2007

Reflections on Remedies and Philip Morris v. Williams

Keith Hylton

REFLECTIONS ON REMEDIES AND *PHILIP MORRIS V. WILLIAMS*

KEITH N. HYLTON

Reflections on Remedies and *Philip Morris v. Williams*

Keith N. Hylton*

Abstract: This essay is a series of reflections on the implications of *Philip Morris* for the tort reform movement. I make an effort below to find a middle ground between the positions of the plaintiff and defendant in *Philip Morris*. That middle ground involves largely returning to the Supreme Court's pre-*Gore* treatment of punitive damages and introducing new procedural devices for defendants to challenge awards. I close with a few observations on the implications of this case law for pain and suffering awards.

* Professor of Law and Paul J. Liacos Scholar, Boston University, knhylton@bu.edu. I thank participants at the AALS Annual Meeting 2007 for helpful responses.

This paper is an outgrowth of remarks I prepared for a panel on tort reform and proposals to limit remedies,[1] a potentially broad topic encompassing many different perspectives. However, in light of current events the topic can be narrowed to one question, punitive damages and tort reform, and more specifically to one case: *Philip Morris v. Williams*.[2] The Supreme Court held in *Philip Morris* that a punitive damage award that punishes a defendant for harm inflicted on persons who are not before the court is a taking of property in violation of the Constitution's Due Process Clause.[3]

I must disclose that I was involved in *Philip Morris*, though somewhat tangentially. I was drawn into the case, as I was in *State Farm v. Campbell*,[4] as an amicus for the plaintiff – that is, the party trying to hold on to the large punitive award ($79.5 million in this case, $145 million in *State Farm*). In both cases, I was asked by the plaintiffs to file a brief to the Supreme Court addressing the question of deterrence theory and punitive damages. In both cases, I faced the same opponents: A. Mitchell Polinsky and Steven Shavell, who were asked by the defendants in *Philip Morris* and in *State Farm* to file deterrence theory briefs.[5] I continue to find it interesting that the litigating parties want to have law-and-economics arguments addressed directly to the Court. I hope that it reflects an accurate perception of the Court's interest in hearing these arguments. However, I found no evidence in the *State Farm* and *Philip Morris* opinions that the Court paid any attention to the law-and-economics arguments offered by the opposing sides.

My involvement on the side of the trial lawyers in the last two big Supreme Court cases on punitive damages strikes me to be ironic in some respects. I am not a natural political ally of the trial lawyers. In fact, I have taken positions on some controversial topics that probably would be repellent to the interest groups typically associated with trial lawyers.[6] And yet I might appear to tort reform proponents to have become something of a gunslinger for the trial lawyers in recent major punitive damages cases. A similar irony has been perceived, I suspect, by the state court judges in Utah and in Oregon that have been involved in these cases. In terms of the divide between red (conservative) and blue (liberal) states, I don't think you can get more "red" than Utah. The Utah judges responsible for *State Farm* are probably among the most conservative in the nation. And while Oregon is not a red state, I am not aware of accusations that its judiciary is especially favorable toward plaintiffs' lawyers. Why we would observe the most

---

[1] For the panel description, see http://www.aals.org/am2007/wednesday/remedies.htm.
[2] Philip Morris USA v. William, 05-1256, 2007 U.S. LEXIS 1332 (2007). This essay began as a set of remarks on the case before it was decided. It has obviously evolved since then to include a critique of the decision.
[3] *Id.* at *13.
[4] 538 U.S. 408 (2003).
[5] Although we have faced off in two high-stakes cases, I have long considered both Steve and Mitch to be friends.
[6] See, e.g., Keith N. Hylton, *A Theory of Minimum Contract Terms, with Implications for Labor Law*, 74 TEX. L. REV. 1741, 1746 n.22 (1996) (arguing that most research indicates that minimum wage laws reduce the welfare of low-skilled workers); *An Economic Theory of the Duty to Bargain*, 83 Geo. L. J. 19, 65 (1994) (explaining that workers have short horizons and are therefore likely to favor inefficient decisions when a firm is failing); *Law and the Future of Organized Labor in America*, 49 Wayne L. Rev. 685, 696 (arguing that employer hostility has little to do with the decline of unions).

controversial punitive damage cases coming out of moderate to conservative states is a question that is interesting on its own, and I will return to later.

This essay is a series of reflections on the implications of *Philip Morris* for the tort reform movement, a movement for which I share considerable sympathy. First, I offer an ideal approach to punitive damages, based on my amicus brief in *Philip Morris*, and apply that approach to the case. I make an effort to find a middle ground between the positions of the plaintiff and defendant – because in any case that reaches the Supreme Court one will find persuasive arguments to be made on both sides. That middle ground involves largely returning to the Supreme Court's pre-*Gore* treatment of punitive damages and introducing new procedural devices for defendants to challenge awards. Second, I examine some of the troubling implications of *Philip Morris*, such as the possibility that class actions are unconstitutional under its theory of due process. Finally, I close with a few observations on the implications of this case law for pain and suffering awards. The likely eventual outcome of decisions such as *Philip Morris* and *State Farm* will be a constitutionally-based requirement for the scheduling of pain and suffering awards.

Part I summarizes the case. In Part II, I lay out an ideal approach to punitive damages based on the arguments I've made in briefs to the Supreme Court in the major punitive damages cases. I invest more effort here in attempting to address the concerns of defendants than was possible in the briefs. In Part III, I discuss the troubling implications of *Philip Morris*, and Part IV concludes.

I. The Case

The facts of Philip Morris are simple. The husband of Mayola Williams (Jesse Williams, but for simplicity I will refer to him as "the husband") began smoking cigarettes in the early 1950s,[7] the time period in which the cigarette companies were becoming fully aware of the health risks connected to smoking while refusing to issue any warnings publicly. This is also before the introduction of the Surgeon General's warning on every pack of cigarettes.[8] In the period in which the husband took up smoking, cigarette companies were not simply refusing to disclose health risks; they were publicly denying health risk claims and even paying spokespeople to publicly reject claims that cigarettes were linked to cancer.[9] This is all beyond debate from what I gather; it is well understood that there was a significant period during which the conduct of the major cigarette companies could be described as the perpetration of a fraud on the cigarette consuming public.

