance with *Philip Morris*. In *Shannon v. Sasseville*, the trial court denied post-trial relief based on a possible *Philip Morris* violation. The trial court explained:

Here, I charged the jury explicitly that jurors could consider Sasseville's molestation of his daughters to measure the reprehensibility of his conduct toward Shannon, but that they could not punish Sasseville for harm he caused anyone other than Shannon. Sasseville points to no direct evidence suggesting that the jury did not follow my instruction. I conclude that the jury instruction satisfied the *Philip Morris* standard. Sasseville's speculation that the size of the jury's award shows that the jury must not have been able to "make the Orwellian . . . evidentiary distinction" between considering harm to others for the purpose of determining that his acts were reprehensible and not considering it when "arriving at the level of punitive damages," is only that—speculation. Under *Philip Morris*, the jury was entitled to consider the prior misconduct in assessing the reprehensibility of Sasseville's conduct toward Shannon, and I turn to that reprehensibility.

In *Wilson v. City of Hazelwood*, defendant complained after trial of a possible *Philip Morris* violation based on the admission of evidence of prior citizen complaints. The court denied a violation noting that it used the Eighth Circuit's model *Philip Morris* compliant punitive damage instruction. The court also noted that its bifurcation of the trial helped preclude a *Philip Morris* violation, even though the jury would have still heard evidence of nonparty harm when determining the amount of punitive damages in the second phase of the trial. Last, the court found no *Philip Morris* violation because "the admission of evidence during the second phase of the trial of complaints against Defendant and of his


257 *Id.* at 175–76 (footnote and citations omitted).


259 *Id.* at 1070.

260 *Id.* ("[B]ifurcation of the trial precluded the jury's hearing evidence which could have been prejudicial in the first phase and facilitated its hearing evidence in the second phase which was relevant to the jury's consideration of the amount of punitive damages.").
being referred to counseling was relevant to the jury’s determination of the amount of punitive damages.”

Similarly, in Cleavenger v. Univ. of Oregon, the defendant complained after trial that the jury punished it for causing nonparty harm. The trial court refused post-trial relief. The trial court specifically told the jury that it could not “set the amount of any punitive damages in order to punish the defendant for harm to anyone other than the plaintiff in this case.” The jury was presumed to have followed this instruction, citing Supreme Court precedent saying the same. The trial court was not concerned that the plaintiff’s counsel’s closing argument “touched on harm to people who [were] not parties to this case,” because that reference was “insufficient to overcome the presumption that the jury followed its instructions, particularly given the evidence in the record that could support a finding there was reprehensible conduct toward Plaintiff.” Last, the trial court explained that a Philip Morris violation in this case was less likely than in Philip Morris itself because “unlike in Philip Morris, the Court [here] explicitly told the jury it could not punish Defendants for having caused injury to others.” By giving that jury instruction, the Court actively protected against the risk that the jury would improperly impose punitive damages.

Another example of rubber-stamp review occurred in McElgunn v. Cuna Mutual Insurance Society. Defendant complained about admission of evidence of other state nonparty harm, but the court was not concerned. “With regard to punitive damages, the court specifically instructed the jury that it could “not include in [its] award of damages any sum that represent[ed] damages for injuries to any person other than Powell.” The court also pointed out that the Supreme Court had recently emphasized that “juries are presumed to follow the court’s


263 See id. at 1152.

264 Id.
instructions."\textsuperscript{272} Because the jury instructions were clear and the jury is presumed to follow those instructions, the lower court did not err in admitting evidence of the defendant's causing nonparty harm.\textsuperscript{273} The court did, however, reduce the punitive damage award from a 30:1 ratio to compensatory damages to an 8:1 ratio.\textsuperscript{274}

Rightly or wrongly, the presence of the jury instruction makes it difficult to find a \textit{Philip Morris} violation. In \textit{Merrick v. Paul Revere Life Insurance Co.}, the Ninth Circuit reversed a $10 million punitive damage award because the evidence presented at trial—of a "decade-long scheme . . . to terminate expensive insurance policies"—"created a significant risk" that the jury punished the defendant for harming nonparties with the $10 million total punitive damages.\textsuperscript{275} The trial court erred in denying the requested \textit{Philip Morris} instruction, and the Ninth Circuit remanded for a new trial for punitive damages.\textsuperscript{276} The next jury received the \textit{Philip Morris} instruction.\textsuperscript{277} The second jury awarded $60 million in punitive damages, six times more than the previous jury that was not given the \textit{Philip Morris} instruction.\textsuperscript{278} Even though the award is higher, it is difficult to conclude that the second jury violated \textit{Philip Morris}, however, because the second jury was properly instructed.\textsuperscript{279} That is the effect that a \textit{Philip Morris} jury instruction has on review.

