

THE SUPREME COURT AND ME: TRAPPED IN TIME WITH
PUNITIVE DAMAGES*

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In *Groundhog Day*,¹ actor Bill Murray plays Phil Connors, a TV weatherman who is assigned to the unenviable task of covering the annual Groundhog Day event in Punxsutawney, Pennsylvania.² A blizzard he did not predict forces Connors to stay overnight, but he awakens the next morning, and the next, to yet another Groundhog Day.³ Connors is trapped in a time loop and there is no escape.⁴ Everyday he meets the same people and knows the outcome of every trivial event in advance.⁵ Ever since writing my LL.M. thesis at Harvard University in 1986, I keep making the same point about the multiple social functions that punitive damages play in American society. My life is remarkably similar to Phil Connors when it comes to punitive damages scholarship. This Crimtort Symposium, which is less than two hundred miles from Punxsutawney, is an opportunity for all of us to reexamine and reevaluate punitive damages as an effective remedy.

My original crimtorts article,⁶ with Tom Koenig, was published in 1998 after the Supreme Court of the United States, for the first time in U.S. history, struck down a punitive damages award on excessiveness grounds in *BMW of North America, Inc. v.*

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¹ GROUNDHOG DAY (Columbia Pictures Corporation 1993).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Thomas Koenig & Michael Rustad, "Crimtorts" as Corporate Just Deserts, 31 U. MICH. J.L. REFORM 289 (1998).

Gore.⁷ The Court's failure to acknowledge the well-established public purpose of punitive damages led us to develop the concept of crimtorts in order to debate the issue in its societal context. This article completes my recent punitive damages trilogy on the consequences of the Court's federalization of punitive damages.⁸ I had Phil Connors' power of prediction in my *Maryland Law Review* article, forecasting with great accuracy the downsizing of punitive damages to fit into an anachronistic retributory justice model.⁹ My *Charleston Law Review* article, written after *Philip Morris USA v. Williams*, explained how Court-imposed limitations will diminish the effectiveness of the remedy of punitive damages.¹⁰ In this third piece, I explore how the Court's punitive damages jurisprudence undermines the crimtort insight that the remedy of punitive damages advances societal justice in addition to redressing harm to the individual plaintiff. My worldview has come under attack by the Supreme Court of the United States time after time.

We—the Supreme Court and me—need to break out of this time loop by returning responsibility for punitive damages doctrinal development to the states. The Supreme Court, too, is trapped in time, continuously federalizing punitive damages. *Philip Morris USA v. Williams*¹¹—the eighth Supreme Court of the United States ruling on the constitutionality of punitive damages since 1989—is the latest in a series of decisions that systematically

⁷ 517 U.S. 559, 574-75 (1996) (striking down a \$2 million punitive damages award as excessive).

⁸ This article completes the constitutionalization of punitive damages trilogy of symposium articles beginning with my 2005 article, Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would be King of Punitive Damages*, 64 MD. L. REV. 461 (2005) (contending that the Supreme Court of the United States, known for its deference to state law, was federalizing the remedy of punitive damages). The second piece in this federalization of punitive damages triptych is, Michael L. Rustad, *The Uncert-Worthiness of the Court's Unmaking of Punitive Damages*, 2 CHAS. L. REV. 459 (2008) (summarizing the Supreme Court's unmaking of punitive damages and contending that the battleground of social theory will soon shift to noneconomic damages).

⁹ Rustad, *Happy No More*, *supra* note 8, at 515-40.

¹⁰ See Rustad, *Uncert-Worthiness of Punitive Damages*, *supra* note 8.

¹¹ 127 S. Ct. 1057 (2007).

undermines the crimtort remedy of punitive damages as the conscience of the common law.

The Supreme Court of the United States' decision in *Williams* may be the obituary for the crimtort paradigm. Crimtorts' principal purpose is as a gap-filler to constrain corporate wrongdoing that is not punished on the criminal docket. Writing for the majority, Justice Stephen Breyer broke new ground by stating an explicit rule of evidence for determining the amount of punitive damages: "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, [that is], injury that it inflicts upon those who are, essentially, strangers to the litigation."¹² This model of individuated retributory justice is unrealistic in the modern era and incomplete when it comes to describing the actions of large corporations. The CEO of a multinational corporation seldom reaches out and commits reprehensible acts against the company's customers or consumers, yet mega firms can unleash death and destruction through reckless indifference to the public good.

This article calls for a paradigm shift back to the crimtort theory that punitive damages fulfill a key societal purpose in constraining corporate misconduct. The Supreme Court of the United States must shed its retributory paradigmatic blinders and recognize the broad social functions that have been underappreciated in their recent punitive damages jurisprudence. My analysis can be summarized in the following two propositions: (1) crimtorts rely upon a robust punitive damages regime to incentivize private lawsuits for a public purpose¹³ and (2) the Supreme Court's new punitive damages paradigm undermines each of the key aspects of the crimtort paradigm.

This article unfolds in two parts. Part I reviews the aims and key concepts of punitive damages as a crimtort remedy. Part II examines the ways in which the Court's jurisprudence undermines the key crimtort variables in the punitive damages equation. I wrap

¹² *Williams*, 127 S. Ct. at 1063.

¹³ Tort remedies have long had a public policy dimension. See Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 2 (1960).

up this piece by explaining that the Court is addressing the wrong question when it focuses on individuated reprisal rather than reckless corporate policies. The better question—one that was raised in my original crimtort article with Tom Koenig—is whether punitive damages play a key role in protecting the public interest against corporate delinquency. The limitations of the criminal law make it an ill-suited mechanism for controlling corporate transgressions. The Supreme Court of the United States has stricken this crucial role of crimtorts from the punitive damages equation, and it should be restored in order to protect the social order.

PART I: THE AIMS AND KEY ASPECTS OF CRIMTORTS

All paradigm shifts start with a growing consciousness that established theory no longer is capable of explaining a growing number of anomalies.¹⁴ Punitive damages, as the cornerstone of the crimtort, may be an anomaly¹⁵ but not an abnormality. For more than two centuries, punitive damages have advanced public policy by vindicating civil wrongs.¹⁶ Crimtorts is our way of describing tort law's multiple functions as "a compensator, a deterrer, an educator, a psychological therapist, an economic regulator, an ombudsperson, and an instrument for empowering the injured to

¹⁴ THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 52 (3d ed. 1996) (developing the theory of scientific progress through paradigm shifts).

¹⁵ "Punitive damages are an anomaly in our civil justice system because they import the public function of criminal punishment into what is otherwise thought of as a primarily private system of restorative justice." Theodore Olson, *Some Thoughts on Punitive Damages*, 15 CIVIL JUSTICE MEMO 1, available at http://www.manhattan-institute.org/html/cjm_15.htm.

¹⁶ See generally THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* (2001) (documenting the long history of torts evolving to confront the emergent social problems of their day); see also Victor E. Schwartz et al., *Stamping Out Tort Reform: State Courts Lack Proper Respect for Legislative Judgments*, *LEGAL TIMES*, Feb. 10, 1997, at S35 (explaining public policy of tort law as discouraging "conduct such as medical malpractice and help[ing] to remove defective products from the market. But unchecked it can also remove goods products from the market, discourage innovation, limit the supply of necessary medical services, eliminate jobs, and unduly raise costs for consumers.").

help themselves and other potential victims of all sorts of wrongdoing in our society."¹⁷

Our purpose in formulating crimtorts was to bring the punitive damages-in-the-books and in-action into alignment.¹⁸ Punitive damages are proper when the defendant's "blatant violation of law or policy . . . rises to levels of extreme indifference to the plaintiff's rights."¹⁹ The fixed and constant feature of crimtorts is the ability of tort law to evolve to respond to social problems.²⁰

Crimtorts have an inimitable capacity to fulfill simultaneously a private function of compensating injured claimants and a public law purpose of controlling socially harmful behavior. The chart below is an overview of the major dimensions and aims of the

¹⁷ Allen M. Linden, *Viva Torts!*, 5 J. HIGH TECH. L. 139, 142 (2005).

¹⁸ Our purpose in developing the crimtort remedy was to acknowledge and create awareness that punitive damages are in the middle ground between criminal law and the law of torts. We were responding to the remedy's anomalous nature by proposing middle level procedural protections. We based our theory of the crimtort on empirical data of punitive damages in action. We began the article shortly after completing a study of three decades of punitive damages in medical malpractice. See Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters,"* 47 RUTGERS L. REV. 975, 1038-56 (1995). A few years before, we interviewed counsel representing plaintiffs and defendants in a quarter century of punitive damages awards in products liability. Earlier still, I completed the first empirical study of punitive damages in products liability where I conducted follow-up interviews with counsel representing both sides. See, e.g., Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 66, 71-76 (1992).

¹⁹ *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.*, 230 Cal. Rptr. 276, 278 (Cal. Ct. App. 1986).

²⁰ In the eighteenth century, the law of torts punished intentional wrongdoing by individuals. In the modern period, punishment has shifted to corporate malfeasance:

Considering the large array of toxic torts knowingly inflicted and consciously covered up by public and private industrial malefactors in recent years, ranging from atomic bomb tests to Love Canal, Agent Orange, acid rain, the deadly dust of asbestos fabrications, Thalidomide and MER-29, not to mention the Pinto and Firestone 500 calamities or the celebrated disasters involving Kepone, Vinyl Chloride, DBCP and PBB, we are proud that tort law's capacity to punish corporate malfeasance as well as to compensate for harm remains a secure part of tort law's presuppositions for the future.

Thomas F. Lambert, Jr., *Law in the Future Part Two: Tort Law 2003*, TRIAL, July 1983, at 92.

crimtort in making society whole again by punishing reckless corporate practices and policies.

THE AIMS & PRINCIPAL FEATURES OF CRIMTORTS

FEATURE	CRIMINAL LAW	TORT LAW	CRIMTORTS
Branch of Law	<i>Public Law</i>	<i>Private Law</i>	<i>Private Law with a Public Purpose</i>
Purposes	<i>Punishment, Deterrence</i>	<i>Compensation</i>	<i>Social Justice</i>
Enforcement Mechanism	<i>Public Prosecutors</i>	<i>Private Litigants</i>	<i>Private Attorneys General</i>
Role of Wealth in Calibrating Punishment	<i>Limited Role in Sentencing Guidelines</i>	<i>Wealth is inadmissible and grounds for reversal of compensatory award.</i>	<i>Wealth-Based Punishment</i>
Procedural Justice Framework	<i>Criminal Law Protections</i>	<i>Common Law Supplemented by Statutes</i>	<i>Middle Level; Reflecting Hybrid Nature</i>

A. Crimtorts as Private Law with a Public Purpose

The principal function of crimtorts is to serve as a gap-filler to constrain corporate wrongdoing that is not punished and deterred by the criminal law.²¹ In *In Defense of Tort Law*, Tom Koenig and

²¹ Take your mind's eye back and recall the most high-profile mass tort disasters of the last quarter century, where scores were injured or killed by defective products known to be dangerous: Ford Pinto, Dalkon Shield, Copper Seven, breast implants, Ford Explorers, and Fen-Phen. No corporate official has spent a day in jail in any mass products case in American history. We should all be legal realists now and realize that the criminal law does not address corporate recklessness that endangers the public. See, e.g., Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their*

I described how tort law not only alleviated " 'the plight of the injured' " but also furthered the " 'cause of social justice' "²² in the Ford Explorer rollover cases involving Bridgestone/Firestone tires.²³ Since writing our book, Bridgestone/Firestone has recalled hundreds of thousands of dangerously defective tires, which

Future, 71 WASH. U. L.Q. 205, 214-15 (1993) (finding it difficult to find instances of corporate wrongdoing punished on the criminal side of the law).

²² KOENIG & RUSTAD, *supra* note 16, at 2 (quoting Australian tort scholar JOHN G. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 1 (1967)).

²³ We explained how "private attorneys general not government regulators, discovered that [Bridgestone/] Firestone tires mounted on Ford Explorers caused hundreds of rollover accidents due to tread separations." *Id.* at 5. We explained how the engine of discovery uncovered evidence that Bridgestone/Firestone had recalled the same model of tire that separated in other countries without informing the National Highway Traffic Safety Administration. *Id.* Products liability lawsuits helped to uncover a dangerous defect in Bridgestone/Firestone tires used on Ford Explorers.

