2011

Pushing for the Injury: Tort Law's Influence in Defining the Constitutional Limitations on Punitive Damage Awards

Jill Wieber Lens

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PUNISHING FOR THE INJURY: TORT LAW'S INFLUENCE IN DEFINING THE CONSTITUTIONAL LIMITATIONS ON PUNITIVE DAMAGE AWARDS

Jill Wieber Lens*

The proper limitations on a punitive damage award depend on the conception of punitive damages. Is the award a private law remedy, limited to resolving the dispute between the parties? Or is it a public law remedy, capable of addressing public harm and achieving public good? The Supreme Court has not wavered from public law ideas of punitive damages—that the damages serve the state’s interests and are similar to criminal punishments. At the same time, the Court’s holdings also indicate a private law idea by focusing on the actual injury to the plaintiff. This focus included prohibiting punitive damages from punishing the defendant for causing harm to nonparties.

This Article examines tort law’s influence in defining the constitutional limitations on punitive damage awards, an influence that mandates a private law conception of punitive damages. Tort law lacks the ability to punish unless liability exists and liability exists only if the defendant caused an injury. Tort law’s capability to punish is similarly limited to punishing the defendant only for causing the injury that is the basis of liability. Consistent with tort law’s influence, punitive damages cannot constitutionally punish the defendant for the public harm the conduct caused. Also consistent with tort law’s influence, punitive damage awards must be personalized to the individual dispute despite the Court’s recent concerns regarding unpredictability.

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I. INTRODUCTION

Suppose that a defendant shoots a gun into a movie theater and injures one person, the plaintiff. The plaintiff files suit for battery and is entitled to punitive damages. But what is it that punitive damages can punish without creating constitutional concerns? Are they limited to punishing the defendant for injuring the plaintiff? Is it problematic if the punitive damage award is larger than a prior one awarded against a defendant for similar conduct? If so, is it still problematic even if the two plaintiffs suffered different injuries? Can the punitive damage award punish the defendant for endangering the rest of the audience? If the plaintiff is (miraculously) not injured by the contact, can punitive damages still punish the defendant for endangering the rest of the audience?

The answers to these questions relate to the conception of punitive damages as part of private law or public law. If punitive damages serve only a private law function, the award can fulfill only the individual litigants’ interests. But if punitive damages serve a public law function, they can do much more—they can punish the defendant for the harm his conduct caused to others and/or to the public and serve as a mechanism to achieve the public interest. In the middle of the nineteenth century, legal scholar Simon Greenleaf lamented that punitive damages confuse public and private law.1 At the time, the Supreme Court was not persuaded that this was problematic.2

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1. SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253, at 242 n.2 (Boston, Charles C. Little & James Brown 1848).
But now, the Court's opinions on the constitutional limits on punitive damage awards dabble between the contrary functions. Much of the Court's commentary indicates a public law viewpoint of punitive damages—that they serve the state's interests in punishment and deterrence, that they are obviously similar to criminal punishments, and that reform is necessary to make the awards predictable. But the Court's holdings also focus on the injury to the plaintiff, including by eliminating the possibility of punishing the defendant for causing harm to nonparties, which indicates a limited private law function.

This dabbling presents multiple questions that the Court will likely have to address. The first is whether punitive damages can punish the defendant for the public harm created by the defendant's tortious conduct, the same harm that criminal law punishes. Lower courts have already attempted to tackle this question, which arises because of the Court's constant commentary that punitive damages serve the state's interests as well as the Court's holding in *Philip Morris USA v. Williams* prohibiting punishment for harm to nonparties. This question is also relevant to the constitutionality of a punitive damage award supported only by nominal damages, an award likely to be minimal unless punitive damages can punish public harm. The second question is the priority between the predictability of punitive damage awards and the personalization of the award to the specific injury to the plaintiff. This question arises from possible tension between the Court's holdings in *Exxon Shipping Co. v. Baker* and *Philip Morris*.

This Article attempts to answer these questions by examining the influence of tort law on the constitutional limitations the Court has imposed on punitive damage awards. Although sometimes thought of as having a public law effect, tort law is powerless to address, much less punish, any wrongdoing unless the defendant's wrongdoing caused the plaintiff an injury. It is this injury that the Court repeatedly focuses on in crafting limitations on punitive damage awards, resulting in a constitutionally-mandated private law conception of punitive damage awards.

Tort law's injury requirement mandates that punitive damages cannot constitutionally punish public harm—the damages cannot serve

3. *See infra* Part IV.
4. *See infra* Part V.
6. *Id.* at 353.
this public law function. The only thing that tort law has the capacity to punish is the defendant's causing an injury to a particular plaintiff. This also means that punitive damages will be minimal if supported by nominal damages only because the injury in these cases is practically non-existent. Tort law's injury requirement also mandates that any concerns for predictability and consistency must give way to the need to personalize punitive damages to the specific dispute.

Part II of this Article defines the private and public law divide and applies it to tort law. Part III gives a very brief review of the Court's punitive damages holdings. Part IV reviews the Court's invocations of a public law viewpoint of punitive damages, including the purposes of punitive damages, their similarities with criminal punishments, and the desire for predictability and consistency among awards. Part V of this Article further explains the injury requirement of tort law and how it has affected the Court's limitations on punitive damage awards, resulting in a private law conception of the award. Part VI discusses likely future constitutional limitations on punitive damage awards in light of tort law's injury requirement.

II. THE PUBLIC-PRIVATE DIVIDE AND TORT LAW

A popular area of debate for torts scholars is whether tort law is private or public law. Generally, the private-public divide depends on the interests at stake. If only private interests are involved, the law is private. If the public or state's interest is involved, the law is public. Tort law resolves disputes between private parties, but is often seen as a method of achieving a greater public interest.

A. Defining the Distinction

The overarching dividing point in the civil law tradition, however, is between public and private law. . . . This distinction stems from an ideological assumption of government's role in society. First, private law represents that area of the law in which government solely functions to recognize and enforce private rights. In private legal relations, the government serves as a referee, with the parties as equals before it.  

10. See infra Parts V.A. and VI.A.2.
11. See infra Part VI.B.
Only the individual litigants' interests are at issue in private law. The government and its interests play a more passive role in private law because noncompliance with private law does not usually cause harm to the public as a whole. Although the government likely desires a peaceful resolution of the private dispute, the government has little interest in the actual result.

In public law, however, more is at stake. "The 'driving consideration' in public law matters... is 'the effectuation of the public interest.'" Common examples of public law include constitutional, administrative, and criminal law. The government is much more than a passive participant—it desires that the public interest be served. Usually, the state is a party to lawsuits involving public law, directly advocating for the public interest. But the lack of direct government involvement does not render the law at issue private. "Public law regulates private conduct in order to prevent public or societal harm even when a private citizen rather than the government seeks the public's protection by securing private recovery."

The distinction between private and public law depends on what the government has at stake. If its role is limited to recognizing and enforcing private interests, the law is likely private. But if it's something more, like achieving the public interest, the law is likely public. The distinction may be understandable, but it's not easy to apply to tort law.

13. See Philip J. McConnaughay, Reviving the "Public Law Taboo" in International Conflict of Laws, 35 STAN. J. INT'L L. 255, 301 (1999) (explaining that private law is the court's consideration of "the rights and duties of private parties to each other[,]" not that of the public sphere (quoting Harold G. Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 AM. J. INT'L L. 280, 289 (1982))).


15. See McConnaughay, supra note 13, at 301 (the nature of private law dictates that the "'interests of governments are not directly engaged'" (quoting Maier, supra note 13, at 289)).


17. See Sievers, supra note 12, at 750-51.

18. Id. at 751.


20. Torts scholars disagree over whether tort law is "merely a branch of the public regulatory state" or private law. Alexandra B. Klass, Tort Experiments in the Laboratories of Democracy, 50 WM. & MARY L. REV. 1501, 1508-09 (2009). The public law camp of scholars includes Judge Richard Posner, Fleming James, Leon Green, and William Prosser, although these scholars do not necessarily share the same view of that public law function. Id. The private law camp of scholars includes George Fletcher, Richard Epstein, Jules Coleman, Ernest Weinrib, John Goldberg, and Benjamin Zipursky. Id. at 1509.
B. The Private and Public Law Aspects of Tort Law Liability Determinations

Traditionally, tort law is thought of as private law.21 One of the original motivations for creating tort law was to prevent duels in the streets by providing a place for individuals to resolve their differences. Tort law "adjust[s] the relations and secure[s] the interests of individuals and determine[s] the controversies between man and man."22 It is a system that enables a "fair adjustment of the conflicting claims of the litigating parties."23

At the same time, tort law has an "air of public regulation,"24 as its effect can extend beyond the each tort lawsuit. Although the specific theories have differed, since the late 1930s, tort law has "been widely understood by academics to be just another way in which the government regulates conduct for the public good."25 This view remains dominant today.26

1. Tort Law’s Focus on the Harm to a Private Individual

Traditional tort claims like battery, assault, trespass, and negligence best reflect the private law function of tort law.27 The government’s role is passive and limited to providing a forum to enable "the recognition and enforcement of private rights."28

21. Id. at 1507; see also Maimon Schwarzschild, Keeping It Private, 44 SAN DIEGO L. REV. 677, 679 (2007) ("In a common law country, private law would translate, more or less, to the law of tort, contract, property, inheritance, as well as many aspects of family and commercial law.").

22. See McConnaughay, supra note 13, at 301 (quoting Roscoe Pound, Public Law and Private Law, 24 CORNELL L.Q. 469, 470 (1939)).

23. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 3, at 15 (5th ed. 1984); see also Roy Kreitner, Fault at the Contract-Tort Interface, 107 MICH. L. REV. 1533, 1540 (2009) ("Tort was indeed private law, and classical legal thinkers found it important to emphasize that as private law it should not be used as a redistributive mechanism, but rather only as a mode for vindicating rights."); McConnaughay, supra note 13, at 304 (explaining that private law "'[exists] mainly to provide private parties with a solution to their disputes in case they have not done so themselves'" (quoting Allan Philip, Mandatory Rules, Public Law (Political Rules) and Choice of Law in the E.E.C. Convention on the Law Applicable to Contractual Obligations, in CONTRACT CONFLICTS: THE E.E.C. CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS: A COMPARATIVE STUDY 81, 83 (P.M. North ed., 1982))).

24. Kreitner, supra note 23, at 1540.


26. See Klass, supra note 20, at 1510.

27. See id. at 1507. "Traditional tort claims fall closer to the private law side of the continuum . . . ." Id. at 1512.

28. See Merryman, supra note 16, at 11; see also Schwarzschild, supra note 21, at 679 ("Private law in a civil law country means the law governing individuals and private organizations and their relations with each other, as opposed to the public law governing the government and its relations to its citizens.").
In a typical tort claim, an injured individual plaintiff brings the claim against the defendant whose (actionable) conduct caused the (actionable) injury. All tort claims share two main components: (1) some conduct committed by the defendant that (2) caused the plaintiff an injury. Tort law addresses various types of conduct, including socially harmful and/or unreasonable conduct. Generally speaking, intentional torts define certain socially harmful "wrongs." Negligence law creates liability for merely unreasonable conduct.

Even if the defendant commits actionable conduct, tort law still only provides compensation for certain injuries. In some intentional torts, legal injury is presumed as soon as the defendant commits the wrong to the plaintiff. As an example, a plaintiff suffers the legally cognizable injury necessary to establish battery when the defendant makes contact with the plaintiff. In negligence, however, the plaintiff must establish that she suffered an actual harm; she must have a valid claim for compensatory damages to recover any damages. Only the person who has been wronged and suffered an injury due to the defendant's conduct has the power to bring a tort claim.

The two components of tort law are better understood when compared to criminal law. Criminal law focuses on public wrongs and righting the resulting public harm. "The criminal law is concerned with the protection of interests common to the public at large, as they are represented by the entity which we call the state; often it accomplishes its ends by exacting a penalty from the wrongdoer."

29. KEETON ET AL., supra note 23, § 1, at 7 ("[T]he law of torts is concerned not solely with individually questionable conduct but as well with acts which are unreasonable, or socially harmful, from the point of view of the community as a whole."); see also Kreitner, supra note 23, at 1540 (stating that although both contract and tort law originated as private law, "it was contract [law] that served as the true core of private law, with tort [law] always retaining an air of public regulation").

30. This first component is often referred to as a "wrong" committed by the defendant, a label that generally only applies to intentional torts.

31. See KEETON ET AL., supra note 23, § 9, at 39 ("A harmful or offensive contact with a person . . . is a battery."). The contact in question need not cause physical harm. Id. § 9, at 41.

32. Id. § 30, at 165.


35. KEETON ET AL., supra note 23, § 1, at 5; see also WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.3(b), at 13 (2d ed. 1986) ("The aim of the criminal law . . . is to protect the public against harm, by punishing harmful results of conduct or at least situations (not yet resulting in actual harm) which are likely to result in harm if allowed to proceed further.").
PUNISHING FOR THE INJURY

A crime causes a public harm—it harms society as a whole. This is why a crime can occur without causing anyone injury: “a public wrong can occur in the absence of an individual victim.” For instance, speeding is a crime because it endangers society and harms the public as a whole. If the crime caused an injury to a particular person, criminal law does nothing to help this person as he receives nothing from the prosecution of the crime. Criminal prosecution and punishment protect the public. Imprisonment protects by removing the criminal from society. Lesser criminal punishments protect by providing a disincentive to commit crime and hopefully deterring the punished criminal and others.

