

Simplifying Punitive Damages in the U.S.: Due Process and the Pursuit of Manageable Awards and Procedures

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ABSTRACT: This article examines the significance of the U.S. Supreme Court’s due process rulings in punitive damages cases, and how they may impact U.S. juries’ calculations of future awards. The Supreme Court case law, particularly with the holding in Phillip Morris U.S.A. vs. Williams (“Phillip Morris II”) barring juries from calculating punitive damages awards based directly on harm to non-parties, solidifies the principle that punitive damages are private in essence. The Supreme Court’s rules appear to narrow the focus for juries making calculations, so as to reduce the risk that juries will calculate awards based on the goal of optimizing the impact of law enforcement – a goal that is public in essence, and beyond the permissible scope of inquiry for juries. Whether the Supreme Court’s holdings will control the risks inherent in the process of rendering punitive damages awards remains to be seen. However, the holdings do appear to steer trial courts and juries towards simplified procedures, and more reliable calculations of awards.

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INTRODUCTION:

Punitive damages apply in civil (private, non-criminal) matters in common law jurisdictions, in circumstances where the defendant’s unlawful conduct was particularly reprehensible or blameworthy. Punitive damages serve dual purposes of retribution and deterrence. They are particularly abundant in the United States,¹ which relies significantly on private litigation to enforce its laws. Punitive damages have many critics, especially in civil law jurisdictions, since awarding them can be unpredictable in practice. The problem is that the size of a punitive damages award – and often, the question of whether punitive damages will be awarded after the jury has found the defendant liable – depends on the factual findings of the jury. Because no two juries and no two sets of facts are the same, forming concrete standards with which to make punitive damages more predictable and less risky is inherently difficult.

The U.S. Supreme Court has determined that too much unpredictability in punitive damages cases threatens substantive and procedural due process rights guaranteed to civil defendants under the U.S. Constitution. The Court has worked to address this problem by advising lower courts to consider guidelines – including suggested ratios – with which to consider whether the size of a punitive damages award is permissible. However, most of the Court’s rulings have been procedural rather than substantive, so as to tighten the scope of permissible ways to calculate

¹ This article refers to several concepts unique to common law jurisdictions and the United States. For a brief explanation of these concepts, please see the appendix.

punitive damages awards, without imposing direct or absolute restrictions on award size. For example, the Court has ruled that a punitive damages award must be based primarily on the reprehensibility of the defendant's conduct against the plaintiff. Most recently, in *Philip Morris USA v. Williams* (*Philip Morris II*), the Court held that a trial court cannot instruct a jury to calculate the size a punitive damages award for the purpose of making up for sub-optimal law enforcement.

This article examines the significance of the U.S. Supreme Court's due process rulings in punitive damages cases, and what they might mean for the future of this controversial remedy. Part I observes the history of punitive damages in common law courts, and the theoretical questions that have recently arisen in U.S. jurisprudence about the role of punitive damages. Part II provides an overview of the case law that has evolved from the U.S. Supreme Court's due process rulings in punitive damages cases, which began just two decades ago. Part III argues that the Supreme Court cases, particularly the most recent ruling in *Phillip Morris II*, are significant in that they promote more responsible use of punitive damages awards – at least in theory. The significance is that the Court's holdings seek to parse out the difference between the “public” and “private” goals purportedly underlying the jury's tasks of calculating punitive damages, and to restrict the role of juries to the latter set of goals. Of course, time will tell whether the Supreme Court's crystallization of a clearer theory behind punitive damages will influence U.S. juries in practice.

I. AN OVERVIEW OF PUNITIVE DAMAGES IN AMERICAN JURISPRUDENCE

Common law courts have used punitive damages since at least the 18th Century to punish defendants for reprehensible conduct.² Punitive damages are extra-compensatory: they provide civil plaintiffs with additional monetary relief beyond the value of the harm incurred.³ This extra-compensatory characteristic helps punitive damages to further two goals: (1) retribution, or the

² James B. Sales & Kenneth B. Cole, Jr. *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119-20 & nn.6-8 (1984).

³ BLACK'S LAW DICTIONARY 175 (3d Pocket ed. 2006). “Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as ‘quasi-criminal,’ operate as ‘private fines’ intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injuries is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.” *Id.* (quoting *Cooper Indus. v. Leatherman Tool*, 532 U.S. 424, 432 (2001)).

vindication of the plaintiff's right and (2) deterrence, or the creation of a financial disincentive for the defendant to engage in the bad conduct.⁴ Because punitive damages further these goals in civil cases, one can think of punitive damages as “quasi-criminal” in nature, or as “private fines.”⁵ These characteristics make punitive damages unique and also controversial.

Courts allow punitive damages awards only in circumstances where the defendant's conduct was sufficiently reprehensible or blameworthy – for example, in cases where the defendant's conduct was not merely negligent, but reckless or malicious.⁶ Recent judicial decisions in several common law jurisdictions indicate that courts will continue to use punitive damages, and to develop the role of punitive damages in punishing and deterring bad conduct by civil defendants.⁷

Punitive damages awards issue more frequently and in higher amounts in the United States than in other common law jurisdictions where they are awarded, such as Canada, England, and Wales.⁸ In the U.S., the standards for calculating punitive damages vary considerably among the 50 states.⁹ Although states have wide discretion in shaping their own substantive laws on punitive damages, states cannot authorize awards or impose procedures that violate the constitutional rights of civil defendants.¹⁰ The U.S. Supreme Court has worked over the past two decades to delineate

⁴ See Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 188 YALE L.J. 392, 459-60 (2008) (deterrence and retribution are the two goals underlying the broader objective of punishment).

⁵ See, e.g., *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 286-87 (O'Connor, J., concurring in part and dissenting in part) (arguing that punitive damages serve the same purposes as criminal law and that courts should scrutinize punitive damages awards as if they were criminal sanctions); *Philip Morris USA v. Williams (Philip Morris II)*, 549 U.S. 346, 359 n.1 (Stevens, J., dissenting) (adhering to same position); see also *Sales & Cole*, *supra* note 5, at 1118.

⁶ See BLACK'S LAW DICTIONARY 175 (3d Pocket ed. 2006).

⁷ See, e.g., *Philip Morris II*, 549 U.S. 346 (2007) (United States); *Whiten v. Pilot Ins. Co.*, [2002] 1 S.C.R. 595 (Canada); *Kuddus (AP) v. Chief Constable of Leicestershire Constabulary*, [2002] 2 A.C. 122 (H.L. 2001) (England).

⁸ See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2623 (citing John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUMBIA J. TRANSNAT'L L. 391, 421 (2004)).

⁹ See *Exxon Shipping*, 128 S. Ct. at 2622-24 (describing various states' punitive damages laws).

¹⁰ *Philip Morris II*, 549 U.S. at 352.

constitutional boundaries applicable to punitive damages awards.¹¹ The constitutional limitations on punitive damages arise primarily from the Due Process Clause, which forbids states from depriving persons of “life, liberty, or property, without due process of law.”¹²

(A) Origins and Common Law History

The origins of punitive damages are traceable to ancient times.¹³ For example, passages illustrating the notion that justice may require a wrongdoer to compensate the victim in an amount greater than the harm caused are found in sources such as the Bible¹⁴ and the Code of Hammurabi.¹⁵

English common law courts fostered comparable ideas in the 18th Century, by refusing to reduce jury awards exceeding the value of the harm caused in certain situations involving blameworthy conduct by defendants.¹⁶ In the case of *Wilkes v. Wood*,¹⁷ the plaintiff sued a law

¹¹ *See id.* at 2625.

¹² U.S. CONST., Amend. XIV, § 1. Notably, the Fifth Amendment also contains a Due Process Clause, charged to the federal government. This article focuses on state punitive damages awards, which involve the Fourteenth Amendment.

¹³ *See Sales & Cole, supra* note 2, at 1119.

¹⁴ *See, e.g.*, Exodus 22.7 (King James) (“If a man shall deliver unto his neighbour money or stuff to keep, and it be stolen out of the man's house; if the thief be found, let him pay double.”); Exodus 22.9 (King James) (“For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbour.”); Numbers 5:6-7 (King James) (“When a man or woman shall commit any sin that men commit, to do a trespass against the LORD, and that person be guilty; Then they shall confess their sin which they have done: and he shall recompense his trespass with the principal thereof, and add unto it the fifth part thereof. . . .”); *see also Sales & Cole, supra* note 2, at 1119 & n. 4.

¹⁵ *See, e.g.*, Code of Hammurabi (L.W. King) § 5 (“If a judge try a case, reach a decision, and present his judgment in writing; if later error shall appear in his decision, and it be through his own fault, then he shall pay twelve times the fine set by him in the case, and he shall be publicly removed from the judge's bench, and never again shall he sit there to render judgement.”); Code of Hammurabi (L.W. King) § 8 (“If any one steal cattle or sheep, or an ass, or a pig or a goat, if it belong to a god or to the court, the thief shall pay thirtyfold therefor; if they belonged to a freed man of the king he shall pay tenfold. . . .”); Code of Hammurabi (L.W. King) § 107 (“If the merchant cheat the agent, in that as the latter has returned to him all that had been given him, but the merchant denies the receipt of what had been returned to him, then shall this agent convict the merchant before God and the judges, and if he still deny receiving what the agent had given him shall pay six times the sum to the agent.”); *see also Sales & Cole, supra* note 2, at 1119 & n. 2.

¹⁶ *Sales & Cole, supra* note 2, at 1119 & n.6 (discussing history of awarding extra-compensatory damages); *Id.* at 1119-20 & nn.7-8 (identifying the decision in *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), as the beginning of

enforcement officer for breaking into his home, and searching and seizing his property based on a false, unlawfully-issued warrant.¹⁸ The plaintiff argued that because the conduct at issue – an abuse of power that threatened the constitutional liberties of ordinary citizens¹⁹ – was so outrageous, the Court of King’s Bench should allow the jury to levy significant punishment against the defendant in the form of extra-compensatory damages.²⁰ The Court of King’s Bench agreed.²¹ Lord Chief Justice Pratt, sitting for the court, reasoned that an extra-compensatory award was appropriate upon a finding of guilt because “[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.”²²

U.S. courts, which adopted the English common law precedent, added to the punitive damages doctrine²³ and continued to expand on it during the 19th century.²⁴ By the mid 20th Century, the popularity of punitive damages appeared to be on the rise in U.S. courts, and on the

English courts’ use of the term “exemplary damages” to denote additional damages awarded to punish and deter the defendant).

