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# Punitive Damages, Retribution, and Due Process

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# PUNITIVE DAMAGES, RETRIBUTION, AND DUE PROCESS

MARK A. GEISTFELD\*

## ABSTRACT

*Tort law provides awards of punitive damages for reasons of deterrence and retribution. In light of a recent decision by the U.S. Supreme Court in Phillip Morris USA v. Williams, the retributive rationale for punitive damages will inevitably come under heightened scrutiny. The case involves a punitive award of \$79.5 million, which is ninety-seven times greater than the compensatory damages, making it constitutionally suspect for exceeding the single-digit ratio between punitive and compensatory damages. The Court, though, has never addressed the constitutional issue in a case involving serious bodily injury or death, and so Williams poses a number of new questions. How can compensatory damages provide an appropriate baseline for evaluating punitive damages in a case of wrongful death, given that monetary damages provide no compensation to a dead person? What is the appropriate baseline? Any future deterrence provided by a punitive award cannot protect the decedent's tort right, and so the award must be justified exclusively in terms of retribution. Is retribution inherently subjective and arbitrary, unless constrained by some objective measure such as the single-digit ratio between the punitive and compensatory damages? Or is there some way to translate retribution into dollars? These questions are not limited to wrongful death cases and must be resolved by any court trying to determine whether a punitive award is unconstitutional for exceeding the single-digit ratio. These questions can*

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\* Crystal Eastman Professor of Law, New York University School of Law. Copyright 2007 Mark A. Geistfeld. I am grateful for the extremely helpful comments I received from Greg Keating and other participants in the faculty workshop at the University of Southern California Gould School of Law, and from Jennifer Arlen, Tom Baker, Peter Schuck, Anthony Sebok, Katrina Wyman, Ben Zipursky and other participants in the New York City Torts Group. Financial support for this project was provided by the Filomen D'Agostino and Max E. Greenberg Research Fund of the New York University School of Law.

*all be answered once retribution is tied to the inherent limitations of compensatory damages, which yields a method for quantifying this form of punitive damages. Based on government data and methodology for quantifying the social cost of a premature death, this method shows why vindication of the decedent's tort right in Williams justifies the \$79.5 million punitive award. When formulated in this manner, vindictive damages satisfy the requirements of both substantive and procedural due process and provide a baseline for reviewing courts to determine whether any given punitive award, like one based on general deterrence, is excessive in violation of substantive due process. This method fully accounts for the reprehensibility factors that determine the constitutionality of a punitive award, while also explaining why the Court could defensibly rely on procedural due process to reverse and remand Williams back to state court.*

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#### I. INTRODUCTION

In a line of relatively recent cases, the U.S. Supreme Court has held that the Due Process Clause of the U.S. Constitution imposes procedural and substantive limitations on tort awards of punitive damages.<sup>1</sup> According

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1. In 1989, the Court left open the question “whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit.” *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989). A decisive, affirmative answer to

to the Court, “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”<sup>2</sup> The Court recently had occasion to address the meaning of this holding and the related constitutional inquiry. In *Philip Morris USA v. Williams*,<sup>3</sup> the jury awarded \$821,485 in compensatory damages and \$79.5 million in punitive damages to the plaintiff due to the fraudulent manner in which the defendant tobacco company had induced her husband to smoke its cigarettes, ultimately causing his premature death. The punitive award was ninety-seven times greater than the compensatory damages for wrongful death, making it constitutionally suspect for significantly exceeding the single-digit ratio. In granting certiorari, the Court decided to address the question of “[w]hether the ratio between compensatory and punitive damages comprises the conclusive and overriding guidepost as to the reasonableness of a punitive damages verdict . . . .”<sup>4</sup>

The issue depends on unresolved issues of foundational importance for tort law. Not surprisingly, wrongful death poses particularly vexing questions about the way in which compensatory tort damages protect the tort right. A monetary damages remedy provides no compensation to a dead person. Given this inherent limitation, why assume that compensatory damages provide an appropriate constitutional baseline for evaluating punitive damages?

Prior to *Williams*, the Court had never confronted this problem. In the first case to adopt the single-digit ratio between compensatory and punitive damages as a factor for evaluating the constitutionality of a punitive award, the Court addressed an economic injury (paint damage on a new car) that was fully compensable by the ordinary damages remedy.<sup>5</sup> The Court has since decided one other punitive damages case, and it also involved an economic injury (bad-faith handling of an insurance claim) that was fully compensable by the ordinary damages remedy.<sup>6</sup> Wrongful death is not the type of injury that is readily compensable by a damages award, and so *Williams* involves the novel question of what constitutes adequate

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that question was provided by the Court a few years later in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 11–23 (1991).

2. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

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

4. Brief for Respondent at i, *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (No. 05-1256), available at [http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/051256\\_Respondent.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/051256_Respondent.pdf) (characterizing the issue in these terms).

5. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 563 (1996).

6. *State Farm*, 538 U.S. at 414.

compensation for determining whether a punitive award satisfies substantive due process.

For now, the Court has ducked this difficult issue by relying on procedural due process to reverse and remand the case to the Oregon Supreme Court.<sup>7</sup> When it first affirmed the award, the Oregon court concluded that due process does not prohibit the jury “from using punitive damages to punish a defendant for harm to nonparties.”<sup>8</sup> The defendant Philip Morris had engaged in a long-running fraudulent scheme designed to dupe the general public into smoking cigarettes, leading the court to conclude that this reprehensible conduct justified the \$79.5 million award.<sup>9</sup> In reviewing this award, the U.S. Supreme Court held 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 on nonparties or those whom they directly represent, *i.e.*, injury that it inflicts on those who are, essentially, strangers to the litigation.”<sup>10</sup> Based on the record before it, the Court was unable to determine whether the Oregon Supreme Court had appropriately relied on harms to nonparties in affirming the punitive damages award, requiring reversal and remand.<sup>11</sup> This procedural ruling enabled the Court to defer the difficult question of substantive due process that it will inevitably have to address at some point.

The Court’s opinion in *Williams*, however, creates its own set of equally difficult problems. By holding that the punitive award cannot punish the defendant for having caused harms to nonparties, *Williams* essentially limits punitive damages to the amount justified solely by the violation of the plaintiff’s individual tort right. Such an award of punitive damages can give the defendant an incentive to respect the plaintiff’s tort right in the future. This deterrence objective, however, is not relevant in a case of wrongful death. Even if the award of punitive damages might cause the defendant and similarly situated duty-holders to behave reasonably in the future, that socially valuable outcome provides no protection for the decedent right-holder. A dead person has no future interest in physical security that can be protected by tort law. Lacking a deterrence rationale, the punitive award for wrongful death must be justified solely in the retributive terms of punishing the defendant for having caused the

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7. *Williams*, 127 S. Ct. at 1062.

8. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1175 (Or. 2006), *vacated and remanded sub nom. Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

9. *Id.* at 1181–82.

10. *Williams*, 127 S. Ct. at 1063.

11. *Id.* at 1065.

premature death of the decedent in violation of his right to physical security. Is retribution inherently subjective and arbitrary, violating due process unless constrained by some objective measure such as the single-digit ratio? Or is there a way to conceptualize the appropriate amount of damages for retributive purposes? In light of *Williams*, these questions must now be addressed by any court evaluating the constitutionality of a punitive damages award in a case of wrongful death.

Indeed, wrongful death merely highlights the role of retribution; the inherent problem of quantifying punitive damages for retributive purposes applies quite generally. “[T]he aggressive, judicial case-by-case review mandated by [the Court] makes *every* punitive damages case a potential constitutional case.”<sup>12</sup> Aside from the single-digit ratio and any existing criminal or civil penalties for similar misconduct, the substantive due process inquiry considers the reprehensibility of the defendant’s conduct.<sup>13</sup> The Court has identified this factor as “[t]he most important indicium of the reasonableness of a punitive damages award . . . .”<sup>14</sup> All else being equal, greater reprehensibility merits more punishment and justifies a greater quantum of punitive damages. The constitutionality of virtually any punitive damages award, therefore, importantly depends on whether the size of the award is an excessive retributive sanction for the defendant’s reprehensible misconduct.

The problem of translating reprehensibility into a specific damages award is difficult enough; it becomes even more puzzling in light of the Court’s holding in *Williams* about the way in which reprehensibility depends on third-party harms:

Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.<sup>15</sup>

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12. Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Tort Law—Defamation, Preemption, and Punitive Damages*, 74 U. CIN. L. REV. 1189, 1256 (2006) (emphasis in original).

13. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

14. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (quoting *BMW of N. Am., Inc.*, 517 U.S. at 575).

15. *Williams*, 127 S. Ct. at 1064.

The dissenting Justices were mystified by this holding. According to Justice Stevens:

[T]he majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant's conduct—which is permitted—from doing so in order to punish the defendant “directly”—which is forbidden. This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm. A murderer who kills his victim by throwing a bomb that injures dozens of bystanders should be punished more severely than one who harms no one other than his intended victim. Similarly, there is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers statewide should not include consideration of the harm to those “bystanders” as well as the harm to the individual plaintiff. The Court endorses a contrary conclusion without providing us with any reasoned justification.<sup>16</sup>

Similar concerns were expressed in the dissenting opinion by Justice Ginsburg, which was joined by Justices Scalia and Thomas.<sup>17</sup>

The issues raised by *Williams* stem from the pivotal role of retribution in quantifying punitive damages. How does the retributive rationale for punitive damages affect the substantive due process inquiry regarding the appropriate relationship between compensatory and punitive damages? In assessing the degree of reprehensibility, how can the jury consider harms to nonparties, and what implications does this inquiry have for the constitutionally required procedures?

This Article seeks to answer these questions by showing how punitive damages can be quantified in order to punish a defendant for having reprehensibly violated the plaintiff's tort right. Having identified such a method, we can then clearly see the procedural implications.

Part II explains why any retributive rationale for punitive damages necessarily depends on the inadequacy of compensatory tort damages. Part III then shows that the compensatory limitations of monetary damages justify negligence liability as the default rule for accidental harms, with punitive damages required for cases in which the defendant advertently rejected the duty to exercise reasonable care. When based on this rationale,

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16. *Id.* at 1066–67 (Stevens, J., dissenting) (citation and footnote omitted).

17. *Id.* at 1068 (Ginsburg, J., dissenting) (arguing that the majority failed to identify any way in which the Oregon courts had improperly relied on third-party harms to determine reprehensibility).

punitive damages can vindicate the decedent's tort right without having to depend on vague notions of retribution. To illustrate, Part IV shows why vindication of the tort right in *Williams* justifies the \$79.5 million punitive award based on data and methodology used by federal regulatory agencies to monetize the social cost of a premature death. Part V evaluates the constitutional properties of vindictive damages, concluding that these awards satisfy both substantive and procedural due process. Pursuant to this approach, vindictive damages can depend on harms to nonparties in a manner that is not constitutionally problematic, thereby explaining the otherwise puzzling holding in *Williams* concerning the appropriate relation between reprehensibility and third-party harms.

## II. PUNITIVE DAMAGES AS RETRIBUTION

Tort liability frequently applies to behavior that was not reprehensible or even blameworthy. Lapses of attention, inadvertence, or a poor decision can cause injury and subject the actor to tort liability. In these cases, the plaintiff is entitled to compensatory damages and nothing more.<sup>18</sup>

The plaintiff can receive a greater amount of damages in virtually every state “only when the tortfeasor has committed quite serious misconduct with a bad intent or bad state of mind such as malice.”<sup>19</sup> Due to the reprehensible nature of the defendant's tortious misconduct, compensatory damages no longer adequately redress the violation of the plaintiff's tort right. Punishment, however, “does not adequately describe the bases for such damages, [and so] they are sometimes called extracompensatory damages.”<sup>20</sup>

According to the U.S. Supreme Court, punitive damages “serve the same purposes as criminal penalties.”<sup>21</sup> Both “are aimed at deterrence and retribution.”<sup>22</sup> When punitive damages are justified solely by deterrence considerations, the award does not involve any retribution and is entirely extracompensatory. The deterrence rationale, though, does not straightforwardly apply in a case of wrongful death. However socially beneficial deterrence might otherwise be, it would not protect the decedent's private interests in a wrongful death case. A dead person no

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18. See *Smith v. Wade*, 461 U.S. 30, 52 (1983) (explaining that under common-law principles, “punitive damages . . . are never awarded as of right, no matter how egregious the defendant's conduct,” whereas compensatory damages “are mandatory” once liability has been established).