---

[7] Williams v. Philip Morris USA, 48 P.3d 824, 829 (Or. App. 2002); *vacated* and *remanded*, 2007 U.S. LEXIS 1332.
[8] Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified at 15 U.S.C. 36, §§ 1331 et seq.).
[9] STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS 2 (1996)

The husband continued to smoke for the rest of his life until he died from lung cancer in 1997.[10] Mayola Williams brought a tort suit in Oregon claiming fraud against Philip Morris. She claimed that her husband relied on the denials of health risks from the company, and that this reliance was a major reason that he continued to smoke.[11] Of course, she also claimed that the lung cancer was caused by smoking. The jury found Philip Morris liable and included a punitive award for $79.5 million dollars, which is equal to the company's profits for a 2.5 week period in the year in which the judgment was awarded.[12] The $79.5 million punitive award was reduced by the trial judge, restored by the appeals court, and eventually upheld by the Supreme Court of Oregon.[13]

Philip Morris challenged the large punitive award in the U.S. Supreme Court on grounds that go the core of deterrence argument for punitive damages. Philip Morris argued that, in light of *State Farm*, it is never constitutionally permissible to multiply an award to take into account harms to people other than the plaintiff before the court.[14] On February 20, 2007 the Supreme Court issued an opinion agreeing with Philip Morris's argument, vacating the judgment and remanding the case to the Oregon Supreme Court.

Philip Morris announces the bold proposition that the Constitution's Due Process Clause does not permit a jury to base a punitive award on the desire to punish a defendant for harming persons who are not before the court.[15] Such an award would amount to a taking

---

[10] Williams v. Philip Morris USA, 48 P.3d 824, at 829.

[11] Despite encouragement from his wife and children to stop smoking because cigarettes were dangerous to his health, Williams continued because he insisted that cigarette companies would not sell a dangerous product and that the companies never said anything about smoking being harmful. Williams told his family that he heard on television that cigarettes did not cause cancer and that he read articles asserting that cigarette smoking was not dangerous. Williams eventually made attempts to stop smoking but they were all unsuccessful. *Id.* at 829.

[12] *Id.* at 841.

[13] There are details that my sketch in the text leaves out. The trial court found for Mayola Williams on both the negligence and fraud claims, and awarded her $21,485.80 in economic damages and $800,000 in non-economic damages. Williams v. Philip Morris, 48 P.3d at 828. The jury awarded $79.5 million for punitive damages on the fraud claim. *Id.* The trial judge reduced the punitive damage award to $32 million on the ground that the $79.5 million was unconstitutionally excessive. *Id.* The trial judge also reduced the non-economic damages to $500,000 in accordance with Oregon's statutory cap on punitive damages. *Id.* Mayola Williams appealed the reduction of punitive damages and Philip Morris appealed rulings related to the fraud and negligence claims. *Id.* The Court of Appeals of Oregon affirmed the trial court's decision on the fraud claim, and, after finding that the jury's award was not excessive under the guidelines set by Oregon's high court and the U.S. Supreme Court, reversed the trial judge's reduction of punitive damages. *Id.* at 842. The Supreme Court granted *certiorari*, vacated the judgment and remanded the case back to the Court of Appeals for reconsideration consistent with *State Farm*. Philip Morris v. Williams, 540 U.S. 801 (2003). On remand, the Oregon appeals court upheld its previous ruling that the $79.5 million punitive damages award was not unconstitutionally excessive. Williams v. Philip Morris, Inc., 92 P.3d 126 (Or. App. 2004). In 2006, the Supreme Court of Oregon reviewed the case and affirmed the decision of the Court of Appeals. Williams v. Philip Morris, Inc. 127 P.3d 1165 (Ore. 2006). The United States Supreme Court has granted *certiorari* to review the punitive damages award. Philip Morris v. Williams, 05-1256, 2006 U.S. LEXIS 4161 (2006); *vacated* and *remanded*, 2007 U.S. LEXIS 1332.

[14] Philip Morris USA, 2007 LEXIS 1332, at *10-11.

[15] *Id.* at *13.

of property without due process.[16] However, *Philip Morris* also holds that harm to others can be considered as part of the reprehensibility analysis in a punitive damages case.[17]

II. The Theory of Deterrence and Punitive Awards

I have made simple points in my briefs to the Court on punitive damages. Punitive awards serve one of either two functions: they *internalize losses* that are not effectively internalized through compensatory damages, and they *eliminate gains* from offensive conduct.[18] The theory of damages has been developed over centuries, starting with philosophers of law like Beccaria and Bentham.[19] My contribution in this area has been to synthesize these arguments, to provide additional rigor where necessary, and to apply them to the punitive damages case law.[20]

The internalization theory gives us one justification for multiplying compensatory awards. Under this theory, it is appropriate to multiply a punitive award in order to make up for the number of times that a tortfeasor gets away with harming people without having to pay any damages. Thus, if a tortfeasor's conduct imposes a loss of $100 on someone every day, and only one out of two of those victims sue for the loss, a proper damage award for internalization would be $200. In this case, the additional $100 added to the compensatory award is a punitive award designed to internalize the total losses imposed on society.

The gain elimination theory offers an alternative perspective on the function of a punitive award. Under this theory, an award should never be less than the profit earned by the offender from some offensive act. Suppose, for example, that the offender does some offensive act that imposes a loss on the victim of $100 and also leads to a gain to the offender of $500. If the damage award is limited to the compensatory (internalization) level, the offender will still gain $400 from his conduct even after being forced to pay a compensatory damage award. The gain-eliminating approach would require a penalty no less than $500. Thus, in this example, the court would issue a compensatory award of $100 and a punitive judgment of at least $400.

When should a court choose internalization, and when gain-elimination? Gain elimination is appropriate when the offender's conduct is always socially undesirable or when it amounts to a nonconsensual taking of some sort.[21] Under these conditions, *complete deterrence* is the appropriate goal. Internalization is appropriate for the

---

[16] *Id.* at *23.
[17] *Id.* at *16-17.
[18] Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO L.J. 421 (1998).
[19] *Id.*, at 425-427; Brief Amicus Curiae of Professor Keith N. Hylton, et al. in Support of Respondents, Philip Morris USA v. Williams, 05-1256, 2007 U.S. LEXIS 1332 (2007) (No. 05-1256).
[20] Hylton, supra note 18, at 430-460; Keith N. Hylton (2005) *The Theory of Penalties and the Economics of Criminal Law*, Review of Law & Economics: Vol. 1 : Iss. 2, Article 1, available at: http://www.bepress.com/rle/vol1/iss2/art1.
[21] Hylton, supra note 18, at 439-444.

remaining cases – e.g., where the defendant's conduct is in general socially desirable, but it nevertheless imposes losses on victims.

