PUNITIVE DAMAGES AND PUNISHMENT

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INTRODUCTION

In a line of relatively recent cases, the U.S. Supreme Court has held that a tort award of punitive damages must satisfy the procedural and substantive requirements of the Due Process Clause of the U.S. Constitution.\(^1\) According to the Court, “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”\(^2\)

The meaning of this holding and the related constitutional inquiry are at issue in *Philip Morris USA v. Williams*.\(^3\) The case has understandably attracted a great deal of attention, although its most interesting feature has largely escaped notice. Regardless of the outcome, the Court’s decision in the case will illustrate how the constitutional inquiry necessarily entails controversial substantive choices about state tort law. The Court must decide whether the state’s interest in punishment is reasonably related to a punitive damages award substantially exceeding the single-digit ratio between punitive and compensatory damages. All agree that extracompensatory tort damages fall into the category of exemplary or punitive damages, but the way in which these damages appropriately punish the defendant is a wide open question. Any decision concerning the required constitutional relation between punitive damages and punishment will rest upon a contestable conception of tort liability, and how the Court deals with this aspect of its decision will clearly reveal the nature of constitutional tort reform.

In *Williams*, 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.\(^4\) The punitive award was 97

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\(^{1}\) In 1989, the Court left open the question “whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit.” *Browning-Ferris Indus. 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).


\(^{4}\) Id. at 1171.
times greater than the compensatory damages, making it constitutionally suspect for significantly exceeding the single-digit ratio. One of the questions to be decided by the Court is “Whether the ratio between compensatory and punitive damages comprises the conclusive and overriding guidepost as to the reasonableness of a punitive damages verdict.”

The issue depends upon unresolved issues of foundational importance for tort law. Not surprisingly, wrongful death poses particularly vexing questions about the compensatory nature of tort damages. A monetary damages remedy provides no compensation to a dead person. Given this inherent limitation, why assume that the compensatory damages award is an appropriate baseline for evaluating punitive damages? Did the award of $821,485 for wrongful death adequately reflect the measure of full compensation? If the Court recognizes this limitation of compensatory damages and allows a significant departure from the single-digit ratio between punitive and compensatory damages, it must then identify the rationale for punitive damages in the case of wrongful death. How can one justify an award of $79.5 million? Is it 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 punitive damages for wrongful death? No matter how the constitutional issue is resolved, the Court will have to confront hard questions about the nature of tort liability.

This article identifies the substantive tort issues at stake in Williams and their implications for constitutional tort reform. As discussed in Part I, when punitive damages are justified as a matter of punishment, the award is supposed to vindicate the plaintiff’s tort right and can ordinarily be accommodated by the single-digit ratio between punitive and compensatory damages. Part II then identifies an additional role for punitive damages, showing how these damages can be justified by the compensatory limitations of the damages remedy. This rationale does not depend upon vague or subjective notions of retribution and will often require departures from the single-digit ratio in cases of serious bodily injury or wrongful death. Part III shows how this conception of punitive damages can support the $79.5 million punitive award in Williams. The article concludes by discussing the implications of this analysis for constitutional tort reform. As implied by this analysis, the Court’s decision regarding the constitutionality of the punitive award in Williams implicitly entails a choice regarding the substantive role of punitive damages. Given the contestable state interests at stake, the Court should defer to the states in these cases, allowing state courts to depart from the

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5 Williams, 126 S.Ct. 2329; see also Brief for the Petitioner, Phillip Morris USA v. Williams (July 2006), at (I), available online at http://www.supremecourtpreview.org.
single-digit ratio when justified by reasonable state interests regarding punishment in tort cases. This approach would serve the salutary purpose of forcing the states to identify more clearly the substantive bases of tort liability, a substantial problem with tort liability that so far has not been adequately addressed by legislative tort reform.  

I. Punitive Damages as Retribution

As the Court has recognized, punitive damages “serve the same purposes as criminal penalties.” 7 Both “are aimed at deterrence and retribution.” 8 The purpose of deterrence, however, does not straightforwardly apply in a case of wrongful death. However socially beneficial deterrence might otherwise be, it would not protect the private interests of the plaintiff in Williams. The fraudulent scheme killed the plaintiff’s husband, and so any future deterrence that might be provided by the punitive award is simply irrelevant to her interests. Lacking any deterrence rationale, the punitive damages award must necessarily be justified on grounds of punishment or retribution. Cases of wrongful death isolate the punitive role of punitive damages.

Tort scholars have identified two different ways in which punitive damages can protect the plaintiff’s interests by punishing the defendant wrongdoer. The basic idea is that the extracompensatory damages are required in order to vindicate the plaintiff’s tort right, a role for tort liability expressly adopted by the Restatement (Second) of Torts. 9 If liability were limited to compensatory damages, a defendant duty-holder could choose to violate the plaintiff’s tort right in exchange for paying the “price” of compensatory damages. As Jules Coleman and Jody Kraus have observed, “It is surely odd to claim that an individual’s right is protected when another individual is permitted to force a transfer at a price set by third parties. Isn’t the very idea of a forced transfer contrary to the autonomy or liberty thought constitutive of rights?” 10 To protect the plaintiff’s right from forced transfers or intentional takings by the defendant duty-holder, tort law must award extracompensatory or punitive damages in these cases. These damages protect the tort right while vindicating the plaintiff’s protected interest in bodily integrity for reasons given by Arthur Ripstein:

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7 State Farm, 538 U.S. at 417.
8 Id. at 416.
9 See Restatement (Second) of Torts § 901 (stating that two of “the purposes for which actions of tort are maintainable” are to “determine rights” and “vindicate parties”).
Without [a punitive response], the wrongdoer would have succeeded in treating the other party’s rights as part of the cost of pursuing his or her own ends. The punitive response cannot just take the form of a solemn public declaration, though. If it did, the wrongdoer would have gotten away with the wrongdoing, for he or she would have been right about the costs and benefits of doing wrong. Something more is needed to reject the perspective from which the wrong was done. Imposing an extra cost does so because it rejects the wrongdoer’s deed from the perspective within which it purportedly made sense, namely, that of private advantage.\textsuperscript{11}

This method for vindicating the plaintiff’s tort right minimally requires the disgorgement of wrongful gains, the same outcome required by the deterrence rationale for the punitive award. As Ripstein further explains:

Punitive damages also deter. That is because the denunciation of the wrongdoing is not possible except by imposing a substantial cost that will more than cancel the expected gain. Deterrence is the inevitable byproduct of condemning the deed in this way. They will also teach the wrongdoer that tort does not pay, because they will make it painfully apparent.\textsuperscript{12}

When punitive damages protect or vindicate the tort right in this manner, they are appropriately constrained by the presumptively required single-digit ratio between punitive and compensatory damages. Consider a manufacturer that decides to sell a defective product, reasoning that the tortious conduct will be profitable because most consumers would not file suit. This decision consciously disregards the individual tort right held by each consumer, including the plaintiff. To protect the individual tort right, the single-digit ratio enables the plaintiff to recover up to $9 of punitive damages for each $1 of compensatory damages. For example, a punitive damages multiplier of three would fully disgorge the wrongful gain the manufacturer had expected to derive when it consciously decided to violate the plaintiff’s tort right by assuming that only one-third of those consumers with valid claims would actually sue and recover for their injuries caused by the defective product.\textsuperscript{13} The single-digit ratio would yield an inadequate punitive award if the manufacturer had expected a much lower proportion of consumers with valid claims to sue, but the presumptive ratio need not apply in these cases. The Court has permitted a significant departure from

\textsuperscript{12} \textit{Id}. at 153 (footnote omitted).
single-digit ratio when doing so was required to eliminate the benefit that the
defendant had expected to derive from violating the plaintiff’s right.\(^\text{14}\) This
justification would seem to apply if the manufacturer’s scheme was based on the
assumption that only one percent of all consumers with valid claims would sue,
since the punitive damages multiplier must be 100 in order to eliminate the
benefit that the manufacturer had expected to derive by violating the plaintiff’s
right. So understood, the single-digit ratio does not necessarily bar larger punitive
damage awards when doing so is required to disgorge the defendant’s expected
wrongful gain. This type of tortious scheme presumably is exceptional—How
often will a defendant’s tortious scheme rely on the assumption that there is less
than a 1:9 chance of incurring liability for all tortiously caused harms?—and so
this method for vindicating the plaintiff’s tort right can be accommodated by the
presumptively required single-digit ratio.