In contrast, tort law focuses on private wrongs done to the plaintiff and righting the resulting private harm. Tort law is “directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests.” Thus, tort law requires an injury to a particular person. Without an injury, there is no individual in need of compensation and no need for tort law. Speeding may be criminal, but it is not a tort. But if

36. Thomas B. Colby, Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages, 118 YALE L.J. 392, 427 (2008) (“If a person drives drunk and is fortunate enough not to cause an accident, she does not commit a tort . . . . But she still commits a crime; her conduct . . . threatened harm to society.”).

37. Professor Dan Markel points out that “[r]estitution is also a familiar part of criminal sanctions, and not long ago, private parties prosecuted criminal actions and collected criminal fines.” Dan Markel, Punitive Damages and Private Ordering Fetishism, 158 U. PA. L. REV. PENNUMBRA 283, 287-88 (2010), http://www.pennumbra.com/responses/05-2010/Markel.pdf. Even if private parties prosecuted criminal actions, this does not mean that the crime suddenly addresses the harm to the individual instead of to the public. Private prosecution is still only possible if the defendant’s conduct is criminal and conduct is made criminal to protect the public. Similarly, restitution to a victim, if even available, generally includes payment only for property or economic losses. See LAFAVE & SCOTT, supra note 35, § 1.3(b), at 13 n.4.

38. LAFAVE & SCOTT, supra note 35, § 1.2(e), at 10.

39. See id. § 1.5(a), at 23-24.

40. But see Klass, supra note 20, at 1507-09 (describing modern torts that seem to address public harm as opposed to harm to an individual person). Perhaps the most common public tort would be a public nuisance claim brought by the government. See id. at 1508 (exemplifying a public nuisance suit).

41. KEETON ET AL., supra note 23, § 1, at 5-6; see also LAFAVE & SCOTT, supra note 35, § 1.3(b), at 14 (explaining that “torts are wrongs to private individuals but crimes are wrong to the public”); Colby, supra note 36, at 424 (“The tort is a private wrong to the individual victim; the crime is a public wrong to society.”); Goldberg, supra note 25, at 599 (“[T]ort law . . . empowers a victim to seek redress from a wrongdoer because that other has acted wrongfully toward him . . . rather than as the vicarious beneficiary of a duty owed to the public at large.” (footnotes omitted)).

42. See LAFAVE & SCOTT, supra note 35, § 1.3(b), at 13 (“[T]ort law requires pecuniary damage, with but minor emphasis on immorality; while criminal law emphasizes immoral behavior, but often does not require any actual damage.”).

43. See Michael I. Krauss, “Retributive Damages” and the Death of Private Ordering, 158 U.

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someone is injured as a result of the defendant's speeding, that injured plaintiff has a tort claim for damages to compensate her for that injury.\footnote{Even though the conduct is criminal, the likely tort claim is negligence instead of an intentional tort. The fact that the defendant was speeding, a criminal violation, would create an inference that the defendant breached the duty he owed to the injured plaintiff. Despite the conduct being criminal, the injured plaintiff would likely not be eligible for punitive damages because the defendant's conduct was merely negligent.}

The damages will not address or compensate the danger to society that the defendant caused.

2. Tort Law's Residual Public Law Effect

Despite tort law's origins in private law, with which "'the interests of governments are not . . . engaged,'"\footnote{McConnaughay, supra note 13, at 301 (quoting Maier, supra note 13, at 289).} tort law also creates social norms.\footnote{David G. Owen, A Punitive Damages Overview: Functions, Problems, and Reform, 39 Vill. L. Rev. 363, 376 (1994) ("When persons in the community agree to rules establishing the boundaries of their legal rights, they each surrender in the process their freedom to violate other persons' boundaries in pursuit of their own personal objectives."); see also John C.P. Goldberg & Benjamin C. Zipursky, Torts as Wrongs, 88 Tex. L. Rev. 917, 918 (2010) ("[Tort law] sets generally applicable standards of conduct.").} Tort law states the community's definition of socially harmful and/or unreasonable conduct.\footnote{See KEEFETON ET AL., supra note 23, § 1, at 7 ("[T]he law of torts is concerned . . . with acts which are unreasonable, or socially harmful, from the point of view of the community as a whole.").}

As applied to driving, negligence law reinforces and elaborates social norms of safe conduct that drivers must observe for the benefit of other drivers, cyclists, pedestrians, persons occupying storefronts, and storeowners. By the same token, malpractice law generates norms of safe practices that doctors are obligated to heed for the benefit of patients (and sometimes non-patients), while product liability law articulates safety norms to be observed by sellers on behalf of product users and certain others.\footnote{Goldberg, supra note 25, at 608; see also Zipursky, supra note 33, at 149 ("[T]ort law . . . articulate[s] norms of conduct that enjoin individuals to treat each other in certain ways (e.g., with reasonable care) and enjoin individuals from treating each other in certain ways (e.g., not battering others . . . .")").}

These norms serve the public interest and the government likely desires that people obey them.

Today, legislatures even create private tort causes of action to achieve the public interest. For instance, in response to the recent mortgage foreclosure crisis, numerous state legislatures passed laws to try to prevent some of the activities that contributed to the crisis.\footnote{Klass, supra note 20, at 1521-22.} To
help enforce the law, legislatures created tort causes of action for those injured by violations of the new law. To incentivize the lawsuit, the legislatures guaranteed minimum damages, punitive damages, or fee-shifting. The lawsuit exists only because the legislature believes it will regulate the industry and thus achieve the public interest.

Another situation where it looks like the “interests of society in general may be involved in disputes in which the parties are private litigants” is the use of tort law in response to mass catastrophes, including flooding, terrorism, and environmental disasters. Tort actions have been filed against airlines based on alleged negligence in allowing terrorists to board flights, and against excessive greenhouse gas emitters for damages related to the environmental consequences of climate change. Mass lawsuits for catastrophic injury make it look like “tort law is part of public law, [and] not merely concerned with settling disputes between individuals fairly.”

C. The Private and—Actually, Just the Private Law Aspects of Tort Law’s Main Remedy

Regardless of whether tort liability involves the resolution of private or public interests, tort law has one default remedy: compensatory damages. These damages make the plaintiff whole after the injury. The plaintiff’s injury determines the amount of damages. Needless to say, compensatory damages do not look to the societal harm that the defendant caused. To the contrary, compensatory damages look only to the individual plaintiff’s interests.

50. Id.
51. Id. at 1522. These measures increase the chance that the plaintiff will bring suit, similar to the bounty theory of punitive damages. See infra note 131.
52. Klass, supra note 20, at 1525 (“Although these torts have significant ‘private law’ aspects in that they are suits brought by individuals seeking relief for wrongs done to them by private parties, they also have significant ‘public law’ aspects. . . . The states are using tort law to assist with public regulation.”).
53. KEETON ET AL., supra note 23, § 3, at 15.
55. See id. at 1090-93.
56. Id. at 1129.
57. Legal and equitable relief is available in tort depending on the circumstances. This Article labels compensatory damages the “default” remedy because of the additional requirements to prove the other remedies. Equitable relief, such as an injunction, is not available if damages are sufficient. See 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 2.5, at 123 (2d ed. 1993). Similarly, restitution is available in tort only if the facts enable a restitutionary remedy; that is, if the defendant gains from the plaintiff. Id. § 4.1(1), at 551.
58. Id. § 3.1, at 281.
59. See id.
Personalization of compensatory damages to the plaintiff is proper in light of tort law’s main goal of compensating the injured plaintiff. In light of this goal, it would be strange to base the plaintiff’s damages on something other than her actual injury. Awarding damages based on the public harm or an objective valuation of an injury would over-compensate some plaintiffs and under-compensate others. Tort law resists objective measurements of damages even for intangible losses like pain and suffering. Personalization is also appropriate because it would not be “fair” to impose any greater monetary burden on the defendant than the amount necessary to make the plaintiff whole. If tort law were to allocate the loss differently, we might as well leave the parties to duel in the street.

Another remedy available in tort law—the remedy at issue in this Article—is punitive damages. They are available in tort, but not for every tort. Each state has its own rules regarding the availability of punitive damages. Per the Second Restatement of Torts, punitive damages are available if the defendant’s tortious conduct is outrageous, whether because of his “evil motive or his reckless indifference to the rights of others.”

Punitive damages are not quite as easy to classify as serving a private or public law function. Like compensatory damages, these damages are traditionally paid to the plaintiff in the specific litigation.

60. Loth v. Truck-A-Way Corp., 70 Cal. Rptr. 2d 571, 576 (Cal. Ct. App. 1998); see also Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20 (1991) (explaining that the jury has significant but not unlimited discretion in determining the amount of “compensation for pain and suffering or mental anguish”). Some courts will not even allow the plaintiff to present expert testimony based on objective estimates of pain and suffering or the loss of enjoyment of life because there is “no meaningful relationship between those arbitrarily selected benchmark spending figures and the value of an individual person’s life.” Loth, 70 Cal. Rptr. 2d at 576-77.

61. Some states do not allow recovery of punitive damages at all. See CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 78, at 279 (1935) (listing Louisiana, Massachusetts, Nebraska, and Washington as rejecting the doctrine). Some states have statutorily defined the availability of punitive damages. These states include, but are not limited to, Alabama, California, Kentucky, and Nevada. See ALA. CODE § 6-11-20 (2005); CAL. CIV. CODE § 3294 (West 1997); KY. REV. STAT. ANN. § 411.186 (LEXIS 2005); NEV. REV. STAT. ANN. § 42.005 (West 2008). Other states use a more general common law standard like the one included in the Second Restatement. See infra note 62 and accompanying text.


63. Many states have adopted statutes mandating that a portion of any punitive damage award be paid to the state or some specified agency. See DOBBS, supra note 57, § 3.11(12), at 527 & n.39 (listing statutes in Colorado, Florida, Iowa, Kansas, and Oregon that mandate that a portion of any punitive damage award recovered by the plaintiff be given to the state or a specific fund). The Supreme Court has previously determined that punitive damage awards are not subject to the Eighth Amendment. The Amendment “places limits on the steps a government may take against an individual.” Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989). The imposition of punitive damages, however, is not an example of the state’s using the “civil
But the damages punish and deter.64 "They are in part like [criminal] fines collected by the bounty hunters who prosecute tort cases, and they are in part like damages awards in a civil action," reflecting both private and public law functions.65 The larger the amount of the punitive damage award, the more it seems to diverge from a private law viewpoint.66

III. BRIEFLY, THE COURT’S PUNITIVE DAMAGE JURISPRUDENCE

In 1885, the Court noted that the “discretion of the jury . . . is not controlled by any very definite rules; yet the wisdom of allowing such additional [punitive] damages to be given is attested by the long continuance of the practice.”67 After another century, the Court changed its tune. In 1986, the Court mentioned the possibility that large punitive damage awards may be unconstitutional.68 The Court eventually determined that the Due Process Clause of the Fourteenth Amendment prohibits “‘grossly excessive’” punitive damage awards.69
A. Early Evaluations of Punitive Damage Awards

In a 1991 case entitled *Pacific Mutual Life Insurance Co. v. Haslip*, the Court upheld a punitive damage award that was more than four times the amount of compensatory damages. The Court noted that "unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." But the actual jury instructions at issue ensured that the jury's discretion was "exercised within reasonable constraints," meaning that no due process violation occurred.

The specific jury instructions at issue explained the purposes of punitive damages. That is, punitive damages do not function to compensate, but to punish the defendant and "protect the public by [deterring] the defendant and others" from committing similar wrongdoing in the future. They also instructed the jury to consider "the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." The Court noted that the state's appellate review of punitive damage awards also checked the jury's discretion.

Two years later, the Court upheld another punitive damage award in *TXO Production Corp. v. Alliance Resources Corp.* This time, the punitive damage award was 526 times larger than the compensatory damage award. In support of its claim for punitive damages at trial, the defendant presented evidence that the plaintiff had "engaged in similar nefarious activities in its business dealings in other parts of the country." In upholding the punitive damage award, the state supreme court noted that the type of "'fraudulent action intentionally undertaken . . . in this case could potentially cause millions of dollars in damages to other victims.'"

The Supreme Court specifically noted that "[i]t is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused its intended victim . . . as well as the
possible harm to other victims that might have resulted if similar future behavior were not deterred. Compared to the amount of potential losses that would have resulted if the "illicit scheme" had succeeded, the punitive damage award was not excessive. Thus, the award, like the award in Haslip, was constitutional.

B. The Constitutional Guideposts

In 1996, in BMW of North America, Inc. v. Gore, the Court was confronted with a $2 million dollar punitive damage award in a case where the defendant failed to disclose that the "new" car sold to the plaintiff had been repainted prior to delivery. The jury awarded the plaintiff only $4,000 in compensatory damages.

The Court chose this case to create three guideposts to test whether a punitive damage award is "grossly excessive" and too arbitrary to be constitutional. An evaluation of the guideposts also indicates whether the defendant "receive[d] fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."

