# TWO WORLDS COLLIDE: HOW THE SUPREME COURT'S RECENT PUNITIVE DAMAGES DECISIONS AFFECT CLASS ACTIONS

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## INTRODUCTION

If you took a poll on the leading civil justice reform issues—those issues most apt to raise the blood pressure on both sides of the debate—the top two likely would be punitive damages and class actions.[1] Perhaps not coincidentally, the last few years have seen congressional and judicial limits on both. In 2005, Congress passed the Class Action Fairness Act,[2] which was aimed at curbing "[a]buses in class actions."[3] And in the last few years, the Supreme Court has issued a cluster of decisions on punitive damages, each aimed at reigning in "punitive damages that 'run wild.'"[4]

The Court's latest pronouncement on punitive damages—its February 2007 decision in *Philip Morris USA v. Williams*—crossed the reform divide and has significant implications not only for how juries translate their outrage into dollar figures, but also for class certification procedures.[5] In *Philip Morris*, the Court vacated a $79.5 million punitive damages verdict against a tobacco company, holding that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."[6]

Professor Keith N. Hylton has suggested that *Philip Morris*'s conclusion has broader implications: the ruling "implies that class actions are

[1] For example, in the latest annual study by the U.S. Chamber Institute for Legal Reform, punitive damages ranked in the top two issues crying out for legal reform. U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, LAWSUIT CLIMATE 2008: RATING THE STATES 8 (2008), *available at* http://www.instituteforlegalreform.com/states/lawsuitclimate2008/pdf/LawsuitClimateReport.pdf. "Limitation of class action suits" also ranked in the top ten issues in need of reform. *Id.*

[2] Class Action Fairness Act of 2005, 28 U.S.C.A. §§ 1453, 1711–15 (West 2005).

[3] *See* S. REP. NO. 109-114, at 4–5 (2005), *reprinted in* 2005 U.S.C.C.A.N. (119 Stat.) 4, 5.

[4] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

[5] *See generally* Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007).

[6] *Id.* at 1063.

unconstitutional"[7] because class actions, by definition, involve "'persons who are not before the court.'"[8] This Article examines a narrower question: What does *Philip Morris* mean for punitive damages class actions?

Determining punitive damages claims as part of a class action has become common in mass tort and employment discrimination suits.[9] Punitive damages claims typically arise in the context of a damages class action under Federal Rule of Civil Procedure 23(b)(3).[10] To certify a damages class under Rule 23(b)(3),[11] a court must find that "the questions

[7] Keith N. Hylton, *Reflections on Remedies and* Philip Morris v. Williams, 27 REV. LITIG. 9, 29 (2007) [hereinafter Hylton, *Reflections on Remedies*].

[8] *Id.* (quoting *Philip Morris*, 127 S. Ct. at 1060.)

[9] *See, e.g.*, Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir.), *superseded by* 509 F.3d 1168 (9th Cir. 2007) (employment discrimination); *In re* Methyl Tertiary Butyl Ether Prods., No. 1:00-1898, 2007 WL 1791258 (S.D.N.Y. June 15, 2007) (mass tort).

[10] The Supreme Court has noted a "substantial possibility" that actions seeking monetary relief "can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not." Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994). The Court, however, has not resolved this question, and Rule 23's advisory committee notes state that damages can be sought in an injunctive class under Rule 23(b)(2) so long as the damages are "incidental" to the requested injunctive relief. FED. R. CIV. P. 23 advisory committee's note. In other words, Rule 23(b)(2) does not authorize a class action where the relief sought "relates . . . predominantly to money damages." *Id.* The circuits are split on how to determine whether monetary relief predominates in a Rule 23(b)(2) class action. The Fifth Circuit has adopted an "incidental damages" test, which allows certification under Rule 23(b)(2) only where the monetary relief will "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998). Thus, under the Fifth Circuit's test, certification under Rule 23(b)(2) is improper where monetary relief does not flow from a class-wide determination of liability, but instead depends on the varying circumstances of each class member's case. *Id.* The Sixth, Seventh and Eleventh Circuits expressly have adopted the Fifth Circuit's approach. *See* Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 649–50 (6th Cir. 2006), *disapproved on other grounds*, Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006); Cooper v. S. Co., 390 F.3d 695, 720 (11th Cir. 2004); Lemon v. Int'l Union of Operating Eng'rs., 216 F.3d 577, 580–81 (7th Cir. 2000); *see also* Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 330 n.25 (4th Cir. 2006). The Ninth and Second Circuits, however, have adopted an "ad hoc balancing" test, which focuses primarily on the plaintiff's intent in bringing suit. *See, e.g.*, Molski v. Gleich, 318 F.3d 937, 950 (9th Cir. 2003); Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001).

[11] In addition, all class actions must satisfy the four threshold requirements of Federal Rule of Civil Procedure 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. FED. R. CIV. P. 23(a). Most state systems employ similar requirements for class certification. 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 13:1 (4th ed. 2002) (noting that Federal Rule of Civil Procedure 23 is the "most prevalent model" for

of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[12] In short, this analysis weighs individual issues against common issues: do the claims of the proposed class involve facts or legal issues unique to each class member, or can the issues be resolved on a class-wide basis?

For the most part, judicial treatment of punitive damages claims in class actions—which has been strongly influenced by deterrence theory—has been fundamentally flawed by the failure to recognize that, as a matter of due process, punitive damages claims require an individualized inquiry where class members allege disparate harms.[13] If injuries—or compensatory damages—vary among class members, punitive damages cannot be determined on a class-wide basis.[14] But does this mean the end of punitive damages class actions, as some defense lawyers have argued?[15]

Part I of this Article examines the purported rationales for class actions and punitive damages. Underlying both is an economic deterrence paradigm—the idea that wrongdoers should bear the full cost of harm that their conduct has caused. In this respect, punitive damages and class actions are intended to remedy an under-litigation problem: many of those who are injured do not seek redress, and defendants thus do not internalize the full cost of their tortious conduct.

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state class action rules). Notably, the majority of states follow the federal predominance and commonality requirements. *See id.* §§ 13:9, 13:10, 13:16 (noting that although specific language varies, state class action rules require commonality).

[12] FED. R. CIV. P. 23(b)(3).

[13] *See* discussion *infra* Part IV.

[14] *See* discussion *infra* Part IV.

[15] Jim Beck & Mark Herrmann, Williams v. PM *and the Passing of Punitive Damages Class Actions*, DRUG & DEVICE LAW, Feb. 27, 2007, http://druganddevicelaw.blogspot.com/2007/02/williams-v-pm-and-passing-of-punitive.html. Jim Beck and Mark Herrmann argue that *Philip Morris* means the end of any punitive damages claim being assessed in class action litigation. *Id.* Hanging on the Court's language regarding "non-parties," Beck and Herrmann suggest that "aggregate punitive awards (including those encompassing 'nonparties' who are 'directly represent[ed] [sic] by parties) are necessarily 'standardless' and 'speculative' in violation of Due Process." *Id.* Such claims exaggerate the Court's holding in *Philip Morris.* As explained *infra* Part III, punitive damages may be awarded on an aggregate basis where compensatory damages can be determined without any individualized inquiry, such as a consumer class action.

Part II provides an overview of the Supreme Court's punitive damages jurisprudence with an emphasis on the due process doctrines relevant to class actions. This Part notes the Court's shift from an approach that places the defendant's conduct and widespread consequences of such conduct paramount to a more disciplined framework that focuses on the harm caused to the plaintiff in the specific lawsuit.

Part III examines the impact of *Philip Morris* on punitive damages claims in class actions. This Part argues that where injuries are not uniform among class members, punitive damages cannot be calculated in the aggregate, but rather must be assessed on an individual basis in relation to each class member's compensatory damages.

Part IV identifies two areas of class actions affected by these due process requirements: (1) whether punitive damages should be treated as an individual issue at the class certification stage, and (2) whether due process prohibits the calculation of an aggregate amount of punitive damages prior to the determination of compensatory damages. This Part explains the class action framework of both issues and examines current case law addressing these questions.

Applying the Supreme Court's due process limits on punitive damages, Part V concludes that the amount of a punitive damages award is constitutionally dependent on the amount of harm to the plaintiff, and therefore, cannot be tried in a vacuum whether by a lump sum approach or a multiplier.

Finally, Part VI argues that *Philip Morris* illustrates the Court's rejection of deterrence theory, and adoption of a private law theory, at least in the context of punitive damages. This Part argues that punitive damages class actions fail to achieve efficient deterrence, and concludes that where harm to the class is individualized, punitive damages cannot be pursued as a class-wide remedy.

## I. THE DETERRENCE JUSTIFICATION FOR CLASS ACTIONS AND PUNITIVE DAMAGES

Not all legal systems allow class actions[16] or permit punitive damages.[17] Indeed, historically, our system followed a rather simple litigation model:

[16] *E.g.*, Linda Mullenix, *Lessons From Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 7 (2001) (noting that most civil law countries as well as England do not have class actions); *see also* Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27

one plaintiff sued one defendant for injuries personal to the plaintiff.[18] "In this one-on-one model, the focus is upon the injurer's act. . . . [I]t is on the parties and their moral relationship to one another . . . ."[19] But the economy industrialized, the distance between manufacturer and consumer grew, and the "mass tort" emerged,[20] where a single product or single catastrophic event could injure a large group of similarly situated individuals.

In this context, scholars advocated a new paradigm: the use of the litigation system to impose damages equal to the aggregate harm caused by

NW. J. INT'L L. & BUS. 301, 303 (2007) (noting Switzerland does not have an American-style class action procedure); Louis Degos & Geoffrey V. Morson, *The Reforms of Class Action Laws in Europe Are as Varied as the Nations Themselves*, 29 L.A. LAW. 32 (Nov. 2006) (summarizing group litigation procedures in various European countries); Emmanuèle Lutfalla & Veronica Magnier, *French Legal Reform: What Is At Stake If Class Actions Are Introduced In France*, 73 DEF. COUNS. J. 301, 301 (2006) (discussing proposed class action reform in France).

[17] For example, punitive damages are not available in most civil law countries. *E.g.*, John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507, 510 (2007) (noting that punitive damages are not available in most civil law countries and discussing possible reforms); Mullenix, *supra* note 16, at 7 (noting that most civil law countries do not allow punitive damages claims). Even those other common law countries that allow punitive damages provide greater restrictions on the recovery of punitive damages than the United States. *See* LINDA L. SCHLUETER, 2 PUNITIVE DAMAGES § 22.1 (5th ed. 2005 & Supp. 2006) (discussing availability of punitive damages in Australia, Canada, Great Britain, India, and New Zealand). Indeed, even here in the United States, several states prohibit punitive damages. *See* N.H. REV. STAT. ANN. § 507:16 (1997); Miller v. Kingsley, 230 N.W.2d 472, 474 (Neb. 1975) (noting that Nebraska generally bars punitive damages); Murray v. Dev. Servs. of Sullivan County, Inc., 818 A.2d 302, 308 (N.H. 2003) (noting that New Hampshire allows "enhanced damages" but these are not designed to punish the defendant).

[18] *See* Thomas C. Galligan, *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117, 125 (2003) [hereinafter Galligan, *Disaggregating More-Than-Whole Damages*]; John C. P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 HARV. J.L. & PUB. POL'Y 3, 14 (2004) (describing private law origins of litigation system).

[19] Thomas C. Galligan, *The Risks of and Reactions to Underdeterrence in Torts*, 70 MO. L. REV. 691, 699 (2005) [hereinafter Galligan, *The Risks of Underdeterrence*].

[20] *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1356 (1995) (noting "[m]ass tort actions matured during the 1980s"); DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 2 (RAND Institute for Civil Justice 2000) ("The 1980s saw the rise of a new form of litigation, the mass-tort suit. Consumers of drugs and medical devices, and workers and others exposed to toxic substances, sued manufacturers for injuries allegedly associated with these products."); *see also* John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L. J. 513, 521 (2003) (noting that "modern realities" such as industrialization gave rise to public tort theory).

the defendant's conduct.[21] And so began the modern class action[22] and economic approach to punitive damages.[23]

## *A. Punitive Damages and Deterrence*

Although the Supreme Court repeatedly has identified "deterrence" as a rationale[24] for punitive damages, the Court has been less than clear on

[21] *See* Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1146–49 (1989); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 32–33 (1982); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Torts Cases*, 115 HARV. L. REV. 831, 853 (2002). Professors Rustad and Koeing, for example, describe the rise of punitive damages awards at the beginning of the twentieth century as "one of the few effective social control devices used to patrol large powerful interests unimpeded the criminal law." Michael Rustad & Thomas Koeing, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1296 (1993). Likewise, "[i]n our complex modern economic system where a single harmful act may result in damages to a great many people there is a particular need for the representative action . . . ." Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir. 1965).

[22] *See* discussion *infra* Part I.B.

[23] *See* discussion *infra* Part I.A.

[24] The Supreme Court usually couples the deterrence objective with a punishment objective. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1062 (2007) ("This Court has long made clear that '[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.'") (citations omitted); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence."). Several scholars have argued that the punishment aspect of punitive damages should be separated from the deterrence function. *E.g.*, Ciraolo v. City of New York, 216 F.3d 236, 245–46 (2d Cir. 2000) (Calabresi, J., concurring) (recognizing deterrence and punishment as conceptually distinct goals); Galligan, *Disaggregating More-Than-Whole Damages*, *supra* note 18, at 128; Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 362–63 (2003). This Article similarly treats punishment and deterrence as "two separate and distinct goals." *Id.* at 363; *see also Ciraolo*, 216 F.3d at 246 (arguing that the system should be reformed to allow separate awards for punitive damages that serve a punishment function and "socially compensatory damages," which force the defendant to realize the full costs of his harmful conduct on society as a whole). Because the deterrence goals of punitive damages echo the purposes of the class action, this Article focuses on the efficiency-deterrence aspects alone. For a discussion of the punishment rationale for punitive damages, see Thomas C. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages As Punishment for Individual, Private Wrong*, 87 MINN. L. REV. 583, 603–09 (2003). Professor Colby explains that "punitive

whether its concept of deterrence embraces a moral theory of specific deterrence, or an economic theory of general deterrence.[25] In simplest terms, "specific deterrence" seeks to deter the defendant in that suit from repeating a wrongful act through the imposition of punitive damages.[26] Scholars, however, generally view punitive damages as serving a general or economic deterrence function,[27] where the prospect of punitive damages will deter others who might otherwise engage in the same type of conduct at issue in the lawsuit.[28]

While scholars dispute the best way to achieve general deterrence through punitive damages,[29] "many of the disputants in the debate over punitive damages seem to agree with the premise that the test of adequacy for a system of punitive damages is whether it is an effective deterrent."[30] Yet, deterrence is an important goal of other components of the law, such as ordinary compensatory damages as well as the criminal system.[31] Thus, for

damages, even when regarded as punishment, were consciously limited to the amount necessary to punish the defendant for the wrong done, and the harm caused, to the individual plaintiff only." *Id.* at 628. Colby's explanation of punitive damages as punishment for private wrong likewise supports the rejection of aggregate punitive damages awards. Apart from punishment and deterrence, scholars have advocated other purposes for punitive damages. *E.g.*, Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 974 (2007) (arguing punitive damages serve "private retribution" function); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005) (arguing punitive damages serve private recourse function).

[25] *See* discussion *infra* Part II.

[26] *See* W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (noting that a purpose of punitive damages is to "teach[] the defendant not to do it again").

[27] *See generally* Sebok, *supra* note 24, at 977. For a concise overview of the scholarship addressing the rise of efficient deterrence theory, see Galligan, *Disaggregating More-Than-Whole Damages*, *supra* note 18, at 128–46.

[28] *E.g.*, A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 877 (1998).

[29] *Compare* Polinsky & Shavell, *supra* note 28, at 874 (arguing "punitive damages ordinarily should be awarded if, and only if, an injurer has a chance of escaping liability for the harm he causes"), *with* Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 456 (1998) (arguing punitive damages should disgorge profit from defendant's tortious conduct) [hereinafter Hylton, *Punitive Damages and Economic Theory*].

