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DEFECTIVE PUNITIVE DAMAGE AWARDS

Jill Wieber Lens*

Abstract

Private redress theories of punitive damages recognize an individual victim's right to be punitive. That right exists because the defendant knew its conduct would probably cause the victim a severe injury, yet the defendant still acted, willfully injuring the victim. The injured victim can seek and obtain punitive damages to punish the defendant for disrespecting her rights.

This Article is the first to apply private redress theories of punitive damages to claims involving a defective product. This application is unexpectedly difficult because of the importance of evidence of harm to nonparties in establishing defect, and because the defendant's knowledge of the probable injury was not specific to the injured victim but instead general to all potential victims.

Absent special circumstances, the manufacturer disrespected each of the injured victims in the same way. Consistent with private redress theories, each injured plaintiff can seek punishment for that disrespect. But the disrespect is not unique and each injured plaintiff should receive an identical punitive damage award.

I. INTRODUCTION

If a manufacturer sells a defective product, that product will likely injure many victims. If those victims successfully sue, they can recover compensatory damages for their injuries. If the manufacturer also acted willfully or recklessly in injuring the victims, the victims may also recover punitive damages. Each victim will bring her own claim against the manufacturer, however, meaning that each victim could recover a different amount of punitive damages. This lack of consistency is not problematic. As the Supreme Court long ago explained in *TXO Production Corp. v. Alliance Resources Corp.*,¹ “a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make.”²

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¹ 509 U.S. 443 (1993).

² *Id.* at 457.

TXO was the last time the Supreme Court found a punitive damage award constitutional.³ Much has changed. The Court recognized numerous constitutional limitations,⁴ which have affected scholarly debate regarding theoretical conceptions of punitive damages. The conception that best reflects those constitutional limitations is a private redress theory. Under private redress theories, punitive damages provide plaintiffs redress for the willful or reckless disrespect caused by defendants. This personalization of the punitive damage award, specific to the disrespect to the individual victim, should similarly create inconsistent awards as each case will have its own facts and circumstances, just as the Court described in *TXO*.

However, victims injured by the same defective product will rely on the same facts. Plaintiffs seeking to establish either a design or warning defect will introduce evidence of the fact that the product injured many victims.⁵ Those same plaintiffs, if they seek punitive damages, will also introduce evidence of another shared fact—that the manufacturer knew of the probable injury its product would cause, yet still sold it.⁶ Product defect claims are somewhat unique because the success of an individual plaintiff depends on her showing the defendant similarly and knowingly injured others.

Private redress theories do not explicitly contemplate the possibility of identical awards but victims injured by the same defective product are disrespected in the same way. Crudely put, victims injured by a defective product are interchangeable. Their compensable injuries will differ, but the manufacturer disrespected them identically. Punitive damage awards based on that identical disrespect should also be identical. The collection of identical punitive damage awards then appropriately punishes the manufacturer for what it did—knowingly endangering many people by selling a defective product.

Part II explains private redress theories of punitive damages and how the Court's various constitutional limitations on punitive damages support those theories. Part III examines the importance of nonparty harm in product defect claims, including its role in demonstrating defect and the fact that the manufacturer's reprehensible conduct was generally directed at all those injured by the defective product. Part IV applies private redress theories to product defect claims. It describes how the manufacturer disrespects each injured victim identically with the defective product, and suggests reforms to achieve a system where victims receive identical punitive damage awards. Part V briefly concludes.

³ *Id.* at 462.

⁴ *See infra* Part II.B.

⁵ *See infra* Part III.A.

⁶ *See infra* Part III.B.

II. THE CURRENT PROMINENCE OF PUNITIVE DAMAGES UNDER PRIVATE REDRESS THEORIES

Generally, a state can impose punitive damages to punish and deter tortfeasors. Punitive damages are available to a plaintiff if she can establish that the defendant's conduct was "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."⁷ A defendant acts with reckless indifference when she consciously disregards the fact that her conduct creates a highly probable risk of death or substantial physical harm to another.⁸ The jury decides whether the defendant acted with evil intent or recklessly. The jury also decides how much to award in punitive damages.⁹

The standards for imposing punitive damages are well established. The concept behind what punitive damages can and should do—either punish certain conduct or deter certain actors—has been subject to much debate. The current prominent conception of punitive damages is as a mechanism for private redress. This conception is the most consistent with the various constitutional limitations the Court has placed on punitive damages.

A. Private Redress Theories of Punitive Damages

Professors Thomas Colby, Benjamin C. Zipursky, and Anthony Sebok each present theories of punitive damages based on private redress. Although their reasoning differs, all three conclude that punitive damages must be limited to redressing the plaintiff for the defendant's disrespect.

⁷ RESTATEMENT (SECOND) OF TORTS, § 908(2) (AM. LAW INST. 1979); *see also* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 3.11(2) at 319 (2d ed. 1993) (stating that courts allow the recovery of punitive damages "if [the defendant] is malicious . . . reckless . . . oppressive, evil, wicked, guilty of wanton or morally culpable conduct, or shows flagrant indifference to the safety of others").

⁸ RESTATEMENT (SECOND) OF TORTS, § 500, cmt. b (AM. LAW INST. 1965).

⁹ *Id.* at § 908 cmt.d.

1. *Professor Thomas Colby*

Professor Colby criticizes “total harm” punitive damages that punish the defendant for the harm it caused to the plaintiff and others.¹⁰ First, he explores the history of punitive damages.¹¹ After reviewing the English tradition of punitive damages and American courts’ incorporation of it, Colby concludes that “punitive damages, even when regarded as punishment, were consciously limited to the amount necessary to punish the defendant for the wrong done, and the harm caused, to the individual plaintiff only.”¹²

Colby then explains the importance of this history—“[p]unitive damages owe their constitutionality solely to their history.”¹³ If punitive damages no longer reflect their historical conception “as punishment for private wrongs,” it would be difficult, if not impossible, to explain their constitutionality.¹⁴ Moreover, if punitive damages punished more than the private wrong—the wrong to the public—punitive damages would be “all but indistinguishable from criminal punishment, but [without] afford[ing] any criminal procedural safeguards.”¹⁵ Punitive damages punishing more than the private wrong to the specific plaintiff are thus unconstitutional.¹⁶

¹⁰ See generally Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 584, 658–62 (2003) (recommending that society should eliminate “total harm” punitive damages).

¹¹ *Id.* at 614–30.

¹² *Id.* at 628.

¹³ *Id.* at 643.

¹⁴ *Id.* at 591.

¹⁵ *Id.*

¹⁶ Professors Zipursky and Sebok criticized some of Professor Colby’s reasoning. Specifically, Professor Zipursky criticizes the idea that procedural safeguards would still not be required even if punishment is for private wrong, Colby’s definitions of public versus private wrongs, and his reliance on the punishment and deterrence purposes of punitive damages because it undercuts his point. See Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 142–44 (2005). Professor Sebok questions whether Professor Colby’s historical account is accurate, why procedural safeguards would not still be required for punishment of private wrongs, and for “transfer[ring] the structural relationship between wrong and sanction found in public law to private law.” See Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1003–07 (2007).

In his later work, Professor Colby answered those criticisms. See Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L. J. 392, 450–57 (2008) [hereinafter Colby, *Clearing the Smoke*]. He addresses why punishment for private wrongs would not require criminal procedural protections: that the Court has drawn such a distinction and “[a]s punishment for private wrongs, punitive damages really do serve a very different goal from the one that triggers criminal procedural safeguards.” *Id.* at 454.

Professor Colby later explains that *Philip Morris USA v. Williams*¹⁷ signaled the end of “total harm” damages.¹⁸ He disagrees with the procedural due process based reasoning,¹⁹ but agrees with the conclusion that punitive damages can, constitutionally, only punish private wrongs: “The Constitution thus mandates that, absent criminal procedural safeguards, punitive damages may be employed as punishment for private wrongs, but not as punishment for public wrongs.”²⁰

2. Professor Benjamin C. Zipursky

Professor Zipursky presents an interpretive theory of punitive damages, explaining that punitive damages have a “double aspect problem.”²¹ He later labels those two aspects as “the private redress conception” and “the noncompliance sanction conception.”²²

The private redress conception is based in civil recourse theory, which he and Professor John Goldberg introduce.²³ Civil recourse theory states that tort law is “about respecting the rights between the private parties” and enabling “individuals who have been wronged to seek redress through the courts for having been wronged.”²⁴ When the defendant acts willfully, the “response entitlement” includes the ability to seek more than damages to compensate for the injury.²⁵ The plaintiff is entitled to be punitive and inflict an injury on the defendant in the form of punitive damages.²⁶

¹⁷ 549 U.S. 346 (2007).

¹⁸ Colby, *Clearing the Smoke*, *supra* note 16, at 400.

¹⁹ *Id.* at 413 (“The majority’s reasoning makes sense only if . . . punitive damages are not a form of punishment for public wrongs to society.”). *See also id.* at 412 (criticizing the Court’s procedural due process bases because “the judicial system does not care whether the defendant would be liable to each and every one of its alleged victims in tort” when punishing public harm).

²⁰ *Id.* at 455.

²¹ Zipursky, *supra* note 16, at 129–30 (explaining that punitive damages “are in part like fines collected by the bounty hunters who prosecute tort cases, and they are in part like damages awarded in a civil action.”).

²² Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1777 (2012) [hereinafter Zipursky, *Palsgraf*].

²³ *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 972 (2010).

²⁴ Zipursky, *Palsgraf*, *supra* note 22, at 1777–78.

²⁵ *Id.* at 1779. *See also* Zipursky, *supra* note 16, at 151 (explaining that the “plaintiff is entitled to go beyond making whole; she is entitled to *be punitive*. This permission exists because of the manner in which she was wronged—willfully and maliciously.”). Professor Sebok argues that there is a “piece missing from Zipursky’s argument” because the private redress model “seems to be nothing less than the power to deliver the wrongdoer to the court for punishment based ‘on the defendant’s conduct and character.’” Sebok, *supra* note 16, at 1026–27.

²⁶ Zipursky, *Palsgraf*, *supra* note 22, at 1781.

The noncompliance sanction conception is a public-law model. The plaintiff is essentially a “private attorney general . . . bringing the defendant’s wrongful conduct to the attention of a jury, which is then supposed to select a financial penalty that will send a strong deterrent message to the defendant about the wrongfulness of his conduct.”²⁷ This idea of using punitive damages to deter corporate misconduct is “largely a development of the twentieth century.”²⁸

Professor Zipursky introduces these two aspects to help explain the constitutionality of a punitive damage award: that “status . . . turns on whether the imposition of punitive damages should be understood as a matter of private redress or as a noncompliance sanction.”²⁹ If the state is empowering the plaintiff to be punitive as a part of her seeking her own private redress consistent with the private redress conception, the punitive damage award is constitutional if imposed under normal tort law procedural protections.³⁰ But if the state is empowering the plaintiff to act like an attorney general and effectively enforce state sanctions consistent with the noncompliance section conception, then criminal procedural protections are constitutionally required.³¹

To tell the difference, Professor Zipursky advocates using what he calls the nonparty-harm rule from *Philip Morris*: “Where the jury is asked to punish the defendant for harm to a person who is the plaintiff or is represented by the plaintiff, it is prima facie permissible for the court to allow punitive damages, because they empower the plaintiff to redress the injury to herself”³² But, if “the jury is asked to punish the defendant for harm to a person who is neither the plaintiff nor someone represented by the plaintiff . . . [the court] must infer that the award is intended in part as a noncompliance sanction” and is unconstitutional because of the lack of procedural protections.³³

3. Professor Anthony Sebok

Professor Sebok seeks to provide an interpretive and adequate theory of punitive damages. He first looks to history, explaining that early English punitive damage cases “focus[ed] on the insulting and humiliating character of the tortfeasor’s act.”³⁴ Later American cases similarly imposed punitive damages in cases where the defendant consciously disdained the plaintiff’s rights, thereby expressing disrespect “similar to that expressed by an act of insult or humiliation.”³⁵

²⁷ *Id.* at 1780–81.

²⁸ Benjamin C. Zipursky, *Punitive Damages After Philip Morris USA v. Williams*, 44 CT. REV. 134 (2007) [hereinafter Zipursky, *Punitive Damages*].

²⁹ Zipursky, *Palsgraf*, *supra* note 22, at 1785.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1787.

³³ *Id.*

³⁴ Sebok, *supra* note 16, at 1009.

³⁵ *Id.* at 1013.

After discussing this history, Professor Sebok turns to philosopher Jean Hampton's work on moral injuries: "A person behaves wrongfully in a way that effects a moral injury to another when she treats that person in a way that is precluded by that person's value, and/or by representing him as worth far less than his actual value."³⁶ Sebok then explains that "[p]unishment is the appropriate response to impermissible exercises of power because it is a form of defeating the wrongdoer."³⁷ That punishment must be within a claim brought by the victim because "[n]o one else can establish the victim's true value" and "nothing can establish the truth except the wrongdoer's own defeat by the victim."³⁸ Sebok recharacterizes Hampton's retributive idea as one of personal revenge.

Professor Sebok then applies this revenge concept to civil recourse theory, explaining that the right to redress is personal to the injured plaintiff.³⁹ The plaintiff has a right to her tort claim and to punitive damages when the defendant violates two rights: "[t]he primary private right (to physical security, property, etc.) and the right to be treated as someone deserving to have those primary private rights respected by others (or at least the defendant)."⁴⁰ The plaintiff has control and the "right to decide whether and how the wrongdoer will suffer punishment."⁴¹ She "argu[es] for punishment based on reasons that she hopes the court will take as objectively valid" and, if accepted, "[t]he victory of her argument for punishment (and not the state's) . . . is her redress."⁴²

Although Professors Colby, Zipursky, and Sebok "take very different routes to get there," they "arrive at nearly the same place."⁴³ They all argue that punitive

³⁶ *Id.* at 1018 (quoting Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1661 (1992)).

