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FEDERAL INCURSIONS AND STATE DEFIANCE: PUNITIVE DAMAGES IN THE WAKE OF *PHILIP MORRIS v. WILLIAMS*

CATHERINE M. SHARKEY*

For more than a decade, the United States Supreme Court has intervened in state courts to police outlier punitive damages jury awards. As an interloper in the domain of state common law, the Court walks a fine line. The Court has been forthright about its resolve to restrain what it deems to be grossly excessive punitive damages jury awards, invoking its constitutional authority under the Due Process Clause of the Fourteenth Amendment. At the same time, the Court treads gingerly to avoid trampling upon the legitimate state interests inherent in the award by juries, and subsequent appellate review by state courts, of punitive damages. The resultant partial "federalization" of punitive damages produces an inherently unstable equilibrium, with the Court's federal excessiveness review superimposed on state substantive and procedural law of punitive damages. Fault lines have emerged in the federal-state punitive damages tectonics.

Philip Morris v. Williams[1] provides the most vivid example to date.[2] The judicial minuet between the U.S. Supreme Court and the Oregon state appellate courts—a back-and-forth process spanning nearly a decade and involving three separate grants of certiorari by the U.S. Supreme Court, two remands back to the Oregon state courts, and culminating in an abrupt denouement with a DIG (dismissal as

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1. 549 U.S. 346 (2007).

2. The Utah Supreme Court's decision on remand from the U.S. Supreme Court in *State Farm v. Campbell* likewise belongs in the annals of state supreme court defiance. *See infra* notes 77–78 and accompanying text. The Oregon Supreme Court's *Williams* decision nonetheless seizes the marquee designation, in that it reinstated an award with a nearly 100:1 ratio and did so in the face of the U.S. Supreme Court's direction—on two separate occasions—that it reconsider the award. *See infra* notes 49–54 and accompanying text.

improvidently granted),[3] leaving in place the original $79.5 million jury award of punitive damages—bespeaks a federal-state power struggle at the root of the punitive damages dialogue. What began as a seminal punitive damages case, completing a trilogy of constitutional due process cases in the line of *BMW v. Gore*[4] and *State Farm v. Campbell*,[5] *Williams* emerged as a case centering on the interaction between federal constitutional due process rights and state rules of civil procedure.

My goal in this Essay is to demonstrate the unresolved tension within U.S. Supreme Court punitive damages jurisprudence, where potential clashes of federal and state power simmer just beneath the surface. To date, state courts have, to a significant degree, followed the U.S. Supreme Court's "marching orders" on reviewing (and reducing) punitive damages awards.[6] With *Williams*, the Oregon Supreme Court provided a bold counterexample of defiance. In the face of a mandate from the U.S. Supreme Court to apply a new constitutional rule forbidding juries from punishing defendants for harms to others, i.e., beyond the plaintiff(s) in the case, the Oregon Supreme Court instead reaffirmed the original $79.5 million jury punitive damages award on "an independent and adequate state [law] ground," obviating the need to take up the constitutional issue.[7] With this procedural maneuver, the Oregon Supreme Court guarded its state law turf against further federal incursions.[8] The Oregon court asserted its prerogative to stake out the metes and bounds of its legitimate state interest in the punitive damages review process, even in the face of heavy-handed direction from the U.S. Supreme Court. And, in the face of this federal-state court standoff, the U.S. Supreme

3. By order of March 31, 2009, the Court dismissed the case as improvidently granted. Philip Morris USA Inc. v. Williams, 129 S. Ct. 1436 (2009) (Mem.). As is customary, the Court did not provide any reason for the DIG. *See id.*

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

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

6. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1423–24 (2006).

7. Williams v. Philip Morris Inc., 176 P.3d 1255, 1260 (Or. 2008). The independent and adequate state ground was jury instructional error, discussed *infra* Part II.A.

8. Or rather, the Oregon Supreme Court upped the ante, challenging the U.S. Supreme Court to raise the stakes by declaring a substantive due process as opposed to a procedural set of constraints on punitive damages. Ultimately, the U.S. Supreme Court folded. *See infra* notes 52–53, 64–65, 76 and accompanying text.

Court "blinked."[9] The consequences, in terms of galvanizing future acts of resistance on the part of state courts and legislatures, could be far-reaching.

I. FEDERAL INCURSIONS

In a trilogy of punitive damages cases, the U.S. Supreme Court has erected an edifice of constitutional due process review superimposed upon state common law practice of punitive damages.

In *BMW v. Gore*—the first case in which the Court overturned a punitive award—the Court fashioned substantive and procedural due process limits on the award of punitive damages.[10] An Alabama jury awarded $4 million in punitive damages (later reduced to $2 million by the Alabama Supreme Court) in a consumer fraud case based upon BMW's failure to disclose a paint touch-up job on a car sold as new.[11] The U.S. Supreme Court overturned the award, which was roughly five hundred times the amount of compensatory damages awarded for the car's diminished economic value.[12] The Court held that, as a matter of procedural due process, defendants were entitled to "fair notice" of the severity of the penalties that may be assessed against them.[13] And, although the Court was cryptic in delineating the contours of the substantive due process right, it signaled that a grossly excessive punitive damages award, in terms of sheer size in relation to the compensatory damages, would be struck down as unconstitutional.[14]

9. Here, I borrow from former Secretary of State Dean Rusk's famous line describing Cuban Missile Crisis brinkmanship: "We're eyeball to eyeball, and I think the other fellow just blinked." *Quoted in* Thomas Blanton, *Annals of Blinksmanship*, WILSON Q., Summer 1997, at 90, *reprinted in* THE CUBAN MISSILE CRISIS, 1962: THE 40TH ANNIVERSARY (Laurence Chang and Peter Kornbluh eds., 1998); *see also* Michael Krauss, Williams *Saga Ends: Supreme Court Dismisses Philip Morris's Appeal as Improvidently Granted*, POINTOFLAW.COM, Apr. 1, 2009, http://www.pointoflaw.com/archives/2009/04/williams-saga-e.php ("The Supreme Court has blinked in its epic poker game with the Oregon Supreme Court over the latter's punitive damages awards against Philip Morris.").

10. 517 U.S. 559, 568–70 (1996).

11. *Id.* at 563–65, 567.

12. *Id.* at 582, 585–86.

13. *Id.* at 574 ("[E]lemental notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

14. *Id.* at 600 (Scalia, J., dissenting) (noting the novelty of the Court's having "actually [taken] the step of declaring a punitive award unconstitutional simply because it was 'too big'").

In the service of protecting substantive and procedural due process, the *Gore* Court articulated three "guideposts" for federal excessiveness review.[15] First, courts were to assess the reprehensibility of the defendant's conduct, considering, among other factors, whether the conduct was directed at vulnerable parties, whether personal injuries as opposed to economic harms were at issue, and whether the defendant engaged in stealth wrongdoing, with a likelihood of escaping detection.[16] Second, courts were to consider the ratio of the punitive damages to the actual (or potential) harm inflicted in the case, where compensatory damages serve as a proxy for that harm.[17] While setting forth a quantifiable approach, and intimating that ratios on the order of 4:1 or 3:1 seemed reasonable, the Court hedged, claiming that the ratio factor eschewed "mathematical precision" and conceding that certain categories of cases—such as those with low or nominal compensatory damages—might require higher ratios.[18] Third, courts were to compare the punitive damages award to comparable civil and criminal penalties for similar wrongdoing.[19]

The Court had a second opportunity to strike down what it deemed to be a grossly excessive punitive damages award in *State Farm v. Campbell*. Like *BMW v. Gore*, *Campbell* was an economic harm case. It arose from an insurer's bad faith failure to settle an action in which the plaintiffs were awarded $1 million for their pain-and-suffering and mental anguish for an 18-month period in which they thought they would have to put their house up for sale to satisfy a judgment their insurance company at first refused to pay.[20] The jury awarded $145 million in punitive damages, relying in part on the fact that defendant State Farm had engaged in a nationwide fraudulent scheme to resist valid insurance claims.[21] The Court reiterated the three *BMW v. Gore* guideposts—reprehensibility; ratio of punitive to compensatory damages; and comparable penalties—as the metrics for evaluating whether the punitive award was grossly excessive and thus in violation of due process.[22] The Court also established a new

15. *Id.* at 574–75 (majority opinion).
16. *Id.* at 575–76.
17. *Id.* at 580–81.
18. *Id.* at 582–83.
19. *Id.* at 583–84.
20. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 412–13, 419 (2003).
21. *Id.* at 412, 414–15.
22. *Id.* at 418.

constitutional constraint: a defendant could not be punished for dissimilar conduct directed towards those in other states.[23] On the facts of *Campbell*, the Court stated that it was neither "close nor difficult" for it to conclude that the $145 million punitive award exceeded the boundaries of due process.[24] Once again eschewing a precise mathematical formula, the Court nonetheless tipped its hand by proclaiming that "[s]ingle-digit multipliers are more likely to comport with due process . . . ."[25] The Court went further in terms of offering more precise guidance for the case before it, suggesting that "[a]n application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded . . . likely would justify a punitive damages award at or near the amount of compensatory damages."[26]

Philip Morris v. Williams rounded out the federal due process trilogy, adding a few new twists. Like *Gore* and *Campbell*, *Williams* presented the Court with a seeming outlier punitive award, a nearly 100:1 ratio between the $79.5 million in punitive damages and the roughly $820,000 in compensatory damages.[27] But, unlike its predecessors, *Williams* was a personal injury case involving a wrongful death.[28] The Court held that Oregon unconstitutionally permitted Philip Morris to be punished for harming non-party victims.[29] The Court acknowledged that it was extending its

23. *Id.* at 422 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.").

