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The Counterintuitive Court: How the Supreme Court's Punitive Damages Jurisprudence Endangers Marginalized Communities

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The Counterintuitive Court: How the Supreme Court's Punitive Damages Jurisprudence Endangers Marginalized Communities

Anne Rodgers*

Abstract

Punitive damages are awarded in civil suits to deter intentionally reckless and grossly negligent behavior. The goal of punitive damages is to punish the tortfeasor and protect the public from future misconduct. However, the Supreme Court's recent jurisprudence on punitive damages reflects a shift towards protecting businesses from what the Court perceives as an arbitrary taking under the Due Process Clause. This Note argues that these decisions are dangerous, especially for marginalized communities. This Note begins by defining punitive damages and common criticisms of punitive damages awards. This Note then discusses the role of the Supreme Court in reviewing punitive damages awards, focusing specifically on the Supreme Court's pro-corporate jurisprudence. This Note argues that these pro-corporate decisions reducing punitive damages awards has created a systemic imbalance in our torts system in which defendants are protected from having to fully internalize the costs of their conduct at the expense of injured plaintiffs. This Note will then highlight the danger of the Supreme Court's punitive damages jurisprudence for marginalized communities through a discussion of Opioid

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Litigation, Exxon Shipping Co. v. Baker, and the Philip Morris Tobacco Cases. Finally, this Note discusses Johnson & Johnson v. Ingham, and suggests that only state appellate courts should be involved in reviewing punitive damages awards.

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I. Introduction

In 1992, Stella Liebeck, a 79-year-old retired sales-clerk, bought coffee from a McDonald's drive through.¹ As Liebeck went to add cream to her coffee, the coffee spilled, resulting in serious third-degree burns.² Liebeck sued McDonald's and a jury awarded her \$160,000 in compensatory damages and \$2.7 million in punitive damages.³ The backlash from the media and legal community was instantaneous, with headlines reading "Hot cup of coffee costs \$2.9 million,"⁴ and "Jury Awards \$3.5 Million Punitive Damages in Hot Coffee Case!"⁵ In short, the McDonald's Hot Coffee case became a media sensation, promoting images of runaway juries and unreasonable punitive damages awards.⁶

However, the media failed to pick up on the following facts that were crucial to the jury's decision to award punitive damages: "By its own corporate standards, McDonald's sells coffee at 180 to 190 degrees Fahrenheit."⁷ It takes less than three seconds to produce a third degree burn at 190 degrees.⁸ Not only did McDonald's have a corporate policy of keeping its coffee at a scalding temperature, it received more than 700 reports about

1. See *Legal Myths: The McDonald's "Hot Coffee" Case*, Pub. Citizen (Nov. 30, 1999) (describing background events leading up to the burn injury in the McDonald's Hot Coffee Case) [perma.cc/C257-J9FE]. and support.

2. See *id.* (describing the spill that led to the famous McDonald's coffee lawsuit).

3. See *id.* (noting that a New Mexico jury awarded Liebeck \$160,000 in compensatory damages and \$2.7 million in punitive damages).

4. See *id.* (arguing that "both the media and those who want to take away consumers' legal rights conveniently overlooked the facts of the case, creating a 'legal myth,' a poster-case for corporate entities with a vested interest in limiting the legal rights of consumers").

5. See Susanah Mead, *Punitive Damages and the Spill Felt Round the World: A U.S. Perspective*, 17 LOY. L.A. INT'L & COMP. L. J. 829, 829 (1995) (describing news headlines following Stella Liebeck's lawsuit against McDonald's).

6. See *Legal Myths: The McDonald's "Hot Coffee" Case*, *supra* note 1 (describing media headlines following the punitive damages award).

7. See *id.* (pointing out the dangerous degree at which McDonald's sells coffee).

8. See *id.* (noting that a scientist testifying for McDonald's stated that any coffee hotter than 130 degrees could produce third-degree burns).

burns from its coffee.⁹ Liebeck spent eight days in the hospital, underwent treatments for third-degree burns (including skin grafting) and was scarred and disabled for more than two years.¹⁰ Despite attempts by plaintiff's counsel to settle the case, McDonald's refused.¹¹ In the end, the jury found that the plaintiff was entitled to \$2.7 million in punitive damages because McDonald's engaged in willfully malicious conduct towards the consumer.¹² The media framed this award as perverted justice, incredibly high, and unreasonably unfair.¹³ But, in 1994, McDonald's made \$1.35 million *a day in coffee sales alone*.¹⁴ Thus, for two years of incredible pain, suffering, and scaring, the jury awarded Ms. Liebeck two- days-worth of McDonald's profits from their coffee sales. And yet, this case lives on as emblematic of why tort reform is necessary to prevent unfairness to corporate entities.

The McDonald's Hot Coffee Case is not a one-time example of reckless behavior by a corporation. There are thousands of McDonald's Hot Coffee Cases that happen every day, but we do not *see* or *hear* about these cases because of who the victims of tortious conduct are: low income, marginalized communities. Victims of tortious conduct in mass torts cases are in a precarious structural position due to the Supreme Court's pro-corporate jurisprudence.¹⁵

9. *See id.* (noting that during trial, McDonald's admitted it knew its coffee had caused serious burns within the last ten years, but it had not warned customers).

10. *See id.* (describing the extent of Liebeck's injuries).

11. *See id.* (noting that before ever filing suit, Liebeck informed McDonald's about her injuries and asked for compensation for her medical bills, which totaled \$11,000 to which McDonald's countered with an offer of \$800).

12. *See id.* (noting that McDonald's had several chances to settle before trial, with Liebeck's attorney offering to settle for \$300,000, but McDonald's refused all attempts to settle the case).

13. *See id.* (arguing that corporate America and the media's "trivial portrayal of the case is deceptive and disgraceful. They have painted a picture of a 'legal horror story' when in fact, the case demonstrates a legal system that punished corporations for misconduct and protects consumers who may be victims of their wrongdoing").

14. *See id.* (noting that the trial court refused to grant McDonald's a retrial, "finding that its behavior was callous").

15. *See infra* Part IV (describing how the Supreme Court's pro-corporate jurisprudence in mass tort cases harms low income, indigenous, and marginalized communities).

The Supreme Court's decision to grant certiorari in the following cases and reduce punitive damages awards in the name of fairness places plaintiffs and society in the position of being denied a full award for tortious conduct.¹⁶

This Note begins by defining punitive damages and common criticisms of punitive damages awards. This Note then discusses the role of the Supreme Court in reviewing punitive damages awards, focusing specifically on the Supreme Court's pro-corporate jurisprudence. This Note argues that these pro-corporate decisions reducing punitive damages awards has created a systemic imbalance in our torts system in which defendants are protected from having to fully internalize the costs of their conduct at the expense of injured plaintiffs. This Note will then highlight the danger of the Supreme Court's punitive damages jurisprudence for marginalized communities through a discussion of Opioid Litigation, *Exxon Shipping Co. v. Baker*, and the Philip Morris Tobacco Cases. Finally, this Note discusses *Johnson & Johnson v. Ingham*, and suggests that only state appellate courts should be involved in reviewing punitive damages awards.