The punitive damages disgorge only the defendant’s expected gain for
violating the plaintiff’s right and therefore cannot be duplicated by punitive
awards in other cases involving different consumers or other types of right-
holders, even if those awards are based upon the same course of tortious
misconduct. Punitive damages that vindicate the plaintiff’s tort right cannot
subject the defendant to duplicative liability across cases in violation of due
process.

When punitive damages vindicate the plaintiff’s tort right by disgorging
the defendant’s wrongful gains, the award also furthers the objective of
deterrence. The rationale for the award, however, is predicated solely upon the
plaintiff’s right and not the social interest in deterrence. Deterrence is the
byproduct of vindication and not its rationale. Deterrence does not have to justify
a punitive award in cases of wrongful death, therefore, in order for the appropriate
award to require the minimal amount of damages necessary for \textit{individual}
deterrence.\(^\text{15}\)

\(^{14}\) See TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 460 (1993) (upholding a
punitive damages award of $10 million in a case involving $19,000 of compensatory damages
because the relevant disparity involves the potential loss to the right-holder that could have
occurred if the defendant had fully succeeded in its wrongful scheme).
\(^{15}\) The term “individual deterrence” means the amount of deterrence required in order to protect
the plaintiff’s tort right, as contrasted to “general deterrence” or the amount of deterrence required
to protect the entire class of right-holders. For tortious conduct affecting mass markets, the two
forms of deterrence typically overlap for reasons given earlier in the text. For tortious conduct not
causing wrongful death, individual deterrence can be a justifiable rationale for punitive damages.
See Geistfeld, \textit{Constitutional Tort Reform}, supra note __, at 1096-98 (illustrating how punitive
damages for trespass to land can appropriately protect the right-holder’s private interest in
exclusive possession).
Punitive damages can be retributive in another respect. According to Anthony Seebok, for example, punitive damages involve a “form of private retribution, [and so] the current practice of punitive damages is best characterized as a form of ‘revenge,’ although it is a very stylized form of revenge.”

A similar point is made by Benjamin Zipursky, who claims that “punitive damages are permitted in light of our legal system’s recognition that the plaintiff has a right to be punitive.” The same role for punitive damages can be derived from welfare economics, whereby “the punishment objective derives ultimately from the pleasure of satisfaction people obtain from seeing blameworthy parties punished.” These rationales for punitive damages rely upon different conceptualizations of the tort right, but all provide a role for private punishment that distinctively differs from disgorgement and deterrence.

Like the other rationale for punitive damages, a purely retributive rationale can also be accommodated by the presumptively required single-digit ratio between punitive and compensatory damages. As the defendant in Williams argued in its brief to the Supreme Court, punishing the defendant for its reprehensible conduct is “inherently subjective,” making the single-ratio a “necessary safeguard” for ensuring the constitutionality of an award that cannot be departed from in any case. Adequate judicial review requires objective guideposts. As an objective matter, the appropriate amount of punishment in most cases was established by the early English practice of authorizing double, treble, or quadruple damages for particular wrongs. “Low multiples remained the standard throughout early American history.” Based upon these historical practices and the Court’s prior decisions, the defendant petitioner concludes that the punishment of reprehensible acts easily fits within the single-digit ratio.

When punitive damages are justified as a means of retribution and not deterrence, the presumptively required single-digit ratio can be defended. The appropriate punitive award vindicates the plaintiff’s right by first disgorging the defendant’s expected wrongful gain and then increasing damages further either as

\[\text{16 Anthony J. Seebok, } \text{Punitive Damages: From Myth to Theory, Iowa L. Rev. (forthcoming) (manuscript at 4).}\]
\[\text{17 Benjamin C. Zipursky, A Theory of Punitive Damages, 84 Tex. L. Rev. 105, 106 (2005).}\]
\[\text{18 A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869, 948 (1998).}\]
\[\text{19 Brief for the Petitioner, Phillip Morris USA v. Williams (July 2006), at 30, 9, available online at http://www.supremecourtpreview.org.}\]
\[\text{20 Id. at 35.}\]
\[\text{21 Id. at 36.}\]
\[\text{22 Id. at 34-35.}\]
a rejection of the defendant’s appropriation of the right or acknowledgement of the plaintiff’s right to exact personal retribution or revenge. Under either rationale, the state’s interest in punishment ordinarily is satisfied by the single-digit ratio, with significant departures limited to exceptional cases in which the defendant’s expected wrongful gains were predicated on the assumption that it would be held accountable for the tortious scheme less than one out of nine times.

II. Punitive Damages as Compensation

Although it might seem counterintuitive that punitive damages can be justified in compensatory terms, the justification has a solid historical and doctrinal foundation. As initially conceived of by the courts, punitive damages provided compensation for intangible harms that were not otherwise included within the recognized categories of compensatory damages.\textsuperscript{23} Consistently with this historical practice, the Supreme Court has indicated that a punitive award can justifiably depart from the single-digit ratio when “the monetary value of noneconomic harm might have been difficult to determine.”\textsuperscript{24} The inherent limitations of compensatory damages can justify an award of punitive damages.

This rationale for punitive damages is particularly compelling in cases of wrongful death. The compensatory damages for premature death are extraordinarily limited and hard to quantify, unlike the compensatory damages for property damage or economic loss involved in the prior cases in which the Court has applied the single-digit ratio.\textsuperscript{25} As the California Court of Appeal has held, “death actions present an example of the type of extraordinary case … in which a single-digit multiplier does not necessarily form an appropriate limitation upon a punitive damages award.”\textsuperscript{26} To correct for the compensatory limitations of the ordinary damages remedy, courts can defensibly award extracompensatory damages for reasons of deterrence and punishment.

A. The Compensatory Conception of Tort Liability

Tort law does not provide a damages remedy for all injuries, making it hard to see how liability can be justified in compensatory terms. For compensatory purposes, however, the actual damages received by the plaintiff in

\begin{itemize}
\item \textsuperscript{23} Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 438 n.11 (2001).
\item \textsuperscript{25} \textit{Id.} (involving wrongful denial of insurance proceeds); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (involving wrongful valuation of new automobiles).
\item \textsuperscript{26} Romo v. Ford Motor Co., 113 Cal.App.4th 738, 761, 6 Cal. Rptr.3d 793, 811 (Cal. Ct. App. 2003).
\end{itemize}
any given case is only one aspect of compensation. Due to the compensatory limitations of the damages remedy, a compensatory conception of tort liability also protects the plaintiff’s tort right by imposing demanding safety requirements upon the duty-holder under a rule of negligence liability. In order for nonconsensual risky interactions to be fairly compensatory, the duty-holder must conform to the demanding requirements of reasonable care, even when it would be less costly for the duty-holder to create the risk and pay for any resultant injuries. The damages payment does not adequately protect the right due to the inherent compensatory limitations of the damages remedy, and so the duty-holder cannot choose to be negligent in exchange for paying the “price” of liability. To ensure that duty-holders behave in the required manner, the duty must be enforced by a liability rule imposing punitive damages upon one who violates the duty in conscious disregard of the requirements of reasonable care. The compensatory conception not only justifies punitive damages, it also provides a method for evaluating the appropriateness of any given punitive award.

The compensatory conception of tort liability can be derived from interest analysis, one of the most common forms of reasoning used in tort law. As a leading treatise explains:

Individuals have many interests for which they claim protection from the law, and which the law will recognize as worthy of protection…. Individuals wish to be secure in their persons against harm and interference, not only as to their physical integrity, but as to their freedom to move about and peace of mind…. In any society, it is inevitable that these interests come into conflict…. The administration of law becomes a process of weighing the interests for which the plaintiff demands protection against the defendant’s untrammeled freedom in furtherance of the defendant’s desires, together with the importance of those desires themselves…. This process of weighing the interests is by no means peculiar to the law of torts, but it has been carried to its greatest lengths and has received its most general conscious recognition in this field.27

Interest analysis was famously employed by Oliver Wendell Holmes in his formulation of “torts as a body of substantive law formed by the active accommodation of conflicting considerations of policy, in particular the prevention of harm, and the freedom to engage in valued activity.”28 Under this formulation, the domain of tort law is defined by conflicting interpersonal

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27 W. Page Keeton et al., Prosser and Keeton on Torts (5th ed. 1984), § 3 at 16 (paragraph structure omitted).
interests. When there is no such conflict, as with many socially cooperative forms of behavior, there is no role for tort law. Any tort rule must mediate conflicting interests, requiring a policy choice. Our focus is on how tort law mediates the individual interest in physical security with the conflicting interest of another to engage in valued activity posing the threat of physical harm.