¹⁷ *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763).

¹⁸ *See Wilkes*, 98 Eng. Rep. at 490.

¹⁹ *Id.*

²⁰ *See id.* The thrust of the plaintiff’s rationale for extra-compensatory damages, according to the court, was that “the constitution of our country had been so fatally wounded, that it called aloud for the redress of a jury of Englishmen. That their resentment against such proceedings was to be expressed by large and exemplary damages. . . .” *Id.*

²¹ *Id.* at 498-99.

²² *Id.*

²³ *See Sales & Cole, supra* note 2, at 1124 (referencing a U.S. state court’s decision in *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791) as the “first American enunciation of punitive damages.” Although the U.S. punitive damages doctrine derived from English cases such as *Wilkes*, the unique application of punitive damages to protect against violations of individual rights by government officials is much more characteristic of English law than U.S. law. *See* Andrew Tettenborn, *Punitive Damages: A view from England*, 41 SAN DIEGO L. REV. 1551, 1565. Prior to recent English decisions, punitive damages in England applied typically in cases against the government rather than in private lawsuits. *Id.* This was almost the opposite of what had evolved in the U.S. courts, where punitive damages became instrumental in private litigation. *See id.*

²⁴ *See Exxon Shipping*, 128 S. Ct. at 2620 (explaining evolution of punitive damages doctrine in American courts).

decline in English and Canadian courts.²⁵ As this evolutionary split widened among common law jurisdictions, courts began to recognize more clearly the distinction between (1) damages that were difficult to quantify in monetary terms but also necessary to compensate plaintiffs for the value of the actual harm caused (e.g. damages based on loss of companionship or pain and suffering) and (2) damages that were truly extra-compensatory in nature.²⁶ Courts eventually accepted that punitive damages fell into the latter category.²⁷ Following this logic, jurisdictions that never intended to provide extra-compensatory damages would eventually decide to stop using punitive damages.

But today, common law jurisdictions provide punitive damages while recognizing their extra-compensatory nature.²⁸ Courts in Canada and England have recently expanded the applicability of punitive damages, in recognition of their extra-compensatory nature and utility as a private punishment for bad conduct.²⁹ Canadian and English courts are working to further refine the legal standards for the applicability of punitive damages.³⁰ They are doing so with the benefit of

²⁵ Courts in Canada and England limited the applicability of punitive damages to a much greater extent than U.S. courts did. *See, e.g.,* *Rookes v. Barnard*, [1964] 1 All E.R. 367, 410-11 (H. L.) (English case stating that punitive damages are only available in three limited scenarios: abuses of power that by government officials that infringe on individuals' rights, injuries caused by defendants who sought profits in excess of harm caused, and express authorization by statute); *Thompson v. Commissioner of Police of Metropolis*, [1998] Q.B. 498, 518 (Canadian case stating that the ratio of punitive damages to compensatory damages should rarely exceed 3:1, and suggesting limits for the monetary sum of punitive damages awards).

²⁶ *Id.*

²⁷ *See Exxon Shipping*, 128 S. Ct. at 2620-21 & n.8 (the past idea that punitive damages are really compensatory in nature is no longer accepted), *see also* Sales & Cole, *supra* note 5, at 1121-22 (same)

²⁸ *See Exxon Shipping*, 128 S. Ct. at 2620-21 & n.8 (explaining the older idea that punitive damages filled a void in compensation by redressing injuries that were difficult to calculate, and noting that this concept seems to be outdated). *See also* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 520 (1957). ([T]he original compensatory function of exemplary damages came to be filled by actual damages, and courts today are led to speak of exemplary damages exclusively in terms of punishment and deterrence).

²⁹ *E.g.,* *Whiten v. Pilot Ins. Co.*, [2002] 1 S.C.R. 595 (Canada); *Kuddus (AP) v. Chief Constable of Leicestershire Constabulary*, [2002] 2 A.C. 122 (H.L. 2001) (England).

³⁰ *See* John D. McCamus, *Prometheus Bound or Loose Cannon? Punitive Damages for Pure Breach of Contract in Canada*, 41 SAN DIEGO L. REV. 1491, 1509 (discussing implications of the Supreme Court of Canada's decision in *Pilot Insurance* as an extension of punitive damages in terms of both availability and the permissible quantum of an award); Tettenborn, *supra* note 23 (reasoning of the House of Lords in *Kuddus* indicates that "punitive damages are here to stay in England."). Further, sharp restrictions on the availability of punitive damages in England have likely been removed. *See id.* at 1557-58.

having observed the U.S. experience with punitive damages. Accordingly, Canadian and English courts may have the foresight and knowledge necessary to avoid the sort of over-proliferation of punitive damages that has characterized much of the U.S. experience with the remedy.³¹ As for U.S. courts, recent decisions indicate that they will continue to authorize punitive damages in a wide variety of cases, albeit with increased awareness of the permissible scope under the U.S. Constitution.³²

(B) Punitive Damages in the U.S. Today: The Focus on State Awards

In the United States, the laws governing the use of punitive damages vary noticeably among the 50 states.³³ State law is dispositive of many questions regarding punitive damages. Since the limitations under the U.S. Constitution always apply, state courts must instruct juries and review awards closely, in order to meet state law requirements while keeping within the ultimate limits under the U.S. Constitution. Questions governed by state law could include: whether a court can allow punitive damages for a particular kind of conduct;³⁴ whether the jury may (or must) consider particular factors when making a punitive damages determination;³⁵ what the standard of proof must be to allow a punitive damages award;³⁶ and whether a court must set aside the portion of a

³¹ See McCamus, *supra* note 30, at 1494-95 (discussing Canadian impression of punitive damages in the U.S., as it has been conveyed through sources such as the media).

³² See, e.g., *Philip Morris II*, 549 U.S. at 352 (acknowledging the longstanding American principle that states may impose punitive damages to further their “legitimate interests in punishing unlawful conduct and deterring its repetition” but recognizing that on the other hand, a state court must provide a procedure that will “avoid an arbitrary determination of an award’s amount.”).

³³ For an overview of state variations on punitive damages law, see *Exxon Shipping*, 128 S. Ct. at 2622-24.

³⁴ See, e.g., OKLA. STAT., Tit. 23, § 9.1 (West 2009) (no punitive damages authorized unless defendant’s conduct involved at least “reckless disregard”); § 9.1(A) (no punitive damages may arise from a contract obligation); ALA. CODE 1975 § 6-11-20 (West 2009) (punitive damages only authorized in wrongful death actions or when “the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff.”).

³⁵ See, e.g., OKLA. STAT., TIT. 23, § 9.1(E) (jury must consider a list of seven specific factors that are designated by statute).

³⁶ Many states require that punitive damages be determined based on clear and convincing evidence of the required elements. E.g., OKLA. STAT. ANN., Tit. 23, § 9.1 (West 2009); ALA. CODE 1975 § 6-11-20 (2009); See also Jessica J. Berch, *The Need for Enforcement of U.S. Punitive Damages Awards by the European Union*, 19 MINN. J. INT’L L. 55, 71 & n.

punitive damages award that exceeds a specific sum or a set punitive-to-compensatory damages ratio.³⁷

(C) Are Punitive Damages Unpredictable? Unfair? Inefficient?

The widespread practice of awarding punitive damages in U.S. courts has encountered widespread criticism.³⁸ Many tribunals outside the U.S. (particularly those in civil law jurisdictions) will not recognize or enforce punitive damages awards.³⁹ U.S. plaintiffs seeking to enforce judgments containing punitive damages against defendants with assets outside of the U.S. are therefore at a disadvantage.⁴⁰ Another set of victims are the U.S. defendants, particularly businesses which constantly face the risk of punitive damages. For example, a business entity might have to pay punitive damages even if an individual employee (rather than the entity itself) acted with a blameworthy mental state.⁴¹

Each state in the U.S. gives full faith and credit to the court judgments rendered in all other states,⁴² so public policy arguments against enforcement in different states are not an issue domestically, as they are internationally. Still plenty of disagreement exists among states with

80 (acknowledging same, and noting that both state courts and state legislatures have imposed heightened burden of proof requirements).

³⁷ See, e.g., OKLA. STAT., Tit. 23, § 9.1(B) (West 2009) (when jury finds “reckless disregard,” punitive damages cannot exceed the greater of \$100,000 or the amount of compensatory damages).

³⁸ See *Exxon Shipping*, 128 S. Ct. at 2624 (acknowledging criticism of punitive damages).

³⁹ See *id.* at 2623-24 (citing John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?* 45 COLUM. J. TRANSNAT’L L. 507, 528 (2007)). See also MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICES OF INTERNATIONAL COMMERCIAL ARBITRATION* 187 & n.21 (Cambridge University Press) (2008) (punitive damages are rarely awarded in international commercial arbitration given the likelihood that civil law courts would refuse to enforce them on public policy grounds).

⁴⁰ See Berch, *supra* note 36, at 59-60 (“In an international marketplace, where a tortfeasor’s assets may not be situated in the same country as that in which the initial judgment was rendered, more judgment-creditors may come to rely on international enforcement of their judgments; and there should be free trade in the enforcement of judgments, including judgments containing punitive damages components.”).

⁴¹ See A. Mitchell Polinsky and Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 910-12 (1998) (arguing that making a corporation pay punitive damages based on an employee’s reprehensible act or due to the wealth of the corporation is unsound economic policy).

⁴² U.S. CONST. art. IV, § 1.

respect to the permissibility of punitive damages. Three states do not authorize punitive damages,⁴³ and four others do not allow them absent express statutory authorization.⁴⁴ Indeed, Americans need not look overseas to find government bodies that lack trust or confidence in punitive damages.