[30] Sebok, *supra* note 24, at 982. Professor Sebok himself rejects the efficient-deterrence function of punitive damages and offers a private retribution rationale. *See id.*

[31] *See* Gary T. Schwartz, *Mass Torts and Punitive Damages: A Comment*, 39 VILL. L. REV. 415, 418 (1994) [hereinafter Schwartz, *Mass Torts and Punitive Damages*]; s*ee also* sources cited *infra* note 159 (discussing deterrent effect of compensatory damages).

a deterrence rationale to make sense, punitive damages must fill some gap in the deterrent functions of the ordinary tort and criminal systems.[32]

Noted scholars have argued that this gap occurs through under-enforcement of tort claims: not enough people bring suit for compensatory damages to provide deterrence.[33] Thus, for example, if "only one victim in three ends up bringing a tort claim, then it might well make sense to enable that victim to recover punitive damages equal to twice the amount of compensatory damages."[34] In short, the theory views the plaintiff in a punitive damages case "as a proxy for those who are damaged but who do not recover."[35]

Accordingly, this theory of punitive damages depends on the idea that not all injured persons will sue, and therefore, aggregate awards of compensatory damages do not reflect the full costs of harm caused by the defendant.[36] Theories on why injured people do not sue abound.[37] Judge Guido Calabresi attributes it to a discomfort or lack of familiarity with the legal system.[38] Professors Polinsky and Shavell, on the other hand, posit that injured parties fail to sue because of detection problems: victims often have difficulty detecting the wrongdoer's identity or connection to the

[32] *See* Schwartz, *Mass Torts and Punitive Damages*, *supra* note 31, at 418.

[33] *See*, *e.g.*, Hylton, *Reflections on Remedies*, *supra* note 7, at 31 n.52 (noting 1991 New England Journal of Medicine study finding that "roughly one out of seven patients injured by medical malpractice caused by negligence brings suit").

[34] Schwartz, *Mass Torts and Punitive Damages*, *supra* note 31, at 418.

[35] Galligan, *Disaggregating More-Than-Whole Damages*, *supra* note 18, at 131.

[36] *E.g.*, *Ciraolo*, 216 F.3d at 243 (Calabresi, J., concurring); Galligan, *The Risks of Underdeterrence*, *supra* note 19, at 703; George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 831 (1995) (noting that "[t]he only plausible defense of punitive damages on deterrence grounds is to restore aggregate damages to a level equal to that which is fully compensatory").

[37] In a classic article, Professors Felstiner, Abel, and Sarat define a three stage response to injury. *See* William L.F. Felstiner, et al., *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 LAW & SOC'Y. REV. 631, 631–54 (1980–81). The first stage, "naming," involved defining a particular event as injurious. *Id.* at 632–33. The second stage, "blaming," is the transformation of a perceived injurious experience into a grievance. *Id.* at 635. "This occurs when a person attributes an injury to the fault of another individual or social entity." *Id.* The final stage, "claming," occurs "when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy." *Id.*

[38] *See Ciraolo*, 216 F.3d at 242–50 (Calabresi, J., concurring).

injury.[39] Alternatively, the expense of bringing suit may exceed the potential recovery.[40] Finally, Dean Galligan notes a more pragmatic reason for the gap: "[Q]uite simply, some people may prefer to do other things than sue, such as go to the movies, watch TV, or play video games."[41]

Deterrence theory, then, views punitive damages as making up for this shortfall. Because compensatory damages fail to measure the "total harm"[42] caused by the defendant's conduct, punitive damages are necessary to make the injurer bear the full costs of its harmful acts.[43] "The plaintiff in the

[39] Polinsky & Shavell, *supra* note 28, at 888; *see also* Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996) (noting that "[w]hen a tortious act is concealable, a judgment equal to the harm done by the act will underdeter"); Galligan, *Disaggregating More-Than-Whole Damages*, *supra* note 18, at 132 (considering difficulty of detection to have "persuasive appeal and intuitive application" in fraud cases). Professor W. Kip Viscusi questions the relevance of the concealment argument when applied to corporate conduct: "McDonald's, for example, could not disavow that it has sold the coffee that spilled on the unfortunate woman's lap." W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L. J. 285, 311–13 (1998). Professor Viscusi further criticizes the detection rationale, at least as applied to corporate actors, as failing to recognize that the tort system is not the only institutional actor responsible for deterring harmful conduct. *Id.* at 312–13. Specifically, Viscusi points to regulatory and market incentives that promote deterrence of harm. *Id.* at 315–20; *see also* Lisa Litwiller, *From* Exxon *to* Engle*: The Futility of Assessing Punitive Damages as Against Corporate Entities*, 57 RUTGERS L. REV. 301 (2004) (contending that punitive damages imposed against corporations do not serve deterrence or punishment goals); *accord* Priest, *supra* note 36, at 831–32 (arguing that punitive damages do not have a deterrent effect on corporate actors).

[40] *See* Galligan, *Disaggregating More-Than-Whole Damages*, *supra* note 18, at 131; *accord* Sebok, *supra* note 24, at 981; *see also Ciraolo*, 216 F.3d at 243–44 (Calabresi, J., concurring) (noting victims may not sue because "costs of doing so—including the time, efforts and stress associated with bringing a lawsuit—outweigh the compensation she can expect to receive").

[41] Galligan, *The Risks of Underdeterrence*, *supra* note 19, at 703. Professor Sebok further notes that some injured parties simply may not be "particularly litigious," or do not sue because they suffer from "'diffuse' social harms," which he defines as harm to a group without any particular individual suffering a compensable tort injury. Sebok, *supra* note 24, at 981.

[42] Professor Thomas Colby coined the term "total harm damages" to describe the "practice of punishing the defendant, in a single case brought by a single victim, for the full scope of societal harm caused by its entire course of wrongful conduct." Colby, *supra* note 24, at 587.

[43] *See* Galligan, *Disaggregating More-Than-Whole Damages*, *supra* note 18, at 128–32 (discussing deterrence rationale for punitive damages); *see also Ciraolo*, 216 F.3d at 243–44 (Calabresi, J., concurring) (explaining deterrent purpose of punitive damages); Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 11–12 (1990) ("An award in excess of compensatory damages may efficiently deter wherever compensatories, coupled with whatever other criminal or civil fines are applicable, understate the costs the relevant activity imposes upon society.").

optimal deterrence case may serve as a proxy for those who are damaged but who do not recover."[44]

Two different versions of deterrence theory dominate with respect to punitive damages:[45] a cost internalization theory[46] and a gain elimination theory.[47] Professors Polinsky and Shavell urge a cost internalization approach to punitive damages.[48] Under this theory, a punitive damages award is imposed in order to make up for the number of times that a tortfeasor escapes liability.[49] Thus, if the tortfeasor causes $100,000 of harm, but will be found liable in only one case out of four, the total damages—under the Polinsky-Shavell formula—would be $400,000 ($100,000 in compensatory damages and $300,000 in punitive damages).[50] The additional $300,000 is meant to internalize the total harm caused by the tortfeasor. Thus, under a cost-internalization approach, "[p]unitive damages can ensure that a wrongdoer bears all the costs of its action, and is thus appropriately deterred from causing harm, in those categories of cases

[44] Galligan, *Disaggregating More-Than-Whole Damages*, *supra* note 18, at 131.

[45] *See generally* Hylton, *Reflections on Remedies*, *supra* note 7, at 14 (describing two approaches). For a concise description of these two theories, see Brief of Professors Keith N. Hylton, et al. as Amicus Curiae in Support of Respondents at 10–14, Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007) (No. 05-1256), 2006 WL 2688793.

[46] *E.g.*, Galligan, *Disaggregating More-Than-Whole Damages*, *supra* note 18, at 128–46; Polinsky & Shavell, *supra* note 28, at 877–904; Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 135 (1982).

[47] *E.g.*, Hylton, *Reflections on Remedies*, *supra* note 7, at 14–15.

[48] Polinsky & Shavell, *supra* note 28, at 877–904. The description here admittedly does not capture many of the nuances surrounding these deterrence theories. Professors Polinsky and Shavell, for example, use a risk-detection approach. *Id.* at 874. In their view, punitive damages should be awarded only when there is a significant likelihood that a defendant's tortious activity will remain undetected. *Id.* In other words, "if a defendant will definitely be found liable for the harm for which he is responsible," punitive damages should not be imposed under the Polinsky-Shavell theory. *Id.* at 878. They suggest a formula, which parallels the famous *Hand* test: "[T]he total damages imposed on an injurer should equal the harm multiplied by the reciprocal of the probability that the injurer will be found liable when he ought to be." *Id.* at 889; *see also id.* at 889 n.48 (stating theory in a mathematical formula); *Ciraolo*, 216 F.3d at 244 (Calabresi, J., concurring) (describing the Polinsky-Shavell test as "total damages should equal the amount of loss in a particular case, multiplied by the inverse of the probability that the injurer will be found liable").

[49] *See* Polinsky & Shavell, *supra* note 28, at 874.

[50] *Id.* at 889–90.

in which compensatory damages alone result in systematic underassessment of costs, and hence in systematic underdeterrence."[51]

Professor Keith Hylton takes a different approach, advocating a "gain elimination" deterrence theory.[52] Gain elimination seeks to strip the entire profit from the tortfeasor's activity—a theory analogous to disgorgement. Essentially, this theory views punitive damages as a complete deterrence method that seeks to eliminate the defendant's conduct by making it unprofitable.[53] Professor Hylton argues that gain elimination should be applied to punitive damages awards because such cases always involve socially undesirable—or in punitive damages parlance, "reprehensible"—conduct.[54]

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[51] *Ciraolo*, 216 F.3d at 243 (Calabresi, J., concurring). Judge Calabresi explained these basic principles of economic deterrence theory:

> A rational actor will undertake an activity when the benefits of doing so exceed the costs. In doing so, it will make some sort of formal or informal, spoken or unspoken, cost-benefit analysis, based on the information it possesses, to determine if a particular activity is worth its price. Such an analysis cannot be even roughly accurate unless approximately all the costs of the activity are borne by the actor. When the perceived benefits of an activity accrue to the actor, but some significant part of the costs is borne by others, the cost-benefit analysis will necessarily be distorted. In such a case, the actor will have an incentive to undertake activities whose social costs exceed their social benefits. In other words, the actor will not be adequately deterred from undesirable activities. And society will suffer.

*Id.*

[52] Hylton, *Reflections on Remedies*, *supra* note 7, at 15. *See generally* Hylton, *Punitive Damages and Economic Theory*, *supra* note 29.

[53] A group of noted law and economics professors illustrate the difference between the two theories in their amicus brief in *Philip Morris*: "If the offender gains $100 from committing an offensive act that imposes a $10 loss on his victim, the cost internalization approach would require a penalty of $10, while the gain elimination approach would require a minimum penalty of $100." Brief for Professors Keith N. Hylton et al. as Amicus Curiae in Support of Respondents at 12, Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007) (No. 05-1256), 2006 WL 2688793; s*ee also Ciraolo*, 216 F.3d at 246 n.8 (Calabresi, J., concurring) (recognizing that complete deterrence may best reflect function of punitive damages in certain situations). Judge Calabresi, however, suggests that where punitive damages serve a complete deterrence function, criminal protections should apply. *Id.*

[54] Hylton, *Reflections on Remedies*, *supra* note 7, at 14–15; *see also* Colby, *supra* note 24, at 611–12 (recognizing inconsistency of cost-internalization theory with reprehensibility requirement); Polinsky & Shavell, *supra* note 28, at 918 (recognizing that "when the defendant's gain is socially illicit . . . extracting the defendant's gain is desirable"). By contrast, Professor Hylton reserves cost-internalization deterrence for compensatory damages alone: in his view, the

From a deterrence perspective, a punitive damages award thus focuses on the defendant's conduct, not the plaintiff's injury. Because the goal is to deter others, the assessment of punitive damages focuses on whether the defendant's conduct warrants legal sanction.

### *B. Class Actions and Deterrence*

Deterrence theory similarly frames the damages class action.[55] Like punitive damages,[56] deterrence theory in the class action context relies on an under-litigation assumption:[57]

> [A]ssume A causes $1,000 worth of damage to 100 people. If there is no liability A can ignore $100,000 in injury costs that he has imposed on others. Alternatively, if for personal reasons, only 40 injured people sue in one-on-one suits and recover a total of $40,000, then A could effectively ignore $60,000 (60 unfiled claims) in costs. However, if the 60 unfiled claims could proceed as a class,

cost internalization approach should be applied "where the defendant's conduct is in general socially desirable, but it nevertheless imposes losses on victims." Hylton, *Reflections on Remedies*, *supra* note 7, at 15. In the *Philip Morris* amicus brief, this distinction was illustrated with the following example:

> [A] railroad may cause enormous damage to nearby farmers by spitting sparks onto their fields and thereby igniting their crops. But society benefits greatly from railroads and has no interest in setting penalties that entirely eliminate the profits from rail service. Cost internalizing penalties, on the other hand, will provide railroads with incentives to find the optimal level of activity—the level at which the gains to society are at a maximum.

Brief of Professors Keith N. Hylton, et al. as Amicus Curiae in Support of Respondents at 13–14, Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007) (No. 05-1256), 2006 WL 2688793.

[55] *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 232 (Yale 1987) (discussing Harry Kalven, Jr. & Maurice Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941)). The modern deterrence conception of the class action originated in the 1941 scholarship of Professors Kalven and Rosenfeld. *See id.*

[56] *See supra* Part I.A.

[57] Galligan, *The Risks of Underdeterrence*, *supra* note 19, at 704; Harry Kalven, Jr. & Maurice Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686–88 (1941).

> or part of a class, then liability (of $60,000) would result in efficient deterrence ($40,000 + $60,000 = $100,000).[58]

Reasons for the failure to sue mirror the punitive damages rationales, such as the lack of knowledge of the legal system[59] or negative value of individual claims.[60]

Thus, like punitive damages, class actions are premised on the idea that defendants will face less than full liability—and less than optimal deterrence—if all injured parties do not sue.[61] "This concept . . . has

[58] Galligan, *The Risks of Underdeterrence*, *supra* note 19, at 704.

[59] Kalven & Rosenfeld, *supra* note 57, at 686.

[60] *E.g.*, HENSLER ET AL., *supra* note 20, 69–71; 5 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.02 (3d ed. 2005); *see also* THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 13 (Federal Judicial Center 1996), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$File/rule23.pdf. The FJC Study found that "the median level of the average recovery per class member ranged from $315 to $528." *Id.* The negative value justification can be traced back to Kalven and Rosenfeld. Kalven & Rosenfeld, *supra* note 57, at 686.

[61] *E.g.*, Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUDIES 47, 49 (1975) ("A key feature of the class action is that it holds the potential for making feasible the compensation of the victims of mass wrongs even though each victim has a loss that is too small to justify an individual action."); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 139 (2006) (asserting that "the primary goal in small-claims class actions is deterrence"); Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 137 (Summer 2001) (noting function of damages class actions is to "deter . . . injurious behavior"). Of course, like punitive damages, additional rationales such as compensation have been used to justify class actions. *E.g.*, Gilles & Friedman, *supra* note 61, at 108–31 (describing compensation rationale for class actions). Indeed, the deterrent function of punitive damages has been under attack for some time. *See* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 74 (arguing that "the class action was never designed to serve as a free-standing legal device for the purpose of 'doing justice,' nor is it a mechanism intended to serve as a roving policeman of corporate misdeeds . . . ."). Professor John C. Coffee, for example, argues that compensation appears to be the primary goal of mass tort class actions. Coffee, *supra* note 20, at 1355. For a thorough examination of the back and forth between compensation rationales and deterrence rationales, see Gilles & Friedman, *supra* note 61. Gilles & Friedman argue that current criticisms of the class action device are based on a compensation rationale and they urge a return to a deterrence-rationale for class actions. *See id.*

become the leading justification for the modern class action."[62] Indeed, the Supreme Court explicitly has recognized the deterrent function of the class action device.[63] In *Amchem Products, Inc. v. Windsor*, for example, the Court stated that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[64] Thus deterrence theory has been embraced by both courts and scholars as a justification—if not *the* justification—for the class action.

## II. THE SUPREME COURT, DETERRENCE, AND PUNITIVE DAMAGES

In the context of punitive damages, the Supreme Court has not consistently articulated the deterrence principles at play, and its approach has evolved over time. Hints of economic deterrence theory can be seen in the Court's earliest punitive damages opinions decided before the Court acknowledged any constitutional limits on punitive damages. In *City of Newport v. Fact Concerts, Inc.*, the Court expressed both a specific and general deterrent function of punitive damages, explaining that the purpose of punitive damages was to "to deter [the defendant] *and others* from similar . . . conduct."[65] After the Court recognized both procedural and

[62] YEAZELL, *supra* note 55, at 232.