19. DAN B. DOBBS, *THE LAW OF TORTS* 1062 (2000).

20. *Id.*

21. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

22. *Id.* at 416.

longer has an interest in physical security, rendering irrelevant the forward-looking objective of deterrence. Without a deterrence rationale, any award of punitive damages must be justified exclusively in the backward-looking terms of retribution.<sup>23</sup>

Tort scholars have identified two different ways in which punitive damages can punish the defendant wrongdoer for having reprehensibly violated the plaintiff's tort right. Each proceeds from the premise that extracompensatory damages are required in order to vindicate the tort right, a role for tort liability expressly adopted by the *Restatement (Second) of Torts* and reflected in the practice of describing punitive damages as "vindictive damages."<sup>24</sup>

If liability were always limited to compensatory damages, a defendant duty-holder could choose to violate the plaintiff's tort right in exchange for paying the "price" of compensatory damages. This conduct is reprehensible due to the way in which it unilaterally appropriates the essential protection afforded by the tort right. As Jules Coleman and Jody Kraus explain:

It is surely odd to claim that an individual's right is protected when another individual is permitted to force a transfer at a price set by [the court in awarding compensatory damages]. Isn't the very idea of a forced transfer contrary to the autonomy or liberty thought constitutive of rights?<sup>25</sup>

The conduct is also economically objectionable because the defendant's attempt to force a transfer inefficiently negates the plaintiff's right to negotiate.<sup>26</sup> A defendant can have the bad state of mind required for punitive damages even while fully expecting to pay compensatory damages for the rights-violation.<sup>27</sup>

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23. To be sure, the mere prospect of punitive damages gives any duty-holder an incentive to comply with the tort obligations, thereby protecting any individual right-holder in this respect. This deterrence is general and not specific to the individual right-holder, however. As a constitutional matter, the objectives of deterrence and retribution must be framed solely in terms of the individual tort right. See *infra* note 113 and accompanying text.

24. See RESTATEMENT (SECOND) OF TORTS § 901 (1979) (stating that two of "the purposes for which actions of tort are maintainable" are to "determine rights" and "vindicate parties"); RICHARD L. BLATT, ROBERT W. HAMMESFAHR & LORI S. NUGENT, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 1.3 (1991) (listing various names for describing punitive damages, including "vindictive damages").

25. Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1338-39 (1986).

26. The conduct, more precisely, inefficiently enables the defendant to convert a "property rule" into a "liability rule." See David D. Haddock, Fred S. McChesney & Menahem Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1, 17-21 (1990).

27. See, e.g., *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 382 (Ct. App. 1981) (upholding a substantial punitive award based on the defendant's conclusion that it would be cheaper to pay

To protect the tort right from forced transfers or intentional takings by a defendant duty-holder, tort law awards extracompensatory or punitive damages in these cases. Punitive damages can vindicate the tort right for reasons given by Arthur Ripstein:

[W]ithout [a punitive response], the wrongdoer would have succeeded in treating the other party's rights as part of the cost of pursuing his or her own ends. The punitive response cannot just take the form of a solemn public declaration, though. If it did, the wrongdoer would have gotten away with the wrongdoing, for he or she would have been right about the costs and benefits of doing wrong. Something more is needed to reject the perspective from which the wrong was done. Imposing an extra cost does so because it rejects the wrongdoer's deed from the perspective within which it purportedly made sense, namely, that of private advantage.<sup>28</sup>

This method for vindicating the plaintiff's tort right minimally requires the disgorgement of the wrongful gains the defendant expected to derive by violating the right, an outcome consistent with the deterrence rationale for a punitive award. As Ripstein further explains:

Punitive damages also deter. That is because the denunciation of the wrongdoing is not possible except by imposing a substantial cost that will more than cancel the expected gain. Deterrence is the inevitable by-product of condemning the deed in this way. They will also teach the wrongdoer that tort does not pay, because they will make it painfully apparent.<sup>29</sup>

As courts have long recognized, deterrence is a consequence of retribution and not its rationale.<sup>30</sup>

Punitive damages can be retributive in another respect. According to the retributive theory developed by Jean Hampton, punishment is warranted when a wrongdoer asserts an undeserved mastery over the

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compensatory damages than to remedy a defectively designed automobile); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 156 (Wis. 1997) (upholding a substantial punitive award as a means of preventing the defendant trespasser from using compensatory damages to purchase an easement).

28. ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 152 (1999) (citation omitted). See also Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686 (1992) (arguing that "retribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity").

29. RIPSTEIN, *supra* note 28, at 153 (citation omitted).

30. See, e.g., *Ward v. Ward*, 41 Iowa 686, 688 (1875) (observing that "vindictive damages are never allowed alone for the purpose of public good through the example given in their assessment" because "[t]he effect upon the public is but an incident" of vindicating the private right).

correspondingly diminished victim.<sup>31</sup> Based on this theory, Marc Galanter and David Luban argue that punitive damages are a justifiable form of “poetic justice.”<sup>32</sup> Hampton’s retributive theory is also relied on by Anthony Sebok, who views punitive damages as a “form of private retribution, [and so] the current practice of punitive damages is best characterized as a form of revenge, although it is a very stylized form of revenge.”<sup>33</sup> By giving plaintiffs a right to seek “stylized revenge” in the form of punitive damages, tort law enables them as diminished victims to assert their equal moral worth with the defendants as reprehensible wrongdoers. A similar justification for punitive damages has been developed by Benjamin Zipursky, who claims that “punitive damages are permitted in light of our legal system’s recognition that the plaintiff has a right to *be punitive*” as a matter of civil recourse.<sup>34</sup> A related role for punitive damages is provided by welfare economics, for which “the punishment objective derives ultimately from the pleasure or satisfaction people obtain from seeing blameworthy parties punished . . . .”<sup>35</sup> These varied rationales for punitive damages rely on different conceptualizations of the tort right, but they all provide a role for private punishment that distinctively differs from vindication as the disgorgement of expected wrongful gains.

In a case of wrongful death, punitive damages are hard to justify as a form of private revenge. The right of the decedent supplies the basis for a wrongful death action brought by the plaintiff (family members or the estate), and so punitive damages can only vindicate the right itself.<sup>36</sup> To do

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31. Hampton, *supra* note 28.

32. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1432–39 (1993) (arguing that punitive damages correct an imbalance between the parties by acknowledging the moral worth of the victim and sending a public signal that the defendant acted in a particularly blameworthy way toward the plaintiff).

33. Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 961 (2007) (emphasis omitted).

34. Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 106 (2005) (emphasis in original).

35. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 948 (1998).

36. As a leading treatise explains:

Wrongful death statutes create a new cause of action for the benefit of survivors; it is not merely a continuance of the deceased’s own claim. At the same [time] they provide or have been interpreted to mean that no new cause of action is created unless the deceased himself would have been able to sue had he lived.

DOBBS, *supra* note 19, at 815. Punitive damages in the wrongful death suit, therefore, can vindicate the decedent’s tort right, explaining why “the statutes themselves” and “a sizeable number of decisions have now allowed a recovery of punitive damages in death actions or have approved them in principle.” *Id.* at 813.

so, the punitive award must: (1) disgorge the defendant's expected wrongful gain in order to protect the right from within the wrongful perspective adopted by the defendant; and then (2) increase damages further to reject altogether the defendant's wrongful perspective, thereby vindicating the right in its entirety.

This rationale for punitive damages, like any other retributive rationale, critically depends on an unexamined assumption. A plaintiff who was tortiously injured by the defendant typically receives compensatory damages and nothing else. Punitive damages are the exception, not the norm. Retribution accordingly depends on a substantive tort right for which compensatory damages are adequate in some circumstances and not others. The role of retribution is somehow tied to the role of compensation, and yet the retributive rationales for punitive damages do not adequately specify the nature of this relationship.

This feature of retribution requires explanation for reasons clearly revealed by the rules of strict liability. As compared to negligence liability, one might think that strict liability is *more* protective of a tort right to physical security. A rule of strict liability, however, does not specify how safely the duty-holder should behave, and so the duty-holder rationally imposes a risk on the right-holder when it would be cost-effective to do so.<sup>37</sup> This predictable incident of strict liability does not trigger a punitive response.<sup>38</sup> Strict liability shows that a duty-holder is not necessarily barred from imposing risks on the right-holder in exchange for paying the "price" of compensatory damages, although the retributive rationales for punitive damages assume as much.

Once we consider the criminal law, the relation between compensation and retribution becomes more evident and even more puzzling. The misconduct that subjects a tortfeasor to punitive damages may also be subject to criminal liability.<sup>39</sup> Consequently, a punitive award quite

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37. See *infra* Part III.

38. According to the U.S. Supreme Court:

Most cases under state common law, although varying in their precise terminology, have adopted more or less the same rule, recognizing that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence.

Smith v. Wade, 461 U.S. 30, 47–48 (1983).

39. "[T]he overwhelming majority of jurisdictions allow crimes based on ordinary negligence." State v. Hazelwood, 946 P.2d 875, 884 n.17 (Alaska 1997). Ordinary negligence, however, "applies in only a relatively few modern statutory crimes. . . . [F]or the most part, . . . something more than negligence is required for criminal liability." WAYNE R. LAFAYE, 1 SUBSTANTIVE CRIMINAL LAW § 5.4(a)(2) (2d ed. 2003). Criminal liability usually requires "a risk greater than simply an unreasonable risk" and/or "a subjective awareness of the unreasonable risk [the duty-holder] creates." *Id.* These

plausibly punishes the defendant for having criminally injured the plaintiff. This particular retributive rationale can explain why punitive damages are limited to certain types of reprehensible wrongdoing and are unavailable for injuries caused by ordinary (noncriminal) negligence or strictly liable behavior. But if punitive damages punish the defendant for criminal misconduct, then imposing criminal liability on the defendant for the same misconduct would involve double punishment. In addressing this issue, the majority of courts have “avoided the double jeopardy problem by holding that punitive damages are punishment, not for the improper act in the abstract, or the wrong that the defendant has caused to society, but for the legal wrong to the individual plaintiff.”<sup>40</sup> This holding assumes that compensatory damages are inadequate. If the damages remedy were fully compensatory for the plaintiff, any residual harm could only involve the defendant’s attempt to appropriate the tort right in exchange for paying the price of compensatory damages. That harm is to the integrity of the right, incurred by the class of similarly situated right-holders and not merely the otherwise fully compensated plaintiff. Such harm justifies criminal liability, not tort liability.<sup>41</sup> By contrast, if tort damages were not fully compensatory, then the individual plaintiff would suffer a harm different from that suffered by the general class of right-holders. The plaintiff’s distinctive private harm could be redressed by a tort award of punitive damages, leaving criminal law with the task of punishing the defendant for the public harm suffered by the general class of right-holders. These similarly situated right-holders could only suffer harm, however, if the ordinary damages remedy were not fully compensatory for them as well. Once again, some unidentified inadequacy of compensatory damages triggers a retributive response, which requires criminal liability in addition to tort liability.

Inadequate compensation is the predicate for retribution. To develop further the concept of vindictive damages, we need to determine why tort liability relies on compensatory damages and how that reliance can render

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added requirements for criminal liability correspond to those required for purposes of punitive damages. See *supra* note 38 and accompanying text.

40. Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 622 (2003). The issue does not involve the Double Jeopardy Clause of the U.S. Constitution. See *United States v. Halper*, 490 U.S. 435, 451 (1989), *overruled on other grounds by Hudson v. United States*, 522 U.S. 93, 101 (1997) (stating that the “protections of the Double Jeopardy Clause are not triggered by litigation between private parties”).

41. See, e.g., Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 780–86 (1989) (explaining why criminal liability, rather than tort liability, governs harm suffered by a general class of right-holders).

compensatory damages inadequate, thereby creating a retributive role for punitive damages.

### III. PUNITIVE DAMAGES IN A COMPENSATORY TORT SYSTEM

The primary purpose of tort liability is “to give compensation . . . for harms,” according to the *Restatement (Second) of Torts*.<sup>42</sup> The compensatory role of tort liability was clearly evident when tort law first originated within the writ system. The writs that are now part of tort law enabled the plaintiff to receive compensation for harms caused by the criminal misconduct of the defendant.<sup>43</sup> Tort law did not have to specify the required forms of behavior as long as liability involved criminal misconduct. The criminal law proscribed certain types of behavior, and the threat of criminal sanctions provided the necessary incentives for deterring individuals from engaging in the prohibited behavior. As it first developed within the writ system, the tort right was adequately protected by the compensatory damages remedy.<sup>44</sup>

Over time, the criminal law and tort law separated, enabling tort law to provide compensation for harms not caused by criminal wrongdoing. The early common law often justified liability in these cases with the maxim *sic utere tuo ut alienum non laedas*—use your own so as not to injure another.<sup>45</sup> The maxim does not base the compensatory duty on the unreasonableness of the injurer’s behavior, and so it has frequently been invoked by courts and commentators to justify rules of strict liability.<sup>46</sup>

As suggested by this history, a compensatory objective would seem to

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42. RESTATEMENT (SECOND) OF TORTS § 901 (1979).