24. *Id.* at 418.

25. *Id.* at 425.

26. *Id.* at 429.

27. 549 U.S. 346, 350–51 (2007).

28. *Id.* at 349.

29. The Court's precise holding is that conduct toward non-party victims may be considered for purposes of determining reprehensibility, but it may not be used to punish the defendant directly. The Court analogized the distinction to recidivism statutes that "do not impose an 'additional penalty for the earlier crimes,' but instead . . . 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" *Id.* at 357 (citing Witte v. United States, 515 U.S. 389, 400 (1995)). The Court's parsing here has been subject to some scathing commentary, including from the dissenting Justices. *See, e.g.*, *id.* at 360 (Stevens, J., dissenting) ("This nuance eludes me."); Michael P. Allen, *Of Remedy, Juries, and State Regulation of Punitive Damages: The Significance of* Philip Morris v. Williams, 63 N.Y.U. ANN. SURV. AM. L. 343, 359 (2007) ("I have read this passage scores of times. I have also taught it to hundreds of students in Remedies courses so far. I confess, however, to being truly perplexed as to how the Court envisions the jury complying with this requirement."); *see also* Elizabeth J. Cabraser & Robert J. Nelson, *Class Action Treatment of Punitive Damages Issues After* Philip Morris v. Williams*: We Can Get There from Here*, 2

Campbell holding, which had prohibited consideration of dissimilar harms to those in other states; now, it foreclosed consideration of harms to any "strangers to the litigation," including in-state residents harmed by similar conduct.[30]

The Court had granted certiorari on two separate questions: the procedural due process question regarding punishment for harm to non-party victims as well as a substantive due process challenge to the outsized punitive-compensatory ratio (100:1) in the case. Having engaged the procedural infirmity, the Court stopped short of taking up the latter substantive due process inquiry.[31] At the time, and even more so in retrospect, *Williams* marked a subtle turn in the Court's punitive damages jurisprudence, towards procedural due process and decidedly away from substantive due process.[32] Justice Stephen Breyer, writing for the Court's majority, emphasized the need for states to establish proper standards to cabin the jury's discretionary authority and to provide "fair notice" to defendants, returning to

CHARLESTON L. REV. 407, 418 (2008) (formulating proposed jury instruction to track *Williams*).

30. *Williams*, 549 U.S. at 357. In other words, the Court vindicated the Oregon Supreme Court's interpretation of the reach of *Campbell*. *See* Williams v. Philip Morris Inc., 127 P.3d 1165, 1175 (Or. 2006) ("[The *Campbell* Court] referred only to *dissimilar* acts and dissimilar claims; the Court intended to prohibit a punitive damage award from becoming a referendum on a corporate defendant's general behavior as a citizen."); *see also* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 362 (2003) ("[T]he [*Campbell*] Court's foremost concern in stressing such an individual harm paradigm . . . appears to be to ensure that '[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.' Indeed, in discussing the relationship 'between harm, or potential harm, to the plaintiff and the punitive damages award,' the Court seems to contemplate explicitly the use of 'harm to the people of Utah,' at least in cases where such an 'adverse effect on the State's general population' could be shown.") (footnotes omitted).

31. *Williams*, 549 U.S. at 358 ("Because the application of this [newly explicated] standard may lead to the need for a new trial, or a change in the level of the punitive damages award, we shall not consider whether the award is constitutionally 'grossly excessive.'").

32. The switch is subtler still, since in many instances there is no hard and fast distinction between the Court's substantive and procedural due process constraints on punitive damages. *See*, *e.g.*, *id.* at 361 (Thomas, J., dissenting) ("It matters not that the Court styles today's holding as 'procedural' because the 'procedural' rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages."); *id.* at 360–61 (Stevens, J., dissenting) ("It is far too late in the day to argue that the Due Process Clause merely guarantees fair procedure and imposes no substantive limits on a State's lawmaking power."). Interestingly, despite Justice Scalia's repeated adherence to the notion that the Constitution does not impose substantive due process limits on punitive damages, see for example *BMW v. Gore*, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting), he did not join Justice Thomas's dissent.

themes he had sounded in his separate concurrence in *Gore*.[33] The shift seems even clearer in hindsight, because at the time it could be said that the Court, having identified fatal procedural due process flaws, had no reason to reach the substantive due process ground. But, at the next opportunity, when the Court granted certiorari in *Williams* for a third time—after the Oregon Supreme Court reinstated the punitive award on adequate and independent state law grounds—it limited its review to the appropriateness of the state procedural device and, this time, refused to take up the substantive due process issue.[34] *Williams* signals the Court's increasing skittishness regarding further pursuit and development of its substantive due process jurisprudence.[35]

To my mind, a different strain of the Court's jurisprudence provides a more defensible justification for federal incursions into the state-law realm of punitive damages: the necessity to intervene when one state attempts to regulate beyond its borders, by allowing juries to award punitive damages for conduct (whether lawful or unlawful) outside of its borders.[36] In *Gore*, the Court invoked principles of state sovereignty and comity in support of its effort to limit the ability of the Alabama courts to regulate conduct—in that case, BMW's policy of disclosure with respect to touch-up repainting of cars sold as

33. *Williams*, 549 U.S. at 352; *see also Gore*, 517 U.S. at 596 (Breyer, J., concurring) ("To the extent that neither clear legal principles nor fairly obvious historical or community-based standards . . . significantly constrain punitive damages awards, is there not a substantial risk or outcomes so arbitrary that they become difficult to square with the Constitution's assurance, to every citizen, of the law's protection? The standards here . . . in my view, make this threat real and not theoretical.").

34. Philip Morris USA Inc. v. Williams, 128 S. Ct. 2904 (2008) (Mem.) (granting certiorari to Question 1 of the petition).

35. Substantive due process is, moreover, the "road not taken" in the next punitive damages case taken up by the Court. The Court granted certiorari in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2614 (2008), on three questions of federal admiralty law, affirmatively passing over the substantive due process gross excessiveness question. By taking up the case under federal admiralty jurisdiction, the Court sat as a federal common law court—a unique posture that gave the Court wide leeway to set forth how, on policy grounds, it would handle review of punitive awards. In other words, limiting review in *Exxon Shipping Co*. to federal admiralty questions provided the Court with an opportunity to set forth, as a sort of template, precisely how it would like lower state and federal courts to handle review of punitive damages. For an elaboration of this view, see Catherine M. Sharkey, *The Exxon Valdez Litigation Marathon: A Window on Punitive Damages*, 22 U. ST. THOMAS L. REV. (forthcoming Apr. 2010).

36. *See* Issacharoff & Sharkey, *supra* note 6, at 1421 (tracing this extraterritoriality justification in U.S. Supreme Court punitive damages jurisprudence).

new—beyond its borders.[37] The Court drew attention to the fact that the jury was told about BMW's nondisclosure of touch-up jobs in 483 instances across the nation. The Court was firm in its resolve not to allow an Alabama jury to set disclosure policy for all other states, especially in light of the fact that such nondisclosure was lawful in some other states.[38] The Court extended this reasoning in *Campbell*, reining in a state's ability to regulate conduct—even unlawful conduct—beyond its borders. The Court chastised the Utah Supreme Court for allowing the jury to punish State Farm for a widespread pattern of nationwide conduct.[39]

Williams would seem, at least at first glance, to be the odd man out.[40] The jury and reviewing state courts limited the scope of defendant Philip Morris's wrongdoing to that which was directed within the state to other Oregonians.[41] As noted above, the Court tamped down consideration of this kind of harm to non-party victims. Moreover, the Court retracted its seeming endorsement of consideration of similar within-state harms in *Gore* and *Campbell*. But *Williams* did not sound the death knell for extraterritoriality concerns. Justice Breyer explicitly invoked federalism-based constraints to support reversing the punitive award: "[W]here the amounts are sufficiently large, it may impose one State's (or one jury's) 'policy choice,' say as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public policies."[42] Justice Breyer sounded the same note again, highlighting the "risk that punitive damage awards can, in

37. *Gore*, 517 U.S. at 574.

38. At the same time, the Court gave its implicit imprimatur on an award that took into account the 14 in-state instances of nondisclosure.

39. *Campbell*, 538 U.S. at 420 ("The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells.").

40. The absence of any overt extraterritorial reach of the punitive damages award buttresses the view of *Williams* as a test case for the Supreme Court's willingness to embrace a substantive due process limitation on punitive damages. *See infra* notes 64–65, 76 and accompanying text. The procedural issues and the federalism concerns were only stopgaps if the real concern was a substantive restraint on the size of punitive damages.

41. *See* Williams v. Philip Morris Inc., 127 P.3d 1165, 1177 (Or. 2006) ("[T]he jury, in assessing the reprehensibility of Philip Morris's actions, could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct."); Williams v. Philip Morris Inc., 48 P.3d 824, 839 (Or. Ct. App. 2002) ("[The] defendant's actions caused harm to many others in Oregon besides Williams.").