The first and "most important" guidepost is whether the damages are commensurate to the level of reprehensibility of the defendant's conduct. The second guidepost is whether a reasonable relationship exists between the amounts of compensatory and punitive damages. The Court declined, however, to define what ratio constitutes a "reasonable relationship." The last guidepost is a comparison of the punitive damage award to the civil or criminal penalties imposed for comparable conduct. Along with the guideposts, BMW also clarified that punitive damages cannot punish a defendant for conduct committed in another state. Applying the guideposts to the facts of the case, the

81. Id. at 460.
82. Id. at 462.
84. Id. at 563-64.
85. Id. at 565.
86. Id. at 574-75.
87. Id. at 574. The Court was "cagey about just which component of the Due Process Clause formed the basis for its holding." Colby, supra note 36, at 403. Professor Colby goes on to explain that the Court's focus was substantive due process: "The Court's real problem with the punitive damages award in BMW was that it was too large, not that it was unexpected." Id. at 403-04.
88. BMW, 517 U.S. at 575.
89. Id. at 580.
90. See id. at 580-83.
91. Id. at 583.
92. Id. at 572 ("We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the
Court, for the first time, found the punitive damage award unconstitutionally excessive.\textsuperscript{93}

Later, in \textit{State Farm Mutual Automobile Insurance Co. v. Campbell},\textsuperscript{94} the Supreme Court clarified its second guidepost slightly, stating that “[s]ingle-digit multipliers are more likely to comport with due process.”\textsuperscript{95} Still though, the Court acknowledged that a different ratio may be constitutionally permissible depending on the amount of compensatory damages: “The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.”\textsuperscript{96}

Also in \textit{State Farm}, the Court clarified that punitive damages cannot punish a defendant for “dissimilar acts, independent from the acts upon which liability was premised.”\textsuperscript{97} Factually, \textit{State Farm} was a bad-faith failure to settle a claim brought by an insured against an insurer. The plaintiff, at trial, introduced evidence of State Farm’s “national scheme to meet corporate fiscal goals by capping [insurance policy] payouts on claims company wide.”\textsuperscript{98} Other victims of the alleged scheme were not parties to the litigation, however, and most of the practices in the alleged scheme “bore no relation to third-party automobile insurance claims” like the plaintiff’s.\textsuperscript{99} The Court held that due process “does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant.”\textsuperscript{100}

\textbf{C. Philip Morris v. Williams}

The Supreme Court again clarified the reprehensibility guidepost in \textit{Philip Morris USA v. Williams} in 2007.\textsuperscript{101} \textit{Philip Morris} involved a $79.5 million punitive damage award in a lawsuit arising out of the

\textsuperscript{93} \textit{BMW}, 517 U.S. at 585-86.
\textsuperscript{94} 538 U.S. 408 (2003).
\textsuperscript{95} \textit{Id.} at 425.
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} \textit{Id.} at 422-23.
\textsuperscript{98} \textit{Id.} at 415 (quoting Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1143 (Utah 2001)).
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} \textit{Id.} at 423. The Court also mentioned that punishment for the defendant’s conduct to nonparties “creates the possibility of multiple punitive damages awards for the same conduct.” \textit{Id.}
\textsuperscript{101} 549 U.S. 346 (2007).
death of a cigarette smoker. The plaintiff alleged that the defendant engaged in deceit in its sale of cigarettes by failing to disclose the associated health risks. Philip Morris's main argument on appeal was that a portion of the $79.5 million punitive damage award "represented punishment for its having harmed others" and not just the plaintiff to the lawsuit.

The Supreme Court held that punitive damages cannot punish the defendant for causing harm to nonparties, meaning individuals not parties to the lawsuit who have their own tort claims against the defendant. Punishment for causing harm to nonparties violates the Due Process Clause in two ways. First, it deprives the defendant an opportunity to defend itself against claims of injured nonparties. For instance, the defendant would not be liable if the nonparties knew that smoking was dangerous and thus could not establish reliance on the defendant's misrepresentations. Second, punishment for harm to nonparties would "add a near standardless dimension to the punitive damages equation" based on the amount of harmed nonparties, the extent of their injuries, and the circumstances of those injuries that could be included in the award. These questions, none of which could be fully answered in the plaintiff's individual lawsuit, heighten the arbitrariness, uncertainty, and lack of notice in imposition of punitive damages.

At the same time, the jury may consider the defendant's conduct towards people other than the plaintiff in determining reprehensibility as.

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102. Id. at 349-50.
103. Id.
104. Id. at 351.
105. See id. at 353. This due process-based holding likely overrules the Court's consideration of harm to others in evaluating the punitive damage award in TXO. See TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993). Based on the TXO reasoning, the punitive damage award could include punishment for purely hypothetical losses not even yet actionable in tort. Philip Morris seems to now preclude this possibility. This TXO reasoning allowing punishment for hypothetical losses is also invalid under this Article's explanation of the influence tort law's injury requirement has on the constitutional limitations the Court has placed on punitive damage awards. See infra Part V.

106. Philip Morris, 549 U.S. at 353-54. Professor Colby argues that the Court's due process rationale does not justify the Philip Morris decision because evidence of the multiple private harms is still admissible for purposes of reprehensibility. Colby, supra note 36, at 410-11. But Colby still argues that the decision is correct because of substantive due process—heightened procedural protections, the same that apply in criminal proceedings, are necessary "unless the punishment is meted out solely for the private wrong, not the public one." Id. at 447. Thus, remand was necessary to ensure that the punishment encompassed only the private wrong.

108. Id.
109. Id. at 354.
110. Id.
“harm to others shows more reprehensible conduct.” The end result of *Philip Morris* is that the lower courts must provide “some form of protection” to ensure that the jury considers the evidence of harm to nonparties in evaluating reprehensibility, but not in determining how much to punish the defendant.\footnote{See id at 355.}

\footnote{See id at 357. The jury’s ability to make this distinction and/or the existence of this distinction has been the subject of much criticism. See infra Part V.B.2.}

\footnote{554 U.S. 471 (2008).}

\footnote{See id at 501-02 (noting that the case involves “the exercise of federal maritime common law authority”).}

\footnote{Id at 480-81. The defendant had already spent $2.1 billion in clean up efforts, paid $25 million in criminal fines and $100 million in restitution, $900 million in claims brought by the United States and Alaskan government, and $303 million in voluntary settlements with other private parties. Id at 479.}

\footnote{Id at 490.}

\footnote{Id at 499.}

\footnote{Id at 500.}

\footnote{Ibid. at 502. Justice Holmes explained that the best way to know and understand the law is to “look at it as a bad man, who cares only for the material consequences which such knowledge}

\footnote{111. See id at 355.}

\footnote{112. See id at 357. The jury’s ability to make this distinction and/or the existence of this distinction has been the subject of much criticism. See infra Part V.B.2.}

\footnote{113. 554 U.S. 471 (2008).}

\footnote{114. See id at 501-02 (noting that the case involves “the exercise of federal maritime common law authority”).}

\footnote{115. Id at 478.}

\footnote{116. Id at 480-81. The defendant had already spent $2.1 billion in clean up efforts, paid $25 million in criminal fines and $100 million in restitution, $900 million in claims brought by the United States and Alaskan government, and $303 million in voluntary settlements with other private parties. Id at 479.}

\footnote{117. Id at 490.}

\footnote{118. Id at 499.}

\footnote{119. Id at 500.}

\footnote{120. Id at 502. Justice Holmes explained that the best way to know and understand the law is to “look at it as a bad man, who cares only for the material consequences which such knowledge}
Reasonable predictability is also necessary for the next bad men: "the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage."121

To better achieve predictability, the Court suggested that the fact finder "peg punitive [damages] to compensatory damages using a ratio or maximum multiple."122 The amount of the multiplier should be based on the level of "blameworthiness within the punishable spectrum" and the amount of compensatory damages.123 If the amount is substantial, a lesser ratio is appropriate; if the amount is modest and/or the odds of detecting the harm are minimal, a higher ratio is appropriate.124 Applying this to the facts of Exxon, the Court determined that a 1:1 ratio was appropriate due to mere recklessness of the conduct and the substantial compensatory award.125

Because Exxon was a common law-based challenge, its expressed concern for predictability is not binding on the states and could be abrogated by Congress. However, some lower courts have already begun to incorporate the concern for predictability within the constitutional analysis of punitive damages.126

IV. THE COURT'S SEEMING ADOPTION OF THE PUBLIC LAW FUNCTION OF PUNITIVE DAMAGES

The Supreme Court has not expressly addressed whether punitive damages serve a private or public law function.127 Much of the Court's

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122. Id. at 506.
123. See id. at 512-13.
124. Id. at 513.
125. Id.
126. See, e.g., James Crystal Licenses, LLC v. Infinity Radio Inc., 43 So. 3d 68, 79 (Fla. Dist. Ct. App. 2010) (noting that a punitive damage award fifty-five times larger than the compensatory damages awards exceeded "reasonable predictability").
127. The purpose of this section is not to argue which of the views of punitive damages is correct, but to attempt to determine the Court's view regarding whether punitive damages serve a private or public law function. The justifications for punitive damages are another hot topic in legal scholarship. The main camps include a victim vindication model, advanced by Mark Geistfeld, Thomas Colby, Marc Galanter and David Luban, John Goldberg, Anthony Sebok, and Benjamin Zipursky. Generally, the victim vindication model claims that the damages vindicate a victim's dignity and autonomy—a private law viewpoint of punitive damages. See Dan Markel, How Should Punitive Damages Work?, 157 U. PA. L. REV. 1383, 1394-95 & n.35 (2009). Other scholars propose a cost internalization or deterrence justification, including Judge Guido Calabresi, Bruce Chapman and Michael Trebilcock, Thomas Galligan, Mitchell Polinsky and Steven Shavell, and Catherine
commentary, however, indicates a public law function. This commentary includes the Court’s explanations of the state’s interests in punitive damages, the similarities between punitive damages and criminal punishments, and the need to increase the predictability of punitive damage awards.

A. The State’s Interest in Punitive Damages

In 1885, the Court stated that punitive damages “blend[] together the interests of society and of the aggrieved individual, and give damages, not only to recompense the sufferer, but to punish the offender.” Today, however, the Court clearly describes that punitive damages further the state’s interest in punishment and deterrence. Thus, the state is more than a passive participant; it wants the plaintiff to recover punitive damages because such damages serve the state’s interests. Under this conception of punitive damages, the damages do more than merely resolve the dispute between the private parties—they “vindicate the public interest.”

The Court’s conclusion that punitive damages serve the state’s interests in punishment and deterrence is not mandatory. It is possible that the damages could punish and deter within a private law function. For instance, punishment could be limited to vindicating “the dignity of an individual victim by allowing her to punish the defendant for

Sharkey. Id. at 1387 n.5. Professor Markel proposes a pluralistic approach to punitive damages, allowing for retributive, aggravated, and deterrence-based damages depending on the factual circumstances. Id. at 1420. Professor Markel first introduced his retributivist public law account of punitive damages in an earlier article. See Dan Markel, Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction, 94 CORNELL L. REV. 239, 257-66 (2009).


130. Klass, supra note 20, at 1563 (concluding that punishment and deterrence are public law goals given that the Court classifies them as state interests). If the state’s interest in litigation is something more than enforcing private rights, the law at issue is more likely to be public than private, at least using the traditional distinction between the two. See McConnaughay, supra note 13, at 301-02.

131. If punitive damages serve any public law function, that theory must necessarily incorporate the bounty theory of punitive damages, requiring that the damages be large enough to create an incentive to bring suit. See Owen, supra note 46, at 380 ("[T]he very existence of a prospective windfall . . . helps to motivate reluctant victims to press their claims . . . "). If the potential punitive damages are not large enough, punitive damages would be powerless to achieve the state’s interests because no plaintiff would file suit. Id. at 380-81. The incentive is especially necessary if the defendant’s conduct caused only minimal compensatory damages. See BMW, 517 U.S. at 582 (explaining that a higher ratio of compensatory to punitive damages may be appropriate when the defendant causes only minimal compensatory damages).

committing a humiliating or insulting tort upon her." 133 This idea of vindictive punishment would make punitive damages a form of "legally sanctioned private revenge." 134 The same holds true with deterrence. It could be limited to deterring the particular defendant from committing the same conduct and injuring the plaintiff again. 135

Despite the possibility of limiting punishment and deterrence to a private law conception of punitive damages, the Court has not done so. Further evidencing the Court's leaning toward a public law conception of punitive damages is the Court's rejection of compensation as a justification for punitive damages. 136 Compensation is the only commonly discussed justification for punitive damages that illustrates solely a private law function in that the damages would be limited to fulfilling the injured plaintiff's interests. 137

Although the Court has stated that punitive damages serve the state's interests, the Court has not expressly addressed whether this means that punitive damages can punish the defendant for the public

133. Colby, supra note 36, at 434. Technically, nominal damages (and not punitive damages) provide this recognition. And tort law itself certifies the importance of the plaintiff's legal rights. If the purpose of punitive damages was to symbolize the importance of the plaintiff's right to bodily integrity, they would be available in all battery cases, which is not true.

134. Id.

135. This would be a theory of specific deterrence, as opposed to general deterrence. "In simplest terms, 'specific deterrence' seeks to deter the defendant . . . from repeating a wrongful act through the imposition of punitive damages." Sheila B. Scheuerman, Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions, 60 BAYLOR L. REV. 880, 887 (2008). However, "general or economic deterrence . . . will deter others who might otherwise engage in the same type of conduct at issue in the lawsuit." Id. (footnote omitted).

Even within specific and general deterrence, scholars have also noted different theories regarding the most effective type of deterrence: optimal versus complete deterrence. See Markel, supra note 127, at 1391 & n.18 (explaining that optimal deterrence theory prices the conduct and requires a defendant to pay for its tortious activity but envisions that the defendant will continue the activity, while complete deterrence prohibits the conduct and seeks to deter the future commission of the conduct).