A. Mitchell Polinsky and Steven Shavell wrote an article arguing that the internalization theory should be used to determine punitive damage awards.[22] I disagree. The vast majority of punitive damages cases involve conduct that is always socially undesirable or involving a taking of some sort. These cases are appropriate for the gain elimination (complete deterrence) theory. The total damage award in these cases should be no less than the level required to eliminate the offender's gain from the harmful conduct.

III. Applying Theory to *Philip Morris*

The Oregon courts never explained precisely what the punitive award was designed to do in *Philip Morris*. The court never explained whether it was designed to internalize losses suffered by other smokers, or eliminate part of Philip Morris's profits. However, the court's decision to use the company's profit as a basis for calculating punitive damages suggests that the court was attempting to eliminate the company's gain from fraudulent conduct.[23]

The theory of penalties set out above suggests that this is perfectly sensible. Philip Morris, and other cigarette companies operating during the period of time after health risks were largely understood by cigarette makers and before health warnings became routine, engaged in a fraud on the public. They sold cigarettes without revealing the information they held privately on the health risks of smoking. Indeed, they deliberately issued or procured from others false statements regarding the health risks of smoking.[24] They did this in order to continue to sell cigarettes in high numbers. This is conduct that is unambiguously socially undesirable.

Under the theory of penalties, the proper penalty is one that eliminates the gain enjoyed by Philip Morris from each fraudulent transaction during the period in which the company engaged in fraud. This could be a lot of money. The amount depends on the length of the period in which unambiguous fraud took place and the number of transactions that could be described as fraudulent. Perhaps the period of fraud is not that long. Perhaps the companies themselves were unsure of the health risks for most of the period before the imposition of the Surgeon General's warning. However, it is generally accepted, I believe, that the companies came to a rather complete understanding of the health risks at some point in time before they began to publicly admit them. The period after the more-or-less full understanding was acquired and before the public admissions of health risks is the window period in which unambiguous fraud took place. Under the

---

[22] A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998).

[23] Williams v. Philip Morris USA, 48 P.3d at 841.

[24] GLANTZ, *supra* note 7, at 171-199; ALLAN M. BRANDT, THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA (Basic Books, 2007); Howard Markel, Tracing the Cigarette's Path from Sexy to Deadly, New York Times, March 20, 2007, available at www.nytimes.com/2007/03/20/health/20essay.html.

gain-elimination approach, the profits that can be attributed to the fraud should be eliminated.

It has been suggested that a large damage awarding imposed so long after the period of fraudulent conduct might be ineffective because it merely punishes the current set of Philip Morris shareholders without really imposing a penalty on the officers and owners who were present during the period of fraudulent conduct.[25] The flaw in this argument is its implication that a penalty imposed tomorrow for offensive conduct today should be viewed as ineffective. That implication is wrong. A rational actor who engages in offensive conduct today should, under an ideal legal system, anticipate punishment in the future. Under an ideal system, the punishment should be sufficient to eliminate any gains the bad actor enjoys today – taking into account the time-value of money.[26]

The theory offered here suggests that the $79.5 million punitive judgment against Philip Morris may have been appropriate as a matter of deterrence policy. Indeed, the theory suggests that the large punitive award probably was appropriate and may have been far less than the amount required to provide the proper deterrent signal to firms that consider engaging in fraud.

A. Some Extremely Important Questions of Detail

There are questions of detail that may lead to a different answer than the one I have suggested so far. For example, we do not know if Mayola Williams's husband really relied on the fraudulent statements of Philip Morris during the period in which he smoked. The trial court found that he did, but perhaps he did not. Perhaps he would have continued smoking even if Philip Morris had revealed most of the key, uncontestable findings on health risks to the smokers of their cigarettes.

There is also the problem of *redundant penalties*. Suppose Philip Morris had already paid settlements or damage judgments for some of the same transactions as the one involved in this lawsuit. To the extent Philip Morris had already settled, it should not be forced to pay again.

Even if Mayola Willliam's husband relied on the fraudulent statements of Philip Morris, maybe some of the other Oregon citizens who smoked at the same time as he did not rely on those statements. If they did not, then it would be inappropriate to treat the sales to them as fraudulent transactions. The gain-eliminating portion of any penalty assessed on behalf of those consumers should be reduced accordingly.

B. The Core Issue: Aggregation and Claim Heterogeneity

[25] Amicus Curiae Brief of A. Mitchell Polinsky, Steven Shavell, and the Cato Institute in Support of Petitioner, Philip Morris USA, Williams, 05-1256, 2007 U.S. LEXIS 1332 (2007) (No. 05-1256), at 5.
[26] Brief of Keith N. Hylton as Amicus Curiae in Support of Petitioners, Johnson v. Ford Motor Co., 113 P.3d 82 (2005) (No. S121723), at 36-42.

The core issue in *Philip Morris*, as in *State Farm*, is whether a court is permitted to consider the harm to others in calculating a punitive award. That is, after all, how a court winds up with a damage award of almost $80 million to one smoker.

To take a simple example, suppose the defendant commits fraud against 10 people every year, and gets sued only once. Each time the defendant commits fraud, it steals $10 from its victim. The damage award to the individual victim is only $10. However, if the court considers the damage to others over the year of the defendant's conduct, the sum comes up to $100 ($10 loss to the victim plus $90 loss to others).

This simple example captures the central economic issue in the Supreme Court's recent punitive damage cases. On one hand, as many courts and commentators have wondered, why let one plaintiff who suffered a loss of $10 walk away with a judgment of $100? Wouldn't this guarantee a long list of plaintiffs, some of whom may not have suffered any harm at all? Doesn't this approach treat all potential plaintiffs the same, when in fact their stories may differ greatly? On the other hand, if most victims of fraud don't sue, failing to award punitive damages is equivalent to giving the green light to perpetrators of fraud. If, after all, I can commit sufficient fraud to strip people of a total of $100 per year, and then expect to pay only $10 in damages, then I'll find the fraud business a good racket to stay in for life.