[Bridgestone/Firestone] and Ford Motor Co. jointly announced the recall of 14.4 million Firestone tires, due to a manufacturing defect that made the tires prone to separating and peeling off. The tires have been implicated in numerous serious and fatal accidents, most involving the extremely popular Ford Explorer. The recall included Firestone's 15-inch radial ATX, ATX II and Wilderness tires. Firestone estimated that 6.5 million of the recalled tires are still on the road. The NHTSA also issued warnings concerning 22 brands of Bridgestone/Firestone tires produced between 1991 and 2000. The tires have been blamed for at least 300 deaths and hundreds of injuries.

Robinson, Calcagnie & Robinson, *Ford Rollover News from Ford Explorer Rollover Lawyers*, http://www.fordrollover.com/rollover_news.html (last visited Apr. 12, 2008). Since we wrote the book, plaintiffs attorneys uncovered the following discovery documents that revealed patterns and practices of wrongdoing:

Recently released company documents and depositions of Ford employees suggest that Ford Motor Co. ignored its engineers' advice that the Explorer sport-utility vehicle needed design revisions to prevent rollover accidents and fatal injuries. Company records show that in 1993, Ford engineers advised the company to reinforce Explorer roof supports to prevent collapses in rollovers. However, Ford engineering supervisor Christopher Brewer stated in a 2003 deposition that Ford didn't make changes because the U.S. government didn't require any. Additionally, in 1999, Ford engineers in Venezuela warned that Explorers were rolling over and had caused at least nine deaths because of flaws in the suspension. Documents reveal that three years earlier, Ford engineers stated that the deficiency could be solved by moving the shock absorbers toward the wheels. Despite the warnings and proposed solution, Ford didn't make the change.

Id.

confirm the role punitive damages play in suing for safety.²⁴ Ford failed to protect the consuming public by recalling or redesigning its vehicles, despite its knowledge of the rollover hazard. As early as 1993, Ford engineers advised Ford to redesign its roofs to be suitable for the environment of use, which included the risk of "collapses in rollovers."²⁵ Ford engineers knew of at least nine prior deaths due to rollovers²⁶: "Documents reveal that three years earlier, Ford engineers stated that the deficiency could be solved by moving the shock absorbers toward the wheels. Despite the warnings and proposed solution, Ford didn't make the change."²⁷ Ford's failure to act after learning of a substantial and unnecessary risk to hundreds of thousands of owners of Explorer SUVs was the reason for imposition of punitive damages not just one motorist's death or serious injury.

The problem of defective tires has become even more difficult to resolve in an era of outsourcing. Hangzhou Zhongce Rubber Company, Ltd., a Chinese company, had a contract to produce tires that would be distributed by Foreign Tire Services. A recent lawsuit charges that a fatal rollover accident was caused by Hangzhou Zhongce's defectively designed tires.²⁸ Hundreds of thousands of American vehicles may be at risk because of the Chinese company's failure to include "[a] gum strip that helps prevent separation of steel belts."²⁹ The chairman of the Chinese company filed an affidavit challenging personal jurisdiction because Hangzhou Zhongce "does not make tires for the New Jersey market, that it does not conduct business in New Jersey, that it does not have offices there, it is not registered to do business there, and that it does not directly market or sell tires in New

²⁴ Robinson et al., *supra* note 23.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Timothy Aeppel, *Accident Raises Safety Concerns on Chinese Tires—Up to 450,000 Imports May Contain a Defect; Obstacles to a Recall*, WALL ST. J., June 26, 2007, at A1.

²⁹ WorldnetDaily.com, *Cheap Chinese Tires Blamed for Fatalities: New Jersey Lawsuit Warns Massive Recall May be Necessary* (June 26, 2007), http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=56369.

Jersey."³⁰ Tort law needs to expand to patrol large-scale risks that originate in another continent. Cross-border crimtorts epitomize "[t]he most elementary conceptions of justice and public policy [that] require that the wrongdoer bear the risk of the uncertainty which his own wrong has created."³¹

B. Crimtorts' Enforcement by Private Attorneys General

A central tenet of the social justice school of American tort law is that a "citizen can both vindicate his or her own claim to rights against the powerful and act as a private attorney general policing the conduct of these actors."³² "Crimes are prosecuted publicly, torts privately."³³ Public prosecutors initiate criminal law prosecutions and the standard of proof is beyond a reasonable doubt versus the civil standard of preponderance of the evidence. "If someone shoots you, you call a cop. If he runs his car into yours, you call a lawyer. Crimes are prosecuted publicly, torts privately."³⁴ If a corporation recklessly endangers the society and is not punished and deterred by the criminal law, you rely upon a call to the private attorney general to expose, address, and publicize the matter. The private attorney general is crimtort's police force.³⁵

³⁰ *Fairness to Americans Injured by the Products of Foreign Manufacturers: Hearing on Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products, Before the Subcomm. on Commercial and Administrative Law, Comm. on the Judiciary, 110th Cong. 5* (2007) (statement of Thomas L. Gowen, Esq., Partner, Locks Law Firm), available at <http://judiciary.house.gov/media/pdfs/Gowen071115.pdf>.

³¹ *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

³² John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 *GEO. L.J.* 513, 561 (2003) (citing KOENIG & RUSTAD, *supra* note 16, at 9).

³³ DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 189 (2000).

³⁴ *Id.*

³⁵ Second Circuit Judge Jerome Frank in *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943), first articulated the concept of the "private attorney general." Judge Frank used the term to refer to "any person, official or not, to institute a proceeding . . . even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals." *Id.* at 704.

The possibility of being awarded punitive damages encourages plaintiffs to act as "private attorneys general" and provides incentives for plaintiffs to sue

American consumer law is unique when compared to many countries because of the degree that it supplements public enforcement with prosecution by private attorneys general. Judge Richard Posner explains the excellent fit between punitive damages and the American experience:

But whether because the American legal and political cultures are unique, or because the criminal justice system in this country is overloaded and some of its functions have devolved upon the tort system, punitive damages are a regular feature of American tort cases, though reserved generally for intentional torts, including the deliberate use of excess force as here. This suggests additional functions of punitive damages[:] Punitive damages relieve the pressures on the criminal justice system. They do this not so much by creating an additional sanction, which could be done by increasing the fines imposed in criminal cases, as by giving private individuals—the tort victims themselves—a monetary incentive to shoulder the costs of enforcement.³⁶

Punitive damages "serve the purpose of encouraging suit by a plaintiff[, acting] as a 'private attorney general' on issues of public importance."³⁷

C. Wealth-Based Punishment

Crimtort's unique capacity to punish corporate malfeasance relies upon the deterrent power of punitive damages. Determining

in instances where conduct has caused widespread harm. Punitive damages permit the litigation of claims that might otherwise be too expensive for an individual plaintiff to prosecute, and they serve as "bounty" for the plaintiff.

Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1322-23 (1993); see also KOENIG & RUSTAD, *supra* note 16, at 9; Ross v. Conoco, Inc., 805 So. 2d 352, 359 (La. Ct. App. 2001) ("[P]unitive damages are awarded to punish . . . and to encourage private citizens to seek the societal vindication that punitive damages embody."); Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 165 P.3d 1079, 1098-99 (Mont. 2007) (describing the public interest role of the private attorney general).

³⁶ Kemezy v. Peters, 79 F.3d 33, 37 (7th Cir. 1996).

³⁷ Myer v. Preferred Credit, Inc., 117 Ohio Misc. 2d 8, 34 (Ohio Ct. Com. Pl. 2001).

the amount of punitive damages based on the defendant's ability to pay appears inequitable because this remedy is in tension with the dominant legal ideology of formal equality. The debate over wealth-based punishment for crimtorts reflects "the paradox of justice"—the long-standing clash between America's egalitarian ideal of protecting the weak while simultaneously advancing the inevitable inequalities produced by a market economy.

In criminal law, "The usual practice with respect to fines is not to proportion the fine to the defendant's wealth, but to allow him to argue that the fine should be waived or lowered because he cannot possibly pay it."³⁸ The critique of wealth-based punishment is:

Introduction of such evidence by plaintiffs is, at bottom, "an improper 'appeal to class prejudice, and pandering to the perception that corporations wield disparate power,' " generally made for no reason " 'other than to prejudice . . . the jury's sworn duty to reach a fair, honest and just verdict.' "³⁹

Judge Posner goes even further, arguing that wealth-based punishment is discriminatory.⁴⁰ Academic critics argue alternatively that punitive damages are ineffective because they overdeter⁴¹ or because they underdeter.⁴² However, "a rational

³⁸ *Kemezy*, 79 F.3d at 37 (citing U.S. SENTENCING GUIDELINES MANUAL § 5E1.2(a) (1991)); see also *United States v. Young*, 66 F.3d 830, 839 (7th Cir. 1995); *Merritt v. United States*, 960 F.2d 15, 18 (2d Cir. 1992).

³⁹ Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1019 (1999) (quoting *Strickland v. Owens Corning*, 142 F.2d 353, 359 (6th Cir. 1998) (citing John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 146-47 (1986)).

⁴⁰ *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676-77 (7th Cir. 2003) (basing punishment on defendant's financial condition "would be discriminatory and would violate the rule of law . . . by making punishment depend on status rather than conduct").

⁴¹ A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 919 (1998) (arguing that excessive punitive damages overdeters); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 287, 324-25 (1998).

⁴² E. Donald Elliot, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1059 (1989) ("[I]n the area of

profit-maximizing actor" considers only those costs it is likely to have to pay and not those it would "never have to pay."⁴³

In the famous *Ford Pinto Case*, a California court of appeals ruled that the punitive damages were not excessive in light of the financial condition of Ford Motor Company:

Nor was the reduced award excessive taking into account defendant's wealth and the size of the compensatory award. Ford's net worth was 7.7 billion dollars and its income after taxes for 1976 was over \$ 983 million dollars. The punitive

corporate decisions in products liability and other safety-related fields, there is no credible evidence that punitive damages have a substantial deterrent effect."). In the pending punitive damages case of *Exxon Shipping Co. v. Baker*, an amicus party made the argument that wealth-based punitive damages have no deterrent value:

Publicly held corporations, however, are not sentient beings; they are entities that exist to generate monetary profits for their shareholders. They are literally incapable of realizing any type of personal, non-monetary gain, such as wrongfully satisfying a sexual urge or a sadistic desire to inflict pain. Accordingly, the effect of liability in deterring future behavior should not differ based on the size of the company: each such company, regardless of size or net worth, should be deterred from wrongful conduct if the punishment is sufficient to show the company that it should expect the result of similar future wrongful behavior to be a monetary loss of even one dollar, rather than a monetary profit Thus, it is irrational, in the name of deterrence, to impose greater punishments based on greater corporate net worth.

Brief of Product Liability Advisory Council, Inc. as *Amicus Curiae* in Support of Petitioners at 31-32, *Exxon Shipping Co. v. Baker*, No. 07-219 (U.S. Dec. 26, 2007) (internal citations omitted); see also *Zazú Designs v. L'Oréal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) ("Corporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law."); Lisa Litwiller, *From Exxon to Engle: The Futility of Assessing Punitive Damages as Against Corporate Entities*, 57 RUTGERS L. REV. 301, 325-30 (2004) (arguing that punitive damages awards often "overdeter[] corporate actors" in part because the culpable individuals "may no longer be affiliated with the company, and the employees working for the company at the time of the award may well be those who have corrected the harm of which the plaintiffs complain").

⁴³ Thomas C. Galligan, Jr., *Disaggregating More-than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117, 129 (2003).

award was approximately .005 percent of Ford's net worth and approximately .03 percent of its 1976 net income.⁴⁴

That court observed that a small punitive award "can be simply written off as a part of the cost of doing business [and] would have no deterrent effect. An award which affects the company's pricing of its product and thereby affects its competitive advantage would serve as a deterrent."⁴⁵

In *Johansen v. Combustion Engineering Inc.*,⁴⁶ a multinational company's mining operation caused environmental damage to adjoining property owners.⁴⁷ The *Johansen* court recognized that wealth-calibrated punishment might be necessary to send a deterrent signal:

CE is a large and extremely wealthy international corporation. It is not unlikely that having to pay \$4.35 million in punitive damages would not make the company newsletter. It should, however, attract the attention of whomever is in charge of the corporation's daily decisions regarding environmental protection, and would, no doubt, bear heavily upon regional or local managers where failures to regard consequences would be expected to subject their employer to loss.⁴⁸

⁴⁴ *Grimshaw v. Ford Motor Co. (The Ford Pinto Case)*, 174 Cal. Rptr. 348, 388-89 (Cal. Ct. App. 1981).