The biggest concern over punitive damages seems to be the fear of unpredictability.⁴⁵ A myriad of criticism based on fairness and efficiency has derived from this concern. Recent empirical studies on punitive damages have refuted some of this criticism by finding that in most cases, the sizes of punitive damages awards are predictable⁴⁶ and moderate.⁴⁷ Of course, even if punitive damages awards are predictable and moderate *in most cases*, this does not mean they are sufficiently under control or that they do not create an overall effect of over-deterrence, which might result from a small number of unusually high awards.⁴⁸ Further, since even low threats of

⁴³ See *Exxon Shipping*, 128 S. Ct. at 2622-23 (internal citations omitted) (noting that Nebraska's state constitution bars punitive damages, and that Michigan and Connecticut authorize limited forms of recovery in cases of bad conduct that are not truly punitive in nature).

⁴⁴ *Id.* at 2622. Three states (Louisiana, Massachusetts, and Washington) impose this rule by common law and one state (New Hampshire) imposes it by statute. *Id.*

⁴⁵ See *Exxon Shipping*, 128 S. Ct. at 2625.

⁴⁶ See Theodore Eisenberg, Valerie P. Hans, and Martin T. Wells, *The Relation between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards* (Cornell Legal Studies Research Paper No. 06-026, Mar. 30, 2007), available at <http://ssrn.com/abstract=929565>. The authors of this article conducted an empirical analysis on the relationship between the size of punitive and compensatory damages, and found that "[t]hroughout a substantial range of compensatory awards, from about \$1,000 to over \$100 million, a strong, significant correlation exists between punitive awards and compensatory awards in the same case." *Id.* at 18. However, "[f]or extremely low and extremely high compensatory awards beyond this range, the association decreases." *Id.*

⁴⁷ See *Exxon Shipping*, 128 S. Ct. at 2625 & n. 14 (citing Theodore Eisenberg, et. al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. OF EMPIRICAL LEGAL STUDIES 263, 278 (2006), available at <http://ssrn.com/abstract=912309> (studies have found that in most cases involving punitive damages, the punitive damages award is less than the compensatory damages award).

⁴⁸ See *id.* at 2625. The Court noted that the same empirical research demonstrated why punitive damages are still too unpredictable. *Id.* It stated that "[a] recent comprehensive study of punitive damages awarded by juries in state civil trials found a median ratio of punitive to compensatory awards of just 0.62:1, but a mean ratio of 2.90:1 and a standard deviation of 13.81 Even to those of us unsophisticated in statistics, the thrust of these figures is clear: the spread is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories." *Id.* (citing Eisenberg, *supra*, at 269).

punitive damages awards can significantly affect settlement values (and since the vast majority of cases settle), there is a strong incentive to monitor punitive damages policy with care.⁴⁹

The U.S. legal system began developing solutions to make punitive damages more manageable two decades ago, when the Supreme Court began to scrutinize the awards and procedures of lower courts. By now, the Supreme Court has reviewed several exceptionally large awards, and it has formulated new standards based on constitutional limits that will affect the future of punitive damages in the U.S. If the Court's recent rulings succeed in reducing the amount of excessive awards and unfair procedures in punitive damages cases, then this might lead to greater acceptance and less criticism of punitive damages in the future.

(1) *Fairness-Based Criticism: A Need to Protect Litigants?*

Some critics argue that courts and legislators should limit the applicability of punitive damages based on fairness concerns. A key observation underlying fairness-based criticism is that punitive damages are civil remedies used to further the goals of retribution and deterrence – which are ordinarily the goals of criminal law. Thus, a fundamental concern related to fairness is that punitive damages, as civil remedies that are “quasi-criminal” in nature, can be potentially dangerous without adequate procedural protections.⁵⁰

To be sure, fairness-related risks are involved when courts use the law to achieve the goals of punishment and deterrence.⁵¹ For example, a jury's sympathy for the plaintiff can exist when a defendant is accused of a bad act that would warrant punishment.⁵² Other risks include the chance that the defendant will not have notice of the fact that the law considers the alleged conduct to be “bad,” or the extent to which the law sanctions the conduct.⁵³ The U.S. criminal law system

⁴⁹ See A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. LEGAL STUD. 663, 664-671 (1997). Further, “to the extent that parties are risk averse, one would expect a disproportionately high settlement rate for cases involving punitive damages.” *Id.* at 668.

⁵¹ See *id.*

⁵² See Sales & Cole, *supra* note 2, at 1168 (warning of the dangers of “biased and rhetorically enraged juries” awarding excessive punitive damages awards).

contains procedural mechanisms to protect criminal defendants from these types of risks, but those mechanisms do not apply to civil defendants.⁵⁴ Thus, an important argument from a fairness-based perspective is that punitive damages should not exist to further the goals of criminal law when civil defendants do not receive the procedural protections necessary to shield them from the risk of inaccurate decision-making by juries in punitive damages cases.⁵⁵

The Due Process Clause of the 14th Amendment guarantees a unique set of procedural protections to criminal defendants.⁵⁶ Among the due process protections unique to criminal law are the heightened standard of proof (proof beyond a reasonable doubt)⁵⁷, and the right to confront adverse witnesses.⁵⁸ These protections can help to minimize fairness-related risks, such as inaccuracy and prejudice.

By analogy, the interests of fairness may dictate that when punitive damages are at stake, the state should provide a special set of procedural protections to the civil defendant. Note, however, that while punitive damages and criminal sanctions may further similar goals, punitive damages are much different from criminal sanctions. Perhaps the most important distinction between punitive damages and criminal sanctions is that punitive damages punish private wrongs, while criminal sanctions punish public wrongs.⁵⁹ Punitive damages do not constitute official public condemnation,

⁵³ For an example of fairness-based criticism that stems from concerns about the “quasi-criminal” nature of punitive damages, see generally Sales & Cole, *supra* note 2.

⁵⁴ For a discussion of the differences between procedural safeguards with respect to public and private punishment, see Colby, *supra* note 4, at 415-21.

⁵⁵ See, e.g., *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.* 492 U.S. 257, 286-87 (O’Connor, J., concurring in part and dissenting in part) (arguing that punitive damages serve the same purposes as criminal law and that courts should scrutinize punitive damages awards as if they were criminal sanctions); *Philip Morris II*, 549 U.S. 346, 359 n.1 (Stevens, J., dissenting) (adhering to same position); see also Sales & Cole, *supra* note 2, at 1159 (“Parties to civil litigation are subject to quasi-criminal fines, and courts are enforcing these penalties without the safeguards afforded even society’s worst criminals.”).

⁵⁶ U.S. CONST. amend XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”)

⁵⁷ *E.g.*, *In re Winship*, 397 U.S. 358, 363 (citing *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

⁵⁸ U.S. CONST., amend. VI.

⁵⁹ See generally, Colby, *supra* note 4.

nor do they imply social stigma as criminal convictions do. And while the calculation of a punitive damages award relates to the fact-specific circumstances of the private case at bar, the calculation of a criminal penalty (or any other type of liability set as a matter of law), usually involves considerations pertaining to the public at large.⁶⁰ Despite these important differences, fairness-related risks can appear in punitive damages cases, like they can appear in criminal cases. For example, a punitive damages award could reflect the jury's prejudice against a wealthy or out-of-state defendant,⁶¹ or impose a greater penalty than the defendant could have reasonably expected as a result of the conduct.⁶² Another potential problem exists with respect to civil plaintiffs: perhaps those who are not among the first to sue a defendant may be deprived the opportunity to receive punitive damages.⁶³ For example, a jury might sympathize with a civil defendant who has already doled out significant funding in previous litigation,⁶⁴ or who is on the verge of becoming financially insolvent.⁶⁵

The U.S. Supreme Court has adopted the principle that due process requires certain procedural protections in punitive damages cases. The Court has explained that “[g]iven the risks of unfairness . . . it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one.”⁶⁶

(2) *Efficiency-Based Criticism: Could Courts “Optimize” Damages?*

⁶⁰ See Colby, *supra* note 4, at 412.

⁶¹ *Philip Morris II*, 549 U.S. at 352 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).

⁶² *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996)).

⁶³ For example, in *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 551-54 (Ga. 2006), the court decided that a Georgia resident could not receive punitive damages from a tobacco manufacturer because the manufacturer had previously agreed to a multi-billion dollar settlement with the state for healthcare reimbursement costs.

⁶⁴ For a scholarly article recommending that juries consider the existence of prior litigation in order to optimize punitive damages, see Polinsky and Shavell, *supra* note 41, at 923-26.

⁶⁵ See *id.* at 910-14 (cautioning against using wealth as a factor in most circumstances).

⁶⁶ *Philip Morris II*, 549 U.S. at 355.

In contrast to fairness-based skepticism about the role of retribution and deterrence in civil litigation, some criticism has used economic reasoning to propose ways in which courts could more efficiently utilize punitive damages in light of these goals.⁶⁷ Law and economics authors, for example, have theorized that courts could achieve “optimal deterrence” by using a multiplier to calculate each damages award to equal what the defendant’s liability would be under perfect enforcement (an enforcement rate of 100%).⁶⁸ This “multiplier theory” emphasizes the role of punitive damages as a deterrent to harm.⁶⁹ A basic illustration of the multiplier theory follows:⁷⁰

The amount of damages that achieves optimal deterrence (D_{optimal}) equals the amount needed to compensate the victim (C) times the damages multiplier (M), which accounts for the similar harms caused by the defendant that would otherwise go undetected or unchallenged. Specifically, M equals the reciprocal of the “enforcement rate” (which is the ratio of (1) the harm for which the defendant has paid or will likely have to pay, to (2) the total harm that the defendant has caused or will likely cause). One can express the formula in variables as: $D_{\text{optimal}} = CM$.