The questions raised here are observed both in a substantial class of punitive damages cases and in class actions. In both sets of cases, the core problem is whether issues are general to the class or individualized. To return to my example above, if all of the issues are general to the class of victims, there is nothing wrong, in deterrence terms, in stripping the defendant of the total harm he has imposed on victims ($100) with one punitive damages judgment. Similarly, there would be nothing wrong in that case, on deterrence grounds, in recognizing a class of victims and allowing them to collect $100. But if the issues are not general to the class, then there certainly are potential problems in recognizing a class. The aggregated or multiplied judgment could vastly exceed the socially optimal penalty and could therefore over-deter the defendant's conduct. For this reason it is possible to defend on economic grounds the decisions of some courts, as in the recent Florida $145 billion smokers case, to refuse to certify classes in which the issues are too individualized to justify a class wide judgment.[27]

The core of the problem in punitive and class actions is the same. In punitive cases, we are looking at an award that is designed to provide a remedy for or penalty on behalf of the potential plaintiffs who are not present in court. In class actions, we are looking at an award that is designed to provide a remedy for or penalty on behalf of plaintiffs who are there in court in only a fictional sense, while being represented by one particular plaintiff. In both cases, an award that strips all illicit gains or internalizes the aggregate harm is based on an extrapolation, aggregation, or multiplication of the gain to the offender or harm to the victim observed in the offender's conduct toward a single representative plaintiff.

[27] Engle v. R.J. Reynolds Tobacco Co., 122 F. Supp. 2d 1355 (S.D. Fl. 2000).

State Farm confused the core issue by addressing the enforcement of rights of citizens of particular states with different legal systems.[28] The more important question is whether a multiplied award effectively creates a class out of a group with individualized issues. And this problem exists whether the victims are all state residents or residents of other states.

In view of this core issue, when is aggregation or multiplication of damages appropriate on deterrence grounds? There are a few problems that make damages for the missing plaintiffs difficult to aggregate. One is that some of the missing plaintiffs may be under a different legal regime, specifically a regime in which the defendant's conduct would be lawful. This was the issue that bothered the Court in *State Farm*. A second issue is that even if the law governing the plaintiff and the missing plaintiffs is uniform, perhaps those plaintiffs have very different cases. Some plaintiffs may have been guilty of negligence themselves. Some plaintiffs may have suffered harm from some other cause. In other words, causation and contributory fault defenses may vary across the population of victims, and this may make aggregation inappropriate and a damage multiplier inappropriate too. All of these issues can be summed up by the label *claim heterogeneity*.

Whether claim heterogeneity makes aggregation or multiplication inappropriate on deterrence grounds is also a function of the nature of the offender's conduct. If the defendant's conduct is either expropriative or uniformly harmful on welfare grounds, there is no reason to worry about overdeterrence of the offender's conduct. Complete deterrence of the offender's conduct is the socially appropriate goal. Given this, there is no reason *on deterrence grounds* to limit aggregation because of the problem of claim heterogeneity. To return to my earlier numerical example, suppose an offender's transactions with each one of 10 victims are unambiguously fraudulent, leading to a loss of $10 to 9 of the victims and only $1 to the last victim. Suppose the court imposed a total damage award of $100 on the offender. This would appear to over-internalize the harm suffered by the last victim. However, since the offender's conduct offers no social benefit whatsoever, there is no cost associated with over-deterrence in this case.

In the case in which complete deterrence is the socially appropriate goal, there may still be some reasons to limit the damage award, but they would have to be based on second-order deterrence concerns or on concerns that are unrelated to deterrence. One second-order concern is marginal deterrence.[29] The marginal deterrence concern is that if the penalty is set too high, the offender may have an incentive to choose the most harmful of a set of harmful options. For example, imposing the death penalty on purse snatchers would give them an incentive to murder their victims in order to facilitate the taking of their purses. The marginal deterrence concern therefore leads us to moderate penalties in order to avoid giving the offender an incentive to choose an even more harmful act. Another reason for limiting the award in the complete deterrence context is a concern that high awards may induce too many people to bring claims to court, which would be costly to society, especially if some of the claims are frivolous.

---

[28] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003).
[29] Brief Amicus Curiae of Professor Keith N. Hylton, et al. in Support of Respondents, Philip Morris USA v. Williams, 05-1256, 2007 U.S. LEXIS 1332 (2007) (No. 05-1256), at 11.

If, on the other hand, the defendant's conduct provides some benefits to society (that is, it is not uniformly harmful), then complete deterrence of the defendant's conduct is no longer the appropriate goal. In this case, one should worry about over-deterrence. In the case in which the defendant's conduct is not uniformly harmful, claim heterogeneity provides an important reason for putting a limit on a punitive award. Indeed, in some cases, victim claims will be heterogeneous precisely because the offender's conduct is not uniformly harmful.

Suppose, returning to the numerical example, the offender's conduct is unambiguously fraudulent with respect to 5 of its transactions and not fraudulent with respect to the other 5. This might be the case because 5 of the offender's customers relied on the offender's fraudulent statements, while the other 5 did not rely and would not have changed their conduct even if the offender had told the truth. Presumably, the 5 non-relying purchasers gained utility in their transaction with the offender. In this case, the offender's conduct provides a benefit to society, in the form of enhanced utility to the purchasers who are indifferent as to its claims. Because of this benefit, there is no reason on deterrence grounds to reduce the offender's activity to zero. A punitive award that attempted to strip the gains to the offender from all of its transactions probably would over-deter his conduct.

The foregoing example applies to *Philip Morris*. Unlike the conduct alleged in *State Farm*, the defendant in *Philip Morris* could plausibly argue that there was a subset of cigarette purchasers who were not victims of fraud. Victims in this subset would have purchased cigarettes even if the companies had accurately disclosed health risks. This suggests that aggregation could lead to socially excessive damages. It would have been quite difficult for the defendant in *State Farm* to make this argument, because in order to do so, State Farm would have had to assert that there were some victims of bad faith conduct in the insurance market that did not mind being victimized in this way at all. Such an argument would have been preposterous on its face. But in the context of smoking, some consumers of cigarettes apparently do so with full awareness of the health risks. For those consumers, one can only conclude that their perceived utility from smoking outweighs the perceived health costs.