Numerous scholars believe that the Court has either abandoned the deterrence purpose or that it never existed as an independent purpose in the first place. See Michael P. Allen, Of Remedy, Juries, and State Regulation of Punitive Damages: The Significance Of Philip Morris v. Williams, 63 N.Y.U. ANN. SURV. AM. L. 343, 365 (2008) (arguing that the Court "discounted the deterrent function of punitive damages" in Philip Morris); Colby, supra note 36, at 459-60 (arguing that deterrence is no different from punishment); F. Patrick Hubbard, Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique"?, 60 FLA. L. REV. 349, 383 (2008) ("[T]he Court has allowed its preference for retribution to trum[p]p considerations of . . . deterrence."); Sharkey, supra note 63, at 52-53 (arguing that, in Exxon, the Court redefines the only legitimate state interest in punitive damages as retributive punishment). Deterrence is the main justification for imposing punitive damages purely because of vicarious liability, which the majority of states allow. KEETON ET AL., supra note 23, § 2, at 12-13. If deterrence is not a valid justification for imposing punitive damages, punitive damages should not be available based solely on vicarious liability.


137. See supra Part II.C.
harm that he caused. The current model jury instructions of numerous jurisdictions allow punishment for the public harm. In Texas, for example, the standard instructions give the jury permission to evaluate the “extent to which [the defendant’s] conduct offends a public sense of justice and propriety.” Similarly, the Eighth Circuit’s instructions direct the jury to consider the extent of criminal sanctions, which punish public harm, for comparable conduct.

According to precedent, the public law view of punitive damages encompassed in these jury instructions is not improper. Per Philip Morris, a jury cannot punish the defendant for harm it caused to nonparties. But Texas’s and the Eighth Circuit’s jury instructions enable the jury to consider the harm that the defendant’s conduct caused society as a whole as opposed to individual nonparties.

B. Similarities with Criminal Punishments

Criminal law is, of course, public law. The state actively participates in criminal law proceedings and criminal punishments serve the public interest by punishing the defendant for the public harm he created. Any similarities between punitive damages and criminal punishments “move punitive damages even further into the public law realm.”

The Court is not shy in acknowledging that “punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law.” Not only has the

138. Much of the Supreme Court’s commentary on punitive damages has focused on appellate review as opposed to providing “any specific kind of guidance” on jury instructions. Anthony J. Sebok, Punitive Damages: From Myth to Theory, 92 IOWA L. REV. 957, 994 (2007).


140. EIGHTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS: CIVIL § 5.02C (2008).


142. See, e.g., Grefer v. Alpha Technical, 965 So. 2d 511, 517 (La. Ct. App. 2007) (“The trial court’s reference to nonparties [in the jury instructions] within the context of the public’s interest and safety did not violate the defendant’s rights to due process.”). Professor Colby believes that Philip Morris “put an end to the uncertainty” of whether punitive damages could punish for public harm. Colby, supra note 36, at 400. But the basis of the appeal in Philip Morris was not that the plaintiff referred to the harm that the defendant caused to society as a whole, but to the harm that the defendant caused to other smokers who had not sued. See Philip Morris, 549 U.S. at 350-51. Technically, Philip Morris only prohibits punishment for multiple private harms to nonparties. See id. at 351-54; see also Sebok, supra note 138, at 999 (“The problem with the plaintiff’s jury instructions in Philip Morris, according to the Court, was that they allowed the jury to decide whether the defendant had legally harmed smokers who had not sued and whose cases were not properly presented to the jury.”).

143. See Klass, supra note 20, at 1563.

144. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989); see
Court stated that the "points of similarity" between punitive damages and criminal punishments are "obvious[,"\(^{145}\) but a number of the Court's holdings have sought to make punitive damages more like criminal punishment.

1. The Guideposts: Hoping to Achieve an Objective Scale of Punitive Damage Awards

Two of the Supreme Court's \textit{BMW} constitutional guideposts, reprehensibility and comparable criminal sanctions, seek to make punitive damages more like criminal punishments. Specifically, these guideposts seek to create an objective scale of punitive damages based on the tortious conduct, similar to how criminal punishment is based on the severity of the crime.

Per the reprehensibility guidepost, a punitive damage award should reflect the defendant's level of reprehensibility as compared to all other tortfeasors paying punitive damages.\(^{146}\) A defendant who caused economic losses should face a smaller punitive damage award than a defendant who caused physical injury.\(^{147}\) Or, a defendant who acted maliciously should face a larger damages award than a defendant who acted recklessly.\(^{148}\)

Somewhat similarly, the comparable criminal sanctions guidepost mandates that courts compare the punitive damage award to the criminal punishment that the legislature set for comparable conduct—a legislative determination deserving of "substantial deference."\(^{149}\) The effect of this comparison is to scale punitive damage awards similar to how criminal punishments are scaled based on the severity of the crime.

\(^{147}\) See \textit{id.} at 576 (observing that the harm inflicted was "purely economic" and, therefore, did not warrant "a significant sanction in addition to compensatory damages").
\(^{148}\) Exxon, 554 U.S. at 510-11.
\(^{149}\) BMW, 517 U.S. at 583 (quoting \textit{Browning-Ferris} at 492 U.S. at 301 (O'Connor, J., concurring in part and dissenting in part)). But see State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 (2003) ("Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof."). Of course, the legislature represents the community and is thus speaking for the community in determining the extent of proper punishments. Similarly, juries speak "as the voice of the community" in assessing the amount of punitive damages. BMW, 517 U.S. at 600 (Scalia, J., dissenting). Perhaps juries deserve the same deference as they, like the legislature, represent the community.
If fully implemented, these two guideposts would create an objective scale of punitive damages, similar to the criminal sentencing guidelines that the Court applauded in Exxon. The scale would define levels of reprehensibility and the corresponding punitive damage award, possibly using criminal sanctions for comparable conduct as a reference point. This scale would compare tortious conducts and objectively define the award. And the scale would likely not take the individual, injured plaintiff into account. This same irrelevance of the victim occurs in the criminal system.

The criminal sanction guidepost also seeks to make punitive damages similar to criminal punishments in another way. If a punitive damage award should be similar to a criminal sanction for comparable conduct, apparently the two punishments punish the same thing. Criminal punishments punish the public harm. Per this guidepost, punitive damages do the same.

2. Using the Analogy to Explain the Need to Reform

In Exxon, the Court further expounded on the need to make the punitive damage system more like the criminal punishment system. The Court criticized punitive damage awards as too unpredictable and explored possible reforms. The majority of the Court’s analysis tracked how the federal criminal sentencing system moved from a discretionary to a guidelines-based system. “To the Court’s mind, little separates punitive damages from criminal fines and penalties; so the guidelines solution for restraining discretion in the criminal context would seem to apply full force in the civil context.”

150. Unfortunately, the reprehensibility guidepost has proven not to be user-friendly. “[T]he Court failed to provide clear guidance about when ‘bad’ was ‘so bad’ that it justified a particularly high award of punitive damages.” Allen, supra note 135, at 349. The same measurement difficulty exists in criminal law, which is why courts are happy to defer to legislative judgments on the proper punishments. See Jeffrey L. Fisher, The Exxon Valdez Case and Regularizing Punishment, 26 ALASKA L. REV. 1, 38-39 (2009) (stating that “there is no easy way to convert crimes into terms of punishment[,]” thus, “when a legislature steps in and attempts to establish a hierarchy of crimes and to assign sentencing values to those crimes, the Court is loathe to second-guess the result of that policy-laden work.”).

151. See Exxon, 554 U.S. at 506 (discussing the guidelines-based federal criminal sentencing system). But see State Farm, 538 U.S. at 428 (explaining that punitive damages must remain distinct from criminal penalties because the civil process does not provide the same procedural protections).

152. See BMW, 517 U.S. at 583 (explaining that a comparison of the punitive damage award and the civil or criminal penalties for comparable conduct may indicate excessiveness of the punitive damage award).

153. See Exxon, 554 U.S. at 504-06.

154. See id. at 503-04, 506-07.

155. See id. at 505-06.

156. Sharkey, supra note 63, at 44.
Before the federal criminal sentencing system changed to a guidelines-based system, sentencing was left to the judge's discretion: "Judges could impose any length of punishment for virtually any reason, and appellate review was essentially unavailable." Thus, "similarly situated offenders were sentenced [to], and did actually serve, widely disparate sentences." In the last quarter of a century, however, the federal criminal system moved to a "system of detailed guidelines tied to exactly quantified sentencing results." According to the Supreme Court, the same problems that existed with the discretionary criminal sentencing system exist today in the imposition of punitive damages. Two tortfeasors committing the exact same conduct can easily be subject to vastly different punitive damage awards. Just as with criminal sentencing, punitive damages must be reformed "to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." Per the Exxon Court, not only are the purposes of punitive damages similar to criminal punishments, the system for imposing punitive damages should also be similar to the federal sentencing guideline system.

158. Exxon, 554 U.S. at 505 (alteration in original) (quoting Ilene H. Nagel, Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. CRIM. L. & CRIMINOLOGY 883, 883 (1990)). Although not mentioned by the Court, the punitive damage system is arguably even more discretionary because the decisions of whether to award punitive damages and how much to award are left to the jury. Additionally, each civil case is heard by a different jury, precluding juries from having any reference point.
159. Id. The Court in Exxon celebrates the movement from the discretionary criminal sentencing system to the current guidelines. The justices on the Court, however, had no involvement with that movement. See id. at 505-06. In 1984, Congress passed the Sentencing Reform Act of 1984, which established these new guidelines. Id. at 505. Ironically, the Court's involvement came later, when it struck down the mandatory nature of the guidelines, rendering them merely advisory. See United States v. Booker, 543 U.S. 220, 246 (2005).
160. See Exxon, 554 U.S. at 502-03.
161. See id. (citing Koon v. United States, 518 U.S. 81, 113 (1996)).
162. See id. at 504-06. States control their systems for determining and imposing criminal sentences and punitive damages; many do not use guidelines-based systems for criminal sentencing. See Fisher, supra note 150, at 43 ("[M]any states in the country still follow a general model of granting unfettered sentencing discretion within widely prescribed sentencing ranges."). The Court's concern for predictability and enthusiasm for the federal criminal sentencing guidelines in Exxon has led some to believe that the guidelines may be constitutionally mandatory. See id. at 46 ("If the mission of the Due Process Clause is now seriously to regularize punishment, there is no reason why that mission should be limited to civil cases."). Exxon, however, was based on federal common law and is thus not binding on the states in either their punitive damage or criminal sentencing systems. See Exxon, 554 U.S. at 501-02.
3. Expressions of Moral Condemnation

Another similarity between punitive damages and criminal sanctions, at least according to the Court's previous holdings, is that the damages express the community's "moral condemnation" of the defendant's conduct.163 The same is true with criminal punishments.164

The Court may be backing off from this similarity, however. In its description of punitive damages in Exxon, the Court invoked Justice Holmes's bad man theory,165 which separates morality from the law.166 Justice Holmes's bad man understands the law as defined by its consequences and sees damages as just one of those consequences.167 The bad man's view of "damages as nothing more than a tax . . . remove[s] any moral onus from the conduct . . . income tax doesn't mean that earning an income is reprehensible, and thus the 'tort tax' doesn't mean that tortious conduct is reprehensible."168

Justice Holmes did not apply his theory to criminal law and punishment,169 but the Supreme Court invoked it in the context of punitive damages.170 The Court's own language also divorces morality from punitive damages—the Court wants to ensure that a defendant knows how much the damages will be so that he can choose whether to still commit the (reprehensible) conduct.171 Punitive damages seem to exemplify the inability to separate morality from the law because the

163. See, e.g., Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001); see also Owen, supra note 46, at 374 ("Punitive damages proclaim the importance that the law attaches to the plaintiff's particular invaded right, and the corresponding condemnation that society attaches to its flagrant invasion by the kind of conduct engaged in by the defendant."). But see LAFAVE & SCOTT, supra note 35, § 1.3(a), at 12 ("[T]he only real basis for distinction between crimes and civil wrongs lies in the moral condemnation which the community visits upon the criminal but not (at least not so powerfully) upon his civil wrongdoer counterpart.").

164. See LAFAVE & SCOTT, supra note 35, § 1.2(f), at 11 ("There is no doubt that society's ideas about morality . . . have had much to do with formulating the substantive criminal law."); Henry M. Hart, Jr., The Aims of the Criminal Law, 23 LAW & CONTEMP. PROBS. 401 (1958), in CRIME, LAW, AND SOCIETY 61, 64-65 (Abraham S. Goldstein & Joseph Goldstein eds., 1971) ("What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation . . . .").


167. See id. at 1565.

168. Id.

169. Id. at 1567. Justice Holmes may not have applied his theory to criminal law because "common sense . . . does not consider a jail sentence as merely a tax." Id. at 1566. The real reason, however, may have been that Justice Holmes thought that criminality was innate and that a criminal would thus not evaluate the consequences of his conduct beforehand. Id. at 1567.


171. See id.
damages are only available if the conduct was reprehensible or, in other words, immoral. But the Court’s view of punitive damages’ role of expressing moral condemnation may be diminishing.

C. Concerns About Predictability and Consistency

The Court’s concerns about the unpredictability and inconsistency of punitive damage awards are most evident in Exxon, in which the Court declared that unpredictability is the “real problem” with punitive damages. These concerns are also evident in the reprehensibility and comparable criminal sanctions guideposts, which also seek to create a predictable, objective scale of punitive damages. The fact that the Court is at all concerned with predictability in punitive damages indicates a public law viewpoint of punitive damages—these concerns are more common to public law than to private law.

The reason that predictability and consistency are greater concerns in public law may be because of the inequality of power. Generally speaking, public law pits the public or state’s interest against an individual’s interest. As an example, criminal law pits the state’s interest in protecting the public against the individual’s freedom. Because of the inequality, it is very important that public law ensure a fair process and achieve a fair result. Criminal law tries to do so through procedural protections for the defendant and measures such as the federal sentencing guidelines.

