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# DUE PROCESS AND THE DETERRENCE RATIONALE FOR PUNITIVE DAMAGES

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Mark A. Geistfeld\*

## DUE PROCESS AND THE DETERRENCE RATIONALE FOR PUNITIVE DAMAGES

### 1. Introduction

Courts in the U.S. have widely recognized that punitive damages ‘are aimed at deterrence and retribution’.<sup>1</sup> As conventionally justified, however, the deterrence rationale for punitive damages apparently violates the federal constitutional requirement of due process for reasons that are likely to be of concern for any jurisdiction that justifies punitive damages in this manner.

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 upon tort awards of punitive damages.<sup>2</sup> The Court most recently addressed this 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 defendant Philip Morris had engaged in a long-running scheme designed to dupe the general public into smoking cigarettes, leading the Oregon Supreme Court to conclude that this reprehensible conduct justified the \$79.5 million award.<sup>4</sup> In doing so, the court concluded that due process does not prohibit the jury ‘from using punitive damages to punish a defendant for harms to nonparties’.<sup>5</sup> Following an appeal by the defendant, the U.S. Supreme Court reached the contrary conclusion and held that ‘the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury

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<sup>1</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

<sup>2</sup> 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. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989). A decisive, affirmative answer to that question was provided by the Court a few years later in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

<sup>3</sup> *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). Hereinafter: ‘*Williams*’.

<sup>4</sup> *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1175 (Or. 2006), cert. granted in part, 126 S.Ct. 2329 (2006).

<sup>5</sup> *Ibid.* at 1181–82.

that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts on those who are, essentially, strangers to the litigation'.<sup>6</sup>

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. Unlike the criminal law, tort law is based upon individual rights and a corresponding set of individual duties.<sup>7</sup> Due to this individual right-duty nexus, tort law can tailor punitive damages to punish the defendant dutyholder for the way in which she violated the plaintiff's right, while also deterring the defendant from violating the plaintiff's right in the future – a purpose commonly called 'individual or specific deterrence'.

The limitation of punitive damages to individual deterrence could rule out punitive damage awards that are formulated to ensure that dutyholders will adequately consider the total social costs of their conduct, not merely the costs faced by an individual rightholder. To promote this objective of general deterrence, tort law must subject risky actors to liability for the full cost of the injuries that they have tortiously inflicted on others. Liability for compensatory damages can achieve this outcome, but in many cases the tortious actor is not sued by the full set of victims. The ensuing liability shortfall can be offset by the award of punitive damages to those victims who successfully sue and recover compensatory damages. These punitive awards, however, are based on nonparty harms for which the defendant has otherwise avoided liability. Consequently, if harms to nonparties are excluded from the damages calculation as a matter of due process, then it would seem to follow that courts are prevented from formulating punitive damages to further the social interest in general deterrence.

Of the two types of deterrence, general deterrence is of much greater practical importance. After all, how many cases are there in which an individual dutyholder threatens repeated violations of the tort right held by the same individual? The deterrence rationale for punitive damages instead has substantially greater practical import insofar as these damages deter both the defendant and similarly situated actors from breaching their tort duties owed to others in the community.

The issue is highlighted in a recent case involving a sports utility vehicle manufactured by Ford Motor Company with a design that allegedly had a higher incidence of rollover causing thirty more deaths per year as compared to another design on the market, thereby constituting a defect according to the plaintiff. Based on this evidence of defect, the plaintiff's attorney made the following closing arguments to the jury with respect to the claim for punitive damages:

1. 'This is how Ford looks at this. That little bit of thirty people being killed every year didn't matter. Those thirty people, those thirty extra people getting killed in a year didn't matter to them because it was just a little bitty number'.

<sup>6</sup> *Williams*, at 353.

<sup>7</sup> See, e.g., *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928) (holding that a tort plaintiff can recover only by showing that the defendant's breach of duty constitutes a "wrong" to herself, *i.e.*, a violation of her own right, and not merely a wrong to someone else, nor conduct 'wrongful' because unsocial').