The multiplier theory posits that imperfect enforcement creates a need to deter defendants from harmful conduct that might otherwise be profitable.⁷¹ For example, assume that because litigation against a major cigarette manufacturer for fraudulent conduct is very costly, and because victims are unlikely to detect that they have been harmed, only 2% of the fraud victims actually sue. (To make matters simple, also assume that 2% accurately reflects the amount of overall harm

⁶⁷ Note, however, that the distinction between fairness-based criticism and efficiency-based criticism is only illustrative. It does not necessarily identify two distinct viewpoints or schools of thought. In reality, these types of criticism may overlap considerably. However, this article identifies macro-economic efficiency and individual fairness as two contrasting considerations that underlie much of the contemporary criticism and analysis on punitive damages.

⁶⁸ See ROBERT COOTER AND THOMAS ULEN, *LAW & ECONOMICS* 396-97 (Denise Clifton ed., Pearson Education) (5th ed. 2008).

⁶⁹ See *id.* The harm caused by the defendant’s conduct (rather than the conduct itself) is the key variable under the most basic formula for the multiplier theory. See also Polinsky and Shavell, *supra* note 41, at 914-17 (arguing that the U.S. Supreme Court’s emphasis on reprehensibility in *Gore* was misplaced, and that reprehensibility should not “per se affect the imposition of punitive damages, given the goal of deterrence. . . .”)

⁷⁰ The problem that follows is adapted from COOTER AND ULEN, *supra* note 68, at 396-97.

⁷¹ See *id.*; see also Keith N. Hylton, *Due Process and Punitive Damages: An Economic Approach*, 2 CHARLESTON L. REV. 345, 363 (2008).

for which the company pays damages). With an enforcement rate of only 2%, the cigarette manufacturer can profit by acting unlawfully if the fraudulent conduct enables it to sell at least enough cigarettes to offset the small costs resulting from infrequent enforcement of the law. A court can resolve this under-enforcement problem by using the punitive damages multiplier to make the firm accountable for all of the similar harm that it has caused. Here, the damages multiplier (M) would equal the reciprocal of 2%, which is 50. After a plaintiff successfully brings a claim for fraud against the cigarette manufacturer, a jury following instructions based on the equation above would multiply the compensatory damages (C) by 50 to calculate the total amount of the award. In short, the tiny enforcement rate of 2% would translate into a punitive-to-compensatory damages ratio of 49:1. The total award would achieve optimal deterrence because it would make the defendant cigarette manufacturer pay a sum equivalent to the total harm it has caused while taking away the incentive to commit fraud.⁷²

The formula $D_{\text{optimal}} = CM$ is a good example of a theory of punitive damages based purely on efficient deterrence of harm, although it is worth noting that variations on this formula can be more complex. Law and economics authors have discussed several issues that might require modification of the formula, including: whether the enforcement multiplier (M) should equal the *potential* harm that the defendant might cause or the *actual* harm that the defendant has caused;⁷³ whether deterring an individual (a person) should be the same as deterring an organization (a fictional thing)⁷⁴; and whether punishment should have value under the multiplier theory.⁷⁵

⁷² The conclusion that the defendant is deterred in this case depends on the assumption that the value of the total harm caused by the defendant firm outweighs the profits that the firm would have made if the damages were only compensatory. This assumption, that the liable party should be the “lowest cost avoider,” reflects many common law theories of liability, including liability under the tort theory of negligence. *See, e.g.*, COOTER AND ULEN, *supra* note 68, at 342-43 (describing economic incentives under negligence standard). Of course, there are legal remedies available for *intentional* harms regardless of any cost avoidance analysis. The multiplier theory could likewise be adjusted to deter bad conduct in cases where the defendant is not the lowest cost avoider, but the defendant’s reprehensible conduct ought to be deterred. *See* Hylton, *supra* note 71, at 363 & n.50 (2008) (where a defendant manufacturer’s profits outweigh the actual value of the harm caused to consumers, but the defendant acted with certainty that harm would result from his conduct, optimal damages should take away the ill-gained profits).

⁷³ *See* Polinsky and Shavell, *supra* note 41, at 914-17 (contending that actual harm is a better fit than potential harm under the multiplier theory, because estimating the potential harm would be more costly and could lead to inaccurate measurements that would tend to result in over-deterrence).

$D_{\text{optimal}} = CM$ demonstrates how the multiplier theory of punitive damages might work in ideal circumstances, but even law and economics authors admit that it is not foolproof. The multiplier theory has two major problems: impracticality and constitutional implications. First, finding an accurate multiplier with which to achieve optimal deterrence may be unrealistic or even impracticable.⁷⁶ Second, even if it were realistic, the multiplier theory would raise constitutional problems because it would deprive a civil defendant of at least some of the procedural safeguards necessary to minimize the chances of an excessive award.⁷⁷

(3) *Responding to Criticism: Punitive Damages May Be Predictable*

Are punitive damages really unpredictable? Contrary to some fairness-based criticism, the short answer is no. “Runaway judgments,” which have been a major focus of the criticism over punitive damages, seem legendary but are also highly unusual. Awards with outrageously high punitive-to-compensatory damages ratios might make newspaper headlines and find their way to the U.S. Supreme Court, but they rarely arise in practice.⁷⁸ In many cases, the costs of litigation prevent plaintiffs from suing.⁷⁹ One empirical study showed that when plaintiffs do prevail and

⁷⁴ See *id.* at 910-12.

⁷⁵ Unlike the utilitarian objective of optimal deterrence, retribution is individualistic in nature. Accordingly, using punitive damages to provide retribution against a defendant would require a showing of bad conduct and not necessarily widespread harm. In spite of this fundamental difference, law and economics scholars have experimented with the idea that retribution could have its own economic value under the multiplier theory. See *id.* at 948 & n.252 (punishment of blameworthy individuals may provide satisfaction to others or fulfill societal expectations); see also Hylton, *supra* note 71, (providing an example of how a multiplier model could be formed to deter conduct as opposed to harm).

⁷⁶ COOTER AND ULEN, *supra* note 68, at 397 n.32 (“Implicit in this argument is the assumption that the rate at which consumers successfully bring suit . . . does not change when punitive damages are added to compensatory damages. This is a strong and unrealistic assumption.”).

⁷⁷ For example, the multiplier theory, as described above, could interfere with a defendant’s ability to present defenses regarding alleged harm to parties who are not before the court. See *Philip Morris II*, 549 U.S. at 353.

⁷⁸ See Eisenberg, Hans, and Wells, *supra* note 46, at 18 (explaining empirical data on the correlation punitive-to-compensatory damages ratios).

⁷⁹ See Graham E. Kelder, Jr. and Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL’Y REV. 63, 71 (1997) (cigarette manufacturers had a strategy of forcing plaintiffs out of litigation before trial; these companies had advantages over plaintiffs in terms of wealth and litigation experience, and their lawyers engineered tactics designed to make the cost of pre-trial discovery financially burdensome for plaintiffs).

receive punitive damages, the mean punitive-to-compensatory damages ratio is less than 1:1.⁸⁰ Further, a significant correlation exists between the amount of the compensatory damages award and the punitive damages award in most cases.⁸¹

However, even if punitive damages are *usually* predictable, this has not been sufficient to prevent problems that civil defendants face in extraordinary cases, according to recent empirical measurements⁸² and Supreme Court determinations.⁸³ Accordingly, the Supreme Court has examined several awards that would seem to fit the description of “runaway judgments” (e.g. those which involve extremely high punitive-to-compensatory damages ratios). As Parts II and III indicate, the Court has addressed primarily fairness-based concerns associated with punitive damages. In contrast, it has viewed the efficiency-based ideas with caution, and it has identified constitutional problems with the multiplier theory.

II. FROM KELCO TO PHILLIP MORRIS: THE SUPREME COURT’S CASE LAW ON DUE PROCESS AND PUNITIVE DAMAGES

About two decades ago, U.S. courts began recognizing with certainty that the U.S. Constitution protects civil defendants against excessive punitive damages awards and unfair procedures. Although the Supreme Court had indicated in the early 20th century that some constitutional limits to punitive damages existed,⁸⁴ it did not begin to define these limits under the Due Process Clause of the Fifth and Fourteenth Amendments⁸⁵ until the end of the 20th Century. Since 1989, the Court has decided nine cases involving questions about constitutional punitive damages limitations. It has analyzed seven of these cases under the rubric of due process.

⁸⁰ See *Exxon Shipping*, (citing Eisenberg, *supra* note 47, at 269).

⁸¹ Eisenberg, Hans, and Wells, *supra* note 46, at 18.

⁸² See *Exxon Shipping*, 128 S. Ct. at 2625.

⁸³ See Eisenberg, Hans, and Wells, *supra* note 46, at 18; Eisenberg, *supra* note 47, at 269

⁸⁴ See *St. Louis, I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 66-67 (U.S. 1919).

⁸⁵ Both the Fifth Amendment and the Fourteenth Amendment contain Due Process Clauses, which contain the same language. This article focuses on state punitive damages awards, which involve the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment forbids states from depriving persons of “life, liberty, or property, without due process of law.”⁸⁶ Under Supreme Court precedent, a state court violates due process, and a punitive damages award must be set aside, if the state court: (1) renders a grossly excessive award (in violation of “substantive due process”), or (2) fails to provide a civil defendant with a reasonable procedure to protect it from a grossly excessive award (in violation of “procedural due process”).⁸⁷ Understanding the distinction between substantive and procedural due process in U.S. law can be confusing, but with respect to punitive damages limits, an easy distinction can be applied: *substantive due process* is what directly limits the size of the punitive damages award (or the punitive-to-compensatory damages ratio), while *procedural due process* is what limits the permissible range of methods for awarding punitive damages.

The Court prefers to make holdings based on procedural due process rather than substantive due process.⁸⁸ This allows the Court to leave the substantive due process questions open for the future. Further, as the Court demonstrated most recently in *Exxon Shipping Co. v. Baker*, it is willing to place sharp substantive limitations on punitive damages awards when deciding non-constitutional questions.⁸⁹ In *Exxon Shipping*, which was the most recent holding regarding punitive damages limits, the Court declined to reach the due process issue, and instead imposed a 1:1 maximum punitive-to-compensatory damages ratio under federal maritime tort law.⁹⁰

⁸⁶ U.S. CONST., Amend. XIV, § 1.