⁴⁵ *Id.* at 389.

⁴⁶ 170 F.3d 1320 (11th Cir. 1999).

⁴⁷ *Id.* at 1326.

⁴⁸ *Id.* at 1338-39 ("We conclude therefore, that substantial punitive damages are warranted for deterrence and, since the actual damages are quite small, must be somewhat disproportional to the actual damage award. The ratio of the district court's reduced award of \$4.35 million to the administrative fine of \$10,000 is significant, but the Georgia statutes provided fair notice to CE that it might be subject to a substantial penalty for pollution of the streams running through its property. The 100:1 ratio of the punitive to the actual damages is at the upper limits of the Constitution, but is justified by the need to deter this and other large organizations from a 'pollute and pay' environmental policy. Under the circumstances of this case, then, \$4.35 million in punitive damages is not so disproportional as to offend the '[e]lementary notions of fairness enshrined in our constitutional jurisprudence.' ") (internal citations omitted).

The states have long permitted the consideration of corporate wealth in setting the level of punitive damages to achieve the proper level of deterrence.⁴⁹ In *Adams v. Murakami*, the Supreme Court of California described that fact finders should calibrate an award to "the amount of the punitive damages award that will have [a] deterrent effect—without being excessive."⁵⁰ A review of the defendant's financial condition "is a matter of utmost importance in both the jury's decision and the court's review of the award" given that⁵¹:

The more wealth the defendant has, the smaller is the relative bite that an award of punitive damages not actually geared to that wealth will take out of his pocketbook, while if he has very little wealth the award of punitive damages may exceed his ability to pay and perhaps drive him into bankruptcy. To a very rich person, the pain of having to pay a heavy award of damages may be a mere pinprick and so not deter him (or people like him) from continuing to engage in the same type of wrongdoing But rich people are not famous for being indifferent to money, and if they are forced to pay not merely the cost of the harm to the victims of their torts but also some multiple of that cost they are likely to think twice before engaging in such expensive behavior again.⁵²

A less controversial way of calibrating the amount necessary to achieve a deterrent purpose is requiring the defendant to disgorge

⁴⁹ As the Supreme Court of New Hampshire ruled in 1870:

In regard to the question of exemplary damages . . . it becomes proper to inquire into the condition and circumstances of the defendant, because . . . [w]hat would be sufficient damages by way of example and of punishment, for a day laborer, would be nothing by way either of example or as a punishment for . . . [a] corporation.

Belknap v. Boston & Me. R.R., 49 N.H. 358, 374 (1870); *see also* Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 42-48 (1998) ("Punitive damages are based upon the wealth of the defendant in the vast majority of states . . .").

⁵⁰ *Adams v. Murakami*, 813 P.2d 1348, 1351 (Cal. 1991).

⁵¹ *Darcars Motors of Silver Spring, Inc. v. Borzým*, 818 A.2d 1159, 1181 (Md. Ct. Spec. App. 2003) (citing *Fraidin v. Weitzman*, 611 A.2d 1046, 1067-71 (Md. Ct. Spec. App. 1992)).

⁵² *Kemezy v. Peters*, 79 F.3d 33, 35-36 (7th Cir. 1996) (citing *Zazú Designs v. L'Oréal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992)).

illicit profits.⁵³ Gains-stripping is particularly appropriate when the "difficulty of detection and less than full enforcement . . . provide strong justifications for efficiency-driven increased or augmented awards."⁵⁴

Punitive damages cannot perform their deterrent role when the level of punishment is capped at some arbitrary level of actual damages. In chiseling cases, in which a defendant skims off a few dollars from multiple plaintiffs, gains-stripping for a single plaintiff would result in grossly inadequate deterrence. On the other hand, the stripping of all of the illicit profits that were gained from the pattern and practice of wrongdoing would achieve a deterrent purpose. Crimtorts are particularly needed where the probability of detection is very low and the probability of harm is very high.⁵⁵ In cases where gains-stripping is not appropriate, the financial circumstances of the defendant are needed to set the appropriate level of civil punishment. Most states have enacted specific procedural and substantive protections against the misuse of wealth in the punitive damages equation.⁵⁶

⁵³ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (upholding Alabama punitive award which took into account "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss . . . [and] the 'financial position' of the defendant"); *see generally* Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 *GEO. L.J.* 421 (1998) (developing gains-stripping theory of punitive damages and deterrence).

⁵⁴ Galligan, *supra* note 43, at 121.

⁵⁵ Wealth-based punitive damages are optimally used to punish and deter wrongdoers where the probability of detection is very low and the probability of harm is very high. Law and economics scholars contend that the price of wrongdoing must be proportional to potential gain in order to have a deterrent effect. *See* WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 160-63 (1987); *see also* Hylton, *supra* note 53, at 439.

⁵⁶ Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 *LOY. L.A. L. REV.* 1297, 1370-1420 (2005) (documenting rules on limitations of wealth and financial condition of the defendant in punitive damages litigation across fifty-one jurisdictions).

D. Developing A Viable Framework for Crimtort Justice

Crimtorts implies a series of "middle range" reforms that would protect corporate defendants. These procedural and substantive safeguards acknowledge crimtort's hybrid status midway between criminal and civil law.⁵⁷ The problematic aspect of the legal hybrid of crimtorts is its potential misuse and abuse because of the lack of procedural safeguards. The court in *TVT Records v. Island Def Jam Music Group* summarizes this problem well:

Though acknowledged to embody a punishment purpose somewhat comparable to that served by criminal law, exemplary damages are subject to none of the heightened constitutional safeguards that attach to criminal procedures to assure that prosecution of crimes extends only to the match of proper offenses and proper offenders and that any penalties ultimately meted out not only reflect considered and proportionate relationship to the wrongs actually committed but also satisfy other basic indices of fairness.⁵⁸

This section provides a new audit on the present day status of these mid-level constraints on corporate punishment. A wave of punitive damages tort reforms is creating a hybrid set of protections for corporate defendants that are less than criminal law but greater than in ordinary civil cases.⁵⁹ Since our original crimtort article was published, Arkansas, Colorado, Florida, Idaho, Mississippi, Montana, Nevada, North Carolina, Oklahoma, and West Virginia have enacted new procedural limitations on punitive damages.⁶⁰ The chart below summarizes the middle level theory of

⁵⁷ Koeing & Rustad, *supra* note 6, at 343.

⁵⁸ *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413, 426 (S.D.N.Y. 2003) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-18 (2003)).

⁵⁹ Rustad, *supra* note 56, at 1300 & n.11 ("[S]ince 1979" "only Delaware, New Mexico, New York, Rhode Island, West Virginia, and Wyoming have not enacted one or more of the following reforms: caps, proof, or split-recovery or state-sharing of the punitive damages awards.").

⁶⁰ *Id.* at 1311.

procedural and substantive tort reforms limiting punitive damages.⁶¹

CRIMTORT PROCEDURAL PROTECTIONS⁶²

Procedural or Substantive Limitations	Number of Jurisdictions
Fortified Jury Instructions	22
Post-Verdict Review for Excessiveness	51
Required Bifurcated Proceeding	14
Heightened Standard of Proof	34

1. Jury Instructions Beyond the Platitudes of Punitive Damages

Half of the states that recognize the remedy of punitive damages revamped their jury instructions in recent decades to provide additional protections, a development consistent with the Supreme Court of the United States' call for improved jury guidance.⁶³ The Court in *Pacific Mutual Life Insurance Co. v. Haslip* noted the importance of explaining the nature and purpose of punitive damages to the jury and to make it clear that the award is within their discretion to punish civil wrongdoing.⁶⁴ Despite the widespread strengthening of jury instructions in the states, the Court continues to express concern about the quality of instruction:

After years of neglect, the jury instruction issue recently resurfaced in *State Farm Mutual Automobile Insurance Co. v. Campbell*. Although *State Farm* focused principally on refining

⁶¹ A fifty-one jurisdiction comprehensive survey of how the states have enacted procedural and substantive limitations on punitive damages is presented in Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1370-1420 (2005).

⁶² This data is drawn from the aforementioned article entitled *The Closing of Punitive Damages' Iron Cage*. *Id.* at 1360, 1370-1420.

⁶³ Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. PA. J. CONST. L. 423, 470-86 (2004).

⁶⁴ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).

the post-verdict "guideposts," the decision also signaled that it is time to reevaluate how courts instruct juries on assessing punitive damages. In *State Farm*, the Supreme Court noted increasing "concerns over the imprecise manner in which punitive damages systems are administered." And for the first time, the Court stated that a specific punitive damages instruction must be given to the jury; the "jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."⁶⁵

2. Mandatory Due Process Review for Excessiveness

Nearly every state had a well-established procedure for determining whether a given award was excessive prior to the Supreme Court's constitutionalization decisions.⁶⁶ Now all courts, state and federal, are required to conduct a postverdict review for punitive damages awards to determine whether they comport with substantive due process as articulated in *Honda Motor Co. v. Oberg*.⁶⁷ The Court also requires all jurisdictions to conduct postverdict reviews to determine whether a given award comports with the *BMW* guideposts.⁶⁸ The federal excessiveness review is inconsistent with the most common state standards of whether a punitive damages award: (1) bears a reasonable relationship to compensatory damages, (2) is a product of "passion or prejudice," or (3) "shocks the conscience."⁶⁹

⁶⁵ Franze & Scheuerman, *supra* note 63, at 426 (quoting and citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417, 422 (2003) (internal citations omitted)).

⁶⁶ Rustad, *supra* note 56, at 1329-34.

⁶⁷ *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (holding that Oregon's state laws that prohibited postverdict review of punitive damages violated procedural due process).

⁶⁸ *State Farm*, 538 U.S. at 418-28 (applying the guideposts from *BWM of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996)).

⁶⁹ An empirical study of the three state law standards for the postverdict review for excessiveness was articulated in Rustad, *supra* note 56, at 1329-34. The Court used the state law doctrine of "reasonable relationship" as a "touchstone for constitutional analysis." *Honda*, 512 U.S. at 430; *see also BMW*, 517 U.S. at 583 ("In most cases, the ratio will be within a constitutionally acceptable range . . .").

3. Bifurcation as Civil Sentencing

A growing number of states conceive of punitive damages as civil punishment where the dollar amount is set in a separate proceeding. At present, fourteen states require that the determination of the amount of punitive damages be determined in a bifurcated judicial proceeding following determination of the defendant's liability for punitive damages.⁷⁰ Many additional states permit, but do not mandate, bifurcation.⁷¹ A few states have enacted trifurcation procedures that divide the proceedings into three phases: the compensatory phase, the punitory liability phase, and the dollar-amount phase (setting the dollar amount of punitive damages).⁷²

A more straightforward middle level tort reform would be to divide punitive damages cases into the punitive liability phase (where reprehensibility is determined) and the dollar amount phase (where the level of civil punishment or dollar amount is determined). With this reform, the jury would first determine whether punitive damages may be imposed and then reconvene to set the amount of the punitive damages award.⁷³ Evidence as to aggravating and mitigating circumstances would be admissible in

⁷⁰ Rustad, *supra* note 56, at 1321-24.

⁷¹ *Id.*

⁷² Trifurcated proceedings divide a trial into three phases: (1) the determination of compensatory damages; (2) determining whether the evidence warrants punitive damages; and (3) determination of the amount of punitive damages. *See Cuzzort v. City of Gretna*, No. 98-3096, 2000 U.S. Dist. LEXIS 621, at *3 (E.D. La. Jan. 20, 2000). Fourteen states, for example, "reconvene the second stage of the trial to permit the jury to receive evidence of the defendant's wealth to set the amount of the award." Rustad, *supra* note 56, at 1322 & n.144. Our crimtort proposal closely tracked Georgia's bifurcation procedure, which provides that:

In any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case. It shall then be the duty of the trier of fact to set the amount to be awarded

GA. CODE ANN. § 51-12-5.1(d)(1)-(2) (West 2007).