2. 'It does matter about those people getting killed. Those thirty people do count. Those thirty people – that's thirty more people that got killed that year. If you expect these vehicles to last about twenty years, that's six hundred more people getting killed using this vehicle as opposed to [the alternative design that was available on the market]. That's serious'.
3. 'And that doesn't count the paralyzed people, the quadriplegics, the people with serious injuries, the thousands of people that have been in these events because of this rollover propensity of this vehicle that they knew about, and they knew it since day one but they chose profit over safety every time because they looked at it as numbers. They didn't look at it as lives, as people'.
4. 'I submit to you that the evidence is that they did it because they thought it was a little, small number... [T]hey did not look at it as thirty lives a year[ ], they didn't look at it as six hundred lives. That's how they should have looked at it, but that was not how they did it'.
5. 'They got together at the highest levels of Ford Motor Company and they made a judgment that rather than delaying and improving the [SUV in question], they were going to sell the vehicle as it was and that they were going to risk people's lives and they were going to risk serious injuries like we have here today. They were going to risk people's brains'.
6. '[Plaintiff] is here today with a brain injury and six hundred other people, or however many it is, lost their lives, and numerous others have brain injuries or are paralyzed, quadriplegic, have extremely serious injuries. We believe that you should tell Ford Motor Company what you think about this kind of thing'.<sup>8</sup>

The jury awarded the plaintiff \$15,000,000 in punitive damages. On appeal, the Supreme Court of South Carolina overturned the punitive damages award because it was based on nonparty harms in violation of *Williams*. 'It is unmistakable that the closing argument relied heavily on inadmissible evidence'.<sup>9</sup> In light of this type of ruling, *Williams* would seem to foreclose the award of punitive damages that is justified by the social concern for general deterrence.

In this chapter, I will show that punitive damages can still further the social interest in general deterrence, at least for what is arguably the most important class of cases. As explained more fully in section 2 below, the individual tort right is now routinely situated in mass markets, a social circumstance that is far different from the type of rights-violations redressed by the early common law.<sup>10</sup> These changed circumstances explain why tort liability in the twentieth century started to be justified in terms of social interests such as the promotion of general deterrence. For reasons given in section 3, this type of rationale for punitive damages is now ruled out by *Williams*, which held that the punitive award must be limited to the violation of the plaintiff's tort right in order to satisfy the federal constitutional requirement of due process. The punitive award, in other words, must vindicate the plaintiff's tort right and nothing more. Nevertheless, section 4 explains why a punitive award that fully vindicates the individual tort right will also further the social interest in general deterrence when the individual tort right is situated

<sup>8</sup> *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 21–22 (S.C. 2010).

<sup>9</sup> *Ibid.* at 22.

<sup>10</sup> This portion of the argument is largely based on Geistfeld 2011a.

in a mass market, the circumstances present in products liability and numerous other tort cases. A punitive award that vindicates the individual right will necessarily supply the requisite protection for all similarly situated rightholders in the market. In these cases, a constitutional requirement of due process does not foreclose the award of punitive damages that promotes general deterrence, but the rationale for these awards must nevertheless be framed in terms of the individual tort right in order to pass constitutional muster.

## 2. Individual Rights and Mass Markets

As Justice Oliver Wendell Holmes famously observed, ‘Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like, where the damages might be taken to lie where they fell by legal judgment’.<sup>11</sup> Justice Holmes made this observation at the end of the nineteenth century when courts in the U.S. were consolidating the highly individuated liability rules under the writ system into a general principle of negligence liability. Having recognized that tort law originated with ‘isolated, ungeneralized wrongs,’ Justice Holmes then observed that ‘the torts with which our courts are kept busy today are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like’.<sup>12</sup> As the economy expanded throughout the twentieth century, individuals became increasingly situated in a mass market of some sort. In this context, the nature of an individual-rights violation is often quite different from the isolated, ungeneralized wrongs that were redressed by the early common law. Today, tort liability routinely involves the individual redress of widespread wrongs in mass markets, the consequences of which are fully illustrated by the modern regime of strict products liability.

Under the early common law, the duty of product sellers was largely limited by the contractual relationship. This limitation of duty was finally demolished by Judge Benjamin Cardozo in the 1916 landmark opinion *MacPherson v. Buick Motor Co.*<sup>13</sup> In the following years this decision was widely adopted, subjecting product sellers to a general rule of negligence liability for defective products. The widespread adoption of negligence liability then created a rationale for strict liability. In the highly influential case *Escola v. Coca Cola Bottling Co.*, Justice Roger Traynor of the California Supreme Court argued in a concurring opinion that the negligence rule, if properly applied, would involve insurmountable problems of proof: ‘An injured person... is not ordinarily in a position to refute [the manufacturer’s evidence of reasonable care] or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is’.<sup>14</sup> This evidentiary problem does not exist under a rule of strict liability, and so the adoption of that rule would give product sellers the financial incentive to distribute nondefective products. Traynor found further support for the rule of strict liability in the implied warranty of merchantability and the related ancient rule that

<sup>11</sup> Holmes 1897, p. 467.