II. Background

A. Defining Punitive Damages

Punitive damages may be awarded in addition to compensatory damages in tort actions.¹⁷ A court will typically only award punitive damages if the plaintiff can prove that the defendant engaged in an intentional tort or wanton and willful misconduct.¹⁸ While “compensatory damages are intended to redress a plaintiff's concrete loss . . . punitive damages are aimed

16. *See id.* (highlighting mass tort cases in which the Supreme Court either reversed or significantly reduced punitive damages awarded to victims).

17. *See Punitive Damages*, LEGAL INFO. INST. (Sept. 4, 2021, 8:37 PM) (providing an overview of punitive damages and their application in tort and contract law) [perma.cc/B7MV-KPVM].

18. *See id.* (explaining the standard for awarding punitive damages in tort law).

at the different purposes of deterrence and retribution.”¹⁹ Punitive damages awards are predicated on utilitarian thought that a rational defendant will forgo unlawful conduct when he or she may bear the full cost of the damage he or she causes.²⁰ The ultimate goal of a punitive damages award is to force the tortfeasor to internalize the full cost of his or her conduct.²¹

Punitive damages are necessary to deter harmful conduct in at least four situations:

first, when the harmful conduct is not always detected by the victim; second, when the probability of recovery is low and does not offer adequate incentive for every victim (or his or her attorney) to file suit; third, when the harm that is recoverable through compensatory damages does not fully capture the harm caused by the conduct; and fourth, when the wrongdoer derives illicit benefits from the conduct that exceed the value of the harm when measured by compensatory damages alone.²²

In the case of a tort inflicted on a member of a low-income, marginalized societal group, punitive damages serve the second and third purposes cited above.

B. Criticisms of Punitive Damages

Critics of punitive damages awards cite several arguments regarding the necessity of punitive damages caps. First, critics have argued that the actual standards used to assess punitive damages are too vague and provide no meaningful guidance to a jury.²³ Second, critics argue that juries are predisposed to award

19. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

20. See Timothy J. Moran, *Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy*, 36 HARV. C.R. & C.L. L. REV. 279, 285 (2001) (“[U]tilitarian analysis recognizes that a rational defendant will refrain from engaging in unlawful conduct from which she benefits only when the expected cost of the conduct exceeds the expected benefit.”).

21. See *id.* (discussing when punitive damages are necessary to deter wrongful conduct in housing discrimination cases).

22. *Id.*

23. See Moran, *supra* note 20, at 303 (listing issues with damages in product liability and environmental safety lawsuits).

large verdicts, particularly in cases in which the defendant is wealthy.²⁴ Third, critics argue that defendants lack fair notice of possible damages awards and “that the threat of large punitive damages award stifles innovation and encourages excessive and wasteful precautions.”²⁵ As Susanah Mead notes, “business interests contend that punitive damage awards are ‘unpredictable bolts of lightning wielded by vengeful juries inflamed by prejudice versus large corporations . . . egged on by greedy plaintiff’s lawyers salivating at the prospect of huge contingency fees.’”²⁶

However, data shows that it is in fact difficult for victims to win civil cases before juries.²⁷ For example, a 2005 study by the Department of Justice found that plaintiffs succeeded in 53.2% of civil jury trials, compared to 65.7% of civil bench trials.²⁸ Focusing specifically on non-asbestos products liability trials, plaintiffs had a substantially lower success rate than the 53.2% of general civil jury trials, winning in only 20.7% of cases.²⁹ Shifting to a focus on business cases, leading experts in the field of jury research found that empirical evidence does not support the idea that juries are biased towards plaintiffs.³⁰ In a survey of claims from doctors and corporate executives regarding unfair treatment from juries, studies show that actual and mock jurors treat plaintiff’s evidence with strict scrutiny.³¹ This trend reflects the inherent trust that

24. *See id.* (same).

25. *Id.*

26. Mead, *supra* note 5, at 830.

27. *See Snapshot of Justice: Jury Verdicts—Consistent and Conservative*, CTR. JUST. & DEMOCRACY (June 1, 2010) (discussing 2005 Department of Justice’s verdicts in civil trials) [perma.cc/8SGM-2G9F].

28. *See id.* (finding that the difference in plaintiff success rates between civil and bench trials was statistically significant).

29. *See id.* (noting that plaintiffs succeeded at a rate of 53.8% in jury trials in asbestos related products liability actions).

30. *See id.* (citing Cornell University Law Professor Valeria P. Hans and Duke University Law Professor Neil Vidmar’s study of doctors’ and corporate executives’ claims of unfair treatment from juries).

31. *See id.* (surveying mock and actual jury verdicts against doctors and corporate defendants, finding that juries subject plaintiffs’ evidence to rigorous scrutiny).

jurors place in corporate defendants to conduct themselves professionally and responsibly.³² For example:

Although the research finds that juries treat corporate actors differently, the differential treatment appears to be linked primarily to jurors setting higher standards for corporate and professional behavior, rather than to anti-business sentiments or a ‘deep pockets’ effect. Members of the public, and juries, in turn, believe that it is appropriate to hold corporations to higher standards, because of their greater knowledge, resources, and potential impact . . . distinctive treatment that businesses receive at the hands of juries is a reflection of the jury’s translation of community values about the role of businesses in society.’³³

Empirical evidence also suggests that jurors are able to understand complex cases, rebutting suggestions that juries are not capable, effective, and fair decision-makers who are able to evaluate claims in complex litigation. Experts in the field of jury verdicts found that jurors tend to critically evaluate the content and consistency of lay and expert testimony.³⁴ Additional findings suggest that most members of the public adhere to an ethic of individual responsibility, and many question the validity of plaintiffs’ claims in civil suits.³⁵ Critical evaluation of lay and expert testimony combined with individual bias towards personal responsibility likely contribute to the finding that the major determinant of verdicts in civil jury trials is the strength of the evidence, and jury awards correlate strongly to the severity of the plaintiff’s injury.³⁶ A survey of three decades of empirical research on jury decision-making confirms findings that juries critically analyze claims in complex litigation and tend to award verdicts

32. *See id.* (citing Valerie P. Hans and Neil Vidmar’s explanation of why jurors tend to subject plaintiffs’ evidence to rigorous scrutiny in cases involving corporate defendants).

33. *Id.* (internal quotations omitted).

34. *See id.* (noting that “[a]fter reviewing their own work and relevant scholarship, Professor Hans and Vidmar reported that jurors’ individual and collective recall and comprehension of evidence [was] substantial”) (internal quotations omitted).

35. *Id.* (internal citations omitted).

36. *See id.* (describing the results of Professors Hans and Vidmar’s empirical research on juries).

based on the degree and nature of the plaintiff's injury, not on the defendant's potential ability to pay a high award.³⁷ Perhaps predictably, this survey found that "negligence matters. Weak cases rarely win, close cases do better, and cases with strong evidence of medical malpractice fair best."³⁸

III. Role of Courts in Reviewing Punitive Damages Awards

A. Historical Review of Punitive Damages

Despite evidence that juries are not predisposed to award high punitive damages awards, judicial review of punitive damages has always been a safeguard against excessive jury verdicts.³⁹ One of the earliest reported cases involving "exemplary damages" arose in England out of King George III's attempt to punish publishers of allegedly seditious materials.⁴⁰ In this case, the King's agents arrested a printer and detained him for six hours.⁴¹ The printer sued the King's agent for this detainment, and the jury awarded the printer £300.⁴² The defendant's lawyer then requested a new trial, arguing that the jury's award was excessive and unfair.⁴³ Although the Court ultimately rejected the defendant's request for a new trial, the Chief Justice rejected the plaintiff's assertion that the Court cannot review jury awards for excessiveness.⁴⁴ The Chief

37. *Id.* (citing University of Missouri—Columbia Law Professor Philip G. Peters, Jr.'s analysis of three decades of jury research).