Another possible reason why predictability and consistency are greater concerns in public law is the extent of the consequences for violating the law. The consequences of violating public law may be severe: “[C]riminal sentences involve removing people from their families and putting them behind bars for years on end or even killing them.”

172. See Luban, supra note 166, at 1569 ("The existence of punitive damages clearly indicates... that the legal system is willing to punish bad men who treat compensation as merely a cost of doing business.").
174. See infra Part IV.B.1.
175. See Roscoe Pound, Law and the State—Jurisprudence and Politics, 57 HARV. L. REV. 1193, 1233 (1944) ("[P]ublic law subordinates individual to public interests... ").
176. In the criminal context, the Due Process Clause of the Fourteenth Amendment mandates additional protections for the criminal defendant. See Daniels v. Williams, 474 U.S. 327, 331 (1986); see also Fisher, supra note 150, at 17-19 (arguing that regularizing punishment to achieve predictability and consistency is constitutionally required by the Due Process Clause); Markel, supra note 127, at 274 n.123 (suggesting the inclusion of additional procedural due process protections for punitive damages that punish the public wrong).
177. Fisher, supra note 150, at 40. But see LAFAVE & SCOTT, supra note 35, § 1.3(a), at 12 ("Paying damages (especially 'punitive damages') for torts or contract breaches is not much
Private law has some concern for consistency and predictability, of course, as consistency and predictability are valid goals for all types of law. But the inequality of power and extent of consequences are not the same in private law. Private law resolves the interests of the actual parties to the dispute. No individual interest is greater than the other. Certainly, no disparity of power exists to the same extent as between the government and a mere individual. Further, the consequence of violating private law is limited to the payment of damages, something not quite as severe as possible loss of liberty.

Plus, some unpredictability and inconsistency is inevitable in private law. This is because each dispute will involve different parties and different individual interests. Specific to punitive damages, the awards have always been a bit unpredictable because a different jury awards them each time without specified guidelines.

The lack of specified guidelines to provide some consistency differs from criminal law where, even though each prosecution likely involves different victims and defendants, there is much emphasis that similarly situated defendants face and receive similar punishments. The Court’s sudden concern with unpredictability and inconsistency in Exxon indicates that the Court thinks that punitive damages are more like a public law remedy than a civil damage.

V. TORT LAW AND THE CONSTITUTIONAL LIMITATIONS ON PUNITIVE DAMAGE AWARDS

The Supreme Court has never used tort law to limit punitive damage awards. Obviously, tort law is not constitutional law. At the same time, tort law has influenced the Court’s definition of the constitutional limits on punitive damage awards—specifically tort law’s injury requirement. The Court’s holdings “have focused, almost laser-
like, not on harms to society as a whole when setting the amount of the [punitive] award, but on only the parties to the lawsuit."\textsuperscript{182} This focus was apparent even in \textit{Exxon}.\textsuperscript{183}

Tort law’s injury requirement resolves the dispute regarding the public or private law function of punitive damages. Tort liability exists only if the defendant caused the plaintiff an injury, and tort law is capable of punishment only because of the liability for causing that same injury. Any punitive damage award is thus inherently limited to punishing the defendant for causing the injury to the plaintiff, resulting in a private law conception of punitive damages.

\textbf{A. Tort Law’s Injury Requirement and the Resulting Limited Public Law Effect}

Injury is a necessary component of a tort claim.\textsuperscript{184} Without an injury, there is no tort claim. True, tort law sometimes presumes an injury,\textsuperscript{185} but this presumption merely aids the plaintiff in demonstrating that an injury occurred. Regardless of how the plaintiff does it, the plaintiff must show that the defendant caused her an injury to establish tort liability. The injury was the point of creating tort law: to provide a means of resolving disputes and compensating a plaintiff who is injured due to the defendant’s conduct.

The injury that gives rise to tort liability is to an individual plaintiff or plaintiffs, as opposed to the public as a whole.\textsuperscript{186} “[T]he only private citizen who can pursue compensation for the violation of a private right is the victim of the violation of the private right.”\textsuperscript{187} The public cannot

\begin{itemize}
\item \textsuperscript{182} Scheuerman, \textit{supra} note 135, at 905.
\item \textsuperscript{183} See Exxon Shipping Co. \textit{v.} Baker, 554 U.S. 471, 506 (2008) (suggesting that punitive damages be pegged to the compensatory damage award).
\item \textsuperscript{184} See \textit{supra} Part II.B.1.
\item \textsuperscript{185} See \textit{supra} Part II.B.1.
\item \textsuperscript{186} See Goldberg, \textit{supra} note 25, at 600 (“Part of what separates wrongs in their public aspect from wrongs in their private aspect is that something different has happened to a particular person so as to render his relationship to the wrongful conduct distinct from the general population’s.”); John C.P. Goldberg & Benjamin C. Zipursky, \textit{Tort Law and Moral Luck}, 92 \textit{CORNELL L. REV.} 1123, 1134 (2007) (“The reckless driver who hits the pedestrian has not only committed an antisocial act of a sort that entitles observers to condemn his actions . . . he has also wrongfully injured the victim. The victim is specially situated with regard to the driver’s actions . . . ”). This same distinction between individual versus societal harm is also a current hot topic in class action litigation. Specifically, the issue is whether the individual class members must each demonstrate their individual entitlement to damages. See Philip Morris USA Inc. \textit{v.} Scott, 131 S. Ct 1, 3 (2010) (granting tobacco companies’ application for stay of judgment until the Court acts upon the petition for writ of certiorari).
\item \textsuperscript{187} Sebok, \textit{supra} note 138, at 1007.
\end{itemize}
bring a claim for battery against a defendant, even if the defendant's conduct endangered and harmed the public as a whole.\textsuperscript{188}

The injury requirement even exists in tort claims created to hopefully achieve some greater public interest—person must be injured to bring that tort claim. Take the example of the tort claim created by a legislature within laws to try to prevent some of the activities that contributed to the recent mortgage foreclosure crisis.\textsuperscript{189} The aim of the law overall is to protect the public. The individual tort claim, however, exists only if an individual is injured by one of the activities prohibited in the law.

Tort law is thought to establish norms of conduct that regulate public conduct, but tort law’s injury requirement limits the potential public law effect of tort law. For instance, traditional thought is that negligence law establishes a norm that we should act reasonably. But negligence law’s only enforcement mechanism is a tort claim, which exists only if an individual has suffered an injury.\textsuperscript{190} Thus, negligence law does not create a general “act reasonably” norm. At most, it creates a norm that we should not commit unreasonable conduct that causes injury.\textsuperscript{191} If there is little chance of injury, negligence law creates no norms.

Tort law’s limited ability to establish norms and achieve a public law effect also applies to the attempt to regulate conduct through intentional torts. For instance, a battery claim is thought to create a societal norm like “do not hit others.” But the only enforcement mechanism is a tort claim, which an individual plaintiff may choose not to bring.\textsuperscript{192} The decision not to pursue the claim is highly likely if the plaintiff lacks compensatory damages. The plaintiff can still win because injury is presumed,\textsuperscript{193} but a claim for nominal damages only is economically inefficient.

Further limiting tort law’s ability to regulate public conduct is that no actionable tort exists based on attempted conduct. For instance, tort liability for battery does not exist unless contact is made. No battery claim arises from an attempted battery\textsuperscript{194}—because there is no injury

\begin{itemize}
  \item \textsuperscript{188} See id.
  \item \textsuperscript{189} See Klass, supra note 20, at 1521-22.
  \item \textsuperscript{190} The injury requirement even hampers the torts that are supposed to achieve the public interest, like torts created within an industry regulation. Again, no enforcement mechanism exists unless an individual is injured as a result of the conduct prohibited in the industry regulation.
  \item \textsuperscript{191} See Goldberg & Zipursky, supra note 186, at 1154 (“[N]egligence law enjoins drivers to drive with ordinary prudence so as to avoid causing bodily injury . . . to others . . . .”).
  \item \textsuperscript{192} See Zipursky, supra note 33, at 150.
  \item \textsuperscript{193} See supra Part II.B.1.
  \item \textsuperscript{194} The attempted battery may constitute an assault, but that is not guaranteed.
\end{itemize}
from the battery. Without liability for attempted conduct, tort liability’s ability to define norms and achieve a public law effect is weakened. Tort law has a limited ability, if any, to achieve a public law effect because of its injury requirement. Any constraints on tort law similarly affect punitive damages, a tort remedy.

B. Seeing Tort Law’s Injury Requirement within the Constitutional Limitations on Punitive Damage Awards

Tort law’s injury requirement has influenced the Court’s constitutional holdings and the limitations it has placed on punitive damage awards. All of the tangible holdings in BMW, State Farm, Philip Morris, and Exxon focus the punitive damages on the plaintiff’s injury. The plaintiff’s injury has gradually become more important within the Court’s analysis.

1. Initial Focus on the Injury and Limiting the Public Law Effect of Punitive Damages

Tort law’s injury requirement is apparent in the Court’s reasonable relationship guidepost, introduced in BMW. First, the guidepost requires a connection between the amount of punitive damages and the amount of the plaintiff’s compensatory damages. It thus constrains the amount of the punitive damage award to the plaintiff’s injury in each case. The injury is what enables tort law to punish and thus the punishment should relate to the injury and nothing else.

Additionally, the guidepost reflects the emphasis on the injury by denying that any set ratio should exist. No two injuries are the same. Different injuries and factual circumstances mean that the amounts of punitive damages awarded should also differ. The Court consistently maintains that the proper ratio between punitive and compensatory damages depends on the facts of each case. In State Farm, the Court held that only a lower ratio would be reasonable because the large compensatory damage award already included amounts to punish and deter. If the compensatory damage award does not encompass

196. See BMW, 517 U.S. at 580-83.
197. Id. at 580.
198. Id. at 582-83.
punishment and deterrence (as, traditionally, it should not), the defendant committing similar conduct should face a different ratio.

Last, this guidepost reflects tort law's injury requirement by prohibiting any consideration of the public harm that the defendant's conduct may have threatened or caused in determining the punitive damage award.200 Harm to the public does not give rise to a tort action and thus punitive damages, a tort remedy, cannot punish it.

The Court's additional holdings in BMW and State Farm also focus on the plaintiff's injury by limiting the type of conduct for which the defendant can be punished in tort. In BMW, the Court declared that punitive damages cannot punish the defendant for out-of-state conduct, which obviously did not injure the plaintiff.201 In State Farm, the Court declared that punitive damages cannot punish the defendant for unsavory business practices that differ from the conduct that injured the plaintiff.202

These decisions do not focus solely on the plaintiff's injury. But they do preclude a more excessive punishment, which may have better served the public interest. Without the state-based limitation established in BMW,203 the jury verdict would have protected all consumers of new BMWs by punishing BMW for concealing repairs to cars sold as new throughout the country. Without the similarity of conduct limitation established in State Farm,204 the jury verdict would have protected all financially weak insureds by punishing the defendant for all of its practices that took advantage of these insureds. By narrowing what could be punished, the Court limited the public law effects of these punitive damage awards.

200. Thomas B. Colby, Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs, 87 MINN. L. REV. 583, 607 (2003) ("[i]f punitive damages were punishment for the full scope of the wrong to society . . . it would make no sense to require a reasonable relationship between the amount of punitive damages and the amount of the individual plaintiff's compensatory damages."); Sebok supra note 138, at 1002 ("[i]f punitive damages truly were intended to punish public wrongs, then it would be hard to explain . . . why a punitive-damages award is measured against the injury suffered by the plaintiff rather than society . . . "); see also Zipursky, supra note 33, at 162, 168 (arguing that the public law or "objective aspect of punitive damages is virtually the only aspect that shows" in the $2 million punitive damages awarded in BMW because the plaintiff "did not really have a particularly serious grievance" against the defendant).

201. See BMW, 517 U.S. at 572. Part of the Court's analysis for this conclusion was that the plaintiff did not produce evidence that "any of BMW's out-of-state conduct was unlawful." Id. at 573. The relevance of the legality of the conduct in other states is unclear because conduct does not need to be illegal to trigger the availability of punitive damages.

202. See State Farm, 538 U.S. at 422-23.
203. BMW, 517 U.S. at 572.
204. State Farm, 538 U.S. at 422-23.
2. Philip Morris: Adopting a Private Law View of Punitive Damages

Tort law’s injury requirement is also evident in the Court’s decision in Philip Morris. The Court held that punitive damages cannot punish the defendant for harm to nonparties, meaning those who may have their own tort claims against the defendant. Punitive damages can punish the defendant only for his conduct that injured the actual plaintiff who brought the lawsuit.205

Tort law requires this result. The defendant would not be liable in tort to the nonparty if the nonparty “knew that smoking was dangerous or did not rely upon the defendant’s statements” in deciding that smoking was safe.206 If the nonparty could not establish liability in her own tort lawsuit against the defendant, then the defendant cannot be punished for its conduct to that nonparty in any tort lawsuit, much less one brought by someone other than the nonparty. This is true regardless of the reprehensibility of the defendant’s conduct.