[63] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (citation omitted); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (noting that class action permits "the plaintiffs to pool claims which would be uneconomical to litigate individually").

[64] *Amchem*, 521 U.S. at 617.

[65] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981) (emphasis added); *accord* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306 n.9 (1986) ("The purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior."). Even in *City of Newport*, however, the Court equally focused on the impact of a punitive damages award on the particular defendant:

> Moreover, there is available a more effective means of deterrence. By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office.

substantive limits on punitive damages, deterrence rationales became even more prominent. In *Pacific Mutual Life Insurance Co. v. Haslip*,[66] for example, the Court endorsed a punitive damages standard that considered the "harm likely to result from the defendant's conduct as well as the harm that actually has occurred."[67] A few years later in *TXO Production Corp. v. Alliance Resources Corp.*,[68] the Court held that a punitive damages award can appropriately consider "the possible harm to other victims that might have resulted if similar future behavior were not deterred."[69]

In recent years, however, the Court has retreated from that approach and tied the amount of a punitive damages award to the plaintiff's harm, and in practical terms, to the amount of compensatory damages.[70] This focus implicitly rejects economic deterrence theory and signals that the Court's ambiguous references to deterrence connote specific deterrence. Four recent decisions illustrate this retreat.

### *A.* BMW of North America, Inc. v. Gore

In 1996, the Court issued its landmark punitive damages decision, *BMW of North America, Inc. v. Gore*.[71] In *BMW*, the purchaser of a new BMW brought a fraud action against the distributor alleging that the distributor failed to disclose that the car had been repainted to cover exposure to acid rain during transit from Germany.[72] The jury found for the plaintiff, awarding $4,000 in compensatory damages and $4 million in punitive damages.[73] On appeal, the Alabama Supreme Court reduced the punitive damages award to $2 million.[74] The court found that the jury improperly

453 U.S. at 269–70.

[66] 499 U.S. 1 (1991).

[67] *Id.* at 21.

[68] 509 U.S. 443 (1993).

[69] *Id.* at 460.

[70] *See* discussion *infra* Part II.A–D.

[71] 517 U.S. 559 (1996).

[72] *Id.* at 563.

[73] *Id.* at 565.

[74] *Id.* at 567. In other contexts, I have described and summarized the Supreme Court's punitive damages jurisprudence. *See generally* Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* State Farm, 6 U. PA. J. CONST. L. 423, 430–66 (2004); Sheila B. Scheuerman & Anthony J. Franze, *Instructing Juries on*

calculated the $4 million punitive award by multiplying the plaintiff's compensatory damages by the number of similar sales in other jurisdictions.[75]

In a landmark decision, the United States Supreme Court reversed, holding that the $2 million punitive damages award was constitutionally excessive and violated due process.[76] The Court established three guideposts to determine whether a punitive damages award violates due process: (1) the reprehensibility of the defendant's conduct, (2) the relationship between the harm or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages award and comparable civil penalties for similar conduct.[77]

The Court characterized reprehensibility as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award."[78] This factor, the Court explained, examines the seriousness of the defendant's conduct.[79] The Court found that it is appropriate to consider whether the defendant "has repeatedly engaged in prohibited conduct" because a recidivist may be punished more severely than a first time offender.[80]

Explaining the second guidepost, the Court noted that the "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff."[81] In practical terms, the Court explained that "harm to the plaintiff" can be measured, in most cases,[82] by looking at the amount of compensatory damages.[83]

*Punitive Damages: Due Process Revisited After* Philip Morris v. Williams, 10 U. PA. J. CONST. L. 1147 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1071073.

[75] *BMW*, 517 U.S. at 567.

[76] *Id.* at 574–75.

[77] *Id.* at 575.

[78] *Id.*

[79] *Id.* at 575–80.

[80] *Id.* at 576.

[81] *Id.* at 580.

[82] *Id.* at 581 (noting that in some cases the inquiry could include the "harm likely to result from the defendant's conduct as well as the harm that actually has occurred.").

[83] *Id.* at 580 (stating that "exemplary damages must bear a 'reasonable relationship' to compensatory damages").

Still, *BMW* left open a door for aggregated punitive damages awards. *BMW* noted that no mathematical formula—"even one that compares actual *and potential* damages to the punitive award"[84]—could denote the limits of due process.[85] In addition, the Court suggested that, in multi-plaintiff cases, the proper comparison looked at the total damages of all the victims.[86] Moreover, the Court seemed to accept some general deterrence-theory principles, specifically the idea that the difficulty of detecting a wrongdoer's actions would support a higher punitive damages award.[87] Indeed, in his concurring opinion, Justice Breyer appeared open to an economic-deterrence theory[88] of punitive damages:

> Dr. Gore did argue to the jury an economic theory based on the need to offset the totality of the harm that the defendant's conduct caused. Some theory of that general kind might have provided a significant constraint on arbitrary awards (at least where confined to the relevant harm-causing conduct) . . . . My understanding of the intuitive essence of those theories, which I put in crude form (leaving out various qualifications), is that they could permit juries to calculate punitive damages by making a rough estimate of global harm, dividing that estimate by a similarly rough estimate of the number of successful lawsuits that would likely be brought, and adding generous attorney's fees and other costs. Smaller damages would not sufficiently discourage firms from engaging in the harmful conduct, while larger damages would "over-deter" by

[84] *Id.* at 582 (citing TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993)). In *TXO Prod. Corp.*, a plurality of the Court had approved a punitive award 526 times the amount of compensatory damages based, in part, on "the possible harm to other victims that might have resulted if similar future behavior were not deterred." 509 U.S. at 460.

[85] *BMW*, 517 U.S. at 582–83.

[86] *See id.* at 582 n.35. In discussing the ratio of the plaintiff's $2 million punitive damages award to the $4000 compensatory damages award, the Court noted that "[e]ven assuming each repainted BMW suffers a diminution in value of approximately $4,000, the award is 35 times greater than the total damages of all 14 Alabama consumers who purchased repainted BMW's." *Id.*

[87] *Id.* at 582 ("A higher ratio [of punitive to compensatory damages] may also be justified in cases in which the injury is hard to detect . . . .").

[88] *See supra* Part I.A.

> leading potential defendants to spend more to prevent the activity that causes the economic harm, say, through employee training, than the cost of the harm itself . . . .
>
> . . . .
>
> . . . The record before us, however, contains nothing suggesting that the Alabama Supreme Court, when determining the allowable award, applied *any* "economic" theory that might explain the $2 million recovery . . . . Therefore, reference to a constraining "economic" theory, which might have counseled more deferential review by this Court, is lacking in this case.[89]

Thus, *BMW* suggested a tacit approval of punitive damages based on harm to others. Indeed, Elizabeth Cabraser, a noted plaintiff's lawyer, has argued that "*BMW* facilitates, rather than precludes, classwide assessment of punitive damages."[90] In her view, *BMW* implied a due process limit on the total amount of punitive damages awarded against a defendant for a single course of conduct.[91] Accordingly, Cabraser argued that "a unitary determination and award of punitive damages to a well-defined group or specific community may present an ideal balance between the due process rights of plaintiffs and defendants when a single tort has harmed many."[92]

### *B.* Cooper Industries Inc. v. Leatherman Tool Group, Inc.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[93] the Court considered the proper appellate standard of review for the *BMW* excessiveness analysis. *Cooper Industries* involved an unfair competition suit following the defendant's use of the plaintiff's product in advertising and marketing.[94] The jury awarded $50,000 in compensatory damages and

[89] *BMW*, 571 U.S. at 592–94 (Breyer, J., concurring) (citations omitted).

[90] Elizabeth J. Cabraser & Thomas M. Sobol, *Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damages Claims*, 74 TUL. L. REV. 2005, 2020 (2000).

[91] *Id.*

[92] *Id.* at 2018.

[93] 532 U.S. 424 (2001).

[94] *Id.* at 427–28.

$4.5 million in punitive damages.[95] On appeal, the Supreme Court held that a de novo standard of review applied to a trial court's application of the *BMW* guideposts.[96]

In explaining why a de novo standard did not violate the Seventh Amendment, the Court acknowledged the views of Professors Polinsky and Shavell, and expressly addressed the use of punitive damages to achieve efficient deterrence:

> Some scholars . . . assert that punitive damages should be used to compensate for the underdeterrence of unlawful behavior that will result from a defendant's evasion of liability. "The efficient deterrence theory thus regards punitive damages as merely an augmentation of compensatory damages designed to achieve economic efficiency." However attractive such an approach to punitive damages might be as an abstract policy matter, it is clear that juries do not normally engage in such a finely tuned exercise of deterrence calibration when awarding punitive damages. . . . Moreover, it is not at all obvious that even the *deterrent* function of punitive damages can be served *only* by economically "optimal deterrence."[97]

The Court thus seemed to find an economic deterrence view of punitive damages "attractive" as a theoretical matter, but dismissed the approach for pragmatic reasons.[98]

Nevertheless, plaintiffs still found support in *Cooper Industries* for aggregated treatment of punitive damages. Elizabeth Cabraser, for example, argued that *Cooper Industries* "can be read, or at least logically extended, to support the construction of a single classwide proceeding for the purpose of adjudicating a truly inclusive aggregate punitive damages award."[99] Indeed, following *Cooper Industries*, plaintiffs began to urge

[95] *Id.* at 429.
[96] *Id.* at 443.
[97] *Id.* at 438–40 (citations omitted).
[98] *Id.* at 440.
[99] Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages In Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST L. REV. 979, 986 (2001).

juries to calculate punitive damages based on harm to non-parties,[100] resulting in several headline-grabbing punitive damages awards.[101] In *Bullock v. Philip Morris USA, Inc.*,[102] for example, the jury awarded $28 billion to a single plaintiff after plaintiff's counsel argued that "only 1 in 28,000 lung cancer victims gets his or her day in court."[103] The jury appeared to award $1 million for each of these hypothetical victims.[104]

### *C.* State Farm Automobile Insurance Co. v. Campbell

In *State Farm Mutual Automobile Insurance Co. v. Campbell*,[105] the Court's views on deterrence began to take greater shape as did the limits on punitive damages. The case involved a bad faith action against an insurance company.[106] At trial, the plaintiffs introduced evidence concerning "fraudulent practices by State Farm in its nationwide operations" over a twenty-year period.[107] The jury found for the plaintiffs and awarded $2.6 million in compensatory damages and $145 million in punitive damages.[108] The trial court reduced the compensatory award to $1

[100] *See* Murray R. Garnick & Robert McCarter, *Helping the Jury Get It Right on Punitive Damages:* Philip Morris USA v. Williams, 35 PRODUCT SAFETY & LIABILITY REP. 513, 513–18 (2007).

[101] *See, e.g.*, Tresa Baldas, *Verdicts Swelling from Big to Bigger*, NAT'L L.J., Nov. 25, 2002, at A1 (reporting recent punitive damages verdicts of $28 billion, $3 billion, $290 million, and $271 million); David Hechler, *Tenfold Rise in Punitives*, NAT'L L.J., Feb. 3, 2003, at C3 ("There were five verdicts of at least $500 million and 22 of at least $100 million [in 2002]."). For a discussion of the debate over the existence and extent of a punitive damages crisis, see Sebok, *supra* note 24, at 962–76 (contrasting empirical studies by Cass Sunstein, Theodore Eisenberg and others on whether punitive damages awards are "out of control").

[102] 42 Cal. Rptr. 3d 140 (Cal. Ct. App. 2006), *rev'd*, 71 Cal. Rptr. 3d 775 (Cal. Ct. App. 2008).

[103] Garnick & McCarter, *supra* note 100, at 517 (quoting Henry Weinstein, *Philip Morris Ordered to Pay $28 Billion to Smoker*, L.A. TIMES, Oct. 5, 2002, at C1).

[104] *See id.* The California Court of Appeals recently reversed the punitive damages award in *Bullock*, and remanded for a new trial on punitive damages on the ground that the trial court failed to protect the defendant from the risk that the verdict was based on harm to non-parties. *Bullock*, 71 Cal. Rptr. 3d 775 (Cal. Ct. App. 2008).

[105] 538 U.S. 408 (2003).

[106] *See id.* at 413–14.

[107] *Id.* at 415.

[108] *Id.*

million and the punitive damages award to $25 million.[109] On appeal, however, the Utah Supreme Court reinstated the jury's $145 million punitive damages award, largely relying on the insurance company's nationwide practices.[110]

Finding the case "neither close nor difficult,"[111] the Supreme Court held that the $145 million punitive damages award violated due process.[112] The Court reiterated that the reprehensibility guidepost under *BMW* remains "the most important indicium of the reasonableness of a punitive damages award,"[113] and repeated the five factors from *BMW*. This time, however, the Court cautioned that "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award."[114] Instead, the Court instructed that "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."[115]

Resolving the issue left open in *BMW*,[116] the Court explained that the states do not have authority to punish a defendant for harm to nonparties:

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case

[109] *Id.*

[110] *Id.*

[111] *Id.* at 418.

[112] *Id.*

[113] *Id.* at 419.

[114] *Id.*

[115] *Id.*

[116] *See supra* text accompanying notes 84–86.

> nonparties are not bound by the judgment some other plaintiff obtains.[117]

Moreover, the Court emphasized that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred."[118] Although recognizing that a defendant's out-of-state conduct may be relevant to a jury's reprehensibility analysis,[119] the Court held that such "conduct must have a nexus to the specific harm suffered by the plaintiff."[120]

Turning to the ratio guidepost, the Court reiterated that the analysis must focus on "the ratio between harm, or potential harm, to *the plaintiff* and the punitive damages award."[121] The Court made clear that this inquiry compares the amount of compensatory damages to the amount of punitive damages: "[T]he measure of punishment [must be] both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."[122] Finally, the Court noted that a high compensatory damages award could mean that "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limits of the due process guarantee."[123] Likewise, a low compensatory damages award could support a higher ratio.[124]

Despite the suggestion that it was improper to punish for harm to others, plaintiffs still found support for class wide treatment of punitive damages by narrowly reading *State Farm*. Plaintiffs relied on the Court's "dissimilar acts" language, arguing that, by bringing together "common claims," a class action would not involve "dissimilar" conduct.[125] Likewise, by utilizing sub-classes, a class action could avoid the prohibition on punishment for

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[117] *State Farm*, 538 U.S. at 422–23 (citations omitted).

[118] *Id.* at 421.

[119] *Id.* at 422.

[120] *Id.*

[121] *Id.* at 424 (emphasis added).

[122] *Id.* at 426; s*ee also id.* at 425 ("The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.").

[123] *Id.*

[124] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 583 (1996).

[125] Elizabeth J. Cabraser, *The Effect of* State Farm v. Campbell *on Punitive Damages in Mass Torts and Class Action Litigation: What Does the Immediate Post-*State Farm *Jurisprudence Reveal*, SJ035 ALI-ABA 1163, 1173–74 (2004).

unlawful conduct.[126] Finally, a class action could address the Court's "multiple punishment" concern by binding all individuals who allege harm from the same course of conduct.[127] Thus, plaintiffs urged that "[t]he aggregation of all persons claiming harm from a given course of conduct for a unitary punitive damage award under the . . . class action where the claimants are too numerous to make individual joinder practicable . . . enforces the *State Farm* mandate by protecting against piecemeal, multiple, redundant, or dissimilar awards for the same conduct."[128]

### *D.* Philip Morris USA v. Williams

In *Philip Morris USA v. Williams*, the Court rejected this narrow reading of *State Farm*.[129] *Philip Morris* involved a products liability action against a cigarette manufacturer.[130] There, the Court held that the Due Process Clause prohibits a state from imposing punitive damages based on injuries that the defendant "inflicts upon nonparties or those whom they directly represent,[131] *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."[132] The Court reasoned that the Due Process Clause guarantees a defendant the "opportunity to present every available defense."[133] Allowing a punitive damages award to be based on harm to non-parties would prevent the defendant from raising all possible defenses.[134] For example, the Court noted that in *Philip Morris*, other

[126] *Id.* at 1174.

[127] *Id.* at 1173.

[128] *Id.* at 1174; s*ee also* Semra Mesulam, Note, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class*, 104 COLUM. L. REV. 1114, 1128 (2004) (arguing that "*State Farm* . . . supports an expansive reading of harm, interpreting the *Gore* calculus to encompass factors that extend beyond an individual plaintiff"); Aileen Nagy, Note, *Certifying Mandatory Punitive Damages Claims in a Post-*Ortiz *and* State Farm *World*, 58 VAND. L. REV. 599 (2005) (arguing *State Farm* supports mandatory class actions).