³⁷ *Id.* at 1019.

³⁸ *Id.* at 1020.

³⁹ *Id.* at 1023–24.

⁴⁰ *Id.* at 1014.

⁴¹ *Id.* at 1029.

⁴² *Id.*

⁴³ Colby, *Clearing the Smoke*, *supra* note 16, at 422, n. 125. Professor Colby admits that his argument "builds upon the important work of Anthony Sebok and Benjamin Zipursky" and that when he states that "punitive damages are punishment for private wrongs," he means that "punitive damages are a form of legally sanctioned private revenge, designed to vindicate a plaintiff's legal right to be punitive in a court of law." *Id.* Similarly Professor Zipursky admits that his view that the plaintiff is "allowed to be punitive" has a "quality of vengefulness." Zipursky, *supra* note 16, at 154. Professor Sebok focuses on the vengeful quality of punitive damages, calling them a form of state-sanctioned revenge. Professor Zipursky mentions this function but, consistent with civil recourse theory, seeks to explain what punitive damages are separate from their possible functions. *Id.* Still, both Professors Sebok and Zipursky cite to Zipursky's *Palsgraf* article to explain the personal nature of punitive damages. *Id.* at 150; Sebok, *supra* note 16, at 1024. Also, both look to the original English tort law role of punitive damages addressing the defendant's insult of the plaintiff. Zipursky, *Palsgraf*, *supra* note 22 at 1779 (explaining that his private redress conception of punitive damages "comes close to capturing the original role of punitive damages in English tort law"); Sebok, *supra* note 16, at 1008–13

damage awards are based on the defendant's disrespect to the plaintiff,⁴⁴ and that the punitive damage award serves as redress for the private wrong the plaintiff suffered.⁴⁵

B. How Constitutional Limitations Reflect Private Redress Theories

The Supreme Court has not weighed in on the "correct" theoretical conception of punitive damages.⁴⁶ But the Court has been active in defining constitutional limitations on punitive damages. These limitations affect the theoretical conception of punitive damages because they restrict what the state can seek to accomplish when imposing punitive damages.

Before the Court began defining constitutional limitations for the damage, it "repeatedly referred to punitive damages as punishment for 'reprehensible conduct,' which would seem to include all consequences thereof."⁴⁷ In *BMW of North America, Inc. v. Gore*,⁴⁸ a products liability case based on fraudulent misrepresentation, however, the Court introduced three guideposts to test whether

(describing the English conception of punitive damages).

⁴⁴ Both Professors Zipursky and Sebok offer interpretative theories of punitive damages, not normative ones. Thus, they do not necessarily make arguments regarding how punitive damages should be conceived, but instead how punitive damages are conceived. Zipursky, *supra* note 16, at 163; Sebok, *supra* note 16, at 1026.

⁴⁵ One place they arrive at is discounting deterrence's involvement with punitive damages. Zipursky believes that deterrence is relevant only to the noncompliance sanction function, for which criminal protections are necessary. *See* Zipursky, *supra* note 16, at 155, 170. Similarly, Sebok argues that under his model, punitive damage awards are not a "form of public law (serving the state's interest in deterrence or retribution)." Sebok, *supra* note 16, at 977–89, 1032. Numerous scholars also believe that the Supreme Court has abandoned the deterrence purpose of punitive damage. *See, e.g.*, 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, *Clearing the Smoke*, *supra* note 16, 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 trump considerations of . . . deterrence.").

⁴⁶ It is unlikely that the Supreme Court will ever do so. The theoretical conception of punitive damages—what they should punish—is a question of state law, meaning only the highest state court can resolve the conceptual question.

⁴⁷ Colby, *supra* note 10, at 603 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). Consistent with this and before *Philip Morris*, many scholars introduced theories enabling punitive damages to achieve broader, public goals. *See, e.g.*, Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 877 n.13 (1998); *Ciraolo v. City of New York*, 216 F.3d 236, 244 (2d Cir. 2000) (Calabresi, J., concurring).

⁴⁸ 517 U.S. 559 (1996).

a punitive damage award is “grossly excessive” and thus unconstitutional.⁴⁹ The first, and “most important” guidepost, is whether the damages are commensurate to the level of reprehensibility of the defendant’s conduct.⁵⁰ The second guidepost looks at the punitive damage award’s “ratio to the actual harm inflicted on the plaintiff,” and whether the punitive damages “bear a ‘reasonable relationship’ to [the] compensatory damages” awarded.⁵¹ The last guidepost is a comparison of the punitive damage award to the civil or criminal penalties imposed for comparable conduct.⁵²

No clear theoretical conception emerges from the guideposts. But the reasonable relationship guidepost suggests a need to focus on the private wrong to the individual plaintiff. “[I]t 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” if “punitive damages were punishment for the full scope of the wrong to society”⁵³

The Court in *BMW* also followed a private redress conception when it discussed how punitive damages cannot punish a defendant for conduct committed in another state.⁵⁴ In the next punitive damages case after *BMW*, *State Farm Mutual Auto Insurance Co. v. Campbell*,⁵⁵ the Court stated that punitive damages cannot punish a defendant for “dissimilar acts, independent from the acts upon which liability was premised.”⁵⁶ These limitations on the scope of punishment—although not yet specific to the defendant’s injury to the plaintiff—suggest that punitive damages cannot punish the defendant for every consequence of its conduct.

The Court’s next constitutional limitation on punitive damages in *Philip Morris USA v. Williams* further limited the scope of possible punishment.⁵⁷ The plaintiff, the widow of a man who died from lung cancer, sued a cigarette manufacturer for negligence and fraud.⁵⁸ The fraud claims were based on the defendant’s false representations “that there was a legitimate controversy about

⁴⁹ *Id.* at 574–75.

⁵⁰ *Id.* at 575.

⁵¹ *Id.* at 580 (citation omitted).

⁵² *Id.* at 583. See generally Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 HASTINGS L. J. 1257 (2015) (providing a thorough review of how lower courts apply the guideposts).

⁵³ Colby, *supra* note 10, at 607. But see *infra* note 163 (discussing Sebok’s opinion of the reasonable relationship guidepost).

⁵⁴ *BMW*, 517 U.S. 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 tortfeasors’ lawful conduct in other States.”).

⁵⁵ 538 U.S. 408 (2003).

⁵⁶ *Id.* at 422–23.

⁵⁷ *Philip Morris USA v. Williams*, 549 U.S. 346, 357–58 (2007).

⁵⁸ *Williams v. Philip Morris Inc.*, 48 P.3d 824, 828 (Or. Ct. App. 2002), *vacated sub nom.* *Philip Morris USA Inc. v. Williams*, 540 U.S. 801 (2003).

whether there was a connection between cigarette smoking and human health.”⁵⁹ Plaintiff alleged that the defendant made these representations “intend[ing] to encourage smokers to continue to smoke and not to make the necessary effort to stop smoking.”⁶⁰ The jury found the defendant liable for negligence and fraud.⁶¹

In closing arguments, the plaintiff’s attorney mentioned that the defendant had made these misrepresentations to many more people than the individual plaintiff: “It’s fair to think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. It’s more than fair to think about how many more are out there in the future.”⁶² The plaintiff’s attorney further encouraged the jury to think of “how many people do we see outside . . . smoking cigarettes? For every hundred, cigarettes that they smoke are going to kill ten through lung cancer.”⁶³

The jury awarded \$79.5 million in punitive damages.⁶⁴ Philip Morris’s main argument on appeal was that the \$79.5 million punitive damage award was unconstitutional because it “represented punishment for its having harmed others” and not just the plaintiff to the lawsuit.⁶⁵ The Supreme Court agreed: “We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now.”⁶⁶

The Court found that punishment for nonparty harm violates procedural due process in two ways.⁶⁷ First, it deprives the defendant the opportunity to defend

⁵⁹ *Id.* at 832.

⁶⁰ *Id.* at 832–33.

⁶¹ *Id.* at 828.

⁶² Joint App., *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (No. 05-1256), 2006 WL 2147483, at *197a.

⁶³ *Id.* at *199a.

⁶⁴ *Philip Morris*, 549 U.S. at 350. The trial court found the award excessive and reduced it to \$32 million. *Id.* But the Oregon Court of Appeals reinstated the \$79.5 million punitive award. *Philip Morris Inc.*, 48 P.3d at 842.

⁶⁵ *Philip Morris*, 549 U.S. at 351.

⁶⁶ *Id.* at 356–57.

⁶⁷ *Philip Morris*, 549 U.S. at 353–54. Many have questioned the procedural due process basis for the holding. See Vikram David Amar, *Business and Constitutional Originalism in the Roberts Court*, 49 SANTA CLARA L. REV. 979, 982–83 (2009) (suggesting that labeling *Philip Morris* as procedural swayed Justices Roberts and Alito to join the opinion and “to sleep a little easier”); Colby, *Clearing the Smoke*, *supra* note 16, at 401–05 (explaining that the Court intentionally disguises substantive due process decisions as procedural due process decisions because it is “ashamed of the substantive due process doctrine’s very existence”); David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce’s Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1038–39 (2009) (“Perhaps in order to keep the Chief Justice and Justice Alito from defecting, Justice Breyer took [great] pains in *Philip Morris* to ground his opinion in the procedural rather than the substantive aspect of the Due Process Clause . . .”); Jill Wieber Lens, *Procedural Due Process and Predictable Punitive Damage Awards*, 2012 B.Y.U. L. REV. 1, 21–22 (2012) (“*Phillip Morris* mandated that lower courts adopt some procedural protections to prevent punitive damages from encompassing the defendant’s

itself against the claims of injured nonparties.⁶⁸ 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.⁶⁹ Without reliance, liability and punishment would not be appropriate. Second, punishment for harm to nonparties would "add a near standardless dimension to the punitive damages equation" based on the number of harmed nonparties, the extent of their injuries, and the circumstances of those injuries.⁷⁰ These questions, which will likely not be answered in the trial, heighten the "risks of arbitrariness, uncertainty, and lack of notice" within the imposition of punitive damages.⁷¹

At the same time, the Court clarified that the jury may still consider nonparty harm in determining reprehensibility because "harm to others shows more reprehensible conduct."⁷² Presumably, this allows the jury to increase the award based on nonparty harm when it demonstrates reprehensibility, although the jury cannot increase the award to directly punish for that same nonparty harm. The Court mandated that lower courts provide "some form of protection" to ensure that the jury considers the evidence of harm to nonparties in evaluating reprehensibility, but not as a basis for punishment.⁷³

In *Philip Morris*, the Court did not embrace the language of private redress theory that empowers victims and gives them the right to be punitive when prohibiting punishment of nonparty harm. However, focusing on the defendant's act of injuring the plaintiff does resemble a private redress theory. Noted torts scholars recognized so. The late Professor Richard Nagareda explained that "[t]he constitutional message in *Williams*—that punitive damages are ultimately about punishment for the wrong done to the plaintiff at hand—gives a considerable nod to what [is] described as plaintiff-focused views in torts literature."⁷⁴ Professor Michael Rustad once argued that punitive damages "serve[] the useful purpose of expressing society's disapproval of conduct which leads to intolerable rates of injuries and deaths."⁷⁵ Yet after *Philip Morris*, he commented: "[T]he Court tacitly

harm to nonparties, another substantive limitation on punitive damages arguably created in *State Farm*."); see also *Philip Morris*, 549 U.S. at 361 (Thomas, J., dissenting) ("[T]he 'procedural' rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages.").

⁶⁸ *Philip Morris*, 549 U.S. at 353–54.

⁶⁹ *Id.*

⁷⁰ *Id.* at 354.

⁷¹ *Id.*

⁷² *Id.* at 355.

⁷³ *Id.* at 357.

⁷⁴ Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1136 (2010).

⁷⁵ Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 86 (1992).

assumed that Philip Morris reached out and harmed Jesse Williams, an individual smoker. While the Court still celebrates the historic functions of punishment and deterrence, its reasoning in *Williams* is very similar to what the civil recourse theorists propose.”⁷⁶

III. UNDERESTIMATING THE IMPORTANCE OF NONPARTY HARM IN PRODUCT DEFECT CLAIMS

Private redress theories now dominate the debate regarding the theoretical conception of punitive damages. The theories empower the individual victim seeking redress. The emphasis on the individual in the punishment portion of the tort claim matches the claim for liability, which “focus[es] on the wrong done, and the harm caused, to the plaintiff.”⁷⁷

This emphasis on the individual, however, does not fit all tort claims.⁷⁸ Specifically, this emphasis does not fit product defect claims due to the importance and role of injured nonparties in such claims. First, an individual plaintiff likely needs to show nonparty harm to demonstrate that the product that injured her is defective. Second, evidence of the defendant’s reprehensibility involves nonparties; if the defendant knew of probable injury, it was not just of potential injury to the plaintiff—it was to all exposed.

A. Crucial Part of Demonstrating Defect

A products liability claim is usually brought by one plaintiff. One plaintiff is injured by an allegedly defective product and seeks compensation for that injury. Some evidence the plaintiff needs to show to demonstrate liability is specific to that plaintiff. For example, the plaintiff needs to show that she was actually injured because actual damage is a required element.⁷⁹ Part of showing actual injury is showing actual damage.⁸⁰ If the plaintiff is physically injured, she will present

⁷⁶ Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 512 (2011) (citations omitted).

⁷⁷ Colby, *supra* note 10, at 654. See also Victor E. Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892, 901 (1983) (explaining that courts hear only “individual cases, and their inquiries are confined to the particular facts and arguments in the cases before them.”).