⁷³ Koenig & Rustad, *supra* note 6, at 345-46.

phase one of the bifurcation.⁷⁴ Evidence relevant only to the amount of punitive damages, such as wealth of the defendant, could only be considered in setting the amount of damages.⁷⁵ Evidence of the defendant's substantially similar bad acts and the wealth of the defendant would be admissible in phase two, but not the liability phase of the trial because of the concern for unfair prejudice.⁷⁶

This bifurcation is the functional equivalent of a civil sentencing phase where mitigatory and aggravating factors are broadly admissible.⁷⁷ A civil sentencing phase of the bifurcated proceeding would give a defendant an opportunity to present its case for why the level of punitive damages should be minimal. The plaintiff would present evidence of aggravating circumstance and the corporate defense would have the opportunity to present any mitigating factors. During civil sentencing, a defendant's failure to take prompt remedial steps in the face of a growing profile of harm is an aggravating factor.⁷⁸

4. Heightened Culpability and Proof

The heightened standard of proof of "clear and convincing" evidence is another "middle ground" crimtort procedural principle. The majority of states have now enacted judicial or legislative tort

⁷⁴ Koenig & Rustad, *supra* note 6, at 345-46.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 345 ("Many states require that punitive damages proceedings be divided into two phases, the determination of liability and the punitive damages phase . . .").

⁷⁸ *See, e.g.,* Hilliard v. A.H. Robins, Co., 148 Cal. App. 3d 374, 401-02 (1983) (holding that the defendant's failure to take the Dalkon Shield intrauterine device off the market knowing that it caused injuries and deaths to other women was a key factor in imposing punitive damages). In contrast, in the *Exxon Valdez* case, the oil company readily accepted responsibility for cleaning up Prince William Sound. Exxon paid \$2.1 billion for the cleanup and promptly paid damages to compensate commercial fishermen who lost their livelihood. Steve Gelsi, *Exxon Valdez Plaintiffs Say Top Court Should Drop Case*, MARKETWATCH, Sept. 21, 2007 <http://www.marketwatch.com/news/story/070921> (follow "Exxon Valdez plaintiffs say top court should drop case" hyperlink) (explaining Exxon's mitigatory steps after the oil spill disaster).

reforms increasing the standard of proof needed to prove punitive damages, from the usual civil standard of preponderance of the evidence to the heightened standard of "clear and convincing evidence," over the past quarter century.⁷⁹ Colorado is the only jurisdiction where a plaintiff must prove punitive damages beyond a reasonable doubt.⁸⁰ Twenty-five states require punitive damages be proven by the heightened burden of proof.⁸¹ Next, this article examines how the Court's federal takeover of punitive damages undermines the aim of crimtorts and conflicts with state procedural and substantive limits on the remedy.⁸²

PART II: HOW THE COURT REMOVED CRIMTORT CORNERSTONES

A. The Supreme Court's Punitive Damages Jurisprudence

The Supreme Court of the United States' reconceptualization of punitive damages from a crimtort remedy to one based on individuated retribution has gained speed in a succession of decisions beginning with the 1989 case of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*⁸³ The Court's latest decision in *Philip Morris USA v. Williams*⁸⁴ was the last rites, if not the obituary, for the crimtort paradigm. The Court's punitive damages cases, taken as a whole, are a step backward into

⁷⁹ Rustad, *supra* note 56, at 1324-25.

⁸⁰ *Id.* at 1324 & nn.151-52 (documenting that at least twenty-five states raised their culpability standard to proof by "clear and convincing evidence" while Colorado is the only jurisdiction that "requires plaintiffs to prove punitive damages 'beyond a reasonable doubt'").

⁸¹ *Id.*

⁸² Justice Scalia, in his dissent, presciently warned against the Court's judicial activism intruding into the arena of state tort law. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 604-05 (1996) (Scalia, J., dissenting). He questioned whether the *BMW* guideposts were even suited for the task of reviewing the state tort remedy of punitive damages. *Id.* at 605. He characterized the majority's due process guideposts as marking "a road to nowhere." *Id.* His prediction that the Court would turn mundane evidentiary questions about punitive damages into questions of constitutional magnitude has come true in *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1061 (2007).

⁸³ 492 U.S. 257, 262-63 (1989).

⁸⁴ 127 S. Ct. 1057 (2007).

the jurisprudence of the eighteenth and early nineteenth centuries.⁸⁵

In its recent line of cases dating from 1989, the Supreme Court of the United States did not challenge the remedy of punitive damages against malicious individuals. The Court's eight punitive damages cases all dealt with corporate punishment for group injuries⁸⁶ that have a social impact beyond the immediate victim. The Court's jurisprudence arose out of corporate punitive liability for products liability,⁸⁷ consumer fraud,⁸⁸ and bad insurance settlement practices.⁸⁹ The Court's model of punitive damages applies equally well to punishment of controversial individuals like O.J. Simpson, but the Court's concern over punitive damages always goes back to corporate punishment. Arguing over whether corporations should be punished for pattern and practice wrongdoing is what traps the Court and me in the punitive damages time loop 'a la Ground Hog Day.

1. The Court's Bad Faith Insurance Cases

The Supreme Court of the United States' utilization of the early nineteenth century model of retributive justice is difficult to reconcile with the corporate punitive damages cases where it

⁸⁵ "As in England, punitive damages in colonial America (and through the nineteenth and well into the twentieth centuries) were available only in a comparatively small class of torts—'the traditional intentional torts.'" Schwartz et al., *supra* note 39, at 1007 (describing how punitive damages were recoverable for intentional torts maliciously inflicted for much of American history).

⁸⁶ Martha Chamallas pioneered the study of how the tort system confronted " 'group' injuries—harms to all persons of an affected class—and thus involve a larger social purpose in eliminating the particular wrong." John T. Nockleby, *Access to Justice: Can Business Coexist with the Civil Justice System?*, 38 LOY. L.A. L. REV. 1009, 1015-16 (2005) (explaining Professor Chamallas' work on the relationship between torts and civil rights); *see also* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001) (explaining societal dimensions and impact of group injury).

⁸⁷ *Williams*, 127 S. Ct. at 1063 (tobacco products liability action); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (ATV products liability action).

⁸⁸ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584-85 (1996).

⁸⁹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 414 (2003); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 6 (1991).

granted certiorari. In the Court's 1991 case, *Pacific Mutual Life Insurance Co. v. Haslip*, the insurer's refusal to pay a policyholder's hospital bills resulted in punitive damages.⁹⁰ In *Haslip*, an insurance agent surreptitiously pocketed his clients' premiums rather than remitting them to the national office.⁹¹ The insurer cancelled the plaintiff's insurance policies while continuing to accept her payments.

The *Haslip* jury returned a verdict that included an award of over \$800,000 in punitive damages.⁹² The punitive damages imposed against the insurer were not for an individual wrong to the individual policyholder, but because of the defendant's corporate policy. The Court's overly individuated view of punitive damages diminishes state sovereignty by forcing punitive damages into a common retributory mold.

*State Farm Mutual Automobile Insurance Co. v. Campbell*⁹³ was another bad faith insurance dispute. In a six to three decision, the *State Farm* Court reversed a \$145 million punitive damages award (reduced to \$25 million by the trial court) because it violated the Due Process Clause protection against excessiveness.⁹⁴ The *State Farm* case arose out of a coverage dispute between the insurance company and its policyholder, Campbell, who was the defendant in a wrongful death action stemming from an automobile accident in Utah.⁹⁵ State Farm made a decision to challenge Campbell's liability in the wrongful death action, refusing to settle the claims for the limits of his insurance policy.⁹⁶ The insurer also refused to post a bond that would enable Campbell to appeal the court's judgment against him.⁹⁷

Punitive damages resulted from State Farm's nationwide employment of hardball tactics in settlement.⁹⁸ The Supreme Court of Utah found evidence that State Farm had a policy of

⁹⁰ *Haslip*, 499 U.S. at 6-7.

⁹¹ *Id.* at 12-13.

⁹² *See id.* at 7 n.2.

⁹³ 538 U.S. 408 (2003).

⁹⁴ *Id.* at 416, 429.

⁹⁵ *Id.* at 412-13.

⁹⁶ *Id.* at 413.

⁹⁷ *Id.* at 413.

⁹⁸ *Id.* at 414-15.

systematically exploiting the vulnerability of impoverished and poorly educated policyholders.⁹⁹ The Supreme Court of the United States reversed the Supreme Court of Utah and held that the \$25 million punitive damages award was excessive and in violation of the insurer's due process rights.¹⁰⁰ The Court criticized the trial court for admitting evidence of State Farm's national policies for purposes of punishment, but did not forge a rule of admissibility against using such evidence for punishment.¹⁰¹

2. The Court's Punitive Justice in Products Liability Actions

In *Philip Morris USA v. Williams*, an Oregon jury awarded an ex-smoker \$821,000 in compensatory damages along with \$79.5 million in punitive damages, finding the tobacco mogul negligent and deceitful in its advertisements about the health effects of smoking.¹⁰² The Court decided that the Due Process Clause precludes the use of evidence of a corporate defendant's injuries to third parties for purposes of punishment.¹⁰³ The *Williams* Court reasoned that: (1) "[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense' ";¹⁰⁴ and (2) permitting nonparty victim evidence to calibrate punitive damages awards "would add a near standardless dimension to the punitive damages equation."¹⁰⁵

The Court held the Oregon jury could consider the harm inflicted on other smokers to determine the degree of reprehensibility, but not for punishment:

⁹⁹ *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1151-52 (Utah 2001).

¹⁰⁰ *State Farm*, 538 U.S. at 428-29.

¹⁰¹ *Id.* at 419-20. However, as the Court observed, the Utah courts used the *State Farm* case "as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country," and the decision by the Supreme Court of Utah "makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells." *Id.* at 420.

¹⁰² *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1061 (2007).

¹⁰³ *Id.* at 1065.

¹⁰⁴ *Id.* at 1063 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

¹⁰⁵ *Id.*

That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.¹⁰⁶

Philip Morris' fraudulent concealment of the deadly consequences of smoking was the basis of the plaintiff's claim.¹⁰⁷ In the Oregon trial court, the cigarette company unsuccessfully asked the trial court to instruct the jury to limit nonparty evidence in the case.¹⁰⁸ In the lower court, the jury set punitive damages partially upon evidence that the company engaged "in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers" in the State of Oregon.¹⁰⁹

The *Williams* decision is the second Supreme Court of the United States case dealing with punitive damages in a products

¹⁰⁶ *Williams*, 127 U.S. at 1064.

¹⁰⁷ *Id.* at 1060-61.

¹⁰⁸ *Id.* at 1061. The Court objected to plaintiff's counsel's argument to the jury asking them:

to "think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. . . ." In light of this argument, Philip Morris asked the trial court to tell the jury that "you may consider the extent of harm suffered by others in determining what [the] reasonable relationship is" between any punitive award and "the harm caused to Jesse Williams" by Philip Morris' misconduct, "[but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims. . . ." The judge rejected this proposal and instead told the jury that "[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct."

Id. (alterations in original) (citations omitted).

¹⁰⁹ *Id.* at 1067 (Stevens, J., dissenting).

liability action. In the 1994 case of *Honda Motor Co. v. Oberg*,¹¹⁰ the Court ruled that Oregon's constitutional provision prohibiting postverdict reviews of punitive damages jury awards violated procedural due process.¹¹¹ This was the first time in American history that the Court set a standard of postverdict review for the excessiveness of punitive damages awards. The punitive damages awarded in *Honda* arose out of an all-terrain vehicle rollover accident involving Honda's Model ATC350X three-wheeled recreational vehicle.¹¹² The plaintiff's counsel introduced into evidence Consumer Product Safety Commission ("CPSC") documentation of at least 100,000 ATV-associated injuries and over 150 ATV-associated deaths in the United States between January 1982 and April 1985.¹¹³ The appeals court found that many of these injuries were flipovers that trapped and crushed the driver similar to the case reviewed by the Court.¹¹⁴ Oregon's jury instruction confirms the role that a defendant's pattern and practice of wrongdoing plays in calibrating punishment.¹¹⁵

3. The Court's Business Tort Punitive Justice Cases

The three business tort cases reviewed by the Court were also punitive damages that punished harmful corporate policies. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, the \$6 million punitive damages award arose out of a case where a large waste disposal firm used predatory practices to

¹¹⁰ 512 U.S. 415 (1994).

¹¹¹ *Id.* at 418.

¹¹² *Oberg v. Honda Motor Co.*, 814 P.2d 517, 519 (Or. Ct. App. 1991).

¹¹³ *Id.*

¹¹⁴ *Id.* at 520 (holding that the lower court did not err in introducing Consumer Product Safety Commission studies and proposed rule to address hundreds of thousands of ATV injuries).