43. See, e.g., David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59 (1996) (observing that under the early common law, “[i]n most instances, the same wrong could be prosecuted either as a crime or as a tort”).

44. See *id.* at 59–60 (“According to the lawyers, victims who preferred vengeance over compensation prosecuted their wrongdoers for crime. Victims who preferred compensation over vengeance sued their wrongdoers for tort.”).

45. The tort maxim *sic utere tuo ut alienum non laedas* literally means “Use your own property in such a manner as not to injure that of another.” BLACK’S LAW DICTIONARY 1238 (5th ed. 1979). As applied to risky behavior not involving the use of property, the maxim yields a common law principle that “under the common law a man acts at his peril.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 82 (Mark DeWolfe Howe ed., Harvard Univ. Press 1967) (1881) (emphasis omitted) (stating that “some of the greatest common-law authorities” held this view).

46. See, e.g., *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1255 (5th Cir. 1985) (noting that under Louisiana law, the *sic utere* maxim is the basis for strict liability for ultrahazardous activities); Stephen D. Sugarman, *Vincent v. Lake Erie Transportation Co.: Liability for Harm Caused by Necessity*, in *TORTS STORIES* 259 (Robert L. Rabin & Stephen D. Sugarman eds., 2003) (discussing how the *sic utere* maxim influenced the famous case of *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910)).

justify a tort regime based on strict liability. The modern tort system, though, has adopted negligence liability as the default rule for accidental harms. Even negligence liability is limited in important ways, providing no damage awards for numerous stand-alone economic or emotional harms foreseeably caused by unreasonable misconduct.<sup>47</sup> A compensatory rationale for tort liability seems to be flatly contradicted by negligence doctrine.

This conclusion, however, depends on a contestable conception of full compensation. Full compensation can be defined prior to the risky conduct in question (ex ante compensation) or after the conduct has injured the plaintiff (ex post compensation). Of these two types of compensation, only ex post compensation requires a damages remedy that fully offsets the harm caused by the injury. This type of remedy is not routinely available to injured accident victims, and so tort law is not plausibly compensatory in this respect. Tort law, though, does not use ex post compensation as the appropriate metric for liability.

According to established doctrine, the jury cannot base a compensatory damages award for an existing injury on the amount of money the victim or anyone else would require in exchange for experiencing the injury.<sup>48</sup> A straight exchange of money for the injury would make plaintiffs “whole” in the ex post sense—the money required by plaintiffs would restore their welfare to the level they would have enjoyed had they not been injured. By prohibiting a damages award based on such an exchange, tort law has rejected ex post compensation. This conclusion is confirmed by the rule that monetary damages for pain and suffering are not supposed to “restore the injured person to his previous position” as required by ex post compensation, but should instead “give to the injured person some pecuniary return for what he has suffered or is likely to suffer.”<sup>49</sup> Tort liability must somehow be compensatory, but not in the ex post sense.

Tort law does not rely on ex post compensation for reasons clearly revealed by a case of wrongful death. Compensation defined at the point of

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47. See DOBBS, *supra* note 19, at 1283 (explaining the rule that “a duty of reasonable care is not ordinarily owed to protect against purely commercial loss”); *Id.* § 308 (identifying various limitations of recovery for negligent infliction of emotional distress).

48. See 4 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *THE LAW OF TORTS* 563–64 (2d ed. 1986) (“All agree that [full compensation for pain and suffering] does not mean the sum that the plaintiff—or anyone else—would be willing to suffer the injury for.”). See generally L. R. James, Annotation, *Instructions in a Personal Injury Action Which, in Effect, Tell Jurors that in Assessing Damages They Should Put Themselves in Injured Person’s Place*, 96 A.L.R.2d 760 (1964).

49. RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979).

a fatal injury is based on the perspective of the decedent right-holder, and it makes no sense to say that a dead person has suffered a personal loss.<sup>50</sup> As a matter of ex post compensation, the loss of life's pleasures is simply not a cognizable harm. But if premature death is not a compensable harm, then the tort duty, which only governs conduct threatening harm, would not protect the right-holder's personal interest in life. Such a duty is obviously problematic, and tort law, unsurprisingly, has not formulated the right-duty nexus in this manner. According to established doctrine, the tort right includes protection from premature death, implying that the loss of life's pleasures is a cognizable harm.<sup>51</sup> That conception of premature death makes sense from the perspective of a right-holder who is living, further establishing that tort law measures injuries from the right-holder's perspective prior to the risky conduct in question.<sup>52</sup>

When tort liability is measured by reference to ex ante compensation, the important doctrines of tort law can all be justified.<sup>53</sup> Under this

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50. Thomas Nagel has identified three different problems created by the claim that death is bad when considered from the perspective of the dead person:

First, doubt may be raised whether *anything* can be bad for a man without being positively unpleasant for him: specifically, it may be doubted that there are evils which consist merely in the deprivation or absence of possible goods, and which do not depend on someone's *mind*ing that deprivation. Second, there are special difficulties, in the case of death, about how the supposed misfortune is to be assigned to a subject at all. There is doubt both as to *who* its subject is, and as to *when* he undergoes it. So long as a person exists, he has not yet died, and once he has died, he no longer exists; so there seems to be no time when death, if it is a misfortune, can be ascribed to its unfortunate subject. The third type of difficulty concerns the asymmetry . . . between our attitudes to posthumous and prenatal nonexistence. How can the former be bad if the latter is not?

THOMAS NAGEL, MORTAL QUESTIONS 4 (1979) (emphasis in original).

51. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 4 (Proposed Final Draft No. 1, 2005) (defining "physical harm" to include physical impairment of the body caused by death); *id.* § 6 (stating general rule of negligence liability for having caused "physical harm").

52. See NAGEL, *supra* note 50, at 2–10 (showing why any loss attributable to death can only be understood from the perspective of the living).

53. A compensatory tort right gives a right-holder's interest in physical security legal priority over the duty-holder's various interests in liberty, creating a tort obligation that burdens the duty-holder's (subordinate) liberty interests in order to compensate any harms those interests foreseeably cause to a right-holder's (superior) interest in physical security. The priority is justified by a principle of equality that values individual autonomy or self-determination, and so the priority must be relative to the overarching principle. Like physical security, liberty is essential for purposes of autonomy, and so tort law cannot ban risky behavior merely because it threatens right-holders with physical harm. This requirement is satisfied by the foregoing compensatory tort right, which enables the duty-holder to engage in risky behavior while using compensation to protect the right-holder's interest in physical security. Tort law expressly recognizes such a priority, the nature of which explains the important doctrines of tort law. See generally MARK A. GEISTFELD, PRINCIPLES OF PRODUCTS LIABILITY 9–33 (2006) (showing how the compensatory conception can explain the important doctrines of products liability in terms of consumer choice); MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS (forthcoming 2008) (showing how a compensatory tort right can explain the important doctrines of tort law); Mark Geistfeld, *The Analytics of Duty: Medical Monitoring and Related Forms of Economic Loss*, 88 VA. L.

approach, the primary objective of tort liability is to “give compensation . . . for harms” as proclaimed by the *Restatement (Second) of Torts*.<sup>54</sup>

Our task is to determine the role of punitive damages in a compensatory tort system, an issue no one has ever addressed.<sup>55</sup> The absence of such an inquiry may explain why “the legal culture lacks a full normative account of the relationship between retributive goals and punitive damages.”<sup>56</sup>

To proceed, we will consider the tort problem of regulating a risky interaction between a driver and pedestrian that would always kill the pedestrian in the contingent event of an automobile accident. This threat to the pedestrian’s interest in physical security gives the pedestrian a tort right vis-à-vis the driver, enabling the pedestrian to determine the appropriate amount of ex ante compensation. For any given probability of suffering the fatal injury, the pedestrian would determine the monetary cost of the risk in terms of the minimum amount of money she would accept in order to assume responsibility for the risk and its potentially fatal outcome. This amount makes the pedestrian indifferent between (1) the state of the world in which she does not face the risk and is not compensated, and (2) the state of the world in which she is compensated for assuming the risk. The amount of ex ante compensation for the pedestrian (the willing-to-assume or “WTA risk measure”) is the monetary benefit that exactly offsets the cost of the risk or welfare loss to the pedestrian as right-holder. Assuming that no monetary benefit could offset the certainty of death, the WTA risk measure equals infinity for that particular type of interaction. As the interaction involves increasingly lower level risks, the WTA risk measure

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REV. 1921 (2002) [hereinafter Geistfeld, *The Analytics of Duty*] (showing how the compensatory conception can explain the important limitations of duty regarding economic loss and emotional distress); Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L.J. 585 (2003) (developing the compensatory conception of tort liability); Mark A. Geistfeld, *Necessity and the Logic of Strict Liability*, ISSUES IN LEGAL SCHOLARSHIP 4 (2005), available at <http://www.bepress.com/ils> (showing how the compensatory conception can explain the rules of strict liability, including the doctrine of necessity).

54. RESTATEMENT (SECOND) OF TORTS § 901 (1979).

55. Tort scholars have reflexively ignored the compensatory conception of tort law by assuming that the limitations of tort liability somehow disprove the conception. See, e.g., Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 775 (1985) (rejecting the compensatory rationale for tort liability because “[t]he tort system does not . . . purport to redress all material losses, physical or mental”). The limitations of tort liability under the ex post conception of compensation, however, do not disprove the proposition that tort liability is adequately compensatory in the ex ante sense.

56. Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2085 (1998).

decreases in magnitude. To face a 1:100,000 chance of dying, for example, the pedestrian might be willing to accept around \$60 (roughly the amount of increased wages required by a typical worker to face an occupational hazard of this magnitude).<sup>57</sup>

Such an exchange would absolve the driver of liability for any damage caused by materialization of the risk under the tort doctrine of express assumption of risk.<sup>58</sup> By receiving the WTA risk measure prior to the risk exposure, the right-holder is made “whole” or fully compensated before she has been exposed to the risk of premature death. As a compensatory matter, the damages remedy is unnecessary in this case.

Of course, transaction costs usually prevent pedestrians from expressly assuming the risk by contracting with drivers, creating a difficult normative problem. Actual, informed consent is normatively appealing due to the way in which it furthers the individual autonomy of both the right-holder and duty-holder. Each participates in the risky interaction only after having made an informed choice to do so. Without actual consent, the hypothetical agreement has normative force only insofar as tort law otherwise ensures that the risky interaction equally respects the autonomy of both the right-holder and duty-holder. Tort law satisfies this requirement by objectively valuing the conduct in question, thereby ensuring that the risky interaction equally respects the legally protected interests of both parties.<sup>59</sup> Tort law, for example, ignores any pleasure the driver might gain from scaring a pedestrian, presumably because such behavior does not adequately respect the pedestrian’s interest in physical security. Once this essential requirement has been satisfied—a critical component of the tort inquiry for reasons that will become evident—the absence of consent is no longer normatively problematic. Tort law can measure full compensation in terms of the hypothetical exchange.

The fully compensatory risky interaction between the driver and pedestrian requires the pedestrian to receive compensation for facing the risk of suffering bodily injury. The driver’s compensatory payment of the WTA risk measure to the pedestrian can take the form of a damages payment for the injury caused by the risk. For example, suppose there is a

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57. See *infra* Part IV. For more formal proof showing that individuals ordinarily will accept money in exchange for facing a fatal risk, see Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 843–44 (1995) [hereinafter Geistfeld, *Pain and Suffering*].

58. See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 2 (2000).

59. RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965) (justifying the objective standard on the ground that “the law can have no favorites”).

1:100,000 probability of an automobile accident (denoted  $P$ ). The monetary valuation of the injury or loss (denoted  $L$ ) is determined by the right-holder's reasonable preferences for facing this particular risk of injury. Suppose the right-holder would be willing to accept at least \$60 to face the risk. Since \$60 is the lowest amount the right-holder requires in order to assume the risk, she must be indifferent between receiving the \$60 or otherwise facing the expected cost of an accident (the amount of loss  $L$  discounted by the probability  $P$ ):

$$\$60 = P \cdot L$$

$$\$60 = (1/100,000) \cdot L$$

$$\$6,000,000 = L$$

For this particular risky interaction, the WTA risk measure can be translated into a compensatory damages award of \$6 million for the premature death.<sup>60</sup> The award depends on the underlying tortious risk of injury, thereby satisfying the tort rule that compensatory damages cannot be based on the certainty of injury or the amount of money the victim would accept in exchange for experiencing the injury in question.<sup>61</sup>

Other interactions involving different magnitudes of risk yield different compensatory measures for premature death. The *ex ante* compensatory damages award has this characteristic because it is based on the underlying risk of injury governed by the tort duty (the term  $P \cdot L$ ). Consequently, changes in the probability of injury (the term  $P$ ) will affect the amount of money the right-holder requires in order to assume the risk (the WTA risk measure). For example, in the extreme case of certain death ( $P = 1$ ), the right-holder presumably would not accept any amount of money (WTA risk measure = infinity), yielding a compensatory measure ( $L = \text{infinity}$ ) which is consistent with the principle that life is infinitely valuable.