To illustrate the nature of the policy choice, consider a tort rule governing risky interactions between an automobile driver and a pedestrian. The transportation enables the driver to pursue various liberty interests, including economic interests. As an unwanted byproduct of that activity, the driver exposes pedestrians to a risk of bodily injury. A pedestrian is also acting in furtherance of her liberty interests, including economic interests. In the event of a crash that physically harms the pedestrian, by definition, her interest in physical security has been injured. The pedestrian also suffers emotional harm (pain and suffering) and economic harm (like medical expenses). If the driver were obligated to compensate any of these harms, the monetary damages would be detrimental to her economic interests. Any precautionary obligations that tort law imposes on the driver, such as a duty to drive slowly, are detrimental to her other liberty interests. Similarly, any precautionary obligations that tort law imposes on the pedestrian (no jaywalking) restrict her liberty. The way in which tort law regulates the risky interaction therefore means at least one party’s interests will be burdened or harmed: Either the pedestrian’s interests in liberty and physical security; the driver’s liberty interests, including the economic interest; or the interests of both parties. The appropriate mediation of these conflicting interests is the basic question of policy or fairness that must be addressed by tort law, leading Holmes to conclude that “[e]very important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy.”

This focus on the liberty and security interests of individuals might seem ill suited for the contemporary issues of greatest concern to the tort system—accidental harms caused by business activity. In these cases, however, tort law does not mediate the security interests of potential victims against an organization or bureaucracy, for a business enterprise is nothing other than the collective undertaking of individual owners, employees, and customers. Their reasons for participating in the business activity—the need to earn a living or to purchase goods and services—is subject to the same normative scrutiny as the other reasons why individuals engage in other types of risky behavior (such as driving) that do not involve market behavior. Moreover, one who participates in the risk-creating

29 Oliver Wendell Holmes, Jr., The Common Law 35 (1881).
activity of business enterprise would be burdened by tort liability, just like the
participant in any other risky activity. A business includes its liability costs in the
price of the goods or services it sells to others. At least part of the cost of tort
liability is passed on to customers in the form of higher prices. The costs that are
not passed on to customers are borne by the business itself, due to lower sales
stemming from any price increase or to reduced profitability for a given level of
sales. This outcome can be costly for the owners, it can cost some employees
their job, and it may have detrimental effects on other individuals in the
community. As is true in other contexts, any tort rule governing business activity
will mediate the liberty interests of risk-creating actors (the participants in the
business enterprise) with the security interests of those facing the risks generated
by the activity.

Tort law mediates conflicting interests by impartially considering the
interests of each party. Impartiality requires equal treatment of identical interests,
such as any normatively indistinguishable liberty interests of the driver and
pedestrian. Impartiality need not require equal treatment of different interests.

Tort law traditionally has distinguished between liberty and security
interests, giving “peculiar importance” to the nature of these interests and their
social value.\(^\text{30}\) The distinction makes it possible for tort law to prioritize the
interests. For example, “the law has always placed a higher value upon human
safety than upon mere rights in property.”\(^\text{31}\) Similarly, case law in the European
Union recognizes that “there could be no question but that the requirements of the
protection of public health must take precedence over economic considerations.”\(^\text{32}\)
According to the leading rights-based or fairness accounts of tort law, the
interpersonal priority of the security interest over conflicting liberty interests is
justified by individual autonomy, an ideal that individuals should be able to live
the life of their own choosing.\(^\text{33}\)

\(^\text{30}\) Restatement (Second) of Torts § 77 cmt. i.
\(^\text{31}\) Prosser and Keeton on Torts, supra note __, § 21, at 132.
\(^\text{33}\) To be autonomous agents, individuals must have both liberty and physical security. Without
liberty, physical security may not be worth having. But liberty depends on security. Unless our
bodies and personal possessions are adequately secure, the threat of physical harm severely
compromises our ability to make plans and live the life of our choosing. Individuals must be
adequately protected from the threat of physical harm before they can meaningfully exercise their
liberty. See generally Richard W. Wright, Justice and Reasonable Care in Negligence Law, 47
Amer. J. Juris. 143 (2002) (describing the positions of leading philosophers on the issue). The
interpersonal priority of the security interest, therefore, sharply distinguishes a rights-based
rationale for tort liability from the efficiency rationale, which equates safety and money via cost-
For tort law to be unified in this respect, it must mediate conflicting security and liberty interests in a consistent manner across the range of tort doctrines, including the intentional torts and the rules of strict liability. These two types of tort rules create a duty to compensate for physical harm caused by the exercise of certain liberty interests. One who intentionally harms the security interest of another is liable and incurs a compensatory duty for the harm. One who engages in strictly liable behavior incurs a compensatory duty for the harms caused by that conduct. Each form of liability burdens the subordinate liberty interests of the duty-holder (defendant) to compensate harms inflicted on the legally superior security interests of the right-holder (plaintiff). This priority of interests is not affected by the fact that the liberty interests involved in the intentional torts fundamentally differ from those involved in the strict-liability torts. Many intentional torts, such as assault, battery, and trespass, frequently involve criminal behavior.\textsuperscript{34} By contrast, the rule of strict liability for abnormally dangerous activities involves behavior that is not wrongful or unreasonable.\textsuperscript{35} The rule of strict products liability has this same attribute.\textsuperscript{36} Nevertheless, the strictly liable actor incurs a duty to compensate for the physical harms caused by the reasonable activity, just as the criminal actor incurs a duty to compensate for the intentional harms. Both forms of behavior, whether reasonable or criminal, create a duty to compensate, making the associated liberty interest legally subordinate to the security interest protected by the tort rule. In order for tort law to be consistent in this respect, this mediation of interests must also apply to negligence liability.

The intentional torts and negligence each involve unreasonable behavior, whereas strict liability involves reasonable behavior. Each form of liability can depend upon the same policy choice or mediation of interests only if the underlying principle permits an interpersonal priority of the security interest over the liberty interest, whether unreasonable (the intentional torts and negligence) or reasonable (strict liability).

\textsuperscript{34} See Wayne R. LaFave & Austin W. Scott, Jr., \textit{Handbook on Criminal Law} §§ 81, 82, 85 (1972).
\textsuperscript{35} See, e.g., Restatement (Third) of Torts: Liability for Physical Harm § 20 cmt. e (Proposed Final Draft No. 1, April 2005) (“Nor does the appeal of strict liability rest on any disparagement of the social utility of the particular . . . activity”).
The interpersonal priority of the security interest over a conflicting liberty interest is not absolute. As Holmes recognized, the early common law did not give the individual “an absolute right” “to his person, and so forth, [to be] free from detriment at the hands of his neighbors.” An absolute right would require the elimination of risk, effectively preventing individuals from exercising their liberty. Tort law must protect both the right to security and the right to liberty, for each is essential to the exercise of personal autonomy. Tort rules, therefore, must be formulated in order to provide for the equal freedom of both the right-holder and duty-holder, explaining why courts have long recognized that “[m]ost of the rights of property, as well as of person, are not absolute but relative.” A relative right prioritizes or protects the security interest while ordinarily permitting risky behavior as a matter of equal freedom.

When the security interest has a relative interpersonal priority over conflicting liberty interests, the primary purpose of tort liability is “to give compensation … for harms” as recognized by the Restatement (Second) of Torts. If risk materializes into injury, the duty-holder’s subordinate liberty interest is burdened by the obligation to compensate the harms inflicted upon the legally superior (prioritized) security interest of the right-holder. This duty permits the actor to engage in risky behavior and relies upon compensation as the means for protecting the security interest of the right-holder, the type of outcome required by a relative right of physical security.

The compensatory conception characterized tort law from its very beginning when the writs provided plaintiffs with a means of obtaining compensation for the harms caused by the criminal misconduct of the defendant. During this period, compensation took the exclusive form of a monetary damages remedy for the harm. Tort law did not have to specify the appropriate forms of risky behavior as long as liability involved criminal misconduct. The criminal law proscribed certain types of behavior, and the threat of criminal sanctions provided the necessary incentives for deterring individuals from engaging in the prohibited behavior. As it first developed within the writ system, tort law only provided the criminal victim with monetary damages and was obviously compensatory in this respect.