Tort law also explains the quirk in the Philip Morris opinion that evidence of harm to others is still admissible for purposes of evaluating reprehensibility,207 but that the jury cannot punish the defendant for that harm. This is a difficult distinction, especially for a jury.208

But it is a necessary distinction because of the constraints of tort law. Although harm to nonparties may be relevant to whether the defendant deserves punishment, it cannot be the basis of punishment. Tort law cannot punish for harm to nonparties because the defendant has

205. Philip Morris USA v. Williams, 549 U.S. 346, 353-54 (2007). The result in Philip Morris is similar to Professor Zipursky’s requirement of subjective punitiveness for punitive damages to be awarded without criminal procedural protections. See Zipursky, supra note 33, at 154, 156. However, his proposed analysis consists of an evaluation of the justification for the award after it has been awarded. See id. at 168-70. Philip Morris mandates procedural protections before the award is awarded to ensure only a private law view of punitive damages, or what Zipursky calls subjective punishment. See Philip Morris, 549 U.S. at 353; Zipursky, supra note 33, at 153-54.

206. Philip Morris, 549 U.S. at 353-54.

207. See id. at 355 (“[H]arm to others shows more reprehensible conduct.”).

208. See Allen, supra note 135, at 359 (“I confess, however, to being truly perplexed as to how the Court envisions the jury complying with this requirement.”); Krauss, supra note 43, at 169 (“How jurors are to clear their minds between these two steps is unclear . . . .”). Justice Stevens, in his dissent, asserted that he does not believe that a distinction between reprehensibility versus punishing the harm to nonparties exists: “When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant’s conduct, the jury is by definition punishing the defendant . . . for third-party harm.” Philip Morris, 549 U.S. at 360 (Stevens, J., dissenting). But tort law lacks the capacity to punish the defendant for the harm to nonparty victims without a finding of liability for that harm. Thus, if Justice Stevens is correct, evidence of harm to nonparties should be inadmissible because there’s no valid purpose of the evidence.
not been found liable in tort for causing that harm. Without liability for that injury, tort law-based punishment is not possible.

The result of Philip Morris is that trial courts must provide some protection to ensure that the jury understands the reprehensibility versus punishment distinction. If procedural safeguards cannot ensure that the jury does not punish the defendant for causing harm to nonparties, punishment not possible under tort law, then the evidence of harm the nonparties should be excluded under Federal Rule of Evidence 403 and equivalent state rules. These rules exclude evidence if its minimal probative value is substantially outweighed by its prejudicial effect or possibility of causing jury confusion.

The reason for exclusion would be similar to the exclusion of prior injuries allegedly caused by a defective product in product liability claims. Evidence of prior injuries is relevant to whether a defect exists, but courts admit it only if the prior injury “occurred under circumstances substantially similar to those at issue in the case at

209. See Krauss, supra note 43, at 170 (“It is the conjunction of wrongfulness and the harm caused thereby that creates the tort obligation.”).

210. For the same reason, the Court’s reasoning in TXO that the plaintiff’s potential losses are relevant to the punitive damage award is likely no longer good law. See TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993). Despite the danger attempted conduct presents to society, it is not actionable in tort. See supra Part V.A. For instance, liability does not exist for an attempted battery because without the harmful or offensive contact, no injury has occurred and tort liability is not possible. Without liability, tort law lacks the capability to punish. Thus, punitive damages cannot constitutionally punish the defendant for the plaintiff’s hypothetical losses had the defendant’s conduct been (more) successful.

211. Philip Morris, 549 U.S. at 355.

212. See, e.g., Hayes v. SmithKline Beecham Corp., No. 07-CV-0682-CVE-TLW, 2009 WL 4912176, at *2 (N.D. Okla. Dec. 14, 2009) (finding that the risks discussed in Philip Morris “will be alleviated by the separation of the actual and punitive damages phases of trial”). The only way that separating the phases of trial would minimize the risk is if the jury forgets about the evidence before the second phase. Plus, the evidence of harm to nonparties should be relevant only to the punitive damages phase, which the district court seemed to realize by noting that the evidence would be admissible in the first phase only if it has “some bearing on the ... claim for actual damages.” Id.

213. See FED. R. EVID. 403.

214. Id. (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”); see also Michael L. Rustad, The Uncert-Worthiness of the Court’s Unmaking of Punitive Damages, 2 CHARLESTON L. REV. 459, 467 (2008) (explaining that the Philip Morris decision “will make it more difficult for plaintiffs’ counsel to introduce pattern and practice evidence against corporate defendants”); Jeremy T. Adler, Comment, Losing the Procedural Battle but Winning the Substantive War: How Philip Morris v. Williams Reshaped Reprehensibility Analysis in Favor of Mass-Tort Plaintiffs, 11 U. PA. J. CONST. L. 729, 738-39 n.50 (2009) (arguing that evidence of “the total amount of harm” should have been excluded under the state versions of Federal Rule of Evidence 403 in both State Farm and Philip Morris).

Without the substantial similarities, the evidence has only minimal probative value in showing a defect, which is substantially outweighed by the evidence's prejudicial effect and tendency to confuse. The prejudicial effect is the risk that the jury would consider it as evidence of defect or negligence even with a limiting instruction. Similarly, the evidence may confuse the jury and cause it to "lose sight of the actual injury being litigated."

The same idea holds true with regard to evidence of the defendant's causing harm to nonparties. The evidence is relevant to reprehensibility. But the evidence should be admissible only if the harm occurred under substantially similar circumstances. This requirement of similarity is not new to punitive damages. In State Farm, the Court limited evidence relevant to reprehensibility based on the dissimilarity between it and the conduct that injured the plaintiff.

Even if the harm to the nonparties was due to conduct similar to the conduct that injured the plaintiff, evidence of that harm to nonparties has minimal probative value in demonstrating reprehensibility if the harm occurred under any materially different circumstances. These material, different circumstances should include anything that negates the defendant's liability to the nonparty. Using the facts of Philip Morris, this would include the nonparty's actual knowledge of the risks associated with smoking. If the nonparty knew of the risks, the nonparty's harm did not occur under circumstances substantially similar to the plaintiff's and evidence of the nonparty's harm has limited probative value in demonstrating reprehensibility.

A material, difference circumstance, like the nonparty's knowledge of the risks of smoking, also increases the prejudicial effect of the

219. See Allen, supra note 135, at 359.
220. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 412, 422-23 (2003); see also Allen, supra note 135, at 353 (explaining that State Farm "effectively imposed evidentiary limitations on the raw material juries could use" in determining the amount of punitive damages).
221. See Philip Morris USA v. Williams, 549 U.S. 346, 354 (2007) (concluding that punitive damages cannot punish the defendant for harm to nonparties because doing so would "add a near standardless dimension to the punitive damages equation," including the unanswered question of whether punishment would be appropriate even though the harm to nonparties occurred under different circumstances).
222. See id. at 353-54.
evidence, making exclusion proper under Rule 403.\textsuperscript{223} There is the
danger that the jury will confuse the issues of reprehensibility and
punishing for that other harm, even with a limiting instruction. That
danger also creates the possible prejudicial effect that the jury will use
the evidence as a basis to punish the defendant.\textsuperscript{224}

\textit{Philip Morris} correctly reflects tort law's mandatory distinction
between reprehensibility and punishing for harm to nonparties—
punishment is not possible without a finding of liability for causing the
harm to nonparties. But evidentiary rules like Federal Rule 403 may
independently mandate the exclusion of evidence of harm to nonparties
even for reprehensibility purposes.\textsuperscript{225}

3. Resolving Tort Law and \textit{Exxon}

It is not as easy to see the influence of tort law's injury requirement
in \textit{Exxon}. \textit{Exxon} highlights principles—predictability and consistency—
that deemphasize the particular facts of each tort lawsuit, facts like the
plaintiff's injury. Still, the Court's ultimate suggestion for reform returns
to tort law's injury requirement.

\textbf{a. Conflicts Between the Rhetoric of \textit{Exxon} and Tort Law}

The Court spends the majority of the \textit{Exxon} opinion lamenting that
the current punitive damage system does not achieve predictability
and/or consistency.\textsuperscript{226} Plainly, similarly situated defendants do not face

\textsuperscript{223} If the defendant moved to exclude evidence of its harm to others under Rule 403, the
defendant would have the burden to establish the limited probative value due to dissimilar
circumstances and the prejudicial effect. \textit{See} \textit{Fed. R. Evid.} 403. This appears to be an impossible
burden. Using the facts of \textit{Philip Morris}, it would have been impossible for the defendant to show
that the circumstances surrounding the harm to the nonparties differed from the harm to the specific
plaintiff. The specific plaintiff's lawsuit "will not ... answer ... questions as to nonparty
victims[;]" including questions such as: "Under what circumstances did injury occur?" \textit{Philip
Morris}, 549 U.S. at 354. Perhaps the products liability context shows a better option. Although the
reason for exclusion of dissimilar prior injuries is also based in Rule 403 (and sometimes Rule 401),
the plaintiff has the burden to demonstrate the similarities between the injury at issue and the prior
injuries she wishes to introduce to establish defect or notice. \textit{See} \textit{Gumbs v. Int'l Harvester, Inc.}, 718
F.2d 88, 97-98 (3d Cir. 1983). \textit{But see} Keith N. Hylton, \textit{Reflections on Remedies and \textit{Philip Morris}
v. Williams}, 27 REV. LITIG. 9, 25 (2007) (proposing a system where the plaintiff would have the
initial burden to establish that an aggregate punitive damage award is appropriate, but then the
defendant should have the burden to discount the plaintiff's case as "[i]t 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").

\textsuperscript{224} \textit{See infra} note 225 and accompanying text.

\textsuperscript{225} \textit{See} \textit{Fed. R. Evid.} 403; \textit{Philip Morris}, 549 U.S. at 355 (explaining that juries may use
reprehensibility evidence to punish the defendant for the harm absent sufficient procedural
safeguards).

similar punitive damage awards. But this is normal for tort damages. Traditional thought is that both compensatory and punitive damage awards should be inconsistent among cases. With respect to compensatory damages, tort law requires personalization to the plaintiff’s injury. Because no two injuries are the same, tort law effectively mandates inconsistency and unpredictability among compensatory damage awards.

Without inconsistency, plaintiffs would not be fully compensated. Suppose that one plaintiff is an average fourteen-year-old high school student and the other is training for the Olympics. Both are paralyzed due to tortious conduct. In the criminal system, punishments for causing the paralysis would be the same. But in the tort system, the Olympic hopeful will receive more in damages because of the plaintiff’s individual characteristics. To fully compensate, the damages must focus on the specific plaintiff without regard to any other plaintiff.

Necessarily, tort law has little concern for whether similarly situated defendants pay similar amounts of compensatory damages. Defendants cause different injuries to different plaintiffs, so consistency in compensatory awards would actually be inappropriate. Even if the defendants caused injury to the same plaintiff, the defendants will likely face different amounts of compensatory damages. The second defendant will pay damages caused by the aggravation of a pre-existing condition, even if the condition resulted from the first defendant’s conduct. In tort, concerns about treating defendants fairly give way to the need to compensate the plaintiff fully.

The necessary inconsistency also occurs with non-economic compensatory damages, although there is increased debate about the

227. See id. at 506 (explaining that no standard tort injury exists).
228. Probably the only damages that are consistent across tort cases are nominal damages. These damages are not personalized to any party and merely signify that the defendant violated the plaintiff’s legal rights regardless of the egregiousness of the violation.
229. See Dobbs, supra note 57, § 3.1, at 281.
230. Goldberg & Zipursky, supra note 186, at 1140 (explaining that compensatory damage awards “often entail[] a disjunction between the sanction that a tortfeasor ‘deserves’ for his misconduct . . . and how much he must actually pay”).
231. An example of this is market share liability, which enables a plaintiff to recover compensatory damages in products liability cases based on a defective product despite her inability to demonstrate that the defendant’s conduct actually caused her injury. Instead, the burden to negate causation shifts to the defendants. In New York, the defendant will still pay damages based on its share of the market even if it can demonstrate that it did not manufacture the product that caused the plaintiff’s damages. See Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. 1989). This system sacrifices fairness to the defendant in order to better ensure compensation to the injured plaintiff. Id. at 1075, 1078 (“[T]he loss [should] be borne by those that produced the drug for use during pregnancy, rather than those who were injured by the use, even where the precise manufacturer of the drug cannot be identified . . . .”).
fairness of these damages. Juries must award an amount of damages specific to the plaintiff’s injury, including the plaintiff’s specific pain and suffering. In Haslip, the Court noted that no due process violation occurs as long as jury instructions reasonably constrain the jury’s significant discretion in awarding noneconomic compensatory damages. The Court said the same thing about punitive damages in Haslip. Exxon, however, states that punitive damages are too unpredictable and that jury instructions cannot fix the problem; maybe non-economic compensatory damages are too unpredictable as well. But if the jury’s role in awarding noneconomic compensatory damages is replaced with some objective measure, some plaintiffs will not receive full compensation for their injuries.

As with compensatory damages, the traditional thought is that punitive damage awards should differ among defendants and cases, and hence be inconsistent. Specifically, the amounts of punitive damages should vary depending on the defendant’s particular circumstances to ensure that the defendant “feels” the award. A $1 million punitive damage award may be too much punishment for someone with a small net worth, but not enough for someone with a large net worth. Similarly, a certain amount deters one defendant too much, but may not deter a wealthier defendant enough.

Long before Exxon, the Court rejected any notion of consistency among punitive damage awards: “[A] jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and

232. Several states have begun to outlaw non-economic damages in certain contexts. See, e.g., Rustad, supra note 214, at 515-16 (“In 2005 alone, roughly half of the states capped non-economic damages in medical liability cases . . .”).