38. *See id.* (noting that juries agree with expert reviewers in eighty to ninety percent of cases in malpractice cases with weak evidence of negligence).

39. *See* *Honda Motor Co. v. Oberg*, 512 U.S. 415, 421–26 (1994) (describing sixteenth and seventeenth century cases from English Courts reducing monetary awards in civil cases).

40. *See id.* at 421–22 (describing the factual background of *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 786 (C.P. 1763)).

41. *See id.* (citing *Huckle* and noting that the plaintiff suffered almost no injury as a result of the six-hour detainment).

42. *See id.* (noting that £300 amounted to almost 300 times the plaintiff's weekly wage) (citing *Huckle*, 2 Wils. at 95).

43. *See id.* (mentioning the procedural history of the case) (citing *Huckle*, 2 Wils. at 95).

44. *See id.* (same) (citing *Huckle*, 2 Wils. at 95).

Justice noted that when “damages are ‘outrageous’ and ‘all mankind at first blush must think so,’ a court may grant a new trial ‘for excessive damages.’”⁴⁵

Common law courts in the United States followed England’s example. In 1822, Justice Story, sitting as a circuit justice, ordered a new trial in a case unless the plaintiff agreed to a reduction in his damages.⁴⁶ Justice Story explained his reasoning as follows:

[T]he court may grant a new trial for excessive damages . . . [i]t is indeed an exercise of discretion . . . [b]ut if it should clearly appear that the jury [has] committed a gross error, or [has] acted from improper motives, or [has] given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.⁴⁷

B. The Role of the Modern Supreme Court in Reducing Punitive Damages Awards

Up until and after⁴⁸ the passage of the Fourteenth Amendment⁴⁹, courts reviewed damages for “partiality” or “passion and prejudice,” inferring passion, prejudice, or partiality from the size of the award.⁵⁰ However, the Supreme Court’s recent

45. *Id.* (citing *Huckle*, 2 Wils. at 95).

46. *See id.* (describing how U.S. courts adopted judicial review of damages awards, which allowed judges to “correct” high damage awards) (internal citations omitted).

47. *See id.* (stating that it is the duty of the Court to interfere when a jury has awarded damages grossly unfair to the defendant) (internal citations omitted); *see also* *McConnel v. Hampton*, 12 Johns 234, 235 (N.Y. 1185) (same); *Taylor v. Giger*, 3 Ky. 586, 587 (1808) (same); *Belknap v. Boston & Main R. Co.*, 49 N.H. 358, 274 (1870) (same).

48. *See* *Honda Motor Co. v. Oberg*, 512 U.S. 415, 425–26 (1994) (citing nineteenth century treatises recognizing judges’ authority to review jury awards for prejudice and order new trials based on the size of damages).

49. *See* US CONST. amend. XIV (“No state shall . . . deprive any person of life, liberty, or property, without due process of law.”).

50. *See Oberg*, 512 U.S. at 425 (finding that in cases of personal injury, a verdict may be set aside for excessive damages if the Court finds the jury acted out of prejudice, passion, or corruption) (citing *Coffin v. Coffin*, 4 Mass. 1, 41 (1801)).

jurisprudence on punitive damages awards reflects a shift towards protecting businesses from what the court perceives as an arbitrary taking under the Due Process Clause. Critics of the media and Corporate America's demonization of the punitive damages award in the McDonalds Hot Coffee Case⁵¹ note that "punitive damages are supposed to be large enough to send a message to the wrongdoer; limited punitive damages awards when applied to wealth corporations, means the signal they are designed to send will not be heard."⁵² However, judicial review and reduction of punitive damages awards means that most defendants will not hear the corrective signals the original punitive damages award was meant to send. Pro-corporate Supreme Court decisions on punitive damages are especially dangerous for marginalized communities who are victims of mass torts. Stacking judicial review against plaintiffs, the Supreme Court has basically ensured that low-income plaintiffs may never see a fully recovery of both compensatory and punitive damages based on attorney's fees, trial costs, and slashing of high punitive damages awards.⁵³

C. The Fourteenth Amendment and Pro-Corporate Jurisprudence

The lack of accountability that companies in America face has effectively been sanctioned by the Supreme Court's use of the Fourteenth Amendment to reduce high punitive damages awards, characterizing these awards as "unconstitutionally excessive."⁵⁴ To the extent that there is any constitutional law involved in

51. See discussion *supra* Part I (using the McDonald's Hot Coffee Case to draw attention to the thousands of overlooked mass tort cases that involve low income marginalized communities).

52. See *Legal Myths: The McDonalds "Hot Coffee" Case*, *supra* note 1.

53. See Brian R. Frazelle, *Big Business Powers Ahead with Another Successful Term at the Roberts Court*, CONST. ACCOUNTABILITY CTR.: CORPS. & SUP. CT. (Oct. 1, 2020) (describing cases restricting when victims of fraudulent debt-collection tactics can challenge those tactics and cases which hinders racial discrimination suits) [perma.cc/FDZ6-JH7M].

54. See *BMW v. Gore*, 517 U.S. 559, 568 (1996) (stating "[b]ecause we believed that a review of this case would help to illuminate 'the character to the standard that will identify unconstitutionally excessive awards' of punitive damages . . . we granted certiorari").

assessing punitive damages, Supreme Court jurisprudence has been fine tuned to reflect business interests. Indeed, business interests of corporate America are at the forefront of Supreme Court decisions reducing punitive damages awards under the theory that these awards constitute unconstitutional takings.⁵⁵ However, there is no constitutional counterpart that protects an individual who has been brutally injured, only to see their punitive damages award reduced. My research has not uncovered a single instance in which the Supreme Court has granted certiorari to review the reduction of a punitive damages award for fairness to the *plaintiff*. When a 79-year-old woman is scalded by coffee that a company knew could and already had produced third-degree burns in three seconds, Corporate America and our torts system view a punitive damages award of one day of McDonald's coffee sales as unconstitutional, unfair, and emblematic of runaway juries. McDonald's is protected from having to internalize the cost of their conduct by the Supreme Court's unconstitutional takings jurisprudence. But, what about Stella Liebeck? Is she not protected from having the skin burned off her body due to an intentional and reckless company policy?