Over time, the criminal law and tort law separated, enabling tort law to provide compensation for harms not caused by criminal wrongdoing. The early

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37 Holmes, supra note __, at 84.
38 Lossee v. Buchanan 51 N.Y. 476, 485 (1873).
39 Restatement (Second) of Torts § 901.
common law often justified liability in these cases with the maxim *sic utere tuo ut alienum non laedas*—use your own so as not to injure another.\(^4^1\) The maxim locates the compensatory duty in the fact of injury-causing conduct rather than the unreasonableness of the injurer’s behavior, and so it has frequently been invoked by courts and commentators to justify rules of strict liability. The compensatory duty, however, does not always justify rules of strict liability. Once liability no longer depends upon criminal misconduct, tort law can specify the safety behavior required of the duty-holder. Doing so requires a rule of negligence. For various reasons, including the inherent limitations of the damages remedy under strict liability, the compensatory duty makes negligence the desirable default rule for accidental harms when supplemented by a rule of punitive damages in the appropriate cases.

**B. Negligence and Compensation**

The compensatory conception of tort liability relies upon compensation to promote individual autonomy equally for both right-holders and duty-holders. As a matter of autonomy, the individual interest in physical security interest can have an interpersonal priority over the conflicting liberty interest of another. As a matter of equal freedom, the liability rule must ordinarily permit the duty-holder to engage in risky behavior, despite the threat to the security interest of the right-holder. For these purposes, the ideal outcome involves the fully informed consent of both the right-holder and duty-holder. Each individual is able to decide how to conduct herself based upon a well-informed deliberation of all relevant issues. In exchange for agreeing to face the risk, the right-holder must be fully compensated.

\(^{41}\) The tort maxim *sic utere tuo ut alienum non laedas* literally means “Use your own property in such a manner as not to injure that of another.” Black’s Law Dictionary 1238 (5th ed. 1979). As applied to risky behavior not involving the use of property, the maxim yields a common-law principle which Holmes has described in terms of a rule that “under the common law a man acts at his peril.” Holmes, *supra* note __, at 82 (stating that some of the “greatest common law authorities held this view”). This duty does not require the elimination of all risk, for that type of duty would involve an absolute priority of the security interest. Instead, the duty-holder must compensate any harms he has caused to the security interest of the right-holder, whether by the exercise of reasonable or unreasonable liberty interests. “For when one person in managing his affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound [sic utere].” Herbert Broom, *A Selection of Legal Maxims, Classified and Illustrated* 367 (8th ed. 1882). In order for there to be such a compensatory obligation, the tort rule must give the right-holder’s security interest a relative priority over the duty-holder’s liberty interest. *Cf. Commonwealth ex rel. Attorney General v. Russell, 33 A. 709, 711 (Pa. 1896)* (“‘Sic utere tuo non alienum laedas’ expresses a moral obligation that grows out of the mere fact of membership in civil society. In many instances it has been applied as a measure of civil obligation, enforceable at law among those whose interests are conflicting.”).
by the duty-holder. That type of fully autonomous exchange defines the ideal outcome for compensatory purposes.

To illustrate, consider risky interactions between drivers and pedestrians. The tort right protects the pedestrian’s interest in physical security, and so the driver must get her consent prior to the risky interaction. Suppose an automobile accident would always kill the pedestrian. For any given probability of suffering the fatal injury, the monetary cost of the risk is determined by the pedestrian’s willingness to accept money in exchange for facing the risk. This amount makes the pedestrian indifferent between (1) the state of the world in which she does not face the risk and is not compensated, and (2) the state of the world in which she faces the risk and receives compensation. The amount of compensation, which is called the willingness-to-accept or WTA risk measure, is the monetary benefit that exactly offsets the cost of the risk or welfare loss for the pedestrian as right-holder. The pedestrian would not accept any money to face the certainty of a fatal accident (the WTA measure equals infinity), although she would accept some finite amount of compensation to face lower level risks. The driver, therefore, can reduce the WTA payment by reducing the risk. Let $B$ denote the total cost or burden of care incurred by the driver. Suppose further that the amount of care exercised by the driver is continuous in the probability of accident, so that incrementally greater care incrementally reduces the probability of a fatal accident. The driver’s total cost—the cost of precaution $B$ and the WTA payment to the pedestrian for the residual risk—is minimized if the driver takes precautions costing less than the associated reduction in the WTA measure. This amount of precaution $B^*$ minimizes accident costs and is allocatively efficient. At the efficient level of care, the pedestrian still faces residual risk of being killed in an accident and requires compensation WTA* for doing so. By definition, the pedestrian’s receipt of the WTA* compensation equalizes her welfare level as compared to a world in which she does not receive the compensation and does not interact with the driver. Pursuant to this exchange, the risky interaction is fully compensatory for the right-holder pedestrian and permits the duty-holder to engage in the risky activity, the outcome required by a relative tort right to physical security.

Of course, transaction costs usually prevent contracting between pedestrians and drivers. Nevertheless, the hypothetical contract between the parties can still provide the benchmark of full compensation. Without actual consent, tort law must ensure that the risky interaction adequately respects the autonomy and equal freedom of both the right-holder and duty-holder. Once that
essential requirement has been satisfied, tort law can appropriately measure full compensation in terms of the hypothetical exchange.

The fully compensatory risky interaction between the driver and pedestrian requires the pedestrian to receive compensation for facing the risk of suffering bodily injury. The driver’s compensatory payment of the WTA* measure to the pedestrian can take the form of a damages payment for the injury caused by the risk. This damages measure conforms to the requirements of tort law—it does not, in particular, require the jury to “value” the injury—and defensibly connects the damages award to the negligence standard of reasonable care.44

The damages measure, though, does not fully solve the compensatory problem, explaining why tort damages do not ordinarily make the plaintiff “whole.” In the context under consideration, the accident would kill the pedestrian. For fatal accidents—the most severe harm to the individual interest in physical security—the pedestrian cannot be compensated by tort damages. What does it mean to have a right to physical security in such a case? The problem is starkly posed by nonconsensual risks threatening fatal injury, although a significant compensatory problem also exists for any nonconsensual risk threatening severe physical injury.45

Consider an injury does not alter the pedestrian’s utility function when the risk of injury is 1 in 10,000 and the pedestrian has a WTA risk measure of $500. The WTA measure includes the cost of risk aversion, making the pedestrian risk neutral with respect to any decision concerning her receipt of the WTA measure. A risk-neutral person whose utility function is not altered by the gamble in question is indifferent between “a certainty consequence [and] any risky prospect whose mathematical expectation of consequences equals that certainty.” Jack Hirshleifer & John G. Riley, The Analytics of Uncertainty and Information 23 (1992). Consequently, the pedestrian would be indifferent between a tort rule giving her a guaranteed receipt of the $500 WTA compensatory proceeds prior to each risky interaction and a tort rule giving her damages of $5,000,000 in the uncertain event of injury (the mathematical expectation of the uncertain damages award, 1/10,000 • $5,000,000, equals the $500 certainty provided by the WTA proceeds). The right-holder, therefore, can receive the WTA compensation by a damages remedy equal to the WTA measure multiplied by the reciprocal of the risk of injury ($500 • 10,000).

See Mark Geistfeld, Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries, 83 Cal. L. Rev. 775, 810-818 (1995) (showing how this damages measure can be harmonized with the case law, including the rule that jurors should not try to “value” the nonmonetary injury); Mark A. Geistfeld, Due Process and the Determination of Pain-and-Suffering Tort Damages, 55 DePaul L. Rev. 331, 349-57 (2006) (showing how this damages measure can be derived from the duty of reasonable care).

When the right-holder suffers severe physical injury, her utility function can be altered so that the satisfaction she gets from a range of activities is changed from the pre-injury state. More formally, the injury can alter the victim’s marginal utility of income or wealth. These injuries frequently reduce the victim’s marginal utility of income—a comatose victim being the most
For these risks, the right is not adequately protected by a negligence duty requiring cost-benefit precaution, because that amount of precaution is required of the driver under ideal conditions when the pedestrian can be fully compensated for the injury. For contexts in which the driver does not incur a fully compensatory damages obligation, the cost-benefit negligence duty gives the driver a windfall—she incurs tort obligations consisting only of the cost-benefit amount of care $B^*$, even though the ideal compensatory outcome involves a more demanding tort obligation of $(B^* + WTA^*)$. When evaluated in terms the ideal compensatory exchange, a negligence rule requiring only cost-justified precautions unfairly disadvantages the right-holder and gives the duty-holder a windfall.