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60. The WTA risk measure includes the cost of risk aversion, making the pedestrian risk-neutral with respect to any decision concerning her receipt of the WTA risk measure. A risk-neutral person whose utility function is not altered by the gamble in question is indifferent between "a certainty consequence" (the receipt of the \$60 WTA risk proceeds) and "any risky prospect whose mathematical expectation of consequences equals that certainty" (the \$6 million damages award in the 1:100,000 event of injury). JACK HIRSHLEIFER & JOHN G. RILEY, *THE ANALYTICS OF UNCERTAINTY AND INFORMATION* 23 (1992).

61. See *supra* note 48 and accompanying text. See also Mark A. Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DEPAUL L. REV. 331, 349-57 (2006) [hereinafter Geistfeld, *Due Process*] (showing how this damages measure can be derived from the duty of reasonable care and arguing that this measure is appropriate for enforcing the duty); Geistfeld, *Pain and Suffering*, *supra* note 57, at 810-18 (showing how this damages measure can be harmonized with the case law, including the rule that jurors should not try to "value" the nonmonetary injury).

This damages measure, however, does not fully solve the compensatory problem. In the context under consideration, the accident would kill the pedestrian, making it impossible to compensate her with the \$6 million damages remedy. While this compensatory problem is most severe for nonconsensual risks threatening fatal injury, a significant compensatory problem also exists for any nonconsensual risk threatening severe bodily harm.<sup>62</sup>

This inherent limitation of the damages remedy explains why a compensatory tort system does not rely on strict liability as the default rule for accidental harms. Under a rule of strict liability, a duty-holder is only obligated to compensate a right-holder's harms caused by the strictly liable conduct. A strictly liable driver, for example, must pay for the injuries he causes to others while driving. A duty framed exclusively in terms of the compensatory damages remedy is unappealing when applied to injuries for which the remedy is inherently inadequate.

By relying solely on the damages award, strict liability places no safety obligations on the duty-holder. In deciding how to behave, a duty-holder subject only to strict liability would rationally try to minimize the total costs he would incur by engaging in the risky activity. Suppose the duty-holder expects to incur liability for all the compensable injuries caused by the risky activity. These liability costs depend on the probability that an injury will occur (denoted  $P$ ) and the total amount of damages for which the duty-holder would be liable (denoted  $D$ ). Multiplying these two factors together yields the duty-holder's expected liability costs ( $P \cdot D$ ) for engaging in the risky activity. The duty-holder can affect the amount of expected liability costs by acting safely. Ordinarily, a precaution imposes a cost or burden on the duty-holder (denoted  $B$ ). Driving slowly eliminates specific risks created by higher speeds, but also costs the driver in terms of lost time. A rational driver, therefore, will compare the burden ( $B$ ) of the safety precaution with the expected liability costs that he would otherwise incur by not taking the precaution and eliminating this particular liability

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62. The damages award is a complete substitute for the WTA risk measure only when the injury does not alter the pedestrian's utility function. When the right-holder suffers severe physical injury, her utility function can be altered so that the satisfaction she gets from a range of activities is changed from the pre-injury state. More formally, the injury can alter the victim's marginal utility of income or wealth. These injuries frequently reduce the victim's marginal utility of income—a dead victim being the most obvious example—and so the right-holder would prefer to receive the WTA risk proceeds prior to the risky interaction, when money is more valuable, rather than being provided with a damages remedy, formulated in terms of the WTA risk measure, afterwards, when the money is less valuable. In these circumstances, a damages remedy formulated in terms of the WTA risk measure falls short of ex ante full compensation.

risk ( $P \cdot D$ ). To minimize costs, the driver will take any precaution costing him less than the expected liability costs he would otherwise incur ( $B < P \cdot D$ ). For a fatal risk, the duty-holder is not obligated to pay any compensatory damages for the decedent's loss of life's pleasures ( $D = 0$ ). The duty-holder will predictably ignore these risks in deciding how safely to behave, reducing his incentives for taking costly precautions that would reduce the risk of a fatal accident ( $B > P \cdot D = 0$ ). The safety problem is captured by the common observation that it would be "cheaper for the defendant to kill the plaintiff than to injure him . . . ."<sup>63</sup> The inherent limitations of compensatory damages render strict liability incapable of adequately protecting the right-holder from the risk of premature death.

This safety problem is addressed by negligence liability. The problem continues to involve consideration of whether the duty-holder should incur the burden ( $B$ ) of a safety precaution in order to eliminate a risk of physical harm ( $P \cdot L$ ) faced by the right-holder. A rule of strict liability lets the duty-holder make this safety decision in terms of a personal cost-benefit calculus, whereas negligence liability obligates the duty-holder to take the precaution as a matter of reasonable care (denoted as an operator  $\otimes$ ). For two reasons, the precautions required as a matter of reasonable care ( $B \otimes P \cdot L$ ) can exceed those that would be voluntarily chosen by a strictly liable duty-holder ( $B < P \cdot D$ ). First, the duty of reasonable care requires safety precautions based on the legal valuation of the loss ( $L$ ).<sup>64</sup> In the case of premature death, the legal valuation of the decedent's loss of life's pleasures vastly exceeds the compensatory damages ( $D = 0$ ). Even if reasonable care is nothing other than a cost-benefit analysis (thereby requiring only those precautions for which  $B < P \cdot L$ ), negligence liability would require the duty-holder to take precautions for reducing the risk of these injuries, unlike strict liability ( $P \cdot D = 0 < B < P \cdot L$ ). In addition, reasonable care can require precautions beyond those that would be justified by cost-benefit analysis. Such additional precautionary investments can fully offset the windfall the duty-holder would otherwise gain by not having to pay damages for the decedent's loss of life's pleasures, forcing the duty-holder to expend the total amount of resources as required by ex ante compensation.<sup>65</sup>

63. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 127, at 945 (5th ed. 1984).

64. See RESTATEMENT (SECOND) OF TORTS § 283 cmt. e (1965) (stating that whether a duty-holder exercised reasonable care requires a determination of "whether the magnitude of the risk outweighs the value which the law attaches to the conduct which involves it").

65. In the prior example, the duty-holder could expend the \$60 WTA risk measure on an equivalent amount of care rather than damages. See *supra* note 60 and accompanying text. For a more rigorous development of this approach, see Mark A. Geistfeld, *Efficiency, Fairness, and the Economic*

Under any formulation of reasonable care, negligence liability specifies the safety precautions the duty-holder must take in order to reduce the risk of fatal injury, thereby protecting the most important component of the right-holder's interest in physical security. The duty-holder's failure to exercise reasonable care creates an inequality between the parties, entitling the plaintiff to compensation for the violation of her right.

For this reason, negligent behavior can be particularly blameworthy and subject to punitive damages. Consider a duty-holder who decides to act negligently in exchange for paying the "price" of compensatory damages. Like someone subject only to a rule of strict liability, the duty-holder has rationally decided that the cost of exercising care exceeds the associated reduction in expected liability costs ( $B > P \cdot D$ ). Even though it would be cheaper for the duty-holder to pay damages than to exercise the costly care, tort law has prohibited such behavior. Compensatory damages are inherently inadequate for serious bodily injury and death, and so the duty-holder is obligated to take any precaution required as a matter of reasonable care ( $B \textcircled{P} \cdot L$ ). By fully rejecting another's right to be protected in this manner, the duty-holder has exhibited a fundamental disrespect for the right-holder's interest in physical security. Such a duty-holder is subject to moral approbation and liability beyond the inherently inadequate compensatory damages, exposing him to liability for punitive damages and even criminal liability. These extracompensatory damages punish the defendant for having advertently rejected the plaintiff's right to security while giving the defendant an incentive to comply with the duty in the future.

As initially conceived of by the courts, punitive damages provided compensation for intangible harms that were not otherwise included within the recognized categories of compensatory damages.<sup>66</sup> Although these

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*Analysis of Tort Law*, in THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS (Mark D. White ed., forthcoming 2008).

66. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001) ("Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time."). For an extended discussion of the historical basis for this concept of punitive damages, see Colby, *supra* note 40, at 614–22 (describing how courts first awarded punitive damages both to punish the wrongdoer and to compensate the plaintiff for intangible harms); Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 165 (2003) (same). The inherent connection between compensatory and punitive damages is reflected in contemporary settlement practices. According to one study, plaintiffs' lawyers report that "in practice there is no clear dividing line between compensatory and punitive damages. Compensatory damages can punish, just as punitive damages can compensate." Tom Baker, *Transforming Punishment into Compensation: In the Shadow of Punitive Damages*, 1998

categories have expanded over time, the inadequacy of compensatory damages continues to supply a defensible rationale for punitive damages—the type of explanation required by any retributive rationale for these awards.<sup>67</sup>

#### IV. JUDICIAL REVIEW OF VINDICTIVE DAMAGES

To illustrate how punishment can be translated into a given quantum of punitive damages, we will consider *Philip Morris USA v. Williams*, which involved compensatory damages of \$821,485 and punitive damages of \$79.5 million for the wrongful death caused by the defendant tobacco company's fraudulent misconduct.<sup>68</sup> The punitive award vastly exceeded the single-digit ratio between punitive damages and compensatory damages, making it constitutionally suspect and a particularly instructive example.<sup>69</sup>

We do not know how the jury in *Williams* derived the punitive award of \$79.5 million. The same problem is confronted by any reviewing court that must determine whether an award of punitive damages should be reduced because the jury relied on passion, prejudice, or some other improper motive.<sup>70</sup> “[B]ecause of the difficulty of probing juror reasoning,” judges typically only “review . . . the amount of awards. Judges . . . infer

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Wis. L. REV. 211, 212. Indeed, some states currently limit punitive damages to a compensatory role. See, e.g., *Fagot v. Ciravola*, 445 F. Supp. 342, 345 (E.D. La. 1978) (“[T]o the extent that Louisiana permits damage awards that other states would term ‘exemplary’ or ‘punitive,’ Louisiana has relied on what may often be viewed as the compensatory nature of even punitive damages.”); *Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980) (“In Michigan, exemplary damages are recoverable as compensation to the plaintiff, not as punishment of the defendant.”); *Munson v. Raudonis*, 387 A.2d 1174, 1177 (N.H. 1978) (stating that despite statutory prohibition against punitive damages, enhanced compensatory damages are available in cases of actual malice). Consistently with the proposition that punitive damages are predicated on inadequate compensatory damages, the limited role of punitive damages in some of these jurisdictions is offset by expanded compensatory damages in wrongful death suits beyond the amount allowed by the majority of jurisdictions. See N.H. REV. STAT. ANN. § 507:16 (1997) (prohibiting punitive damages unless otherwise allowed by statute); *Marcotte v. Timberlane/Hampstead Sch. Dist.*, 733 A.2d 394, 405 (N.H. 1999) (allowing compensatory damages for decedent's loss of life's pleasures in wrongful death action). Compare *Berry v. Loiseau*, 614 A.2d 414, 435 (Conn. 1992) (noting that “punitive damages serve primarily to compensate the plaintiff for his injuries and, thus, are properly limited to the plaintiff's litigation expenses less taxable costs”) with *Katsetos v. Nolan*, 368 A.2d 172, 184 (Conn. 1976) (allowing compensatory damages for decedent's loss of life's pleasures in wrongful death action).

67. See *supra* Part II.

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

69. See *supra* notes 1–5 and accompanying text.

70. *Jane Massey Draper, Excessiveness or Inadequacy of Punitive Damages Awarded in Personal Injury or Death Cases*, 12 A.L.R.5th 195, 195 (1993) (identifying improper juror motive as the reason for reducing a punitive award on judicial review).

passion, prejudice, or partiality from the size of the award.”<sup>71</sup> When the Oregon courts reviewed the punitive damages award in *Williams*, for example, they asked whether the award was “grossly excessive” for exceeding the “range that a rational juror would be entitled to award . . . .”<sup>72</sup>

The judicial review of a punitive award does not depend upon how it compares to an *inadequate* award of compensatory damages. The jury award of compensatory damages in *Williams* could not reflect the amount of loss suffered by the decedent. Oregon, like the vast majority of jurisdictions, does not award compensatory damages for the decedent’s loss of life’s pleasures or “hedonic” damages.<sup>73</sup> The decedent’s tort right only supplied the basis for the plaintiff’s wrongful death action; the compensatory damages were for harms suffered by the plaintiff (the wife of Jesse Williams) and not the decedent (Jesse Williams).<sup>74</sup> The compensatory damages are inherently inadequate in this respect, and so the first step in calculating vindictive damages involves determining the adequate amount of compensation for the decedent’s loss of life’s pleasures.