Protecting businesses is not a new trend or concept in the Supreme Court's jurisprudence. During the Supreme Court's 2019 – 2020 term, the Chamber of Commerce participated in 15 cases before the court by filing amicus briefs, prevailing in 10 out of the 15 cases.⁵⁶ This 67% win rate is consistent with the Chamber of Commerce's long-term average of a success rate of 70% since Chief Justice John Roberts and Justice Samuel Alito have joined the Court.⁵⁷ During the 2019 – 2020 term, the Supreme Court never reversed a pro-corporate win.⁵⁸ This finding is consistent with the

55. See Frazelle, *supra* note 53 (examining cases in which the U.S. Chamber of Commerce filed amicus briefs).

56. See Frazelle, *supra* note 53 (tracking Corporate America's success in the 2019–2020 Supreme Court term by examining cases in which the U.S. Chamber of Commerce participated by filing an amicus brief).

57. See *id.* (noting the average “win rate” for the Chamber of Commerce in cases in which the chamber filed amicus briefs).

58. See *id.* (stating that “[w]hen the Supreme Court reviewed decisions favoring big business, not once did individuals or the government persuade the Court to reverse those pro-corporate wins”).

fact that the Supreme court has not reversed a lower court decision favoring corporate interests in more than four years.⁵⁹ Most notably during the 2019–2020 term, the Supreme Court:

[M]ade it harder for victims of racial discrimination to sue under a Reconstruction-era civil rights law (*Comcast v. National Association of African-American Owned Media*), restricted circumstances in which victims of fraudulent debt-collection tactics can challenge those tactics (*Rotkiske v. Klemm*), limited the ability of employees to sue to protect their retirement plans (*Thole v. U.S. Bank*), and permitted the construction of natural gas pipelines through National Park Services lands (*U.S. Forest Service v. Cowpasture River Preservation Association*).⁶⁰

There are multiple ways a corporation can influence a Supreme Court decision. Pro-corporate entities like the Chamber of Commerce can file amicus briefs and financing campaigns against pro punitive damages state judges.⁶¹ Anti-punitive damages lawyers such as Ted Olson⁶² are not only trying to persuade the Supreme Court to cut large punitive damages awards; they are also arguing “that consumers injured by dangerous or defective medical devices and drugs in some cases shouldn’t be able to file product-liability suits at all.”⁶³ By arguing that consumers should not be able to sue under state law, “the business community . . . is trying to ensure that these consumers

59. *See id.* (noting that the Court has not reversed a single pro-corporate decision over this four-year period despite reviewing more than seventy cases in which the Chamber of Commerce has submitted an amicus brief).

60. *Id.*

61. *See* Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES (Mar. 16, 2008) (noting that in 2008, the Chamber of Commerce’s litigation center filed amicus briefs in fifteen cases and its side won in twelve of them, which was the highest percentage of victories in the center’s thirty-year history) [perma.cc/49W8-LCDW].

62. *See id.* (noting that Ted Olson a pro-business lawyer, former solicitor general under President George W. Bush, and “has devoted most of his energies in private practice to changing the legal and political climate for American business”).

63. *See id.* (explaining that advocates like Ted Olson want to block injured consumer suits in state courts “because there is no national product-liability law that allows federal suits for personal injuries”).

often have no legal remedy for their injuries.”⁶⁴ Taking this point to the Supreme Court, Ted Olson has argued that manufacturers of defective medical devices like heart valves, breast implants, and defibrillators should be immune from liability because the federal Food and Drug Administration had approved the devices and manufacturers had complied with all federal requirements.⁶⁵

In these cases, the Chamber of Commerce and pro-business attorneys are not hiding the fact that they are advocating for cutting off consumers rights to sue. These arguments rest on the idea that a maimed consumer should not be able to sue for dangerous product defect. Ultimately, these findings reflect the Supreme Court’s pro-corporate jurisprudence, with one commentator stating:

What is striking today . . . is how often the Roberts Court, like its predecessor the Rehnquist Court, hands down counter-intuitive 5-4 victories to corporations by ignoring clear precedents, twisting statutory language, and distorting legislative intent. From labor and workplace law to environmental law, from consumer regulation to tort law and the all-important election law, the conservative-tilting Court has reached out to enshrine and elevate the power of business corporations—what some people have begun to call “corporate Americans”—over the rights of the old-fashioned human beings called citizens.⁶⁶

64. *See id.* (noting that there is no federal products-liability law for consumers to sue under).

65. *See id.* (describing arguments before the Supreme Court advocating for cutting off consumers’ rights to sue in products liability cases).

66. *Rise of the Corporate Court: How the Supreme Court is Putting Businesses First*, PEOPLE AM. WAY FOUND. (2010) 1, 2 [perma.cc/HBG4-69KF].

D. The Constitutionalization of Protections for Corporations: Due Process

1. Honda Motor v. Oberg

These pro-corporate rulings are bolstered by two Supreme Court cases making punitive damages a constitutional issue. Relying on the Due Process Clause of the Fourteenth Amendment, the Supreme Court has warped the language of the clause to protect corporations against high punitive damages awards. In *Honda Motor Co. v. Oberg*,⁶⁷ petitioner Honda Motor Co., Ltd. manufactured and sold a three-wheeled all-terrain vehicle that overturned while respondent was driving it, causing him permanent, severe injuries.⁶⁸ The respondent argued that Honda knew or should have known that “the vehicle had an inherently and unreasonably dangerous design.”⁶⁹ The Oregon jury agreed, awarding the respondent \$919,390.39⁷⁰ in compensatory damages and punitive damages of \$5 million.⁷¹ On appeal, Honda argued that the award of punitive damages violated the due process clause of the Fourteenth Amendment because the award was excessive and Oregon courts lacked the power to correct excessive verdicts.⁷² The Oregon Court of Appeals and the Oregon Supreme Court affirmed.⁷³ The Oregon Supreme Court noted that Oregon law

67. See *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (holding that the Due Process Clause requires judicial review of punitive damages awards).

68. See *id.* at 418 (describing the factual background of the case).

69. See *id.* (describing respondent’s products liability action at the Oregon trial court level).

70. See *id.* (noting that the compensatory damages in the case were reduced by 20% to \$735,512.31, because respondent’s own negligence contributed to the accident).

71. See *id.* (noting that the jury found the petitioner liable before awarding punitive damages).

72. See *id.* at 418 (describing Honda’s argument on appeal).

73. See *id.* at 418–19 (noting that the Oregon Supreme Court “relied heavily on the fact that the Oregon statute governing the award of punitive damages in product liability actions and the jury instructions in the case contain substantive criteria . . . that provide at least as much guidance . . . [as the] jury instructions that [the Supreme Court] upheld in *Haslip*”).

provides protections to defendants by requiring a plaintiff to prove entitlement to punitive damages by clear and convincing evidence:

Recognizing that other state courts had interpreted *Haslip* as including a ‘clear . . . constitutional mandate for meaningful judicial scrutiny of punitive damages awards . . . the court nevertheless declined to interpret *Haslip* to hold that an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review that includes the possibility of remittitur.⁷⁴

The Supreme Court granted certiorari to consider whether Oregon’s limited review of the size of punitive damages awards was consistent with the Court’s ruling in *Haslip*.⁷⁵ The Supreme Court first cited the Oregon Constitution, noting that “an amendment to the Oregon Constitution prohibits judicial review of the amount of punitive damages awarded by a jury ‘unless the court can affirmatively say there is no evidence to support the verdict.’”⁷⁶ Thus, the question before the Court was whether that prohibition was consistent with the Due Process Clause of the Fourteenth Amendment.⁷⁷ More specifically, the Court asked whether the Due Process Clause requires judicial review of the amount of punitive damages awards.⁷⁸ The Court ultimately found this prohibition to be inconsistent with the Due Process Clause, holding that Oregon’s denial of judicial review of the size of

74. *See id.* at 419 (describing the Oregon Supreme Court’s interpretation of the constitutional requirements for review of punitive damages awards following the *Haslip* decision).

75. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (concluding that the punitive damages award against Pacific Mutual Life Insurance Company did not violate the due process clause of the Fourteenth Amendment).

76. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418 (1994).

77. *See id.* at 418 (noting the question before the Supreme Court is “whether [Oregon’s] prohibition is consistent with the Due Process Clause of the Fourteenth Amendment”).

78. *See id.* at 420 (providing a narrower question for the court to consider).

punitive damages awards violates the Due Process Clause of the Fourteenth Amendment.⁷⁹

The Court's analysis in the case turned on the degree to which Oregon's prohibition on judicial review of the amount of punitive damages awarded by a jury unless the court can affirmatively say there is no evidence to support the verdict departs from traditional methods of reviewing punitive damages awards. Justice Stevens, writing for the majority, relied strongly on *Haslip* to emphasize the importance of the procedural component of the Due Process Clause, noting that the *Haslip* Court held that the common law method of assessing punitive damages did not violate procedural due process, stressing the availability of meaningful and adequate review by the trial court and appellate court.⁸⁰

Justice Stevens then reasoned that the Court's findings in *Haslip* "suggest that our analysis in this case should focus on Oregon's departure from traditional procedures."⁸¹ Justice Stevens then went on to cite a series of Supreme Court cases that recognize that the Constitution imposes a substantive limit on the size of punitive damages.⁸² In overturning Oregon's statute, the majority found "there is a dramatic difference between the judicial review of punitive damages awards under the common law and the scope of review available in Oregon."⁸³ Specifically, Justice Steven's reasoned:

An Oregon trial judge, or an Oregon appellate court, may order a new trial if the jury was not properly instructed, if error occurred during the trial, or if there is no evidence to support any punitive damages at all. But if the defendant's only basis for relief is the *amount* of punitive

79. See *Honda Motor Co. v. Oberg*, 512 U.S. 415, 426;432 (1994) (concluding that "Oregon's denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment").

80. See *id.* at 420 (describing the Court's holding in *Haslip*).

81. *Id.* at 421 (describing how the Court should review Oregon's punitive damages statute) (emphasis added).

82. See *id.* at 420 (citing *Pacific Mut. Life. Ins. Co. v. Haslip*, 499 U.S. 1 (1991) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) for the proposition that the due process clause requires judicial review of punitive damages awards).

83. *Id.* at 426.

damages the jury awarded, Oregon provides no procedure for reducing or setting aside that award.⁸⁴

The Court's holding in *Honda Motor Co., Ltd. v. Oberg* ultimately turned on the fact that the Oregon statute provided absolutely no method of completely overturning the punitive damages awards. Thus, the Court suggests, and ultimately holds, that there must be a possible avenue to completely overturn a punitive damages award for the punitive damages award and process to comport with due process. Justice Stevens writes,

Oregon's abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause . . . [b]ecause the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial. In fact, most of our due process decisions involve arguments that traditional procedures provide too little protection and that additional safeguards are necessary to ensure compliance with the Constitution.⁸⁵

Justice Stevens finds Oregon's final safeguard, a proper jury instruction on punitive damages, to be an insufficient protection against what Stevens views as a potentially arbitrary deprivation of property. Finding the jury instruction to be insufficient, Justice Stevens states: "[t]he problem that concerns us, however, is the possibility that a jury will not follow those instructions and may return a lawless, biased, or arbitrary verdict."⁸⁶

2. BMW of North American, Inc. v. Gore

Following the Supreme Court's decision in *Honda Motor Co. v. Oberg*, the Supreme Court granted certiorari in *BMW of North*

84. *Id.* at 426–27.

85. *See id.* at 430 (reasoning that Oregon's departure from the common law principle of providing a method to completely vacate a punitive damages award raises a presumption that Oregon's procedure for reviewing awards violates the Due Process Clause).

86. *Id.* at 433.

*America, Inc. v. Gore*⁸⁷ because the court “believed that a review of [*Gore*] would help to illuminate ‘the character of the standard that will identify unconstitutionally excessive awards of punitive damages.’”⁸⁸ In *BMW of N. Am., Inc. v. Gore*, an automobile purchaser brought an action against BMW of North America based on the distributor’s failure to disclose that the automobile had been repainted after being damaged prior to delivery.⁸⁹ To determine whether a punitive damages award of \$2,000,000 was grossly excessive compared to \$4,000 compensatory award, Justice Stevens, writing for the majority, started his review of the punitive damages award by noting when a punitive damages award raises a due process concern:⁹⁰

[B]ecause [a punitive damages award] violates due process only when it can fairly be categorized as ‘grossly excessive’ in relation to the State’s legitimate interest in punishing unlawful conduct and deterring its repetition . . . the federal excessiveness inquiry . . . begins with an identification of the state interests that such an award is designed to serve.⁹¹

With this triggering framework in mind, the Court then goes on to state that “elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person will receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty a State may impose.”⁹² Finally, Justice Stevens articulated a three-part framework for evaluating the punitive damages award: the degree of reprehensibility of the conduct, the ratio of the punitive damages award to the actual harm inflicted on the plaintiff, and the

87. See *BMW v. Gore*, 517 U.S. 559, 580 (1996) (explaining that “because this case exhibits none of the circumstances ordinarily associated with egregiously improper conduct . . . BMW’s conduct was not sufficiently reprehensible to warrant imposition of a \$2 million exemplary damages award”).

88. *Id.* at 568.

89. See *id.* at 563 (describing the factual background of the complaint).

90. See *id.* at 568 (explaining when a punitive damages award raises a due process concern).

91. *Id.* at 559.

92. *Id.* at 574.

difference between the punitive damages award and civil penalties authorized or imposed in other cases.⁹³

Beginning with the degree of reprehensibility of the defendant's conduct, the Court found that none of the aggravating factors associated with particularly reprehensible conduct were present in this case.⁹⁴ The harm the plaintiff experienced, a minor loss of value to the car he purchased, was purely economic in nature.⁹⁵ In addition, BMW's conduct reflected no indifference or reckless disregard for the plaintiff's health or the health and safety of others.⁹⁶ The Court then addressed the ratio of the punitive damages award to the actual harm inflicted on the plaintiff, noting that the "damages must bear a 'reasonable relationship to the compensatory damages'" awarded in the case.⁹⁷ The Court ultimately found the \$2 million punitive damages award against BMW, which was 500 times the amount of the compensatory award, was disproportionate to the amount of compensatory damages.⁹⁸ However, the Court noted that it has:

Consistently rejected the notion that the constitutional line is marked by a simple mathematical formula . . . low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might be difficult to determine.⁹⁹

93. *See id.* at 574–75 (stating that these "[t]hree guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the \$2 million award against BMW is grossly excessive").

94. *See id.* at 576 (noting that BMW's conduct in this case was not reprehensible for the purposes of a high punitive damages award).