This distributional problem can be ameliorated by the behavioral duty imposed upon the driver. Since the driver cannot pay the WTA* amount to the pedestrian in the form of tort damages for a fatal accident, the duty of reasonable care can instead require the driver to make the WTA* payment in the form of safety precautions. A duty requiring the driver to take precautions costing $(B^* + WTA^*)$ imposes the same total burden on the driver as she would incur under ideal conditions. As compared to the efficient standard of reasonable care $B^*$ that is appropriate under ideal conditions, the more exacting standard $(B^* + WTA^*)$ reduces risk when enforced by punitive damages in the appropriate circumstances. The risk reduction directly protects the security interest and increases the welfare of the pedestrian by making it less likely that she will be obvious example—and so the right-holder would prefer to receive the WTA risk proceeds prior to the risky interaction, when money is more valuable, rather than being provided with an damages remedy formulated in terms of the WTA measure, when the money is less valuable. A damages remedy formulated in terms of the WTA measure no longer implements the compensatory ideal, an outcome consistent with the tort rule that damages for the loss of life’s pleasures—a form of damages for pain and suffering—are not supposed to “restore the person to his previous position,” but should instead only “give the injured person some pecuniary return for what he has suffered and is likely to suffer.” Restatement (Second) of Torts § 903 cmt. a (1977).

Negligence liability cannot reduce risk below the cost-benefit amount if the duty-holder could treat any negligence standard requiring more than the cost-benefit amount of care as a form of strict liability. Under strict liability, the duty-holder chooses the cost-benefit amount of care, as care beyond that point will cost more than the expected reduction in liability costs. By this same reasoning, if the negligence standard requires more than the cost-benefit amount of care, the duty-holder will choose to be negligent, as the expected liability costs are less than the cost of the required care in excess of the cost-benefit amount. When the prospect of paying damages for injury is merely the “price” that the duty-holder must pay for being negligent, the actor will pay the price when it is cost-effective to do so. Under these conditions, negligence liability can reduce risk only to the cost-benefit amount. To enforce such a negligence standard, tort liability must include extracompensatory or punitive damages to create the corrective incentive for complying with the standard of reasonable care.
seriously injured or killed. The more exacting negligence duty more closely approximates the distribution of welfare that would obtain under ideal compensatory conditions, producing a more fair interaction between the right-holder and duty-holder as required by a relative right to physical security.47

This form of negligence liability is compensatory in the sense that the tort rule permits the duty-holder to engage in the risky activity by expending resources to protect the right-holder’s security interest. From the duty-holder’s perspective, it does not matter whether the resource expenditure takes the form of safety precautions or monetary damages. As illustrated by the driver-pedestrian example, tort law can precisely specify the requirements of reasonable care so that the duty-holder incurs the same overall burden as she would otherwise bear in a perfectly compensatory regime in which every tortiously caused injury is fully compensable with a damages remedy.

As I have explained elsewhere, the compensatory conception of tort liability can explain the important limitations of negligence liability while also justifying the rules of strict liability recognized by the courts.48 For present purposes, the importance of the compensatory conception resides in its ability to identify the importance of punitive damages in wrongful death cases.

During the nineteenth century when the tort law emerged from the writ system and adopted negligence as the default rule for accidental harms, the pressing social problem of accidental bodily injury was largely one of premature death. At least until the 1880s, one who suffered a severe physical injury often died due to the “relatively primitive state of medical care.”49

47 For expositional simplicity, I am assuming that the risky interaction involves one driver and one pedestrian. When numerous individuals are exposed to the risk governed by the tort duty, the rights-based tort rule no longer necessarily diverges from the cost-benefit tort rule. See Geistfeld, Safety Principle, supra note __, at 149-51.

48 See generally Mark Geistfeld, Negligence, Compensation, and the Coherence of Tort Law, 91 Geo. L.J. 585 (2003); see also Mark A. Geistfeld, Principles of Products Liability (2006) (showing how the interpersonal priority of the security interest can explain the important doctrines of products liability in terms of consumer choice); Mark A. Geistfeld, Necessity and the Logic of Strict Liability, Issues in Legal Scholarship (2005), available at http://www.bepress.com/ils (showing how the autonomy-based interpersonal priority of the security interest can explain the rules of strict liability, including the doctrine of necessity); Mark Geistfeld, The Analytics of Duty: Medical Monitoring and Related Forms of Economic Loss, 88 Va. L. Rev. 1921 (2002) (showing how the interpersonal priority of the security interest can explain the important limitations of duty regarding economic loss and emotional distress).

Not surprisingly, premature death poses a unique compensatory problem. Under the early common law, “in a Civil Court, the death of a human being could not be complained of as an injury.”\textsuperscript{50} In the early 1800s, not all states followed this rule:

[B]y mid-century, the question of whether there was a common law action for wrongful death became hotly contested and heavily litigated even in jurisdictions allowing such actions. Such uncertainty as to the law of wrongful death prompted legislators to take action, especially in light of the increased frequency of accidents in the early industrial economy. Thus, beginning in 1840 American state legislatures enacted wrongful death statutes to allow recovery in the event of an accident victim’s death.\textsuperscript{51}

In 1847, New York adopted a wrongful death statute authorizing actions for wrongful death “caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party to maintain an action.”\textsuperscript{52} The approach was widely adopted. “By 1869, 29 of the 37 states had enacted wrongful death statutes,” with most following New York’s approach.\textsuperscript{53} The early common-law rule barring recovery for wrongful death had been legislatively altered to provide “family members negligence claims for the pecuniary damages they suffered as a result of the death of a husband or father.”\textsuperscript{54}

At the time when the tort system emerged, negligence liability provided the exclusive mechanism for compensating premature death. The monetary compensation, of course, was received by family members and not the decedent. Damages provide no compensation to a dead person, an obvious limitation of the tort remedy that explains why negligence liability ordinarily is more capable of protecting the security interest than the damages afforded by a rule of strict liability. For good and obvious reasons, judges would have been attracted to the

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\textsuperscript{51} Witt, \textit{supra} note __, at 733.
\textsuperscript{52} An Act Requiring Compensation for Causing Death by Wrongful Act, Neglect, or Default, 1847 N.Y. Laws chap. 450, § 1, at 575 (quoted in full in Witt, \textit{supra} note __, at 734, n.45).
\textsuperscript{53} Witt, \textit{supra} note __, at 736.
\textsuperscript{54} Id. at 736 n.50. The states not adopting the New York approach limited wrongful death claims to injuries negligently caused by common carriers. \textit{Id.} The limitation of remedy to cases involving death of a husband or father involved deeply gendered notions of the family. \textit{See generally id.}
deterrence advantages of negligence liability, explaining why courts often adopted negligence rules involving a highly demanding standard of reasonable care.\textsuperscript{55}

This reasoning also explains why most observers of the time thought that negligence liability served the purpose of punishing or deterring civilly blameworthy or “negligent” behavior.\textsuperscript{56} The justification for negligence liability involved its ability to reduce risk by controlling risky behavior, a rationale that was frequently relied upon by courts in the nineteenth century:

Two [themes that recurred in the case law] were a judicial concern for the risks created by modern enterprise and a judicial willingness to deploy liability rules so as to control those risks. Another set of themes included a judicial solicitude for the victims of enterprise-occasioned accidents and a judicial willingness to resolve uncertainties in the law liberally in favor of those victims’ opportunities to secure recoveries.\textsuperscript{57}

The compensatory advantages of negligence liability can explain why courts adopted negligence rather than strict liability as the default rule for accidental harms. Negligence permits duty-holders to engage in reasonably risky behavior while specifying the resources that they must expend to protect right-

\textsuperscript{55} For example, the liability of a common carrier for injuries to passengers was based on a highly demanding negligence standard that made the carrier liable in tort for “the least negligence, or want of skill or prudence” on the part of the carrier or its employees. “[I]f the plaintiff showed that he was a passenger and that he was injured, he made out a prima facie case of negligence; to escape liability, the carrier then had to show that the injury was unforeseeable or impossible to guard against.” “The duty of care to which courts held passenger carriers for the road worthiness of their vehicles was just short of strict liability…. [T]he passenger carrier was liable for defects that were discoverable on inspection no matter how extraordinary the inspection required to discover it.” Robert J. Kaczorowski, The Common-Law Background of Nineteenth Century Tort Law, 51 Ohio St. L.J. 1127, 1162-63 (1990). Similarly, the defense of “inevitable accident” for trespass on the case may have involved such a highly demanding standard of reasonable care.