As we have found, a juror could reasonably measure full compensation in terms of the amount of money that the decedent, Jesse Williams, would have needed to receive in order to willingly assume the risk of dying prematurely due to smoking.<sup>75</sup> The reasonableness of that award can then be used by a reviewing court to evaluate the actual jury award of punitive damages.

The reviewing court can rely on such an award without proof that Jesse Williams, more likely than not, would have accepted a given amount of money in exchange for facing a specific probability of premature death. For purposes of quantifying damages, courts do not apply the preponderance of the evidence standard that governs proof of the prima

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71. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 425 (1994).

72. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1177 (Or. 2006), *vacated and remanded sub nom. Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (quoting *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 483 (Or. 2001)).

73. *See supra* Part II.

74. *See Williams*, 127 P.3d at 1167. Recovery under the Oregon Wrongful Death Act compensates a limited group of statutorily defined beneficiaries for their loss caused by the decedent’s premature death. OR. REV. STAT. § 30.020 (2005). The cause of action, however, is based on the decedent’s tort right. *See Cowgill v. Boock*, 218 P.2d 445, 448 (Or. 1950) (holding that under the wrongful death statute, “we must test the instant cause by the same legal principles that would have been applicable if [the decedent right-holder], had he lived, brought an action against [the defendant] for personal injuries”). Oregon’s approach in this respect conforms to the majority approach. *See supra* Part II.

75. *See supra* Part III.

facie case for liability.<sup>76</sup> Such certainty is not possible for many damage claims, including those for lost future earnings extending far into the future. The evidentiary problem exists only because of the defendant's wrongdoing. Had the defendant's tortious conduct not injured the plaintiff, there would be no need to estimate the plaintiff's lost future earnings. Hence, it would be "a perversion of fundamental principles of justice" if the uncertainty created by the defendant's tortious misconduct were to bar the plaintiff from recovering damages.<sup>77</sup> To avoid this injustice, tort law reduces the plaintiff's burden of proof regarding damages. The plaintiff is required to establish the amount of damages with "as much certainty as the nature of the tort and the circumstances permit."<sup>78</sup> Based on this relaxed evidentiary standard, judicial review of the punitive award in *Williams* can consider what types of evidence would have enabled a juror to make reasonable estimates of the relevant factors for determining the ex ante measure of full compensation.

When the problem is considered in light of data relied on by federal regulatory agencies, the measure of ex ante compensation in *Williams* could reasonably be in the tens of millions, requiring only a single-digit multiplier to attain the \$79.5 million of punitive damages awarded by the jury. This approach does not fully account for the reprehensibility of the defendant's misconduct. Doing so can justify the \$79.5 punitive award even when based on an unreasonably low measure of ex ante compensation.

#### A. PUNITIVE DAMAGES AS A SINGLE-DIGIT MULTIPLE OF FULL COMPENSATION

In *Williams*, the jury found that the defendant's fraudulent scheme caused the premature death of the plaintiff's husband, Jesse Williams.<sup>79</sup> The jury, more precisely, concluded that if Jesse Williams had not been deceived by the defendant tobacco company, he would not have smoked and faced the associated risks, nor suffered the ensuing injuries.<sup>80</sup>

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76. See RESTATEMENT (SECOND) OF TORTS § 912 (1979).

77. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

78. RESTATEMENT (SECOND) OF TORTS § 912.

79. See *Williams*, 127 P.3d at 1171.

80. See *id.* at 1170. For this reason, compensation is not appropriately measured in terms of the consumer's willingness to pay to eliminate the risk (WTP), a measure that yields compensatory amounts much lower than those based on the individual's willingness to assume or accept the risk (WTA). Even if income effects are held constant, the two measures significantly diverge when there are fewer substitutes for the good being risked. See W. Michael Hanemann, *Willingness to Pay and Willingness to Accept: How Much Can They Differ?*, 81 AM. ECON. REV. 635, 635 (1991) (providing

This risk determines the amount of ex ante full compensation: a higher risk requires more compensation than lower level risks, all else being equal.<sup>81</sup> The risk must be measured in an objectively reasonable manner, such as by reference to the risk faced by the population of smokers exposed to the fraud.<sup>82</sup> To determine the amount of full compensation for the wrongful death of Jesse Williams, the jury had to have some knowledge of the general risk of smoking.

As frequently occurs in tort cases, the plaintiff's attorney made sure the jury appreciated the risk created by the defendant's tortious misconduct:

In Oregon, how many people do we see outside, driving home, coming to work, over the lunch hour smoking cigarettes? For every hundred, cigarettes that they smoke are going to kill ten through lung cancer. And of those ten, four of them, or three of them I should say, because the market-share of Marlboros is one-third[, will be caused by the defendant's product].<sup>83</sup>

Unfortunately, smoking creates many other risks in addition to the increased incidence of lung cancer. Smoking also increases the risks of heart disease, emphysema, and bronchitis, for example.<sup>84</sup> "On average, adults who smoke cigarettes die fourteen years earlier than nonsmokers."<sup>85</sup> The average risk, however, was not the one faced by the plaintiff's husband

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formal analysis proving this proposition). Life, of course, is one good for which there is no substitute. "[I]n the limit, WTP could equal the individual's entire (finite) income, while WTA could be infinite." *Id.* at 635–36.

When risk is measured with the WTP measure—the outcome when the right-holder would still purchase the product—the role of punitive damages is unlikely to include punishment for its own sake. The right-holder, like other consumers, would pay for the right to punish via increased product prices, and it seems unlikely that consumers value punishment in this way. Rather, consumers would employ punitive damages as a means of deterrence. *See* GEISTFELD, PRINCIPLES OF PRODUCTS LIABILITY, *supra* note 53, at 51–58 (explaining why the ordinary consumer reasonably expects to receive tort damages only when the liability promotes product safety).

81. *See supra* Part III.

82. Outside of a "radically subjectivist" conception of risk, risk measures are objective in the sense that they require "relative frequencies that have been defined with respect to a certain class of persons" or some sort of epistemic conception of mutual acceptance to the concerned parties, such as "the probability judgments of a reasonable or representative person." Stephen R. Perry, *Risk, Harm, and Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 321, 328, 329, 335 (David G. Owen ed., 1995) (emphasis in original).

83. Brief for the Petitioner at 4, *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (No. 05-1256), available at [http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/05-1256\\_Petitioner.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/05-1256_Petitioner.pdf).

84. Centers for Disease Control and Prevention, *Smoking & Tobacco Use: Tobacco-Related Mortality*, at [http://www.cdc.gov/tobacco/data\\_statistics/Factsheets/tobacco\\_related\\_mortality.htm](http://www.cdc.gov/tobacco/data_statistics/Factsheets/tobacco_related_mortality.htm) (last visited Jan. 2, 2008).

85. *Id.*

Jesse Williams. He was a very heavy smoker.<sup>86</sup> When a group of heavy smokers (more than ten cigarettes per day) was compared to a group of nonsmokers, the risk of dying from any cause over a twenty-five-year period increased by eighty percent.<sup>87</sup>

This information, of course, describes the impact of cigarette smoking on the population of smokers. As the plaintiff's attorney in *Williams* emphasized, the risk is not somehow unique either to the plaintiff's deceased husband or to the fraudulent conduct of the defendant; it inheres in smoking cigarettes.

The jury was told that smoking is extraordinarily dangerous, with ten out of a hundred smokers dying from lung cancer alone.<sup>88</sup> The jury presumably knew that smoking entails other health hazards as well. Had the jury been fully informed, a reasonable juror could have considered the following questions: How much money would Jesse Williams have accepted in exchange for losing at least fourteen years of his life on average? How much money would he have accepted in order to face an eighty percent increase in the risk of dying from any cause over a twenty-five-year period? Such risks are extraordinarily high, enabling a reasonable juror to conclude that the measure of full compensation for the premature death vastly exceeds the amount of compensatory damages under Oregon's wrongful death statute, which could only redress the harms suffered by the decedent's spouse.

To see why, consider how federal administrative agencies such as the U.S. Environmental Protection Agency ("EPA") evaluate health and safety regulations that reduce the risk of premature death.<sup>89</sup> In evaluating the costs and benefits of such regulations, the EPA must monetize or quantify the safety benefit that the regulation would achieve by reducing total mortalities.<sup>90</sup> For this purpose, the EPA treats each reduced individual mortality as being equivalent to a savings of \$6.1 million in 1999 dollars.<sup>91</sup>

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86. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1168 (Or. 2006), *vacated and remanded sub nom. Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (stating that the plaintiff's husband eventually smoked three packs a day).

87. See David R. Jacobs et al., *Cigarette Smoking and Mortality Risk*, 159 ARCHIVES OF INTERNAL MED. 733, 733 (1999) (finding that the "[a]djusted hazard ratio[] for all-causes death in smokers as compared to nonsmokers [was] . . . 1.8 . . . for smokers of 10 cigarettes per day or more" in a study spanning twenty-five years).

88. Brief for the Petitioner, *supra* note 83, at 4.

89. See W. Kip Viscusi & Joseph E. Aldy, *The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World*, 27 J. RISK & UNCERTAINTY 5, 53-56 (2003) (describing how this approach is used by governments around the world).

90. See *id.* at 53.

91. U.S. ENVTL. PROT. AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSES 90 (2000)

The EPA derives this measure from the same type of inquiry that would be engaged in by a right-holder like Jesse Williams trying to determine the amount of money he would require to assume a risk willingly.

The \$6.1 million measure is the average produced by twenty-six different studies of how individuals, typically workers, monetarily value small, incremental changes in mortality risks.<sup>92</sup> For example, a study might find that 100,000 workers were willing to face a 1:100,000 increased annual risk of dying on the job in exchange for an annual wage increase of \$61 dollars. The risk on average would kill one of the workers in the group, and the group as a whole was willing to accept \$6.1 million of increased wages in exchange for facing that risk. The value of a statistical life (“VSL”) within the group, therefore, is \$6.1 million.

This same type of calculation can yield the amount of full compensation for wrongful death. The \$61 increase in annual wages is the average amount that each worker, as right-holder, requires to assume the risk. Unlike a worker who receives increased wages for assuming the risk, a right-holder like Jesse Williams can receive the compensation only via a damages remedy. The reciprocal of the risk (like 1:100,000) is multiplied by the amount of money the right-holder would accept in order to assume the risk (say \$61) to yield the damages award (\$6.1 million). The rationale for this measure of compensatory damages is that under certain conditions, the right-holder would be indifferent between receiving the \$61 prior to the risk exposure and receiving the damages award of \$6.1 million in the event of injury.<sup>93</sup> The ex ante measure of full compensation is accordingly based on the same methodology employed by the EPA measure, making the VSL estimate of \$6.1 million relevant for tort purposes.

The jury in *Williams* was never informed of the VSL estimate adopted by the EPA. Nevertheless, the estimate provides a reasonable basis for evaluating the punitive award. The estimate is the average measure produced by numerous studies involving large numbers of workers.<sup>94</sup> Consequently, a reviewing court can defensibly assume that a representative member of the community—a reasonable juror—would rely on a similar valuation adjusted to reflect any relevant differences in circumstances.

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[hereinafter EPA GUIDELINES], available at <http://yosemite.epa.gov/ee/epa/ee/mfile.nsf/vwAN/EE-0228C-07.pdf>.

92. *Id.*

93. See *supra* notes 59–61 and accompanying text.

94. See EPA GUIDELINES, *supra* note 91, at 90.

When considered in relation to the VSL estimate relied on by the EPA, the amount of full compensation for the premature death in *Williams* is presumably much higher. Any VSL estimate depends on a range of factors, including the individual's age at the time of risk exposure.<sup>95</sup> Suppose that every one of these factors substantially reduces the measure of full compensation for Jesse Williams as compared to the VSL for the average individual encompassed by the EPA estimate. Even if that were true, the EPA estimate of \$6.1 million is quite likely to be substantially lower than the amount of full compensation for the tortious risk faced by Jesse Williams. The \$6.1 million VSL is based on "relatively small risk changes" such as a 1:100,000 increased risk of premature death.<sup>96</sup> Unlike the small risks underlying the EPA estimate, the defendant tobacco company imposed a substantial risk on Jesse Williams.<sup>97</sup> The enormity of the risk vastly increases the amount of full compensation above the EPA estimate for a VSL.