⁷⁸ This Article does not address punitive damages in products liability claims because such awards are skyrocketing or out of control—as many claimed in the 1980s. Rustad, *supra* note 75, at 2–16. To the contrary, empirical evidence suggests that punitive damages are “rarely awarded” in products liability claims. *Id.* at 45. Instead, this Article addresses punitive damages in products defect claims because of the interesting application of private redress theories to those awards.

⁷⁹ RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (AM. LAW INST. 1998) (requiring “harm to persons or property caused by the defect.”); *Id.* § 9 (requiring “harm to persons or property caused by the misrepresentation.”).

⁸⁰ 15 U.S.C. § 1640 (2010).

evidence of that physical injury, any related lost wages, and any related pain and suffering, etc. Another required element is specific causation.⁸¹ The plaintiff needs to show that the defective product specifically caused her injury. Evidence of nonparty harm is unlikely to demonstrate specific causation.⁸²

Many other elements of the individual plaintiff's product defect claim involve evidence not specific to the individual plaintiff. For example, to demonstrate general causation—that the product is capable of causing injury—the plaintiff will likely seek to introduce evidence of nonparty harm.⁸³ In toxic tort cases, the plaintiff will “often rely on epidemiological studies and animal studies” as indirect evidence “that a particular substance causes a particular injury.”⁸⁴ This evidence is helpful because the more people who are injured in a certain way by a defective product, the more it demonstrates that defective product was capable of causing the injury to the plaintiff. A plaintiff will also often look to nonparty harm to establish proximate causation—that the injury the plaintiff suffered was a foreseeable result of the defect.⁸⁵ Again, the more people who are injured in a certain way by a defective product, the more probable it is that the injury was foreseeable to the defendant. For purposes of establishing causation, it is advantageous for the plaintiff to present herself as one of many injured by introducing evidence of nonparty harm.

The plaintiff will also likely seek to introduce evidence of nonparty harm to demonstrate that the product is defective. In the context of determining defectiveness, evidence of nonparty harm is usually referred to as evidence of other accidents.⁸⁶ This evidence of nonparty harm or other accidents is not just advantageous for demonstrating defect, it is practically required. Under the risk utility test, a product is defectively designed if “the nature and extent of a product's dangerous condition”⁸⁷ outweigh the costs of a reasonable alternative design. How better to show the product's dangerous condition than to show that the product has injured others? “Evidence that there have been 100 accidents involving the same model SUV under similar circumstances” helps demonstrate a

⁸¹ *In re Mirena IUD Prods. Liab. Litig.*, 202 F. Supp. 3d 304, 310 (S.D.N.Y. 2016).

⁸² Population-based epidemiological studies are usually not enough to prove specific causation. Harvey Brown & Melissa Davis, *Eight Gates for Expert Witnesses: Fifteen Years Later*, 52 HOUS. L. REV. 1, 112–13 (2014). *But see In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 318 F. Supp. 2d 879, 892–93 (C.D. Cal. 2004) (allowing the use of epidemiological studies to demonstrate specific causation when the studies show “a relative risk greater than 2.0.”).

⁸³ DAVID G. OWEN, PRODUCTS LIABILITY LAW 404 (2d ed. 2008) (explaining that evidence of nonparty harm is relevant to “the causal relationship between the condition and the plaintiff's harm.”); Zipursky, *Punitive Damages*, *supra* note 28, at 146–47 (discussing that evidence of prior injuries can be “introduced to show general causation.”).

⁸⁴ Brown & Davis, *supra* note 82, at 113.

⁸⁵ RESTATEMENT (SECOND) OF TORTS, § 435 (AM. LAW INST. 1965) (explaining that liability will not result if it was “highly extraordinary” that the defendant's conduct caused the plaintiff's injury).

⁸⁶ *See infra* note 98 (listing cases).

⁸⁷ OWEN, *supra* note 83, at 404.

high probability of accident and severity of accident.⁸⁸ The more who are injured, and the more severe the injuries are, the greater the likelihood that the plaintiff will be able to establish that the nature and extent of the danger posed by the product outweighs the costs of an alternative design. To outweigh the costs of the alternative design, the plaintiff needs to show that nonparties—those “who are in no way related to the litigation”⁸⁹—were also injured by the defective product.

Evidence of nonparty harm may be the only evidence available to show defect. Products liability expert Professor David Owen listed the following ways to establish defectiveness: 1) use of the product malfunction test if facts are unavailable to show defectiveness; 2) violation of a government safety standard; 3) evidence of “similar accidents involving the defendant’s other similar products[.]” or 4) evidence “that the defendant acknowledged the problem by remedying the hazard after the plaintiff’s injury.”⁹⁰ The three options other than evidence of nonparty harm may be unavailable because some facts are unknown. This deprives the plaintiff of: 1) the malfunction test; 2) the safety standard;⁹¹ and 3) defendant changes. This leaves the plaintiff with the option of relying on evidence of other accidents, also known as nonparty harm.

But even in the unlikely case that other evidence is available, evidence of nonparty harm is widely considered advantageous for plaintiffs. “Plaintiffs’ attorneys consider other-accident evidence to be an especially powerful form of proof”⁹² Commentators have explained that evidence of nonparty harm “is arguably the single most important category of evidence available to the plaintiff,”⁹³ is “the strongest evidence the plaintiff can adduce,”⁹⁴ is often “vital” to the plaintiff’s case,⁹⁵ and “can be critical to the outcome of a case.”⁹⁶ And the use

⁸⁸ *Id.*

⁸⁹ Zipursky, *Punitive Damages*, *supra* note 28, at 145.

⁹⁰ See David G. Owen, *Proof of Product Defect*, 93 KY. L. J. 1, 3–4 (2004).

⁹¹ Additionally, if a government agency created an applicable safety standard, it likely only did so after determining that the product injured many—necessitating the safety standard. Therefore, even a violation of a safety standard depends on nonparty harm. If the defendant violated a safety standard, however, the plaintiff would not need to present evidence of nonparty harm to demonstrate the product’s defectiveness.

⁹² OWEN, *supra* note 83, at 403.

⁹³ Francis H. Hare, Jr., *Admissibility of Evidence Concerning Other Similar Incidents in a Defective Design Product Case: Courts Should Determine “Similarity” by Reference to the Defect Involved*, 21 AM. J. TRIAL ADVOC. 491, 494 (1998).

⁹⁴ *Id.* at 504.

⁹⁵ *Id.* at 522. See also *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434, 1440 (10th Cir. 1992) (acknowledging that “the occurrence of similar accidents or failures involving the same product has great impact on a jury.”).

⁹⁶ Robert A. Sachs, “Other Accident” Evidence in Product Liability Actions: Highly Probative or an Accident Waiting to Happen?, 49 OKLA. L. REV. 257, 293 (1996); *id.* at 258 (explaining that evidence of other accidents “has the potential to affect significantly the outcome of the case.”). See also Gail A. Randall, *Product Liability Litigation: Impact of the Federal Rule of Evidence 404(b) Upon Admissibility Standards of Prior Accident Evidence*, 61 WASH. U. L. REV. 799, 800 n.5 (1983) (explaining that “to successfully carry

of evidence of nonparty harm is so common that courts developed an evidentiary rule allowing evidence of prior or subsequent accidents only if they are substantially similar to plaintiff's injury.⁹⁷ Generally, the other-accident evidence is admissible "if the facts and circumstances surrounding the other accidents are shown to be reasonably similar to those surrounding the plaintiff's case, and the jury may consider any dissimilarities in evaluating the weight of the evidence."⁹⁸

Although not as commonly associated with nonparty-harm evidence, a plaintiff wishing to establish a warning defect would also like to present this evidence. A warning defect exists if the defendant failed to warn about a foreseeable danger.⁹⁹ What better way to show foreseeability than to show others were injured? "[T]he more numerous and serious the similar accidents caused by a product, the more likely it is that the manufacturer became (or should have become) aware of the product's danger . . ."¹⁰⁰ Just like with a design defect, it is to the plaintiff's advantage to present evidence of nonparty harm—to show she is one of many injured.

One clarifying point on the use of evidence of nonparty harm to establish defectiveness is worthwhile—that this use of evidence of nonparty harm does not pose the constitutional problems the Court identified in *Philip Morris*. This is because the defectiveness determination leads to the imposition of compensatory damages; *Philip Morris* was concerned about the jury's use of nonparty harm as a basis for punitive damages. Different concerns exist for compensatory and punitive damages. Professor Owen explained:

Because most companies are insured against such losses, and because they have greater access to much of the crucial evidence and greater financial resources with which to defend their cases, a little bias in favor

[the burden of proof that a product was defective], the plaintiff often needs to rely on prior accident evidence to establish a circumstantial inference of such a manufacturer's defect" and that without that inference, the plaintiff's case will likely be dismissed).

⁹⁷ OWEN, *supra* note 83, at 406.

⁹⁸ *Id.* at 407 (citation omitted). Courts frequently admit evidence of non-identical accidents. *See, e.g.*, *Exum v. General Elec. Co.*, 819 F.2d 1158, 1163 (D.C. Cir. 1987) (admitting evidence of other accidents involving the same model of fryer even though the accidents did not involve a foreign object dropped into the fryer as the plaintiff did); *see Santos v. Chrysler Corp.*, 715 N.E.2d 47, 53 (Mass. 1999) (admitting evidence of other accidents even though they involved vans of different model years, different safety mechanisms, and the accidents did not occur on snow or ice); *Moulton v. Rival Co.*, 116 F.3d 22, 27 (1st Cir. 1997) (admitting evidence of other accidents including one involving a different model of an electric potpourri pot); *Bellinger v. Deere & Co.*, 881 F. Supp 813, 818 (N.D.N.Y. 1995) (admitting evidence of other accidents even though differences existed regarding how the victims came into contact with the defendant's cornpicker); *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 554 (D.C. Cir. 1993) (admitting evidence of other accidents even though failure of the product was due to wear and tear instead of defectiveness).

⁹⁹ RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1(c).

¹⁰⁰ OWEN, *supra* note 83, at 405.

of compensating the injured user of a product may in fact be good. For even if a ‘close-call case’ is ‘wrongly’ rendered for the plaintiff, his suffering will be lessened, and the institutional ‘suffering’ of the manufacturer will be limited to the amount of the plaintiff’s actual loss, his compensatory damages. Only infrequently, and only in a few jurisdictions, will such ‘wrong’ decisions against a manufacturer reach one million dollars. We thus may wish to tolerate, and perhaps be able to afford, a little such compassion at the expense of some efficiency. The stakes are increased considerably, however, in both principle and amount, when claims are made for punitive damages. The presence of such claims places a premium on the oratorical and other trial skills of counsel in products cases, raising a special risk of tapping juror bias that may test the limits of fair adjudication.¹⁰¹

These views are outdated. Punitive damages no longer create the stigma they once did,¹⁰² and they are often covered by insurance.¹⁰³ Punitive damages are also more often subject to damage caps than compensatory damages.¹⁰⁴ In addition, compensatory damage awards include pain and suffering damages, which, like punitive damages, “have no economic referent and no widely agreed-on means of

¹⁰¹ David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 11–12 (1982) [hereinafter Owen, *Problems in Assessing*].

¹⁰² Jill Wieber Lens, *Justice Holmes’s Bad Man and the Depleted Purposes of Punitive Damages*, 101 KY. L.J. 789, 823 (2013) (“No longer does the public question the defendant’s integrity like the traditional stigma assumes. Instead, the public questions the legitimacy of the punitive damage award imposed.”).

¹⁰³ See RESTATEMENT OF THE LAW OF LIAB. INS. § 34 cmt. j (AM. LAW INST., Tentative Draft No. 1, 2016) (concluding that public policy supports insurability of punitive damages); Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1462 (2008) (“Currently, nine states prohibit the availability of insurance for punitive damages, but the majority of jurisdictions permit such insurance and about a dozen states have not decided conclusively through courts or statutes what the rule is.”).

¹⁰⁴ Elliot M. Kroll & James M. Westerlind, *Arent Fox LLP Survey of Damage Laws of the 50 States Including the District of Columbia and Puerto Rico*, ARENT FOX, LLP (2012), <https://www.arentfox.com/sites/default/files/Downloads/practicesindustries/practices/AF-Survey-of-Damage-Laws.pdf> [<https://perma.cc/UK9H-XNG5>] (according to a 2012 survey, three states prohibit punitive damages and sixteen states cap their recovery, whereas only four states have a compensatory damage cap not specific to medical malpractice claims and fifteen states have a compensatory damage cap applicable only to medical malpractice claims).

determination,” making them similarly susceptible to a good lawyer’s oratorical skills and difficult to defend regardless of financial resources.¹⁰⁵ Regardless, the consideration of nonparty harm to determine defectiveness will only result in the awarding of compensatory damages, meaning *Philip Morris* concerns do not exist.¹⁰⁶

Private redress theories do not address the (constitutional) use of evidence of nonparty harm to establish defectiveness in a product defect claim. The theories acknowledge that evidence of nonparty harm can be relevant to punitive damages,¹⁰⁷ but they underplay the importance of nonparty harm in establishing liability in a product defect claim, likely finding it inconsequential. For instance, Professor Zipursky admits the relevance of nonparty harm in establishing defect, but explains that “the act of risking is not the basis of liability;” instead “*the act of tortiously injuring* is the basis of liability.”¹⁰⁸ But it is not so easy to separate the two. Because of the common law definitions of design and warning defect, the risky course of conduct injuring nonparties is a necessary, if not sufficient, part of the basis of liability. The injury to the individual plaintiff is tortious only if the product is defective and the product is likely defective only if nonparties are injured.¹⁰⁹

¹⁰⁵ Jeffrey O’Connell & Geoffrey Paul Eaton, *Binding Early Offers as a Simple, if Second-Best, Alternative to Tort Law*, 78 NEB. L. REV. 858, 862–63 (1999).