95. *See id.* at 576 (explaining why BMW's conduct did not rise to a level of reprehensibility that would trigger a high punitive damages awards).

96. *See id.* at 576 (same).

97. *Id.* at 580.

98. *See id.* at 582 (describing the ratio between the compensatory damages and the punitive damages).

99. *Id.*

After discussing the ratio between the compensatory and punitive damages award, the Court articulated a third factor for assessing whether a punitive damages award is excessive: whether or not there are other civil or criminal penalties that could be imposed for comparable misconduct.¹⁰⁰ The Court noted that the maximum civil penalty for deceptive trade practices in Alabama is \$2,000, reasoning from this fact that the punitive damages award bore little resemblance to comparable penalties.¹⁰¹ In perhaps the Court's most overtly pro-corporation protectionist use of due process in this case, Justice Stevens stated:

The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce.¹⁰²

*IV. Applying Pro-Corporate Jurisprudence to Mass Torts:
Marginalized Victims of the Supreme Court's System*

The constitutionalization of protection for businesses facing high punitive damages awards is especially problematic when the harm perpetrated is the result of intentional targeting of a marginalized community.¹⁰³ Recent opioid litigation provides shocking examples of companies intentionally targeting impoverished sections of West Virginia with drugs they knew were

100. *See id.* at 583 (providing the third factor used to evaluate punitive damages awards).

101. *See id.* at 548 (comparing the punitive damages award to other comparable civil fines).

102. *Id.* at 585.

103. *See Glossary of Essential Health Equity Terms*, NAT'L COLLABORATING CENTRE DETERMINANTS HEALTH (defining marginalized populations as "groups and communities that experience discrimination and exclusion (social, political, and economic) because of unequal power relationships across economic, political, social and cultural dimensions") [perma.cc/Q7CG-P9GL].

highly addictive.¹⁰⁴ In a civil case brought by Cabell County and the City of Huntington in West Virginia against AmerisourceBergen Drug Co., Cardinal Health Inc, and McKesson Corp., the plaintiffs presented email evidence of company executives referring to people from West Virginia as “pillbillies,”¹⁰⁵ and referring to Oxycontin as “hillbilly heroin.”¹⁰⁶ Another email from a company executive, referencing proposed legislation for substance abuse programs, stated that “one of the pillbillies must have learned to read.”¹⁰⁷ Executives also targeted children, with one email showing “a children’s cereal box based on Kellogg’s cereals, with a frog holding a syringe. The title on the box said ‘Sugar Smacks.’”¹⁰⁸ Punitive damages were designed to punish this type of intentional company conduct, but for victims of the opioid crisis, any punitive damages they could hypothetically be awarded may be reduced by the Supreme Court for “fairness” to Amerisource Bergen.

There are several areas of tort litigation in which juries have actually awarded relatively high punitive damages awards that were later reduced by judges in the interest of fairness to the defendants in the case. These cases show that the threat of denial of full recovery is all too real for some plaintiffs from low income, indigenous, and marginalized communities.

104. See generally *Drug Executive Emails Mocked Appalachians as “Pillbillies,”* CBS NEWS (May 14, 2021, 3:29 PM) (discussing evidence of corporate wrongdoing in opioid litigation) [perma.cc/Q4PY-HX85].

105. See *id.* (describing the lawsuits brought as a result of the Opioid epidemic).

106. See Brian Mann, *Opioid Trial in West Virginia Comes Amid a National Reckoning for Big Pharma*, NPR (May 26, 2021, 11:32 AM) (noting that “hillbilly heroin” is a term used to refer to Oxycontin) [perma.cc/FQ84-RWLF].

107. See *Drug Executive Emails Mocked Appalachians as “Pillbillies,”* *supra* note 104.

108. John Sammon, *Washington Opioid Trial: State Introduces Distributor’s Internal ‘Pillbillies’ Memo Mocking Addicts*, LEGAL NEWSLINE (Dec. 2, 2021) [perma.cc/754H-D2NB].

A. Exxon Shipping Co. v. Baker

The Supreme Court's counter-intuitive jurisprudence on punitive damages comes to a head in *Exxon Shipping Co. v. Baker*,¹⁰⁹ in which indigenous villages were denied full recovery due to the Roberts' Court's insistence on protecting corporations from punitive damages awards. Described as one of the worst environmental disasters in history,¹¹⁰ the jury awarded the plaintiff fisherman and nearby residents \$287 million in compensatory damages and another \$5 billion in punitive damages for Exxon's corporate recklessness.¹¹¹ After two remands, the ninth circuit reduced the punitive damages award to \$2.5 billion.¹¹² However,

even this pared-down judgment was too much for Justices Roberts, Kennedy, Thomas, Souter, and Scalia. In 2008, this bloc reduced the punitive damage award from \$2.5 billion to \$507.5 million . . . the only thing that stopped them from deleting the award altogether was that they were on vote short of being able to find that a corporation is not responsible for the reckless acts of its own managers acting in the scope of their employment.¹¹³

The *Baker* case arose out of a March 24, 1989 Exxon Valdez Supertanker crash on Bligh Reef off the coast of Alaska.¹¹⁴ The Exxon Valdez was carrying 53 million gallons of crude oil when it

109. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 475–76 (2008) (holding “that the federal statutory law does not bar a punitive award on top of damages for economic loss, but that the award here should be limited to an amount equal to compensatory damages”).

110. See *Rise of the Corporate Court: How the Supreme Court is Putting Business First*, *supra* note 66, at 5 (describing the Exxon Valdez crash in 1989).

111. See *Exxon Shipping Co.*, 554 U.S. at 480–81 (providing the original amount of punitive damages awarded against Exxon Mobile for reckless corporate conduct).

112. See *id.* at 481 (noting that the Ninth Circuit reduced the punitive damages award after two remands and a close study of the issue of punitive damages).

113. See *Rise of the Corporate Court: How the Supreme Court is Putting Business First*, *supra* note 66, at 5.

114. See *Exxon Shipping Co.*, 554 U.S. at 476 (describing the events leading up to the lawsuit).

crashed into the reef, releasing “a toxic flood of oil into Prince William Sound . . . destroying vast amounts of marine wildlife and the livelihood of many fishing communities and native Alaskans.”¹¹⁵ Commercial fishermen and native Alaskans brought claims for economic loss due to their dependency on the Prince William Sound for their livelihood.¹¹⁶ The crash occurred after the ship’s captain, John Hazelwood, inexplicably “left the bridge after speeding the tanker up, placing it on autopilot and leaving it in the hands of an inexperienced officer unlicensed to navigate that part of the Prince William Sound.”¹¹⁷

Captain John Hazelwood was an alcoholic.¹¹⁸ Before the Valdez left the port on the night of the crash, Hazelwood had five double vodkas at the waterfront bars of Valdez.¹¹⁹ Exxon knew that Hazelwood was an alcoholic.¹²⁰ Hazelwood, according to the District Court, “drank in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers . . . [as well as with] Exxon officials.”¹²¹ Prior to the crash, “Exxon managers knew that he had relapsed into his old drinking habits.”¹²² Despite the fact that Exxon “had a clear policy prohibiting employees from serving onboard within four hours of consuming alcohol . . . Exxon presented no evidence that it monitored Hazelwood after his return to duty [following his exit

115. See *Rise of the Corporate Court: How the Supreme Court is Putting Business First*, *supra* note 66, at 5.

116. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 476 (2008) (describing the plaintiffs in the case).