42. Philip Morris USA v. Williams, 549 U.S. 346, 352–53 (2007) (citing *Gore*, 517 U.S. at 571–72).

practice, impose one State's (or one jury's) policies (e.g., banning cigarettes) upon other States."[43]

I take the persistent appearance of the extraterritoriality concern in the Court's punitive damages due process trilogy to be significant. At the same time, this federalism-based justification has never been fully developed by the Court. What is the constitutional source of such a limitation? What are its precise contours in terms of how one gauges extraterritorial effect?

An advantage to tackling punitive damages review through a federalism-based lens—as opposed to constitutional due process—is that it maintains focus throughout on the competing state and federal regulatory interests. Vindicating "state interests" in this realm cuts in two separate directions. On the one hand, each state maintains the prerogative to design and implement a punitive damages scheme in furtherance of its legitimate state interests. On the other hand, federal intervention may be necessary to restrain a state from imposing punitive damages that regulate beyond its borders, thereby trampling upon other states' legitimate policy aims.

The Court's due process approach, by contrast, muddies the waters. The Court consistently begins with "a [s]tate's legitimate interests in punishing unlawful conduct and deterring its repetition[,]"[44] but then proceeds on the basis of a singular individual retributive purpose served by punitive damages. One effect of the Court's implicit constriction of the legitimate state interests involved in punitive damages is to pave the way for overly broad federal incursions into the state law domain.[45]

II. STATE DEFIANCE

Williams fits the mold of its predecessor constitutional due process cases before the U.S. Supreme Court: a single plaintiff victim sues a defendant who has inflicted widespread harms on numerous individuals (the plaintiff as well as others not before the court); a jury

43. *Id.* at 355.

44. *Gore*, 517 U.S. at 568.

45. The Court's intervention in *Williams* would have been a real stretch on federalism-based extraterritoriality grounds, standing alone. According to Justice John Paul Stevens, it was likewise too much of a reach on due process grounds. Justice Stevens, who authored the majority opinion in *BMW v. Gore* and joined the majority in *State Farm v. Campbell*, distanced himself from the majority in *Williams*. 549 U.S. at 358 (Stevens, J., dissenting). Stevens was unwilling to go along with the "Court's imposition of a novel limit on the State's power to impose punishment in civil litigation." *Id.*

awards sizeable punitive damages, which might be appropriate in light of the classwide harms, but seem excessive in terms of what is necessary to deter and punish for the individual harm to the plaintiff in the case; the award is nonetheless affirmed by the state trial and appellate courts. Mayola Williams, whose husband died of lung cancer after years of smoking Marlboro cigarettes, brought a deceit action against Philip Morris for systematically misrepresenting the risks of smoking. In 1999, the jury awarded Williams $821,485 in compensatory damages (automatically reduced by the court to $521,485 under an Oregon law capping damages for wrongful death) and $79.5 million in punitive damages.[46] The trial judge, taking direction from the Supreme Court's *BMW v. Gore* decision, reduced the punitive damages to $32 million.[47] The reviewing appellate court, however, reinstated the $79.5 million punitive award in its entirety, and the Oregon Supreme Court declined further review of the award.[48]

Twice, the Justices of the U.S. Supreme Court told the Oregon state courts to reconsider the $79.5 million punitive damages award. In 2003, the Court vacated and remanded *Williams* back to the Oregon appellate court to reconsider the punitive damages award in light of *State Farm v. Campbell*.[49] But, on remand, the Oregon appellate court (in 2004) once again re-affirmed the award in its entirety.[50] This time, the Oregon Supreme Court took up the case and added its imprimatur (in 2006) to the full $79.5 million punitive award.[51] The U.S. Supreme Court granted certiorari on separate questions raising procedural and substantive due process infirmities with the punitive award.[52] The Court ruled only on the procedural due process ground, holding that the Oregon court system had unconstitutionally permitted the jury to punish Philip Morris for harms to non-party victims.[53] So, for the second time, the U.S.

46. *Williams*, 48 P.3d at 828.

47. *Id.*

48. *Id.* (reversing on the plaintiff's appeal of the reduced punitive damages award), *review denied*, Williams v. Philip Morris Inc., 61 P.3d 938 (Or. 2002).

49. Philip Morris USA Inc. v. Williams, 540 U.S. 801 (2003) (Mem.).

50. Williams v. Philip Morris Inc., 92 P.3d 126 (Or. Ct. App. 2004).

51. Williams v. Philip Morris Inc., 127 P.3d 1165 (Or. 2006).

52. Philip Morris USA v. Williams, 547 U.S. 1162 (2006) (Mem.).

53. In *Williams*, the Court stated:

> [W]e believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris's appeal . . . . Because the application of this standard may lead to the need for a new trial, or a change in the level of the

Supreme Court remanded the case (in 2007), this time back to the Oregon Supreme Court.

At this juncture, it is worth observing that the jury's punitive damages award was subject to extensive review within the Oregon state courts. The trial judge subjected the award to scrutiny (in fact reduced the award by roughly 40%); twice, the Oregon appellate court weighed the appropriateness of the award, in light of the standards articulated in *Gore* and *Campbell*; and finally the Oregon Supreme Court engaged in a thorough review of the award. A consistent theme of the dissenting Justices in the punitive damages trilogy has been that punitive damages fall squarely within the domain of state common law and, to the extent outlier punitive damages awards must be reined in, state appellate courts are certainly up to the task.

Williams is a pressure point. On the one hand, the affront to the state courts is even more palpable than in either *Gore* or *Campbell*, given the Oregon appellate courts' multiple reviews and reconsideration of the award. Justice Ruth Bader Ginsburg, joined by Justices Antonin Scalia and Clarence Thomas in her *Williams* dissent, resented the federal incursion, and instead would have accorded "more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent."[54] On the other hand, the very fact that the U.S. Supreme Court had to intervene not once, but twice, to restrain a sizeable punitive award (roughly 100 times the compensatory award) might itself be evidence of state courts' inability to police outlier punitive awards on their own.

But the U.S. Supreme Court's *Williams* decision is not the end of the story. For this federal incursion—whether justified or not—begat yet another round of state court defiance.

A. Adequate and Independent State Grounds

In January 2008, with a move that took the legal world by surprise, the Oregon Supreme Court once again re-affirmed the $79.5 million punitive award, this time finding an adequate and independent

> punitive damages award, we shall not consider whether the award is constitutionally 'grossly excessive.'

Philip Morris USA v. Williams, 549 U.S. 346, 357–58 (2007).

54. *Williams*, 549 U.S. at 364 (Ginsburg, J., dissenting).

basis under *state law* for sustaining the verdict.[55] The decision rested on procedural technicalities relating to appeals based upon allegedly erroneous jury instructions. In this case, Philip Morris had not objected to the actual jury instruction given in the case, so it had waived its right to appeal on that basis. Instead, Philip Morris had to rest its appeal upon the court's refusal to give its proposed jury instruction.[56] But here is where the Oregon Supreme Court pronounced a procedural default on the basis of state law. Under Oregon law, if a proposed jury instruction is not "correct in all respects, both in form and in substance, and altogether free from error" then a judge should rightfully refuse to issue it.[57] The Oregon Supreme Court identified two flaws in Philip Morris's proposed jury instruction: (i) it used permissive ("may") language instead of mandatory ("shall") language to describe Oregon's statutory punitive damages factors; and (ii) it made mention of "illicit profit" instead of "profit" for misconduct, thereby injecting the issue of the subjective state of mind of Philip Morris instead of an objective outcome.[58] The Oregon Supreme Court addressed these infirmities in the proposed jury instruction, which had eluded the Court's own previous review of the punitive damages award,[59] as well as that of the Oregon appellate court on two separate occasions. The state courts, in other words, had not availed themselves of three separate opportunities to impose the state-law barrier.[60] This state procedural default rule, moreover,

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

56. *Williams*, 549 U.S. at 364 (Ginsburg, J., dissenting) ("The Court ventures no opinion on the propriety of the charge proposed by Philip Morris, though Philip Morris preserved no other objection to the trial proceedings.").

57. *Williams*, 176 P.3d at 1261 (quoting Beglau v. Albertus, 536 P.2d 1251 (Or. 1975)).

58. *Id.*

59. According to the Oregon Supreme Court, the plaintiff had raised these instructional errors when the case was first before the court. *Id.* at 1259 n.2. The court, however, did not mention the errors in its first opinion.

60. The plaintiff, moreover, apparently raised these state-law instructional errors at each stage of the litigation. *See, e.g.*, Brief for the Petitioner at 25 n.7, Philip Morris USA Inc. v. Williams, 129 S. Ct. 1436 (Aug. 13, 2008) (No. 07-1216) ("The Oregon courts were well aware of plaintiff's argument that Philip Morris's federal claim was procedurally barred by errors of state law in the proposed instruction; plaintiff briefed that contention several times"); Reply Brief for the Petitioner at 7, *Williams*, 129 S. Ct. 1436 (Nov. 3, 2008) (No. 07-1216) (pointing out that the Oregon state courts had nine years to address plaintiff's state-law waiver arguments, which were less complex than the constitutional issues, but chose not to do so until the U.S. Supreme Court overruled their decisions on the merits). *See also* Petition for a Writ of Certiorari at 16, Philip Morris USA Inc. v. Williams, 129 S. Ct. 1436 (Mar. 24, 2008) (No. 07-1216) ("The Oregon courts lost the prerogative to invoke a state-law procedural bar to

would have precluded federal constitutional review of the punitive damages award. Indeed, it rendered the U.S. Supreme Court's *Williams* decision akin to an advisory decision on constitutional due process grounds—which the Oregon Supreme Court now said it could not reach.