<sup>12</sup> *Ibid.* at 467.

<sup>13</sup> *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

<sup>14</sup> *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

imposed strict liability on the sellers of contaminated food.<sup>15</sup> The doctrinal and policy arguments for strict liability were compelling. In 1963, the California Supreme Court accepted Traynor's argument for strict products liability.<sup>16</sup> The rule of strict products liability was then adopted in section 402A of the *Restatement (Second) of Torts* in 1965. By 1971, twenty-eight states had adopted the *Restatement (Second)* rule of strict liability for product defects; by 1976, forty-one states had adopted it. Today, only a few states have formally rejected the rule of strict products liability, although each nevertheless largely applies the liability rules adopted by the other states.

The growth of products liability has been astounding, with much of it attributable to issues that had not been extensively considered when the *Restatement (Second)* rule of strict products liability was promulgated in the 1960s. This liability rule was formulated to deal with cases in which a defect caused the product to malfunction and injure the user, such as an exploding bottle of soda.<sup>17</sup> By the 1970s, the allegations of defect moved beyond malfunctioning products. Even if the product functioned according to design, plaintiffs began claiming that the design itself was defective for not containing a particular safety feature, like a guard on a machine. Plaintiffs also claimed that properly designed and manufactured products were defective for not adequately warning consumers about product risks. The claims of design and warning defects now constitute the bulk of products liability suits. Allegations of warning defects, for example, are involved in the massive number of suits involving asbestos liability.<sup>18</sup> 'From an inauspicious beginning in the late 1960s, asbestos litigation has generated over 730,000 claims, at an overall cost of at least \$70 billion'.<sup>19</sup> The asbestos cases are an extreme example, but they illustrate how the scope of tort liability far exceeds that which was contemplated when courts first adopted the rule of strict products liability.

This extension placed tort law in the center of disputes involving widespread harms. Whereas product cases initially involved singular accidents caused by an isolated product malfunction (like the exploding bottle of soda), the extension of products liability to encompass product designs and warnings implicates *all* consumers of the product because each one is exposed to the risks of the defective design or warning. Like tort law more generally, products liability no longer is limited to isolated, ungeneralized wrongs but now often redresses the widespread accidental harms that can occur in mass markets.

In a mass market, the individual tort right of each consumer is necessarily interrelated. Individual consumers have different preferences for product safety and other aspects of quality, making it ordinarily infeasible for product sellers in a mass market to completely satisfy the preferences of everyone. Product sellers in mass markets respond to aggregate consumer demand, and so product liability rules are formulated by reference to the safety

<sup>15</sup> See *ibid.* at 441–42.

<sup>16</sup> See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900–01 (Cal. 1963).

<sup>17</sup> See generally Green 2009 (showing that the rule of strict products liability was initially formulated to deal with the problem of malfunctioning products).

<sup>18</sup> E.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5<sup>th</sup> Cir. 1973).

<sup>19</sup> Hanlon & Smetak 2007, p. 526.

expectations of the ordinary or average consumer, not the particular plaintiff.<sup>20</sup> Because a manufacturer's safety decision depends on the safety needs of the average or ordinary consumer, any particular rights-violation can have categorical effects for similarly situated rightholders. A single claim seeking recovery for injuries caused by a defectively designed product, for example, implicates all other identically designed products in the entire market. One claim can also influence the litigation decisions of similarly situated consumers, further influencing the manufacturer's safety decisions with respect to the entire market.<sup>21</sup> Litigation of the individual tort case does not involve an isolated instance of wrongdoing that was characteristic of the claims adjudicated by the early common law, but can now affect other rightholders (consumers) in the mass market. The imposition of liability in a single case involves conduct directed towards the market as a whole, creating categorical effects that are not present in the traditional torts context.