[129] *See generally* 127 S. Ct. 1057 (2007).

[130] *Id.* at 1060.

[131] *Id.* at 1063. Relying on this phrase, Professor Keith N. Hylton has suggested that *Philip Morris* renders class actions themselves constitutionally suspect. Hylton, *Reflections on Remedies*, *supra* note 7, at 29–30.

[132] *Phillip Morris*, 127 S. Ct. at 1063; *see also id.* at 1065 ("[T]he Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation.").

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

[134] *Id.*

allegedly injured smokers might have known smoking was dangerous,[135] or might not have relied upon the defendant's statements.[136] As such, the Court emphasized that due process entitles a defendant to procedural protections: "Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice . . . of the severity of the penalty that a State may impose.'"[137] The Court thus expressed concerns that allowing a jury to punish a defendant based on harm to non-parties "would add a near standardless dimension to the punitive damages equation."[138] The Court reasoned that the questions[139] raised by the addition of non-party victims would add a risk of "arbitrariness [and] uncertainty"[140] forbidden by the Due Process Clause.[141] Finally, the Court firmly closed the door opened in *TXO*[142], explaining that "potential harm" analysis does not include harm to non-parties. Rather, "the potential harm at issue was harm potentially caused the plaintiff."[143]

[135] *Id.* Under Oregon law, a fraud cause of action requires the plaintiff to show: "'(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury.'" Estate of Schwarz v. Philip Morris Inc., 135 P.3d 409, 422 (Or. Ct. App. 2006) (citation omitted). Knowledge that smoking was dangerous would negate the reliance element of the fraud claim.

[136] 127 S. Ct. at 1063 ("Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.").

[137] *Id.* at 1062 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996)).

[138] *Id.* at 1063.

[139] The Court noted the following potential questions: "How many such victims are there? How seriously were they injured? Under what circumstances did the injury occur?" *Id.*

[140] *Id.*

[141] *Id.*; *see also, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of . . . arbitrary punishments on a tortfeasor.").

[142] In TXO Production Corp. v. Alliance Resources Corp., the Court upheld a 526 to 1 ratio by considering "the possible harm to other victims that might have resulted if similar future behavior were not deterred." 509 U.S. 443, 460 (1993); *see also* Franze & Scheuerman, *supra* note 74, at 467 n.374 (explaining "potential harm" analysis of *TXO*).

[143] *Phillip Morris*, 127 S. Ct. at 1063.

The Court also reaffirmed its holding in *State Farm* that evidence of a defendant's harm to others may be used by the jury to gauge the reprehensibility of the defendant's conduct.[144] Under the Court's harm-to-others and reprehensibility holdings, a jury can consider harm-to-others when evaluating the reprehensibility of the defendant's conduct (one of the *BMW* guideposts) but may not "use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."[145] Thus, the Court held that "the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility but also to punish for harm caused strangers."[146]

In sum, the Supreme Court's jurisprudence has evolved from an approach that at least gave lip service to the premise that punitive damages serve general and specific deterrence functions to the more recent cases that have focused, almost laser-like, not on harms to society as a whole when setting the amount of the award, but on only the parties to the lawsuit.

## III. PROCEDURAL DUE PROCESS AND PUNITIVE DAMAGES CLASS ACTIONS

So what does the Supreme Court's evolving approach to punitive damages, which essentially has adopted specific deterrence theory, mean for class actions? In a punitive damages class action, protection of the defendant's substantive due process rights requires an individualized assessment of punitive damages except where the class shares an identical harm, such as the unique case where every member of the class would be entitled to the identical amount of statutory damages.[147] *Philip Morris* confirmed what *State Farm* suggested: procedural due process protections are necessary to guarantee a defendant's right to a reasonable punitive

[144] *Id.* at 1063–64; *see also id.* at 1065 ("And a jury consequently may take this fact [harm to others] into account in determining reprehensibility.").

[145] *Id.* at 1064.

[146] *Id.*; *see also id.* at 1065 (stating that "the Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation"). Aggregate statutory damages awards, however, present their own due process concerns. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damage and Class Actions*, 74 MO. L. REV. (forthcoming 2009).

[147] For example, the Fair Credit Reporting Act allows statutory and punitive damages where the defendant's conduct is willful. 15 U.S.C. § 1681n(a)(1)–(2) (2000).

damages award based on proper considerations.[148] *State Farm* recognized that substantive due process influences the requirements of procedural due process. Specifically, *State Farm* held that a jury must be instructed on one of the substantive, post-verdict limits recognized by the Court.[149] *Philip Morris*, in turn, recognized that procedural due process requires states to adopt procedures that enforce the substantive due process limits on punitive damages.

What then are the substantive due process rights that require individual treatment of punitive damages? *Philip Morris* makes clear that due process prohibits a jury from punishing a defendant (at least as in terms of setting the amount of the award) for harm caused to anyone other than the plaintiff: "a jury may not punish for the harm caused others."[150] Practically speaking, "harm" is measured by the amount of compensatory damages.[151] In a class action, the extent of each class member's harm remains an abstract, unanswerable question until adjudication of the class member's individual compensatory damages. In other words, the proper amount of a punitive damages award cannot be evaluated until the total compensatory award is known.[152] Indeed, *State Farm* stressed that businesses constitutionally could be punished only "for the conduct that harmed the plaintiff, not for being . . . unsavory."[153] Treating punitive damages as a class-wide issue despite the presence of individual injuries fails to connect punishment to each plaintiff's harm. Instead, class wide adjudication turns the punitive damages award into punishment for being unlikable.

Moreover, due process does not allow courts to eliminate the proportionality requirement in order to aggregate multiple, individual

[148] *See generally* Franze & Scheuerman, *supra* note 74.

[149] 538 U.S. 408, 417–18 (2003); *see also id.* at 422 (stating that "[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred").

[150] *Philip Morris*, 127 S. Ct. at 1065 ("We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now.").

[151] *E.g.*, *State Farm*, 538 U.S. at 426 (punitive damages awards must be "proportionate to the amount of harm to the plaintiff and to the general damages recovered"); *see also* Sebok, *supra* note 24, at 974–75 (noting that compensatory damages "might serve[] as a proxy for the damage caused by the defendant's tortious act, thus anchoring punishment to harm").

[152] *See In re* Chevron Fire Cases, No. A104879, 2005 WL 1077516, at *14–15 (Cal. Ct. App. May 6, 2005) (rejecting argument that "a punitive damages class action can proceed untethered to the examination of proportionality as to each plaintiff's compensatory damages").

[153] *State Farm*, 538 U.S. at 423.

claims into a punitive damages class. In explaining the substantive due process "reasonable relationship" limit, *State Farm* emphasized that the size of a constitutionally permissible ratio may vary with the size of a compensatory damages award: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[154] The converse is also true: "[L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages."[155] Thus, the Court made clear: the amount of a punitive damages award is a fact-specific inquiry that depends on the specific amount of an individual's compensatory damages award.

This is not to say that the compensatory damages serve the same purpose as a punitive damages award.[156] The Supreme Court has acknowledged that the two awards have distinct purposes: "Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'"[157] By contrast, punitive damages serve a broader function: they are aimed at deterrence and retribution.[158] Nevertheless, as both courts and scholars have recognized, in some circumstances, compensatory damages alone will produce the desired deterrent effect, rendering a punitive award unnecessary.[159]

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[154] *Id.* at 425.

[155] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996).

[156] *See* Schwartz, *Mass Torts and Punitive Damages*, *supra* note 31, at 421 (criticizing argument that large compensatory award should negate or lessen punitive damages award).

[157] *State Farm*, 538 U.S. at 416 (citation omitted).

[158] *See supra* Part I.A.

[159] Ciraolo v. City of New York, 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, J., concurring); Viscusi, *supra* note 39, at 310 (noting that "[f]or a large class of circumstances, compensatory damages alone provide adequate deterrence"); *accord* Priest, *supra* note 36, at 830–31. As Professor George Priest has explained:

> [I]t is widely accepted—and it is a routine proposition of a first-year modern torts course—that compensatory damages—economic losses and pain and suffering—serve a complete deterrent purpose in addition to their role in compensating injured parties. Compensatory damages impose costs on defendants who wrongfully fail to prevent accidents, costs equal in amount to the injuries suffered…Indeed, the strongest theory in the modern tort academy is that full compensatory damages generate exactly the optimal level of deterrence of accidents—not too little and not too much.

Finally, adjudicating punitive damages as a common issue before a defendant can challenge an individual class member's underlying entitlement to relief violates the most basic procedural due process guarantees—the defendant's due process right to present defenses to claims against them.[160] In *Philip Morris*, the Supreme Court made clear that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'"[161] Applying this well-established due process principle to the punitive damages context, the Court noted that defendants must be given the opportunity to defend against each individual claim.[162] Permitting class-wide recovery of punitive damages before the defendant can challenge the elements of each individual[163] claim allows punitive damages award to be based on non-injured parties.

Imagine a class action of Oregon smokers based on the facts of *Philip Morris.*[164] Although a jury found Philip Morris liable to Jesse Williams,[165] Philip Morris might not be liable to other Oregon smokers. As the Supreme Court noted, other smokers might have known smoking was dangerous, or might not have relied upon the defendant's statements.[166] Thus, any class-wide punitive damages award necessarily would include class members

*Id.*; *cf.* Elizabeth J. Cabraser, *Enforcing the Social Compact Through Representative Litigation*, 33 CONN. L. REV. 1239, 1253 (2001) (acknowledging that punitive damages are appropriate where compensatory damages "are considered inadequate, of themselves, to inflict a sting sufficient to bring recognition, remorse, and reform").

[160] *See* Colby, *supra* note 24, at 654–55 (arguing aggregate punitive damages awards violated due process by failing to allow defendant to contest elements on an individual basis with respect to each plaintiff).

[161] 127 S. Ct. 1057, 1063 (2007) (quoting Lindsey v. Normet, 469 U.S. 56, 66 (1972)).

[162] *Id.* Indeed, the Court illustrated its holding with defenses typical in any failure-to-warn case: prior to the imposition of punitive damages, the defendant has a due process right to show "that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary." *Id.*

[163] For the same reason, the use of "bell-weather" plaintiffs or a calculation of compensatory damages for only the named class representatives fails to resolve the due process problem.

[164] This imagined class is considered only for the purpose of illustrating the punitive damages issues. Of course, numerous arguments could be advanced against class-wide treatment of liability. *See generally* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse By Requiring Plaintiffs To Allege Reliance As An Essential Element*, 43 HARV. J. ON LEGIS. 1 (2006) (arguing that reliance in consumer fraud claims should be treated as an individual issue).

[165] *Philip Morris*, 127 S. Ct. at 1060–61.

[166] *Id.* at 1063; *see also* discussion *supra* notes 135–36.

who were not injured by Philip Morris's conduct.[167] Such an inclusion violates procedural due process.

Thus, procedural due process requires that where compensatory damages mandate an individualized inquiry, punitive damages likewise pose an individual issue. This ensures that the substantive due process limits on punitive damages are respected. The punitive award will bear a reasonable relationship to the plaintiff's harm, and the defendant will have the opportunity to defend against each claim.

## IV. ENFORCING DUE PROCESS LIMITS ON PUNITIVE DAMAGES IN CLASS ACTIONS

Application of these procedural due process limits on punitive damages can arise at two places in a class action: (1) class certification, and (2) trial management. Treating punitive damages as an individual issue affects the court's predominance analysis for class certification: whether common issues predominate over individual issues to justify use of the class action.[168] A punitive damages claim should be treated as an individual issue where compensatory damages involve individual issues. The combination of individual assessments of both punitive and compensatory damages should defeat class certification. Courts, however, largely have failed to recognize the due process implications of a punitive damages claim, and often give the issue short shrift in any certification analysis.

The mistaken assumption that punitive damages can be adjudicated on a class-wide basis creates a secondary due process problem: the management of a punitive damages claim in class action trial plans.[169] By failing to see

[167] *See also* Hylton, *Reflections on Remedies*, *supra* note 7, at 20–22.

[168] *See* FED. R. CIV. P. 23(b)(3).

[169] Under Federal Rule of Civil Procedure 23(b)(3), a plaintiff must show that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." This burden requires the plaintiff to show that a class action would be manageable. FED. R. CIV. P. 23(b)(3)(D). As the Civil Rules Advisory Committee has noted, "[a] critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible to class-wide proof." REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 98 (2002), *available at* http://www.uscourts.gov/rules/jc09-2002/CVRulesJC.pdf; *see also* ANN. MANUAL FOR COMPLEX LITIG. § 22.756 (4th ed. 2007) (noting that a trial plan helps to determine whether a class action trial would be manageable).

the constitutional implications of a punitive damages claim, courts often adopt class action trial plans that violate procedural due process.

### *A. Punitive Damages at the Class Certification Stage*

Class certification has been described as "the backbreaking decision" in class action proceedings.[170] As Judge Easterbrook has explained:

> Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims.[171]

To certify a so-called "damages class"[172] under Rule 23(b)(3), the court must find that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[173] In short, this inquiry weighs individualized issues against the common issues: where common issues do not predominate, a class action is inappropriate and the case should proceed as a traditional single-plaintiff suit.[174] Courts, however, are split on whether to treat a punitive damages claim as an individual issue.

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[170] Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 379 (5th Cir. 2007).

[171] *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015–16 (7th Cir. 2002).

[172] Punitive damages also can be sought in an injunctive class under Rule 23(b)(2) so long as the damages are "incidental" to the requested injunctive relief. FED. R. CIV. P. 23 advisory committee's note. Circuits are split on the test to apply when punitive damages (or any money damages) are sought in a 23(b)(2) class. *See* cases cited *supra* note 10.

[173] FED. R. CIV. P. 23(b)(3). In addition, a class must satisfy the four threshold requirements of Federal Rule of Civil Procedure 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. FED. R. CIV. P. 23(a). Most state systems employ similar requirements for class certification. 4 CONTE & NEWBERG, *supra* note 11, § 13:1 (noting that Federal Rule of Civil Procedure 23 is the "most prevalent model" for state class action rules). Notably, the majority of states follow the federal predominance and commonality requirements. *See id.* §§ 13:9, 13:10, 13:16 (noting that although specific language varies, state class action rules require commonality).

[174] Circuits are split on whether a class can still be certified, despite the predominance of individual issues, under Federal Rule of Civil Procedure 23(c)(4). On the one hand, the Ninth

1. Punitive Damages as an Individual Issue

Only a handful of courts have concluded that "punitive damages are an individualized, not a class-wide, remedy."[175] In *Nelson v. Wal-Mart Stores, Inc.*,[176] for example, plaintiffs brought a class action against Wal-Mart in Arkansas district court alleging that the company's hiring practices for over-the-road truck drivers discriminated against African Americans.[177] Plaintiffs sought back-pay, declaratory relief, injunctive relief, and punitive damages.[178] Plaintiffs asked the court to certify a class under Rule 23(b)(2), or alternatively, Rule 23(b)(3).[179] The court, however, concluded that the

Circuit has held that "even if common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues." Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996); *accord In re* Nassau County Strip Search Cases, 461 F.3d 219, 226 (2d Cir. 2006); Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 439 (4th Cir. 2003); *see also e.g.*, Olden v. LaFarge Corp., 383 F.3d 495, 509 (6th Cir. 2004) (approving use of Rule 23(c)(4) to bifurcate issues of liability and damage). The Fifth Circuit, on the other hand, has adopted a stringent view of issue classes finding that "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3), and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996) (prohibiting attempts to "manufacture predominance through the nimble use of subdivision (c)(4)"). For a thoughtful argument against the use of "issue classes," see Laura J. Hines, *Challenging The Issue Class Action End-Run*, 52 EMORY L. J. 709 (criticizing use of Rule 23(c)(4) to sever individual issues).