117. See *Rise of the Corporate Court: How the Supreme Court is Putting Business First*, *supra* note 66, at 5.

118. See *id.* at 5 (noting that the Captain of the Exxon Valdez was “a long-term alcoholic”).

119. See *id.* at 5 (describing the amount of alcohol Hazelwood drank prior to the crash).

120. See *id.* (“Exxon knew all about Captain John Hazelwood’s alcoholism. He had completed part of an alcohol treatment program but dropped out of its concluding segment and he had stopped going to Alcoholics Anonymous meetings.”).

121. *Id.*

122. See *id.* (describing Captain John Hazelwood’s history and struggle with alcoholism).

from rehabilitation services] or considered giving him a shoreside assignment.”¹²³

The Supreme Court considered the following three questions of maritime law: “(1) whether a shipowner may be liable for punitive damages without acquiescence in the actions causing harm”, (2) “whether punitive damages have been barred implicitly by federal statutory law making no provision for them”, and (3) “whether the award of \$2.5 billion is greater than maritime law should allow in the circumstances.”¹²⁴ Exxon argued that the \$2.5 billion punitive damages award exceeded the bounds justified by the goal of punitive damages to deter reckless behavior.¹²⁵ The Court stated that Exxon’s claim “[went] to our understanding of the place of punishment in modern civil law and reasonable standards of process in administering punitive law, subjects that call for starting with a brief account of the history behind today’s punitive damages.”¹²⁶ The Court then launched into a history of state punitive damages statutes, noting that some states bar punitive damages,¹²⁷ and some states permit punitive damages only when authorized by statute.¹²⁸ This history included a survey showing that “by most accounts the mean ratio of punitive damages to compensatory awards has remained less than 1:1. Nor do the data substantiate a marked increase in punitive awards over the past several decades.”¹²⁹

The Court then goes on to focus on outlier punitive damages awards to argue that “the real problem . . . is the stark unpredictability of punitive awards.”¹³⁰ The Court goes on to cite a study showing that the median ratio of punitive damages to

123. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 477 (2008) (describing Exxon’s failure to monitor Captain Hazelwood’s alcoholism while allowing him to captain the Exxon Valdez).

124. See *id.* at 475–76.

125. See *id.* at 490 (providing Exxon’s argument before the Supreme Court).

126. *Id.*

127. See *id.* at 494 (noting that Nebraska completely bars punitive damages on state constitutional grounds).

128. See *id.* (noting that Louisiana, Massachusetts, Washington, and New Hampshire only permit punitive damages when authorized by statute).

129. *Id.* at 498–99.

130. *Id.*

compensatory damages in state civil trials is 0.62:1, and a mean ratio of 2.90:1.¹³¹ Noting that a penalty should be reasonably predictable in its severity, the Court decided that a 1:1 limit of punitive to compensatory damages will be the uppermost limit in maritime cases.¹³² The Court's decision has been described as follows:

What the 5-justice majority found, over the objections of dissenting liberal justices who accused them of legislating from the bench, was that it would impose in maritime tort cases a 1-1 ratio between compensatory and punitive damages – a formula found nowhere in the statute and essentially pulled out of a hat made by a big corporation. In dissent, Justice Stevens chastised the majority for interpreting the congressional choice not to limit the availability of punitive damages under maritime law as an invitation to make policy judgements on the basis of evidence in the public domain that Congress is better able to evaluate than is the Court.¹³³

Exxon ended up paying punitive damages equal to a day or two of company profits, which is indicative of the Supreme Court's valuation of Exxon Mobile over indigenous fishing communities.¹³⁴ On top of the fact that the punitive damages award in this case essentially amounts to a slap on the wrist, Exxon actually made money on the spill because of the resulting increase in oil prices.¹³⁵ The initial casualties of the spill included around 300,000 birds, 3,500 sea otters, 300 harbor seals, and 15 killer whales.¹³⁶ More

131. *See id.* at 500.

132. *See id.* at 513 (“[G]iven the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ration . . . is a fair upper limit in such maritime cases.”).

133. *Rise of the Corporate Court: How the Supreme Court is Putting Businesses First*, *supra* note 66, at 5.

134. *See id.* (describing what Exxon actually paid in comparison to its company profits).

135. *See id.* (describing how Exxon actually made money off of the oil spill).

136. *See* Duane A. Gill & J. Steven Picou, *The Day the Water Died: The Exxon Valdez Disaster and Indigenous Culture*, in *AMERICAN DISASTERS* 277–279 (Steven Biel, ed., 2001) (describing the initial wildlife losses immediately following the Exxon-Valdez oil spill).

than 1,300 miles of coastline and 10,000 square miles of coastal seas were covered in oil.¹³⁷ Even two decades after the spill, an estimated 55 tons of oil still sits just below the water's surface.¹³⁸ The shellfish and otter populations have never recovered.¹³⁹

In addition to the devastating environmental impact, the spill disproportionately affected the livelihood and wellbeing of indigenous populations and Alaskan Natives. Linking the disaster to Native Alaskans way of life, the oil spill "attacked subsistence, the defining characteristic linking modern Natives to their traditional culture. Not only does the environment have sacred qualities for Alaskan Natives; their cultural survival depends on a healthy ecosystem and maintaining subsistence norms and values."¹⁴⁰

The fishing industry was particularly hard hit by the oil spill. Fish prices dropped dramatically, and "people started selling their fishing permits to pay their mortgages, and then lost their houses anyway."¹⁴¹ Following the Court's reduction of the original \$5 billion punitive damages award, a fisherman in the area stated: "[m]y heart's not into receiving this money because, in reality, were getting nothing . . . [e]ven if we got the full \$5 billion, we still wouldn't come close to what we would have made in 20 years of fishing."¹⁴² Although this fisherman will receive about \$180,000, the average award will be about \$15,000.¹⁴³ Another fisherman borrowed and saved \$300,000 to buy a salmon seiner's permit on

137. *See id.* (describing the consequences of the spill on native people in terms of subsistence, cultural traditions, and psychological wellbeing).

138. Kim Murphy, *Exxon Valdez Victims Finally Getting Payout*, THE SEATTLE TIMES (Dec. 7, 2008) (describing the environmental impacts of the oil spill two decades after the spill) [perma.cc/62DV-FCJL].

139. *Id.*

140. *See generally* Gill & Picou, *supra* note 136 (describing the affect the oil spill had on Native Alaskans).

141. *See* Murphy, *supra* note 138.

142. *See id.* (noting that this fisherman will received about \$180,000, compared to the \$2.5 million he might have received under the initial judgement).