¹¹⁵ *Id.* at 523 n.13 (quoting from Oregon model jury instructions). The Oregon trial court in *Oberg* instructed the jury with a statutorily mandated jury instruction that made reference to the public harm: "wanton disregard for the health, safety, and welfare of others . . . [w]anton disregard for the health, safety, and welfare of others is conduct amounting to a particular aggravated deliberate disregard of the rights of others." *Id.* The mandated factors included "pattern and practice" aggravating circumstances such as: the defendant's awareness, the duration of the misconduct, and their conduct and attitude when their wrongdoing is uncovered. *Id.*

squeeze out its smaller rival.¹¹⁶ The predatory practices of the defendant harmed all Vermonters by restricting competition. Federal antitrust enforcement, by its very nature, protects the marketplace, not just individual companies injured by predatory or sharp business practices.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the punitive damages award grew out of an unfair competition lawsuit based upon trademark infringement.¹¹⁷ On the surface, the case was just a routine business-to-business dispute over intellectual property rights. However, trade dress protects the overall image of goods to prevent the likelihood of confusion in the consumer marketplace.¹¹⁸ The defendant's concerted effort to cause confusion in the consumer marketplace by copying its competitor's trade dress was the basis for civil punishment.

In *TXO Production Corp. v. Alliance Resources Corp.*, a \$10 million punitive damages award was imposed against oil venturers

¹¹⁶ *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 261 (1989).

¹¹⁷ *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 429 (2001).

¹¹⁸ Federal as well as state trademark law protects trade dress. The law of trademarks protects the public by preventing competitors from selling products in a confusingly similar manner. J. Thomas McCarthy explains the public interest underlying trade dress infringement actions like *Cooper Industries, Inc.* where the plaintiff's action is based upon the similarity of the defendant's product, packaging, and image:

If defendant's trade dress is likely to cause confusion with plaintiff's trade dress, then a finding of unfair competition is warranted. The ultimate protection desired—prevention of a likelihood of confusion of buyers—is just as important when a junior user presents a package which in toto is confusingly similar to plaintiff's, as when a mere part of the package (such as a word mark) is simulated.

J. THOMAS MCCARTHY, 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 8:1 (4th ed.) (2006); see RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 16 cmt. a (1995) ("With the abandonment of the distinction between technical 'trademarks' and other indicia of source, the protection of distinctive packaging and product design has been incorporated into the general law of trademarks."); see also *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 767-70 (1992) (explaining how trade dress is protection by section 43(a) of the Lanham Act governing unfair competition). Cf. Jay Dratler, Jr., *Trade Dress Protection for Product Configurations: Is There a Conflict with Patent Policy?*, 24 AIPLA Q. J. 427, 434 (1996).

for the intentional tort of slander of title.¹¹⁹ The oil and gas developers brought a declaratory judgment action against the lessor and lessees of development rights to clear a purported cloud on title arising out of natural gas development rights. The claim was actually a pretext that was calculated to force the plaintiff to renegotiate its royalty arrangements. The Court upheld the punitive damages award given the developer's bad faith and the fact that the West Virginia case was part of a larger pattern of fraud, trickery, and deceit.¹²⁰ Such predatory practices have a deleterious impact on the marketplace for natural gas and therefore injure all consumers.

4. The Court's Consumer Fraud Punitive Case

In *BMW of North America, Inc. v. Gore*,¹²¹ the majority of the Supreme Court of the United States held a \$2 million punitive damages award to be excessive and violative of the Due Process Clause of the Fourteenth Amendment.¹²² While the Court did not directly address wealth, the use of ratios of punitive damages to compensatory damages undermined this factor.¹²³

The Court reiterated its concern about the dangers of wealth-based punishment: "The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States

¹¹⁹ *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 450-51 (1993).

¹²⁰ The Court upheld the award not only on the specific harm to the plaintiff but the potential harm of other victims:

It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred. In this case, the State Supreme Court of Appeals concluded that TXO's pattern of behavior "could potentially cause millions of dollars in damages to other victims."

Id. at 460-61 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 889 (W. Va. 1992)) (emphasis in original).

¹²¹ 517 U.S. 559 (1996).

¹²² *Id.* at 586.

¹²³ A large number of states have instituted hard caps on the size of punitive damages but the Court's presumptive cap applies to all states. Rustad, *supra* note 56, at 1299 (documenting the "significant variation among the states in the availability of punitive damages" with some states omitting them completely while others place substantive caps on the amounts awardable).

impose on the conduct of its business."¹²⁴ The *BMW* case grew out of a corporate policy of repainting or touching up new luxury automobiles harmed in transit without disclosing this remedial measure to the consumers.¹²⁵ BMW did not formulate this policy to harm the individual who bought the car in question. In each of the cases the Court reviewed, the wrongdoing was systematic, not an isolated case against a single consumer, competitor, or customer. The Court shifted their analysis away from crimtorts even though none of the cases involved malicious injuries that harmed individual plaintiffs.

B. The Court's Striking of Society from the Punitive Damages Equation

1. Punitive Damages as Retributory Justice

The Court's backward-looking punitive damages jurisprudence is a horse and buggy paradigm¹²⁶ ill-suited for the Age of the Internet. Nearly every eighteenth and early nineteenth century case arose out of a one-on-one intentional tort, usually between neighbors or members of the community.¹²⁷ In a typical early English case, the owner of an orphanage was compelled to pay punitive damages for maliciously shaving the head of a young female pauper without justification.¹²⁸ The remedy served to moderate conflict by giving an alternative to "private vengeance which [would] disturb the peace of the community."¹²⁹

¹²⁴ *BMW*, 517 U.S. at 585.

¹²⁵ *Id.* at 563-64.

¹²⁶ See, e.g., *Nat'l Casket Co. v. Powar*, 125 S.W. 279 (Ky. 1910) (imposing punitive damages where plaintiffs were thrown from their horse-drawn buggy when the defendant's car sped by startling the horses).

¹²⁷ See generally Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269 (2003) (citing cases demonstrating that punitive damages was a remedy deployed in intentional torts cases mediating conflict in the local community).

¹²⁸ *Forde v. Skinner*, (1830) 172 Eng. Rep. 687, 687 (H.C.).

¹²⁹ Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198 (1931). In an early nineteenth century English case, a defendant scattered poisoned barley on his neighbor's premises for the sole purpose of destroying his poultry. *Sears v. Lyons*, (1818) 171 Eng. Rep. 658 (K.B.). The

Punitive damages came to America as a mechanism of social control of intentional torts in the local community. Punitive damages awards frequently vindicated family values by punishing defendants who committed torts such as seduction, breach of promise to marry, alienation of affection, and general property wrongs. With the rapid growth of industrialization after the Civil War, punitive damages evolved to begin to confront corporate malfeasance. This remedy was sufficiently flexible to protect the public from corporate-generated risks such as the unsafe maintenance of railroad tracks, bridges, and other industrial infrastructure.¹³⁰ Punitive damages served as an "effective social control device[] used to patrol large powerful interests unimpeded by the criminal law."¹³¹

Punitive damages in group injury cases did not evolve until the last third of the twentieth century. In June 1937, a sales representative for S.E. Massengill Company reported that consumers were requesting that the miracle drug Elixir Sulfanilamide be produced in a liquid form so it would be easier to administer to children.¹³² The company's chief chemist and pharmacist discovered that sulfanilamide would dissolve quickly in

judge instructed the jury that it could award greater damages than the mere value of the fowl destroyed. *Lyons*, 171 Eng. Rep. at 658. Specifically, the jury could punish the defendant for his malicious intent, whether for insult or injury. *Id.* The jury awarded the plaintiff fifty pounds. *Id.* at 659.

¹³⁰ Professor Sebok explains how "efficient deterrence" evolved as the leading scholarly account of corporate punitive justice against railroads and other powerful nineteenth century corporate actors:

The reasons that punishment might serve as a deterrent, either specific or general, are as complex in tort law as they are in criminal law. Nineteenth-century courts likely believed that a properly chosen punishment would be the proper measure of deterrence. It was not until recently that some commentators began to argue that, since the main purpose of tort law was to maximize social welfare, the proper measure of a punitive-damages award is the sum of money that it would take to achieve efficient deterrence.

Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 977 (2007).

¹³¹ Rustad & Koenig, *supra* note 35, at 1296 (describing expansion of exemplary damages to constrain corporate wrongdoers such as railways).

¹³² Carol Ballentine, *Taste of Raspberries, Taste of Death: The 1937 Elixir Sulfanilamide Incident*, FDA CONSUMER, June 1981, available at <http://www.fda.gov/oc/history/elixir.html>.

diethylene glycol.¹³³ S.E. Massengill Company then placed the drug on the market without even taking the elementary step of studying the safety of this compound.¹³⁴ The company's treatment of consumers as guinea pigs was a deadly decision.¹³⁵ Every child who took Elixir Sulfanilamide died after their kidneys shutdown and their urine stopped, which initiated a cycle of severe abdominal pain, nausea, vomiting, stupor, and convulsions leading to death.¹³⁶ In a letter to President Franklin D. Roosevelt, a woman described the death of her child:

The first time I ever had occasion to call in a doctor for [Joan] and she was given Elixir of Sulfanilamide. All that is left to us is the caring for her little grave. Even the memory of her is mixed with sorrow for we can see her little body tossing to and fro and hear that little voice screaming with pain and it seems as though it would drive me insane. . . . It is my plea that you will take steps to prevent such sales of drugs that will take little lives and leave such suffering behind and such a bleak outlook on the future as I have tonight.¹³⁷

The field of products liability did not emerge until the post-World War II period. The mass production of consumer products led to new hazards that required expanded tort remedies:

This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its

¹³³ Ballentine, *supra* note 132.

¹³⁴ Donna Young, *Documentary Examines Sulfanilamide Death of 1937*, American Society of Health-System Pharmacists, http://www.ashp.org/s_ashp/article_news.asp?CID=167&DID=2024&id=3659 (last visited Apr. 13, 2008).

¹³⁵ Ballentine, *supra* note 132.

¹³⁶ *Id.*

¹³⁷ *Id.*

safety and well-being. Purchasers cannot try out drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames.¹³⁸

In my empirical study of a quarter century of punitive damages awards, prior similar wrongdoing was usually part of a larger pattern of corporate transgressions.¹³⁹ Punitive damages in products liability punish and deter five patterns and practices of socially harmful conduct: "(1) fraudulent-type misconduct; (2) knowing violations of safety standards; (3) inadequate testing and manufacturing procedures; (4) failures to warn of known dangers before marketing; and (5) post-marketing failures to remedy known dangers."¹⁴⁰

The smoking gun evidence that leads to punitive damages includes the failure to take remedial action in the face of "field testing reports showing dangers, prior consumer complaints, prior lawsuits, corporate awareness of epidemiological evidence of a

¹³⁸ *Dalehite v. United States*, 346 U.S. 15, 51 (1953) (Jackson, J., dissenting). The *Romo* court makes a similar point:

In cases of mass-produced consumer goods or company-wide practices of large insurers, outrageous or malicious wrongdoing was no longer simply an affront to the dignity of a single victim. Instead, the affront was to all affected by the goods or services or, given the reach of the misconduct, the affront was viewed as one to society as a whole. In this view, because the "wrong" was directed beyond the immediate plaintiff, punitive damages awards needed to be based on the overall scope of the wrong in order to punish and deter the mass torts.

Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 800 (Cal. Ct. App. 2003).

¹³⁹ Rustad, *supra* note 18, at 64-73. The standard for punitive liability in products liability cases is reckless disregard of the public safety as opposed to inadvertent conduct affecting a single defendant. Reckless disregard is difficult, if not impossible, to prove without a showing of prior similar cases showing a manufacturer's awareness of a profile of danger. *See, e.g.*, *Thiry v. Armstrong World Indus.*, 661 P.2d 515, 518 (Okla. 1983) ("[R]eckless disregard' is not to be confused with inadvertent conduct. To meet this standard the manufacturer must either be aware of, or culpably indifferent to, an unnecessary risk of injury.").

¹⁴⁰ David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1329 (1976).

danger or risk, and sacrificing public safety for profits."¹⁴¹ As Judge Posner noted: "[M]ost tort defendants against whom punitive damages are sought are enterprises rather than individuals"¹⁴² The most developed crimtorts of the twenty-first century in the imposition of punitive damages are products liability, insurance bad faith, consumer fraud, and toxic torts cases. Crimtorts are underdeveloped in state intellectual property cases as well as cybertorts.