¹⁰⁶ Plus, it is possible that a dimension exists when considering nonparty harm to determine defectiveness—the substantial similarity dimension. It defines what other accidents can be considered. In fact, it is similar to the dimension set in *State Farm*: “A defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422–23 (2003). The fact that courts routinely admit evidence of substantially similar nonparty harm to determine defect makes one wonder why the Court was so concerned about procedural protections in *Philip Morris*.

¹⁰⁷ Evidence of nonparty harm demonstrates that the defendant acted reprehensibly, but reprehensibly with respect to injuring the individual plaintiff. Evidence of nonparties injured by a defective television “demonstrate[s] the reprehensibility of the decision to go ahead and sell the defective product to the plaintiff.” Colby, *Clearing the Smoke*, *supra* note 16, at 466; accord Sebok, *supra* note 16, at 1032 (explaining that evidence of nonparty harm is admissible only to the extent that it can be connected to the disrespect that the plaintiff suffered); Zipursky, *Palsgraf*, *supra* note 22, at 1787–88 (discussing the distinction between admitting evidence to show “the reprehensibility of the *defendant’s wrong to the plaintiff herself*” and admitting it to show “the reprehensibility of the *defendant’s wrongs to nonparties*.”).

¹⁰⁸ Zipursky, *Punitive Damages*, *supra* note 28, at 145.

¹⁰⁹ Professor Christopher Robinette identifies products liability law as not fitting within civil recourse tort theory because of its instrumental goals. Christopher J. Robinette, *Two Roads Diverge for Civil Recourse Theory*, 88 IND. L.J. 543, 547–48 (2013) (“If an important reason courts created the legal wrong of strict products liability was to compensate and to deter, and strict products liability does, in fact, serve the goals of compensation and deterrence, it seems to me that at least a purpose of the law is to compensate and deter.”); *see also* Christopher J. Robinette, *Why Civil Recourse Theory Is Incomplete*, 78 TENN. L. REV. 431, 471 (2011) (describing the instrumental goals in

Defectiveness's dependence on nonparty harm also makes it difficult to apply some of Professor Sebok's theory of punitive damages. He describes that a tort claim addresses: 1) the victim's right to physical well-being (vindicated through compensatory damages) and 2) the victim's right to respect of that right to physical well-being (vindicated through punitive damages).¹¹⁰ Sebok also states that these rights are personal.¹¹¹ But an injured plaintiff likely has to establish nonparty harm to establish a defect. Using Sebok's terms, an injured plaintiff has to establish the violation of those nonparties' rights to physical well-being. And the injured plaintiff relies on those nonparties' rights without their consent, making the rights less personal than they may seem.

Professor Colby is the most outspoken in minimizing the importance of nonparty harm in establishing defect. In fact, he believes it "impossible" for an individual plaintiff to introduce evidence of nonparty harm.¹¹²

developing and reforming products liability law). Another reason defect claims may not fit so well within civil recourse theory is due to the dependence on nonparty harm. Under civil recourse theory, "for conduct to be tortious, it must not only be wrongful in some generic sense (i.e., antisocial) but also *relationally wrongful*—wrongful with respect to the victim who complains of the wrongdoing." John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1137 (2007). The wrongful conduct for a design defect, though, is that the costs of *all* injuries likely to result from the defect outweighed the costs of an alternative design. The distinction between a stereotypical car accident negligence claim and defect claim is easy to see. Professors Goldberg and Zipursky use that stereotypical example: "The reckless driver who hits the pedestrian has not only committed an antisocial act of a sort that entitles observers to condemn his actions and the state to sanction him; he has also wrongfully injured the victim. The victim is specially situated with regard to the driver's actions . . ." *Id.* at 1134. Moreover, the "driver has done something wrong to *her* that he has not done to anyone else." *Id.* at 1135. If the product is defective, however, the manufacturer has done something wrong to the victim, but it's done the same something wrong to many others. Is the manufacturer relationally wrongful to all those injured? Or is the manufacturer identically relationally wrongful to all injured? Either way, the wrong is very different than reckless driving injuring a pedestrian.

¹¹⁰ Sebok, *supra* note 16, at 1026.

¹¹¹ *Id.* (explaining that because only the victim can correct that disrespect, the infliction of the punishment must be imposed in a tort claim brought by the injured plaintiff).

¹¹² Colby, *supra* note 10, at 654.

The other wrongs allegedly resulting from the same course of conduct will be treated only peripherally and painted with a very broad brush. The plaintiff will probably be permitted to introduce some very general, most likely statistical, evidence about these other wrongs, but, because the trial must necessarily center on the plaintiff's case, no evidence will be introduced regarding the specifics of any of them. In all likelihood, no effort will be made to determine, for instance, how many of the other acts were genuinely wrongful, or how many of the other supposed injuries were legitimate, and were in fact caused by the defendant.¹¹³

If the plaintiff's claim is based on a product defect, though, the wrong done to the plaintiff—the defectiveness of the product—is only a wrong because it also injured others. Necessarily, evidence of nonparty harm will not be treated peripherally and broadly. In fact, both sides will introduce evidence of the specifics of other accidents. The plaintiff wants to demonstrate that the product injured nonparties in a way that is substantially similar to how the plaintiff is injured.¹¹⁴ The defendant wants to demonstrate that the accidents were dissimilar to minimize the weight of the evidence.¹¹⁵

The trial still “necessarily center[s] on the plaintiff's case,”¹¹⁶ but nonparty harm is a crucial part of the plaintiff's case. Not surprising given the breadth of evidence presented, a finding of liability—even though technically only liability to one plaintiff—is also broad. If the design is defective, then every product so designed or with the same inadequate warning is also defective.¹¹⁷ Courts pretend as if these broader effects do not exist. And, in a way, they are correct. The jury has impugned the design generally, but it is not as if the defendant is forced to alter the design or the warning. Plus, the breadth of the finding is not that the defendant is liable for all injuries caused by the defect. The defendant is liable only to the specific plaintiff for damages based on her injury.

Still, the logical effects are broad, and ignoring the broader effect causes problems in the warning context. Warnings are thought to be very inexpensive.¹¹⁸ When each jury weighs whether the defendant should have warned of danger A,

¹¹³ *Id.*

¹¹⁴ *See Wheeler v. John Deere Co.*, 862 F.2d 1404, 1407–08 (10th Cir. 1988) (listing cases determining the substantial similarity of other accidents).

¹¹⁵ *See id.* at 1408 (“Any differences in the accidents not affecting a finding of substantial similarity go to the weight of the evidence.”).

¹¹⁶ Colby, *supra* note 10, at 654.

¹¹⁷ RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. a (AM. LAW INST. 1998) (explaining that if a design or warning defect is “found to exist, then every unit in same product line is potentially defective.”). If a warning is defective, every individual product with that warning is defective. *Id.* If a defendant lied to the plaintiff about the product, then it lied to everyone.

¹¹⁸ *Moran v. Faberge, Inc.*, 332 A.2d 11, 15 (Md. 1975) (“[T]he cost of giving an adequate warning is usually so minimal, amounting only to the expense of adding some more printing to a label . . .”).

the jury is focused only on the nonexistent practical burden of adding language about A. But one jury finds liability for a failure to warn of A, another finds liability for a failure to warn of B, and so on. At some point, it is simply not practical for a warning to include all dangers.¹¹⁹ Plus, at some point, including any additional warnings will do more harm than good as consumers tend to disregard excessive warnings. But, “[e]ven a court [that] knows, in the abstract, that a limit will ultimately be reached, has no immediate sense of whether the case before it pushes the warning package beyond the appropriate constraints.”¹²⁰

Ultimately, the logically broad effect of a finding of a design or warning defect is due to the use of nonparty harm in establishing that same defect. Surprisingly, evidence of nonparty harm is actually the “primary focus of the dispute” over defectiveness¹²¹—something that private redress theories underestimate.

B. *The Bigger Picture—Reprehensibly Injuring Many Nonparties*

By definition, a defective product means many injured nonparties.¹²² This context could present issues for imposing punitive damages in claims based on product defect.¹²³ As commentators pointed out, punitive damages “evolved in the context of a one-on-one relationship.”¹²⁴

¹¹⁹ *Cotton v. Buckeye Gas Prods. Co.*, 840 F.2d 935, 938 (D.C. Cir. 1988) (“If every foreseeable possibility must be covered, [T]he list of foolish practices warned against would be so long, it would fill a volume.”).

¹²⁰ James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 301 (1990).

¹²¹ Colby, *supra* note 10, at 654.

¹²² *See supra* Part III.A.

¹²³ Some questioned whether allowing punitive damages was logically consistent with a strict liability claim. *See, e.g.*, Forrest L. Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNS. J. 300, 301 (1972) (explaining that in strict liability “the character of the defendant’s act is of no consequence,” but “in the punitive damages claim the character of the act is paramount.”). Commentators and courts rejected this problem relatively quickly because the entitlement to punitive damages is usually proven by facts of culpability, which are usually different than the facts “supporting the underlying claim for compensatory damages.” David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1269 (1976) [hereinafter Owen, *Punitive Damages in Products*]; *see also* *Acosta v. Honda Motor Co.*, 717 F.2d 828, 833 (3d Cir. 1983) (“[T]here is no theoretical problem in a jury finding that a defendant is liable because of the defectiveness of a product and then judging the conduct of the defendant in order to determine whether punitive damages should be awarded on the basis of ‘outrageous conduct’ in light of the injuries sustained by the plaintiff.” (quoting *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357 (E.D.Pa. 1982))); *id.* at 835 (“The fact that some sellers therefore will be found liable in the absence of fault does not mean that those who are at fault—and outrageously so—should not be punished.”). In short, the incompatibility argument did not have any merit.

¹²⁴ James D. Ghiardi & Natalie B. Koehn, *Punitive Damages in Strict Liability Cases*,

That one-on-one relationship, however, does not usually exist in a modern products liability claim. Instead, a modern manufacturer sells the defective product to many. If the defendant acted reprehensibly, the defendant's "evil conduct at issue exists not with respect to any particular person, but rather with respect to that class of persons who have been or will be exposed to the product."¹²⁵ An individual can obtain punitive damages if she can show evil conduct, even though the evil conduct was "towards a much larger group of people"¹²⁶ and had "little to do with the particular plaintiff."¹²⁷ The generality of the defendant's conduct also leaves "no compelling reason why a particular plaintiff should receive the punitive damages award, any more than any other plaintiff who has been injured by the product."¹²⁸ And if "[e]very person injured thereby may make an independent claim for punitive damages"¹²⁹ punitive damages "may be repetitively imposed for a single course of conduct."¹³⁰ Judge Henry Friendly famously wondered "how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."¹³¹ Professor David Owen initially disagreed,¹³² but later expressed concerns similar to Judge Friendly: "[T]he experience of the past several years has raised questions whether the punitive damages doctrine is being abused in products cases, whether some manufacturers are being punished who should not be, and whether penalties, though appropriately assessed, are sometimes unfairly large."¹³³

61 MARQ. L. REV. 245, 248 (1977).

¹²⁵ Ellen Wertheimer, *Punitive Damages and Strict Products Liability: An Essay in Oxymoron*, 39 VILL. L. REV. 505, 516–17 (1994) (explaining that if the defendant "made a reprehensible design decision[,] that decision "was equally reprehensible with respect to all of those adversely affected by the product.").

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 516.

¹²⁹ John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 145–46 (1986).

¹³⁰ *Id.*; see also *id.* at 146 ("In this way, the defendant may be punished ten or twenty or a hundred times over, in cumulations so extravagant and destructive as to defy any rational justification and to threaten the civil extinction of major business entities."); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1142 (1984) ("If punitive damages may be awarded repeatedly for the same design or marketing deficiency, then indeed, the punitive damage doctrine may be utilized to punish a product supplier to the point of economic destruction.").

¹³¹ *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

¹³² The practical problems identified here and by Judge Friendly gained some traction, but were mostly laid to rest in 1976 when Professor David Owen published his influential law review article advocating the imposition. See generally Owen, *Punitive Damages in Products*, *supra* note 123.

¹³³ Owen, *Problems in Assessing*, *supra* note 101, at 59. Despite these concerns, punitive damages are widely available in punitive damages claims today. 3 OWEN & DAVIS ON PROD. LIAB. § 26:20 (4th ed.). One commentator noted that the damages are most often awarded when:

Private redress theories address some of these concerns directly. First, private redress theories empower the individual victim whom the manufacturer disrespected.¹³⁴ It empowers the injured victim to right that disrespect by pursuing and obtaining punitive damages. Only the injured victim can file a lawsuit to right that disrespect. Thus, there is a compelling reason why one plaintiff receives punitive damages—to right that disrespect. Even if the manufacturer also disrespected many others, the manufacturer disrespected the particular victim who sues and that victim is thus entitled to seek punitive relief.

Second, private redress theories theoretically prevent the defendant from being punished over and over for the exact same thing. If punitive damage awards can punish the defendant only for the private wrong to the plaintiff, then multiple potentially overlapping punishments should not occur. The defendant can still be punished for its multiple private wrongs committed against different victims, but each award is specific to that private wrong.

But private redress theories do not otherwise address the broader context of a product defect claim with its many victims. They do not address the fact that if the manufacturer acted reprehensibly in selling a defective product, that conduct “was equally reprehensible with respect to all of those adversely affected by the product.”¹³⁵ Similarly, the theories do not address whether those many victims’ punitive damage claims and awards should relate.