### 3. The Deterrence Rationale for Punitive Damages and the Constitutional Problem of Due Process

The growth of mass markets throughout the twentieth century coincides with the increased prominence of punitive damages practice in the U.S., including the constitutional regulation of this practice by the U.S. Supreme Court. Though awarded infrequently, punitive damages have been a focal point in the debate over tort reform. Public scrutiny is invited by the enormous punitive awards in some product cases, like the \$28 billion punitive damages award one jury levied against a tobacco company.<sup>22</sup> The reasons for these developments, once again, are most easily illustrated by product cases.

The plaintiff can receive punitive damages in a 'great majority' of states, but 'only when the tortfeasor has committed quite serious misconduct with a bad intent or bad state of mind such as malice'.<sup>23</sup> Most courts in the U.S. have recognized that product cases 'require a unique description of what specific conduct will render [the manufacturer] liable for punitive damages'.<sup>24</sup>

'In summary, case law establishes that a defendant must have specific knowledge of a product's defect and its potential for harm before an exemplary award is appropriate. This knowledge is

<sup>20</sup> See, e.g., *Campbell v. General Motors Corp.*, 649 P.2d 224, 233 n.6 (Cal. 1982) (holding that under the consumer-expectations test, 'the jury considers the expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case').

<sup>21</sup> Mass torts routinely involve defective products. The litigation dynamic for a mass tort involves a movement from the immature to mature stages. See Nagareda 2007, p. 11–28. The transition to the mature stage of litigation comes only when the threat to prevail is such that defendants face a substantial probability of loss in the event of trial. The usual way to establish the credibility of this threat, not surprisingly, is through actual plaintiff victories in some early cases. *Ibid.* at 15.

<sup>22</sup> These awards are often substantially reduced by judicial review. See, e.g., *Bullock v. Philip Morris USA*, 138 Cal. App. 4th 1029, 174–80 (2006) (affirming remittitur that reduced punitive damages award of \$28 billion to \$28 million).

<sup>23</sup> Dobbs 2000, p. 1062.

<sup>24</sup> *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 653 (Md. 1992) (quoting 2 J. Ghiardi and J. Kircher, *Punitive Damages Law and Practice* § 21.01, at 2 (1985)).

usually gained through defendant's testing procedures before marketing or through postmarketing consumer accident reports and complaints received by the defendant'.<sup>25</sup>

As one court described this inquiry, 'the plaintiff must prove (1) actual knowledge [or a willful refusal to know] of the defect on the part of the defendant, and (2) the defendant's conscious or deliberate disregard of the foreseeable harm resulting from the defect'.<sup>26</sup>

To understand why this standard requires actual knowledge of defect, we need to understand why a manufacturer would sell a product that it knows to be defective. Under the risk-utility test adopted by the majority of U.S. jurisdictions, a product design or warning is defective only if the burden or cost of the safety precaution (denoted  $B$ ) is less than the expected injury costs that would be avoided by the precaution (the probability of accident  $P$  multiplied by the amount of loss  $L$ ), or  $B < PL$ .<sup>27</sup> When the risk-utility test is adequately enforced, it would be less costly for the manufacturer to make the safety investment (and pay the cost  $B$ ) than to incur liability for the associated injury costs (with expected liability costs of  $PL$ ). This financial calculus changes, however, if the manufacturer does not expect to incur liability for every case in which a defect causes physical harm. Suppose the manufacturer expects that only one out of ten consumers with meritorious claims will actually sue and recover, perhaps because they are unable to identify the defect (like the failure to warn of a risk of cancer) as the cause of their injuries (cancer). To maximize profits, the manufacturer would make the safety decision by comparing the cost of the precaution ( $B$ ) with these expected liability costs ( $1/10 \cdot PL$ ). The cost of the safety precaution could exceed the manufacturer's expected liability costs, creating an incentive to sell the defective product:

$$\text{Expected Liability} = 1/10 \cdot PL < B < PL = \text{Expected Injury Costs}$$

This deterrence problem can be solved by punitive damages. If each plaintiff who recovers compensatory damages were to receive a total damages award ten times greater than the actual loss, the manufacturer's expected liability costs would equal the expected injury costs ( $1/10 \cdot PL \cdot 10 = PL$ ). When punitive damages are formulated in this manner, the manufacturer has a sufficient financial incentive to comply with the tort duty:

$$B < 1/10 \cdot PL \cdot 10 = PL$$

The deterrence rationale explains why punitive damages should be awarded only when the manufacturer has actual knowledge of the defect, but these extracompensatory damages 'are aimed at deterrence *and* retribution'.<sup>28</sup> As in the case of deterrence, the retributive rationale for punitive damages also requires actual knowledge of the defect.