C. Determining the Appropriate Punitive Award

What does this imply for punitive awards? The Supreme Court's response to these issues, which are in the background and inadequately addressed in the opinions, has been to attempt to restrain or put a ceiling on punitive damage awards. That is unhelpful. It is a good approach from the perspective of defendants who may be hit with large punitive judgments, but not necessarily good for society. The proper response is to require the litigants to answer the questions about the appropriateness of aggregation or multiplication. That raises the issue of which party (plaintiff or defendant) should have the burden of proof on these questions, but I will treat that as subsidiary to the core issue of the appropriateness of aggregation.

As the foregoing discussion of theory suggests, there are several issues that have to be considered in designing the appropriate penalty. Focus for the moment on the multiplier; the case in which a plaintiff seeks a large punitive award to punish the defendant for harms done to many other plaintiffs. If a multiplier is requested, the court needs to answer several questions. First, *is the defendant's conduct uniformly reprehensible (i.e., reprehensible with respect to all transactions), so that a complete deterrence policy would be appropriate*? If so, then there is no deterrence-based argument for questioning an aggregated award when there are many victims. There may be other bases for questioning or challenging the award, but they would be based on something other than deterrence, or perhaps what I have described earlier as a second-order deterrence concern (e.g., marginal deterrence). *If, on the other hand, the defendant's conduct is in some respects socially beneficial, then the court should be concerned about the possibility of over-deterrence*. In this case, the following questions should be considered.

Is the multiplier designed to provide a penalty on behalf of plaintiffs injured in areas where defendant's conduct is legal? Obviously, a plaintiff should not be able to collect on behalf of plaintiffs whose rights have not been violated in any legally recognized sense. As a practical matter this should not be observed much at all. Punitive damages are reserved, under the law, for unambiguously bad conduct. Conduct that is legal in some states and illegal in others usually would not satisfy the reprehensibility requirement for a punitive award. Murder, offensive battery, theft, fraud, and similarly bad conduct are illegal everywhere you go, and that is what punitive damages are designed to cover. Still, if it does happen – if the plaintiff obtains a punitive award in connection to defendant conduct that is lawful in some states – then courts have a duty to disaggregate hypothetical plaintiffs. Hypothetical plaintiffs whose rights have not been violated should have their claims decoupled and discarded.

Next, the court should make a determination – same as in class actions – whether individual issues dominate and how much. Ideally, the court should be able to narrow the multiplier to the point that it covers the appropriate penalty for a class of victims with homogeneous injury claims. This implies that in a case involving smokers, a penalty for hypothetical plaintiffs should be permitted only for those plaintiffs who match the one in court on issues such as reliance, contributory fault, and causation. Thus, a smoker who took up the habit long after the government and industry began issuing regular warnings to the public should not be treated as within the same hypothetical plaintiff class as a smoker who took up the habit back in the old days when many reputable-seeming sources were disputing the possibility that smoking could be harmful.

Consider the following illustration, based loosely on the facts of *Philip Morris*. Suppose the defendant sells cigarettes, while fraudulently misstating the health risks, to 40,000 consumers. The defendant earns, over the relevant period, $10 per consumer. Half of the consumers relied on the fraudulent statements, the other half would have continued to purchase the cigarettes even if accurate health-risk information had been provided.[30]

---

[30] One might argue that it is impossible to know whether half of the consumers relied on the statements of the seller. If it were impossible to find a reasonably accurate estimate of the percentage of consumers who were real victims of fraud (i.e., who really relied on the seller's statements), then it would follow that the

Since the transactions with 20,000 consumers were unambiguously fraudulent, the gains from those transactions should be stripped. For the fraud victims, the gains to the defendant amount to $200,000. Now suppose the plaintiff receives a compensatory award of $100,000. Under the theory presented here, the minimum gain-stripping award is $200,000, which implies a punitive award of $100,000. Such an award would remove all profit from the business of fraudulently misstating health risks to consumers who relied on the health disclosures of the seller.

D. Distribution of Punitive Award

After the claim heterogeneity issues are taken into account, the state can do whatever it wants with the punitive award under the theory presented here. It can hand it over to the victim. Or it can put it in a fund for similar victims. This is simply a matter of distribution – or call it a distributive justice concern. Different states may have different notions about how the money should be divvied up. Of course, given that we want someone to sue to stop a perpetrator of fraud, it would make sense to offer the plaintiff some nontrivial portion of the punitive award as a bounty.

The goal that should not be sacrificed because of distribution concerns is deterrence. Punitive awards and class action awards should exist because they serve an important deterrent function in the law. Without them, the worst offenders will find bad conduct profitable, and there are not enough government regulators in the world to stop them.

E. Burdens in Punitive Damages Litigation

Who should have the burden of proof on issues that must be resolved in order to design the right penalty? The ideal regime would be one in which the plaintiff has the burden of proof in arguing that an aggregate gain-eliminating penalty, which effectively multiplies the gain-stripping portion due solely to the plaintiff, is appropriate. The defendant should have the burden of proof regarding the details of aggregation – i.e., in showing that the individualized questions outweigh the common questions to a degree that suggests that multiplication would be inappropriate.

Putting the burden of proof on the plaintiff to make the case for a multiplied award involves no innovation in the law at all. Plaintiffs already have the burden to prove that a defendant is guilty of negligent or intentionally offensive conduct. To make the case for a multiplied award is simply a matter of proving that there were many other victims other than the plaintiff. In many cases, this will be clear. Moreover, if the offender's conduct justifies a gain-eliminating award, there should be an immediate presumption that the appropriate penalty will be sufficient (at a minimum) to eliminate the offender's gain. It should be the defendant's burden from this stage to show that the proposed penalty is too large.

---

approach suggested here could not be implemented. Individual plaintiffs would have to be satisfied with compensatory awards. The deterrence objective could be pursued through statutory penalties. However, I find it difficult to believe that it would be impossible to find reasonably accurate estimates of the percentage of consumers who relied on the seller's statements.