Under this writ, the plaintiff could establish a prima facie right to recover by proving that the defendant had caused the harm, a basis of responsibility expressed by the common-law maxim sic utere tuo ut alienum no laedas. E.g., Tuberville v. Stamp, 88 Eng. Rep. 1228 (K.B. 1697). The doctrine of “inevitable accident” provided the defendant with an affirmative defense. In applying this defense, courts apparently required the defendant to prove that the accident was “impossible [to avoid] as a practical matter[.]. The implicit standard of care was consequently higher than a standard of reasonable or customary care [required by ordinary negligence liability], but lower than a standard of literal physical impossibility.” Stephen G. Gilles, Inevitable Accident in Classical English Tort Law, 43 Emory L.J. 575, 578 (1994).

\textsuperscript{56} G. Edward White, Tort Law in America 61-62 (1980).

\textsuperscript{57} Gary T. Schwartz, The Character of Early American Tort Law, 36 UCLA L. REV. 641, 665 (citations omitted)
holders from injury. The fair amount of resource expenditure can be based upon the perfectly compensatory exchange between the right-holder and duty-holder.

The limitations of the damages remedy also explain why negligent behavior can be particularly blameworthy. Consider a duty-holder who chooses to act negligently because the cost of the required precautions exceeds the duty-holder’s expected liability costs. That conduct does not become permissible merely because the duty-holder is obligated to pay monetary damages for the injury. In order to protect fairly the security interest, tort law must strive to reduce risk under a negligence rule precisely because the damages remedy is inadequate for serious bodily injury and death. By rejecting another’s right to be protected in this manner, the duty-holder is subject to moral approbation and liability beyond compensatory damages. One cannot choose to be negligent in exchange for paying the “price” of monetary damages. The tort right is not vulnerable to forced exchanges of this nature. Negligence liability prohibits unreasonable behavior, and so one who egregiously disregards this prohibition is subject to punitive damages and even criminal liability.58

III. Punitive Damages and the Single-Digit Ratio

We can now consider how the compensatory rationale for punitive damages applies to Philip Morris USA v. Williams, which involves compensatory damages of $821,485 and punitive damages of $79.5 million for the wrongful death caused by the defendant tobacco company’s fraudulent misconduct.59 Although the U.S. Supreme Court has held that a punitive damages award exceeding the single-digit ratio is presumptively unconstitutional, that holding assumes the compensatory damages were adequate.60 The mere fact that the punitive award in Williams significantly exceeds an inadequate compensatory award should not be a constitutional problem.

58 "Where the defendant’s wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action ‘punitive’ or ‘exemplary’ damages, or what is sometimes called ‘smart money.’” Prosser and Keeton on Torts, supra note _, at 9. As for criminal liability, “the overwhelming majority of jurisdictions allow crimes based on ordinary negligence.” State v. Hazelwood, 946 P.2d 875 (Alaska 1997). However, ordinary negligence “applies in only a relatively few modern statutory crimes…. [F]or the most part, … something more than negligence is required for criminal liability, [involving] ‘a risk greater than simply an unreasonable risk’ and/or ‘a subjective awareness of the unreasonable risk he [the duty-holder] creates.’” Wayne R. LaFave, 1 Substantive Criminal Law § 5.4(a) (2d ed. 2003).


60 See supra notes _ and accompanying text.
According to the Oregon Supreme Court, the $79.5 million punitive damages award was justified because of the manner in which defendant Philip Morris consciously disregarded the safety rights of smokers, including the plaintiff’s deceased husband:

Philip Morris knew that smoking caused serious and sometimes fatal disease, but it nevertheless spread false or misleading information to suggest to the public that doubts remained about that issue. It deliberately did so to keep smokers smoking, knowing that it was putting the smokers’ health and lives at risk, and it continued to do so for nearly half a century. Philip Morris’s fraudulent scheme would have kept many Oregonians smoking past the point when they would otherwise have quit. Some of those smokers would eventually become ill; some would die. Philip Morris’s deceit thus would, naturally and inevitably, lead to significant injury or death.61

Lest there be any doubt about the reprehensibility of the tortious misconduct, the court found that the defendant’s fraudulent scheme, when viewed in the light most favorable to the plaintiff (as required for purposes of appellate review), “would have constituted [criminal] manslaughter” at its inception, and today “would constitute at least second-degree manslaughter, a Class B felony.”62

The court’s discussion about the extent to which the defendant’s fraudulent scheme injured other smokers in the state creates a potential constitutional problem. As the U.S. Supreme Court had previously held, any award for punitive damages must be justified by the individual tort right held by the plaintiff.63 Consequently, the Court is also reviewing “[w]hether the Oregon courts deprived Philip Morris of due process by permitting the jury to punish Philip Morris for harms to non-parties.”64 The manner in which a defendant manufacturer injures other consumers in the marketplace, however, is an essential component for determining how to protect an individual tort right with compensation.

61 Williams, 127 P.3d at 1177 (paragraph structure omitted).
62 Id. at 1179.
63 State Farm, 538 U.S. at 423 (holding that “[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant”).
64 Brief for the Petitioner, Phillip Morris USA v. Williams (July 2006), at (I), available online at http://www.supremecourtpreview.org.
The manufacturer of a mass-marketed product does not give individualized treatment to each consumer. The manufacturer treats each consumer as nothing more than a member of a group—the market or those individuals whose aggregate demand determines the most profitable attributes or characteristics of the product. To protect the individual right held by each consumer, the court must consider how the manufacturer has behaved towards the group of consumers in the market. This behavior establishes the amount of risk the manufacturer imposed upon the plaintiff consumer (and all other consumers), which in turn determines the amount of full compensation for the tortious risk in question.

Not surprisingly, the degree of risk created by the defendant’s tortious misconduct was emphasized by the plaintiff’s attorney in his closing argument to the jury:

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

This argument tells the jury that smoking increases the risk of lung cancer by ten percent, the cause of the premature death under consideration. The risk is not somehow unique either to the plaintiff or defendant; it inheres in smoking cigarettes. An objective measure of risk is required for determining the amount of full compensation.

Unfortunately, smoking creates many other risks in addition to the increased incidence of lung cancer. Smoking also increases the risks of heart disease, emphysema, and bronchitis, for example. “On average, adults who smoke cigarettes die 13-14 years earlier than nonsmokers.” The average risk, however, was not the one faced by the plaintiff’s husband Jesse Williams. He was a very heavy smoker. When the group of heavy smokers (more than 10

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65 Id. at 4.
66 National Center for Chronic Disease Prevention and Health Promotion, Tobacco-Related Mortality (Feb. 2004), available online at http://www.cdc.gov/tobacco/factsheets/.
67 Id.
68 Williams, 127 P.3d at 1168 (stating that the plaintiff’s husband eventually smoked three packs a day).
cigarettes per day) is compared to those who do not smoke, the risk of dying from any cause over a 25-year period increases by 80 percent.\textsuperscript{69}

All of this information, of course, describes the impact of cigarette smoking on the population of consumers. The market-wide impact determines the risk the defendant’s fraudulent scheme imposed upon the plaintiff’s husband in \textit{Williams}. This risk caused the injury in question. As required by the element of causation, the jury must have found that the defendant’s fraud caused the premature death of the plaintiff’s husband Jesse Williams. In other words, had Jesse Williams not been deceived by the defendant, he would not have smoked and faced the associated risks.\textsuperscript{70} In order to be fully compensated for the tortious risk created by the defendant’s conduct, Jesse Williams would need to receive the amount of money he would accept in order to face the risk of dying prematurely due to smoking. How much money would he accept in exchange for losing at least 13-14 years of his life on average? How much money would he accept in order to face an 80 percent increase in the risk of dying from any cause over a 25-year period? These risks are extraordinarily high, justifying a measure of full compensation vastly exceeding the amount of compensatory damages actually awarded in the case.

To see why, consider how federal administrative agencies such as the U.S. Environmental Protection Agency (EPA) evaluate health and safety regulations

\textsuperscript{69} David R. Jacobs et al., \textit{Cigarette Smoking and Mortality Risk}, 159 Arch. Intern. Med. 733, 733 (1999) (finding that the “adjusted hazard ratio for all-causes death in smokers as compared to nonsmokers [was] 1.8 for smokers of 10 cigarettes per day or more in a study spanning 25 years and seven countries).