[175] *E.g.*, Nelson v. Wal-Mart Stores, Inc., 254 F.R.D. 358 (E.D. Ark. 2007); *accord* O'Neal v. Wackenhut Servs., Inc., No. 3:03-CV-397, 2006 WL 1469348, at *22 (E.D. Tenn. May 25, 2006) ("[P]roof of [punitive] damages must be related to harm to the plaintiff. To hold otherwise would violate defendant's rights to due process.") (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)); Carlson v. C.H. Robinson Worldwide, Inc., No. Civ.02-3780 JNE/JGL, 2005 WL 758602, at *16 (D. Minn. Mar. 31, 2005) (holding that punitive damages claim "require[s] individualized factual determinations whose manageability could overwhelm the litigation"); Elkins v. Am. Showa, Inc., 219 F.R.D. 414, 427 (S.D. Ohio 2002) (noting that "[p]unitive damages likewise must be determined based on the harassment inflicted on an individual plaintiff . . . ."); *In re* Copley Pharm., Inc., 161 F.R.D. 456, 467 (D. Wyo. 1995) (holding "punitive damages were inappropriate for class certification because they depend on an individual's injury and compensable damages").

[176] 245 F.R.D. 358 (E.D. Ark. 2007).

[177] *Id.* at 362.

[178] *Id.* at 373.

[179] *Id.*

punitive damages claim presented an individual issue.[180] The court found that under *Philip Morris*, "an award of punitive damages often must include an inquiry into each individual plaintiff's circumstances in order to determine the amount of punitive damages awardable to that plaintiff."[181] The court recognized that some class members may not have actually been harmed by the alleged discriminatory practices.[182] Accordingly, the court reasoned that "[i]ndividualized determinations are necessary to fully realize the extent of the harm caused by [the defendant's] conduct."[183] The court further concluded that the individual punitive damages issues also defeated the superiority requirement: "The individual issues involved in these 'mini-trials' would swamp the litigation and, as a result, detract from a class action's superiority over other methods of adjudication."[184] The court, however, did not deny class certification, but instead chose to sever the issue of punitive damages under Rule 23(c)(4)(A).[185]

### 2. Punitive Damages as a Common Issue

Most courts have not found that punitive damages present an individualized issue precluding class certification.[186] These courts falter in three principal ways: (1) a failure to distinguish between the assessment of

[180] *Id.* at 378.

[181] *Id.* at 376.

[182] *Id.* at 377. The proposed class included all African American residents of the United States who either unsuccessfully applied for employment as over-the-road truck drivers at Wal-Mart or who were "deterred or thwarted" from applying for those positions due to Wal-Mart's alleged discriminatory practices. *Id.* at 365. Finding it unlikely that all class members suffered harm, the court noted that some class members may have been denied employment for lawful reasons. *Id.* at 377–78.

[183] *Id.* at 378.

[184] *Id.* at 379.

[185] *Id.* at 380. The court certified the class under Rule 23(b)(2) on the issues of liability, declaratory relief and equitable relief. *Id.*

[186] *See, e.g.*, Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir.), *superseded by* 509 F.3d 1168 (9th Cir. 2007); Ellis v. Costco Wholesale Corp., 240 F.R.D. 627, 643 (N.D. Cal. 2007) (rejecting argument "that punitive damages must be based on actual harm to the plaintiffs and therefore require individualized determinations" because punitive damages claims "focus[] on the conduct of the defendant and not the individual characteristics of the plaintiffs"); Anderson v. Boeing Co., 222 F.R.D. 521, 541 (N.D. Okla. 2004) (treating punitive damages as a class-wide issue in a Rule 23(b)(2) class because "the major focus in the punitive damages inquiry is 'the degree of reprehensibility of the defendant's conduct'").

punitive damages and the distribution of a punitive damages award to the class, (2) a failure to recognize that the reasonable relationship requirement applies at the trial level, and (3) a failure to recognize that the Supreme Court's due process analysis has shifted away from an emphasis on the defendant's conduct.

Another case against Wal-Mart illustrates these rationales. In *Dukes v. Wal-Mart Stores, Inc.*,[187] female employees brought a sex discrimination claim against Wal-Mart under Title VII of the 1964 Civil Rights Act[188] asserting an unequal pay claim and a failure to promote claim.[189] The plaintiffs sought class-wide injunctive and declaratory relief, lost pay, and punitive damages, but did not seek any compensatory damages.[190] The district court certified the proposed class as to the equal pay claim, and as to liability (including punitive damages) on the promotion claim.[191]

On appeal under Federal Rule 23(f),[192] the United States Court of Appeals for the Ninth Circuit rejected Wal-Mart's argument that treating punitive damages as a class-wide issue violated due process under *State Farm*.[193] The court dismissed *State Farm* as "readily distinguishable,"[194] focusing on the fact that *State Farm* was a single-plaintiff action brought

[187] 474 F.3d 1214 (9th Cir.), *superseded by* 509 F.3d 1168 (9th Cir. 2007).

[188] 42 U.S.C. § 2000e (2000).

[189] Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1174 (9th Cir. 2007).

[190] *Id.*

[191] *Id.* at 1175.

[192] The rule permits interlocutory appeals from a denial or grant of class certification. FED. R. CIV. P. 23(f).

[193] Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1242 (9th Cir.), *superseded by* 509 F.3d 1168 (9th Cir. 2007). The Ninth Circuit subsequently withdrew this initial opinion. As noted by the dissent, the majority chose to avoid the constitutional challenges in the second opinion:

> In its first opinion, the majority explicitly approved of the district court's trial plan in the face of the Due Process deprivations. In this second opinion, the majority "express[es] no opinion regarding Wal-Mart's objections to the district court's" scheme and finds it sufficient to "note" that "there are a range of possibilities-which may or may not include the district court's proposed course of action-that would allow this class action to proceed in a manner that is both manageable and in accordance with due process." Wal-Mart has appealed precisely the unconstitutionality in the district court's order, so it is incumbent upon us to correct it.

*Dukes*, 509 F.3d at 1198 (Kleinfeld, J., dissenting).

[194] *Dukes*, 474 F.3d at 1242.

under state law.[195] The court assumed that the harm suffered by the plaintiff class was identical and took comfort in the fact that the punitive damages award would "'be based solely on evidence of [the defendant's] conduct that was directed toward the class.'"[196] Focusing on distribution not assessment, the court further relied on the fact that the class-wide punitive damages award would be distributed only to plaintiffs who showed that they were harmed by the defendant's conduct.[197] Finally, failing to recognize that post-verdict review cannot remedy the violation of a defendant's procedural due process rights,[198] the court reasoned that the reasonable relationship requirement could be imposed post-verdict by the trial court.[199]

Similarly, in *Palmer v. Combined Insurance Company of America*,[200] an Illinois district court found that punitive damages did not require an individualized inquiry.[201] The court recognized that "each class member has suffered differing degrees of harm," but nonetheless concluded that punitive damages could be assessed on an aggregate basis.[202] The court reasoned that "[b]ecause the focus of punitive damages is on the defendant's conduct, not the class members, it is possible to fashion a

[195] *Id.* Relying on the federal nature of the suit, the Ninth Circuit found no possibility that Wal-Mart would be punished for conduct that is lawful where it occurred because Title VII applies nationwide. *Id.*

[196] *Id.* (quoting Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 172 (N.D. Cal. 2004)).

[197] *Id.*

[198] *See infra* text accompanying notes 267–68.

[199] *See Dukes*, 474 F.3d at 1242; *accord In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., No. 1:00-1898, 2007 WL 1791258, at *6 (S.D.N.Y. June 15, 2007) (reasoning post-verdict review could correct any problem with aggregate punitive damages).

[200] 217 F.R.D. 430 (N.D. Ill. 2003).

[201] 217 F.R.D. 430, 438–40 (N.D. Ill. 2003). True, Judge Zagel conceded that "cases suitable for class action on punitive damages would be quite rare," but he believed that "this case, as pled (but not proved), is rare." *Id.* at 441. It appears that Judge Zagel believed *Palmer* was a "rare" exception because the defendant's structure was decentralized. *Id.* at 439 ("It is the rather unusual structure of [the defendant] that distinguishes this case from other Title VII class actions involving the more typical workplace."); *see also id.* at 433 (noting that the defendant was "one of the last (if not the very last) vestiges of the 'door-to-door' salesmen variety of insurance selling"). The case, however, presented standard employment discrimination claims: female employees were paid less than their male counterparts, female employees received fewer promotions than their male counterparts, female employees experienced sexual harassment and female employees received inferior training. *Id.* at 433–35.

[202] *Id.* at 339.

punitive damages award that would punish [the defendant] for past wrongdoing . . . and not require individualized inquiry."[203]

The failings of these courts to recognize the due process implications of a punitive damages claim at the certification stage have important repercussions on the litigation. Certification creates enormous pressure on a defendant to settle.[204] As the United States Court of Appeals for the Fifth Circuit recently stated, "class certification may be the backbreaking decision that places 'insurmountable pressure' on a defendant to settle, even where the defendant has a good chance of succeeding on the merits."[205] Indeed, the perception of this "blackmail effect" of class actions was cited by the Senate as one of the reasons for the Class Action Fairness Act:

> Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling-rather than litigating-frivolous lawsuits. This is a particularly alarming abuse because the class action device is intended to be a procedural tool and not a mechanism that affects the substantive outcome of a lawsuit. Nonetheless, state court judges often are inclined to certify cases for class action treatment not because they believe a class trial would be more efficient than an individual trial, but because they

[203] *Id.* at 339–440 (stating that "punitive damages can be awarded to the class as a whole without determining liability with respect to individual class members"); *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 2007 WL 1791258 at *5 (allowing aggregate treatment of punitive damages because "punitive damages are based on a defendant's overall conduct as well as the harm to plaintiff").

[204] *E.g.*, David Marcus, *Erie, The Class Action Fairness Act, And Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1287 (2007); Hensler & Rowe, *supra* note 61, at 138 (noting "higher-than-average risks" present in class action litigation create incentives to settle).

[205] Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 379 (5th Cir. 2007) (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996)). Even Judge Jack Weinstein, a leading proponent of the class action, has acknowledged that class certification may "encourage settlement of the litigation." *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 721 (E.D.N.Y. 1983).

> believe class certification will simply induce the defendant to settle the case without trial.[206]

When the class action includes a claim for punitive damages claim, the combined settlement pressure increases exponentially. Adding a punitive damages claim to a case creates a "correspondingly greater incentive to settle."[207] Indeed, regardless of whether the prospect of an enormous punitive damages award reflects reality,[208] perceptions of "out of control" punitive damage awards influence decision-making.[209] "A belief that punitive damages are 'out of control' and randomly assessed may create a self-fulfilling prophesy as parties negotiate claims according to their perception of the populist behavior of juries."[210]

Thus, the presence of a punitive damages claim creates acute settlement leverage, particularly in a class action. Indeed, because parties often settle

[206] S. REP. NO. 109-14, at 20–21 (2005), *reprinted in* 2005 U.S.C.C.A.N. (119 Stat.) 3, 21. *But see* Charles Silver, *"We're Scared To Death": Class Action Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (challenging normative and factual basis of "blackmail" analogy); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 403 ("doubt[ing] that litigation class actions . . . exert systematic blackmail pressure against defendants").

[207] A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable and Rational? A Comment on Eisenberg, et al.*, 26 J. LEGAL STUD. 663, 668 (1997); *see also* Viscusi, *supra* note 39, at 326–27 (noting that "the unpredictability of juries and the threat of punitive damages . . . may lead firms to settle out of court to avoid the risk of a major financial penalty"). Professor Anthony Sebok has criticized the "shadow-effect argument" as "very difficult to evaluate." Sebok, *supra* note 24, at 966. Professor Sebok critiques the argument based on whether it accurately reflects the magnitude and frequency of punitive damages awards. *Id.* at 966–69. But, as Professor Koenig has noted, perception of punitive damages may matter more than reality. *See* Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169, 172 (1998).

[208] The battle on this topic has been fought for the past ten years. *E.g.*, Polinsky, *supra* note 207, at 664 (criticizing Theodore Eisenberg, et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUDIES 623 (1997), and arguing that "punitive damages may not be rational even if the level of punitive damages is systematically and positively related to the level of compensatory damages"). For a thorough critique of the "myth" that "punitive damages are 'out of control,'" see Sebok, *supra* note 24, at 962–75.

[209] *E.g.*, Koenig, *supra* note 207, at 172 (noting that "what litigators 'define as real, becomes real in their consequences").

[210] *Id.* Professor Koenig notes that the effect of punitive damages on settlement has not been systematically studied. *Id.* at 209.

in order to reduce litigation costs and to avoid risk,[211] cases with punitive damages claims can be expected to settle more frequently than cases involving compensatory damages alone.[212] Moreover, these settlement factors suggest that "'big' punitive damages cases will tend to settle more frequently than 'small' punitive damages cases . . . because the higher the amount of punitive damages at stake, the more will be spent on litigation and the larger the risk for the parties."[213] In turn, the possibility of a large punitive damages award on top of a class-wide aggregated compensatory award makes punitive damages claims in a class action a "bet the company" proposition.[214]

### *B. Punitive Damages at the Case Management Stage*

By failing to treat punitive damages as an individual issue, courts have thus eased the burden for certification and increased the pressure for defendants to settle. But apart from certification, the management of a punitive damages claim at trial similarly implicates a defendant's due process rights.

Pursuant to Federal Rule of Civil Procedure 42(b),[215] courts often bifurcate individual issues from common issues in class action trials.

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[211] Polinsky, *supra* note 207, at 667–68. Professor Polinsky notes two additional explanations for why plaintiffs may be more inclined to settle punitive damages cases: (1) unlike compensatory damages, punitive damages awards are taxable, which can be avoided by a settlement characterizing the amount as compensatory, (2) in some states, a plaintiff may be forced to share a punitive damages award with the state under split-recovery statutes. *Id.*

[212] *Id.*; *see also* Koenig, *supra* note 207, at 174 ("'[T]he biggest problem that we have with punitive damages claims is that they are used as a lever for out-of-court settlements.'") (quoting Milo Geyelin, *Product Suits Yield Few Punitive Awards*, WALL ST. J., Jan. 6, 1992, at B1).

[213] Polinsky, *supra* note 207, at 668. Professor Polinsky notes that punitive damages could increase the potential disagreement between the parties' views of the suit, which could lead to trial instead of settlement. *Id*. at 669–70; *see also* Brief of the National Association of Manufacturers et al, as Amicus Curiae in Support of Petitioner at 2, Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007) (No. 05-1256), 2006 WL 2153788 (noting that a "single large punitive damages award typically serves as a bellwether for settlement—dramatically increasing the leverage of those who seek to impose quasi-regulatory demands on entire industries").

[214] Koenig, *supra* note 207, at 173. Indeed, even the Florida Supreme Court recognized that the $145 billion *Engle* verdict would have "cripple[d]" the defendants. Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1265 n.8 (Fla. 2006); *see also* discussion *infra* Part VI.A.

[215] The rule provides: "For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues. . . . When ordering a separate

Courts have split trials into two or more distinct stages—separate proceedings[216] to resolve liability, compensatory damages and punitive damages.[217] Typically, the first phase will determine liability as a class-wide issue.[218] Unless all plaintiffs suffered the same harm in the same way, compensatory damages then must be determined on an individual basis.[219] Although a handful of courts have recognized that the reasonable relationship requirement requires a determination of compensatory damages before punitive damages,[220] most courts treat punitive damages as a class-

trial, the court must preserve any federal right to a jury trial." FED. R. CIV. P. 42(b). An analysis of the Seventh Amendment issues presented by separating the amount of a punitive damages award from liability and entitlement to punitive damages is beyond the scope of this Article.

[216] *E.g.*, Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir.), *superseded by* 509 F.3d 1168 (9th Cir. 2007); Hilao v. Estate of Marcos, 103 F.3d 767, 782 (9th Cir. 1996); *In re* Tobacco Litig., 624 S.E.2d 738, 740 (W. Va. 2005). Courts also may reverse bifurcate the trial and decide the issue of compensatory damages before any determination of liability. *See, e.g.*, Angelo v. Armstrong World Indus., Inc., 11 F.3d 957 (10th Cir. 1993).

[217] In what appears to be a unique approach, plaintiffs in a fraud claim in the Southern District of New York asked the court to allow class members "to intervene . . . or file their own lawsuits and petition individually for punitive damages" following class-wide determinations of liability and individual determinations of compensatory damages. Torres v. Gristede's Operating Corp., No. 04 Civ. 3316(PAC), 2006 WL 2819730, at *1 (S.D.N.Y. Sept. 29, 2006). The court granted plaintiffs' motion for class certification, but did not address the treatment of punitive damages on the fraud claim. *Id.* at *17 n.15.