IV. IDENTICAL PUNITIVE DAMAGE AWARDS

Private redress theories, and *Philip Morris*, do not contemplate the possibility of identical punitive damage awards. That is likely partially because the theories

Four factors consistently appear in the reported cases that have addressed the question of punitive damages in strict products liability actions. First, the cases generally find some corporate knowledge of the danger posed by the design of the product. Second, the cases reveal knowledge by corporate agents that the defect has caused injuries to persons other than the person involved in the present litigation. Third, there is generally some sort of procrastination on the part of the corporation in remedying the defect or in warning the public of the defect. Finally, a number of cases note that alternative designs would have been economically feasible.

Richard D. Schuster, *Punitive Damage Awards in Strict Products Liability Litigation: The Doctrine, the Debate, the Defenses*, 42 OHIO ST. L. J. 771, 774 (1981). See also Owen, *Punitive Damages in Products*, *supra* note 123, at 1329 (explaining that juries commonly impose punitive damages in products liability claims involving “(1) fraudulent-type misconduct; (2) knowing violations of safety standards; (3) inadequate testing and manufacturing procedures; (4) failures to warn of known dangers before marketing; and (5) post-marketing failures to remedy known dangers.”).

¹³⁴ Michael L. Wells, *Civil Recourse, Damages-as-Redress, and Constitutional Torts*, 46 GA. L. REV 1003, 1005 (2012).

¹³⁵ Wertheimer, *supra* note 125, at 517.

mandate personalization of the punitive damage award to the disrespect that the individual plaintiff suffered; personalization naturally leads to nonidentical awards.

But what if disrespect is identical? With respect to product defects, the manufacturer disrespected the victims' rights when it knew of the probable injury, yet still sold the product. The knowledge was generally directed to the many possible victims. Absent special circumstances, the manufacturer was not aware of any greater chance to one potential victim over another. Instead, the manufacturer disrespected each eventual victim identically. The only difference between the many victims is their amount of compensatory damages. The factors that determine compensatory damages—pre-injury occupation, pre-existing medical conditions, emotional state—however, were unknown to the manufacturer and thus could not have affected the manufacturer's disrespect. Despite their differing compensatory damages, the manufacturer disrespected each of its victims identically and should pay identical punitive damage awards to each. The collection of identical punitive damage awards then represents punishment for the defendant's knowingly injuring many by selling a defective product.

Even if appropriate, identical punitive damage awards for product defect claims will not be easy to achieve. The current system of jury-imposed punitive damages is incapable of producing identical awards. Likely the only way to achieve identical awards for product defects is through legislatively created hierarchies of fault. Legislative involvement to create a system of identical punitive damages in product defect claims is also consistent with private redress theories.

A. Identifying the Disrespect

Professors Colby, Zipursky, and Sebok point to products liability punitive damage awards as examples of awards inconsistent with private redress theory. Professor Colby points to a \$28 billion "total harm" punitive damage award in a tobacco case, stating that "no rational justice system could possibly mete out that kind of penalty for harming a single person, no matter how severe the suffering and how reprehensible the wrongdoing."¹³⁶ Professor Zipursky cites *BMW of North America, Inc. v. Gore*,¹³⁷ describing "how absurd it is to suppose that Dr. Gore is entitled to redress the fraud perpetrated upon him by exacting a \$2 million penalty from BMW."¹³⁸ And Professor Sebok criticizes an attorney's arguments that a punitive damage award needed to be large enough to gain enough publicity to notify owners of a car's danger and to effectively "force Ford to recall [vehicles]."¹³⁹

¹³⁶ Colby, *Clearing the Smoke*, *supra* note 16, at 397.

¹³⁷ 517 U.S. 559 (1996).

¹³⁸ Zipursky, *supra* note 16, at 162. Zipursky also criticizes the use of punitive damages in products liability claims to "fill this regulatory void" as an (unconstitutional) noncompliance sanction. Zipursky, *Palsgraf*, *supra* note 22, at 1783.

¹³⁹ Sebok, *supra* note 16, at 1034. See Jill Wieber Lens, *Product Recalls: Why Is Tort Law Deferring to Agency Inaction?*, 90 ST. JOHN'S L. REV. 329, 347, n. 76 (2016)

These examples do not, however, answer the question of what should a punitive damage award in a product defect claim look like if consistent with private redress theories. Fortunately, Professor Sebok provided analogous historical examples to help identify the manufacturer's disrespect in a products liability claim. His first example is fraud between a seller and buyer.¹⁴⁰ Punitive damages were appropriate because of the defendant's "specific desire . . . to use the power he had over the victim (usually knowledge of the true state of things, which, if the defendant had shared with the victim, would have led the victim to walk away from the fraudulent deal)."¹⁴¹ The defendant's conduct "suggested a

(discussing that very few states have adopted liability for a failure to recall a product); *see, e.g.,* *Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993) (stating that "[o]nly evidence which is relevant to the conduct for which liability is imposed can support an award of punitive damages."); *Berczyk v. Emerson Tool Co.*, 291 F. Supp. 2d 1004, 1016 (D. Minn. 2003) (refusing punitive damages based on the manufacturer's failure "to institute a product recall, or retrofit" because Minnesota law did not recognize such duties); *Bushmaker v. A. W. Chesterton Co.*, No. 09-CV-726-slc, 2013 WL 11079371, at *7 (W.D. Wis. Mar. 1, 2013) ("If, as defendant argues here, a defendant cannot be liable at all for a post-sale failure to warn, then it would follow that it would be improper to consider evidence of such conduct in the punitive damages assessment."); *Cameron v. DaimlerChrysler Corp.*, No. CIV.A. 504CV24JMH, 2005 WL 2674990, at *9 (E.D. Ky. Oct. 20, 2005) (explaining that the state "does not recognize a post-sale failure to warn. Therefore, the plaintiff's evidence of the defendant's post-sale conduct has to be relevant to the design defect claim in order to warrant an award of punitive damages."); *see also* *Rustad*, *supra* note 75, at 66 (explaining that in 75% of the products liability punitive damage awards in his empirical study were the result of the defendants' failure to warn before sale or "postmarketing failures to remedy known dangers."). Regardless of consistency with private redress theory, basing punitive damages on a failure to recall a product is likely unconstitutional. That is because the failure to recall is generally not a basis for tort liability. Per *Philip Morris*, a punitive damage award can punish the defendant only for what it did to the plaintiff. The failure to recall the product is not, per tort law, how the defendant injured the plaintiff. If tort law does not recognize liability for injury due to the failure to recall, then tort law cannot constitutionally punish the same conduct. Some courts have recognized the problem with basing punitive damages on the failure to recall the product. *But see* *Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129, 134 (8th Cir. 1985) (refusing a jury instruction creating liability for the failure to recall the product and instead "suggest[ing] to appellants' counsel that failure to recall could be argued with respect to the punitive damage issue."); *Hackethal v. Harbor Freight Tools USA, Inc.*, No. 4:15CV01398 ERW, 2016 WL 695615, at *2 (E.D. Miss. Feb. 22, 2016) (striking allegations of negligence based on failure to recall/retrofit the product because Missouri law doesn't recognize such a duty, but refusing to strike allegations that Plaintiff was entitled to punitive damages because of the failure to recall/retrofit); *Reed v. Ford Motor Co.*, 679 F. Supp. 873, 880 (S.D. Ind. 1988) (stating that although no liability exists for the defendant's failure to recall the product, "Ford's failure to voluntarily recall its product is but one manifestation of the defendant's recklessness—a recklessness that entitles [the plaintiff] to damages.").

¹⁴⁰ Sebok, *supra* note 16, at 1012–13.

¹⁴¹ *Id.* at 1013.

conscious disdain of the victim, especially when, as the courts noted, there were differences in social or economic power between the parties.”¹⁴² Sebok also described that, historically, punitive damages were appropriate where “parties used commercial relationships as a vehicle for the exercise and abuse of economic power.”¹⁴³ The examples Sebok gives are railroad and trolley companies found liable for punitive damages when they knew of or ratified their employees’ mistreatment of passengers.¹⁴⁴ The companies ignored the mistreatment “because they felt that it was not to their advantage to act, it was costly to respond to the plaintiff’s complaint, and it was (hopefully) cost-free to ignore the complaint.”¹⁴⁵ Punitive damages were imposed based on the “defendant’s unequal or unfair treatment of the plaintiff.”¹⁴⁶

These examples are similar to the modern-day basis for punitive damages in products liability claims. The first is a fraudulent misrepresentation claim, a type of claim in which punitive damages are still common today. But the conduct can also be present in a defect claim; the defendant has power over the victim because of its knowledge of the probable injury. By still selling, the manufacturer consciously disdains that chance of injury. The second example is also analogous to the willfulness or recklessness that could accompany a design defect. The manufacturer was aware of a potential danger in its design, but believed it was advantageous to keep that design due to costs. Thus, the manufacturer knew of risk the product posed, but consciously disregarded it.

In both examples, just as manufacturers do today, the defendant consciously disdained the victim’s right to physical safety and well-being. When lying to users or disregarding known risks, manufacturers consciously disdain private rights to physical safety and well-being. The manufacturer determines that the injured plaintiff’s primary private rights “are not worthy of respect.”¹⁴⁷ That is the disrespect that an individual injured plaintiff can personally correct by suing and recovering punitive damages in her product defect claim.

B. Identical Disrespect—Despite Victims’ Individual Differences

Victims injured by defective products are not carbon copies of each other. They will be injured in different ways and suffer different damages. For instance, one plaintiff may have acted unreasonably in using the product to such an extent that state law bars her recovery.¹⁴⁸ Or, the defendant may be able to prove that a

¹⁴² *Id.*

¹⁴³ *Id.* at 1011–12.

¹⁴⁴ *Id.* at 1012.

¹⁴⁵ *Id.* Professor Zipursky also describes that his private redress conception of punitive damages is similar to the role described in these same early English tort cases. Zipursky, *Palsgraf*, *supra* note 22, at 1779.

¹⁴⁶ Sebok, *supra* note 16, at 1012.

¹⁴⁷ *Id.* at 1014.

¹⁴⁸ RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965). *See, e.g.*, *Tillman v. C.R. Bard, Inc.*, 96 F. Supp. 3d 1307, 1353–54 (M.D. Fla. 2015) (applying

plaintiff would not have obeyed an adequate warning, precluding the plaintiff from showing cause-in-fact.¹⁴⁹ Thus, not every victim injured by a defective product will even be able to establish the manufacturer's liability to her.¹⁵⁰

Additionally, victims' injuries will differ. If a defective vehicle is likely to start on fire, victims are likely to suffer burns. Some of those victims may get lucky, however. For instance, some may escape the vehicle early and suffer only smoke inhalation. Others will suffer the expected burns. Still, others may suffer worse; maybe due to pre-existing conditions, the burns the victims suffer will be unexpectedly fatal.

Victims' compensatory damage amounts will differ. Some of this is attributable to different injuries—e.g., smoke inhalation or death.¹⁵¹ But amounts of compensatory damages will likely also differ even when the injuries are more similar. Compensatory damages will include past and future medical expenses, past and future lost wages, and past and future pain and suffering.¹⁵² Thus, compensatory damages are based on the plaintiff's personal circumstances—the extent of harm, the actual costs of the medical treatment the plaintiff received and/or will receive, possible adjustments based on insurance coverage, her occupation before the injury, her salary before the injury, her likely career trajectory before the injury, her extent of pain and suffering since the injury and the likelihood that it will continue post injury. Even if two plaintiffs suffer the exact same injury, like corneal ulcers, their compensatory damages can dramatically differ because they are based on each plaintiff's personal circumstances. Ordinarily, identical compensatory damage awards for plaintiffs injured by a defective product should not occur.

These differences exist, and will matter to the manufacturer at the time of trial. Some plaintiffs will be unable to establish liability. But if they are successful and seek punitive damages,¹⁵³ the focus switches to the manufacturer's

Florida law).

¹⁴⁹ See *Pavlik v. Lane Ltd./Tobacco Exporters Int'l*, 135 F.3d 876, 879–80 (3d Cir. 1998).

¹⁵⁰ See *Philip Morris v. Williams*, 549 U.S. 346, 353 (giving examples of reasons a defendant may not be liable in tort to nonparty victims).

¹⁵¹ The eggshell plaintiff rule mandates that the defendant would have to pay damages based on the death resulting from the defective product even though the death was unforeseeable. *Lens*, *supra* note 67, at 40–41 (“The eggshell plaintiff rule famously mandates compensation for damages worsened due to a plaintiff's pre-existing condition, even though the extent of the injury is unforeseeable. As an example, if a plaintiff has a heart condition making her more susceptible to stress, a simple assault based on scaring the plaintiff may end up causing a heart attack. The defendant will pay damages based on causing that heart attack even though it was unforeseeable.”).

¹⁵² *Calva-Cerqueira v. United States*, 281 F. Supp. 2d 279, 302 (D.D.C. 2003).

¹⁵³ Arguably, the manufacturer disrespected victims injured by the defective product even if the victim could not establish liability for compensatory damages because of her own fault or because of her inability to establish causation. But if liability is not established, then the defendant did not injure the plaintiff in a way recognized by tort and thus any disrespect cannot be redressed through punitive damages.

reprehensible conduct—the selling of a product it knows will probably cause injury. At that point, the many differences between the victims cannot be a part of that disrespect; the manufacturer did not know of those differences. The manufacturer’s reprehensible conduct was directed at the entire “class of persons who have been or will be exposed to the product.”¹⁵⁴ It did not know specifics about persons within that class and thus it could not have known the compensatory damages a victim would suffer.¹⁵⁵ Necessarily, the manufacturer was “equally reprehensible with respect to all of those adversely affected by the product.”¹⁵⁶ Each victim injured by the defective product suffered the same, identical disrespect.