Perhaps the key reason it should be the defendant's burden to make the case against a large punitive award is that such a case often depends on evidence that is privately held by the defendant. It is often the defendant that knows how many victims of its conduct exist, and whether it has been fined by other courts for the same conduct. Once a plaintiff has the made the case for a substantial punitive award, the door should be opened to the defendant to make the case that the court's proposed award is unreasonably high.

Consider, for example, *Philip Morris*. The strongest arguments against the large punitive award in that case are (1) that it includes a gain-stripping component for transactions with consumers who may not have been victims of fraud (*claim heterogeneity*) and (2) that it may impose or lead to the future imposition of a redundant penalty (*redundancy*).

The first argument points to the serious difficulty of determining the number of real victims of Philip Morris's deceitful conduct. Indeed, perhaps Mayola Williams's husband was not a victim of fraud. There is no way to tell in the abstract. We are forced to rely on the trial court's finding that he was a victim of fraud. However many real victims existed, it should be clear that the position that there were *no* real victims is quite unlikely to be valid.

Was Mayola Williams's husband the only real victim of fraud perpetrated by the cigarette makers during the period in which he smoked? To believe so, one would have to think that there were virtually no smokers during the relevant time period that would have changed their conduct if the cigarette companies had issued the sort of health warnings then that they issue today. Whatever may be the truth of the matter, this is highly unlikely. Among adult males in the U.S., the percentage of smokers is now less than 24%.[31] In 1955, the percentage of smokers among adult males in the U.S. was 56.9%.[32] The lower percentage today reflects a range of factors. One of them is the greater availability of health risk information.

In any event, it should be possible as an empirical matter to determine the percentage of smokers within the cohort that included Mayola Williams's husband that would have continued smoking even if the cigarette makers had issued accurate statements about the health effects of smoking.[33] The party in litigation in the best position to offer such evidence is Philip Morris. The cigarette companies have studied the reactions of consumers to various advertising campaigns.[34]

---

[31] "Fact Sheet: Adult Smoking in the United States: Current Estimates," *Centers for Disease Control and Prevention*, http://www.cdc.gov/tobacco/data_statistics/Factsheets/adult_cig_smoking.htm.
[32] *Id.*
[33] As I noted earlier, one could take the position that it is impossible to determine the percentage of smokers within the relevant cohort who relied on the statements of cigarette sellers. If this position were valid, it would follow that one could not determine an appropriate aggregate gain-stripping penalty. However, I find this position implausible, and in any event it should be subjected to empirical investigation to determine whether it has any merit.
[34] Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1467-1552 (1999).

With respect to the second issue, redundancy, it should be clear that Philip Morris is capable of proving in the current litigation, or in any future trial, that it has already paid a penalty on behalf of fraud victims within the same cohort as Mayola Williams's husband. This is evidence that is obviously in the hands of the defendant and could be presented to the court with ease.

In general, the law should be structured so that the party with the best information on claim heterogeneity or redundancy should have an incentive to reveal that information in court. In the typical case involving an offender whose conduct has harmed a large number of victims, it will be the offender that is in the best position to know whether the victims have heterogeneous injury claims or whether it has paid a penalty on behalf of the victims already.

F. A Suggested Approach to Determination and Review

The extremely important details considered to this point do not disturb the fundamental theoretical bases for punitive awards. The details may be so important that they lead to a completely different result than that suggested by theory and a broad-brush description of the facts. For example, the reliance finding alone, in a fraud case, might be based on such questionable evidence that it should not be allowed to stand as justification for a large award.

It is important, however, for courts to distinguish basic theory from matters of detail. And the Supreme Court has not come close to doing this, largely because it has not attempted to set out the theoretical basis for punitive awards. In other words, the theoretical explanations that the court has willingly examined in some areas, such as antitrust, remain an unexplored terrain in the context of punitive damages. As a result, the court has produced confusing opinions that fail to articulate principles for determining whether a punitive award is appropriate.

The account given here suggests an algorithm of the following sort for determining and reviewing punitive awards. If the defendant is found guilty of some reprehensible act that justifies a punitive award, the initial presumption should be that there will be a punitive award that is no less than the amount required to strip gains from transactions with or conduct harming the victims. Moreover, if the conduct is truly reprehensible, this amount should be considered a minimum level which courts can exceed at their discretion.

To minimize the risk of erroneous punitive judgments, courts should adopt a "clear and convincing" standard with respect to the reprehensibility test.[35] If the appellate court reviewing a punitive award is still in doubt as to whether the offender's conduct satisfied

[35] This is consistent with the law of most states, see, e.g., Denise E. Antolini, Punitive Damages in Rhetoric and Reality: An Integrated Empirical Analysis of Punitive Damages Judgments in Hawaii, 1985-2001, 20 J. Law & Politics 143, 185 (2004).

the reprehensibility requirement, it should seek to constrain the punitive award to the minimum gain-stripping level.[36]

If the plaintiff has satisfied the standards required to obtain a punitive award, it should be the responsibility of the defendant to offer arguments and evidence favoring a reduction in the award. If, for example, there is uncertainty as to whether a reprehensible act occurred, the defendant will have every incentive to bring this uncertainty to the court's attention. It should be the defendant's responsibility to do so, rather than the plaintiff's responsibility to prove the negative proposition that there is no uncertainty. If the defendant has already paid the penalty that is part of the punitive judgment, this should be a reason to reduce the award, and the defendant should have the responsibility to bring this to the court's attention. If the punitive award aggregates claims that are heterogeneous, this may be a basis for reducing the punitive award, provided that there is some evidence that the defendant's conduct was not uniformly socially undesirable.[37] It should be the defendant's responsibility, not the plaintiff's, to bring these arguments to the court's attention.

Since states have developed reasonable rules regarding the requirements for a punitive award, the Supreme Court's most useful decision would be to remove itself from regulating the substance of punitive awards, and to return to the pre-*Gore* emphasis on procedure. The Supreme Court should adopt doctrines that require strong proof of reprehensibility and effectively require lower courts to permit defendants to challenge awards on the grounds suggested here.

IV. *Philip Morris*

As I said before, the ideal approach to punitive damages elaborated above, and outlined in my amicus brief, apparently had no effect on the Supreme Court's decision in *Philip Morris*. I find some consolation in the fact that the arguments of the law-and-economics gunslingers on Philip Morris's side, Steve Shavell and Mitch Polinsky, were also ignored by the Court.