The Oregon Supreme Court thus did not consider the constitutional question remanded to it by the U.S. Supreme Court. The Oregon court adopted a narrow reading of the U.S. Supreme Court's mandate to re-evaluate the case but not explicitly to take up the constitutional question.[61] Was the Oregon court thumbing its nose (albeit delicately) at the U.S. Supreme Court? Or, instead, was this a good faith (albeit belated) discovery of a legitimate state procedural default rule precluding further constitutional review? The U.S. Supreme Court granted certiorari for a third time in *Williams*, presumably to endorse one of these competing views.

B. State Court "Run-Arounds"

In its (third) cert petition to the Court, Philip Morris argued that a state court could not use a newly minted procedural bar to reopen a punitive verdict after the U.S. Supreme Court required it to apply a constitutional rule to judge the award.[62] Specifically, according to Philip Morris, the Oregon Supreme Court was an "inferior court" that had "overstepped its authority" by refusing to apply the new federal constitutional standard set out by the U.S. Supreme Court.[63] Philip Morris also argued that the $79.5 million punitive award was grossly excessive in violation of substantive due process.[64] In granting

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Philip Morris's due process rights when, given no fewer than three opportunities to interpose such a barrier, they nevertheless consistently adjudicated the merits of the federal question.").

61. The Oregon Supreme Court stated:

> Under the Supreme Court's remand, then, it is our task to apply the constitutional standard set by the Supreme Court . . . . As we shall explain, however, there is a preliminary, independent state law standard that we must consider, before we address the constitutional standard that the United States Supreme Court has articulated.

Williams, 176 P.3d at 1260; *see also id.* at 1260 n.4 ("[W]e understand the Court's use of the phrase, 'upon request,' to be an acknowledgment of the authority of states to place reasonable procedural requirements on any request for instructions, including requests like the one at issue here.") (citation omitted).

62. Petition for a Writ of Certiorari at i, Philip Morris USA Inc. v. Williams, 129 S. Ct. 1436 (Mar. 24, 2008) (No. 07-1216).

63. *Id.* at 3; *see also id.* at 13 ("The Oregon Supreme Court's defiance of this Court's directive should not be countenanced.").

64. *Id.* at 3.

certiorari, the Court limited its review to the appropriateness of the state procedural device, refusing to take up the substantive due process issue.[65]

Justice Breyer candidly conceded during oral argument that "[w]hen I read that petition for cert, I thought this is a run-around"—in other words, he leaned towards the view that the Oregon Supreme Court had thumbed its nose at the U.S. Supreme Court.[66] Voicing a similar concern, Justice David Souter asked at oral argument:

> [H]ow do we guard . . . against making constitutional decisions which are simply going to be nullified by some clever device raising a procedural issue or an issue of State law when the case goes back? Is there any way for us to ensure against, in effect, a bad faith response to our decision . . . .[67]

Did the defiance on the part of the Oregon Supreme Court rise to the level of bad faith? Chief Justice John Roberts intimated as much at oral argument, raising the "concern . . . [that] there is something malodorous about the fact that the Oregon Supreme Court waited until the last minute to come up with this rule that was before it all the time."[68] But Justice John Paul Stevens elicited a concession from Philip Morris's attorney that there was no basis for questioning the good faith of the Oregon Supreme Court.[69] This put a lid on the "malodorous" whiffs of bad faith invoked by several of the Justices—and indeed, was likely a pivotal moment in the case. Shortly after oral argument, the U.S. Supreme Court dismissed *Williams* as improvidently granted.[70]

65. Philip Morris USA Inc. v. Williams, 128 S. Ct. 2904 (2008) (Mem.).

66. Transcript of Oral Argument at 18, Philip Morris USA Inc. v. Williams, 129 S. Ct. 1436 (2008) (No. 07-1216), 2008 WL 6524409 [hereinafter Transcript]. Equally candidly, Justice Breyer expressed skepticism on that count, adding, "I'm not sure that I think that now." *Id.*

67. *Id.* at 48. In response to this line of questioning, counsel for plaintiff Mayola Williams (Robert S. Peck, Esq.) responded, "I think the adequate and independent State law ground provides all the protection [needed to ensure against a bad faith response to Supreme Court decisions by state courts]. You assume, and I think properly so, that State supreme courts will operate in good faith." *Id.* at 49.

68. *Id.* at 52.

69. *Id.* at 20 ("[W]e don't question the good faith of the court.") (Stephen M. Shapiro, Esq., counsel for Philip Morris).

70. Philip Morris USA Inc. v. Williams, 129 S. Ct. 1436 (2009) (Mem.).

C. *Future State-Federal Power Struggles*

Bad faith represents an extreme version of the state-federal power struggle. Separate and apart from bad faith is the question, as posed by Justice Antonin Scalia: "Is it is up to a state court to sit in judgment about whether our remand orders are in error or not?"[71]

1. *Dwindling Options for U.S. Supreme Court Response*

The *Williams* saga reminds us that, notwithstanding the breadth of federal incursions into state law territory, powerful limits remain. At oral argument, the Justices toyed with two further responses to the Oregon Supreme Court's decision that seemed to insulate the punitive damages award from further review.

The U.S. Supreme Court could dictate to state supreme courts precisely how to organize and sequence their procedural review of jury instructions.[72] At oral argument, Justice Souter asked whether such a mandate might be necessary "so that when the case gets to us, we can be assured that there is no lurking issue that has not yet been decided as a matter of state law that in effect could then be resurrected to nullify our decision."[73] But, as a general matter, it is not feasible for federal courts to micromanage state courts in such a fashion.[74] Moreover, as Justice Ginsburg pointed out, consistent with federalism principles, the U.S. Supreme Court remands cases to state supreme courts "for further proceedings not inconsistent with [its] opinion[s]."[75]

71. Transcript, *supra* note 66, at 46.

72. Philip Morris had argued that the Oregon Supreme Court was required to apply any state procedural bar before the U.S. Supreme Court ruled on the federal constitutional issues because to do otherwise would allow the Oregon Supreme Court to "second-guess[] the fundamental premise of *Williams II* [i.e. that Philip Morris properly preserved its federal constitutional claim]." Brief for the Petitioner at 19, Philip Morris USA Inc. v. Williams, 129 S. Ct. 1436 (Aug. 13, 2008) (No. 07-1216). Philip Morris went so far as to state that this underlying premise had become "law of the case, binding on the Oregon courts." *Id.* at 21.

73. Transcript, *supra* note 66, at 48.

74. One area in which the federal courts have exercised such close oversight is federal habeas review of alleged errors in jury instructions in the criminal context. But "unlike federal habeas corpus review of state-court convictions under 28 U.S.C. § 2254, [in the area of punitive damages] the Court 'work[s] at this business of [checking state courts] alone,' unaided by the participation of federal district courts and courts of appeals." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 431 (2003) (Ginsburg, J., dissenting) (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 613 (1996)) (alteration in original).

75. Transcript, *supra* note 66, at 4.

Alternatively—as Chief Justice Roberts suggested—the Court could revert back to substantive (as opposed to procedural) due process review.[76] Recall that the second question presented on which the Court granted certiorari (but did not decide) in the first *Williams* case was whether the punitive award was grossly excessive as a matter of substantive due process. And, this time around, the Court did not even grant cert on that issue.

The Court's DIG in *Williams II* belies significant support or momentum on the Court (at least at present) for either response. *Williams II* thus represents the inherent limitations on federal court authority and power in the state law realm of punitive damages. But could it also represent the flip side—namely the empowerment of state court defiance?

2. Inspiring Rebellious Uprisings by States?

It is one thing to posit that *Williams II* demonstrates that there are outer limits to the U.S. Supreme Court's authority and capacity to intervene in state courts to rein in punitive damage awards, but quite another—and more provocative—to frame *Williams II* as a model of state court defiance that could be emulated by others.

a. Judicial Defiance

Williams of course is not the first example of state court defiance in the punitive damages realm. Nor is it even the first within the context of the U.S. Supreme Court's trilogy of punitive damages cases. In *State Farm v. Campbell*, the Court had intimated that, in a case with "substantial" compensatory damages like the one before it, a 1:1 ratio of punitive to compensatory damages likely comprised the outer due process limit on punitive damages.[77] On remand, the Utah Supreme Court resisted this invitation to reduce the award to a 1:1 ratio, choosing instead to remit to a 9:1 ratio, which it deemed the outermost due process limit.[78] But, while not falling in line with the Court's 1:1 suggestion, the Utah Supreme Court did, after all,

76. *Id.* at 51 ("There is, of course, another way to protect our constitutional authority in this case.").

77. *Campbell*, 538 U.S. at 429 ("An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded . . . likely would justify a punitive damages award at or near the amount of compensatory damages.").

78. Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409, 420 (Utah 2004) ("[W]e hold that State Farm's behavior was so egregious . . . as to warrant a punitive damages award . . . nine times greater than the amount of compensatory and special damages.").

substantially reduce the jury's punitive damages award—and to within the "single digit" multiplier that the Court suggested most likely comported with constitutional due process.