Professor Colby acknowledged the possibility of identical disrespect, but discounted it: “[E]ven if the defendant’s conduct toward one plaintiff calls for punitive damages, it may not follow that the defendant should be punished (or punished to the same degree) for the wrongs done to all of those who were harmed by its actions.”¹⁵⁷ He offers an example: a defendant’s “conduct toward customers who purchased the product . . . before the company was aware of the defect” is far less culpable than “a defendant’s conduct toward customers who purchased its product at a time when the defendant knew and concealed evidence that the product was defective.”¹⁵⁸

Professor Colby’s example is correct. Customers who purchased the product before the manufacturer knew of the danger may be able to establish liability for compensatory damages, but not entitlement to punitive damages. These customers suffered no disrespect as the defendant acted, at worst, negligently. But the manufacturer disrespected the customers who purchased after the manufacturer became aware of the defect and those customers would be entitled to punitive damages. Notably, those customers were disrespected to the same degree. Even Professor Colby’s example is one of victims suffering identical disrespect.

Professor Colby offers another example: “A bogus telephone psychic, for example, commits a much more culpable act by telling a desperate and exploitable

¹⁵⁴ Wertheimer, *supra* note 125, at 516.

¹⁵⁵ Additionally, the level of disrespect does not vary depending on the victim’s emotional distress. “Disrespect of the plaintiff’s rights may produce strong emotional reactions on her part, or it may not . . . Still, courts would understand that the attitude of disrespect instantiated by the defendant produced an injury that was independent of the emotional distress the plaintiff may or may not have suffered.” Sebok, *supra* note 16, at 1016. *See also id.* at 1018 (“Moral injury is not a physical harm, nor even the psychological pain that one might experience after being the object of a moral injury.”). *Id.* (“[O]ne can suffer an injury to one’s dignity without subjectively suffering (one might be made of stern stuff).”).

¹⁵⁶ Wertheimer, *supra* note 125, at 517.

¹⁵⁷ Colby, *supra* note 10, at 600–01. Colby also brings up that the defendant’s level of culpability differs if it sold the product “after the dangers associated with the product became common knowledge.” *Id.* at 600. If the dangers are widely known, the product may not even be defective as widely known dangers likely mean that no alternative design exists for the product.

¹⁵⁸ *Id.*

victim of domestic violence that, according to the stars, her abuser will change his ways, than by telling a lovelorn college student that someday he will meet a tall, dark stranger.”¹⁵⁹ Different levels of disrespect may exist in this example—the psychic disrespected the victim of domestic violence to a greater extent. But only if the psychic knew of the different vulnerabilities. If the psychic did not know, then the psychic disrespected both victims identically by knowing that the statement was fraudulent and disregarding their rights to emotional well-being. Recklessness, the standard triggering the availability of punitive damages, is subjective.¹⁶⁰ The defendant must have subjectively known of the high chance of severe injury.¹⁶¹ Similarly, the defendant must have subjectively known of the vulnerability.¹⁶²

In most product defect cases, a manufacturer will not know of differences between victims. The manufacturer has no relationship with the purchasers of its products, and it certainly has no relationship with bystander victims. Without a relationship, it is impossible to know a victim’s pre-injury occupation, pre-existing medical conditions, or tolerance for pain and suffering or emotional distress. If the manufacturer does not know of its victims’ personal characteristics, then those characteristics cannot be relevant to the extent of the manufacturer’s disrespect.¹⁶³

¹⁵⁹ Colby, *supra* note 10, at 601.

¹⁶⁰ Gregory A. Williams, Tuttle v. Raymond: *An Excessive Restriction upon Punitive Damages Awards in Motor Vehicle Tort Cases Involving Reckless Conduct*, 48 OHIO ST. L.J. 551, 570 (1987).

¹⁶¹ *Statler v. George A. Ray Mfg. Co.*, 195 N.Y. 478, 480–82 (1909).

¹⁶² The Supreme Court has not expressly declared this, but in *State Farm*, a case where the defendant did take advantage of financially vulnerable plaintiffs, that subjective knowledge of vulnerability is clear. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 433 (2003) (Ginsburg, J., dissenting) (arguing for affirmance of the punitive damage award based on the trial court’s reliance of “the testimony of several former State Farm employees affirming that they were trained to target ‘the weakest of the herd’”); *see also Brand Marketing Group LLC v. Intertek Testing Services, N.A., Inc.*, 801 F.3d 347, 364 (3d Cir. 2015) (finding reprehensibility based on defendant’s attempts to exploit the plaintiff’s financial vulnerability); *Krysa v. Paine*, 176 S.W.3d 150, 160 (W.D. Mo. 2005) (explaining that targeting financially vulnerable victims shows reprehensibility); *Wooley v. Lucksinger*, 61 So.3d 507, 635 (La. 2011) (finding reprehensible conduct because of the defendant’s knowledge of and its motivation to take advantage of financially vulnerable victims). Logically, it is impossible to target vulnerability without also knowing of that vulnerability. Additionally, the other factors the Court identified as relevant to reprehensibility are within the defendant’s subjective knowledge/control—whether

the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others . . . the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419.

¹⁶³ Professor Sebok seems to admit so within his own criticism of the reasonable relationship guidepost, labeling the mention of single-digit multipliers “the most regrettable

It is possible that the manufacturer targeted one set of consumers, or that the manufacturer knew that one segment of the population would be at greater risk of injury.¹⁶⁴ Suppose the manufacturer knew that its product could spontaneously combust and cause dramatic burns. Also suppose that the manufacturer knew that the product's likely users include both illiterate and literate users, and that the manufacturer warned the product was flammable, but not explosive, and did not include pictorial warnings. The defendant likely disrespected the private rights of illiterate plaintiffs more so than the literate ones. The illiterate plaintiffs were not warned at all. The literate plaintiffs were warned, but maybe not adequately. Assuming liability, these different levels of disrespect should produce different levels of disrespect between literate plaintiffs and illiterate plaintiffs. However, all the literate injured plaintiffs suffered identical disrespect, and all the illiterate injured plaintiffs suffered identical disrespect.

In most cases of reprehensible conduct, all the manufacturer knows is the probable injury. If a defective engine design is likely to cause the car to start on fire in a rear-end collision, many are likely to suffer burns of varying degrees. Or, if a warning is defective because it failed to warn of the risk that contact lenses could cause corneal ulcers, then many are likely to suffer corneal ulcers. These similar injuries are why plaintiffs can establish proximate cause in the first place—it was foreseeable that the defective product would injure them in this way.¹⁶⁵

[words] ever written about punitive damages.” Sebok, *supra* note 16, at 1029. *See also* Professor Anthony Sebok, *After Philip Morris v. Williams: What Is Left of the “Single-Digit” Ratio?*, 2 CHARLESTON L. REV. 287, 293 (2008) (“It is not clear what purpose or value the ratio rule has at this point.”). *But see* Colby, *supra* note 10, at 639 (pointing to the ratio rule as evidence of the need for a private-focused punitive damage award and labeling the requirement “a direct remnant of the historical conception of punitive damages”). Professors Colby and Zipursky have not criticized the ratio guideline the same way.

¹⁶⁴ *See* Memorandum Opinion and Order Denying Defendants’ Joint Motion for Summary Judgment, *Stanley Indus., Inc. v. W.M. Barr & Co.*, 784 F. Supp. 1570 (S.D. Fla. 1992) (No. 89-1840-CIV) (noting that the defendants targeted the Hispanic population through the use of the Hispanic media).

¹⁶⁵ The extent of the injuries may differ among injured victims, but if the victims are able to establish proximate cause, then, under the majority rule, those victims were able to establish that their general type of injury was foreseeable given the defective product. *See, e.g.*, *Hooper v. Cty. of Cook*, 851 N.E.2d 663, 669 (Ill. Ct. App. 2006) (“Although the foreseeability of an injury will establish legal cause, the extent of the injury or the exact way in which it occurs need not be foreseeable.”); *Powers v. Ryder Truck Rental, Inc.*, 625 So.2d 979, 981 (Fla. Dist. Ct. App. 1993) (“[I]t is not necessary that the tort-feasor be able to foresee the exact nature and extent of the injuries, but all that is necessary for liability to arise is that the tort-feasor be able to see that some injury will likely result in some manner as a consequence of his negligent acts.”). This is the same type of generalizing of the foreseeable injury that administrative agencies do when determining whether to set a safety standard for a product or whether to order a product recall. *See Southland Mower Co. v. Consumer Prod. Safety Comm’n*, 619 F.2d 499, 502 (5th Cir. 1980) (generalizing the types of injuries caused by lawnmowers necessitating the agency’s safety standard for walk behind lawn mowers); *U.S. v. Gen. Motors Corp.*, 565 F.2d 754, 759 (D.C. Cir. 1977)

Assuming victims can prove liability and entitlement to punitive damages, private redress theories then mandate punitive damages be based on the manufacturer's disrespecting the victims. But the manufacturer disrespected each of those victims identically. If punitive damages are based on that disrespect, then the injured victims should recover identical punitive damage awards.

C. Fixing the Reversed Disconnect Private Redress Theory Creates

Private redress theories are attractive because they fix the perceived disconnect between an individual tort claim and a punitive damage award—in an individual tort claim brought by just one plaintiff injured by a defective product, how is the defendant punished for \$62 million?¹⁶⁶ This is the disconnect Professors Colby, Zipursky, and Sebok focus on.

As a part of his private redress theory, Colby attempts to explain that disconnect by distinguishing the public wrong—which juries were improperly punishing—and the private wrong—which juries should have been punishing. He uses the example of a criminal assault to illustrate the difference. The individual victim has a tort claim. But that assault also causes a public harm: it “disturb[s] the peace and violate[s] the social order.”¹⁶⁷ A murder or rape “makes us all feel less secure”¹⁶⁸ and “makes us afraid for our own safety.”¹⁶⁹ The criminal punishment punishes this public wrong,¹⁷⁰ and tort law can punish the private wrong to the individual, “one consequence”¹⁷¹ of the public wrong. The two punishments are “imposed as a consequence of the same wrongful act,”¹⁷² but “serve distinct punitive goals.”¹⁷³

Professor Colby also applies his public-private distinction to product defect claims. He believes that punitive damages in these claims attempt to punish the manufacturer for causing public harm¹⁷⁴—for making all of us less secure and more afraid for our safety due to the possibility of accidents caused by defective

(affirming agency's recall order based on finding that some cars were likely to “burst into flames” due to defect).

¹⁶⁶ Kim Bell, *St. Louis Jury Orders Johnson & Johnson to Pay \$72 Million in Talcum Powder Cancer Case*, ST. LOUIS POST-DISPATCH (Feb. 23, 2016), http://www.stltoday.com/news/local/crime-and-courts/st-louis-jury-orders-johnson-johnson-to-pay-million-in/article_26e6046c-f97d-5a6d-a879-a97535dd78bc.html [<https://perma.cc/8JH7-N3SQ>].

¹⁶⁷ Colby, *Clearing the Smoke*, *supra* note 16, at 424.

¹⁶⁸ *Id.* at 426.

¹⁶⁹ *Id.* Colby also accurately points out that this public wrong can occur “in the absence of an individual victim.” *Id.* at 427. Even if a drunk driver does not injure anyone, he has endangered the public and made the public feel less secure, and can face criminal punishment. *Id.*

¹⁷⁰ *Id.* at 426.

¹⁷¹ *Id.* at 423.

¹⁷² *Id.* at 440.

¹⁷³ *Id.*

¹⁷⁴ Colby, *supra* note 10, at 584.

products.¹⁷⁵ That is how one jury could impose a \$62 million punishment for the defendant injuring one plaintiff. By narrowing the scope of the punitive damages to providing just the individual plaintiff redress, a \$62 million award (presumably) should not occur. Instead, the punitive damage award will be limited to providing the plaintiff redress just as the compensatory damage award is limited to compensating the plaintiff for her injuries.

But in the context of product defect claims, a private redress conception of punitive damages creates a new, reversed disconnect. The punitive damage award is now constitutionally limited to the private wrong—the disrespect the plaintiff suffered. But the liability for the product defect is not so limited. The basis for that liability is much broader—the jury likely determined that the defendant’s product injured nonparties. Even the basis for the private redress punitive damage award is much broader—the jury likely determined that the defendant knew of the probable injury to all exposed to the product, broad knowledge that “had little to do with the particular plaintiff.”¹⁷⁶ Thus, a new disconnect exists. Individualized punitive damages, yet broader notions of product defect and reprehensible conduct triggering those punitive damages.

The question, then, is how to construct a punitive damage award that punishes the disrespect that the plaintiff suffered, yet still reflects the breadth of the manufacturer’s conduct, the injured nonparties, and the manufacturer’s general knowledge of the probable injury to many.

The answer is identical punitive damage awards for those victims injured by the same defective product. The manufacturer generally disrespected potential

¹⁷⁵ If jurors were doing so, it would fill a void; no current mechanism exists to address the public wrong that a defective product causes. Criminal law punishes public wrongs, but very few examples of criminal punishment for defective products exist. *See* Rustad, *supra* note 75, at 73 (of over 350 punitive damage awards studied between 1965–1990, only one defendant was criminally sanctioned). Tort law also cannot punish this public wrong. Even if people are at risk, no tort claims exists until someone is actually injured. *Frank v. DaimlerChrysler Corp.*, 292 A.2d 118, 120 (N.Y. Sup. Ct. 2002) (denying class certification due to lack of injury when proposed class members were merely at risk of “neck and back injuries, paraplegia, quadriplegia, and even death” due to possibility of seat malfunction in the event of a rear-end collision).