[218] *See also* Colindres v. Quietflex Mfg., 235 F.R.D. 347, 377 (S.D. Tex. 2006) (holding "[p]unitive damages have to be determined after proof of liability to individual plaintiff"). In the liability phase, some juries also determine compensatory damages for a set of bellwether plaintiffs, followed by a determination of class-wide punitive damages. *See, e.g.*, Silivanch v. Celebrity Cruises, Inc., 171 F. Supp. 2d 241, 250 (S.D.N.Y. 2001) (using bellwether approach where jury determined compensatory damages for two plaintiffs, followed by a class-wide determination of punitive damages); *see also* MANUAL FOR COMPLEX LITIGATION § 33.27–28 (3d ed. 1995). As the Fifth Circuit has explained:

> The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray, and so it is in the mass tort context.

*In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997).

[219] *See* Colby, *supra* note 24, at 657 ("[D]ue process will not permit a defendant to be tagged with compensatory damages for the wrongs that it visited upon a large number of people without being afforded the opportunity to contest individual elements of each alleged victim's claim and to raise victim-specific affirmative defenses . . . .").

[220] *See In re* Simon II Litig., 407 F.3d 125, 138 (2d Cir. 2005) (noting that assessing amount of punitive damages prior to determination of compensatory damages "would fail to ensure that a

wide issue, and therefore, calculable prior to a determination of compensatory damages.[221]

Courts determine a class-wide punitive damages award in two principal ways: (1) a "multiplier" approach, where the jury determines a ratio to be applied to subsequent compensatory awards, or (2) a "lump sum" approach where the jury determines a lump sum amount of punitive damages to be subsequently divided among eligible class members.[222] Both approaches pose procedural due process problems under *Philip Morris*. Again, the fundamental mistake in these trial plans is a failure to recognize that punitive damages claims pose an individual issue in class actions.

### 1. The Flawed Multiplier Approach

Under one approach, the court bifurcates the trial into two or three phases.[223] In Phase I, the jury determines liability and entitlement to punitive damages.[224] If liability and entitlement to punitive damages are established, the Phase I jury then decides on a "punitive damages multiplier"—a ratio that would be applied to each individual plaintiff's compensatory damages: "The jury [calculates] a multiplier such that the final dollar amount of punitive damages paid by the defendant would bear a

jury will be able to assess an award that, in the first instance, will bear a sufficient nexus to the actual and potential harm to the plaintiff class, and that will be reasonable and proportionate to those harms"); *see also* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417–18 (5th Cir. 1998) (noting that "because punitive damages must be reasonably related to the reprehensibility of the defendant's conduct and to the compensatory damages awarded to the plaintiffs, recovery of punitive damages must necessarily turn on the recovery of compensatory damages") (citations omitted); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 97 (W.D. Mo. 1997) (rejecting assessment of lump-sum punitive damages award prior to determination of compensatory damages because "the amount of punitives must bear a relationship to the actual damages suffered").

[221] *E.g.*, *Hilao*, 103 F.3d at 782 (holding trifurcation of trial into liability, punitive damages and then compensatory damages stages did not pose "any constitutional problems" without any discussion of Supreme Court jurisprudence on punitive damages).

[222] Courts take a variety of approaches to distributing the lump sum amount. *See infra* text accompanying notes 250–52.

[223] *E.g.*, *In re* Tobacco Litig., 624 S.E.2d 738, 740 (W. Va. 2005). The district courts have the authority to bifurcate trials under the Federal Rules of Civil Procedure 42(b). For the text of Rule 42(b), see *supra* note 215. Most states follow a similar rule. JOHN J. KIRCHER & CHRISTINE WISEMAN, PUNITIVE DAMAGES: LAW & PRACTICE §§ 12:5, 12:6 (2d ed. 2000).

[224] *E.g.*, *In re Tobacco Litig.*, 624 S.E.2d at 740.

reasonable relationship to the harm that was likely to occur from the defendant's conduct as well as the harm that actually occurred."[225]

In Phase II, subsequent juries then determine individual compensatory damages and other individual issues such as affirmative defenses unique to a particular plaintiff.[226] After the Phase II trial is complete, the judge takes the punitive damages multiplier from Phase I, multiplies the plaintiff's compensatory damages by the multiplier, and thereby determines the amount of the punitive damages award for each plaintiff.[227]

Few courts have analyzed whether the multiplier system satisfies due process under *BMW*, *State Farm*, or *Philip Morris*. In *In re Tobacco Litigation*, however, the West Virginia Supreme Court upheld a multiplier approach against a due process challenge.[228] *In re Tobacco Litigation* involved approximately eleven-hundred individual smokers who had brought personal injury claims against various cigarette manufacturers.[229] The trial court ordered a consolidated single trial,[230] bifurcated into two phases.[231] In Phase I, the jury would determine liability, as well as entitlement to punitive damages.[232] In Phase II, separate individual trials[233] would consider individual issues and compensatory damages.[234]

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[225] *E.g.*, *id.* at 747 (Starcher, J., concurring); *see also id.* at 740 (majority opinion); *In re* Methyl Tertiary Butyl Ether Prod. Liab. Litig., No. 1:00-1898, 2007 WL 1791258, at *6 (S.D.N.Y. June 15, 2007).

[226] *E.g.*, *In re Tobacco Litig*., 624 S.E.2d at 740.

[227] *E.g.*, *id.* at 747 (Starcher, J., concurring). The trial court would further conduct a post-verdict review of the amount of the award to ensure that it was not constitutionally excessive. *Id*.; *see also supra* text accompanying note 77.

[228] *In re Tobacco Litig.*, 624 S.E.2d at 739 (majority opinion).

[229] *Id.* In 1999, the West Virginia Supreme Court consolidated all pending personal injury tobacco litigation with Judge Arthur M. Recht, a member of the Mass Litigation Panel. *Id.*

[230] The cases were consolidated for trial pursuant to Rule 42 of the West Virginia Rules of Civil Procedure, which follows the same standard as its federal counterpart. *Compare* W. VA. R. CIV. P. 42(a) (allowing consolidation where actions involve "a common question of law or fact"), *with* FED. R. CIV. P. 42(a) (same).

[231] *In re Tobacco Litig.*, 624 S.E.2d at 739–40.

[232] *Id.* at 740.

[233] The case management order suggested that various decision-makers could be employed in Phase II, including separate juries, an individual judge or separate judges. *Id.*

[234] *Id.*

The defendants argued that *State Farm* required the court to remove the issue of punitive damages from Phase I.[235] The trial court agreed, but certified the question to the West Virginia Supreme Court.[236] Answering the certified question, the West Virginia Supreme Court reversed. The court found "nothing in *Campbell* that per se precludes a bifurcated trial plan in which a punitive damages multiplier is established prior to the determination of individual compensatory damages."[237] With little analysis, the court concluded that determining a punitive damages multiplier prior to determining individual compensatory damages did not violate due process.[238] Rather, the court found that the trial court's post-verdict review of any punitive damages award could "ensure that [the amount of the award] comports with the principles articulated in *Campbell*."[239]

[235] *Id.* The defendants argued that *State Farm* created an evidentiary limit on mass litigation. *Id.* Specifically, the defendants contended that the trial plan violated *State Farm* "by permitting the plaintiffs to show the reprehensibility of the defendants' conduct, for the purpose of proving the appropriateness of punitive damages, by admitting evidence of conduct that was dissimilar to the conduct that injured particular plaintiffs." *Id.*

[236] *Id.* The trial court viewed *State Farm* as establishing an evidentiary limit that turns punitive damages into an individual issue: "[T]he conduct of a party against whom punitive damages are sought must have a direct nexus to a specific person who claims to have been damaged by that conduct." *Id.* The court further found that "[t]he emphasis upon a subjective analysis of the defendant's conduct vis-à-vis a specific plaintiff requires that the defendant's conduct be tailored to each plaintiff." *Id.* (quoting Trial Court Order of June 16, 2004). According to the court's analysis, the trial plan violated *State Farm* by treating punitive damages as a common issue.

[237] *Id.* at 741.

[238] *Id.* at 743–44; *cf.* Philip Morris, Inc. v. Angeletti, 752 A.2d 200, 245 & n.36 (Md. 2000) (rejecting use of multiplier on state law grounds without reaching the defendant's constitutional arguments).

[239] *In re Tobacco Litig.*, 624 S.E.2d at 743. Regarding the evidentiary argument, the court acknowledged that *State Farm* prohibited the jury from basing a punitive damages award on a defendant's "dissimilar acts," but, without explanation, did not find that this limit created an individual issue. *Id.* at 742. Justice Benjamin wrote separately to emphasize the narrowness of the court's opinion. *Id.* at 749–52 (Benjamin, J., concurring). Emphasizing that the court held only that *State Farm* did not "per se" preclude the proposed trial plan, Justice Benjamin noted that the actual evidence concerning reprehensibility—potentially involving different plaintiffs "harmed by diverse conducts of different defendants, the products of which all plaintiffs did not smoke,"—could implicate *State Farm*'s evidentiary restrictions. *Id.* at 751. Justice Benjamin also noted the potential of "other legal reasons to question the circuit court's bifurcated trial plan" such as the possibility that the magnitude of compensatory damages would not warrant the imposition of punitive damages. *Id.* at 752; *see also infra* text accompanying notes 284–86.

In his concurrence, Justice Larry V. Starcher elaborated on the reasoning behind the decision.[240] Justice Starcher contended that "what process is due under the due process clause is determined under a sliding scale, and changes with the facts of each case."[241] Justice Starcher then limited *State Farm* to its single plaintiff-single defendant posture, and found that the trial plan adequately encompassed the Supreme Court's due process limitations on punitive damages.[242] At the end of the day, Justice Starcher appeared most concerned with what he termed the "judicial administrative nightmare" that would result from accepting the defendant's argument.[243]

### 2. The Suspect Lump-Sum Approach

Courts similarly have rejected due process challenges to trial plans that calculate a lump sum punitive damages award before consideration of the compensatory damages. Under this approach, courts likewise employ a bifurcated trial plan. In Phase I, the jury determines liability and entitlement to punitive damages.[244] If liability and entitlement to punitive damages are established, the Phase I jury then calculates a lump sum award of punitive damages for the entire class. In Phase II, subsequent juries then determine individual issues such as compensatory damages and unique defenses.[245] As a result of the Phase II proceedings, some individuals may drop out of the class.[246] After the Phase II trials are complete, the judge divides the lump sum punitive damages award among the remaining class members.[247]

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[240] *In re Tobacco Litig.*, 624 S.E.2d at 744–49 (Starcher, J., concurring).

[241] *Id.* at 748.

[242] *Id.* at 749.

[243] *Id.* Conflating the issue of punitive damages with liability, Justice Starcher concluded that accepting the defendant's argument would accord the defendant "a right to thousands upon thousands of individual trials that would cause the legal system to grind to a halt." *Id.*

[244] *See, e.g.*, Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1248 (9th Cir.) (Kleinfeld, J., dissenting), *superseded by* 509 F.3d 1168 (9th Cir. 2007); Henley v. FMC Corp., 20 Fed. App'x. 108, 112 & n.5 (4th Cir. 2001); Palmer v. Combined Ins. Co. of Am., 217 F.R.D. 430, 439 (N.D. Ill. 2003); *In re* New Orleans Train Car Leakage Fire Litig., 795 So. 2d 364, 372 (La. Ct. App. 2001).

[245] *See* sources cited *supra* note 244.

[246] For example, a particular plaintiff may not be able to establish causation or the defendant may succeed on an affirmative defense.

[247] *See* sources cited *infra* notes 251–52.

Here, too, courts have failed to distinguish between the due process limits on assessment of a punitive damages award and distribution issues. In *Dukes*, the Ninth Circuit initially approved, without discussion, a trial plan in which the jury would decide a lump sum amount of punitive damages followed by a determination of back and front pay by a special master.[248] The court found that this method satisfied *State Farm* because distribution of the lump-sum amount would be "in reasonable proportion to individual lost pay awards."[249] But an ex-post distribution that imposes a reasonable relationship fails to account for whether the total amount of punitive damages bore a reasonable relationship to the total amount of harm. In other words, an ex-post reasonable relationship analysis could render the total punitive damages award either insufficient or excessive.

Moreover, not all courts using a lump-sum approach have endorsed distribution plans that hint at the reasonable relationship requirement. Instead, some courts have endorsed *pro rata* distribution of the punitive damages award, wholly dispensing with the reasonable relationship requirement.[250] Finally, in a unique approach, the Southern District of West Virginia used a lump sum approach to be allocated to class members "in a percentage equal to the relationship of their compensatory award to the total compensatory damages award."[251] None of these approaches come close to

[248] *See supra* note 193.

[249] *Dukes*, 474 F.3d at 1242 (quoting district court order). Judge Andrew J. Kleinfeld, however, dissented. He argued that the trial plan violated the Due Process Clause under *State Farm.* "[I]n a multi-plaintiff, multi-defendant action, an approach that compares each plaintiff's individual compensatory damages with the punitive damages awards against each defendant more accurately reflects the true relationship between the harm for which a particular defendant is responsible, and the punitive damages assessed against that defendant." Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1198 (9th Cir. 2007) (Kleinfeld, J., dissenting) (quoting Planned Parenthood of Columbia/Williamette, Inc. v. Am. Coal. of Life Activists, 422 F.3d 949, 961 (9th Cir. 2005)); *see also Planned Parenthood of Columbia/Willamette, Inc.*, 422 F.3d at 962 ("[I]t makes sense to compare each plaintiff's individual compensatory damages and punitive damages awards to each defendant because this approach simplifies the task of assessing constitutional reasonableness.").

[250] Palmer v. Combined Ins. Co. of Am., 217 F.R.D. 430, 439 (N.D. Ill. 2003) (endorsing an allocation of a lump sum class punitive damages award on a *pro rata* basis or alternatively suggesting that the lump sum punitive damages be awarded "*cy pres* to an appropriate organization").

[251] Henley v. FMC Corp., 20 Fed. App'x. 108, 112 n.5 (4th Cir. 2001) (noting, without disapproval, trial court's proposed distribution of punitive damages award). The *Henley* trial plan never was tested as the parties eventually settled. Henley v. FMC Corp., 207 F. Supp. 2d 489

the requisite due process analysis between the punitive damages award and the harm to each class member.

Similarly, in a pre-*State Farm* decision, the Louisiana Court of Appeal rejected a due process challenge to a trifurcated trial plan that placed punitive damages before compensatory damages.[252] *In re New Orleans Train Car Leakage Fire Litigation* involved a chemical leak from a railroad tank car, and the subsequent two-day fire that spread toxic chemicals throughout the surrounding residential neighborhood.[253] The trial court certified a class of over 10,000 persons and entities,[254] and trifurcated the trial into liability, punitive damages, and individual compensatory damages.[255] Thus, the class-wide award of punitive damages was determined prior to the calculation of punitive damages for the majority of class members.[256]

On appeal, the defendant argued that the trial plan violated due process. Specifically, the defendant contended that the constitutional due process requirement of a "reasonable relationship" between the amount of punitive damages and the amount of compensatory damages meant that the total amount of compensatory damages must be determined prior to the punitive damages award.[257] The Louisiana Court of Appeal, however, rejected this argument.

Each of the grounds underlying the court's holding fails scrutiny under the Supreme Court's punitive damages cases. First, like the West Virginia Supreme Court,[258] the Louisiana court reasoned that the "reasonable

(S.D.W. Va. 2002) (holding proposed settlement was fair and reasonable); Smith v. FMC Corp., 225 F. Supp. 2d 707, 710 (S.D.W. Va. 2002) (approving final settlement).

[252] *In re* New Orleans Train Car Leakage Fire Litig., 795 So. 2d 364, 381 (La. Ct. App. 2001). Noted plaintiff's attorney Elizabeth Cabraser has argued that the case provides a model for class treatment of punitive damages awards. Cabraser, *supra* note 99, at 1037–40.

[253] *In re New Orleans Train Car*, 795 So. 2d at 370–71.

[254] Adams v. CSX Railroads, 615 So. 2d 476, 481 (La. Ct. App. 1993).

[255] *In re New Orleans Train Car*, 795 So. 2d at 372, 380 n.3.