\textsuperscript{70} Williams, 127 P.3d at 1170. For this reason, compensation is not appropriately measured in terms of the consumer’s willingness-to-pay to eliminate the risk (WTP), a measure that yields compensatory amounts much lower than those based on the individual’s willingness to accept the risk (WTA). Even if income effects are held constant, the two measures significantly diverge when there are fewer substitutes for the good being risked. \textit{See} W. Michael Haneman, \textit{Willingness to Pay and Willingness to Accept: How Much Can They Differ?}, 81 Am. Econ. Rev. 635 (1991) (providing formal analysis proving this proposition). Life, of course, is one good for which there is no known close substitute. “[I]n the limit, WTP could equal the individual’s entire (finite) income, while WTA could be infinite.” \textit{Id.} at 635-36.

When risk is measured with the WTP measure—the outcome when the right-holder would still purchase the product—the role of punitive damages is unlikely to include punishment for its own sake. The right-holder, like other consumers, would pay for the right to punish via increased product prices, and it seems unlikely that consumers value punishment in this way. Rather, consumers would employ punitive damages as a means of deterrence. \textit{See} Geistfeld, \textit{Products Liability, supra} note __, at 217-221 (explaining the deterrence rationale for punitive damages in product cases).
that reduce the risk of premature death.\textsuperscript{71} To evaluate the costs and benefits of proposed regulations, the EPA measures the safety benefit of each reduced individual mortality to be $6.1 million in 1999 dollars.\textsuperscript{72} The measure is derived from the same type of inquiry that is required to compute the amount of full compensation for facing a tortious risk. The $6.1 million measure is the average value produced by 26 different studies of how individuals, typically workers, value small, incremental changes in mortality risks.\textsuperscript{73} For example, a study might find that 10,000 workers were willing to face a 1:10,000 increased annual risk of dying on the job in exchange for an annual wage increase of $610 dollars. The risk on average will kill one of the workers in the group, and the group as a whole is willing to accept $6.1 million of increased wages in exchange for facing that risk. The value of the statistical life (VSL) within the group, therefore, is $6.1 million. This same sort of calculation is used to calculate the amount of full compensation for any given tortious risk: the reciprocal of the risk (like 1:10,000) is multiplied by the amount of money the individual would accept in order to assume the risk (say $61) to yield the damages award ($6.1 million). The rationale for this award is that under certain conditions, the individual would be indifferent between receiving the $61 prior to the risk exposure or receiving the damages award of $6.1 million in the event of injury.\textsuperscript{74}

When considered in relation to the VSL estimate relied upon by the EPA, the amount of full compensation for the premature death in Williams is substantially higher. Any VSL estimate depends upon a range of factors, including the individual age at the time of risk exposure, the period of time when the risk exposure took place, and so on.\textsuperscript{75} Suppose that every one of these factors substantially reduces the VSL for Jesse Williams as compared to the VSL for the average individual encompassed by the EPA estimate. Even if that were true, the EPA estimate of $6.1 million is quite likely to be substantially lower than the amount of full compensation for the tortious risk faced by Williams. As the EPA recognizes, the VSL based on wage estimates is limited to “relatively small risk changes.”\textsuperscript{76} Unlike the small risks underlying the EPA estimate, the defendant tobacco company imposed a substantial risk upon Williams. The enormity of the


\textsuperscript{73} Id.

\textsuperscript{74} See supra note 43 and accompanying text.

\textsuperscript{75} See generally Viscusi & Aldy, supra note ___ (describing variety of factors affecting VSL).

\textsuperscript{76} EPA Guidelines, supra note __, at 76.
risk substantially increases the amount of full compensation for reasons given by Richard Posner:

[T]his approach will not work when the probability of death is high. The fact that someone demands only $100 to incur a .0001 risk of death does not imply that he will demand only $100,000 to incur a 10 percent risk of death—or $1 million to incur a certainty of death…. Most people would not accept any amount of money to give up their life on the spot. But if we infer from this that the value of life is infinite, then … people will never take any risks—an obviously false description of human behavior. It would seem, therefore, that the value of life … rises faster than the risk of death…. People will demand much more money to take a large risk than the amount computed by multiplying the money demanded to take a small risk by the increment in risk.

For example, even if Jesse Williams would have required $200 to accept an increased risk of 1:10,000 of premature death when he began smoking in 1950—numbers that yield a VSL substantially lower than the EPA estimate—that risk measure does not mean he would require $2 million to be fully compensated for facing the actual risk of smoking. If he had known the actual risk and not been deceived by the defendant tobacco company, he would have realized that smoking, on average, almost doubles the risk of dying from fatal causes and typically would take at least 13-14 years from his life. For risks approaching such a magnitude, the amount of money anyone presumably would require to accept the risk rises exponentially as the measure approaches infinity for the risk of certain death. Smoking almost doubled the total risk of premature death for Williams, a risk increase that will do much more than double the required amount of full compensation. The amount of full compensation could easily increase by a factor of five or ten, increasing the fully compensatory award from $2 million (for the small risk of 1:10,000) to $10 or $20 million for the actual risk caused by smoking.

Once the amount of full compensation is conceptualized in this manner, the punitive award of $79.5 million is quite plausibly only a single-digit multiplier of the amount of full compensation. Indeed, no multiplier may be required. Would it be unreasonable for the jury to have found that $79.5 million is required as compensation for being exposed to a tortious risk that, on average, would rob the individual of at least 13-14 years of life?

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The justification for the punitive award is even stronger than the analysis so far has suggested. Jesse Williams was never given the opportunity to value the risk in question. The damages calculation is inherently uncertain in this respect. In calculating damages, tort law places the burden of factual uncertainty upon the defendant wrongdoer, and that principle easily justifies a punitive award in the tens of millions.

Consider the evidence a court would rely upon to determine damages in a case involving a promising third-year law student who was permanently disabled by the defendant’s tortious misconduct, leaving her unable to practice law. As part of the damages award, the plaintiff can collect the future earnings she will lose as a result of the tortious injury. Various types of evidence show how much a law student is likely to earn in the future. But even the best evidence of projected future earnings cannot establish that this particular student, more likely than not, would in fact receive these earnings 30 or 40 years from now had she not been permanently disabled. Such certainty is not possible for damage calculations extending far into the future. The more-likely-than-not evidentiary standard would bar many claims for lost future earnings. Barring the plaintiff from recovery would be unjust, though, because the evidentiary problem must be confronted only because of the defendant’s wrongdoing. Had the defendant’s tortious conduct not permanently disabled the student, there would be no need to estimate the student’s lost future earnings. Hence it would be “a perversion of fundamental principles of justice” if the uncertainty created by the defendant’s tortious misconduct were to bar the plaintiff from recovering damages.78 To avoid this injustice, tort law reduces the plaintiff’s burden of proof regarding causal questions in the damages phase. The plaintiff is only required to establish the amount of damages with “as much certainty as the nature of the tort and the circumstances permit.”79

Is it more likely than not that Jesse Williams would have accepted $20 million in exchange for losing at least 13-14 years of his life? We don’t know. The jury could still consider the amount to be full compensatory, however, because there is a reasonable basis for doing so.

Having justified $20 million as an amount of full compensation, the justification for the $79.5 million punitive award is straightforward. The $20 million figure for full compensation reflects a consensual exchange between the duty-holder and right-holder. Without actual consent, this measure of full compensation is justifiable only if the duty-holder otherwise adequately respected

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79 Restatement (Second) of Torts § 912 cmt. a.
the autonomy of the right-holder. The court determined that the defendant tobacco company consciously disregarded the tort rights of Jesse Williams, making the measure of fully compensation inadequate. Without more, damages set at the amount of full compensation would allow the defendant manufacturer to have appropriated William’s tort right in exchange for paying the “price” of compensation. To vindicate the tort right, exemplary or punitive damages are justified. The reasoning at this point relies upon the retributive rationales for punitive damages.\textsuperscript{80}

When considered in these terms, an even higher award can be justified. Nothing in the analysis so far has considered whether the defendant engaged in the tortious scheme by relying on the assumption that it would avoid liability for all tortiously caused harms. For example, a punitive damages multiplier of three would fully disgorge the wrongful gain defendant had expected to derive from violating the tort right of Jesse Williams (and every other consumer) if the defendant had assumed that only one-third of those consumers with valid claims would actually sue and recover for their injuries caused by the fraud.\textsuperscript{81} The very nature of the defendant’s scheme strongly indicates that it had some sort of expectation of this type, further justifying an increase of the punitive award.\textsuperscript{82}

Conclusion

In explaining the role of the single-digit ratio between punitive and compensatory damages, the U.S. Supreme Court has said that compensatory damages can include any “potential harm” likely to be suffered by the plaintiff.\textsuperscript{83} The ratio, therefore, depends upon a conception of total harm rather than the compensatory damages actually awarded to the plaintiff. In affirming the punitive damages award in \textit{Williams}, the Oregon court relied upon the concept of potential damages to justify the award.\textsuperscript{84} The actual compensatory award did not and could

\textsuperscript{80} See supra Part I.
\textsuperscript{81} See supra notes ___ and accompanying text. [Part I]
\textsuperscript{82} Compare, in this regard, the Oregon Supreme Court’s description of the defendant’s scheme at supra notes ___ and accompanying text.
\textsuperscript{83} State Farm, 538 U.S. at 418.
\textsuperscript{84} According to the court:

Plaintiff suffered relatively small economic damages for Williams’s wrongful death—less than $25,000. However, that low figure occurred only because Williams died shortly after being diagnosed with cancer. If Williams had lived long enough to incur substantial medical bills, for example, economic damages could easily have been 10 or more times the amount awarded here. Only chance saved Philip Morris from a much higher compensatory award.