By contrast, the Oregon Supreme Court's defiance was more absolute. After all, it reinstated the jury's $79.5 million award (a nearly 100:1 ratio) in full, and refused to consider the constitutional question remanded to it by the U.S. Supreme Court. Michael Krauss has forewarned: "Expect other state supreme courts to invoke procedural limitations to sidestep constitutional rulings of which they disapprove . . . ."[79] Victor Schwartz has similarly cautioned that the Court's DIG "[s]ignals to Judicial Hellhole™ courts that the teacher has left the class room."[80] For a state court that wishes to insulate punitive damages awards from federal constitutional due process review, state procedural rules might provide a legitimate means to evade federal incursions. And perhaps the Oregon Supreme Court's brinksmanship with the U.S. Supreme Court, culminating in the *Williams II* DIG, will embolden other state supreme courts to wield this weapon from their arsenal.

State courts have other means at their disposal to resist the U.S. Supreme Court's "single-digit multiplier" edict.[81] Where particularly egregious conduct is at issue, courts can argue that the "reprehensibility" of defendant's actions warrants a higher punitive-compensatory damages multiplier. This was, in fact, the first tactic employed by the Oregon Supreme Court.[82] And, it was the question presented in the certiorari petition filed by Philip Morris that was granted, but then not answered, by the U.S. Supreme Court: whether the reprehensibility guidepost could trump the ratio guidepost.[83] Given the Court's skittishness regarding pursuit of substantive due

79. Krauss, *supra* note 9. Krauss' comment echoes Philip Morris's charge that the Oregon Supreme Court's defiance could "provide a roadmap for state courts seeking to frustrate the invocation of federal rights." Petitioner's Reply Brief at 1, Philip Morris USA Inc. v. Williams, 129 S. Ct. 1436 (2009) (07-1216).

80. E-mail from Victor Schwartz to Catherine M. Sharkey (Jan. 21, 2010, 4:02 EST) (on file with author).

81. There is, moreover, some wiggle room in the single-digit edict itself given the Court's refusal to impose "mathematical precision." *See* text accompanying *supra* note 18.

82. Williams v. Philip Morris Inc., 127 P.3d 1165, 1181 (2006) ("[T]he absence of bright-line rules necessarily suggests that the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio.").

83. Petition for Writ of Certiorari at i, Philip Morris USA Inc. v. Williams, 128 S. Ct. 2904 (2008) (No. 07-1216).

process, lower courts could be emboldened to follow this line of argument.[84]

The defendant's wealth provides another avenue for increased ratios.[85] While the U.S. Supreme Court has stated that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award,"[86] it has not prohibited courts' reliance upon wealth as a relevant factor in determining punitive damages.[87] Oregon juries—like those in several other states—are specifically instructed to consider "[t]he financial condition of the defendant" in awarding punitive damages in products liability actions.[88] And the Oregon

84. The Oregon Supreme Court was not the only state court to hold that the reprehensibility guidepost could override the ratio guidepost. *See, e.g.*, Mission Resources, Inc. v. Garza Energy Trust, 166 S.W.3d 301, 319 (Tex. Ct. App. 2005) (upholding a punitive damages award twenty times greater than the compensatory damages award on the grounds that the defendant's conduct was "highly unlawful."); Superior Federal Bank v. Jones & Mackey Construction Co., 219 S.W.3d 643, 653–54 (Ark. Ct. App. 2005) (upholding a punitive damages award that was more than seventeen times greater than the compensatory damages award). *See also* Petition for a Writ of Certiorari at 11–12, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (No. 05-1256).

85. Opinions differ sharply on the relevance of wealth to the award of punitive damages. Keith Hylton has argued convincingly that "[t]he profitability of [a corporate defendant's] act, not its wealth, is the key determinant of the optimal punitive judgment . . . [unless] the profitability of the corporation's act is not directly observable and the wealth measure is correlated with the profitability of the act." Keith N. Hylton, *A Theory of Wealth and Punitive Damages*, 17 WIDENER L.J. 927, 946 (2008) (emphasis omitted); *see also* Amicus Curiae Brief of A. Mitchell Polinsky, Steven Shavell, and the CATO Institute in Support of Petitioner at 17, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (No. 05-1256) (urging the Court to "reject any contention that the punitive damages can be justified on the basis of Philip Morris's financial condition"). Polinsky and Shavell are adamant that a corporation's wealth is irrelevant, regardless of the circumstances, to either the deterrent or retributive goals of punitive damages.

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

87. Justice Breyer has gone further, suggesting that the introduction of evidence of a defendant's wealth is neither "unlawful [n]or inappropriate." BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 591 (1996) (Breyer, J., concurring), *cited approvingly in Campbell*, 538 U.S. at 427–28.

88. OR. REV. STAT. § 30.925(2)(f) (2007). Moreover,

> [t]he vast majority of courts which have considered the issue of whether the trier of fact may also consider the wealth of the defendant in fashioning a punitive award have determined that the defendant's wealth is an appropriate consideration because the degree of punishment or deterrence is to some extent proportionate to the means of the wrongdoer.

Annotation, *Punitive Damages: Relationship to Defendant's Wealth as Factor in Determining Propriety of Award*, 87 A.L.R. 4th 141, § 2[a] (1991).

Judge Richard Posner has suggested another way in which the wealth of the defendant could figure prominently:

> Where wealth in the sense of resources enters is in enabling the defendant to mount an extremely aggressive defense against [small stakes] suits . . . and by doing so to

appellate court took Philip Morris's wealth into consideration when it upheld the punitive award after the first remand from the Supreme Court after *Campbell*.[89]

Finally, courts could articulate non-retributive justifications for punitive damages and affirm awards on that basis. Judge Richard Posner's provocative opinion in *Mathias v. Accor Economy Lodging, Inc*. is a case in point.[90] Quickly dubbed the "bedbugs" case (and quickly making its way into numerous torts and remedies casebooks), *Mathias* involved a brother and sister who fell prey to bedbugs at a Chicago hotel.[91] A jury awarded each of the two plaintiffs $5,000 in

> make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33–40 percent contingent fee.

Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003).

89. Williams v. Philip Morris Inc., 92 P.3d 126, 145 (Or. Ct. App. 2004) (reasoning that a punitive award against a wealthy corporation such as Philip Morris must be sizeable enough not to be dismissed as "an insignificant nuisance and part of the cost of doing business"). *See also* Williams v. Philip Morris Inc., 48 P.3d 824, 841 (Or. Ct. App. 2002) ("[W]hen the record contains evidence of the defendant's financial condition, determining the proper relationship between the punitive award and the actual harm may well include consideration of that evidence.").

The Oregon Supreme Court distanced itself from the lower court's reasoning here, at least to the extent that it sanctioned the use of wealth to justify an otherwise excessive award. *See* Williams v. Philip Morris Inc., 127 P.3d 1165, 1181 (Or. 2006) (agreeing with Philip Morris that *Campbell* prohibits relying on wealth to conclude that a punitive damages award is not constitutionally excessive). But the court reaffirmed that "*Campbell* did not otherwise remove wealth from the punitive damage equation . . . . A jury still may levy a higher punitive damage award against a wealthy defendant, as long as the final punitive damage award does not exceed the constitutional limits established by the three *Gore* guideposts." *Id.*

90. Several commentators charged Judge Posner with flouting the U.S. Supreme Court's dictates in *Campbell*. *See, e.g.*, Anthony J. Sebok, *Deterrence or Disgorgement? Reading* Ciraolo *After* Campbell, 64 MD. L. REV. 541, 569 (2005) ("A number of courts have already found various methods to avoid the upper limit of the single-digit ratio set up by the Supreme Court.") (citing, inter alia, *Mathias*, 347 F.3d at 676, 678). And while *Mathias* was decided by the Seventh Circuit, a federal court sitting in diversity, the point here is that its approach and analysis could readily be used by a state court. Several state courts have cited *Mathias* in upholding larger than single-digit ratios. *See, e.g.*, Simon v. San Paolo U.S. Holding Co., 113 P.3d 63, 81–82 (Ca. 2005); Int'l Union of Operating Eng'rs, Local 150 v. Lowe Excavating Co., 870 N.E.2d 303, 324 (Ill. 2006); Krysa v. Payne, 176 S.W.3d 150, 163 (Mo. Ct. App. 2005); Hollock v. Erie Ins. Exch., 842 A.2d 409, 421 (Pa. Super. Ct. 2004).

91. *Mathias*, 347 F.3d at 675. The facts are especially colorful:

> The infestation continued and began to reach farcical proportions, as when a guest, after complaining of having been bitten repeatedly by insects while asleep in his room in the hotel, was moved to another room only to discover insects there; and within 18 minutes of being moved to a third room he discovered insects in that room as well and had to be moved still again. (Odd that at that point he didn't flee the motel.)

Id.

compensatory damages and $186,000 in punitive damages.[92] Following closely on the heels of the Court's single-digit multiplier admonishment in *Campbell*, *Mathias* nonetheless affirmed a nearly 40:1 punitive to compensatory ratio.[93] For present purposes, what is key is Judge Posner's reasoning, which returned to first principles to "consider *why* punitive damages [were] awarded."[94] In the case before him, Judge Posner highlighted the law-and-economics inspired deterrence rationale for punitive damages:

> The award of punitive damages in this case . . . serves the . . . purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is "caught" only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.[95]

While conceding that "the precise number chosen by the jury was arbitrary," Judge Posner nonetheless mentioned that "[i]t is probably not a coincidence that $5,000 + $186,000 = $191,000/191 = $1,000: i.e., $1,000 per room in the hotel."[96] And there was evidence before the jury that numerous other rooms were infested.[97] Another gloss on the jury's verdict, then, is that it was an inchoate attempt at effectuating what I have called "societal compensation"[98]—namely the redress of harms caused by defendants who injure persons beyond

92. *Id.* at 674.