\textsuperscript{272} \textit{Id.} (quoting \textit{CSX Transp., Inc. v. Hensley}, 556 U.S. 838, 841 (2009)).

\textsuperscript{273} \textit{Id.}

\textsuperscript{274} \textit{Id.} at 1168–69.

\textsuperscript{275} \textit{Merrick v. Paul Revere Life Ins. Co.}, 500 F.3d 1007, 1009, 1016 (9th Cir. 2007).

\textsuperscript{276} \textit{Id.} at 1015–18.

\textsuperscript{277} The instruction was:

\begin{quote}
In assessing punitive damages you may punish a defendant only for that conduct which it directed towards the plaintiff. You may not directly punish a defendant for harm to anyone other than Mr. Merrick. I allowed you to hear evidence about conduct that may have harmed others, only to allow you to consider more fully the question of the reprehensibility of the conduct directed towards Mr. Merrick.

In other words, you may use all the evidence you have heard or seen to determine how reprehensible or blameworthy a defendant's conduct was. This includes evidence of how a defendant's actions may have harmed others besides Mr. Merrick. In deciding what amount, if any, should be awarded as punitive damages, you may not award an amount to punish for harm that may have been caused to people other than Mr. Merrick.
\end{quote}


\textsuperscript{279} In two other reversals due to the denial of a \textit{Philip Morris} instruction, the second jury awarded a smaller amount of punitive damages. In \textit{Bullock v. Philip Morris USA, Inc.}, the appellate court reversed a $28 million punitive damage award. 71 Cal. Rptr. 3d 775, 802, 812 (Cal. Ct. App. 2008). On remand, the new jury in the limited retrial (on punitive damages only) awarded $13.8 million in punitive damages. Bullock v. Philip Morris USA, Inc., 131 Cal. Rptr. 3d 382, 392 (Cal. Ct. App. 2011). In \textit{Estate of Schwarz ex rel. Schwarz v. Philip Morris Inc.}, the jury awarded $150 million total punitive damages, which the trial court reduced to $100 million. 235 P.3d 668, 672 (Or. 2010). The case was adhered to on reconsideration. Estate of Schwarz ex rel. Schwarz v. Philip Morris Inc., 246 P.3d 479,
Rubber-stamp review based on the presence of a jury instruction is also what courts have used to evaluate challenges based on the BMW/State Farm prohibition on punishment for out-of-state conduct.\textsuperscript{280} If properly instructed, the jury must have considered the evidence for reprehensibility purposes, but not as a basis for punishment.\textsuperscript{281} Interestingly, many states have incorporated the guideposts into jury instructions, something the Court has never required but some scholars believe to be appropriate.\textsuperscript{282} Reviewing courts have not, however, simply questioned whether the jury was properly instructed.\textsuperscript{283} Instead, courts will still independently apply the guideposts even though the jury, presumably, followed the guidepost instructions.\textsuperscript{284}

Regardless, it is difficult to square this deferential review with the Supreme Court’s explanations of why meaningful judicial review of punitive damage awards is constitutionally required. In Honda, the Court specifically explained that judicial review is constitutionally required to protect against “the possibility that a jury will not follow those instructions.”\textsuperscript{285} Thus, punitive damages are one area in which the

\begin{itemize}
\item \textsuperscript{280} Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 433–35 (1994). Maybe judicial review of whether the jury actually punished the defendant for causing nonparty harm is not necessary because Philip Morris only guarantees a procedural and not a substantive right. See Philip Morris USA v. Williams, 549 U.S. 546, 353 (2007); see also supra note 31. As one commentator hypothesized:
\end{itemize}
Supreme Court specifically identified the potential risk of juries not following instructions. But, current review based on *Philip Morris* is practically limited to questioning whether the jury was properly instructed—without any ability to determine that the jury disregarded that instruction.286

2. Better Judicial Review

Much can be done to improve judicial review of a possible *Philip Morris* violation. The more sophisticated understanding of the reprehensibility-punishment distinction alone will better aid courts. They must have greater awareness that evidence of nonparty harm does not necessarily demonstrate reprehensibility.