The mechanism that comes closest to addressing the public wrong created by a defective product is agency regulation. But agencies rarely impose fines. *See* Rustad, *supra* note 75, at 73 (of over 350 punitive damage awards studied between 1965–1990, only eleven “defendants received some form of penalty from a local, state, or federal agency”). Regardless, agencies can only impose civil fines, the main purpose of which is usually not punishment. Colby, *Clearing the Smoke*, *supra* note 16, at 454 (explaining that the Supreme “Court often finds . . . that the civil penalty is in reality simply a form of rough compensation to the government for the cost of enforcing the law, rather than an attempt to penalize the defendant for violating the law, and thus the penalty is really remedial, and is not punishment at all.”). *See also* 49 C.F.R. § 578.2 (2016) (empowering the NHTSA to impose civil fines “to effectuate the remedial impact of civil penalties and to foster compliance with the law”).

¹⁷⁶ Wertheimer, *supra* note 125, at 515–16.

victims when it knew of the probable general type of injury, yet still sold the product. Each injured victim can pursue punitive damages to correct that disrespect. Yet, each injured victim was disrespected identically, and the manufacturer should pay those injured victims identical punitive damage awards.

The collection of individual punitive damage awards then represents the many private injuries that made the product defective. It also represents punishment for the many private wrongs. Professor Colby believes that juries were punishing the product manufacturer for the public wrong caused by a product defect, but what is likely happening is that juries are punishing the product manufacturer for the collection of private wrongs. In *Philip Morris*, the plaintiff's attorney refers not to the general risk to society, but instead to other individual smokers; the Oregon Supreme Court upheld the \$80 million punitive damage award partly because Philip Morris's conduct "caused a significant number of deaths each year in Oregon."¹⁷⁷ In *BMW of North America, Inc. v. Gore*,¹⁷⁸ the jury likely calculated \$4 million punitive damages by multiplying the actual damages to each car, \$4,000, by the 1,000 cars BMW had fraudulently sold as new.¹⁷⁹ Juries have already been attempting to punish the defendant for the collection of private wrongs committed. This practice should continue consistent with private redress theory, through individual, identical punitive damage awards.

D. Creating A System of Identical Awards

Two issues arise with creating such a system of identical punitive damage awards. The first issue arises with any private redress theory—how to monetarily value the manufacturer's disrespect of the plaintiff. There is no easy answer. Before the introduction of private redress theories, courts and academics struggled with the jury's process of determining the proper punitive damage award.¹⁸⁰ Private redress theories limit that discretion by specifically identifying what the punitive damage award can punish—the manufacturer's disrespect of the individual plaintiff. But none of Sebok, Colby, or Zipursky set out to provide guidance on how to translate that disrespect into a dollar amount.¹⁸¹

¹⁷⁷ *Williams v. Philip Morris, Inc.*, 127 P.3d 1165, 1170 (Or. 2006).

¹⁷⁸ 517 U.S. 559 (1996).

¹⁷⁹ *Id.* at 609.

¹⁸⁰ Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 206 (2003).

¹⁸¹ Professor Sebok specifically explained that the purpose of his article is not to "set[] out a rule or formula for their calculation or for reviewing them on appeal." Sebok, *supra* note 16, at 1030. Professor Colby explained that his theory will allow appellate courts to "strik[e] down awards that would be . . . excessive as punishment for the individual tort[,]," but offered no more specific guidance. Colby, *Clearing the Smoke*, *supra* note 16, at 467. The only specific numbers Professor Zipursky discussed were with respect to *BMW*, explaining that \$2 million was too much punishment, but that \$4,000 was likely too little. Zipursky, *supra* note 16, at 168–69.

This Article introduces a second issue, however—the need for identical punitive damage awards in product defect claims where the manufacturer disrespected each individual victim identically. Although not necessarily constitutionally required, such consistency is certainly desirable.¹⁸² The Court said so in *Exxon Shipping Co. v. Baker*,¹⁸³ explaining that “[c]ourts of law are concerned with fairness as consistency.”¹⁸⁴ Consistency in punishment is also required by the rule of law, which ensures that law dictates the results as opposed to the decision maker.¹⁸⁵

In *Exxon*, the Court anecdotally highlighted the inconsistent results produced by the current system: one Alabama jury awarded one plaintiff \$4 million in punitive damages based on a fraudulent misrepresentation, but another Alabama jury awarded no punitive damages to another plaintiff who relied on the same fraudulent misrepresentation.¹⁸⁶

This Article calls for a system that will help create consistency—where victims injured by the same defective product receive an identical punitive damage award because they suffered identical disrespect. Numerous practical difficulties make this system difficult to achieve.

This is not possible under the current system of jury imposition of punitive damage awards. Assuming plaintiffs injured by a defect product sue, a different jury will hear each individual claim. Juries allowed to impose punitive damages may decline. If juries choose to impose punitive damages, and even if properly instructed to punish the private wrong, those juries will likely value that private wrong differently.¹⁸⁷ The awards will not be consistent.

¹⁸² See Lens, *supra* note 67, at 27–31. Others have commented on the desirability of consistent punitive damage awards. See, e.g., Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 295 (1997) (“If punitive damages were fashioned to fit the infraction, we would expect identical wrongs to garner identical penalties.”).

¹⁸³ 554 U.S. 471 (2008).

¹⁸⁴ *Id.* at 499.

¹⁸⁵ See Lens, *supra* note 67, at 27–29 (discussing the rule of law’s need for consistency and predictability).

¹⁸⁶ See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 500 (discussing that after *BMW*, a “second Alabama case with strikingly similar facts produced ‘a comparable amount of compensatory damages’ but ‘no punitive damages at all.’”).

¹⁸⁷ *Id.* at 501 (“We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances.”); see also *id.* at 504 (doubting whether jury instructions could “promot[e] systemic consistency when awards are not tied to specifically proven items of damage” partially based on the Court’s “experience with attempts to produce consistency in the analogous business of criminal sentencing” where it concluded that only “a quantified approach will work.”); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 41 (1991) (Kennedy, J., concurring) (explaining that “inconsistency of jury results can be expected” because a “jury is empaneled to act as a decisionmaker in a single case, not as a more permanent body” and will necessarily “reach disparate outcomes based on the same instructions” and because of “generality of the instructions”).

Additionally, judge imposed punitive damages could not achieve identical punishment for identical respect. Judges, like juries, would lack a reference point to use to impose the award. Unlike juries, judges could look at previous punitive damage awards and match them. This solution has the same problems as the once popular one-award provision, where the defendant would be punished only once for its entire course of conduct.¹⁸⁸ In the earlier case, “the full extent of the defendant’s malice” may not have yet been clear.¹⁸⁹ Thus, the prior award may not properly reflect the extent of the defendant’s disrespect of the victim injured by the defective product, making it improper to repeat that prior award for the next victim injured by the same defective product.

If juries and judges cannot implement a system of identical awards for those injured by the same product, the only possible reformer left is the legislature. Thus far, most legislative reforms have been based on ratios—mandating that the punitive damage award cannot exceed some multiple of the compensatory damage award—or split-recovery statutes—mandating that some percentage of the punitive damage award go to the state instead of the individual plaintiff.¹⁹⁰ Neither of these types of reforms would help obtain identical awards. Ratios depend on the amount of compensatory damages. Two plaintiffs suffering the same disrespect can still receive vastly different punitive damage awards if their compensatory damages differ as they ordinarily will. Split-recovery schemes also will not result in identical awards for identical respect as they do not affect the amount awarded and will only reduce the amount the individual plaintiff can recover by a percentage.

A legislature has the theoretical capacity to set amounts of punitive damages based on the specific defective product, but likely not the practical capacity. Again, if the award is defined too early, the legislature may not yet have full information regarding the extent of the defendant’s reprehensibility. Plus, the legislature is not practically equipped to be able to pass legislation specific to each defective product likely to be at issue in several lawsuits. Lawsuits would likely need to be filed to gain the legislature’s attention, leaving legislatures unable to define the punishment beforehand.

Although a legislature is likely not able to set up the ideal system of defining a punishment specific to the defective product, a legislature does have the capacity to define a “hierarchy of fault within the realm of conduct subject to punitive

¹⁸⁸ “Some courts and commentators have proposed what is essentially a ‘double jeopardy’ regime: having the jury in the first case that goes to trial determine an appropriate punishment (if any) for the entire course of conduct, and then precluding all subsequent juries from imposing punitive damages.” Colby, *supra* note 10, at 658; *see also* GA. CODE ANN. § 51-12-5.1(e)(1) (2015) (allowing “only one award of punitive damages [to] be recovered in a court in this state from a defendant for any act or omission” in a products liability claim).

¹⁸⁹ Colby, *supra* note 10, at 659.

¹⁹⁰ Victor E. Schwartz et. al., *I’ll Take That: Legal and Public Policy Problems Raised by Statutes That Require Punitive Damages Awards to Be Shared with the State*, 68 MO. L. REV. 525, 526 (2003).

damages.”¹⁹¹ Such hierarchies do not currently exist legislatively. State statutes often clarify that punitive damages are available only upon a showing of evil intent or recklessness,¹⁹² but lack further differentiation of or guidance rating such levels.

Such state statutes likely do not currently exist because they are difficult to create.¹⁹³ One can agree on rating certain levels of culpability—evil intent based on a desire to injure is the most culpable, followed by evil intent based on substantially certain knowledge of injury, then followed by recklessness based on lesser knowledge. But how does the intended harm factor in? Evil intent to cause physical harm is likely more culpable than evil intent to cause economic harm, but is reckless disregard of the chance of physical harm more culpable than evil intent to cause economic harm?¹⁹⁴ What about emotional harm? In addition to the difficulty of ranking culpability associated with harm, a legislative hierarchy would need to be extensive; tort law “cover[s] a wide range of disparate conduct—from assault to trespassing to defamation to interference with business expectancies,” meaning hierarchies would need to cover “more finely grained categories of misconduct.”¹⁹⁵

Still, hierarchies are not impossible. To the contrary, they may already be socially ingrained. Professors Cass Sunstein, Daniel Kahnman, and David Schkade surveyed jury-eligible citizens to study the arbitrariness and unpredictability of punitive damage awards. The citizens were presented with different personal injury scenarios in which the plaintiffs received \$200,000 in compensatory damages and also requested punitive damages.¹⁹⁶ The participants were asked to rank those scenarios, using a scale of zero to six, according to the outrageousness of the defendant’s behavior and how much the defendant should be punished, and then to separately assign a dollar amount of punitive damages.¹⁹⁷ The researchers expected to find, and did find, remarkable similarity in the assignments of values for

¹⁹¹ Jeffrey L. Fisher, *The Exxon Valdez Case and Regularizing Punishment*, 26 ALASKA L. REV. 1, 28 (2009).

¹⁹² Annotation, *Punitive Damages in Actions for Violations of Federal Civil Rights Acts*, 14 A.L.R. FED. 608 (1973).

¹⁹³ This is the same reason that the Supreme Court’s reprehensibility guidepost has proven not to be user-friendly. “[T]he Court failed to provide clear guidance about when ‘bad’ conduct was ‘so bad’ that it justified a particularly high award of punitive damages.” 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, 349 (2008); see also Hines & Hines, *supra* note 52, at 1281 (explaining that the Supreme Court “shed little light on the relative importance of each factor or various combinations thereof.”).

¹⁹⁴ “The difficulties of cross-category comparisons inevitably lead to instability in the judgments of individuals, and to an impairment of consensus, relative to within-category comparisons.” Cass R. Sunstein et. al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1173 (2002).

¹⁹⁵ Fisher, *supra* note 191, at 41–42.

¹⁹⁶ Cass R. Sunstein et. al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in the Law)*, 107 YALE L. J. 2071, 2095 (1998).

¹⁹⁷ *Id.*

outrageousness and extent of punishment.¹⁹⁸ They concluded that “[j]udgments of intent to punish in these personal injury scenarios evidently rest on a bedrock of moral intuitions that are broadly shared in society.”¹⁹⁹ The researchers did not expect to find, however, similarity in the dollar amounts assigned.²⁰⁰ Again, they were correct. This is due to the difficulty of translating outrage into a dollar amount.²⁰¹

Another hierarchy can be deciphered from the results of Professor Michael Rustad’s empirical study on products liability punitive damage awards.²⁰² The study looks at the 355 such punitive damage awards imposed between 1965 and 1990.²⁰³ All involve manufacturers who knew of the probable risk of injury, yet different levels of reprehensibility are apparent in the awards. A very small percentage involved fraudulent-type misconduct,²⁰⁴ like knowledge of the risk plus concealment.²⁰⁵ Most, however, followed the “typical pattern of misconduct”—“a firm acquiring knowledge of a risk or danger caused by its product, and yet delaying remedial steps.”²⁰⁶ Another group of awards involved the defendants knowing of probable risks yet failing to warn of them,²⁰⁷ and another group of awards involved the defendants knowing of probable risks, yet refraining from conducting additional testing to confirm those risks.²⁰⁸

After presenting the results of their study, Professors Sunstein, Kahneman, and Schkade suggested numerous reforms. One involved a hierarchy scale: ask the jury to decide, on a scale, how severe of punishment the defendant deserves.²⁰⁹ The judge would then convert that judgment into a dollar amount using preset guidelines.²¹⁰ The professors noted the similarity of such a system to criminal sentencing where juries decide liability, but judges, using guidelines, decide

¹⁹⁸ *Id.* at 2098–100. The researchers did find, however, a “statistically significant difference in average rates” between “women and men.” *Id.* at 2100.

¹⁹⁹ *Id.* at 2098.