93. *Id.* at 678.

94. *Id.* at 676 (emphasis added). *See also* Kemezy v. Peters, 79 F.3d 33, 34–35 (7th Cir. 1996).

95. *Mathias*, 347 F.3d at 677. *See also* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874 (1998) ("When an injurer has a chance of escaping liability, the proper level of *total damages* to impose on him, if he is found liable, is the harm caused multiplied by the reciprocal of the probability of being found liable.").

Judge Posner's formulation of the deterrence rationale for the imposition of punitive damages implicates Professor Hylton's distinction between a defendant's wealth and the profitability of the defendant's misconduct. *See* Hylton, *supra* note 85, at 946.

96. *Mathias*, 347 F.3d at 678.

97. *Id.* at 675 ("[T]hat night [of the plaintiffs' stay] 190 of the hotel's 191 rooms were occupied, even though a number of them had been placed on the same don't-rent status as [plaintiffs' room].").

98. *See* Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 446 (2005) ("I would argue that the $186,000 in punitive damages awarded to each plaintiff is not only an attempt to punish the hotel for its misconduct, or to deter it from future failure to exterminate properly, but also—or perhaps instead—an attempt, albeit an imperfect one, to effect societal compensation."). I also characterized the Oregon Court of Appeals' 2004 *Williams* decision—which was pending on appeal before the Oregon Supreme Court—as another example of societal compensation. *Id.* at 446 n.182.

the individual plaintiffs in a particular case. The difficulty here—as I take up in the next section—is that to withstand *Williams*' constitutional scrutiny, courts will have to demonstrate that the non-retributive goal served by punitive damages is a legitimate state interest. Absent some clearer signals from state courts and the common law, this may be a difficult row to hoe. But, at the same time, the converse presents itself: states could affirmatively assert rationales for punitive damages based upon under-enforcement and under-deterrence rationales.

b. Legislative Defiance

An equal—if not greater—threat to the U.S. Supreme Court's power and authority over punitive damages is the prospect that state courts' defiance in this realm prompts action by state legislatures.[99] For not only can state legislatures effectuate far-ranging reform, but should they act boldly in the realm of punitive (or, more generally, supracompensatory) damages, the U.S. Supreme Court would be even more hard-pressed to overturn their actions than to restrain disobedient state courts. Federal incursions into legitimate state interests—as propounded by the state legislature—are on even shakier ground than interventions into state courts.

To date, state legislatures have not actively staked out non-punitive rationales for punitive damages. So, when the U.S. Supreme Court repeatedly states that the purposes of punitive damages are to punish and deter—and more and more, invokes a single individual retributive punishment rationale—it could be that the Court is merely parroting the legitimate state interests as expressed by state legislatures. On this view, to be sure the Court is being heavy-handed, construing ambiguity to align with what perhaps is the Court's own normative view, but the Court has stopped short of constitutionalizing one particular view of punitive damages.[100]

99. I do not mean to suggest this as a predictive matter. In fact, state legislative momentum has been in the direction of rentrenchment, with the adoption of caps and additional measures to cut back on punitive damages. *See, e.g.*, Jonathan Klick & Catherine M. Sharkey, *What Drives the Passage of Damage Caps?*, *in* EMPIRICAL STUDIES OF JUDICIAL SYSTEMS AROUND THE GLOBE (Institutum Jurisprudentiae, Academia Sinica, 2008), *available at* http:// ssrn.com/abstract=1342535. Rather, by greater threat, I mean the potential or theoretical challenge state legislative action would pose, given the Court's relative inability to clamp down on clearly articulated legitimate state interests.

100. *See* Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 477 (2008) ("*Williams* does not constitutionalize the view of punitive damages as punishment for private wrongs.").

But states may already have—and certainly could develop in the future—alternative, non-retributive rationales for punitive damages. And, even as the U.S. Supreme Court intervenes to scrutinize punitive damages awarded under state law, it always begins with an opening salvo of deference to the "state interests" served by punitive damages.[101] Nothing in *Williams* changes this key federalism point: namely that states remain free to articulate and act upon non-retributive punishment purposes for what have hitherto been called "punitive" damages.[102] Chief among these non-retributive goals is economic deterrence: punitive damages are warranted to combat under-enforcement and under-deterrence.[103]

But see Allen, *supra* note 29, at 352 ("[I]n reading the Court's decisions, it seems far more likely that the Court was going beyond the descriptive; it was itself establishing the constitutionally legitimate purposes of this historically state-defined remedial device."); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. (forthcoming Sept. 2010), *available at* http://ssrn.com/abstract=1506460 ("The *constitutional* message in *Williams*—that punitive damages are ultimately about punishment for the wrong done to the plaintiff at hand—gives a considerable nod to what I have described as plaintiff-focused views in the torts literature.") (emphasis added).

101. As I asked in a previous article:

> But what if—as is certainly the case—not all states share this view of the [single retributive] purpose of punitive damages? After all, in *BMW v. Gore*, the U.S. Supreme Court made it clear that "the federal excessiveness inquiry [into the magnitude of punitive damages] appropriately begins with an identification of the *state interests* that a punitive award is designed to serve."

Sharkey, *supra* note 30, at 350 (emphasis added).

102. *See* Issacharoff & Sharkey, *supra* note 6, at 1426 ("If the state definition of the purposes of punitive damages coincides with that of the Court, then there is no great conflict between state interests and the constitutional overlay. But what if a state has a different conception of punitive damages?"); *see also* Jeffrey L. Fisher, *The* Exxon Valdez *Case and Regularizing Punishment*, 26 ALASKA L. REV. 1, 31 (2009) ("[L]egislatures may seek to further a broad array of governmental interests through permitting punitive damages.").

103. As I have previously elaborated:

> There are at least three categories of situations that lead to this problem of underdeterrence (or "underliability") of defendants. The first category involves cases in which the victim is aware of his or her injuries but, for some reason, does not bring a lawsuit against the tortfeasor either because (1) the probable compensatory damages are too low; or (2) the victim is not particularly litigious, is unsophisticated, lacks the necessary financial resources, or perhaps has been harmed by a "shaming tort" . . . . [T]he second category arises from "concealed acts," where the injurer has a chance of escaping liability either because (1) the injuries suffered are concealed or difficult to detect; or (2) while the harm can be detected, the identity of the defendant, who has covered his tracks, is unknown . . . . The third and final category is comprised of more "diffuse" societal harms, which could stem from either overt or concealed acts by the defendant.

Sharkey, *supra* note 30, at 366–67. *See also* Edward L. Rubin, *Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law*, 1998 WIS. L. REV. 131, 132 ("Properly understood and utilized, [punitive damages] often have nothing to do with

Legislatively enacted statutory multiple damages provide one model whereby state legislatures could articulate non-retributive goals, such as heightening the incentive to litigate small claims, or effectuating broader cost-internalization for widespread harms that may not be pressed by all victims via individual litigation. Legislatively enacted split-recovery schemes—which direct a portion of punitive damages away from the litigants to the state or a state-directed fund—provide another possible locus of legislative creativity in terms of establishing non-retributive aims for supracompensatory damages in particular types of cases.

1. Statutory Damages

Statutory damages are civil penalties that permit a plaintiff to recover a specified sum of money, often instead of proving actual damages. Statutory damages are often aimed at providing incentives to bring suit for violations where damages are small or else difficult to determine.[104] There are a variety of ways that statutory damages

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punishment, but represent an ordinary and essential mechanism for the private enforcement of commercial law.").

104. Distinct issues are raised when statutory minimum damages are combined with the class action or other aggregate procedure, likewise designed to induce litigation.

> By authorizing minimum awards, statutes subsidize individual claims arising from technical violations of regulatory requirements and, thereby, encourage compliance with statutory provisions that might otherwise be ignored. However, because conduct regulated by statutes with minimum-damages provisions often affects large populations, technical violations can foster lawsuits with enormous potential damage awards if aggregation is permitted.

PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.03 cmt. e (Proposed Final Draft 2010); *see also* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 115 (2009) ("Aggregating statutory damages claims warps the purpose of both statutory damages and class actions.").

States might provide for statutory damages but bar their recovery in class actions (unless the legislature provides otherwise in a particular statute). *See, e.g.*, Sperry v. Crompton Corp., 863 N.E.2d 1012, 1017 (N.Y. 2007) (affirming dismissal of purported class action complaint on the grounds that the statutory treble damages were a penalty under N.Y. C.P.L.R. 901(b) (McKinney 2005), which prohibits class actions from seeking such damages without specific statutory authorization). *But see* Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., No. 08-1008, 2010 WL 1222272, at *8–*12 (U.S. Mar. 31, 2010) (holding that Federal Rule of Civil Procedure 23, which prescribes procedures for class actions in federal court, preempts the application of N.Y.C.P.L.R. 901(b) in diversity suits).