2. Punitive Damages as Societal Justice

The Court's jurisprudence undermines the punitive damages' societal function of punishing and deterring corporate wrongdoing.¹⁴³ The Court overlooks the notable role that the remedy has played in punishing and deterring aggravated misconduct in association with "group injuries."¹⁴⁴ The *Philip Morris USA v. Williams* Court's claim that it could "find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others" is simply a misreading of legal history.¹⁴⁵ Punitive damages have long been a remedy giving the jury the discretion "to consider what the

¹⁴¹ Rustad, *supra* note 18, at 65-66 (reporting punitive damages in products litigation for the period of 1965 to 1990 in all jurisdictions) (internal citations omitted).

¹⁴² *Kemezy v. Peters*, 79 F.3d 33, 36 (7th Cir. 1996).

¹⁴³ Crimtorts used in the toxic torts context "combine deterrent elements from both criminal and civil law, [and] provide the first line of defense against the threats to the common welfare caused by chemical, biological, biochemical, and radioactive exposures." Thomas H. Koenig & Michael L. Rustad, *Toxic Torts, Politics, and Environmental Justice: The Case for Crimtorts*, 26 LAW & POL'Y 189, 190 (2004).

¹⁴⁴ Punitive damages for "group injuries" have grown up alongside the theory of enterprise liability. The defendants in the Supreme Court of the United States' punitive damages cases all involved corporate misconduct arising out of pattern and practice evidence.

¹⁴⁵ *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007). Corrective justice would dictate that the rights of unconsenting parties be compensated in medical malpractice. Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2350, 2355 (1990) (explaining theory of individualized justice).

interests of society, as well as justice . . . require[.]"¹⁴⁶ The Court's individuated retributory justice view blinds them to the well-established societal functions of punitive damages.¹⁴⁷

The states' standards of liability for awarding punitive damages often expressly address the societal purpose.¹⁴⁸ In Arizona, for example, punitive damages are recoverable if the defendant's misconduct manifested a reckless indifference to the interest of others.¹⁴⁹ Arkansas, too, states that punitive damages are for the "wanton . . . disregard of the rights and safety of others."¹⁵⁰

¹⁴⁶ See also *Collins v. Albany & Schenectady R.R. Co.*, 12 Barb. 492, 495 (N.Y. App. Div. 1852) ("The jury are allowed, and even advised to consider what the interests of society, as well as justice to the plaintiff, requires . . .").

¹⁴⁷ The diversion of the path of punitive damages law from punishment and deterrence to retribution began with *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 576 (1996). The *BMW* Court characterized reprehensibility of the defendant's conduct as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Id.* at 575.

¹⁴⁸ The *Restatement (Second) of Torts* views punishment, specific deterrence, and general deterrence as the principal functions of punitive damages: "Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908(1) (1979). The comment to the *Restatement (Second) of Torts* articulates the black letter law that

"punitive damages," or "exemplary" damages as they are frequently called, are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future. Although the purposes are the same, the effect of a civil judgment for punitive damages is not the same at [sic] that of a fine imposed after a conviction of a crime, since the successful plaintiff and not the state is entitled to the money required to be paid by the defendant.

Id. at § 908 cmt. a; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (stating that punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence").

¹⁴⁹ *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 679-80 (Ariz. 1986).

¹⁵⁰ *Texarkana Gas & Elec. Light Co. v. Orr*, 27 S.W. 66, 68 (Ark. 1894). A number of other states explicitly address that it is the rights of others in society that is key to punitive damages. See, e.g., *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135, 136 (Ind. 1988) (stating the punitive liability standard as "subjecti[ng] other persons to probable injury, with an awareness of such impending danger and with heedless indifference of the consequences"); *Jardel Co. v. Hughes*, 523 A.2d 518, 530 (Del. 1987) (stating punitive damages predicate as "a conscious indifference to the rights of others").

Arkansas' punitive damages jurisprudence requires the fact finder to find that "the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage."¹⁵¹ A proposed Ohio jury instruction expressed the societal function of punitive damages well:

At the punitive-damages level, it is the societal element that is most important. The plaintiff remains a party, but a de facto party is our society, and the jury is determining whether and to what extent we as a society should punish the defendant. Ohio's courts have a central role to play in the distribution of punitive damages. The distribution of the jury's award must recognize the effort the plaintiff undertook in bringing about the award and the important role a plaintiff plays in bringing about necessary changes that society agrees need be made. Plaintiffs themselves might get involved in how the award is distributed. The final net amount remaining after prescribed payments may go to a place that will achieve a societal good, determined by the Court, a good that can rationally offset the harm done by the defendant in this case.¹⁵²

California's punitive damages statute acknowledges the remedy's purely public purpose "to punish wrongdoing and thereby to protect [the public] from future misconduct, either by the same defendant or other potential wrongdoers."¹⁵³

The Supreme Court of the United States has stricken the interests of society from the equation in its individuated view of punitive damages.¹⁵⁴ A survey of state punitive damages shows

¹⁵¹ ARK. CODE ANN. § 16-55-206(2) (2005).

¹⁵² *Hayden v. Hayden*, No. 04CV62797, 2006 WL 680368, at *1 (Ohio Ct. Com. Pl. Jan. 25, 2006) (reporting plaintiff's supplemental jury instructions for punitive damages).

¹⁵³ *Adams v. Murakami*, 813 P.2d 1348, 1350 (Cal. 1991) (citing *Neal v. Farmers Ins. Exchange*, 148 Cal. Rptr. 389, 299 n.13 (Cal. 1978)).

¹⁵⁴ Punitive damages vindicating the larger societal interest are not a recent innovation. As the Supreme Court of Maine stated in 1869:

The right of the jury to give exemplary damages for injuries wantonly, recklessly, or maliciously inflicted, is as old as the right of trial by jury itself; and is not, as many seem to suppose, an innovation upon the rules of the common law. It was settled in England more than a century ago.

Goddard v. Grand Trunk Ry., 57 Me. 202, 218 (1869).

this conclusion to be mistaken. Representative juries reflect the community judgment and common sense justice in addressing civil wrongs injurious to society: "Punitive damages blend civil law—which deals with private wrongs—in the direction of criminal law to punish behavior that is not typically covered by criminal statutes. Moreover while the government itself may in some instances do the prosecuting, American law encourages private enforcement of public policy."¹⁵⁵

Punitive damages, in contrast to compensatory damages, "implicate other societal policies."¹⁵⁶ The Supreme Court of Delaware notes that the chief purposes of punitive damages are the societal interest in punishment and the "desire to deter others from engaging in similar conduct."

The Court's restrictions on a corporation's other victims clashes directly with several features of Montana's punitive damages statute, which reflects a legislative judgment that other bad acts are relevant in setting the level of punishment.¹⁵⁷ Montana's statute requires the judge to examine the "nature and reprehensibility of the defendant's wrongdoing" as well as the "extent of the defendant's wrongdoing."¹⁵⁸ The judge must consider "*previous* awards of punitive or exemplary damages against the defendant based upon the same wrongful act."¹⁵⁹ Finally, the statute also requires the trial judge to consider "any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages."¹⁶⁰ This factor calls for the broad admissibility of the defendant's pattern and practice of wrongdoing.

¹⁵⁵ NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 305 (2007).

¹⁵⁶ *Jardel Co. v. Hughes*, 523 A.2d 518, 528 (Del. 1987) ("[C]ompensatory damages aim to correct private wrongs, while assessments of punitive damages implicate other societal policies."); *see also* *Stroud v. Lints*, 790 N.E.2d 440, 445 (Ind. 2003); *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997) (noting that the aim of punitive damages is to "protect society by punishing the offender rather than to compensate the injured party").

¹⁵⁷ *Czajkowski v. Meyers*, 172 P.3d 94, 104 (Mont. 2007).

¹⁵⁸ *Id.* at 103.

¹⁵⁹ *Id.* at 104 (emphasis added).

¹⁶⁰ MONT. CODE ANN. § 27-1-221(b)(ix) (2007).

The standard of liability for awarding punitive damages often expressly addresses the societal purpose. The remedy is for conduct beyond the pale of what society tolerates.¹⁶¹ The Court's individuated retributory justice theory is also inconsistent with a growing number of jurisdictions that require state sharing of punitive damages.¹⁶² Iowa, for example, remits 25% of the punitive damages to the plaintiff and the other 75% to a civil reparations fund.¹⁶³ The Court's binary theory of punitive justice also collides with state rules prohibiting multiple awards stemming from the same act, as in a mass products case. Justice John Paul Stevens questions the majority's false dichotomy between admissibility of nonparty evidence for purposes of reprehensibility, but inadmissibility for settling the dollar amount of punitive damages:

Whereas compensatory damages are measured by the harm the defendant has caused the plaintiff, punitive damages are a sanction for the public harm the defendant's conduct has caused or threatened. There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages.¹⁶⁴

C. Patterns and Practices Profiles of Corporate Danger

Judge Guido Calabresi, in *The Complexity of Torts: The Case of Punitive Damages*, criticizes the Court's attempt to reduce a multidimensional tort remedy to one thing, retributory

¹⁶¹ Punitive damages play a similar role as crime in setting boundaries for acceptable conduct. Because corporations may not be put to death or imprisoned, punitive damages are the functional equivalent of criminal law for individuals. See ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 81 (George Simpson trans., Free Press 1964) (1893) ("[W]e must not say that an action shocks the common conscience because it is criminal, but rather that it is criminal because it shocks the common conscience. We do not reprove it because it is a crime, but it is a crime because we reprove it.").

¹⁶² See generally, Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *YALE L.J.* 347, 372-89 (2003) (surveying state-sharing schemes in which a portion of punitive damages is allocated to a state fund).

¹⁶³ IOWA CODE ANN. § 668A.1(2)(b) (West 1998).

¹⁶⁴ *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1066 (2007) (Stevens, J., dissenting).

punishment.¹⁶⁵ I share Judge Calabresi's concern that the Court's one-dimensional punitive damages jurisprudence disregards the multiple social benefits of the remedy. More than any other decision, *Philip Morris USA v. Williams*¹⁶⁶ is a far-reaching transformation of punitive damages awarded to punish violations of societal interests because of its limitations on the use of evidence of corporate patterns and practices of corporate wrongdoing. My thesis is that this ruling creates, at a minimum, a swirl of uncertainty on how to prove that a company engaged in egregious conduct in a group injury case. The Supreme Court of the United States' peculiar holding that a jury may not use punitive damages "to punish a defendant *directly* on account of harms it is alleged to have visited on nonparties," but a jury is still permitted to consider the harm to third parties to determine the "reprehensibility" of the defendant's conduct.¹⁶⁷

In the aftermath of *Williams*, plaintiffs now may introduce pattern and practice evidence for reprehensibility, but not for punishment.¹⁶⁸ In the *BMW* case, the Court observed that "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."¹⁶⁹ The states will need to update their jury instructions to comport with the Court's new rules concerning corporate patterns and practices evidence. It will not be an easy task to develop instructions informing the jury that they may consider nonparty evidence for reprehensibility, but not for punishment. How is a jury to understand the subtle distinction between "strong medicine" for purposes of reprehensibility because of a pattern of wrongdoing and a ban on considering this evidence for setting dollar amounts?

During oral argument for *Williams*, Justice Ruth Bader Ginsburg questioned whether juries would be confused "if they are

¹⁶⁵ Guido Calabresi, *The Complexity of Torts-The Case of Punitive Damages*, in *EXPLORING TORT LAW* 333, 335-36 (M. Stuart Madden ed., 2005).

¹⁶⁶ *Williams*, 127 S. Ct. at 1057.

¹⁶⁷ *Id.* at 1064 (emphasis added).

¹⁶⁸ *Id.* at 1063-64.

¹⁶⁹ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576-77 (1996) (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993)).

first told they may consider the extent of harm suffered by others, and then the next instruction seems to say they can't?"¹⁷⁰ The Court's punitive damages decisions are already resulting in fewer and smaller punitive damages awards against corporations.¹⁷¹ The Court's punitive damages jurisprudence is casting a giant shadow on state punitive damages by forcing every state's law into a common mold.¹⁷²

D. The Death of the Private Attorney General

The Supreme Court of the United States has undermined the private attorney general role by its restrictions on introducing a defendant's other bad acts and its earlier decisions placing de facto caps on punitive damages.¹⁷³

The *Williams* Court elevates reprehensibility as the focus of punitive damages, giving only a passing nod to the long-established functions of punitive damages in most states.¹⁷⁴

¹⁷⁰ Transcript of Oral Argument at 4, *Williams*, 127 S. Ct. 1057 (2007) (No. 05-1256).