[256] During Phase I, the jury determined compensatory damages for twenty plaintiffs. *Id.* at 372. During Phase II, the jury assessed a class-wide punitive damages award of $2.5 billion against defendant CSX Transportation Inc. *Id.* On post-verdict review, the trial court reduced this award to $850 million. *Id.* at 373. The trial court disbursed approximately $2.1 million of this amount to the twenty bellwether plaintiffs, and directed that the remainder be held in escrow to be "allocated to the remaining 8,000 + class members in accordance with further proceedings." *Id.*

[257] *Id.* at 379.

[258] *See supra* text accompanying note 240.

relationship" requirement was a post-verdict factor, not a consideration for the jury.[259] Indeed, the court found that "the lack of a determination of compensatory damages as to all class members as of the time of trial of the amount of punitive damages is irrelevant, at least in terms of constitutional Due Process."[260] In reaching this conclusion, the court relied on the Supreme Court's decision in *Pacific Mutual Life Insurance Company v. Haslip*,[261] which upheld jury instructions that did not include a "reasonable relationship" instruction.[262] That approach, however, disregards the evolution of the Court's punitive damages jurisprudence. *Haslip* was decided before the Court had even adopted any substantive due process limits on punitive damages and before the Court had identified the guideposts. Though *BMW* identified the guideposts as post-verdict factors, that does not mean that these principles do not guide pre-verdict procedures. Indeed, in *Philip Morris*, the Supreme Court acknowledged that evidence of a defendant's out of state conduct may be admissible for purposes of proving reprehensibility (one of the *BMW* guideposts), but nevertheless held that states must employ procedures for the proper use of such evidence at trial.

Second, the court found that the lack of a compensatory award would not affect post-verdict review, effectively ignoring the Supreme Court's recognition that "harm" typically is measured by the compensatory award.[263] Rather, the Louisiana court reasoned that the proper measure of "harm" included "potential" harm, a factor which juries are not asked to determine.[264] This reasoning is questionable in light of *Philip Morris*'s holding that "potential" harm only includes harm to the plaintiff.

In sum, before *Philip Morris*, courts repeatedly upheld trial plans that disregarded the necessary link between the plaintiffs' harm and the amount of a punitive damages award. These courts did so under the assumption

[259] *In re New Orleans Train Car*, 795 So. 2d at 380.

[260] *Id.*; *see also id.* at 381 ("[T]here is certainly no Due Process requirement that the jury, in setting the amount of punitive damages, consider the amount of compensatory damages.").

[261] 499 U.S. 1 (1991).

[262] *In re New Orleans Train Car*, 795 So. 2d at 380.

[263] *Id.* at 381.

[264] *Id.* at 383–84. Relying on *TXO*, the court hypothesized that the "potential harm" could have included the destruction of "whole city blocks" if the railroad car had exploded, or "death and destruction for up to a mile in any direction" if the tanker had "taken off like a missile." *Id.* at 386.

that the reasonable relationship is merely a post-verdict consideration, without ever explaining how the initial punitive damages award can constitutionally be divorced from the plaintiff's harm. To be sure, the Supreme Court has not yet held that procedural due process requires the jury to be instructed on any of the *BMW* guideposts.[265] Since *BMW*, however, the Supreme Court has linked the procedural and substantive due process requirements,[266] ultimately confirming in *Philip Morris* that procedural protections are required to prevent violations of the substantive due process limits on punitive damages. In the class action context, these procedural protections require consideration of the reasonable relationship standard at the jury level.

## V. CALCULATING PUNITIVE DAMAGES BEFORE COMPENSATORY DAMAGES VIOLATES DUE PROCESS

Due process does not allow courts to eliminate the proportionality requirement in order to aggregate multiple, individual claims into a punitive damages class.[267] Indeed, *State Farm* stressed that businesses constitutionally could be punished only "for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[268] A one-size-

[265] *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 602 (Scalia, J., dissenting) (noting that "if those 'interests' are the most fundamental determinant of an award, one would think that due process would require the assessing jury to be *instructed* about them").

[266] *See* Franze & Scheuerman, *supra* note 74, at 427–32.

[267] Apart from the due process problems discussed here, these trial plans may present Seventh Amendment problems as well. *Compare In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (holding that the Seventh Amendment includes "a right to have juriable issues determined by the first jury impaneled to hear them"), *with* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 169 n.13 (2d Cir. 2001) ("Trying a bifurcated claim before separate juries does not run afoul of the Seventh Amendment" as long as a single factual issue is not "tried by different, successive juries."). The Seventh Amendment provides, in relevant part, that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. Bifurcation *per se* does not violate the Seventh Amendment. Rather, as Professor Steven S. Gensler has explained, "[t]he Re-examination Clause does not prohibit different juries from hearing the same evidence; it only prohibits different juries from deciding the same issue." Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 736 (2000). But the issue remains a concern depending on the individual trial plan. For an argument that bifurcation does not violate the Seventh Amendment, see Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499 (1998).

[268] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003).

fits-all multiplier or lump sum award no longer punishes the defendant for the harm suffered by each particular plaintiff, but instead punishes the defendant for being a "bad" actor. The Supreme Court was unambiguous that the amount of punitive damages must be tied to the harm to the plaintiff. But in a lump sum or multiplier proceeding, the extent of each class member's harm remains an abstract, unanswerable question until the conclusion of the individual phase. The Maryland Supreme Court cogently stated the problem with multipliers or lump sum approaches to punitive damages:

> Allowing a single jury to set irrevocably the amount of punitive damages to be imposed relative to and on behalf of several, let alone thousands of individuals, whose actual damages are themselves determined separately from each other, does not enable the jury to properly assess the amount of punitive damages that are appropriate in specific relation to differing amounts of—and reasons for—actual damages. Mere widespread, identical proportionality between actual damages and punitive damages for such a multitude of plaintiffs would not necessarily encapsulate the relation between the two types of damages . . . .[269]

When a class action is bifurcated into separate punitive damages and compensatory damages phases, the jury is "left to speculate"[270] on the total harm caused by the defendant's conduct. Indeed, the questions raised by the Court in *Philip Morris* apply equally to a bifurcated trial on punitive damages:

> [T]o permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did the injury occur? The trial will not likely answer such questions as to nonparty victims . . . And the fundamental due process concerns to which our punitive

[269] Phillip Morris v. Angeletti, 752 A.2d 200, 249 (Md. 2000); *see also In re* Chevron Fire Cases, No. A1048790, 2005 WL 1077516, at *15 (Cal. Ct. App. May 6, 2005) (rejecting argument that "a punitive damages class action can proceed untethered to the examination of proportionality as to each plaintiff's compensatory damages").

[270] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007).

> damages cases refer—risks of arbitrariness, uncertainty, and lack of notice—will be magnified.[271]

"How many victims" will not be determined until individual liability issues are sorted out in the compensatory damages phase.[272] Nor can the jury determine how each class member was injured until the final individual proceedings. In a typical bifurcation, the Phase II jury considering the assessment of punitive damages will have no idea what the total harm suffered by the class means. Only where the underlying claim of injury is capable of class-wide proof can punitive damages be adjudicated in a class-wide manner.

*Philip Morris* makes clear that substantive due process prohibits a jury from punishing a defendant for harm caused to anyone other than the plaintiff.[273] To guarantee this substantive right, procedural due process prohibits a punitive damages class action disconnected from the harm suffered by each individual class member. Practically speaking, "harm" is measured by the amount of compensatory damages,[274] which means that a compensatory award must precede a punitive damages award.

Moreover, these bifurcated trial plans violate the most basic procedural due process guarantees—the defendant's right to present defenses to claims against them. In *Philip Morris*, the Supreme Court made clear that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'"[275] The Court applied this well-established due process principle to the punitive damages context, and noted that defendants must be given the opportunity to defend against each individual claim.[276]

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[271] *Id.*

[272] *See State Farm*, 538 U.S. at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . .").

[273] *Philip Morris*, 127 S. Ct. at 1065 ("We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now.").

[274] *See State Farm*, 538 U.S. at 426 (awards of punitive damages must be "proportionate to the amount of harm to the plaintiff and to the general damages recovered"); *see also* Sebok, *supra* note 24, at 973–74 (noting that compensatory damages "might . . . serve[] as a proxy for the damage caused by the defendant's tortious act, thus anchoring punishment to harm").

[275] *Philip Morris*, 127 S. Ct. at 1063 (quoting Lindsey v. Normet, 405 U.S. 56, 66 (1972)).

[276] *Id.* Indeed, the Court illustrated its holding with defenses typical in any failure-to-warn case: prior to the imposition of punitive damages, the defendant has a due process right to show

Bifurcated trial plans anticipate variations in actual injury, causation, or at a minimum, the amount of harm/compensatory damages.[277] Permitting class-wide recovery of punitive damages by the class before the defendant can challenge the elements of each individual[278] claim violates the defendant's due process rights.[279] Instead, class-wide assessment of punitive damages works only where the class is truly homogenous.

Finally, lump-sum awards and multipliers run afoul of the Court's repeated holding that no bright-line rule applies. The Supreme Court repeatedly has "decline[d] . . . to impose a bright-line ratio" between the amount of compensatory damages and the amount of punitive damages.[280] But, that is hardly the same as construing the reasonable relationship requirement as a "general concern[] of reasonableness."[281] The Supreme Court has, in fact, provided concrete guidance on the contours of the reasonable relationship requirement:

> Our jurisprudence and the principles it has now established demonstrate, however, that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . 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 the range of 500 to 1 . . . .[282]

Indeed, the Court's reluctance to impose any exact formula stems from the deterrent effect that compensatory damages alone could serve. The Court recognized that, in some circumstances, high compensatory damages

"that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary." *Id.*

[277] Professor Keith Hylton labels this a problem of "claim heterogeneity." Hylton, *Reflections on Remedies*, *supra* note 7, at 17–21.

[278] For the same reason, the use of "bell-weather" plaintiffs or a calculation of compensatory damages for the named class representatives fails to resolve the due process problem.

[279] *See* Colby, *supra* note 24, at 654–55 (arguing aggregate punitive damages awards violated due process by failing to allow defendant to contest elements on an individual basis with respect to each plaintiff).

[280] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

[281] *In re* New Orleans Train Car Leakage Fire Litig., 795 So. 2d 364, 384 (La. Ct. App. 2001).

[282] *State Farm*, 538 U.S. at 425.

would reduce the need for deterrence via a punitive damages award.[283] But the need for further deterrence can only be known after the total compensatory award is calculated. In any event, even "general concerns of reasonableness" require a jury to be able to assess reasonable in relation to what? And the answer to that question is that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."[284] Mere widespread proportionality or pro rata distribution does not reflect the true harm suffered by each plaintiff. As the Court has emphasized, "[t]he precise award in any case . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."[285] Detached from a determination of compensatory damages, a multiplier or lump sum award becomes the kind of arbitrary punishment forbidden by the Due Process Clause.

These limits cannot be ignored by trying to cabin the reasonable relationship requirement to post-verdict review. As *State Farm* made clear, the substantive limits on punitive damages guide the "reasonableness" of pre-verdict process.[286] *Philip Morris* confirms this understanding of the relationship between the substantive due process limits and the procedural requirements.

Thus, to satisfy the Due Process Clause, both compensatory damages and punitive damages need to be individually adjudicated for each class member. Even if such a class passes the predominance hurdle,[287] the class

[283] *Id.* ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").

[284] *Id.* at 426.

[285] *Id.* at 425.

[286] *See* Franze & Scheuerman, *supra* note 74, at 511. The authors explained:

> By holding that a substantive due process limit must be provided to the jury, *State Farm* recognized that—in the context of punitive damages—substantive due process influences the requirements of procedural due process. At a minimum, the Court's recognition of a correlation between procedural and substantive due process indicates that the concept of "adequate guidance" to the jury has evolved since *Haslip*.

*Id.*

[287] *See* discussion *supra* Part IV.A. The use of such "issue class actions" limited to the common issue of liability has been hotly debated by both scholars and courts. In two comprehensive articles, Professor Laura J. Hines has analyzed the validity of the issue class action

fails the superiority requirements.[288] Such a class action would devolve into a series of individual trials, and would lose any administrative efficiency.[289] The punitive damages inquiry combines a focus both on the defendant's conduct, and the harm and characteristics of the plaintiff. Thus, aside from potential Seventh Amendment issues,[290] evidence relevant to punitive damages—such as the defendant's conduct—would duplicate the liability phase of the trial.

In sum, as a matter of due process, punitive damages necessarily require an individualized inquiry into each person's harm. Thus, where compensatory relief cannot be determined on a class-wide basis, punitive damages pose an individual issue. Such cases suitable for class actions on punitive damages may be quite rare. But as aptly stated by the Fourth Circuit, "it is not the task of the federal court to create class-action rules that favor those with whom we empathize."[291]

## VI. DETERRENCE THEORY IS MISAPPLIED TO PUNITIVE DAMAGES CLASS ACTIONS

While deterrence theory may have had some appeal before *State Farm* and *Philip Morris*, the Court has retired any notion that a punitive damages award is meant to vindicate un-filed claims by non-parties.[292] Indeed, the Court explicitly rejected this argument in *State Farm*: "[T]he argument that State Farm will be punished in only the rare case . . . had little to do with

both as a matter of doctrine as well as a normative question. *See* Hines, *supra* note 174 (arguing that text, structure and history of Rule 23 do not support issue class action); Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L. J. 567 (2004) (arguing issue class action exacerbates individual autonomy concerns and undermines representative nature of class action).

[288] For class certification under Rule 23(b)(3), the plaintiff must show that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3); *see also* 4 CONTE & NEWBERG, *supra* note 11, § 13:1 (noting that most states follow Federal Rule 23).

[289] *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 419–20 (5th Cir. 1998) (noting that bifurcation "decreas[es] the superiority of the class action device").

[290] Analysis of whether subsequent individual trials on compensatory and punitive damages would violate the Seventh Amendment is beyond the scope of this Article.

[291] Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 328 n.20 (4th Cir. 2006).

[292] *See also* Hylton, *Reflections on Remedies*, *supra* note 7, at 28–29 (noting that Supreme Court's theory of due process runs contrary to deterrence objectives).

the actual harm sustained by the Campbells."[293] The Supreme Court has essentially stripped punitive damages of any general deterrence function.[294]

Instead, the Supreme Court has premised its due process theory on a one-on-one model of adjudication that focuses on the parties' relationship to one another and not the impact on non-parties or larger social issues.[295] By making punitive damages a function of compensatory damages, the Court implicitly has rejected Professors Polinsky & Shavell's cost-internalization formula as well as the gain-elimination approach of Professor Hylton. Indeed, as Judge Posner has recognized, limiting punitive damages to single-digit ratios does not promote efficient deterrence.[296] Moreover, a ceiling on punitive damages awards—which is what the Court's substantive due process cases hold—rejects a gain-elimination theory of deterrence as well.[297]

Thus, the Court has essentially adopted a bipolar view of punitive damages—even in cases that on their facts involve classic mass torts. From the Court's jurisprudence, the purpose of punitive damages is not to punish the defendant for its wrongful act generally,[298] but to punish the defendant

[293] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 427 (2003).

[294] Professor Colby notes other features of the punitive damages doctrine that render it inconsistent with optimal deterrence theory: (1) the requirement that the plaintiff prevail on the underlying cause of action, (2) allowing the plaintiff to keep the punitive damages award, and (3) the reprehensibility requirement. Colby, *supra* note 24, at 611–12; *see also* discussion *supra* Part II.

[295] *Cf.* Galligan, *The Risks of Underdeterrence*, *supra* note 19, at 699 (describing traditional litigation model as focused "on the parties and their moral relationship to one another").

[296] *See* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 675–77 (7th Cir. 2003); *see also* Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages and Criminal Punishment*, 88 MINN. L. REV. 880, 909 n.164 (2004) (explaining how *Mathias* illustrated the principle that efficient deterrence requires higher ratios than single-digit limits set by *State Farm*).

[297] Brief for Keith Hylton et al. as Amicus Curiae in Support of Respondents at 14, Phillip Morris USA v. Williams, 127 S. Ct. 1057 (2007) (No. 05-1256), 2006 WL 2688793 (acknowledging that "if the conduct is truly reprehensible, there is no deterrence-based argument for putting a ceiling on . . . the punitive damages award").

[298] While harm to others remains relevant to reprehensibility, the overall focus ties the punitive damages award to the plaintiff's harm, not nonparties. *State Farm* cautioned that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." 538 U.S. at 423. And while *Philip Morris* permits consideration of "harm caused others under the rubric of reprehensibility," the purpose of this evidence is not to punish the defendant for its wrongful acts towards others, but to show heightened reprehensibility:

for the harm done to the plaintiff. If that is true, arguably, a specific deterrence function remains possible for punitive damages, but only so far as it remains tied to the one plaintiff.