Courts are wrestling with how to respond to statutes that are silent about the effect of aggregate procedures on statutorily imposed damages. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.03 cmt. e (Proposed Final Draft 2010) ("In cases brought under such silent statutes, judges have tried to mediate between the risk of under-deterrence, which a denial of aggregation might cause, and the risk of over-compensation and over-deterrence, which a decision allowing aggregation would encourage."). The core issue is one of

might be set forth in a statute: as a specified amount, as a dollar range, and as varying depending upon the procedural format for litigation (for example, a cap in the event of a class action).[105] Legislatures have enacted statutory remedies "to address a wide range of public harms, such as the sending of junk faxes, failure to comply with support orders, displays of Indian-style arts and crafts in a manner that falsely suggests that they were made by Indians, and violations of cable television privacy rules."[106]

Statutory damages occupy a netherworld somewhere between compensatory and punitive damages. If statutory multiple damages are enacted for a retributive punishment purpose, then it would seem that the U.S. Supreme Court's constitutional due process apparatus should apply, full stop.[107] But, if instead, these legislatively enacted

legislative intent: would aggregated statutory damages further or impede the statutory scheme? The ALI Principles project offers no categorical answer that could apply across different statutory schemes, but suggests "[a] middle-ground position may be that judges have the option of certifying a class with a damages cap or some other procedural limiting device that would prevent the aggregation from transforming the remedial reach of the statute." PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.03 cmt. e (Proposed Final Draft 2010).

105. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.03 cmt. e (Proposed Final Draft 2010) ("The statutory language that entitles persons to minimum damages is phrased in different ways: as an entitlement to a specific dollar amount ($1000 per violation, for example), to a dollar amount within a specified range (not less than $100 but not more than $1000 per violation), or to an amount that depends on the procedural posture of the litigation ($1000 per violation but with an aggregate cap of $500,000 in the event of a class action).").

106. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 493–94 (2009).

107. The alternative is review under the extraordinarily deferential standard of *St. Louis, I.M. & S. Ry. Co. v. Williams*: a statutory damages award violates due process only if it is "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable." 251 U.S. 63, 66–67 (1919). *See also* Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909) (holding that statutorily prescribed damages awards should be upheld unless they were "so grossly excessive as to amount to a deprivation of property without due process of law"). A similarly deferential standard governs civil fines. *See, e.g.*, United States v. Bajakajian, 524 U.S. 321, 334–37 (1998) (holding that judgments about the size of civil fines "belong in the first instance to the legislature" and violate the Constitution only if "grossly disproportional" to conduct). In crafting the modern punitive damages excessiveness standard, the U.S. Supreme Court drew upon the earlier statutory damages cases, without making any distinction between the two. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 478–79 (1993).

I focus on the punitive/non-punitive distinction as dispositive to the application of the *Gore* framework. Others have argued, instead, that the Court's main concern is the jury's unbounded discretion in awarding punitive damages. On this view, so long as the legislature has weighed in at all (even if it sets up multiple civil fines for retributive punishment purposes), then the *Gore* framework should not apply. *See, e.g.*, Fisher, *supra* note 102, at 25, 27 (identifying the true source of the Court's discontent as the fact that "there is little to no democratically enacted law" and pointing out that the Court "treats setting criminal

damages serve non-retributive, legitimate state interests—such as deterrence and compensation—then they would fall on the non-punitive side of things and outside of the Court's constitutional due process purview.[108]

Often, statutory damages (like punitive damages) simultaneously embrace punitive and non-punitive goals and the process of disaggregation can be complex.[109] Moreover, statutory damages may be warranted precisely because actual (compensatory) damages are difficult, or even impossible, to determine.[110] Copyright damages present this issue with a vengeance.[111] Historically, copyright statutory damages were "intended to ensure that copyright owners could obtain at least some measure of compensation when it was

punishments as an almost purely legislative task and defers almost completely to legislative and other deliberative policymaking actors that establish punishment regimes in democratic ways").

108. The classification of statutory multiple damages as punitive or non-punitive has ramifications with respect to insurability of damages—when classified as remedial or non-punitive, such damages have been held to be insurable. *See* Sharkey, *supra* note 98, at 454 & n.224.

109. *See* Rubin, *supra* note 103, at 141 ("Most statutory language can be interpreted in a variety of ways."); *see also* United States v. Halper, 490 U.S. 435, 448 (1989) ("[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.").

110. *See, e.g.*, Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004) ("The *Gore* guideposts do not limit the statutory damages here because of the difficulties in assessing compensatory damages in this case.").

In addition, statutory damages may be awarded for public harm, in which case there is no necessary link to individual compensatory damages. *See, e.g.*, Centerline Equip. Corp. v. Banner Pers. Serv., Inc., 545 F. Supp. 2d 768, 777 (N.D. Ill. 2008) ("There is no requirement that the statutory remedy be proportional to the plaintiff's own injury, however; Congress may choose an amount that reflects the injury to the public as well as to the individual.").

111. Moreover, several high profile copyright cases with extraordinarily high damages awards have focused attention on the issue of whether the *Gore* constitutional excessiveness apparatus should be applied to statutory damages. *See, e.g.*, Sony BMG Music Entm't v. Tenenbaum, No. 07cv11446-NG, 2009 WL 4723397, at *2 (D. Mass. Dec. 7, 2009) (ordering individual, noncommercial defendant to pay $675,000 in damages in copyright infringement peer-to-peer file sharing case); Memorandum in Support of Defendant Joel Tenenbaum's Motion to Dismiss at 7–10, Capitol Records, Inc. v. Alaujan, 626 F. Supp. 2d 152 (D. Mass. 2009) (Nos. 03-CV-11661-NG, 07-CV-11446-NG), 2009 WL 2390615 (arguing that per-violation statutorily prescribed damages against noncommercial defendant, which bear no reasonable relation to actual harm, violates due process under the *Gore* standards); Statutory Damages and the Tenenbaum Litigation, http://www.ipcolloquium.com/Programs/5.html (last visited Mar. 10, 2010); *see also* UMG Recordings, Inc. v. MP3.com, Inc., No. 00 Civ. 472(JSR), 2000 WL 1262568, at *6 (S.D.N.Y. Sept. 6, 2000) (upholding $118 million statutory damages award in a case in which defendant had uploaded about 4,700 CDs it had purchased into an online database).

difficult to prove how much damage they had suffered as a result of the defendants' infringements."[112] But, as Pamela Samuelson and Tara Wheatland have explained:

> In 1976, Congress made anew the unfortunate mistake of melding together compensatory and penal functions in the tripartite structure it established for statutory damage awards under the Copyright Act of 1976: very modest damages for the exceptional cases of innocent infringement, a rather broad range of damages for ordinary infringement, and enhanced levels of damages for the exceptional cases of willful infringement.[113]

Here, Congress has made it very difficult to disaggregate the non-punitive from the punitive purposes, but at some point, the imposition of enhanced damages for a retributive punishment purpose crosses the constitutionally established line.[114]

My main point remains: state legislatures could step forward and clearly articulate non-retributive, remedial, or deterrence goals in establishing statutory multiple damages for specific types of torts.[115] Statutory damages provide an avenue whereby legislatures can attempt to achieve socially optimal deterrence by forcing the defendant to internalize the full social costs of its conduct where partial enforcement is the norm. For example, they might enact a treble (or multiple) damages penalty for engaging in fraud or misrepresentation, on the ground that such harms are likely to go undetected and therefore under-deterred by compensatory damages alone.

The U.S. Supreme Court has not decisively weighed in on whether statutory damages should be subject to *Gore* due process excessiveness review, though the issue has been percolating in the

112. Samuelson & Wheatland, *supra* note 106, at 446. A provision in the 1909 Copyright Act made clear that statutory damages "shall not be regarded as a penalty." *Id.* at 449 (quoting 17 U.S.C. § 101(b) (1976) (superseded)).

113. *Id.* at 444–45.

114. Samuelson and Wheatland argued that "[s]tatutory damage awards only become punitive when they are imposed on willful infringers and represent high multiples over actual damages or the defendant's profits." *Id.* at 472. *See also* Rubin, *supra* note 102, at 147 ("Damage awards become truly punitive, and thus vulnerable to challenge, when they are set at a level over and above the level judged necessary to induce compliance.").

115. Although the argument applies generally to all types of statutory damages, the issue of the potential constitutional excessiveness of statutory damages is most likely to arise in regard to statutory multiple damages or statutory damages in aggregate procedures, such as class actions.

lower courts.[116] But, in its recent punitive damages decision in *Exxon Shipping v. Baker*, the Court did lend its imprimatur to legislatively enacted treble damages regimes in antitrust, RICO, and patent law.[117] With respect to treble antitrust damages, the Court specifically recognized Congress' non-punitive goal: "Congress devised the treble damages remedy for private antitrust actions with an eye to supplementing official enforcement by inducing private litigation, which might otherwise have been too rare if nothing but compensatory damages were available at the end of the day."[118] This

116. In dicta, the Second Circuit suggested, in the context of a class action brought by cable television subscribers alleging violations of the Cable Communications Policy Act, that the class action mechanism "may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages" such that the U.S. Supreme Court's constitutional due process review should apply. Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003).

Most courts have thus far resisted applying the *Gore* framework to statutory damages. *See, e.g.*, Zomba Enter., Inc. v. Panorama Records, Inc., 491 F.3d 574, 588 (6th Cir. 2007) ("Until the Supreme Court applies *Campbell* to an award of statutory damages, we conclude that [the extremely deferential *St. Louis* standard] controls, not *Campbell*."); Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004) (reasoning that the purpose of the Gore guideposts—to control "[t]he unregulated and arbitrary use of judicial power"—"is not implicated in Congress' carefully crafted and reasonably constrained statute[s]").