¹⁷¹ See Margaret Cronin Fisk, *Punitive Damages Shrink as High Court Reins in Trial Lawyers*, BLOOMBERG.COM, Jan. 15, 2008, http://www.bloomberg.com/apps/news?pid=email_en&refer=home&sid=aYBW3kooP9xc (documenting that the largest punitive damages verdicts fell sharply in 2007 to \$1.6 billion from \$5 billion in 2005).

¹⁷² This result was predicted in Rustad, *supra* note 56, at 1360-67.

¹⁷³ In recent years, the Court gives only passing mention to deterrence and punishment, lumping these well-established separate functions into its concept of retributory justice. See Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 648 (1980) (explaining that retribution function cannot be separated from deterrent function because imposition of punishment for past acts also tends to control future behavior). Cf. Professor Richard Epstein argues that "[i]n the end the strongest, indeed the only, justification for punitive damages is [retribution]." RICHARD A. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 180 (Quorum Books 1980).

¹⁷⁴ The *Williams* Court acknowledges that punitive damages are "imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Williams*, 127 U.S. at 1062. However, the Court's excessiveness review borrowed from *BMW* and *State Farm* focuses on the defendant's reprehensibility as the touchstone of punitive damages. *Id.* at 1062-63 ("[E]xcessiveness decision depends upon the reprehensibility of the defendant's conduct."). The Supreme Court of the United States' path of punitive damages law has gradually deemphasized punishment and deterrence, replacing it with retribution. In *State Farm*, the Court acknowledged that punitive

Punitive damages are a unique legal institution that awards a bounty to the "tort victims themselves—a monetary incentive to shoulder the costs of enforcement."¹⁷⁵ A private attorney general uncovering patterns and practices of corporate wrongdoing must often pursue a "discovery war" with an army of top legal talent.

In typical punitive damages litigation, private attorneys general conduct broad discovery that uncovers a company's patterns and practices of indifference to public safety.¹⁷⁶ In the tobacco litigation, the defendant's litigation tactics are similar to that of a scorched earth¹⁷⁷ military campaign:

Hallmarks of the cigarette manufacturers' scorched earth strategy include: 1) never settling cases involving injured smokers; 2) extreme investigation tactics designed to

damages serve the purposes of deterrence and retribution. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). In *BMW*, the Court described reprehensibility of the defendant's conduct as perhaps the emblem of a reasonable punitive damages award. *BMW*, 517 U.S. at 575.

Courts have long recognized that punishment and deterrence are the twin aims of punitive damages, not retribution. *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893) (punitive damages can be imposed "as a punishment to the guilty, [and] to deter from any such proceeding for the future") (quoting *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489, 498-99 (K.B.)).

¹⁷⁵ *Kemezy v. Peters*, 79 F.3d 33, 35 (7th Cir. 1996).

¹⁷⁶ See generally, Rustad, *supra* note 18, at 66, 71-76 (documenting that punitive damages in products liability cases were frequently based upon a company's failure to warn of known dangers and the postmarketing failure to remediate known dangers); see also Michael L. Rustad, *How the Common Good Is Served by the Remedy of Punitive Damages*, 64 TENN. L. REV. 793 (1997) (explaining aggravating circumstances leading to punitive damages).

¹⁷⁷ A plaintiff's counsel compared the tobacco industry lawyers' tactics to a "scorched earth" policy:

A scorched earth policy is a military tactic which involves destroying anything that might be useful to the enemy while advancing through or withdrawing from an area. Apparently a translation of Chinese (Jiao Tu), the term refers to the practice of burning crops to deny the enemy food sources, although it is by no means limited to food stocks, and can include shelter, transportation, communications and industrial resources, which are often of equal or greater military value in modern warfare, as modern armies generally carry their own food supplies. The practice may be carried out by an army in enemy territory, or by an army in its own home territory.

C. Calvin Warriner, *Big Tobacco, Scorched Earth Tactics & the Engle Case*, INJURYBOARD.COM, Feb. 16, 2007, <http://westpalmbeach.injuryboard.com/cigarettes-tobacco/big-tobacco-scorched-earth-tactics-the-engle-case.php>.

intimidate; 3) destruction of documents and other discovery abuses; and 4) filing of an unusually high number of motions to attain a tactical advantage. For each of these strategies, there exists strong evidence in internal company documents that explains what these tactics are, how they are done, and why they are an important part of an overall litigation strategy. Such aggressive litigation tactics should be a factor for consideration in any analysis of the amount of punitive damages awarded The harm to these deterred potential plaintiff non-parties should be considered when reviewing the appropriateness of punitive damages awards involving defendants that have utilized such tactics.¹⁷⁸

The *Williams* Court is forcing states to adopt new discovery, evidentiary, and punitive damages procedures to limit the private attorneys general's use of evidence that a corporate defendant's bad acts were part of a larger pattern or policy.¹⁷⁹ One of the first punitive damages cases punished a television manufacturer for failing to take prompt remedial steps after it learned that its television sets caused a series of home fires.¹⁸⁰ The admissibility of

¹⁷⁸ Posting of Mark Gottlieb to American Constitution Society Blog, <http://www.acsblog.org/> (Oct. 27, 2006, 16:16 EST).

¹⁷⁹ *Williams*, 127 S. Ct. at 1065.

¹⁸⁰ The private attorney general in products litigation uncovers "smoking gun" evidence that the defendant disregarded consumer safety in prior cases as in *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975). The aggravating circumstances were Admiral Corporation's inaction in the wake of prior television fires:

Mrs. Gillham purchased an Admiral "24" series color T.V. set in June 1964. On the night of Nov. 19, 1968, after the set had been turned off for the evening, Mrs. Gillham observed a blue flash come across the T.V. screen and left the room. Returning 15 minutes later, she found the T.V. set on fire with flames rising almost to the ceiling. As she tried to beat the fire out with sofa pillows, there was an explosion and plaintiff was severely burned with second and third degree burns covering 18.5% of her body. As a result of her burns and resulting complications, plaintiff was hospitalized for 18 months and submitted to 7 operations, her complications including infection and inflammation of the burns, systemic toxicity, fever, secondary pneumonia, loss of appetite and malnutrition, an acute chronic urinary tract infection, acute pancreatitis, thrombophlebitis, colitis, and a gastrocolonic fistula, which permitted fecal matter to enter her stomach. . . . In Judge McCree's thoughtful and balanced assessment, "Her injuries transformed Zora Gillham from an active and vivacious woman into a virtual invalid who requires twenty-four hour nursing care" By 1968 when plaintiff's fire occurred, at

the other house fires caused by spontaneous combustion of the defective components would be questionable after *Williams*.

The Court's emphasis on one-on-one torts will make it extremely difficult to pursue cases in which a large number of victims were each defrauded out of a small amount of money. These new restrictions on private attorneys general pursuing crimtort actions will greatly impede the societal benefits of high-profile crimtort litigation.

E. The Court's Rewriting of Discovery Rules

The engine of discovery is a central tool of the private attorney general operating in the crimtort paradigm. As John Goldberg notes, "[S]ocial justice theory notes the value of the discovery process in tort litigation, through which plaintiffs' lawyers can uncover paper trails documenting instances of corporate misinformation and malfeasance."¹⁸¹ Smoking gun evidence in products cases almost always involves establishing a company's indifference in the face of clear notice of a developing profile of danger. In *Maggard v. Ford Motor Co.*,¹⁸² a jury recently awarded \$3.3 million in compensatory damages and \$9 million in punitive damages¹⁸³ in an automobile products liability action in which prior similar product failures were introduced into evidence.

In *Maggard*, the plaintiff was a forty-eight year-old mother of two who suffered a traumatic amputation of her leg when her van

least 91 such fires had been reported to Admiral. . . . The essence of this incriminating evidence shows more than oversight, inadvertent mistake and scanting of costs by a manufacturer. It shows a flagrant and conscious disregard of the safety of the consuming public, [that is], subjecting numerous purchasers to known very serious risk without excuse. . . . Defendant's icy indifference to such serious consequences imperatively called for the sanction of punitive damages.

Michael Rustad, *The Jurisprudence of Hope: Preserving Humanism in Tort Law*, 28 SUFFOLK U. L. REV. 1099, 1136 (1994) (quoting Thomas F. Lambert, Jr., *Products Liability: A Trilogy of Duty-to-Warn Cases*, 36 ATLA L.J. 1, 17-19 (1976)).

¹⁸¹ Goldberg, *supra* note 32, at 561.

¹⁸² No. 3:05-0369, 2007 U.S. Dist. LEXIS 88495 (M.D. Tenn. Nov. 30, 2007).

¹⁸³ *Id.* at *19.

self-shifted from park to reverse and rolled over her leg.¹⁸⁴ The plaintiff's counsel read potentially inculcating stipulations to the jury, acknowledging the company knew of prior self-shifting accidents due to the fact "that vehicles can move rearward if an individual does not position the gear shift into Park."¹⁸⁵ A jury could have concluded that Ford was deserving of punishment for having failed to make design changes despite clear evidence that its vehicles were creating a danger to the consuming public.¹⁸⁶ The *Maggard* court found an ample basis for punitive damages based upon Ford's stipulation about prior gear slippage cases:

One of Ford's experts, Frederick King, went on to testify that the gear could then slip into Reverse on its own, again as was the plaintiffs' contention in this case. Mr. King also testified that, in the 1970s, as a Ford engineer, he had investigated installing in Ford vehicles a warning system that would warn the driver when the car was not actually in Park. He testified that this warning system would have cost \$3 per car, and he gave the reasons why Ford decided not to install this warning system, which, in part, was due to the fact that incidents of cars being in "illusory Park" were "rare."¹⁸⁷

Similarly, in *Gonzales v. Surgidev Corp.*,¹⁸⁸ the Supreme Court of New Mexico excluded evidence of defect in one model of intraocular lens as irrelevant for proving the manufacturer's notice of serious eye injuries in another product model absent substantial similarity in design.¹⁸⁹ However, testimony as to the medical product designer's inaction in light of a profile of developing dangers is material to the issue of punitive damages because it sheds light on whether the corporate actor had or should have had knowledge of the risk of harm that its marketing practices would create.¹⁹⁰

¹⁸⁴ *Maggard*, 2007 U.S. Dist. LEXIS 88495, at *5, *8.

¹⁸⁵ *Id.* at *16.

¹⁸⁶ *Id.* at *19.

¹⁸⁷ *Id.* at *16.

¹⁸⁸ 899 P.2d 576 (N.M. 1995).

¹⁸⁹ *Id.* at 587.

¹⁹⁰ *Id.* (citing *Edgar v. Fred Jones Lincoln-Mercury of Okla. City, Inc.*, 524 F.2d 162, 167 (10th Cir. 1975)).

Kubota's marketing of dangerously defective tractors to American farmers that lacked the rollover protection provided for by the Japanese market,¹⁹¹ the Carrollton school bus tragedy in which twenty-seven were killed in a raging inferno,¹⁹² and the intraocular lenses whose design resulted in blinding were injustices to scores of American consumers and are examples of private litigation for a public policy purpose.¹⁹³ The private attorneys general conducted broad discovery of the defendant's entire course of conduct related to the plaintiff's injury in each of these punitive damages cases.

Patterns of wrongdoing were the aggravated misconduct leading to punitive damages in one of the best-known tort stories in American history, the famous McDonald's hot coffee case. In that case, Mrs. Stella Liebeck suffered third-degree burns when she spilled coffee on herself while a passenger in her grandson's car.¹⁹⁴ Mrs. Liebeck spent a week in the hospital, undergoing a series of painful skin grafting and debridement procedures.¹⁹⁵

The conservative New Mexico jury awarded punitive damages based upon the restaurant chain's inaction, despite its knowledge of hundreds of prior severe burns caused by superheated coffee.¹⁹⁶ The jury returned a verdict of \$2.9 million, including a gross compensatory award of \$200,000, reduced by 20% for the plaintiff's comparative negligence, and \$2.7 million in punitive damages. On posttrial motions, the trial court remitted the punitive award to \$480,000.¹⁹⁷

In the wake of *Williams*, future courts will need to instruct juries that they may consider the defendant's substantially similar

¹⁹¹ KOENIG & RUSTAD, *supra* note 16, at 82-86 (explaining how a Japanese company marketed tractors in the United States market with rollover protection ("ROPS") as option knowing of the tip-over hazard and marketing the same model with ROPS in Japan).