This awareness combined with an evidentiary rule akin to Rule 609(a) already will provide for more aggressive review (and reversals) given that evidence should be included only if its prejudicial effect is less than its probative value. Moreover, this judicial review should be de novo. It is well established that de novo review applies to determinations on the constitutionality of punitive damage awards.287 Possible *Philip Morris* violations based on the admission of evidence of nonparty harm should also be reviewed de novo. This review will allow the reprehensibility-punishment distinction to “acquire more meaningful content” and will better give direction and clarification for lower courts.288 True, evidentiary determinations are usually reviewed for abuse of discretion, but not always.289 Because of the constitutional implications, courts have used de novo review to determine whether the lower court’s admission of evidence violated the defendant’s Confrontation Clause rights.290 The admission of evidence of nonparty harm also has constitutional implications, and should be reviewed de novo.

The Court should similarly use a de novo standard of review to evaluate whether jury instructions sufficiently protected the defendant’s constitutional rights. To assure that the jury asked the right question, as *Philip Morris* mandates, reviewing courts must ask more than just “was the jury properly instructed” and then presume compliance with that instruction.291 First, the court should review the context of the instructions. Were the instructions clear? Did the instruction explain

(Thomas, J., dissenting) ("It matters not that the Court styles today's holding as 'procedural' because the 'procedural' rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages." (citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 26–27 (1991) (Scalia, J., concurring in judgment))); see also supra note 31 (citing those who have questioned the procedural due process basis of *Philip Morris*). If this is correct, it would mean that a defendant has a right to a procedural protection, but no further right to complain if the jury still punished it for causing nonparty harm. See supra note 31.

286 See discussion supra Section II.B.iii.1.
288 Id.
289 United States v. Malpica-Garcia, 489 F.3d 393, 395 (1st Cir. 2007).
290 Id.
291 See id. at 355–57.
to the jury how nonparty harm could show reprehensibility? Did the instruction further explain why the jury could not punish the defendant for causing nonparty harm?

Importantly, the reviewing court must also evaluate any references to nonparty harm made during trial. For example, were the plaintiff’s attorney’s references to nonparty harm limited to reprehensibility—to show the defendant’s knowledge, plan, lack of mistake, etc.? As an example, did the plaintiff point to instances of nonparty harm to show that the defendant knew of the probability of injuring the plaintiff, or did the plaintiff’s attorney encourage direct punishment for nonparty harm? Unless the plaintiff’s attorney also explains how nonparty harm shows reprehensibility, references to nonparty harm risk a Philip Morris violation. Because of that risk, the reviewing court should closely review any references to nonparty harm.

Ultimately, we cannot know whether a jury punished a defendant for causing nonparty harm. But that does not mean that reviewing courts have to just assume that the jury asked the right question.

CONCLUSION

In 1991, Justice O’Connor lamented that punitive damages jury instructions were far from adequate: “[r]arely is a jury told anything more specific than ‘do what you think best.’” The use of a Philip Morris instruction means juries are now told more. But Justice O’Connor would likely not view a confusing and general, “consider evidence of nonparty harm for reprehensibility, but do not punish based on it” instruction as an improvement.

The first step to complying with Philip Morris is better understanding the reprehensibility-punishment distinction and ensuring that admitted evidence of nonparty harm actually demonstrates reprehensibility. If so, courts should then evaluate the admissibility of evidence of nonparty harm under a more exclusion-friendly balancing test, integrate explanations into Philip Morris jury instructions, and still investigate the possibility of a Philip Morris violation on appeal despite the use of a jury instruction.

It will always be difficult to detect a Philip Morris violation after trial. But admitted futility does not protect defendants’ constitutional rights. Use of these suggested measures will help comply with the Supreme Court’s mandate that juries ask the right question with respect to nonparty harm.

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293 See Philip Morris, 549 U.S. at 355.