When used for retributive purposes, punitive damages are supposed to punish a defendant in order to vindicate the plaintiff's tort right. The premise of these awards is

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> See Geistfeld 2011b.

<sup>28</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (U.S. 2003) (emphasis added).

that the plaintiff's tort right is not adequately protected by the compensatory damages remedy, thereby justifying extracompensatory damages in certain cases. The prior analysis assumed that the amount of the defendant's liability or damages ( $D$ ) equals the legal valuation of the loss ( $L$ ). This assumption is unrealistic because in the event of a fatal accident, the defendant dutyholder does not have to pay damages for the decedent rightholder's loss of life's pleasures.<sup>29</sup> Liability in a case of wrongful death is governed by a *wrongful death statute* that gives specified beneficiaries, typically immediate family members, a right to recover for their own injuries stemming from the decedent's loss of life. Wrongful death statutes do not provide recovery for the decedent's loss of life's pleasures, however, because tort damages cannot compensate a dead person. Consequently, a defendant can incur less tort liability by killing the plaintiff rather than injuring him. For example, the average jury verdict in New York City from 1984–1993 in a case of wrongful death was over \$1 million, whereas the average verdict in a case of brain damage was over \$3 million.<sup>30</sup> As illustrated by the problem of wrongful death, the compensatory damages remedy does not fully protect the rightholder's interest in bodily integrity, and so the tort right is not wholly defined by an entitlement to compensatory damages.<sup>31</sup> The tort right instead is primarily concerned about the prevention of injury, obligating sellers to provide reasonably safe or nondefective products. By selling a product it knows to be defective, a manufacturer has acted in conscious disregard of the plaintiff's right, even if the manufacturer fully expects to pay compensatory damages. The defendant's payment of compensatory damages in such a case would not fully vindicate the rights-violation, explaining why the defendant can be subject to extracompensatory liability as punishment or retribution.

These attributes of punitive damages have created significant practical problems. Punitive damage awards are not coordinated across cases and jurisdictions. For deterrence purposes, only one or a few plaintiffs has to receive a particularly large punitive award to restore the seller's financial incentive for complying with the tort duty (\$28 billion?). However, plaintiffs who subsequently sue could still seek punitive damages as retribution or punishment for the way in which the defendant's tortious conduct violated their individual tort right. What ensures that a defendant manufacturer does not incur an excessive amount of punitive damages across the full spectrum of cases?

To address this problem, the U.S. Supreme Court has held that defendants are protected against excessively high punitive damage awards by the Due Process Clause of the U.S. Constitution. To determine whether a punitive damages award satisfies due process, judges must evaluate the award in terms of three factors: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or

<sup>29</sup> McClurg 2005, p. 18–33.

<sup>30</sup> Geistfeld 2008, p. 358 (citing Edward A. Adams, *Venue Crucial to Tort Awards: City Verdicts Depend on Counties*, N.Y.L.J., April 4, 1994, at 1, 5).

<sup>31</sup> Although premature death is the most extreme example, any physical harm ordinarily is an irreparable injury that cannot be adequately restored by an award of compensatory damages, explaining why a defendant's willingness to pay compensatory damages does not bar an award of punitive damages. See Geistfeld 2011c (explaining why the valuation of injury within the tort duty exceeds the valuation of injury within the compensatory damages remedy, a 'misalignment' that is then enforced by awards of punitive damages in the appropriate cases).

potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases'.<sup>32</sup>

In elaborating upon this inquiry, the Court has held 'that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process'. 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>33</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, making the single-digit ratio only a presumptive requirement.

The Court has identified the reprehensibility factor as '[t]he most important indicium of the reasonableness of a punitive damages award'.<sup>34</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, depends on whether the size of the award is an excessive retributive sanction for the defendant's reprehensible misconduct, and yet the Court has offered little guidance on the matter. Outside of the historical practice that can justify punitive awards up to four times greater than the compensatory damages, what enables a court to translate reprehensibility into an even greater amount of damages?