⁸⁷ See *Philip Morris II*, 549 U.S. at 353 (explaining difference between substantive and procedural due process with respect to punitive damages).

⁸⁸ “Due process” means something similar to “reasonable procedure.” See *Edward Samuel Corwin, Harold William Chase, Craig R. Ducat*, Edward S. Corwin's *The Constitution and What It Means Today* 389 (14th ed. 1977). Thus, “procedural due process” seems redundant and “substantive due process” seems self-contradicting. The latter has been particularly despised throughout the history of U.S. constitutional law, and it is associated with judicial activism and over-reaching. Justice Thomas, who believes that the Constitution should not impose any restrictions on punitive damages, hinted at this problem in his dissenting opinion in *Philip Morris II*, opining that “[i]t 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.” 549 U.S. at 361. For a discussion of concerns over substantive due process related to punitive damages limits and *Philip Morris II*, see Colby, *supra* note 4, at 401-08.

⁸⁹ In *Exxon Shipping*, the Court set a maximum punitive-to-compensatory ratio of 1:1 for federal maritime tort cases. 128 S. Ct. at 2633. It decided the case based on federal common law instead of the Due Process Clause. *Id.* at 2626.

What happened in *Exxon Shipping* reflects a theme in U.S. punitive damages law: all kinds of laws can restrict or ban punitive damages, but there are few substantive limits under the U.S. Constitution. When the Constitution does limit punitive damages, it is usually through procedural due process requirements, which help to ensure that juries use reasonable factors to calculate awards.⁹¹

(A) History of the Court’s Punitive Damages Rulings

The constitutional challenge that set the Supreme Court’s line of punitive damages cases in motion was *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*⁹² In *Kelco*, a jury found the defendant business liable for an antitrust violation and tortious interference with a competitor’s contract.⁹³ Although the compensatory damages were just \$51,146, the jury awarded \$6 million in punitive damages, making the punitive-to-compensatory damages ratio 117:1.⁹⁴ The defendant challenged the award based on the Eighth Amendment of the U.S. Constitution,⁹⁵ which states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁹⁶ The defendant contended that the award constituted an “excessive fine” imposed by the government.⁹⁷ In an interesting opinion emphasizing the historic differences between the Excessive Fines Clause of the Eighth Amendment and comparable restrictions on excessive “amercements” that appeared in the English Magna Carta,⁹⁸ the Court rejected the

⁹⁰ *Id.* at 2633.

⁹¹ *See Philip Morris II*, 549 U.S. at 355.

⁹² *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

⁹³ *Id.* at 263.

⁹⁴ *Id.*

⁹⁵ *Id.* at 268-69.

⁹⁶ U.S. CONST. amend. VIII.

⁹⁷ *Kelco*, 492 U.S. at 268-69.

⁹⁸ *See id.* at 268-77. The defendant used English history in attempt to demonstrate that “excessive fines” encompassed sanctions authorized by the government in non-criminal matters. *Id.* at 268. The Court, however, distinguished

defendant's argument.⁹⁹ The Court determined that the Excessive Fines Clause could only apply to criminal cases involving fines, or civil cases in which the government sought money from the defendant.¹⁰⁰ In other words, the Excessive Fines Clause could not limit punitive damages awards given to private plaintiffs in civil cases.¹⁰¹ The Court noted that in future cases, the Due Process Clause might provide the basis for a viable argument against excessive punitive damages awards, although the defendant had waived this argument by failing to raise it in the lower courts.¹⁰²

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Court handed down its first due process decision on punitive damages in *Pacific Mutual Life Insurance Co. v. Haslip*, a case involving fraud by an insurance agent.¹⁰³ In *Haslip*, the Court affirmed an award consisting of \$200,000 in compensatory damages and \$840,000 in punitive damages (a 4:1 ratio).¹⁰⁴ The Court determined that imposing punitive damages against the insurance company was acceptable because “[i]mposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position to guard substantially against the evil to be prevented.”¹⁰⁵ The Court also analyzed the state’s statutory scheme for awarding punitive damages in cases of fraud by a policy holder, and determined that the scheme had appropriate procedural safeguards to protect defendants against excessive awards.¹⁰⁶ With respect to the ultimate substantive question of how large of a punitive damages award could be within due process limits, the Court stated:

punitive damages (which are ordinarily awarded to private parties) from the amercements of 13th century England, which were non-criminal penalties for bad conduct that went to the Crown. *Id.* at 1171-72.

⁹⁹ *Id.* at 275-76.

¹⁰⁰ *Id.* at 263-64; 275-76

¹⁰¹ *Id.*

¹⁰² *Id.* at 276-77.

¹⁰³ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 4-6 (1991).

¹⁰⁴ *Id.* at 7 & n.2.

¹⁰⁵ *Id.* at 14 (internal citations omitted).

¹⁰⁶ *Id.* at 19-23.

“We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.”¹⁰⁷

A few years later, the Court reviewed an award with a 526:1 punitive-to-compensatory damages ratio¹⁰⁸ (the largest it has seen to date) and affirmed it.¹⁰⁹ In *TXO Production Corp. v. Alliance Resources Corp.*, the defendant had knowingly misrepresented ownership of certain mineral rights.¹¹⁰ The state court rendered a \$10 million punitive damages award, even though the compensatory damages were only \$19,000.¹¹¹ Declining to interfere with the award, the Court stated that only “grossly excessive” awards could be struck down on substantive grounds.¹¹² It emphasized that a potential reason for such a high award was the need to deter the defendant’s conduct in light of the potential harm that it could have caused the plaintiff.¹¹³

In *BMW of North America, Inc. v. Gore*, the court reversed on substantive due process grounds an award with a 500:1 punitive-to-compensatory damages ratio,¹¹⁴ which a state court had entered against an auto manufacturer that had fraudulently concealed repairs on an automobile and sold it as new.¹¹⁵ Because BMW’s policy was not to tell customers about certain minor pre-sale repairs that

¹⁰⁷ *Id.* at 18.

¹⁰⁸ *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 451 (1993).

¹⁰⁹ *Id.* at 453.

¹¹⁰ *Id.* at 447-48.

¹¹¹ *Id.* at 453.

¹¹² *Id.* at 458.

¹¹³ *Id.* at 462.

¹¹⁴ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996).

¹¹⁵ *Id.* at 563.

had been performed on its cars, and BMW had sold approximately 1,000 cars without disclosing these repairs, the plaintiff requested \$ 4 million in punitive damages at the trial level.¹¹⁶ In other words, the plaintiff used the multiplier theory as it is discussed in Part II(C)(2), *supra*, to calculate an optimal damages award.¹¹⁷ The jury awarded the entire amount requested.¹¹⁸ Although the state supreme court had reduced the award to \$2 million,¹¹⁹ the Supreme Court held that the \$ 2 million award was grossly excessive under the Due Process Clause.¹²⁰ *Gore* has been the only case thus far where the Court reversed a state court’s punitive damages award on substantive due process grounds.

The *Gore* Court further stated in dicta (non-binding instructional guidance that appears in an opinion) that lower courts should look consider three “guideposts” when determining whether punitive damages awards are grossly excessive: (1) the level of reprehensibility of the defendant’s conduct; (2) the punitive-to-compensatory damages ratio; and (3) the existence of comparable criminal or regulatory sanctions that would apply to similar acts.¹²¹ The Court elaborated on the importance of reprehensibility, the first guidepost. It stated that “the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”¹²²

Turning to the first guidepost, the Court identified five probative questions for determining the extent to which the defendant’s conduct was reprehensible:

We have instructed courts to determine the reprehensibility of a defendant by considering whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an

¹¹⁶ *Id.* at 564.

¹¹⁷ *See id.*

¹¹⁸ *Id.* at 565.

¹¹⁹ *Id.* at 567.

¹²⁰ *Gore*, 517 U.S. at 586-87.

¹²¹ *Id.* at 574-75.

¹²² *Id.* at 575.

indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident.¹²³

The Court further elaborated on the significance of the answers to these five questions, stating that:

The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.¹²⁴

In 2003, the Court reversed on procedural grounds a \$145 million punitive damages award (which was 145 times greater than the \$1 million compensatory damages award) in *State Farm Mutual Automobile Insurance Co. v. Campbell*.¹²⁵ The state court had entered the award against an insurer for bad-faith failure to settle within policy limits, fraud, and intentional infliction of emotional distress.¹²⁶ The state court had allowed evidence of the insurance company's nationwide "performance, planning, and review" policies, to show that it had defrauded consumers systemically.¹²⁷ The Supreme Court reversed the award, and ruled that a state court could not allow a jury to punish the defendant for lawful out-of-state conduct with "no nexus to the specific harm suffered by the plaintiff," and that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."¹²⁸

¹²³ *Id.* (Numbers and parentheses added for emphasis).

¹²⁴ *Id.*

¹²⁵ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

¹²⁶ *Id.* at 415-16.

¹²⁷ *See id.* at 415.

¹²⁸ *Id.* at 422.

The *Campbell* opinion, like the *Gore* opinion, contained a great deal of dicta.¹²⁹ But this time, the dicta focused exclusively on a substantive due process concept: the size of the punitive-to-compensatory damages ratio.¹³⁰ The Court stated that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”¹³¹ Although not technically not part of the *Campbell* holding, this statement effectively creates a presumption against double-digit punitive-to-compensatory ratios.¹³²

(B) *Philip Morris USA v. Williams: The Non-Party Harm Rule*

Philip Morris USA v. Williams was the most recent Supreme Court case based on the application of the Due Process Clause to punitive damages. The procedural history of this case is complex. The case went to the U.S. Supreme Court twice, and through the state court system in Oregon three times. This section is accordingly broken into five subsections that correspond with the procedural stages of the case.