²⁰⁰ *Id.* at 2100.

²⁰¹ *Id.* at 2103.

²⁰² *See generally* Rustad, *supra* note 75, at 14–16 (discussing empirical data regarding punitive damages in tort law cases such as products liability).

²⁰³ *Id.* at 38.

²⁰⁴ *Id.* at 66.

²⁰⁵ *Id.* at 68.

²⁰⁶ *Id.* Professor Rustad separately groups awards based on fraudulent-type misconduct, violation of safety standards, inadequate testing/quality control, failure to warn of known dangers, and postmarketing failures to remedy known dangers. His description of cases in the safety-standard violation grouping includes cases where the defendant knew of the danger yet failed to notify the appropriate regulatory agency. *Id.* at 69–70. This could just as easily fit into the fraudulent-type misconduct category if focused on the knowledge instead on the safety standard violation.

²⁰⁷ *Id.* at 71–73.

²⁰⁸ *Id.* at 70–71.

²⁰⁹ Sunstein et al., *supra* note 196, at 2121.

²¹⁰ *Id.* at 2113.

sentences.²¹¹ Professor Jeffrey Fisher more recently suggested creating a hierarchy for punitive damages similar to the criminal sentencing system to better achieve predictability and consistency within the imposition of punitive damages.²¹²

Product defect claims provide an opportunity for legislatures to begin to experiment with hierarchies because of the characteristics of the claims. For instance, product defects usually result in personal injuries.²¹³ In fact, as a matter of law, product defect tort claims cannot be based on economic losses and must instead involve either personal injury or property damage.²¹⁴ And, if punitive damages are available, personal injury was likely involved.²¹⁵ This focus on personal injuries makes a hierarchy more feasible.²¹⁶

The hierarchy could then be based on: 1) the extent of the defendant's knowledge; 2) the known likely injury; and 3) the type of product.

²¹¹ *Id.* at 2120.

²¹² See generally Fisher, *supra* note 191 (discussing the implications of the Supreme Court's recent decision in *Exxon Shipping Co. v. Baker* for the Court's ongoing punitive damages jurisprudence).

²¹³ See, e.g., Jacob Kreutzer, *Somebody Has to Pay: Products Liability for Spyware*, 45 AM. BUS. L.J. 61, 63 (2008).

²¹⁴ RESTATEMENT (THIRD) OF TORTS PRODUCTS LIABILITY § 21 (AM. LAW INST. 1998).

²¹⁵ Rustad, *supra* note 75, at 32 n.167 (explaining that he did not include claims for economic loss in his extensive empirical study of products liability punitive damage awards because they are "too uncommon and unestablished"); see also *id.* at 62 (explaining that the plaintiffs receiving punitive damages in his study "were the victims of catastrophic injury or death").

²¹⁶ All of the hypotheticals in Sunstein, Kahne, & Schkade's study assumed \$200,000 in compensatory damages awarded, although the injuries differed. Sunstein et. al., *supra* note 196, at 2095. As examples, one plaintiff developed severe side-effects from using a baldness treatment, another suffered serious back injuries as a result of doing an exercise video, another was a child who suffered severe burns over a significant portion of his body when wearing flammable pajamas, and another suffered serious internal injuries due to defective brakes. See *id.* at Appendix C.

Extent of Defendant's Knowledge	Desire to Injure Substantially Certain of Injury Knowledge of Highly Probable Injury Knowledge of Probable Injury
Known, Expected Injury	Death Permanent Serious Bodily Harm Temporary Serious Bodily Harm
Type Product	Lifesaving Other Lesser Necessity Cars Consumer Products Children's Products

The extent of the defendant's knowledge is, of course, greatly relevant to the extent of the defendant's disrespect. The most culpable mindset is the defendant's desiring to injure when selling a defective product, whereas the least culpable, yet still deserving punishment, mindset is the defendant's knowing of the probability of injury. This scale of knowledge—ranging from desire to injure to knowledge of probable injury—mirrors the general levels of culpability in tort law and should be incorporated into any hierarchy of conduct subject to punitive damages.

The injury about which the defendant knows should also be part of the hierarchy. Fewer levels of reprehensibility exist here as only knowledge of death or serious bodily injury are likely to trigger punitive damages. Serious bodily harm can still be divided as permanent or temporary.

The last factor is the type of product, which is also relevant to the extent of the manufacturer's disrespect. For instance, the manufacturer has great power over a victim needing a product for survival. Similarly, the manufacturer has great power over, and a great ability to take advantage of, vulnerable consumers like children. Lesser power exists when the product at issue is less necessary.

Using these factors, Congress, the only legislature capable of creating national uniformity, could set awards. For instance, if the jury finds X extent of knowledge, Y likely injury, and Z type of product, then the product punitive damage award is \$50,000.²¹⁷ True, a legislature most often sets penalties for public wrongs, not private wrongs.²¹⁸ Still, research of prior punitive damage awards and

²¹⁷ Any legislative involvement in the setting of amounts of punitive damage awards is obviously inconsistent with the jury's traditional discretion in deciding whether to impose damages and how much to impose. But there is likely no way to achieve any kind of consistency without infringing on that discretion. Plus, jury involvement is not constitutionally required. Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 181 (1998).

²¹⁸ See generally Colby, *supra* note 10 (discussing punitive damage awards for private wrongs).

empirical research could help determine proper awards. Additionally, legislators obviously represent the community and thus have some ability to express the community's disapproval of the manufacturer disrespecting victims' rights.

Assuming different juries hearing cases about the same defective product make the same factual conclusions about the manufacturer's reprehensibility in selling that defective product, this type of hierarchy should create identical punitive damage awards for identical disrespect. The solution is not perfect as identical awards are not guaranteed, but the solution increases the chances.

Notably, one factor that is not included is the plaintiff's specific injury suffered. The manufacturer's disrespect is based on the injury expected to occur, like permanent serious burns likely to result from a defect causing a vehicle to start on fire—not on the injury that occurred. It is possible that an individual victim escapes the vehicle early and suffers only smoke inhalation. But, the manufacturer disrespected the victim by selling a product it expected to cause burns. The fact that this victim was lucky does not alter that level of disrespect.²¹⁹

Another factor not included is the amount of the plaintiff's compensatory damages. Amounts of compensatory damages are not relevant to the extent of the manufacturer's disrespect, and thus the damages should not be a factor in the hierarchy.²²⁰ Notably, in Sunstein, Kahneman, and Schkade's study, when making additional changes to the hypotheticals based on the injuries occurred, they found that the "harm that occurred did not affect the degree of outrage evoked by the defendant's behavior."²²¹ The survey participants, did, however, alter the amounts of punitive damages awarded.²²² This difference suggests that amounts of compensatory damages are interfering with juries' abilities to translate their outrage into dollar amounts. Regardless, amounts of compensatory damages are not relevant to the manufacturer's disrespect and should not be considered in the hierarchy.²²³

²¹⁹ This is similar to a point the Court made in *Philip Morris*:

[W]e can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harmed potentially caused *the plaintiff*."

Philip Morris USA v. Williams, 549 U.S. 346, 354.

²²⁰ See *supra* Part IV.B.

²²¹ Sunstein et al., *supra* note 196, at 2104.

²²² *Id.* at 2104–05 (explaining that the differing harms "had a small but statistically significant effect on punishment ratings, where defendants who had done more harm to the plaintiff were judged to deserve greater punishment" and a similar effect was seen in different assignments of dollar awards).

²²³ This Article has also not included the defendant's wealth as a relevant factor. Some states do allow the jury to consider the defendant's wealth when determining the amount of punitive damages, usually justified by the need for a greater amount to deter a

One likely pushback is the appropriateness of a hierarchy system specific only to product defect claims. The same problem that product defect claims pose—the defendant disrespecting many—also exists for other tortious conduct. This Article does not mean to suggest that hierarchies would be impermissible for other tort claims. Instead, it suggests a hierarchy for one context in which a hierarchy especially makes sense. Defective products injure many and, absent special circumstances, manufacturers act identically reprehensibly to those injured. That identical disrespect should be punished identically and a hierarchy is the best way to achieve such identical awards. Once a hierarchy is established, the legislature could clarify whether it could also serve as a reference point for other tort claims.

Admittedly, legislative involvement seems antithetical to personalized punitive damages. Professor Sebok addressed this, discussing a possible system “where victims initiated the process but courts took over by applying schedules or ratios.”²²⁴ He admits that it would likely still be a system of state-sanctioned private revenge, but a compromised one because the injured plaintiff’s only power would be to seek “state-administered penalties . . . against her wrongdoer.”²²⁵ A non-compromised system must recognize “the victim’s right to decide whether and how the wrongdoer will suffer punishment” by providing her an “active role . . . in determining the appropriate remedy for her case of wrongful loss.”²²⁶

Still, private redress theorists do not acknowledge the idea of identical disrespect—that a manufacturer can disrespect injured victims in the same way. If disrespect is identical, nothing in private redress theory otherwise precludes identical punitive damage awards. And even if a penalty is preset, Professor Sebok admits that a system would still empower the plaintiff to be punitive and to “make claims about the rightful treatment that she was owed.”²²⁷ It is just that, absent special circumstances, everyone injured by the defective product is entitled to that same rightful treatment. Identical disrespect should give rise to identical and consistent punitive damage awards, which can only be accomplished with legislatively set punitive damage awards.

One additional possibility absent legislative action is to reevaluate class-wide punitive damages. The initial thought was that *Philip Morris* signaled the end of punitive damages in class actions because of the need for personalization: “Treating punitive damages as a class-wide issue despite the presence of individual injuries fails to connect punishment to each plaintiff’s harm.”²²⁸ That assumes

rich defendant. None of Colby, Zipursky, or Sebok discusses the defendant’s wealth as a factor relevant to measuring the defendant’s disrespect of the victim.

²²⁴ Sebok, *supra* note 16, at 1027.

²²⁵ *Id.*

²²⁶ *Id.* at 1029.

²²⁷ *Id.* at 1028. Additionally, the plaintiff is still bringing the claim, not the state.

²²⁸ Sheila B. Scheuerman, *Two Worlds Collide: How the Supreme Court’s Recent Punitive Damages Decisions Affect Class Actions*, 60 BAYLOR L. REV. 880, 906 (2008); *see also, e.g.*, Nagareda, *supra* note 74, at 1138 (explaining that classwide punitive damages are likely not possible after *Philip Morris*); Byron G. Stier, *Now It’s Personal: Punishment and Mass Tort Litigation After Philip Morris v. Williams*, 2 CHARLESTON L.

personalization to the amount of each plaintiff's compensatory damages. Under the private redress theories, however, the amount of plaintiff's compensatory damages is not relevant to the disrespect each plaintiff suffers.²²⁹ The foreseeable injury may be relevant to the level of disrespect, but the plaintiff's occupation pre-injury is not. Thus, perhaps class-wide punitive damages are still possible after *Philip Morris*.

No easy fix exists to change our current system of imposing punitive damages into one that will produce identical awards for identical disrespect. Regardless, there is value in recognizing the possibility of and need for uniformity under private redress theories of punitive damages.

V. CONCLUSION

Professor Ellen Wertheimer argues extensively against the imposition of punitive damages in strict products liability claims. One of her arguments is:

In the context of design defects, a plaintiff prevails by showing that the particular defendant has been guilty of evil conduct in the course of designing its product. Since design defect cases focus on an aspect of the product that affects all of those who are exposed to it, the evil conduct at issue exists not with respect to any particular person, but rather with respect to that class of persons who have been or will be exposed to the product. The fact that a particular plaintiff proves an entitlement to punitive damages has little to do with the particular plaintiff, and everything to do with the conduct of the defendant towards a much larger group of people. Thus, there is no compelling reason why a particular plaintiff should receive the punitive damages award, any more than any other plaintiff who has been injured by the product.²³⁰

REV. 433, 445–46 (2008) (explaining that classwide punitive damages are likely not possible after *Philip Morris*). *But see* Catherine M. Sharkey, *The Future of Classwide Punitive Damages*, 46 U. MICH. J.L. REFORM 1127, 1140 (2013) (arguing that classwide punitive damages are still viable and that to “the extent that punitive damages embody a societal deterrence objective, a punitive damages class should be *more*—not less—prone to certification than any compensatory damages class, which is more apt to hinge on individualistic differences among plaintiffs.”).

²²⁹ *See supra* Part IV.B (discussing that compensatory damage amounts are irrelevant to the defendant's extent of disrespect).

²³⁰ Wertheimer, *supra* note 125, at 516.

Wertheimer has little scholarly company—those that agree that punitive damages should not be available in products liability claims.²³¹ And private redress theories address part of her critique. There is a compelling reason why a particular plaintiff injured by a defective product should receive a punitive damage award—to provide her redress for the manufacturer disrespecting her rights.

Nevertheless, Professor Wertheimer's criticism is also not wrong. The manufacturer's disrespectful conduct of selling a defective product despite knowing the probable injury was directed towards a much larger group of people. The manufacturer disrespected each of those victims identically. The question then is how to give effect to these facts when applying private redress theories to product defect punitive damage awards.

Private redress theories would appear to produce unique, personalized punitive damage awards to each plaintiff. But, in a product defect claim, the manufacturer disrespected each injured victim equally. And those injured victims should be able to seek redress for that disrespect, but they should also receive personalized yet identical punitive damage awards.

²³¹ See 3 OWEN & DAVIS ON PROD. LIAB. § 26:20 & n.36 (4th ed.) (explaining that punitive damages are recoverable today “[n]otwithstanding the paucity of logical support for the proposition that punitive damages should not be allowable” advanced by “defense lawyers, and even one otherwise intelligent products liability scholar,” citing Professor Wertheimer).