As Richard Posner explains:

The fact that someone demands only \$100 to incur a .0001 risk of death does not imply that he will demand only \$100,000 to incur a 10 percent risk of death—or \$1 million to incur a certainty of death. . . . [M]ost people would not accept any amount of money to give up their life on the spot. But if we infer from this that the [VSL] is infinite, then . . . people would never take any risks—an obviously false description of human behavior. It would seem, therefore, that the [VSL] . . . rises faster than the risk of death . . . . [P]eople will demand much more money to take a large risk than the amount computed by multiplying the money demanded to take a small risk by the increment in risk.<sup>98</sup>

For example, suppose Jesse Williams would have required \$20 to assume a 1:100,000 increased risk of premature death caused by smoking, yielding a VSL of \$2 million that is one-third the size of the EPA estimate for a fatal risk of similar magnitude. That risk measure does not mean Williams would have required \$2 million to be fully compensated for facing the actual risk of smoking. If he had known the actual risk and not been deceived by the defendant tobacco company, he would have realized that smoking, on average, almost doubles the risk of dying from fatal

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95. See Viscusi & Aldy, *supra* note 89, at 50–53 (describing a variety of factors affecting VSL).

96. EPA GUIDELINES, *supra* note 91, at 76. See also W. Kip Viscusi, *The Value of Life: Estimates with Risks by Occupation and Industry*, 42 ECON. INQUIRY 29, 33 tbl.1 (2004) (surveying VSL studies of labor markets involving risks ranging from approximately 1:100,000 to 45:100,000).

97. See Jacobs, *supra* note 87, at 733.

98. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 198–99 (6th ed. 2003).

causes and typically would take at least fourteen years from his life.<sup>99</sup> For risks approaching such a magnitude, the amount of money anyone presumably would require to assume the risk rises exponentially as the measure approaches infinity for the prospect of certain death. Smoking almost doubled the total risk of premature death for Williams, a risk increase that will do much more than double the required amount of full compensation for a low-level risk like 1:100,000. The amount of full compensation could easily increase by a factor of five or ten, increasing the measure of full compensation from \$2 million (for the small risk of 1:100,000) to \$10 or \$20 million for the tortious risk to which Williams was actually exposed when he was fraudulently induced to smoke cigarettes. Indeed, would it be unreasonable for a juror to conclude that \$79.5 million is required as compensation for being exposed to a tortious risk that, on average, would rob the individual of at least fourteen years of life?

This rationale for the punitive award does not require proof that Jesse Williams, more likely than not, would have accepted \$10 to \$20 million in exchange for losing at least fourteen years of his life. Any inherent uncertainty in this respect only involves the extent of damages, and tort law places the burden of such uncertainty on the defendant wrongdoer. The uncertainty does not justify a speculative award, but speculation is not required. A reasonable juror could have found such an amount to be fully compensatory by relying on a measure of full compensation (like \$2 million for a 1:100,000 fatal risk) much lower than the VSL estimate used by the EPA (\$6.1 million for the same risk).<sup>100</sup>

This measure of full compensation does not fully vindicate the reprehensible violation of the decedent's tort right. The measure is based on a consensual exchange between the right-holder and duty-holder. Without actual consent, the measure adequately protects the tort right only if the duty-holder otherwise adequately respected the decedent's right to physical security.<sup>101</sup> In *Williams*, the defendant's conduct clearly violated this requirement. The Oregon Supreme Court found that the defendant's fraudulent scheme, when viewed in the light most favorable to the plaintiff (as required for purposes of appellate review), "would have constituted [criminal] manslaughter" at its inception, and today "would constitute at least second-degree manslaughter, a Class B felony."<sup>102</sup> The defendant

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99. See *supra* notes 84–87 and accompanying text.

100. See EPA GUIDELINES, *supra* note 91, at 90.

101. See *supra* notes 58–60 and accompanying text.

102. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1179 (Or. 2006), *vacated and remanded sub*

tobacco company utterly failed to respect the tort right of Jesse Williams, making the measure of full compensation inadequate. Without more, damages set at the amount of full compensation would allow the defendant tobacco company to appropriate the tort right in exchange for paying the inherently inadequate “price” of compensatory damages. Vindication of the tort right requires exemplary or punitive damages, presumably as some single-digit multiplier of the fully compensatory measure. A single-digit multiplier of four to eight would produce \$80 million of punitive damages for an underlying compensatory measure of \$10 to \$20 million for the wrongful death.

#### B. PUNITIVE DAMAGES THAT FULLY ACCOUNT FOR REPREHENSIBILITY

According to the U.S. Supreme Court, judicial review of a punitive award must consider the full degree of reprehensibility:

[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.<sup>103</sup>

These reprehensibility factors have not been fully incorporated into our analysis of punitive damages. Insofar as “the harm caused was physical as opposed to economic,” we have found that the appropriate quantum of punitive damages can be greatly increased beyond a single-digit multiple of the inherently inadequate compensatory damages remedy for wrongful death. The resultant amount of punitive damages, however, still does not account for the other reprehensibility factors in *Williams*, most notably the

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

103. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (2003)) (citations and quotations omitted).

“trickery” or “deceit” of the defendant’s fraudulent scheme and the way in which this “tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others.”

These reprehensibility factors loomed large in *Williams*. According to the Oregon Supreme Court, the \$79.5 million punitive damages award was justified by the manner in which defendant Philip Morris deceived smokers in the state, including the plaintiff’s deceased husband, in a manner that effectively rejected their individual tort rights to physical security:

Philip Morris knew that smoking caused serious and sometimes fatal disease, but it nevertheless spread false or misleading information to suggest to the public that doubts remained about that issue. It deliberately did so to keep smokers smoking, knowing that it was putting the smokers’ health and lives at risk, and it continued to do so for nearly half a century.

Philip Morris’s fraudulent scheme would have kept many Oregonians smoking past the point when they would otherwise have quit. Some of those smokers would eventually become ill; some would die. Philip Morris’s deceit thus would, naturally and inevitably, lead to significant injury or death.<sup>104</sup>

These reprehensibility factors affect the calculation of vindictive damages. Recall that a punitive award can vindicate an individual tort right by: (1) disgorging the defendant’s expected wrongful gain in order to protect the right from within the wrongful perspective adopted by the defendant; and then (2) increasing damages further to reject altogether the defendant’s wrongful perspective, thereby vindicating the right in its entirety.<sup>105</sup> This inquiry compares the perspective required by the tort right to the wrongful perspective adopted by the defendant. That wrongful perspective includes trickery, deceit, and harms to nonparties—the varied reprehensibility factors that courts are supposed to consider when evaluating the reasonableness of a punitive award.<sup>106</sup>

The first step involves comparing the defendant’s wrongful perspective to the perspective required by the right. As before, the requirements of reasonable care can be simply expressed with some algebra. If  $B$  represents the burden of precautions the defendant duty-holder must incur as a matter of reasonable care  $\otimes$  in order to eliminate a probability  $P$  of causing a loss  $L$  for the right-holder, then the duty can be

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104. *Williams*, 127 P.3d at 1177.

105. See *supra* note 36 and accompanying text.

106. See *State Farm*, 538 U.S. at 419.

formally expressed as requiring  $B \textcircled{R} P \cdot L$ . The duty-holder must act by reference to the legal valuation of the threat to the right-holder's interests (the term  $P \cdot L$ ) and not by reference to the amount of damages the duty-holder expects to pay for the injury in question (the term  $P \cdot D$ ). Consequently, even if the duty-holder expects to pay compensatory damages for all injuries caused by the tortious misconduct, punitive damages are still warranted. The duty-holder acted by reference to the wrongful perspective of its expected liability costs ( $P \cdot D$ ) rather than by reference to the perspective required by the tort right ( $P \cdot L$ ).

In the previous inquiry, we first adjusted the loss from the actual damages award ( $D$ ) to the actual loss in question ( $L$ ), and then applied a single-digit multiplier as punishment for the adoption of this wrongful perspective. This inquiry assumed that the defendant expected to incur liability for all tortiously caused harms. That assumption is inapposite in *Williams*. The defendant's fraudulent scheme was presumably motivated by the assumption that the deceit would not be detected, and so this reprehensibility factor needs to be incorporated into the analysis.

Suppose the defendant Philip Morris estimated that it faced only a ten percent chance of incurring liability for the fraud, an estimate supported by the Oregon Supreme Court's invocation of the fact that the defendant engaged in the scheme for almost forty years.<sup>107</sup> For every tortiously caused harm ( $L$ ), the defendant expected to pay damages ( $D$ ) in only one out of ten cases. For the tortious risk faced by each one of these individuals, including Jesse Williams, the defendant ignored the required valuation ( $P \cdot L$ ) and instead considered only its expected liability costs,  $(P \cdot D) \cdot (1/10)$ . To eliminate this aspect of the expected wrongful gain, vindication of an individual tort right requires the defendant to incur total damages  $D$  that would equate its wrongful perspective  $(P \cdot D) \cdot (1/10)$  with the perspective required by the tort right ( $P \cdot L$ ):

$$\text{Solve for } D, \text{ where } (P \cdot D) \cdot (1/10) = (P \cdot L).$$

The solution is  $D = 10L$ , and so the total amount of damages  $D$  must be ten times greater than the measure of full compensation  $L$  in order to account for the way in which the rights-violation involved trickery or deceit (embodied in the assumption that there was only a ten percent chance of getting caught).

An analogous justification for increasing the punitive award can be derived from the widespread harms caused by the defendant's misconduct.

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107. See *Williams*, 127 P.3d at 1168.

A defendant that expects to be caught only ten percent of the time has the same incentives as a defendant that expects to harm ten individuals and incur liability to only one of them. A defendant that reprehensibly violates a tort right in this manner ignores the perspective required by the right ( $P \cdot L$ ) and instead acts by reference to its expected liability costs. The defendant discounts its expected liability for any given rights-violation ( $P \cdot D$ ) by the likelihood that it will have to pay damages to a right-holder (one in ten). At the time of the misconduct, then, the defendant valued each of the ten individual rights at  $(P \cdot D) \cdot (1/10)$ . To vindicate any one of these individual rights, the total damages  $D$  must be ten times greater than the measure of full compensation  $L$ . The award vindicates the individual tort right, but now the amount is also equivalent to ten fully compensatory awards to ten similarly situated victims whose premature death was caused by the fraudulent scheme. Vindication of the individual tort right can straightforwardly account for harms to nonparties.

Based upon the reprehensibility factors involving trickery, deceit, and harms to nonparties, the vindication of the individual tort right in *Williams* could justify punitive damages ten times greater than the measure of full compensation. If the measure of full compensation for the wrongful death were only \$6.1 million as per the EPA estimate (derived from a substantially smaller risk), then it follows that either reprehensibility factor can justify total liability of \$61 million in order to eliminate the wrongful gain that the defendant Philip Morris expected to derive by violating the tort right of Jesse Williams.

This measure of liability would not fully vindicate the tort right, however. The right requires the duty-holder to eliminate the risk as a matter of reasonable care, not as a matter of maximizing profits. Full vindication of the right accordingly requires an outright rejection of the defendant's wrongful perspective, not merely the elimination of the defendant's expected wrongful gain from within its wrongful perspective. This aspect of the punitive award only requires treble damages of the underlying \$6.1 million measure of full compensation in order to approximate the punitive award actually granted by the jury in *Williams* (\$61 million + \$18.3 million).

By clearly identifying how punitive damages can vindicate the tort right, it becomes apparent that a reasonable juror could rely on a number of justifiable reasons to derive the \$79.5 million punitive award in *Williams*. The award was exceptionally high, but the same is true of the tortious risk the defendant tobacco company imposed on the decedent right-holder by engaging in the highly reprehensible fraudulent scheme.

## V. RETRIBUTION AND DUE PROCESS

When subjected to the federal constitutional requirements of substantive due process, vindictive damages pass constitutional muster. Having addressed the relevant concerns of substantive due process, we can then clearly identify how a punitive award might violate procedural due process.

## A. SUBSTANTIVE DUE PROCESS

In evaluating the constitutionality of a punitive award, a reviewing court must consider whether the award exceeds a single-digit ratio between the punitive and compensatory damages.<sup>108</sup> This compensatory baseline is not limited to the compensatory damages awarded by the jury. According to the U.S. Supreme Court, whether a punitive award is constitutionally excessive depends on the “disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award.”<sup>109</sup> A jury award of compensatory damages only encompasses the harms actually suffered by the plaintiff. If the plaintiff could have suffered even greater harm as a result of the defendant’s wrongdoing, then the single-digit ratio applies to that amount rather than to the smaller jury award of compensatory damages. In one case, for example, the Court upheld a punitive award that was over 500 times greater than the jury award of compensatory damages due to the substantially greater harm that the defendant could have caused the plaintiff to suffer.<sup>110</sup> The single-digit ratio, therefore, applies to a compensatory baseline of total harm that is not solely defined by the jury award of compensatory damages.