(1) Trial and Appellate Rulings in Oregon State Court

Mayola Williams, as the representative of her deceased husband’s estate, sued the cigarette manufacturer Philip Morris for negligence and fraud.¹³³ The decedent, Jessie Williams, had been a smoker since the 1950s and died of smoking-related lung cancer in 1997.¹³⁴ Plaintiff’s counsel appealed to the jury to punish Philip Morris for not only the fraud and negligence in the instant case, but also for the terrible effects it had caused to the public at large, as it stated:

“think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. ... In Oregon, how many people do we see outside, driving home ... smoking cigarettes?... [C]igarettes ... are going to kill ten [of every hundred]. [And] the

¹²⁹ The Court’s emphasis on dicta in two consecutive decisions might indicate that the Court was struggling to develop guidelines that lower courts could follow, without taking the risk of developing rules proved to be too rigid.

¹³⁰ *See Campbell*, 538 U.S. at 425.

¹³¹ *Id.*

¹³² *See id.*

¹³³ *Williams v. Philip Morris, Inc.*, 48 P.3d 824, 828 (Or.App., 2002).

¹³⁴ *Id.*

market share of Marlboros [*i.e.*, Philip Morris] is one-third [*i.e.*, one of every three killed].”¹³⁵

The jury found Philip Morris liable and awarded pecuniary compensatory damages of \$21,485.80 and non-pecuniary compensatory damages of \$800,000 on each claim.¹³⁶ The jury also found that the plaintiff was entitled to a punitive damages award of \$79.5 million (97 times greater than the compensatory damages award) for the fraud claim.¹³⁷ The trial court reduced the punitive damages award to \$32 million, and both parties appealed.¹³⁸ The Court of Appeals of Oregon reversed the trial court’s decision and re-instated the \$79.5 million award.¹³⁹ The Oregon Supreme Court denied Philip Morris’ petition for review.¹⁴⁰

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Morris petitioned to the U.S. Supreme Court, which granted certiorari to decide whether: (1) Philip Morris was entitled to a jury instruction on punitive damages which stated that the jury could not punish the defendant for the impact of harm to non-parties, and (2) the punitive damages award was grossly excessive and violated due process.¹⁴¹

(2) *Philip Morris I*

The U.S. Supreme Court vacated the punitive damages award.¹⁴² The Court did not issue a written opinion. Instead, it simply instructed the Court of Appeals of Oregon to reconsider the

¹³⁵ *Philip Morris II*, 549 U.S. at 350.

¹³⁶ *Williams*, 48 P. 3d at 828. The trial court reduced the compensatory damages award for the negligence claim in accordance with an Oregon state statute. *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Williams v. Philip Morris, Inc.*, 61 P.3d 938 (Or. 2002).

¹⁴¹ *Williams*, 61 P.3d 938, *cert. granted*, 71 USLW 3699, 72 USLW 3203, 3234 (U.S. Oct. 6, 2003) (No. 02-1553).

¹⁴² *Philip Morris USA v. Williams (Philip Morris I)*, 540 U.S. 801 (2003).

case in light of the due process decision in *Campbell*, which the Supreme Court had just issued earlier that year.¹⁴³

(3) *On Remand in Oregon State Court*

One might have expected the Court of Appeals of Oregon to reduce the award on remand, particularly considering the “single digit ratio” dicta that the Supreme Court had just issued in *Campbell*. Instead, the Court of Appeals of Oregon reinstated the \$79.5 million punitive damages award,¹⁴⁴ and the Supreme Court of Oregon affirmed the decision.¹⁴⁵

In its opinion, the Court of Appeals of Oregon first reviewed the factual background supporting the jury’s finding of liability for fraud, and emphasized the history of Philip Morris’ campaign to maintain a loyal base of smokers among the public since the 1950s.¹⁴⁶ The court cited Philip Morris’ reprehensible conduct, including its role in a 1954 nationwide newspaper promotion urging consumers that reliable evidence of smoking-related harm was lacking, and its role in forming the Tobacco Industry Research Committee with other major cigarette manufacturers, in order to give smokers “a psychological crutch and a self-rationale that would encourage them to continue smoking.”¹⁴⁷ The court also noted how Philip Morris had conducted its independent research at a facility in Europe, and “was careful to avoid preserving records of the results. . . .”¹⁴⁸

As for Jessie Williams, the court noted that he had been “one of the intended recipients of the industry’s message,” and that the record contained sufficient evidence for the jury to find that he had relied to his detriment on Philip Morris’ deliberately false misrepresentations regarding the risks of smoking-related health problems and addiction.¹⁴⁹ Indeed, the record contained

¹⁴³ *Id.*

¹⁴⁴ *Williams v. Philip Morris USA*, 92 P.3d 126, 145 (Or. App., 2004).

¹⁴⁵ *Williams v. Philip Morris USA*, 127 P. 3d. 1165, 1168 (Or. 2006).

¹⁴⁶ *Williams*, 92 P.3d 126, 128-130 (Or. App., 2004).

¹⁴⁷ *Id.* at 128-30.

¹⁴⁸ *Id.* at 129.

¹⁴⁹ *Id.* at 130.

compelling indications that Philip Morris' conduct reached Williams on a psychological level as he struggled with tobacco addiction.¹⁵⁰ For example:

Despite the increasing amount of information that linked smoking to health problems during this period, Williams resisted accepting or attempting to act on it. When his family told him that cigarettes were dangerous to his health, he replied that the cigarette companies would not sell them if they were as dangerous as his family claimed. When one of his sons tried to get him to read articles about the dangers of smoking, he responded by finding published assertions that cigarette smoking was not dangerous. However, when Williams learned that he had inoperable lung cancer he felt betrayed, stating "those darn cigarette people finally did it. They were lying all the time."¹⁵¹

Turning to the due process analysis, the Court of Appeals of Oregon determined that the *Campbell* decision did not preclude the \$79.5 million punitive damages award, where Philip Morris had acted so reprehensibly and had defrauded countless smokers in Oregon.¹⁵² The court stated that "the unique facts in this case, when compared to the circumstances considered by the Supreme Court and this court in other cases, would justify more than a single-digit award under the Due Process Clause."¹⁵³ Relying heavily on an efficiency-based rationale for deterrence, the Court of Appeals of Oregon concluded that the jury was entitled to calculate a substantial punitive damages award to properly account for other similar harms and risks that Philip Morris had caused.

The Supreme Court of Oregon affirmed the decision.¹⁵⁴ It agreed that the instruction at trial, which allowed the jury to consider harm to others within the state of Oregon, was proper under *Campbell*.¹⁵⁵ Like the appellate court, it stated that because *Campbell* only precluded

¹⁵⁰ *Id.* at 128.

¹⁵¹ *Id.*

¹⁵² *Williams*, 92 P.3d at 145.

¹⁵³ *Id.*

¹⁵⁴ *Williams*, 127 P.3d 1165, 1182 (Or. 2006).

¹⁵⁵ *See id.* at 1176.

punishment for lawful out-of-state conduct or dissimilar acts unconnected to the defendant's liability, it did not bar the jury in *Williams* from punishing Philip Morris for defrauding countless Oregonians with the same deceptive campaign that had victimized Williams.¹⁵⁶ It also emphasized the extreme reprehensibility of Philip Morris' conduct (including the widespread public harm resulting from Philip Morris' conduct) to distinguish the case from *Campbell*, and to justify the exceptionally high punitive-to-compensatory damages ratio.¹⁵⁷

(4) *Philip Morris II*

The U.S. Supreme Court vacated the judgment of the Supreme Court of Oregon in a 5-4 decision.¹⁵⁸ The Court ruled that using a punitive damages award to directly punish a defendant for harm caused to non-parties amounted to a taking of private property without due process of law.¹⁵⁹ It made the holding on this procedural due process issue, declining to reach the issue of whether the award itself was grossly excessive.¹⁶⁰

a. *The Court's Opinion*

Justice Breyer, writing for the Court, stated that allowing a jury to use punitive damages to punish a defendant for actual or potential harm to non-parties created an undue risk of unfairness to defendants.¹⁶¹ One reason for determining that this practice was unconstitutional was because it deprived defendants of the opportunity to present defenses that could apply if the non-parties were to actually bring their own lawsuits.¹⁶² Further, allowing punishment based on non-party harm would add "a near standardless dimension to the punitive damages equation," and broaden the risk

¹⁵⁶ *See id*; *see also Williams*, 92 P. 3d at 141 ("The tobacco industry and defendant directed the same conduct toward thousands of smokers in Oregon. They all received the same representations, from the same entities, and through the same media, and the industry intended to induce Oregon smokers to act on those representations in the same way.").

¹⁵⁷ *Williams*, 127 P. 3d. at 1177-78, 1181-82.

¹⁵⁸ *Philip Morris II*, 549 U.S. at 352.

¹⁵⁹ *Id.* at 349.

¹⁶⁰ *Id.* at 353.

¹⁶¹ *Id.* at 355.

¹⁶² *Id.* at 354.

of “arbitrariness, uncertainty and lack of notice. . . .”¹⁶³ The Court also identified two nuanced factors on which juries *could* base their punitive damages calculations. First, juries could calculate punitive damages awards based on the risk that the defendant would cause future harm *to the plaintiff*, but not to non-parties.¹⁶⁴ The Court acknowledged that while previous cases (e.g. *TXO* and *Gore*) had left open this precise issue, the Court’s decision to eliminate punishment by the jury for non-party harm flowed from its emphasis on deterring future harm to *plaintiffs* in those cases.¹⁶⁵ Second, a jury could infer from the risk of harm to non-parties that the defendant’s conduct particularly reprehensible.¹⁶⁶ The Court stated that these procedural due process guidelines were necessary to ensure that juries made decisions based on the right questions, and in order to minimize the potential for fairness-related problems.¹⁶⁷

b. The Dissent

Four Justices dissented from the Court’s holding. Justice Stevens delivered his own dissenting opinion,¹⁶⁸ and Justice Ginsburg wrote a dissenting opinion in which Justices Scalia and Thomas joined.¹⁶⁹ Justice Thomas also added a separate dissenting opinion.¹⁷⁰ Justice Stevens argued that there was no real distinction between using non-party harm to directly punish a defendant and considering non-party harm for the limited purpose of reprehensibility.¹⁷¹ Justice

¹⁶³ *Id.*

¹⁶⁴ *Philip Morris II*, 549 U.S. at 354.