Instead of grappling with the theory of deterrence, the Court adopted a theory of procedural due process under which it is unconstitutional to do precisely what deterrence theory indicates one should do in the case of a recidivist, infrequently punished, wrongdoer. Consider the case of a wrongdoer who steals $100 from one victim every day, and is punished with a monetary fine for only 50 percent of those harms. Deterrence theory requires a penalty of at least $200 in each instance of punishment. Yet the Court

---

[36] Brief of Keith N. Hylton as Amicus Curiae in Support of Respondents, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (No. 01-1289), at 28-30.

[37] In some cases, claim heterogeneity alone may provide a sufficient basis for limiting the award. Consider *Philip Morris*. An aggregated gain-stripping judgment poses the risk of imposing on the defendant a penalty for transactions with smokers who did not care whether they were being told the truth about health risks (i.e., smokers who did not rely on the firm's statements). The existence of these types within the hypothetical victim class is a consequence of the fact that the firm's conduct was not fraudulent with respect to all smokers within the Jesse Williams's cohort.

has adopted a theory of due process that apparently forecloses this very sensible solution to a common problem, in the context of punitive damages. This is troubling on a number of grounds.

First, as noted in the previous parts, the concern that most clearly motivated the Court's decision in *Philip Morris*, claim heterogeneity, is observed in the class action setting as well. The courts have been eager, because of the same issues underlying the Court's due process concerns with respect to punitive damages, to adopt rules that ensure that claim aggregation does not occur, in the class action setting, with respect to heterogeneous claims.[38] The same rules that are in the process of development in the class action context could have been imported to the punitive damages case law.

Second, the Court's theory of due process implies that class actions are unconstitutional. Indeed, if I were a lawyer representing defendants in class actions, I would have started strategizing, within minutes of reading the decision, on how to use *Philip Morris* to put an end to class action lawsuits. The reason is easy to state. The differences between class actions and many punitive damages lawsuits are, from an economic perspective, slight.[39] Plaintiffs are seeking aggregated judgments in class action lawsuits and in many punitive damages lawsuits. In the punitive damages lawsuit, there is only one plaintiff in court. In the class action lawsuit, the class is only there in theory, not in fact. The only real plaintiffs are the class representatives. If the Due Process Clause does not permit a court to impose a damage award or penalty behalf of "persons who are not before the court",[40] then it would appear to invalidate class action lawsuits. The Court's argument in *Philip Morris* applies so easily to class actions that it would seem to be professionally irresponsible for class action defense attorneys not to press this point until it is resolved by the Court.

Admittedly, one can draw technical distinctions between class actions and punitive damages lawsuits. One could argue, for example, that the punitive award goes only to one victim while the class award goes to the entire class of victims. But this distinction is weakened by the existence of split-award statutes that distribute the proceeds of punitive judgments to others. And presumably any court could approve a settlement in a punitive damages case that creates a fund for similar victims not in court, thereby converting a punitive damages lawsuit into a class action lawsuit. Alternatively, one could argue that the punitive damages plaintiff is not necessarily representative of the class of victims not present in court, while the class action representatives are. But this argument can be met by, as I have already argued, adopting rules that effectively require representative status on the part of the punitive damages plaintiff by preventing multiplication of

[38] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 628 (1997) (holding that a class must satisfy the tests of common issue predominance and adequacy of representation).
[39] Indeed, many punitive damages claims against corporations will be for products that injure many people. In this context, punitive damages claims serve the same deterrence function as class-action lawsuits. Another type of punitive damages claim will arise in connection with some intentional tort that occurs between one offender and one victim – such as punch in the nose. In this class of cases, punitive damages have no connection at all to class actions. However, it is obvious that *Philip Morris* does not apply to this second class of punitive damages claim.
[40] *Philip Morris USA*, 2007 U.S. LEXIS 1332, at *6.

heterogeneous missing-victim claims. In terms of the fundamental deterrence objectives, class action and punitive damages lawsuits are, in many instances, equivalent.

Third, *Philip Morris* will encourage obfuscation and dishonesty from lower courts more than straightforward analysis of the grounds for a punitive award. *Philip Morris* instructs courts that it is permissible to consider harm to other victims in determining reprehensibility, but impermissible to actually increase an award in an effort to punish the defendant for the harms inflicted on others. It is a distinction that many will find confusing, as dissenting opinions noted. Moreover, it is a distinction that will encourage lower courts to simply say nothing about the function of a punitive judgment. The surest method for a court to avoid review under *Philip Morris* is to talk about reprehensibility, and then to say nothing more than that the punitive award it has imposed is a proper response to the defendant's reprehensible conduct toward the victim. If the court thinks that the award is appropriate because it penalizes the defendant for conduct toward many victims, it is not in the court's interests, after *Philip Morris*, to say so. That is an outcome that serves no one's interests.

In addition to creating confusion and encouraging dishonesty, the rule of *Philip Morris* is unlikely to provide any substantial benefit to potential defendants. Again, consider the basic proposition that harm to others can be taken into account in the reprehensibility analysis, but not in the calculation of the punitive award. This proposition is incomprehensible, because it says that an award can be increased on the basis of reprehensibility, which is a function of harm to others, but cannot be increased in order directly to punish for the harm done or threatened to others. The end result will be that lower courts will focus entirely on the reprehensibility matter, and continue in effect to increase awards to reflect harm done to others. But because the Supreme Court has now prevented lower courts from addressing the harm to others in a direct and straightforward way, it has made it more difficult for reviewing courts to determine whether in fact a penalty is excessive on social welfare grounds – say because it is a redundant penalty. Indeed, the risk of redundant penalties in punitive damages litigation is probably enhanced by the *Philip Morris* decision.

Given the alternative approaches available, the only sturdy reason that can be discerned for the Court's decision is the notion that every person not before the court is capable of bringing his own lawsuit and having it decided on the basis of the issues in his case. While this sounds fine in theory, it is far from what happens in real life. The truth is that relatively few people bring lawsuits. For example, the vast majority of medical malpractice victims do not sue.[41] A constitutional doctrine that prohibits punitive damage judgments and class actions on the ground that each individual should bring his own lawsuit has only one predictable effect: injurers will be effectively shielded from liability for torts that affect many victims.