The Court's due process jurisprudence has also created considerable uncertainty over the deterrence rationale for punitive damages. In *Philip Morris USA v. Williams*, the Court recently 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>35</sup> 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. This constitutional limitation would seem to rule out the deterrence rationale for punitive damages, at least as conventionally formulated. If, for example, the manufacturer expects to be sued by only one out of ten injured consumers and accordingly decides to sell a defective product, then the deterrence-based total damages award must be ten times greater than the compensatory damages recovered by the plaintiff. The plaintiff would receive damages based on the tortious harms allegedly suffered by nine other consumers who are not pursuing their claims, yielding a punitive award that is based on nonparty harms in violation of *Williams*.

Lacking a deterrence rationale, the punitive award must be justified solely in the retributive terms of punishing the defendant for having consciously disregarded the

<sup>32</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

<sup>33</sup> *Ibid.* at 425.

<sup>34</sup> *Ibid.* at 419 (quotation omitted).

<sup>35</sup> *Williams*, at 353.

plaintiff's 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?

#### 4. The Vindication of Individual Rights in Mass Markets

To punish the defendant and vindicate the plaintiff's tort right, the punitive award must first disgorge any wrongful gains the defendant expected to derive by violating the right. The mere elimination of the expected wrongful gains is not enough, however, because the award would not punish the defendant for having adopted this wrongful perspective in the first instance. The punitive award must be increased further to reject altogether the wrongful perspective, thereby vindicating the right in its entirety.<sup>36</sup>

To illustrate, suppose the defendant manufacturer estimated that it faced only a ten percent chance of incurring liability for the defective product. 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 individual rightholders, including the plaintiff, the defendant ignored the legally 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 eliminate the expected wrongful gains. To punish the defendant for having adopted this wrongful perspective, the damages must then be increased to fully vindicate the individual tort right. The historical practice of double or treble damages serves as a presumptive guideline according to the Court, yielding a total award in this particular case that is 20 to 30 times greater than the compensatory damages.

Vindicating the individual tort right only requires the jury to consider the defendant manufacturer's misconduct toward the plaintiff, thereby satisfying the important due process requirement that the punitive award cannot be based on harms suffered by nonparties to the litigation. Vindictive damages are based on the defendant's *expected* wrongful gain vis-à-vis the individual rightholder, an amount that does not require the court to determine the tortious harms *actually* suffered by nonparties. To be sure, that same misconduct also applies to a much larger group of similarly situated rightholders (consumers), but the punitive awards is formulated solely by reference to the individual tort right. In mass markets, an award that vindicates the individual right necessarily

<sup>36</sup> See generally Geistfeld 2008b, p. 272–73 (developing this conception of punitive damages and applying it to the facts and constitutional concerns of *Williams*). The ensuing analysis is an elaboration of an argument from this article. See *ibid.* at 297–301.

accounts for the dutyholder's misconduct toward similarly situated rightholders, increasing the award in the prior example by a factor of ten – the equivalent of ten fully compensatory awards to ten different victims. In mass product markets, vindication of the individual tort right necessarily accounts for harms to nonparties as required by the social objective of deterrence.

## 5. Conclusion/Recommendations

Any evaluation of punitive damages must consider whether it is appropriate to pursue the objectives of punishment and deterrence within the tort system. Tort cases now frequently involve widespread wrongs in mass markets, as when a corporation distributes a defectively designed product to large numbers of consumers. Behavior causing widespread social harms ought to be punished and deterred in many cases, but liability for social wrongdoing is ordinarily a matter of criminal law. Punishing such behavior with punitive damages suffers from the obvious problem that tort law does not provide defendants with the procedural safeguards of the criminal law. Consequently, the requirements of due process limit the defendant's liability to the violation of plaintiff's individual tort right, the only legal claim that can be fairly defended by the defendant in a tort suit. The limitation of punitive damages to the amount required to vindicate the plaintiff's tort right, however, does not prevent these awards from furthering the social interest in general deterrence. In a mass market, the rights-violation suffered by the plaintiff/consumer (physical harm caused by the defectively designed product) is no different from the violations faced by a large number of similarly situated rightholders (other consumers in the market exposed to the defective product). Due to the interdependence of rights-violations in mass markets, a punitive award that fully vindicates the plaintiff's tort right will necessarily account for the manner in which the defendant failed to adequately account for the interests of similarly situated rightholders. Punitive damages can further the social interest in general deterrence, even though the fundamental requirement of due process limits a defendant's tort liability to the amount of damages that vindicate the plaintiff's individual tort right.

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