\textit{Williams}, 127 P.3d at 1180.
not reflect the amount of loss suffered by the decedent. Fully accounting for that loss can justify punitive damages substantially greater than a single-digit multiple of the actual compensatory damages, the result reached by the California Court of Appeal in a wrongful death case.\(^{85}\)

The compensatory rationale for punitive damages is supported by the historical practice of treating punitive damages as a form of compensation for intangible harms that are not otherwise accounted for by compensatory damages.\(^{86}\) Tort law does not compensate a decedent for the loss of life’s pleasures, and yet surely that loss matters a great deal. A tort right to physical security must involve protection from the most serious threat faced by the right-holder—the risk of suffering premature death. Tort law cannot protect this essential aspect of the right with a damages remedy, and so it protects the right by imposing a standard of reasonable care upon duty-holders. Consequently, a defendant who consciously disregarded the requirements of reasonable care necessarily forces the court to protect the right with the damages remedy. Strictly speaking, the damages for the decedent’s loss of life’s pleasures and the like are not compensatory; money provides no compensation to a dead person. As a legal matter, the damages must be extracompensatory, even though they can be conceptualized in terms of the amount of money that would have been fully compensatory for the right-holder. These damages must then include an additional punitive component in order to vindicate the decedent’s right to physical security. The rights-violation did more than just rob the decedent of life; the conduct failed to respect the decedent in the fundamental manner required by tort law. The defendant’s payment of full compensation would not fully redress the rights-violation, and so tort law can justifiably increase damages by an even greater amount. Even if the constitution limits this punitive increase to a single-digit multiple of full compensation, the punitive damages award can vastly exceed the compensatory damages actually awarded in the case.

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\(^{85}\) Romo v. Ford Motor Co., 113 Cal.App.4th 738, 761, 6 Cal. Rptr.3d 793, 811 (Cal. Ct. App. 2003) (holding that “the proportionality inquiry must focus … on the relationship of punitive damages to the harm to the deceased victim, not merely to the compensatory damages awarded,” thereby justifying a substantial punitive damages award in a wrongful death case in which the deceased’s estate received no compensatory damages).

\(^{86}\) See supra note ___ and accompanying text. The classic reference on this point is Simon Greenleaf, A Treatise on the Law of Evidence 240-50 (16th ed. 1899) (describing the role of exemplary damages in terms of compensation for intangible or dignitary harms). For extended discussion of the historical basis for this concept of punitive damages, see generally Thomas B. Colby, Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs, 87 Minn. L. Rev. 583 (2003).
The Oregon Supreme Court, though, was not clear about the matter in *Williams*. Its opinion indicates that the punitive damages award might have been at least partially justified by the social value of deterrence, causing the plaintiff respondent to rely upon this rationale for punitive damages in defending the award before the U.S. Supreme Court.\(^87\) For punitive damages to play this role, the substantive nature of the tort right must protect both private and social interests.

The defendant petitioner, by contrast, claims that the tort liability cannot further the social interest in general deterrence, as claimed by the plaintiff respondent, but instead must protect only the interests of the plaintiff. That conception of the tort right, though, is entirely consistent with the compensatory conception of punitive damages. The amount of full compensation depends only upon the hypothetical exchange between the right-holder and duty-holder, and so the compensatory conception of punitive damages is a direct implication of a tort right that protects only private interests.

Either of these two different substantive conceptions of the tort right can support the Oregon judgment, but to evaluate the constitutionality of the award the Court will have to rely upon a particular conception. If tort liability furthers the social interest of deterrence, then due process presumably requires the state to employ procedures for ensuring that the defendant is not subject to “multiple punitive damages awards for the same conduct.”\(^88\) That procedural protection is not required when punitive damages exclusively concern the private interest in compensation, since that conception of the right rules out the possibility that different cases involve damages for the same interest. The exact reason why the punitive damages award in *Williams* passes constitutional muster accordingly depends upon a particular conception of the substantive tort right.

Of course, the Court might find that the punitive award in *Williams* violates due process by unacceptably departing from the single-digit ratio between punitive and compensatory damages. That ruling would rely upon a very different conception of the tort right, one which requires tort damages to provide “fair compensation” rather than full indemnification.\(^89\) Given the historical

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\(^{87}\) Brief for the Respondent, Phillip Morris USA v. Williams (July 2006), available online at http://www.supremecourtpreview.org.

\(^{88}\) State Farm, 538 U.S. at 423. For good discussion of such an approach and how it can provide the requisite procedural protections, see Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347 (2003).

practice in which punitive damages involved some single-digit multiplier of the compensatory damages actually awarded in the case, this conception of the tort right could justify the reversal of *Williams*.

Any decision concerning the constitutionality of the punitive award in *Williams*, therefore, will rest upon a contestable conception of tort liability. Any such decision could use the federal constitutional guarantee of due process to impose a particular substantive conception of the common law upon the states. In that event, constitutional tort reform will turn out to be the converse of the so-called *Lochner* approach in which the Court effectively, and infamously, incorporated a particular substantive conception of the common law into the federal constitution.\(^\text{90}\)

Rather than intrude upon state interests in this manner, the Court could instead require state courts to explain more precisely the substantive nature of the tort right and how its protection justifies the punitive award in any given case. Remand can be much more desirable than affirming or reversing particular awards. In the past few decades, the issue of tort reform has revolved around the question of whether there is too much or too little liability. The most severe problem with tort law, however, lies in the vagueness of its most important rules. In discussing why punitive damages raise constitutional concerns regarding due process, the Court has relied upon reasons that apply with equal force to a wide swath of important tort doctrines.\(^\text{91}\) Any given tort award can be excessive, regardless of whether the defendant faces the prospect of liability in other cases.

\(^{90}\) In the early twentieth century, the Supreme Court repeatedly struck down legislation as violating the federal constitution by relying upon a particular conception of liberty as freedom of contract, a conception necessarily based upon a particular conception of the common-law rights of contract and tort. *See, e.g.*, *Lochner* v. New York, 198 U.S. 45 (1905). As Justice Stevens has noted, “When the Court repudiated the line of cases that is often associated with *Lochner* v. New York, it did so in strong language that … seemed to foreclose forever any suggestion that the due process clause of the fourteenth amendment gave any power to federal judges to pass on the substance of the work product of state legislatures.” John Paul Stevens, *Judicial Restraint*, 22 San Diego L. Rev. 437, 448 (1985). If federal courts are foreclosed in this manner from overturning state legislation, then it is hard to see how they could achieve the same result with respect to the substance of state common law. *Cf.* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (stating that the due process inquiry “appropriately begins with an identification of the state interests that a punitive award is designed to serve”).

\(^{91}\) See Geisfeld, *Constitutional Tort Reform*, supra note __, at 1095-1111 (showing how the constitutional “concerns” expressed by the Court in *State Farm* apply with equal force to various tort doctrines, including the standard of reasonable care and jury awards of nonmonetary damages).
Any given award can be inherently arbitrary and capricious when based upon overly vague liability rules. As a matter of due process, there is nothing particularly distinctive about punitive damages. By using due process to cure this infirmity of tort law, constitutional tort reform can simultaneously defer to the states and still improve the tort system by advancing the values of notice, predictability, and reasoned decisionmaking. Whether the Court takes that path is the most important issue that it created in deciding to hear *Phillip Morris USA v. Williams*. 