Sometimes the Constitution forbids a potentially better policy.[299] But is that the case here? In terms of efficient deterrence, tortfeasors should pay for the harm their conduct generates, not more and not less. If tortfeasors pay less than the harm they cause, under-deterrence may result—"precautions may be inadequate, product prices may be too low, and risk-producing activities may be excessive."[300] On the other hand, if tortfeasors pay more than the harm that they cause, "wasteful precautions may be taken, product prices may be inappropriately high, and risky but socially beneficial activities may be undesirably curtailed."[301]

Assuming that the goal of class-wide punitive liability is to achieve efficient deterrence, the current system does not serve that goal.[302] The punitive damages class action risks over-deterrence. The failure to consider individual defenses means that the total punitive damages award is based on conduct that caused no harm, thereby over-deterring the defendant's conduct. Similarly, the failure to assess the total harm means that the total punitive award may undervalue the total harm, thereby under-deterring the defendant's conduct.

### *A. The Over-deterrence Problem*

Even proponents of a class-action deterrence theory concede that a class-wide punitive damages award poses over-deterrence problems.[303] In a

"[C]onduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." Philip Morris USA v. Williams, 127 S. Ct. 1057, 1065 (2007).

[299] A paraphrase of Professor Steven S. Gensler: "[S]ometimes the Constitution forbids a potentially more efficient procedure." Gensler, *supra* note 267, at 711.

[300] Polinsky & Shavell, *supra* note 28, at 873.

[301] *Id.*

[302] Professor W. Kip Viscusi takes the position that punitive damages do not serve any deterrent function in the context of corporate defendants alleged to have committed environmental or safety torts. *See generally* Viscusi, *supra* note 39.

[303] *E.g.*, Gilles & Friedman, *supra* note 61, at 156. On the whole, Gilles and Friedman do not believe that class actions pose any over-deterrence problems. *Id.* That said, they concede that over-deterrence could be a valid concern where a case results in a class-wide punitive damages award: "[T]he only time a defendant is forced to internalize costs that exceed the social costs of its actions is, we suspect, when a case goes to judgment, and punitive or treble damages are

class action, a cost-internalization theory does not support inclusion of a punitive damages claim. By definition, a properly certified class will obtain compensatory damages that reflect the total harm of the defendant's wrongful conduct.[304] Indeed, in class actions, "rational attorneys will try to bring the most sympathetic and compelling cases first,"[305] thereby inflating the jury's perception of the total actual harm.

Moreover, even the gain elimination theory has flaws in this context. A class-wide punitive damages award assessed before the determination of compensatory damages may overestimate the actual harm caused by the defendant's conduct. Many of the alleged victims may not be "victims" at all.[306] Some class members may not be able to establish certain elements.[307] Or the defendant might have unique affirmative defenses to some claims. Perhaps a class member voluntarily and knowingly assumed the risk. Or they were guilty of comparative negligence. Or in an employment context, they were not qualified for the position.[308] Causation also may vary across the class making class-wide punitive damages claims inappropriate.[309]

Consider the flip-side of Professor Polinsky and Shavell's illustration on detection difficulties:

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imposed." *Id.* Gilles and Friedman respond to this argument simply by noting that few class actions reach judgment. *Id.* While that is certainly true—indeed, only 2% of tort cases in federal court were tried in 2002–03—it does not address the real over-deterrence that results when such damages are imposed. BUREAU OF JUSTICE STATISTICS, *Bulletin, Federal Tort Trials and Verdicts, 2002–03* (Aug. 2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fttv03.pdf.

[304] *Contra* Ciraolo v. City of New York, 216 F.3d 236, 248 (2d Cir. 2000) (Calabresi, J., concurring) (finding punitive damages still necessary to serve deterrence goals). Judge Calabresi rejects the idea that the class action serves these functions. First, he argues that a defendant's attempts to conceal the wrongdoing may allow the defendant to escape liability. The class action, however, does answer that charge: all it takes is one class representative to detect the wrongdoing. The same is true in a punitive damages case: all that is needed is just one plaintiff to detect the defendant's wrongdoing. Beyond that criticism, Judge Calabresi generally criticizes the class action as "compromising plaintiffs' autonomy and ignoring conflicts among class members." *Id.* Such general critiques of the class action are beyond the scope of this Article.

[305] Colby, *supra* note 24, at 613.

[306] *Id.* at 601.

[307] *See supra* text accompanying notes 135–36 (discussing reliance problem in *Philip Morris*).

[308] *See* Colby, *supra* note 24, at 601 (criticizing total harm punitive damages award based on differences among the individual victims).

[309] *See* Hylton, *Reflection on Remedies*, *supra* note 7, at 20–21 (noting that claim heterogeneity renders aggregation of punitive damages inappropriate).

> [T]he victim may have difficulty determining that the harm was the result of some party's act—as opposed to simply being the result of nature of bad luck. For instance, an individual may develop a form of cancer that could have been caused by exposure to a naturally occurring carcinogen, such as radon gas, but which was in fact caused by exposure to a manmade carcinogen that was released by the injurer.[310]

But what if the converse is true? What if the injury was "in fact" caused by exposure to natural radon gas? Or by a genetic predisposition? Including these class members in calculating a punitive damages award results in a sum greater than the harm caused by the defendant's conduct. Indeed, such claim heterogeneity is reflected in the fact that of the small percentage of cases reaching trial, plaintiffs only win roughly half the time.[311] On an individual basis, the defendant can be expected to prevail 50% of the time.[312]

Arguably, over-deterrence cannot occur with a truly reprehensible act.[313] This position, however, assumes that the defendant's conduct was, in fact,

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[310] Polinsky & Shavell, *supra* note 28, at 888.

[311] *See* BUREAU OF JUSTICE STATISTICS, *supra* note 303 (noting that "plaintiffs won in 48% of tort trials terminated in U.S. district courts in 2002–03"); NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1999–2000 34 (2000), *available at* http://www.ncsconline.org/D_Research/CSP/1999-2000_Files/1999-2000_Tort-Contract_Section.pdf.

[312] *See* NATIONAL CENTER FOR STATE COURTS, *supra* note 311, at 33. Indeed, Philip Morris itself reports that since January 1999, "verdicts in favor of PM USA and other defendants were returned in 28 of the 45 [individual] cases." Altria Group 10k-k, for 12/31/06, *available at* http://www.secinfo.com/d14D5a.u1B9m.htm#3rut.

[313] Polinsky & Shavell, *supra* note 28, at 907 & n.120; *accord* Hylton, *Reflection on Remedies*, *supra* note 7, at 20. Hylton provides the following example:

> [S]uppose an offender's transactions with each one of 10 victims are unambiguously fraudulent, leading to a loss of $10 to 9 of the victims and only $1 to the last victim. Suppose the court imposed a total damage award of $100 on the offender. This would appear to over-internalize the harm suffered by the last victim. However, since the offender's conduct offers no social benefits whatsoever, there is no cost associated with over-deterrence in this case.

*Id.*; *see also* Pac. Mut. Life Ins. Co v. Haslip, 499 U.S. 1, 54 (O'Connor, J., dissenting) ("[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible").

reprehensible towards each plaintiff. If the defendant's conduct was not uniformly harmful, then "one should worry about over-deterrence."[314] Beyond the fact that some class members may not have been harmed at all, the blameworthiness of the defendant's actions can vary among particular victims. Imagine a class action based on a drug company's failure to warn about the risks of a certain drug. Perhaps some consumers purchased the product before the defendant was aware of the risks. Other class members, however, purchased the drug after the defendant was aware of the risks and continued to sell the product. It is easy to imagine levels of reprehensibility varying among particular class members.

Thus, requiring manufacturers to pay punitive damages based on all class members results in over-deterrence.

### *B. The Under-deterrence Problem*

At the same time that it creates over-deterrence, calculating punitive damages before the extent of harm is fully known creates a risk of under-deterrence. Because the facts are similar in many cases, the tobacco law suits provide a frame of reference. Let's start with the landmark *Engle* decision.[315] *Engle* involved a class of Florida[316] smokers and their survivors who brought products liability claims[317] against various cigarette manufacturers.[318] The proceedings were divided into three principal phases.[319] Phase I considered the issues of liability and entitlement to punitive damages.[320] Phase II-A determined compensatory damages for the five class representatives, and Phase II-B decided a total lump sum amount

[314] Hylton, *Reflection on Remedies*, *supra* note 7, at 20.

[315] Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006) ("Engle II").

[316] The trial court originally certified a nationwide class, but the Florida Court of Appeals limited the class to only Florida smokers. *See* R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 42 (Fla. Dist. Ct. App. 1996).

[317] Plaintiffs asserted numerous products liability theories including strict liability, fraud and misrepresentation, conspiracy to misrepresent and commit fraud, breach of implied warranty, intentional infliction of emotional distress, negligence and breach of express warranty. Engle v. R.J. Reynolds Tobacco, No. 94-08273, 2000 WL 33534572, at *1 (Fla. Cir. Ct. Nov. 6, 2000) ("Engle I").

[318] *Engle II*, 945 So. 2d at 1256.

[319] *Id.*

[320] *Id.*

of punitive damages to be awarded to the class.[321] In Phase III, new juries would decide the individual liability and compensatory damages for each class member.[322] The trial court would then divide the amount of punitive damages determined in Phase II-B equally among successful class members.[323] After over two years of trial,[324] the jury found for the plaintiffs in Phase I, and awarded a record-setting $145 billion in punitive damages in Phase II-B.[325]

True, this award did not survive appellate review. But let us consider whether $145 billion accurately reflected a reasonable relationship between the amount of harm to the plaintiffs and punitive damages. The class was estimated to include approximately 700,000 members.[326] The trial plan contemplated a pro rata division of the punitive damages award, without regard to the individual injuries of each class member.[327] Applying the trial court's pro rata approach the amount of punitive damages per class member would be roughly $207,000.

Does this accurately reflect the extent of each class member's harm? Phase II-A only determined compensatory damages for the named class

[321] *Id.* at 1257.

[322] *Id.* at 1258.

[323] *Id.*

[324] Engle v. R.J. Reynolds Tobacco, No. 94-08273, 2000 WL 33534572, at *31 (Fla. Cir. Ct. Nov. 6, 2000).

[325] Relying on *State Farm*, the Florida Supreme Court reversed the punitive damages award. *Engle II*, 945 So. 2d at 1264–66. The court recognized that the due process reasonable relationship requirement prohibited calculation of the amount of punitive damages prior to an assessment of compensatory damages. *Id.* at 1264. Accordingly, the court held "the amount of compensatory damages must be determined in advance of a determination of the amount of punitive damages awardable, if any, so that the relationship between the two may be reviewed for reasonableness." *Id.* at 1265. A lump sum determination of punitive damages for the entire class prior to the determination of the total compensatory damages made it "impossible to determine whether punitive damages bear a 'reasonable relationship' to the actual harm inflicted on the plaintiff." *Id.* (quoting Liggett Group Inc. v. Engle, 853 So. 2d 434, 451 (Fla. Dist. Ct. App. 2003)); *see also In re* Simon II Litig., 407 F.3d 125, 138 (2d Cir. 2005) (noting that assessing amount of punitive damages prior to determination of compensatory damages "would fail to ensure that a jury will be able to assess an award that, in the first instance, will bear a sufficient nexus to the actual and potential harm to the plaintiff class, and that will be reasonable and proportionate to those harms").

[326] *Engle II*, 945 So. 2d at 1258.

[327] *Id.*

representatives; the compensatory damages totaled $12.7 million,[328] with individual amounts ranging from $523,000 to $5,831,000.[329] Assuming those ranges would likewise be represented in the class compensatory damages award, the ratio between punitive and compensatory damages was approximately .04 to 1.

Now, consider the relationship between punitive and compensatory damages in individual tobacco cases.[330] In *Henley v. Philip Morris, Inc.*,[331] for example, the California Court of Appeal upheld a 6 to 1 ratio of punitive to compensatory damages.[332] Another individual smoker suit in New York represents a 5 to 1 ratio of punitive to compensatory damages.[333] These ratios suggest—in an admittedly rough way—that the class-wide adjudication of punitive damages in *Engle* undervalued the harm to the plaintiffs, and thus may create a risk of under-deterrence.

As Dean Thomas Galligan has noted, the societal costs of under-deterrence are "grave":

> First, society faces a misallocation of resources. Second, some people are allowed to engage in activities without having to face accurate costs or accurate marginal cost curves.[334] This threatens free competition, has wealth

[328] *Id.* at 1257.

[329] Class representative Mary Farnan recovered $2,850,000 from the defendants; Frank Amodeo recovered $5,831,000; Ralph Della Vecchia recovered $1,500,000; James Della Vecchia recovered $523,000; and the Estate of Angie Della Vecchia recovered $523,000. *Engle I*, 2000 WL 33534572, at *31–32.

[330] *Philip Morris* itself is excluded because the punitive damages award included an unconstitutional component of harm-to-others and there is no way to strip that consideration from the amount. *Cf.* White v. Ford Motor Co., 312 F.3d 998, 1016 (9th Cir. 2002) (noting that remittitur could not cure punitive damages award tainted by extraterritorial conduct), *amended on denial of reh'g*, 335 F.3d 833 (9th Cir. 2003).

[331] 9 Cal. Rptr. 3d 29 (Cal. Ct. App. 2004).

[332] The compensatory damages were $1.5 million, and the court reduced the punitive damages award to $9 million. *Id.* at 38.

[333] Rose v. Brown & Williamson Tobacco Corp., No. 101996/2002, 2005 WL 5959748 (N.Y. Sup. Ct. Dec. 2, 2005), *rev'd*, 53 A.D.3d 80 (N.Y. App. Div. 2008) (finding no basis for the award of punitive damages because plaintiffs failed to make out a prima facie case for holding defendants liable for compensatory damages).

[334] In noting this point, Galligan implicitly focuses on mass torts and claims against manufacturers. Explaining the reduced marginal cost curve, Galligan notes that by facing less than full liability, a manufacturer has lower production costs, and therefore can charge less for the

> distribution effects, and causes unequal profit opportunities. Third, because the underdeterred are able to injure others at inefficiently high levels, they impact injured people's freedom in a way that is not only inefficient but also morally disturbing.[335]

True, traditional, single-plaintiff suits may risk under-deterrence.[336] But, that argument is based on the underlying premise that harmed individuals will not sue. Here, the continued presence of an individual punitive damages claim itself may eliminate the negative value of the suit, and provide incentives for attorneys to take the case.[337]

## CONCLUSION

No plaintiff has a "right" to punitive damages.[338] On the other hand, defendants do have a right to procedural due process protections against excessive and arbitrary awards. The only sound reading of the Court's punitive damages decisions is that we are now left with compensatory damages-only class actions unless the harm to the class is identical. Individuals, of course, remain free to pursue individual actions that seek punitive damages. Not only is this the constitutionally required solution, it is the right solution. The jury must know the total harm caused by the defendant's conduct before it can assess a class-wide punitive damages

product or good: "These defendants would be getting an advantage which could be characterized as effectively receiving a subsidy." Galligan, *The Risks of Underdeterrence*, *supra* note 19, at 703.

[335] *Id.* at 695.

[336] *See, e.g.*, *id.* at 693 (arguing that the "one-on-one model holds the least promise for achieving efficient deterrence in mass torts cases because many of the underdeterrence problems arise as a result of this model."); Cabraser, *supra* note 125, at 1176 (arguing "[a]n endless series of one-plaintiff, "*State Farm*" type cases will not add up to full deterrence, if a defendant's seamless course of conduct must be hypothecated on a plaintiff-by-plaintiff basis, and the endless series of *de novo* appellate reviews will cause endless delay").

[337] *See, e.g.*, Colby, *supra* note 24, at 594–95 (arguing that denying "total harm" damages creates incentives for other victims to seek a "piece of the punitive pie.").

[338] *See, e.g.*, Smith v. Wade, 461 U.S. 30, 52 (1983) ("[P]unitive damages . . . are never awarded as of right, no matter how egregious the defendant's conduct.").

remedy. Otherwise, we fall through the Looking Glass where trials proceed, "Sentence first! Verdict afterwards."[339]

[339] LEWIS CARROLL, ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS 137 (Grosset & Dunlap, Inc. 1992) (1951).