---

[41] A. Russell Localio, et al., The Relation Between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Malpractice Study III, 325 New England J. Medicine 245-251, 245 (1991) (roughly 1 out of 7 patients injured by medical negligence bring suit).

Moreover, the notion that a multiplied or aggregated punishment is inappropriate because every victim is capable of suing on his own is hard to square with state statutes that allow for multiple damages (e.g., consumer fraud statutes that provide for treble damages). Treble damages provisions are often based on the notion that they punish the offender for the wrongs for which he would otherwise not be punished. If it is a violation of due process for a state court to use a punitive judgment to punish a defendant for harms to missing victims, then it would seem that a state statute requiring trebling of damages raises the same due process concerns. What, for example, would be the Court's response if Oregon were to pass a statute trebling damages for every smoker who prevails in a fraud action against a cigarette company? Statutes already exist at the state level providing multiple damages in consumer fraud actions. The justification for many of these statues is the same that would be used to justify a punitive judgment. Are such statutes unconstitutional under *Philip Morris*?

V. Implications for Pain and Suffering

It is strange that the tort reform movement, as reflected in the Supreme Court, has focused on punitive damages rather than pain and suffering awards. The notice issues identified by the Court in *State Farm* apply equally well, and perhaps better, to pain and suffering awards. In addition, the theoretical case for pain and suffering awards, unlike that for punitive damages, has always been murky and contested. Finally, pain and suffering awards occur frequently and have a noticeable and unavoidable effect on the tort system. Punitive damages, in contrast, are rare.

Pain and suffering awards are difficult to justify. Much of what I will say here can be traced, with some work of course, to Calabresi and Melamed's famous article on remedies.[42] The strongest economic justification for pain and suffering awards comes in the context of "property rule violations", i.e., expropriations of some sort (e.g., theft, battery, rape). The law governing remedies for property and bodily integrity gives the potential victim the right to enjoin a taking, which means that the potential victim can demand from the potential offender a payment that compensates for the subjective losses that would be suffered by the victim from transferring his entitlement to the offender. In view of this, it would be sensible for the law of damages to include a subjective component when there has been a taking of some sort. Pain and suffering awards in the context of takings are therefore justifiable on the basis of the economic literature on property rules.[43]

The other context in which a subjective element is sensible in light of the economic literature is when the offender's conduct is always socially undesirable. Threatened conduct that is always socially undesirable, such as speeding in the wrong direction on a

[42] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).
[43] Keith N. Hylton, *Property Rules and Liability Rules, Once Again*, 2 REV. L. & ECON. 137, 178-183 (2006).

road, probably would be enjoined by a court. Given this, a damage award that includes a subjective component is consistent with basic economic principles.

Indeed, punitive awards can sometimes be justified as compensation for subjective losses. Pain and suffering awards in the two settings just described – takings and always-socially-undesirable conduct – would be justifiable on grounds that are somewhat similar to the justification for punitive damages. However, the theoretical function of punitive damage awards differs greatly from that of pain and suffering awards. Punitive awards are designed to deter. Pain and suffering awards are designed to compensate for the subjective loss suffered by the victim. If a court gives a punitive award that is actually designed to compensate for pain and suffering, then it may be acting in an economically defensible manner while confusing categories.

In the context of ordinary negligent acts, such as a mistake due to negligence in the medical setting, a damage judgment requiring compensation of objective losses is the approach adopted by courts and accepted in the theory of damages. We know that victims often suffer subjective losses in these cases. However, the law has not given potential victims a right to enjoin this conduct, as a means of demanding compensation for threatened subjective losses. When the law of damages permits compensation for subjective losses in these cases, at it does, it permits plaintiffs to obtain indirectly through damages what it has denied plaintiffs the right to obtain directly through equitable remedies. This is inconsistent and difficult to justify.[44]

Because subjective losses exist, perhaps a case can be made on cost-benefit grounds for including a component for subjective losses in ordinary damage remedies for negligence.[45] However, it would appear to be desirable in this case to schedule the subjective component in order to make it more predictable and consistent across cases.

The upshot of this theory is that pain and suffering awards in the context of takings and always-socially-undesirable conduct are justifiable on economic grounds. That is, in the traditional categories in which punitive damages would be awarded on reprehensibility grounds, which strongly overlaps with takings and always-socially-undesirable categories, pain and suffering awards for subjective losses serve the socially desirable purpose of providing a proxy form of compensation for subjective losses. However, in the context of ordinary negligence, pain and suffering awards do not have a firm basis in the theory of remedies.[46]

If the Supreme Court adheres to *Philip Morris*, I would predict that pain and suffering awards are next on the substantive-due-process chopping block. The arguments that imply constitutional impermissibility in the punitive damages context imply the same with greater force in the case of pain and suffering awards. Perhaps the best that plaintiffs' lawyers can hope for in this scenario is a rule from the Court requiring the

---

[44] *Id*.
[45] *Id.* at 169, 182.
[46] *Id.* at 182-183.

scheduling of pain and suffering award in order to remain within the requirements of the emerging due process doctrine.

VI. Conclusion

I return to the question I raised at the start: why, in spite of the business lobby's support for the decisions in *State Farm* and *Philip Morris*, have we observed a rather confused set of political alliances on the question of punitive damages? The answer is simple. Political moderates and conservatives include, in addition to the business lobby, groups that have an old-fashioned belief that bad conduct deserves punishment. This is quite obviously the motivation that led the Utah courts to uphold large punitive judgments against State Farm, to the point of coming close to defying the Supreme Court on remand. The Oregon courts in *Philip Morris* have also come close to defiance, probably for the same reasons as the Utah courts. I think that defiance is what we will continue to observe until the Court adopts a rational policy on punitive damages.

A rational policy on punitive damages would give the Court a set of consistent guidelines for determining the appropriate award and for reviewing an award on appeal. The Court's decisions in *Gore* and *State Farm* have suggested vague constraints (e.g., single digit ratio of punitive to compensatory damages) while failing to provide useful guidance on punitive damages. *Philip Morris*, with its claim that considering harms to others is permissible as part of the reprehensibility analysis but not as part of the actual calculation of a punitive judgment, also fails to provide clear guidance. The reason for this failure is that the Court has refused to closely examine the theoretical rationales for punitive awards and to use those rationales as a basis for its doctrine.