234. Id.


236. Haslip saw no difference between the jury’s discretion in assessing non-economic compensatory damages and punitive damages. See Haslip, 499 U.S. at 20. Thus, Exxon should also apply to non-economic compensatory damages. See Sharkey, supra note 63, at 45 (“Surely, the same unpredictability that taints the jury’s punitive damages decision-making process would surface in the jury’s determination of noneconomic compensatory damages . . . .”). Perhaps the Court would distinguish the two by finding that jury instructions do fix any unpredictability issue with non-economic damages, although there is little guidance in jury instructions for non-economic compensatory damages. Or maybe the correct distinction is that the unpredictability is more tolerable for non-economic compensatory damages because the damages compensate, whereas punitive damages punish. If this is the distinction, it conflicts with Haslip, which saw no distinction between the jury’s discretion in assessing both non-economic compensatory damages and punitive damages.

237. See Owen, supra note 46, at 365 (explaining the different factors the jury takes into consideration when formulating a punitive damage award).
circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make. Under this line of thinking, consistency among punitive damages should not exist.

But then Exxon happened. The Court avoided the problem of making factual comparisons by simply not making any. Instead, the Court used studies encompassing all previous punitive damages (resulting from different factual circumstances), including the problematic high outliers. The Court used that data to determine that the median ratio of compensatory to punitive damages in these studies was less than 1:1. The Court then applied a 1:1 ratio to the facts of Exxon even though it involved mere recklessness—a low level of culpability. The Court’s analysis in Exxon departed from its previous hesitance to make any factual comparisons among punitive damage awards.

b. Exxon and Tort Law’s Injury Requirement

The Court’s ultimate suggestion for reform in Exxon, however, returned to tort law’s injury requirement: the Court suggests that punitive damages be pegged to the amount of compensatory damages. This suggestion heightens the importance of the injury for which the

238. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 457 (1993). After Exxon, appellate courts have compared punitive damage awards among cases in hopes of achieving consistency and predictability. See Klass, supra 180, at 193-94 (criticizing the lower courts’ comparison of opinions reviewing punitive damage awards as “arbitrary and haphazard” and problematic due to unreported decisions). The Court rejected this idea in TXO. See TXO, 509 U.S. at 457.

239. See Exxon, 554 U.S. at 497-501; see also id. at 512 (“These studies cover cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions.”). The Court does not indicate whether there were an equal number of punitive damage awards for each level of reprehensibility, which could affect the median. The Court also does not indicate the amounts of the compensatory damage awards in the cases involved in the studies. If all of the cases involved modest amounts of compensatory damages or substantial amounts of compensatory damages, that also should have affected the Court’s conclusion that a 1:1 ratio is proper in a case like Exxon that did not involve a modest amount of compensatory damages. See id. at 512-13.

240. See Sharkey, supra note 63, at 41-42. The Court’s statistical analysis in Exxon has been subject to scholarly derision. See Theodore Eisenberg et al., Variability in Punitive Damages: Empirically Assessing Exxon Shipping Co. v. Baker, 166 J. INSTITUTIONAL & THEORETICAL ECON. 5, 12-23 (2010); Sharkey, supra note 63, at 41-42.

241. Exxon, 554 U.S. at 512.

242. See id. at 513-15.

243. Compare TXO, 509 U.S. at 457 (“[N]o two cases are truly identical, meaningful comparisons of such [punitive] awards are difficult to make.”), with Exxon, 554 U.S. at 512 (“There is better evidence of an accepted limit of reasonable penalty . . . reflecting what juries and judges have considered reasonable across many hundreds of punitive awards.”).

244. Exxon, 554 U.S. at 506.
defendant is liable in tort because it is the baseline for the damages. And this is an appropriate level of importance. Tort law-based punishment is possible only because of liability for that injury and thus, the punishment should be based on that injury.

The Court’s suggested reform also diminishes the importance of components of its punitive damage jurisprudence that are not related to the injury.\textsuperscript{245} The extent of the defendant’s reprehensibility, once the most important guidepost in the Court’s constitutional analysis, is merely a factor to consider when determining the multiplier.\textsuperscript{246} Similarly, the Court evaluated the criminal sanctions for comparable conduct only to confirm its already determined 1:1 ratio.\textsuperscript{247} Admittedly, \textit{Exxon} was not a constitutional-based challenged to punitive damages.\textsuperscript{248} But just as in a constitutional challenge, the Court used the guideposts to evaluate the award.\textsuperscript{249} And the Court relegated the guideposts reflecting a public law view of punitive damages, reprehensibility and criminal sanctions, to secondary status.

Admittedly, the Court’s focus on the actual injury and suggestion to peg punitive damages to compensatory damages may not have been the result of a deliberate choice to limit punitive damages according to the injury.\textsuperscript{250} The reasonable relationship guidepost has proven to be the only one applied easily by the lower courts.\textsuperscript{251} Even if it is a convenient, workable solution, the Court does not appear to be settling. The Court has never wavered in the relevance of the relationship between the amount of punitive damages and compensatory damages.\textsuperscript{252} And this

\begin{footnotesize}
\begin{enumerate}
\item See id. at 503-04.
\item See id. at 512-13.
\item See id. at 514-15. The Court’s disregard of the criminal sanctions guidepost is a little surprising because the Court relied so heavily on the similarities in punitive damages and criminal punishments in explaining the need to reform punitive damages. Still, the Court looked elsewhere— to the plaintiff’s actual injury—in fashioning the suggested reform. See id. at 506 (suggesting pegging punitive damages to the compensatory damage award).
\item Id. at 501-02.
\item See id. at 513-14 (confirming the 1:1 ratio based on the defendant’s low level of reprehensibility and the substantial amount of compensatory damages, and the Clean Water Act fines for comparable conduct).
\item See id. at 506 (rejecting the possibility of punitive damage caps because “there is no ‘standard’ tort or contract injury, making it difficult to settle upon a particular dollar figure as appropriate across the board”).
\item See Allen, supra note 135, at 349-50 (discussing the difficulty of applying the reprehensibility guidepost as opposed to the reasonable relationship between the amount of compensatory and punitive damages guidepost); see also Sebok, supra note 138, at 1001 (explaining that ratios are attractive because of their simplicity).
\item See Exxon, 554 U.S. at 507 (“[T]he potential relevance of the ratio between compensatory and punitive damages is indisputable . . . .”).
\end{enumerate}
\end{footnotesize}
relationship is relevant because tort law's ability to punish wrongdoers is limited to punishment for causing the injury giving rise to tort liability.

Although the Court has not owned up to it, tort law is influencing its holdings in punitive damages cases. The Court repeatedly focuses on the plaintiff's injury in crafting both constitutional and common law-based limitations on punitive damage awards. What results is a private law conception of punitive damages—that they are limited to the extent of punishment and deterrence necessary to resolve the private dispute between the litigants.

VII. PREDICTING THE FUTURE: MORE LIMITATIONS ON PUNITIVE DAMAGE AWARDS

What does the influence of tort law's injury requirement mean for the future? Punitive damage awards that exceed that private law conception, that do more than resolve the dispute between the individual litigants, will likely be unconstitutional. Thus, punitive damages cannot constitutionally punish public harm. This means that if no actual injury exists, any constitutional punitive damage award would likely be minimal. Similarly, the private law conception prioritizes personalization of punitive damage awards over consistency.

A. Impossibility of Punitive Damages Serving a Public Law Function

The Court has not expressly addressed whether punitive damages can punish the defendant for causing public harm. The answer to this question is especially important to cases in which the plaintiff lacks an actual injury; if the award cannot constitutionally encompass public harm, it will be minimal. The influence of tort law's injury requirement, however, precludes any constitutional punishment for public harm within a punitive damage award. This is because the plaintiff lacks an actual injury, which is the injury that tort law has the capability to punish.

1. The Conflict Between Philip Morris and Punitive Damages Serving the State's Interests

The Court's very specific holding in Philip Morris prohibits punishing the defendant for private harms caused to nonparties who have their own tort claims against the defendant. But it does not expressly address whether punitive damages can punish the defendant for the

public harm, a conclusion that seems consistent with the Court's public law commentary that serve the state's interests and are similar to criminal punishments.

At least one lower court has noted this potential conflict. A Louisiana trial court's jury instructions explained that punitive damages "protect[] the public interest" and are awarded to "compel the wrongdoer to have due and proper regard for the rights of the public." On appeal, the court acknowledged that the instructions refer to nonparties, which Philip Morris prohibits for the purpose of punishment. But that reference was "within the context of the public's interest and safety." The Louisiana Court found no Philip Morris due process violation because the Supreme Court has repeatedly held that punitive damages serve the public interest; the damages "'further a State's legitimate interest in punishing unlawful conduct and deterring its repetition.'" Thus, any reference to the public interest within the jury instructions cannot violate Philip Morris.

The Louisiana Court did not cite it, but the Supreme Court's constant comparisons of punitive damages to criminal punishments also support the Louisiana Court's holding. Using punitive damages to punish the public harm must be constitutional because the Court has consistently maintained that punitive damages are just like criminal punishments, especially in Exxon. And that is what criminal punishments do—punish the public harm and protect the public.

The Louisiana Court's holding is consistent with former Justice Stevens's dissent in Philip Morris where he described punitive damages as "a sanction for the public harm the defendant's conduct has caused or threatened." Justice Stevens admits that he sees little difference

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256. Id. at 517.

257. Id.

258. Id. (emphasis added) (quoting Philip Morris, 549 U.S. at 352); see also Markel, supra note 127, at 1428 (explaining that his proposal of punitive damages to serve the public's interest in retribution is "exactly what the Supreme Court thinks that punitive damages may lawfully do now: serve as 'quasi-criminal' sanctions to advance the public interest in retributive justice").

259. See Exxon Shipping Co. v. Baker, 554 U.S. 471, 503-05 (2008) (analogizing criminal sanctions and punitive damages); see also supra Part IV.

260. See supra notes 34-39 and accompanying text.

between punitive damages and criminal punishments,\textsuperscript{262} which is also consistent with \textit{Exxon}. Under Justice Stevens's view, the defendant's conduct in \textit{Philip Morris} endangered the public as a whole: the defendant “engag[ed] in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers.”\textsuperscript{263} Regardless of whether those nonparty smokers could succeed in their own tort claims against the defendant, punitive damages can constitutionally punish the defendant for threatening the public's safety.

Justice Stevens articulated his public law view of punitive damages in his dissent in \textit{Philip Morris}.\textsuperscript{264} It does not seem to be a view that the majority of justices in \textit{Philip Morris} share. If the majority thought that punitive damages had the constitutional capacity to serve the public interest, there would be no reason to limit the punishment to only what the defendant did to the plaintiff.\textsuperscript{265}

At the same time, the Court's due process rationale in \textit{Philip Morris}—the inability to present defenses to the nonparties' tort claims and the lack of standards in assessing the award—does not mandate a rejection of the public law function of punitive damages.\textsuperscript{266} The inability-to-present-defenses issue should not arise because public harm emanates from the defendant's conduct that injured the specific plaintiff and any defenses to the public harm likely coincide with the defenses to the conduct to the specific plaintiff. Simpler yet, if punitive damages encompass public harm, notifying the defendant before the civil trial would ensure sufficient notice and opportunity. Similarly, there is no

\textsuperscript{262}. \textit{Id.} at 359.
\textsuperscript{263}. \textit{Id.} at 360.
\textsuperscript{264}. \textit{Id.} at 358-59.
\textsuperscript{265}. See Colby, \textit{supra} note 36, at 413 (“The majority's reasoning makes sense only if—contrary to Justice Stevens's assertion—punitive damages are not a form of punishment for public wrongs to society.”); \textit{Rietema, supra} note 254, at 1167 (discussing that \textit{Philip Morris} did not preclude punishment for the public harm resulting from harm caused to the plaintiff by the defendant).
\textsuperscript{266}. In his more recent article, Professor Colby does not (seem to) distinguish between punishment for multiple private harms versus punishment for multiple public harms—he often interchanges discussions of multiple private harms to others with discussions of the public harm. Colby, \textit{supra} note 36, at 397-98 (discussing the harm caused to an individual plaintiff versus harm done unto a large population). They are different, however, as multiple private harms are still actionable in tort, whereas, generally, public harm does not give rise to tort liability. Regardless, Professor Colby explains that the \textit{Philip Morris} holding is correct because punishing the defendant for anything more than the private wrong done to the specific plaintiff would violate due process. This explanation would prohibit punitive damages from encompassing either the defendant's causing multiple private harms and/or public harm unless heightened procedural protections applied. Additionally, in an earlier article, Professor Colby argued that punishment for multiple private harms and for public harm is unconstitutional because of the historical conception of punitive damages. \textit{See Colby, supra} note 200, at 650-55.
fear of standardless dimensions in that the punitive damage award would punish just like criminal sanctions for comparable conduct.

2. Tort Law’s Inability to Punish Public Harm

Tort law’s influence on the Court’s constitutional analysis of punitive damage awards, however, mandates a rejection of the possibility that punitive damages could fulfill anything more than a private law function.267 A tort cause of action does not arise from public harm—a particular plaintiff must suffer an injury to bring a tort claim. Similarly, tort remedies cannot address public harm. This includes even punitive damages.

Without a finding of liability for an individual injury, tort law is incapable of punishing a defendant even if his conduct threatens society and punishment would thus serve the public interest. Take the example of an assault intentional tort claim. “[T]o shoot at and miss a sleeping man cannot be a civil assault, as there is no injury, even mental, to the sleeper; but such behavior is socially dangerous enough to constitute a criminal assault.”268 If punitive damages punished the public harm created by the defendant’s conduct, they should be imposed in this situation.269 But the defendant is not liable and tort law lacks the ability to punish this socially dangerous conduct.