¹⁶⁵ *See id.* (citing *TXO*, 509 U.S. at 460-62; *Gore*, 517 U.S. at 568 n. 11). The Court attempted to explain why the holding in *Phillip Morris II* made sense in light of its reasoning in these previous cases. *Id.*

¹⁶⁶ *Id.* at 355

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 358 (Stevens, J., dissenting).

¹⁶⁹ *Id.* at 362 (Ginsburg, J., dissenting).

¹⁷⁰ *Philip Morris II*, 549 U.S. at 361 (Thomas, J., dissenting).

¹⁷¹ *Id.* at 360 (Stevens, J., dissenting) (“This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant’s conduct, the jury is by definition punishing the defendant – directly – for third-party harm.”).

Ginsburg’s opinion did not focus on this distinction, but instead pointed to the lack of proof in the record that the jury had considered non-party harm as anything other than an indicator of reprehensibility of the defendant’s conduct.¹⁷² Justice Ginsburg argued that the trial court was correct to deny Philip Morris’ proposed jury instruction, because Philip Morris had described the significance of non-party harm in a way that was confusing and potentially misleading to jurors.¹⁷³ Further, Justice Ginsburg made an acute observation about the procedural posture of the case, contending that because Philip Morris had failed to preserve “any objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel’s argument,” the Court had no authority to reach that issue and vacate the award.¹⁷⁴ Justice Thomas wrote separately to emphasize his view that the Constitution should not restrain punitive damages awards.¹⁷⁵

(5) *Outcome on 2nd Remand in Oregon State Court.*

In spite of the U.S. Supreme Court’s announcement of the non-party harm rule, and its second decision to vacate the \$79.5 million punitive damages award against Philip Morris, the Supreme Court of Oregon once again reinstated the award in its entirety.¹⁷⁶ It maintained that Philip Morris’ proposed instruction had inaccurately stated Oregon law, and that Philip Morris had waived its opportunity to challenge the actual jury instruction on due process grounds by not preserving the issue on appeal.¹⁷⁷ The court acknowledged the U.S. Supreme Court’s mandate in *Philip Morris II* that the court offer the defendant reasonable procedural protections to minimize

¹⁷² *Id.* at 362 (Ginsburg, J., dissenting) (“The Court identifies no evidence introduced and no charge delivered inconsistent with that inquiry.”).

¹⁷³ *See id.* at 363 (Ginsburg, J., dissenting) (“A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge.”). After referencing the relevant part of Philip Morris’ proposed jury instruction, Justice Ginsburg rhetorically inquired: “Under that charge, just what use could the jury properly make of ‘the extent of harm suffered by others’? The answer slips from my grasp.” *Id.*

¹⁷⁴ *Id.* at 362 (Ginsburg, J., dissenting).

¹⁷⁵ *Id.* at 361 (Thomas, J., dissenting).

¹⁷⁶ *Williams v. Philip Morris Inc.*, 176 P.3d 1255, 1257 (Or. 2008).

¹⁷⁷ *Williams*, 176 P.3d at 1260. This position was consistent with a point that Justice Ginsburg had stressed in her dissent about the procedural posture of the case. *See Philip Morris II*, 549 U.S. at 362 (Ginsburg, J., dissenting).

fairness-related risks, but also noted the Supreme Court’s statement that such protections were required “on request [by the defendant].”¹⁷⁸ The Supreme Court of Oregon interpreted this to mean that Philip Morris’ request needed to be proper before the court could be obliged to grant it.¹⁷⁹

The Supreme Court again granted Philip Morris’ petition for certiorari,¹⁸⁰ following the decision of the Supreme Court of Oregon on remand. But the Court later withdrew its decision to hear the case, on the ground that certiorari had been improvidently granted.¹⁸¹ This was a bizarre ending to the Philip Morris v. Williams saga: the rule in *Philip Morris II* was monumental, yet the holding did not come to pass in the instant case.

III. THE FUTURE: CALCULATING PUNITIVE DAMAGES AWARDS TO ACHIEVE PRIVATE RETRIBUTION (NOT PUBLIC DETERRENCE)

The result of *Philip Morris II* is a major change in punitive damages theory. Courts are now on notice that using punitive damages to directly punish the defendant for harm to non-parties violates due process. This rule is responsive to fairness-based concerns about unpredictability and arbitrariness. It also simplifies the scope of the jury’s inquiries by making it smaller and more precisely-defined. The non-party harm rule dismisses as unconstitutional the theory that juries should use the degree of non-party harm as a variable to optimize deterrence. In practice, this development in the law governing punitive damages will impact litigants at trial and in terms of

¹⁷⁸ See *id.* at 1260 n.4.

¹⁷⁹ See *id.*

¹⁸⁰ *Philip Morris USA Inc. v. Williams*, 128 S.Ct. 2904 (2008) (No. 07-1216) (order granting certiorari in part).

¹⁸¹ *Philip Morris USA Inc. v. Williams*, 129 S.Ct. 1436 (2009) (No. 07-1216) (order dismissing certiorari as improvidently granted). An order dismissing certiorari as improvidently granted has the same effect as an order denying certiorari. This rare type of order is the result of the Court’s determination, upon learning more details about the case, that the Court is unable (for jurisdictional or discretionary reasons) to reach the issue it originally agreed to decide. Although the Court did not announce the reason for its determination, it decided that it could not reach the issue that had been raised by Philip Morris.

how they negotiate settlements. Of course, the ultimate effect in the U.S. remains to be seen, but *Phillip Morris II* appears to be a step towards placing punitive damages within their proper scope.

The non-party harm rule narrows the role for juries in punitive damages cases substantially: a jury may no longer aim to deter a defendant based on public harm when calculating the size of an award. A jury may seek to provide *private* (case-specific) deterrence, which by definition is only necessary in limited circumstances where the defendant could potentially cause future harm to the plaintiff.¹⁸² The non-party harm rule thus relieves juries of the impractical task of developing an optimal equation to protect the public.¹⁸³ That task seems much better suited for lawmakers, who can design civil liabilities to meet the end of deterrence.

The Court had alluded to the principle that punitive damages punish only private, party-specific harm in the punitive damages cases preceding *Philip Morris II*.¹⁸⁴ Nonetheless, some U.S. courts seemed to have difficulty adhering to this principle.

For example, in the 2006 case of *Brown & Williamson Tobacco Corp. v. Gault*, a state court blocked the plaintiff from seeking punitive damages against a cigarette manufacturer because the manufacturer had settled for an extraordinary amount (\$4.8 billion) in a previous lawsuit brought by the state for healthcare cost reimbursement.¹⁸⁵ The court noted that the public settlement released the defendant from further liability to the state of Alabama for smoking-related harms.¹⁸⁶ It added that because punitive damages “serve a public interest and are intended to protect the general public, as opposed to benefitting or rewarding particular private parties,”¹⁸⁷ the

¹⁸² See *Philip Morris II*, 549 U.S. at 354.

¹⁸³ Juries will no longer calculate punitive damages awards to achieve deterrence, except for in those limited circumstances where the defendant must be deterred from harming the plaintiff in the future. Of course, a punitive damages award might nonetheless deter unlawful conduct in the same way posited by the multiplier theory, even though the jury didn't aim to calculate damages to achieve this end.

¹⁸⁴ See *Gore*, 538 U.S. at 473-74 (striking down punitive damages award that had been based mostly on events that had happened in other jurisdictions); *Campbell*, 538 U.S. at 410 (“[d]ue process does not permit courts to adjudicate the merits of other parties’ hypothetical claims . . .”).

¹⁸⁵ *Gault*, 627 S.E.2d 549, 551-54

¹⁸⁶ *Gault*, 627 S.E.2d. at 550-52.

¹⁸⁷ *Id.* at 552.

plaintiff was not eligible to receive punitive damages.¹⁸⁸ The reasoning in *Gault* is a good example of the confusion regarding the proper scope of punitive damages awards,¹⁸⁹ which existed even after the Court had decided *Cambell* and *Gore*. The *Philip Morris II* holding should help to reduce this sort of confusion among lower courts, because it openly recognizes that punitive damages must be private in scope.

The idea that the court must instruct the jury to base an award only on the circumstances specific to the case at bar, and not on some idea relating to the fulfillment of a greater public duty, is an important fairness-related principle. Defining deterrence in private, case-specific terms and ruling out the broader idea of deterring non-party harm should alleviate fairness-based concerns that punitive damages come too close to overlapping with criminal sanctions. This narrower definition of deterrence also minimizes the risk that a jury would punish a civil defendant based on an arbitrary or inaccurate estimation of harm to persons that are not before the court.

The Court's repeated emphasis on reprehensibility of the defendant's conduct in *Philip Morris II*, since stating in *Cambell* that this was the most important factor to consider, shows another important aspect of the law governing punitive damages. The emphasis on reprehensibility not only helps to provide defendants with fair notice of the extent to which their unlawful conduct may be punished; it also reinforces the idea punitive damages must be calculated based on case-specific factors, and not on estimates of public harm.

One key challenge that U.S. courts will face in the wake of *Philip Morris II* is determining the extent to which the risk of harm to the public caused by a defendant's conduct can go towards reprehensibility. The Court made this into a confusing issue. In what was probably the most puzzling part of the *Philip Morris II* opinion, the Court stated that "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk

¹⁸⁸ *Id.* at 553.

¹⁸⁹ See Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 95 IOWA L. REV. 957, 1035 (2007) (arguing that the court's reasoning in *Gault* mistakenly characterized punitive damages as public in purpose). See also Colby, *supra* note 4, at 417 ("How is it constitutional to punish a defendant in the absence of criminal procedural protections? The answer, I believe, is that it is not --unless the punishment is meted out solely for the private wrong, not the public one.").

of harm to the general public, and so was particularly reprehensible. . . .”¹⁹⁰ Whether the Court was simply referring to the jury’s ability to evaluate the defendant’s mental state (e.g. to determine that the defendant acted with reckless disregard for human life – which might just as easily occur where a defendant risked harm to only one person), or if the Court meant that a jury could consider the *number* of people exposed to risk in order to determine the level of reprehensibility, is not clear. The Court may need to shed more light on this nuance in the future.