¹⁹² *Id.* at 86-91 (documenting gruesome accident caused by defective fuel system in which a ruptured fuel tank geysered gasoline into the bus after an accident resulting in an inferno and killed twenty-seven persons, mostly children).

¹⁹³ *Id.* at 98-101.

¹⁹⁴ *Id.* at 7.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 8.

¹⁹⁷ *Id.*

wrongdoing for reprehensibility, but they may not calibrate punishment on evidence of bad acts to other victims of corporate wrongdoing. Justice Stevens' dissenting opinion takes issue with the Court's newly minted rule of evidence: "Unlike the Court, I see no reason why an interest in punishing a wrongdoer 'for harming persons who are not before the court,' . . . should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct."¹⁹⁸ As Justice Stevens argues in his dissent, in practice it is extremely difficult for a jury to consider prior corporate wrongdoing as material for reprehensibility, but inadmissible for setting the amount of punitive damages.

F. The Court's Marginalization of Wealth-Based Punishment

The Court's Procrustean¹⁹⁹ bed for punitive damages is a rejection of the crimtort paradigm, which values the ability of the remedy to mutate to fill enforcement gaps. The Supreme Court of the United States has slowly turned away from the use of wealth in setting the level of punitive damages.²⁰⁰ The Court in *TXO Production Corp. v. Alliance Resources Corp.*²⁰¹ listed the wealth of the defendant as a legitimate consideration in the West Virginia jury's award of punitive damages.²⁰² The *TXO* Court stated that the use of defendant's financial condition to set the amount of punitive

¹⁹⁸ *Phillip Morris USA v. Williams*, 127 S. Ct. 1057, 1066 (2007) (Stevens, J., dissenting) (internal citations omitted).

¹⁹⁹ Procrustes was a giant in Greek mythology that "would capture travelers and tie them to an iron bed. If they were longer than the bed, he would hack off their limbs until they fit it." ERIC DONALD HIRSCH, JR. ET AL., *THE NEW DICTIONARY OF CULTURAL LITERACY* 41 (3d ed. 2002). The Procrustean bed was always the right size, as the victims were "stretched or lopped . . . to fit the furniture." Anthony Harris, *An EMU that Makes for Quarrelsome Bedmates*, *TIMES* (London), Jan. 29, 1997, at 29.

²⁰⁰ The American Law Institute's *Restatement (Second) of Torts* finds that "[i]n assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant." *RESTATEMENT (SECOND) OF TORTS* § 908(2) (1979).

²⁰¹ 509 U.S. 443 (1993).

²⁰² *Id.* at 462.

damages was "settled."²⁰³ Justice Sandra Day O'Connor questioned the use of wealth in setting punitive damages against corporations:

Courts long have recognized that jurors may view large corporations with great disfavor Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources; jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.²⁰⁴

In 1994, the Court vacated a multi-million dollar punitive damages award against a Japanese manufacturer because the state of Oregon did not permit, let alone mandate, a postverdict review of the award for excessiveness.²⁰⁵ The Court again acknowledged that the financial condition of Honda Motor was a proper consideration well established in the common law but expressed concern about "the presentation of evidence of the defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses."²⁰⁶ The *Honda* Court expressed concern about the vagueness of punitive damages jury instructions: "Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."²⁰⁷ In *BMW of North*

²⁰³ *TXO*, 509 U.S. at 462 n.28.

²⁰⁴ *Id.* at 490-91 (O'Connor, J., dissenting).

²⁰⁵ *Honda Motor Co. v. Oberg*, 512 U.S. 415, 426-27 (1994).

²⁰⁶ *Id.* at 432.

²⁰⁷ *See id.* ("[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."). As a result, the "frequency and size" of punitive damages awards continues to "skyrocket." *See also* CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* 90-93 (2002) (contending that jury instructions are inadequate in addressing punitive damages).

America, Inc. v. Gore,²⁰⁸ a five to four majority held a \$2 million punitive damages award to be excessive and violative of the Due Process Clause of the Fourteenth Amendment.²⁰⁹ While the Court did not directly address wealth, the use of ratios of punitive damages to compensatory damages undermined this factor.²¹⁰ The Court reiterated its concern about the dangers of wealth-based punishment: "The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business."²¹¹

In the *BMW* case, the Court identified three guideposts for reviewing courts to apply to determine whether a given punitive damages award is excessive: (1) the degree of reprehensibility, (2) the ratio between punitive award and plaintiff's actual harm, and (3) the legislative (criminal or regulatory) sanctions imposed for comparable misconduct.²¹² The Court's guidepost that punitive damages should be reasonably related to the compensatory damages is inconsistent with setting the size of the award on the wealth of the defendant.

The Supreme Court of the United States sharpened its attack on wealth-based punishment stating, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,²¹³ that a defendant's wealth alone could not justify a high-ratio punitive damages award.²¹⁴ The *State Farm* Court struck down a \$145 million punitive damages award that was equal to 145 times the compensatory damages as

²⁰⁸ 517 U.S. 559 (1996).

²⁰⁹ *Id.* at 568-85.

²¹⁰ *Id.* at 580-83.

²¹¹ *Id.* at 585.

²¹² *Id.* at 575-85.

²¹³ 538 U.S. 408 (2003).

²¹⁴ *Id.* at 427 ("While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*. Here the argument that [the defendant] will be punished in only the rare case, coupled with reference to its assets (which, of course, are what other insured parties in Utah and other States must rely upon for payment of claims) had little to do with the actual harm sustained by the [plaintiffs]. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

disproportionate to the wrong committed by the insurer.²¹⁵ The Court continued its attack on wealth, striking down a \$145 million punitive damages award because it was so excessive as to violate the insurer's rights under the Due Process Clause of the Fourteenth Amendment.²¹⁶

The *State Farm* Court formulated a presumptive mathematical test for reviewing the reasonableness of high-ratio punitive damages awards: "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, . . . or, in this case, of 145 to 1."²¹⁷ Justice Anthony Kennedy, writing for the majority, observed that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."²¹⁸ The ratio test of ten to one constrains the use of wealth especially where compensatory damages are slight.²¹⁹

The *State Farm* de facto cap is inconsistent with the states' common law and statutory treatment of wealth. While some academic commentators criticize the use of wealth to determine corporate punishment,²²⁰ most states permit the financial

²¹⁵ *State Farm*, 538 U.S. at 426, 429.

²¹⁶ *Id.* at 412, 429.

²¹⁷ *Id.* at 425 (internal citations omitted).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 415 (1989); see, e.g., Morris, *supra* note 129, at 1191 ("It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare."). Polinsky and Shavell argue that wealth should be stricken from the punitive damages formula in cases against corporations:

Should defendants with greater wealth pay higher punitive damages? Our main conclusion in this section is that, from the perspective of achieving proper deterrence, a defendant's wealth generally should not be considered when the defendant is a corporation. We also conclude that the wealth criterion frequently should not be considered when the defendant is an individual, although we discuss certain circumstances in which an individual's wealth should be taken into account in imposing punitive damages

. . . It follows from this basic conclusion that, if damages are raised above the magnitude given by our formula when corporations are relatively

circumstances of the defendant to be considered in the punitive damages calibration.²²¹ In California, the use of wealth is not only admissible, it is mandatory.²²² In future crimtorts litigation, it is unclear whether private attorneys general can introduce the financial condition of the defendant or the profits it derived from its illicit activities.

The *State Farm* Court employs arbitrary mathematical ratios as a guidepost of constitutionality. "[P]unitive 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."²²³ The Court noted that where compensatory damages were substantial, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."²²⁴ The California Superior Court for example,

wealthy, those corporations will be led to take excessive precautions, will undesirably curtail their activities, and will set prices above the proper level, chilling consumption of their products. In an extreme case, such corporations might even withdraw their products from the marketplace despite the value of the products to society. An additional point reinforces the conclusion that corporate wealth should not influence punitive damages: imposing punitive damages on the basis of corporate wealth effectively imposes a tax on corporate size and success, thereby discouraging growth and development. This effect can be important in industries in which liability costs are a significant component of total cost (such as in the pharmaceutical and general aviation aircraft industries).

A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 911-12 (1998); see also Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 824-25 (1989) (contending that wealth is an inappropriate factor in setting punishment for corporations). *But cf.* Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 459 (1998) (noting that while wealth is not generally a factor "when the aim of the penalty designer is to eliminate the defendant's prospect of gain, wealth is potentially relevant to the determination of an appropriate penalty").

²²¹ Rustad, *supra* note 56, at 1311-59 (documenting state tort reforms addressing the admissibility and discovery of wealth in punitive damages litigation).

²²² *Adams v. Murakami*, 813 P.2d 1348, 1356 (Cal. 1991).

²²³ *State Farm*, 538 U.S. at 419 (citing *BWM of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

²²⁴ *Id.* at 425.

ruled in *Boeken v. Philip Morris, Inc.*²²⁵ that the trial court must now evaluate the ratio of punitive damages to the injuries but consider only harms suffered by the individual plaintiff, not nonparties injured by the tobacco company.²²⁶ The *Williams* Court explained:

Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . . [y]et . . . a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.²²⁷

The next case in the constitutionalizing decisions will likely address whether wealth should be stricken from the punitive damages equation.

CONCLUSION

For much of modern American legal history, the remedy of punitive damages has served the vital social function of admonishing corporate wrongdoing when the criminal law was inadequate. The Supreme Court of the United States has diminished the effectiveness of the remedy by striking the interests of society from the equation through its individuated retributory justice view of punitive damages.²²⁸ Plaintiffs in post-*Williams* punitive damages litigation will need to demonstrate that a company's wrongdoing is reprehensible and directed to the individual

²²⁵ No. BC 226593, 2001 WL 1894403 (Cal. App. Dep't Super. Ct. Aug. 9, 2001).

²²⁶ *Id.* at *4.

²²⁷ *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007).

²²⁸ Punitive damages vindicating the larger societal interest are not a recent innovation. As the Supreme Court of Maine stated in 1869:

The right of the jury to give exemplary damages for injuries wantonly, recklessly, or maliciously inflicted, is as old as the right of trial by jury itself; and is not, as many seem to suppose, an innovation upon the rules of the common law. It was settled in England more than a century ago.

Goddard v. Grand Trunk Ry., 57 Me. 202, 218 (1869).

plaintiff to set the level of punitive damages. The Court warned that "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system . . . may threaten 'arbitrary punishments,' [that is], punishments that reflect not an 'application of law' but a 'decisionmaker's caprice.'"²²⁹

With this new rule of evidence, the Court marginalizes the social control functions that punitive damages have played since the late nineteenth century. In modern times, punitive damages have evolved into a purpose-driven remedy that could address egregious corporate misbehavior.²³⁰ The beauty of the punitive damages remedy is that it is flexible enough to confront corporate patterns and practices that harm many victims.

The crim tort focus is on the path of the law as it evolves to meet novel challenges created by economical, technological, and sociological developments. The social justice school takes a macroscopic view of torts by examining the social functions tort remedies play in constraining powerful actors.²³¹ Crim torts are instrumental in bringing about social justice because of the "evolving and open-ended nature of tort causes of action, a quality that permits tort plaintiffs to bring to light, and seek remedies for, new forms of domination and exploitation as they emerge."²³² So, what is to be done? The main task is for the Court to restore punitive damages' social control functions as quickly as possible. The only way out of the Groundhog Day time loop for the Supreme Court and me is for them to return punitive damages to the states.

²²⁹ *Williams*, 127 S. Ct. at 1062.

²³⁰ Punitive damages evolved in common law courts as part of the tort law. Traditionally, most of America's tort law has been common law, developed by courts through judicial decisions. In the past, judges perhaps realized that this power was delegated to them by the legislature. . . . For more than 200 years, courts developed the common law slowly and incrementally in accordance with state policy considerations.

Schwartz et al., *supra* note 16, at S34 (explaining how, beginning in the 1970s, courts expanded the "reach of product liability and punitive damages").

²³¹ John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1646-48 (2002) (explaining the regulatory effect of punitive damages).

²³² Goldberg, *supra* note 32, at 561 (citing Anita Bernstein, *Complaints*, 32 MCGEORGE L. REV. 37, 51-53 (2000)).