The same holds true with a consent defense to battery: “[T]orts are wrongs to private individuals but crimes are wrongs to the public. Thus consent of the adult injured party is a defense to intentionally inflicted torts; but in analogous situations in the field of criminal law consent of the victim may not be a defense.”270 Again, the defendant’s violent battery endangers society and if punitive damages punished public harm, a defendant should still be subject to them even if he is not liable in tort due to consent. But just as with the assault example, tort law lacks the capability to punish this socially dangerous conduct.271

The fact that tort law’s injury requirement impedes the ability of punitive damages to protect society is apparent in Professor Dan Markel’s introduction of his system of “retributive damages.”272

267. See supra Part V.B.
268. See LAFAVE & SCOTT, supra note 35, § 1.3(b), at 13.
269. See Colby, supra note 200, at 607 (“[I]f punitive damages truly were punishment for public wrongs... it should not be necessary for the plaintiff to prevail on an underlying civil cause of action in order to receive them.”).
270. LAFAVE & SCOTT, supra note 35, § 1.3(b), at 14.
271. See Goldberg & Zipursky, supra note 186, at 1138 (explaining that tort law differentiates between creation of a risk of injury versus causation of actual injury).
272. Professor Markel advocates a pluralistic approach to punitive damages—one approach being retributive damages. See Markel, supra note 127, at 259-60.
Professor Markel introduces a punitive damages system that would achieve the "public's interest in retributive justice." 273 In his system, one of the first things Professor Markel does is eliminate the injury requirement, 274 thus enabling claims despite the lack of an injury. This is necessary because conduct that does not cause an injury, like drunk driving or attempted criminal conduct, still poses a risk to the public and thus must be punishable. 275 Professor Markel does not address whether traditional tort claims would need to be rewritten in his retributive damages scheme. 276 But it seems necessary to ensure that the public interest in punishment is achieved. Otherwise, a defendant could endanger the public by shooting at a sleeping person and not face any punishment. Similarly, a defendant could endanger the public by committing battery and not face any punishment if the victim consented. Unless these traditional tort claims are rewritten, retributive damages would not achieve the public's interest in retributive justice.

273. Id. at 246.
274. See id. at 279-80. Professor Markel proposes a pecking order for who would be able to bring the claim for retributive damages. First, the tort plaintiff actually harmed would have the choice to bring the claim. See id. at 281. If no one was harmed or the plaintiff chose not to bring the suit, a private attorney general ("PAG") would notify the state of the claim and the state would then have the opportunity to bring the cause of action. Id. If successful, the PAG would receive a reward for notifying the state. Id. If the state declined to bring the suit, the PAG would be able to retain an attorney and bring the claim. Id at 281-82. Professor Markel does not explain how this pecking order would fit within statutes of limitations. Specifically, he does not explain whether the tort plaintiff would have less time than the full statute of limitations to choose to bring the claim. It is not immediately clear how this system would work if a statute of limitations begins to accrue at the time of the plaintiff's injury or later constructive discovery of the injury.

275. Id. at 279 (explaining that certain "harmless crimes" such as drunk driving are punishable even when there is no actual harm caused to a plaintiff because the conduct is "worthy of condemnation"). See also id. at 283 (stating that a plaintiff's choice not to bring a tort claim "not only risks leaving the state unaware of the defendant's misconduct . . . but it leaves the defendant a risk to others and possibly again to the victim"). This language is similar to the type of harm that criminal law punishes. See supra notes 34-37 and accompanying text.

276. Professor Markel admits that "under a traditional torts scheme," in cases without an injury, "the wrongdoer escapes legal responsibility." Markel, supra note 127, at 283. The dramatic extent of Professor Markel's suggested reforms alone may demonstrate tort law's inability to achieve a public law goal without becoming unrecognizable. Owen, supra note 34, at 190 (characterizing Professor Markel's suggested reforms as "radical"). But Professor Markel did not intend to fit his proposal of retributive damages within tort law constraints. See Markel, supra note 37, at 284 (explaining that his "concern is not tort law's past, or even its present, but its future"). However, Professor Markel argues that his retributive damages system fits within the Supreme Court's limitations on punitive damages. See Markel, supra note 127, at 327. This Article disagrees: punitive damages cannot constitutionally punish the public harm because of the heavy influence of tort law's injury requirement within the constitutional limitations the Court has developed. Because of that influence, any proposal of punitive damages that strays from tort law's injury constraint would not be constitutional under the current limitations. Of course, if punitive damages were completely separated from tort law, as Professor Markel seems to advocate, new constitutional limitations may develop and likely look similar to those limitations imposed on crimes.
Simply put, tort law lacks the capability to punish the defendant for anything other than causing the injury to the individual plaintiff—that injury enables liability and the capability of punishment. The influence of tort law's injury requirement means that punitive damages cannot constitutionally punish the defendant for anything more than causing the injury to the individual plaintiff.277 Anything more would exceed the state's limited interests in punishment and deterrence within resolving the dispute between the private tort litigants.

3. Punitive Damages Without Underlying Compensatory Damages

Certain intentional torts presume injury. Without an injury, however, the plaintiff can receive only nominal damages.278 Some states allow plaintiffs to recover punitive damages even if the plaintiff recovers only nominal damages.279 But what can the punitive damages punish?280 One of the most famous cases allowing punitive damages supported only by nominal damages is Jacque v. Steenberg Homes, Inc.,281 in which the Wisconsin Supreme Court determined that a punitive damage award of $100,000 for trespass was not unconstitutionally excessive.282

The court purported to evaluate the award under the constitutional guideposts,283 but declined to apply two of the guideposts. Specifically, the court declined to compare the punitive damage award to the nominal damage award because it "may not reflect the actual harm caused."284 The court also declined to consider the criminal sanction for comparable

277. Practically, lower courts should cease using any jury instructions that incorporate the public interest. Also, lower courts should exclude evidence of harm to nonparties if procedural protections are insufficient to help the jury distinguish between considering the evidence for purposes of reprehensibility versus punishing the defendant for that harm. See supra notes 219-25 and accompanying text (arguing for exclusion of evidence of harm to nonparties under Federal Rule of Evidence 403).

278. See DOBBS, supra note 57, § 3.3(2), at 296.

279. In the states that require underlying compensatory damages for punitive damages to be awarded, tort law and punitive damages have an even more limited ability to regulate conduct and serve the public interest. The defendant has committed an intentional tort, obviously condemnable conduct, and thus likely endangers society. But in these jurisdictions, tort law still cannot punish the wrongdoer unless the conduct has caused actual damages, like actual medical expenses. See generally Part V.A.


281. 563 N.W.2d 154 (Wis. 1997).

282. Id. at 163.

283. The Wisconsin Supreme Court's decision was not appealed to the United States Supreme Court, which has the final say on the application of the Due Process Clause of the Fourteenth Amendment.

284. Jacque, 563 N.W.2d at 164.
conduct, a maximum $1000 fine, because it was insufficient to deter a trespasser.\textsuperscript{285}

Instead, the Wisconsin Supreme Court relied heavily on the public harm caused by the trespass in affirming (and justifying) the award. “Society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner.”\textsuperscript{286} The Wisconsin Supreme Court’s emphasis of the public harm makes sense. Without it, the punitive damage award seems too severe because the individual plaintiff suffered no actual injury.

But based on the influence of tort law’s injury requirement on the constitutional limitations on punitive damage awards, punitive damages cannot punish the defendant for the public harm his conduct caused. Thus, a constitutional award in\textit{Jacques} cannot go beyond the interests of the individual landowner. An award punishing the defendant for anything more than causing the plaintiff landowner’s injury exceeds the state’s limited interest in any punishment and deterrence necessary to resolve the private dispute between the landowner and trespasser. Because the plaintiff suffers no actual injury, any constitutional punitive damage award supported only by nominal damages will likely be minimal.\textsuperscript{287}

\textbf{B. At Most, Concerns for Consistency and Predictability are Secondary}

Another conflict that exists in the Court’s holdings and its commentary is between consistency and personalization. The Court’s focus on the plaintiff’s injury emphasizes personalization of each punitive award to the facts of the case, exemplifying a private law view of punitive damages.\textsuperscript{288} \textit{Exxon}, on the other hand, emphasizes consistency among multiple punitive damages—a goal more common to public law.\textsuperscript{289} One of these emphases must give. It is not possible to

\begin{itemize}
\item \textsuperscript{285} Id. at 165 (commenting that the criminal sanction “failed to deter [defendant’s] egregious misconduct”). In discussing the public’s interest in punishing the trespass, the court expounded: “People expect wrongdoers to be appropriately punished. Punitive damages have the effect of bringing to punishment types of conduct that, though oppressive and hurtful to the individual, almost invariably go unpunished by the public prosecutor.” Id. at 161. This language is similar to Professor Markel’s proposal for retributive damages to step in for laws that the criminal justice system underenforces due to “scarce investigative and prosecutorial resources.” Markel, supra note 127, at 283.
\item \textsuperscript{286} \textit{Jacque}, 563 N.W.2d at 160.
\item \textsuperscript{287} But cf. Colby, supra note 36, at 468 (explaining that “eliminating [punitive damages] and focusing only on the private wrong to the individual victim will result in underdeterrence”).
\item \textsuperscript{288} See supra Part V.B.2.
\item \textsuperscript{289} Exxon Shipping Co. v. Baker, 554 U.S. 471, 502 (2008).
\end{itemize}
achieve consistency, especially the type of consistency that the federal sentencing guidelines achieve, if each punitive damage award must be specific to the facts of the case.

Tort law’s influence on the Court’s constitutional analysis resolves this inherent conflict. Any punishment must be specific to the injury that the defendant caused the plaintiff because tort law’s ability to punish depends on that injury. Any desires for consistency or predictability must give way to the need to make each punitive damage award specific to the plaintiff’s injury.

Since Exxon, numerous lower courts have compared punitive damage awards to those in previous cases. This must stop—the propriety of each punitive damage award depends on the facts of each case. Even if levels of culpability are similar, the Court looks to the injury requirement of tort law in determining the constitutionality of punitive damage awards and no two injuries, or plaintiffs, are the same. As the Court stated in TXO, “meaningful comparisons of such awards are difficult to make” because of their factual dependence. The influence of tort law’s injury requirement mandates that this sentiment remains true today.

VIII. CONCLUSION

The Supreme Court has toyed with both public law and private law conceptions of punitive damage awards. These conceptions can conflict and lower courts have started to notice, especially after Philip Morris. The punitive damage award cannot punish the defendant for causing harm to nonparties, but can it punish the harm that the defendant’s conduct caused to the public as a whole? Philip Morris seems to narrow the focus to the plaintiff’s injury, but the Court has consistently maintained that punitive damages serve the state’s interests in punishing the wrongdoer to protect the public and are obviously similar to criminal punishments.

290. See supra Parts V.A. and VI.A.2.
291. See, e.g., JCB, Inc. v. Union Planters Bank, NA, 539 F.3d 862, 877 (8th Cir. 2008) (reducing the punitive award to match comparable cases); see also Klass, supra note 180, at 193 (“[S]ince Exxon, courts have carefully surveyed prior opinions reviewing punitive damages verdicts to ensure their ratios and punitive damages awards are in line with those prior cases.”).
292. Both the reasonable relationship guidepost and Exxon itself note that the proper ratio between compensatory and punitive damages depends on the specifics of the case. Regardless of reprehensibility, the amount of the compensatory damage itself can mandate a smaller ratio. See Exxon, 554 U.S. at 506.
This conflict is especially problematic for punitive damage awards supported only by nominal damages. The injury to the plaintiff is presumed, but is practically non-existent. Any significant punitive damage award looks like it does more than resolve the private dispute between the parties, a dispute that did not even involve an actual injury. This should not be an issue if the damages have the capacity to serve a public law function.

The Court’s most recent opinion in *Exxon* further exemplifies the differing conceptions, but in a different way. The Court’s focus was to reform punitive damages to make them more predictable and thus more consistent among tort cases. This is similar to the consistency among criminal punishments, which punishes the public harm instead of the individual injury. But *Philip Morris* mandates that the award be specific to the plaintiff’s injury, which will differ in each tort claim. What is more important—consistency or specificity?

Tort law is a proper place to look for answers; the influence of tort law’s injury requirement is evident in the Court’s opinions. The Court has repeatedly returned to the plaintiff’s injury in crafting both constitutional and common law-based limitations on punitive damage awards. This makes sense because tort law lacks the capacity to punish without liability and liability cannot exist unless the defendant caused the plaintiff an injury. The injury enables punitive damages and the damages should thus encompass only that individual injury. Constitutionally then, punitive damages can punish the defendant only for causing the plaintiff’s injury.

Punitive damages cannot constitutionally punish the defendant for causing public harm. Punitive damages encompassing public harm do more than is justified by the limited state interest in resolving the private dispute between the individual litigants. Contrary to some of the Court’s previous statements, punitive damages do differ from criminal punishments as punitive damages cannot punish public harm.

Because punitive damages cannot constitutionally punish the defendant for causing public harm, any punitive damage award should be minimal when supported only by nominal damages. This is a necessary result because no actual injury occurred, leaving little for punitive damages to punish. The limited scope of punishment also mandates that any concerns for consistency in punitive damage awards must give way to the need to ensure that a punitive damage award resolves the specific dispute.

Thus, if a defendant shoots a gun into a movie theater and injures the plaintiff, the plaintiff may be able to recover punitive damages in her battery claim against the defendant. But to be constitutional, those
punitive damages must only punish the defendant for the injury he caused to the plaintiff. It is true that the defendant’s conduct endangered others in the movie theater and society as a whole. But tort law’s influence on the constitutional limitations on punitive damage awards mandates that the award be specific to the injury that enables the tort claim—the injury to the individual plaintiff.