Lower courts can help to implement punitive damages policy that is consistent with due process simply by focusing on the basic elements for reprehensibility. Consider again the five factors set forth in *Gore* for determining the degree of reprehensibility of the defendant’s conduct:

“[W]hether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident.”¹⁹¹

If U.S. courts can further develop the law beneath these five questions in the future, they will shape future punitive damages law so that it is consistent with due process.

The Court developed a set of profound standards in its two most recent punitive damages due process cases (*Campbell* and *Philip Morris II*). *Campbell* introduced guidance on the ultimate, substantive question of permissible punitive-to-compensatory damages ratios, and *Philip Morris II* solidified an idea that the Court had seemed to inch toward in prior cases: the principle that punitive damages are private and not public. These principles create a more simple and precise definition of the permissible contours of punitive damages under the U.S. Constitution. Time will tell whether this will make lower courts adopt more orderly procedures, render more predictable awards, and ultimately reduce the fairness-related risks to private litigants. Another Supreme Court case that may direct lower courts towards this end, albeit without compelling them, is *Exxon*

¹⁹⁰ *Philip Morris II*, 549 U.S. at 355.

¹⁹¹ *Gore*, 517 U.S. at 575 (2003).

Shipping. While *Exxon Shipping* did not involve a constitutional holding, the Court sent a strong message in that case by setting a 1:1 limit on punitive damages in federal maritime tort cases.¹⁹²

The Court's most recent wave of punitive damages decisions indicates that it has responded to fairness-related concerns about punitive damages by aiming to foster more moderate and responsible procedures and awards. Importantly, the Court has not sabotaged the goal of efficient deterrence by striking down the multiplier theory with respect to punitive damages calculations. It is true that juries can no longer seek to craft punitive damages awards to neutralize the problem of imperfect enforcement. However, lawmakers are the ones responsible for imposing liabilities that are sufficient to deter harm to the public at large. Narrowing the role of juries, who are fact-finders, does not adversely affect the abilities of lawmakers to create efficient civil liabilities. In fact, if narrowing the scope of inquiry for juries in punitive damages cases leads to more predictable awards, this would seem to help lawmakers to correctly gauge enforcement levels, and to increase the odds that they would design efficient legal policy.

Punitive damages in the U.S. could enter a new and more simplified era, but this will depend on whether practice follows theory. The new set of due process standards applicable to punitive damages awards indicates that the U.S. is working to make punitive damages more manageable. As a result of the Supreme Court's recent rulings, defining punitive damages seems to be an easier task today than it would have been in the past. For example, U.S. courts now know that punitive damages punish civil defendants only for private, party-specific harms, and that the size of a punitive damages award should reflect the reprehensibility of the defendant's conduct. In the future, courts will need to administer procedures and enter awards clearly and predictably enough to put these new theories into practice and to demonstrate that there is a science behind punitive damages, rather than just a game of chance.

APPENDIX:

¹⁹² *Exxon Shipping*, 128 S. Ct. at 2634.

Below is an introduction to some of the main concepts referred to in this article that are unique to common law jurisdictions or the United States.

Responsibilities of the Judiciary and the Role of Precedent:

Common law courts are known for producing judge-made law, which is aptly referred to as “common law.” Common law courts must also interpret statutory law and resolve constitutional questions. There is a hierarchy that applies to these tasks: First, the courts must uphold the Constitution, and ensure that no other laws contradict it. Second, courts must interpret statutes. Third, courts may create common law, but only in circumstances where statutory law does not exist on point. Sometimes, a new statute displaces the common law of the jurisdiction. This is called *codification* when a newly-enacted statute adopts the common law rule, or *modification* when the statute alters the common law rule. Statutes trump common law: once a statute is enacted, it is binding on the courts, and the courts cannot adopt new common law rules to displace statutory law. However, courts have the power (and the obligation) to strike down unconstitutional statutes.

A common law court adheres to a body of *precedent* that applies in its jurisdiction.¹⁹³ When resolving any issue of law, a court will adhere its own previous rulings on the issue (or any analogous issues), and it must always be sure to decide consistently with the precedent of the higher courts. This is the case regardless of whether a court’s decision is based on a constitutional question, an issue of statutory interpretation, or an issue controlled by common law.

Federalism:

The United States has two levels of government: state and federal. The federal level of government has a U.S. Constitution, federal statutes, and federal courts. Further, all 50 states have their own constitutions, statutes, and courts. Article VI clause 2 of the U.S. Constitution (the “Supremacy Clause”), provides that “[the] Constitution and the Laws of the United States which shall be made in Pursuance thereof. . . .” are the “supreme Law of the Land.” This has been interpreted to mean that no law may contradict the U.S. Constitution and no state law may contradict a federal law.

Federal statutes apply to those limited areas of the law that the federal government (or more precisely, Congress) is allowed to govern under the U.S. Constitution. Article I clause 8 of the Constitution provides specific grants of power to Congress, including, for example, the power to regulate interstate commerce. All powers not granted to Congress are governed by state law, according to the Tenth Amendment.

¹⁹³ Changes in precedent may occur frequently, but one defining characteristic of common law is an organic development of the law. For example, much of U.S. law is closely related to English common law from centuries ago, even though modifications in precedent may have occurred.

Federal courts are courts of limited jurisdiction, which usually can only hear cases that meet one of two jurisdictional bases. The first jurisdictional basis is *diversity*, which typically means that no single plaintiff in the dispute resides in the same state as any defendant. The second jurisdictional basis is *federal question*, which means that the plaintiff is asserting a claim based on a federal statute or the U.S. Constitution. Three levels of federal courts exist: the U.S. District Court, the U.S. Court of Appeals, and the U.S. Supreme Court. In civil cases, either party can appeal to the U.S. Court of Appeals. After that, the likelihood that an appeal will be heard by the U.S. Supreme Court is extremely slim. In the vast majority of cases, litigants have no right to review by the Supreme Court, and the Court may only hear a case based on a federal question. More specifically, the Supreme Court's jurisdiction is limited to (1) any type of federal question (derived from federal law or the Constitution) that has been decided by the U.S. Court of Appeal or (2) a federal constitutional question that has been decided by a state's highest court. A litigant must petition the Supreme Court for a *writ of certiorari* in order to be considered for review. The Court files through hundreds of petitions for certiorari each month, to decide to hear those cases which present a substantial federal question in need of resolution.

For the most part, state governments function independently of the federal government, but they must adhere to the standards of federal law. Notwithstanding the requirement that a state constitution must be consistent with U.S. Constitution and federal law, it is otherwise the ultimate legal authority of the state. Thus, state constitutions may offer broader (but not narrower) protections to citizens than the U.S. Constitution. State statutes can govern a broad range of issues – they may govern any area of law that is not occupied by the federal government pursuant to the U.S. Constitution. State courts are likewise broad in scope, compared to federal courts. With just a few minuscule exceptions, state courts can hear virtually any case or controversy. The vast majority of disputes take place in state courts. The exact nature of each state court's system varies by state, but state court systems typically consist of trial courts, appellate courts, and a state supreme court, which hears certain appeals. The only federal court that can review a state court decision is the U.S. Supreme Court, and it can only review decisions which (1) are final at the highest level of state proceedings, and (2) raise an issue under the U.S. Constitution.

Separate Opinions (to explain concurrence or dissent):

A panel of judges in a reviewing court might not agree on the holding of a case. When this happens, the majority writes the decision of the court and enters a final order, which binds on the parties and forms precedent. The judges who do not agree with the court's holding may write separate dissenting opinions. Judges may also write separate concurring opinions if they agree with the holding, but for different reasons than stated by the majority. The U.S. Supreme Court frequently publishes separate opinions.¹⁹⁴

¹⁹⁴ As a side note, many people in the U.S. *expect* the Justices on the U.S. Supreme Court to disagree along political lines. U.S. popular culture emphasizes the ideological variation among the nine Justices on the Court. Other federal courts do not appear to be nearly as politicized as the Supreme Court, and the Justices are subject to a much higher level of public exposure than other judges.

Judge and Jury:

Judges decide questions of law, but juries make findings of fact.¹⁹⁵ At trial, the judge submits any factual questions to the jury. The judge uses *jury instructions* to identify the precise factual inquiries that the jury must answer. The judge may also review a jury's verdict after the jury has made its findings, and may issue an order setting aside or reversing the verdict if it is inconsistent with the law. The distinction between legal and factual questions is important with respect to punitive damages. Recent Supreme Court decisions recognizing constitutional limitations on punitive damages awards have resulted in increased judicial scrutiny over awards. This means that judges need to play a more proactive role in reviewing punitive damages awards (in terms of both size and the factors upon which the juries base their factual decisions) to ensure that punitive damages awards comport with the Constitution.

U.S. Reliance on Private Litigation:

In addition to acknowledging key differences between civil law and common law legal systems, it is also worth noting that U.S. common law has evolved to embrace characteristics that are significantly different from other common law jurisdictions. The U.S. tends to depend more on private litigation, and less on administrative oversight and enforcement, than many other countries as a means to achieving an efficient legal enforcement structure. This trend is linked with the role of punitive damages in U.S. law. Common law systems have used punitive damages essentially as "private fines," and the U.S. has traditionally employed this remedy more expansively than other common law jurisdictions, such as England and Canada. Awarding punitive damages in a greater variety of cases can strengthen the role of private litigation in enforcement, while reducing the need for administrative enforcement by the government. Punitive damages are just one of many characteristics of the U.S. legal system that promote and incentivize private civil litigation.¹⁹⁶

¹⁹⁵ The parties can also choose not to have a jury trial. If this happens, then the judge decides questions of both fact and law. Notably, defendants in criminal proceedings are entitled to a trial by jury upon demand.

¹⁹⁶ Among the features that promote or incentivize private litigation in the U.S. are plaintiff class actions, treble damages or other statutory multipliers, qui-tam statutory provisions (also known as "private attorneys general" provisions), contingent attorney fees, and equitable extra-compensatory remedies such as restitution and disgorgement.