A conception of total harm, as we have just found, can support punitive damages ninety-seven times greater than the award for compensatory damages in a wrongful death case like *Williams*. Fully accounting for the decedent’s loss can justify punitive damages that are not *any* multiple of compensatory damages, the result reached by the California Court of Appeal in a wrongful death case involving an estate that received zero compensatory damages.<sup>111</sup> When punitive damages punish a defendant

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108. *State Farm*, 538 U.S. at 425.

109. *Id.* at 418.

110. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (upholding a punitive damages award of \$10 million in a case involving \$19,000 of compensatory damages because the relevant disparity involves the potential loss to the right-holder that could have occurred if the defendant had fully succeeded in its wrongful scheme).

111. *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 811 (Ct. App. 2003) (holding that “the proportionality inquiry must focus . . . on the relationship of punitive damages to the harm to the

for having caused wrongful death, substantive due process does not limit the award to a single-digit multiple of the compensatory damages in the case.

Since substantive due process permits the jury to account for the total potential harm threatened by the defendant's misconduct, the punitive damages calculation for wrongful death also applies to any case involving serious bodily injury. Misconduct that caused serious bodily injury could have killed the plaintiff. The total potential harm, therefore, is encompassed by the measure of full compensation for premature death, establishing wrongful death as the appropriate compensatory baseline for evaluating punitive awards in cases of serious bodily injury.

As illustrated by our prior analysis of the punitive award in *Williams*, vindictive damages punish the defendant for having reprehensibly violated the individual tort right and find justification in that right alone.<sup>112</sup> Consequently, vindictive damages satisfy the constitutional requirement that an award of punitive damages must be limited to the amount justified solely by the individual tort right.<sup>113</sup>

Punitive damages that are formulated to vindicate an individual tort right cannot subject the defendant to duplicative liability across cases in violation of substantive due process, even if those awards are based on the same course of tortious misconduct. For purposes of vindicating an individual tort right, it does not matter whether other tort rights have been or will be vindicated. The mere fact that the defendant incurs vindictive damages for the same misconduct in other cases involving other rights-violations is not a constitutional problem.

To be sure, punitive damages are not always formulated to vindicate the plaintiff's tort right. For example, the Oregon Supreme Court in

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deceased victim, not merely to the compensatory damages awarded," thereby justifying a substantial punitive damages award in a wrongful death case in which the decedent's estate received no compensatory damages).

112. See *supra* Part IV.B (concluding that vindication of the tort right alone in *Williams* could lead to the \$79.5 million punitive damages award).

113. See *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (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"); *State Farm*, 538 U.S. at 423 (finding that the punitive award violated due process because "our review of the Utah courts' decisions [does not] convince us that [the defendant duty-holder] was only punished for its actions towards the [plaintiff right-holders]"); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991) (holding that due process requires a "meaningful individualized assessment of appropriate deterrence and retribution"). See also *Colby*, *supra* note 40, at 623 (arguing that punitive damages must be limited to punishment of the individual rights violation in order to satisfy due process).

*Williams* indicated that the punitive award could be justified by the social values of punishment and general deterrence.<sup>114</sup> Oregon has adopted a split-recovery statute that allocates sixty percent of each punitive damages award to the state's Criminal Injuries Compensation Account.<sup>115</sup> In finding that this statutory requirement satisfies the Oregon Constitution, the court had previously held that punitive damages serve the purposes of "punishment and deterrence. . . . Furthermore, Oregon courts view[] the punitive and deterrent effect of punitive damages as vindicating interests of society in general, and not of any plaintiff in particular."<sup>116</sup> The split-recovery statute defensibly furthers the social interest in punitive damages, while allowing the prevailing plaintiff to retain forty percent of the award for the "utility" of providing "an incentive for plaintiffs to 'prosecute' claims that the state otherwise would not pursue, *i.e.*, to act as so-called 'private attorneys general.'"<sup>117</sup> Rather than being justified by the individual right, Oregon and some other states treat punitive damages as a form of societal damages.<sup>118</sup>

In reviewing a punitive award of this type, a court can still proceed by considering whether the award would be a reasonable amount of vindictive damages. "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property."<sup>119</sup> A punitive award that vindicates the plaintiff's individual right furthers a legitimate purpose that is independent of any other purpose that the state might be trying to further, such as one involving the social interests in punishment or deterrence. By concluding that a punitive award reasonably vindicates the individual right, a court will necessarily find that the award satisfies this requirement of substantive due process, regardless of any other purposes served by the award. Substantive due process also limits the punitive award to the amount justified solely by the individual tort right.<sup>120</sup> That amount is determined by the vindictive award, implying that a smaller punitive award cannot be excessively high in violation of substantive due process. A punitive award justified by the social interest in punishment and

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114. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1175 (Or. 2006), *vacated and remanded sub nom. Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (concluding that due process does not prohibit the jury "from using punitive damages to punish a defendant for harm to nonparties").

115. OR. REV. STAT. § 31.735 (2005) (formerly § 18.540).

116. *DeMendoza v. Huffman*, 51 P.3d 1232, 1243 (Or. 2002) (en banc) (citations omitted).

117. *Id.*

118. *Id.* See also Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 389 (2003) (explaining how punitive damages can be justified as a form of liability for social harms caused to right-holders other than the plaintiff).

119. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

120. See *supra* note 113 and accompanying text.

deterrence will satisfy substantive due process, then, if that award is less than the amount needed to vindicate the individual tort right.

The social interest in punishment must be limited to vindication of the individual right, for otherwise the punitive award would involve public punishment and create the constitutional problem of double jeopardy.<sup>121</sup> The substantive due process inquiry thus reduces to the question of whether a punitive award that promotes the social interest in general deterrence is less than the amount needed to vindicate the individual tort right.

A punitive award that furthers the social interest in deterrence depends on the harms actually caused by the tortious misconduct.<sup>122</sup> For example, if only one out of ten smokers in Oregon with valid claims actually sued and recovered from the defendant tobacco company in *Williams*, then the defendant and similarly situated duty-holders would have an adequate incentive to exercise reasonable care when forced to pay total damages ten times greater than the compensatory damages available to a prevailing plaintiff.<sup>123</sup>

Unlike punitive damages that further the societal interest in deterrence, vindictive damages depend on either actual or potential harm, whichever is greater. This important difference has a predictable consequence that has been identified by A. Mitchell Polinsky and Steven Shavell:

[C]ourts take potential harm into account by raising damages when the actual harm is unusually low—because it could have been much higher—but do not lower damages when the actual harm is high. . . . [S]uch a policy imparts a systematic upward bias to the level of damages and results in injurers bearing damages in excess of actual harm.<sup>124</sup>

Since vindictive damages predictably exceed the total amount of actual harm, these awards exceed the amount required to promote the societal

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121. See *supra* note 40 and accompanying text.

122. See Polinsky & Shavell, *supra* note 35, at 914 (explaining why punitive damages that further the goal of deterrence should be based solely on actual harms caused by the tortious misconduct).

123. When applied across cases, this measure of punitive damages would force the defendant to fully internalize the cost of the tortious misconduct, thereby promoting optimal deterrence. See, e.g., *Ciraolo v. City of New York*, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring) (observing that “extracompensatory damages assessed in order to avoid underdeterrence” are designed to “ensure that all of the costs of the harmful acts are placed on the liable actor”).

124. Polinsky & Shavell, *supra* note 35, at 915–16. In this passage, Polinsky and Shavell are only hypothesizing that courts apply the potential harm factor in this way. For reasons given in the text, this approach is fully justified as a matter of reprehensibility. See *supra* Part IV.B.

interest in general deterrence.<sup>125</sup> The vindictive award is not excessive as a matter of substantive due process, and so a deterrence-based award necessarily satisfies substantive due process as well.

Punitive damages that further the social objective of general deterrence pose an additional constitutional issue, however. Such an award is based on the total social harm actually caused by the defendant's wrongdoing, which necessarily implicates harms suffered by nonparties to the litigation. This aspect of the award could violate the constitutional requirement that a punitive award cannot "punish a defendant directly on account of harms it is alleged to have visited on nonparties."<sup>126</sup> *Williams* makes it hard to identify how general deterrence can be a constitutionally permissible rationale for punitive damages.

Once again, the constitutionality of a deterrence-based award can be judged by reference to vindictive damages. When the tortious misconduct occurs in mass markets or otherwise threatens large numbers of individuals, vindictive damages will always further the social interest in deterrence. A mass manufacturer, for example, treats each consumer as nothing more than a member of a group—the market or those individual right-holders whose aggregate demand determines the most profitable characteristics of the product. The manufacturer's misconduct vis-à-vis the individual consumer does not differ from its misconduct toward the market in general. In these circumstances, vindicating an individual tort right necessarily protects other rights as well. Our analysis of *Williams*, for example, showed how an award of total damages that is ten times greater than compensatory damages can be conceptualized as ten compensatory awards for ten individual rights-violations.<sup>127</sup> Consequently, the punitive award can be justified in one way (vindication) or the other (general deterrence or compensation of societal harms) without affecting the constitutionality of the award. As the Oregon Supreme Court observed, the plaintiff's receipt of punitive damages in these circumstances "is consistent with the underlying purpose of punitive damages as serving a societal interest."<sup>128</sup> Due to this consistency, the constitutionality of vindictive damages establishes the constitutionality of punitive damages serving a societal interest in general deterrence.

Since the requirements of substantive due process are satisfied by

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125. Polinsky & Shavell, *supra* note 35, at 916.

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

127. See *supra* Part IV.B.

128. DeMendoza v. Huffman, 51 P.3d 1232, 1243 (Or. 2002) (en banc).

vindictive damages, a reviewing court can evaluate the constitutionality of *any* punitive award by reference to the maximally permissible award of vindictive damages. As long as a punitive award does not exceed the largest justifiable award of vindictive damages, the defendant cannot be subject to more liability than is justified by the individual tort right as required by substantive due process.

#### B. PROCEDURAL DUE PROCESS

The reprehensible nature of the defendant's tortious misconduct must justify any award of vindictive damages,<sup>129</sup> which in turn raises concerns about procedural due process. The reprehensibility factor may enable the jury to punish the defendant for having caused harms to individuals not involved in the litigation, thereby depriving the defendant of the constitutionally required opportunity to defend itself against these nonlitigated claims.<sup>130</sup>

To address this issue, the U.S. Supreme Court in *Williams* adopted the following evidentiary rule:

Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet . . . a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.<sup>131</sup>

This rule permits the jury to consider the *risk* of harm rather than the actual occurrence of harm. The risk of harm determines both the harms potentially caused by the defendant's wrongdoing and the wrongful gains the defendant expected to derive by violating the plaintiff's right, each of which is involved in the calculation of vindictive damages. Consequently, the jury can determine vindictive damages in the manner required by *Williams*. As applied to the facts of *Williams*, for example, if the defendant had engaged in the fraudulent scheme based on the expectation that only one out of ten smokers with valid claims would sue and recover, then vindicating the individual tort right of Jesse Williams would require the defendant to incur total liability ten times greater than the measure of full

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129. *See Williams*, 127 S. Ct. at 1064.

130. *See id.* at 1063.

131. *Id.* at 1064.

compensation. Proof of this expectancy does not require proof that Jesse Williams and nine other smokers in Oregon all have valid claims, but instead only involves proof pertaining to the nature of how the defendant wrongfully violated the tort right of Jesse Williams. Vindictive damages do not require the resolution of hypothetical claims involving nonparties to the litigation, thereby satisfying this important requirement of procedural due process.

Having found that vindictive damages satisfy due process, we are left with the final issue of determining how other rationales for punitive damages fare in this respect. The substantive due process inquiry can rely on the maximally permissible vindictive award to evaluate any punitive award, but procedural due process may nevertheless require courts to give juries sufficient guidance on how to compute the amount of punitive damages. The mere fact that a given award is not excessively high in violation of substantive due process does not necessarily establish that the award also satisfies procedural due process.

This possibility explains why the U.S. Supreme Court remanded *Williams* to the Oregon Supreme Court:

How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.<sup>132</sup>

The “unnecessary risk of . . . confusion” cannot involve an excessively high award, since we have found that the appropriate award based on societal harm is lower than the vindictive award. The confusion must instead stem from the absence of adequate jury guidance—the lack of “some form of protection.”

This constitutional concern is amply supported by empirical studies that seek to determine how individuals determine reprehensibility and translate that moral conclusion into a judgment about dollars. As

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132. *Id.* at 1065 (emphasis in original).

summarized by Cass Sunstein, these studies tend to reach the same conclusions:

There is a consensus [among individuals and jury-size groups] about the appropriate level of outrage. But even when that consensus exists, there is no consensus about appropriate punishment in terms of dollars. . . .