But scholars have linked the Court's due process concerns with punitive damages to statutory damages. *See, e.g.*, Sharkey, *supra* note 98, at 454 n.225; Blaine Evanson, *Due Process in Statutory Damages*, 3 GEO. J.L. & PUB. POL'Y 601, 615 (2005) (advocating "looking to the institutional competency of the legislature [as] an effective way for judges to review the excessiveness of an award"); Scheuerman, *supra* note 104, at 133 ("No principled reason supports application of a separate, outdated standard to statutory damages. Accordingly, courts should apply [the *Gore*] factors when considering the constitutionality of a statutory damages award."). *See also* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04 cmt. e (Proposed Final Draft 2010) ("Recent cases addressing the constitutionality of punitive-damage awards suggest that the Court today might require a closer connection between statutory damages and actual losses."); Samuelson & Wheatland, *supra* note 106, at 471 ("The relevance of the Supreme Court's due process jurisprudence for statutory damage awards in copyright cases has been recognized by a number of courts and commentators.").

117. Jeffrey Fisher, who represented the plaintiffs in the *Exxon Valdez* case before the U.S. Supreme Court, has written a provocative law review article taking seriously the Court's seeming embrace of legislatively designed schemes akin to the federal sentencing guidelines. His aim is to "elucidat[e] the Court's reasoning [in order to] provide legislatures, organizations, and citizens interested in preserving the availability of stiff punitive damages in appropriate future cases with an understanding of how to go about doing that." Fisher, *supra* note 102, at 1 n.*. *See also id.* at 46 ("The [*Exxon Shipping*] decision leaves it to Congress and state legislatures to ratify the possibility of imposing large punitive awards in appropriate cases and plants the seeds of affording extreme, if not absolute, deference to such democratic determinations.").

118. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2632 (2008). Thomas Colby has charged the U.S. Supreme Court with employing "dubious legal fictions" to classify civil penalties as remedial. Colby, *supra* note 100, at 454 ("The Court often finds, for instance, that

lends a modicum of support to the disaggregation of supracompensatory damages along the punitive/non-punitive divide.[119]

2. *Split-Recovery Statutes*

In another remote corner resides legislative activity that, if awakened, could unleash strong waves of state defiance: split-recovery statutes that direct a portion of punitive damages awards away from the plaintiff, either to the state treasury or to a designated fund.[120] Such schemes exist in eight states[121] and have been on the horizon in several others.[122] State legislatures could use split-

the civil penalty is in reality simply a form of rough compensation to the government for the cost of enforcing the law, rather than an attempt to penalize the defendant for violating the law, and thus the penalty is really remedial, and is not punishment at all.").

119. The Court gave a previous nod to legislative presumptions of damages in *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), a voting rights case implicating the concept of presumed damages as a substitute for compensatory damages based upon actual loss. Apparently first recognized in cases involving tortious interference with the right to vote, presumed damages are awarded to incentivize lawsuits, avoid non-compliance because of the difficulty of monetizing the loss, and reaffirm the importance of the right at stake to the stakeholder. *See id*. at 312 n.14.

120. For a description of these schemes—which vary in terms of what percentage of the award is allocated to the state, the fund to which the award is directed, and whether attorneys' fees and costs are calculated based upon the total award or only the smaller portion retained by the plaintiff—see Sharkey, *supra* note 30, at 372–80.

121. The eight states are: Alaska, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon, and Utah. *See* ALASKA STAT. § 09.17.020(j) (2009); GA. CODE ANN. § 51-12-5.1(e)(2) (2009); 735 ILL. COMP. STAT. 5/2-1207 (2009); IND. CODE § 34-51-3-5(c)(2) (2009); IOWA CODE § 668A.1 (2008); MO. REV. STAT. § 537.675(3) (2009); OR. REV. STAT. § 31.735(1)(b) (2007); UTAH CODE ANN. § 78B-8-201(3)(a)(ii) (2009). Although no such legislative scheme exists in Ohio, the Ohio Supreme Court has declared its authority to allocate a portion of punitive damages to "a place that will achieve a societal good" on the ground that society is a de facto party in any suit seeking punitive damages. Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121, 146 (Ohio 2002). *See also* Sharkey, *supra* note 30, at 380–86 (discussing judicial experimentation in the apportionment and distribution of punitive damages awards).

122. Colorado's split-recovery scheme was struck down as an unconstitutional taking of property. *See* Kirk v. Denver Publ'g Co., 818 P.2d 262, 264 (Colo. 1991) (holding split-recovery statute unconstitutional under the Takings Clause). Four states allowed their split-recovery statutes to sunset. *See* CA. CIV. CODE § 3294.5 (allowed to sunset on July 1, 2006); FLA. STAT. ANN. § 768.73(2)(b) (allowed to sunset in 1995); KAN. STAT. ANN. § 60-3402 (allowed to sunset in 1989); N.Y. C.P.L.R. 8701 (allowed to sunset in 1994). At least six other states—Arizona, Hawaii, New Jersey, New Mexico, Oklahoma, and Tennessee—have proposed, but failed to enact, split-recovery statutes. *See* H.R. Con. Res. 2054, 47th Leg., 1st Reg. Sess. (Ariz. 2005); S. 328, 2003 Leg., 22d Sess., Reg. Sess. (Haw. 2003); Assem. 2283, 212th Leg. (N.J. 2006); S. 860, 47th Leg., Reg. Sess. (N.M. 2005); S. 764, 49th Leg., 1st Sess. (Okla. 2003); S. 978, 104th Gen. Assem. (Tenn. 2005); H.R. 1857, 104th Gen. Assem. (Tenn. 2005). Each of these bills (save New Jersey's) would have allocated the entire punitive damages award to the state.

recovery schemes as a model to recast the underlying purpose of punitive damages as societal compensation or deterrence, redesigning such schemes to set up a designated fund for receipt of some percentage of the punitive award that would be directed to remediating the particular harm involved.

So long as state legislatures clearly articulate a non-retributive, societal rationale for these supracompensatory damages (hitherto known as "punitive damages")—for example, to compensate for or deter widespread harms not likely to be detected—such schemes should elude the Supreme Court's constitutional due process grasp.[123] The U.S. Supreme Court surely would hesitate to find a legislature's expressed purpose for punitive damages an illegitimate state interest.[124] By contrast, some commentators have argued that split-recovery schemes are unconstitutional in light of *Williams*, for they violate the Court's mantra that punitive damages should be awarded only for the harm directed to the individual plaintiff in the case.[125] But these critics seem to miss (or not fully appreciate) the critical distinction: the Court limited retributive punishment to the harms directed toward the individual plaintiff, but did not contemplate a non-retributive, societal goal of punitive damages.[126]

III. CONCLUSION

Williams represents a fault line in U.S. Supreme Court punitive damages jurisprudence. It signifies verve for federal intrusion upon a traditionally state-law area of torts when it comes to reining in outlier

123. Sharkey, *supra* note 30, at 401 ("By reconceptualizing these underdeterrence damages as societal compensation, as opposed to quasi-fines or penalties, the societal damages approach would seem to survive the retributive-punishment-focused due process constraints of *State Farm*.").

124. *Cf.* Colby, *supra* note 100, at 450 ("The Court generally defers to the legislative (or presumably common law) label of a sanction as criminal or civil . . . .").

125. *See, e.g.*, Allen, *supra* note 29, at 352 ("[I]t arguably would not have been appropriate for a state to enact legislation to realize Professor Catherine Sharkey's innovative suggestion that punitive damages be re-conceptualized as a form of 'societal compensatory' damages."); Paul B. Rietema, *Reconceptualizing Split-Recovery Statutes:* Philip Morris v. Williams, 127 S. Ct. 1057, 31 HARV. J.L. & PUB. POL'Y 1159, 1166 (2008) ("[S]tates may no longer use punitive damages to encourage socially optimal deterrence as traditionally conceived—where the focus is on creating full internalization of harm in a world of partial enforcement—or to advance a social compensation goal.").

126. *Accord* Colby, *supra* note 100, at 477 ("[After *Williams*, t]he states are free to adopt (or continue in effect) other forms of extracompensatory damages that serve one or more alternative goals; they simply need to make clear that these damages are not a form of impermissible punishment and to make sure that they are never used as one.").

punitive damages awards. But, at the same time, it demonstrates the power a state court can wield when it resists the U.S. Supreme Court's trenching upon state law turf. Ultimately, the Oregon Supreme Court prevailed—and the $79.5 million punitive damages award (nearly five hundred times the compensatory award) was upheld.

The tale of *Williams* is a hiccup in the unfolding story of increasing federalization of the law of punitive damages. It highlights some underappreciated inherent limitations, given our federal system, on federal court authority and power in the state law realm of punitive damages. It provides an example alternately of courage or of woeful defiance on the part of a state court that stood up to the U.S. Supreme Court. But, most significantly, it lays bare—and, more provocatively, may unleash—the untapped potential on the part of state courts and legislatures to stake out the metes and bounds of the legitimate state interests in punitive damages.

To date, states have not pressed non-retributive punishment rationales for punitive damages. But if a state were to articulate a societal compensatory or deterrence purpose in enacting a statutory multiplier for certain torts, or a split-recovery scheme (or a combination of both), the Court would be hard-pressed to strike down these legislative enactments as unconstitutional. Should *Williams* awaken the sleeping state giants, that would be an ironic twist of fate for a Court that has downplayed the federalism interests at stake in its unfolding punitive damages jurisprudence.