With respect to dollars, both individuals and jury-size groups are all over the map. Even when moral rankings are shared—as they generally are—dollar awards are extremely variable.<sup>133</sup>

Regardless of the size of a particular punitive award, these studies identify an “unnecessary risk” of arbitrary decision making that can violate procedural due process.<sup>134</sup> As Sunstein further explains:

[T]he effort to “map” moral judgments onto dollars is an exercise in “scaling without a modulus.” In psychology, it is well known that serious problems will emerge when people are asked to engage in a rating exercise on a scale that is bounded at the bottom but not at the top, and when they are not given a “modulus” by which to make sense of various points along the scale. For example, when people are asked to rate the brightness of lights, or the loudness of noises, they will not be able to agree if no modulus is supplied and if the scale lacks an upper bound. But once a modulus is supplied, agreement is substantially improved. Or if the scale is given an upper bound, and if verbal descriptions accompany some of the relevant points, people will come into accord with one another.

The upshot is that much of the observed variability with punitive damage awards—and in all likelihood with other damage awards too—does not come from differences in levels of outrage. It comes from variable, and inevitably somewhat arbitrary, “moduli” selected by individual jurors and judges. If the legal system wants to reduce the problem of different treatment of the similarly situated, it would do well to begin by appreciating this aspect of the problem. . . . Indeed, the rise of guidelines for criminal sentencing can be understood as responsive, at least in part, to exactly this problem.<sup>135</sup>

Once the problem of procedural due process is framed in this way, the range of solutions narrows considerably. For example, although juror discretion in awarding punitive damages is not qualitatively different from the discretion that jurors exercise when awarding damages for pain and

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133. Cass R. Sunstein, *On the Psychology of Punishment*, 11 SUP. CT. ECON. REV. 171, 179–80 (2004) (citations omitted).

134. See *Williams*, 127 S. Ct. at 1065.

135. Sunstein, *supra* note 133, at 180–81 (citations omitted).

suffering, this equivalence does not resolve the procedural due process problem. Each suffers from the same problem of vagueness and unpredictability caused by the lack of jury instructions on how to translate a nonmonetary judgment (pain or reprehensibility) into dollars.<sup>136</sup> Moreover, the procedural problem has nothing to do with the size of the damages award. Procedural due process may simply require a minimal amount of process, a requirement that can be violated by overly vague jury instructions concerning the appropriate modulus for determining the punitive award.

So conceptualized, procedural due process justifies remand of a case like *Williams* back to state court. Procedural due process requires courts to give jurors sufficient guidance on how to compute punitive damages. Lacking such guidance, jurors can agree on reprehensibility and still arbitrarily assign dollar values to the vindictive award. To address this procedural problem, juror discretion must be constrained in some way, explaining why the Court adopted the single-digit ratio between punitive and compensatory damages. The ratio, however, is only a guideline and not an ironclad requirement.<sup>137</sup> Juror discretion could instead be adequately constrained by some other method, like the one proposed here. Upholding a punitive award on this basis would require courts to identify more precisely how reprehensibility translates into dollars. A remand in a case like *Williams* may force the states to clarify the substantive bases of tort liability, thereby helping to ameliorate the ongoing problem of vagueness that has plagued tort law.<sup>138</sup>

## VI. CONCLUSION

Tort law protects the individual interest in physical security. To do so, tort law must protect individuals from the most serious threat to their physical security—the risk of premature death. Tort law cannot adequately

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136. See Geistfeld, *Due Process*, *supra* note 61, at 333–47 (showing how the constitutional concerns that the Court has identified with respect to punitive damages practice fully apply to jury awards of compensatory damages for pain and suffering). For these same reasons, departures from the single-digit ratio are not justified as a means of respecting juror discretion whenever damages are inadequate and hard to measure. The unguided juror discretion is the rationale for the single-digit ratio, not a reason for departing from it. *But see* Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83 (2007).

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

138. See Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1114 (2005) (showing how the constitutional concerns the Court has identified with respect to punitive damages practice apply to a broad range of tort doctrines and arguing that constitutional tort reform can reduce overly vague tort rules).

protect this critical component of the individual right with compensatory damages, and so it protects the right by imposing a demanding duty of reasonable care on actors whose conduct foreseeably threatens the right-holder's interest in physical security. The prevention of premature death is far more valuable to the right-holder than a damages remedy in the event of a fatal accident. A case of wrongful death makes it readily apparent why the tort system adopted negligence liability as the default rule for accidental harms, thereby giving individuals a right to be protected from the unreasonable risk of premature death.

A defendant who advertently rejected the plaintiff's right to be protected in this manner cannot fully satisfy the duty by paying only the inherently inadequate compensatory damages for the wrongful death. A duty-holder cannot choose to be negligent in exchange for paying the "price" of compensatory damages. To redress this type of rights-violation, tort law relies on extracompensatory damages. The right can be protected by extracompensatory damages formulated to deter future violations, but this rationale is not relevant in a case of wrongful death. The decedent no longer has an interest in physical security that can be protected by tort law, reducing the role of extracompensatory damages to one of punishing the defendant for having killed the decedent with such reprehensible conduct.

The retributive rationale for punitive damages, however, creates a difficult due process problem. How can the jury translate reprehensibility into a dollar amount? Lacking any guidelines for doing so, a jury award of punitive damages may be nothing more than an arbitrary deprivation of the defendant's property.

To address this problem, the U.S. Supreme Court has imposed procedural and substantive requirements on jury awards of punitive damages. According to the Court, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."<sup>139</sup> The Court partially justified the single-digit ratio with the "long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish."<sup>140</sup> Historical practice is a defensible way to address the intractable problem of telling the jury how it can appropriately translate reprehensibility into a dollar damages award. Yet reprehensibility involves many factors, and so the Court recognizes that even higher awards can be justified under the appropriate conditions.

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139. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

140. *Id.*

In this respect, the Court's guidance is lacking. Outside of the historical practice that can justify punitive awards up to four times greater than the compensatory damages, how can a juror reasonably translate reprehensibility into an even greater amount of damages? The lack of guidance on this issue has predictably produced a wide range of outcomes in the lower courts. According to one comprehensive study:

[W]hen the ratio under review has been between 4:1 and 9.9:1, a significant number of courts have rubber-stamped it as constitutionally permissible without carefully analyzing whether a further reduction might be warranted. This has led to the counterintuitive result that jury awards yielding ratios of 10:1 or more are routinely reduced to 4:1, but jury awards yielding ratios between 4:1 and 9.9:1 often withstand post-verdict review.<sup>141</sup>

In contrast to the current approach, reviewing courts could evaluate punitive damages much more rigorously. Reprehensibility depends on either actual or potential harm, whichever is greater. A defendant who inflicted severe bodily injury on the plaintiff could have killed her. The measure of full compensation for wrongful death accordingly provides the appropriate compensatory baseline for evaluating any punitive award involving serious bodily harm. This measure of full compensation does not entail an arbitrary exercise of equating money and life. It has a rational structure that is substantively equivalent to the established federal regulatory practice of estimating the social cost of a prematurely lost life, enabling a reviewing court to draw on a substantial amount of such data in order to identify the amount of full compensation for the injury in question.

From this baseline of full compensation, vindictive damages must then be increased further in order to eliminate any wrongful gains the defendant had expected to derive by violating the right in such a reprehensible manner. Again, this inquiry directly translates into a quantitative exercise that can further increase the punitive award above the inherently inadequate compensatory award.

Having eliminated the defendant's expected wrongful gains, the punitive damages award must then further punish the defendant for having advertently rejected the perspective required by the tort right. At this point there is no metric or method for translating punishment into dollars, and so the historical practice of double, treble, or quadruple damages becomes a defensible guideline for constraining the jury's discretion.

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141. Lauren R. Goldman & Nickolai G. Levin, *State Farm at Three: Lower Courts' Application of the Ratio Guidepost*, 2 NYU J. L. & Bus. 509, 511 (2006).

This method shows why a punitive award that vindicates the decedent's tort right can vastly exceed a single-digit multiple of the compensatory damages actually awarded by the jury in a case of wrongful death. The method, for example, explains why the jury in *Williams* could reasonably have awarded \$821,485 in compensatory damages and \$79.5 million in punitive damages to vindicate the decedent's tort right.<sup>142</sup>

The enormity of the vindictive award in *Williams* illustrates another important attribute of vindictive damages for purposes of due process. By relying on either actual or potential harm, whichever is greater, a damages inquiry framed exclusively in terms of vindication will increase the punitive award above the amount required to promote the interests in general deterrence and compensation of societal harms. The vindictive award does not exceed the amount justified solely by the individual tort right, and so the inherently lower awards that promote the social interests in compensation or deterrence also satisfy this constitutional requirement. As a matter of substantive due process, the constitutionality of vindictive damages establishes the constitutionality of the other important forms of punitive damages.

Vindictive damages also avoid any constitutional problem of "multiple punishments" that many find to be the most troubling feature of contemporary punitive damages practice.<sup>143</sup> According to this view, "it is unfair to expose a defendant who has done but one wrong to multiple punitive damages. The cumulative impact of all such awards . . . may in effect overpunish the defendant."<sup>144</sup> The only wrong in *Williams*, for example, involved the single fraudulent scheme that the defendant engaged in with respect to the entire market, justifying a single instance of adequate punishment rather than the multiple punishments potentially available under tort law. This characterization of the wrongdoing, though, ignores the nature of the individual rights-violation. From a rights-based perspective, the defendant in *Williams* did not inflict one undifferentiated wrong upon one undifferentiated group of consumers in the mass market. The defendant

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

143. See, e.g., David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 406 (1994) (describing the issue as "the most momentous question as yet unresolved by the Court"). It is worth noting, however, that "the vast majority of courts that have addressed the issue have declined to strike punitive damages awards merely because they constituted repetitive punishment for the same conduct." *Dunn v. HOVIC*, 1 F.3d 1371, 1385 (3d Cir. 1993). For a thorough discussion of the issue, see Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. U. L. REV. 1613, 1613-44 (2005).

144. *Punitive Damages: A Constructive Examination*, 1986 A.B.A. SEC. LITIG. REP. 71 (Report of the Special Committee on Punitive Damages).

instead owed an individual duty to each individual right-holder in the market, turning the purported single instance of undifferentiated wrongdoing into a large number of individual rights-violations. A focus on individual rights has the effect of increasing the magnitude of the wrongdoing in cases involving mass markets or large numbers of similarly situated right-holders, explaining why vindictive damages exceed punitive awards formulated to further the social interests of deterrence or compensation. But because each particular vindictive award redresses a distinctive rights-violation, the defendant is not punished more than once for the same course of conduct, eliminating any constitutional problem in this regard.

The absence of such a constitutional problem, however, does not imply that there is no problem created by multiple punitive awards. As a categorical matter, a defendant subject to multiple awards of punitive damages for the same course of conduct faces a substantial risk of bankruptcy, an event that would leave the typical defendant unable to pay compensatory damages for each rights-violation in the affected class. In these circumstances, the tort right must be limited in order to ensure the most widespread compensation for the most serious harms caused by the wrongdoing.<sup>145</sup> The rationale for limiting the number of punitive awards that can be levied against a defendant for the same course of tortious misconduct, therefore, is supplied by the individual tort right and not a constitutional concern about treating the defendant unfairly. This rationale also justifies legislative schemes, like that adopted in Oregon, which place a substantial portion of a plaintiff's punitive award into a statewide victims' compensation fund.<sup>146</sup>

Even though the concept of vindictive damages can explain why the varied forms of punitive damages all satisfy substantive due process, the requirements of procedural due process must also be satisfied. If juries are not adequately instructed on how to compute punitive damages, how can a reviewing court be sure that the jury did not rely on passion or prejudice rather than reason? Merely looking at the size of the award is not enough, particularly since studies have found that extralegal factors such as gender, race, socioeconomic status or appearance become more influential in jury decision making when the legal standards are the most ambiguous.<sup>147</sup> This

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145. See generally Geistfeld, *The Analytics of Duty*, *supra* note 53 (using this analysis to show why the right-duty nexus excludes compensation for pure economic or emotional harm).

146. See OR. REV. STAT. § 31.735 (2005) (formerly § 18.540).

147. For a survey of this literature, see Frederick S. Levin, Note, *Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie,"* 22 U. MICH. J.L. REFORM 303, 321 nn.64-68 (1989).

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particular problem explains why the U.S. Supreme Court could defensibly rely on procedural due process to remand *Williams* back to the Oregon Supreme Court.

To determine whether a punitive award satisfies procedural due process, state courts will need to identify the underlying substantive rationale for the award in order to evaluate whether the jury instructions provided sufficient guidance for computing the award. Judicial opinions of this type would greatly clarify the substantive bases of tort liability and improve jury instructions in future cases. By relying on procedural due process to accomplish this outcome, *Williams* shows how constitutional tort reform can simultaneously defer to the states and still improve the tort system by advancing the constitutional values of notice, predictability, and reasoned decision making.