143. *See id.* ("The first claims now being paid cover 13 of the roughly 50 categories of claimants, mainly salmon fishermen with no complications in their claims and no liens by creditors filed against them. In the end, the average award will be about \$15,000.").

the eve of the spill, finally selling it in 1994 for \$47,000.¹⁴⁴ Discussing why we should have punitive damages awards, the fisherman's wife stated: "[i]f we had five-cent speeding tickets, would people slow down? It's like [Exxon] got a hall pass to run amok . . . if there really is no significant consequence to corporations, no matter how egregious their behavior, then why should they change?"¹⁴⁵ This fisherman's wife is right: corporations like Exxon have no incentive to change following an act demonstrating reckless indifference when the company only has to pay one to two days-worth of its profits in punitive damages and actually ends up making money off of the spill.¹⁴⁶

B. Philip Morris Litigation

The Philip Morris litigation represents another example of the Supreme Court reducing punitive damages awards in the interest of fairness to the defendant. In 2002, a jury awarded \$28 billion in punitive damages against tobacco maker Philip Morris in a case involving claims of negligence, fraud, and strict products liability after the plaintiff developed inoperable lung cancer.¹⁴⁷ The evidence in this case demonstrated that the tobacco company executives knew that cigarette smoke caused and causes lung cancer and that nicotine was and is highly addictive.¹⁴⁸ In addition, evidence demonstrated that tobacco companies destroyed research showing the adverse health effects of smoking cigarettes and marketed to the public that smoking was not harmful or addictive.¹⁴⁹ Philip Morris appealed the decision, and after 9 years,

144. *Id.*

145. *Id.*

146. *See generally* Gill & Picou *supra* note 136.

147. *See Today in 2002: California Jury Awards \$28 Billion in Damages Against Philip Morris*, THOMAS REUTERS: LEGAL (Oct. 4, 2019) (noting that this case is significant because "\$28 billion in damages was the largest ever awarded to an individual plaintiff . . . in 2000, \$145 billion in punitive damages was awarded by a Florida jury, but the case was a class-action with over 500,000 plaintiffs") [perma.cc/M8EE-ZE4U].

148. *Id.*

149. *See id.* ("Not coincidentally, it was this evidence that outraged the jury so to slap Phillip Morris with a staggering 11-figure punitive damages award.").

the punitive damages award was reduced to one-tenth of a percent by the reviewing court to \$28 million in 2011.¹⁵⁰ The plaintiff died in 2003.¹⁵¹

The case above is not Philip Morris's only victory in getting a punitive damages award reduced. In 2007, "the Supreme Court reversed a \$79.5 million punitive damage award handed down against . . . [Philip Morris] by a jury which hear damning evidence of the company's massive disinformation campaign to suppress the truth about the health effects of smoking."¹⁵² In *Philip Morris USA v. Williams* (2007),¹⁵³ the widow of a heavy cigarette smoker sued Philip Morris after her husband died from lung cancer. A jury found that Williams' death was caused by smoking.¹⁵⁴ Williams believed smoking was safe because of Philip Morris' disinformation campaign that led Williams to believe that smoking was in fact safe, when the company knew evidence suggested smoking was dangerous.¹⁵⁵ Based on these facts, the jury found that Philip Morris was negligent and deceitful and awarded \$79.5 million in punitive damages.¹⁵⁶ The Supreme Court reversed this award, finding that the Due Process Clause does not permit a jury to base a punitive damages award on a desire to punish the defendant for

150. *Id.*; see also *Philip Morris v. Williams*, 549 U.S. 346, 353 (2007) (finding that "the Due Process clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties, or those whom they directly represent").

151. See *Today in 2002: California Jury Awards \$28 billion in damages against Philip Morris*, *supra* note 147 ("Jury verdicts of the magnitude of Bullock's original award against tobacco companies are far rarer today than ten years ago, thanks in no small part to many court decisions such as the one in Bullock that slash the jury award to a thousandth of its original size.").

152. See *Rise of the Corporate Court: How the Supreme Court is Putting Businesses First*, *supra* note 66, at 6.

153. See *Philip Morris*, 549 U.S. at 353 (finding that "the Due Process clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties, or those whom they directly represent").

154. See *id.* at 350 (providing Mr. William's cause of death).

155. See *id.* (noting that the jury found that Philip Morris "knowingly and falsely" led consumers to believe smoking was safe).

156. See *id.* (describing how the trial court awarded \$821,000 in compensatory damages and \$79.5 million in punitive damages).

injuries to non-parties.¹⁵⁷ However, as Justice Stevens correctly points out in dissent, a punitive damages award is a sanction for the public harm of the defendant.¹⁵⁸ Justice Stevens reasons:

A murderer who kills his victim by throwing a bomb that injures dozens of bystanders should be punished more severely than one who harms no one other than his intended victim. Similarly, there is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers statewide should not include consideration of the harm to those ‘bystanders’ as well as the harm to the individual plaintiff.¹⁵⁹

The majority’s holding again reflects counterintuitive reasoning that distorts the purpose of punitive damages for the sake of protecting a corporate entity that has shown reckless disregard for public safety.¹⁶⁰ In the end, the decision in this case is another “startling victory not for honest business but for those large corporations that inject dangerous products into the stream of commerce.”¹⁶¹

C. Danger to Marginalized Communities

The Supreme Court’s jurisprudence reflects a constitutionalization of protection for defendants, but there is no constitutional protection that will allow a plaintiff to bring a claim for artificial denial of full recovery or force defendants to

157. *See id.* at 354 (reasoning that there is “no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others.”).

158. *See id.* at 358 (Stevens, J., dissenting) (arguing that there is “no reason why an interest in punishing a wrongdoer for harming persons are not before the court . . . should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct”) (internal citations omitted).

159. *Id.* at 360.

160. *See Rise of the Corporate Court: How the Supreme Court is Putting Businesses First*, *supra* note 66, at 6 (noting that “this counter-intuitive decision negates the whole meaning of ‘punitive’ damages which are meant to punish and deter misconduct by tortfeasors who make themselves a threat to the general public health and safety”).

161. *Id.*

completely internalize their behavior. This is the systemic imbalance that plagues our torts system. And this imbalance perpetuates the harm our system is supposed to prevent. The Supreme Court has created this imbalance through pro-corporate reasoning and decision making:

[H]ands down counter-intuitive victories to corporations by ignoring clear precedents, twisting statutory language and distorting legislative intent. From labor and workplace law to environmental law, from consumer regulation to tort law and the all-important election law, the conservative tilting court has reached out to enshrine and elevate the power of business corporations – what some people have begun to call “corporate Americans” – over the rights of old-fashioned human beings called citizens.¹⁶²

This is especially dangerous for marginalized communities. When companies intentionally target marginalized communities, and the Court fails to adequately sanction this conduct through a full punitive damage award, the Court sends a message that company profits are more important than rectifying patterns of targeting low-income, marginalized communities. The cases cited above suggest that punitive damages should be measured in a way that punishes the defendant for injurious behavior while also maintaining “fairness” in the damages award scheme.¹⁶³ This “fairness to the defendant” notion finds constitutional grounding in the Due Process clause, which prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.¹⁶⁴ However, as recent opioid litigation¹⁶⁵ and the Exxon Valdez¹⁶⁶ case show, company conduct that disproportionately impacts marginalized communities is grossly unfair to the individuals impacted by the company’s injurious behavior. If the Supreme Court continues to slash punitive damages awards, the rights of members of

162. *See id.* at 2 (arguing that the Supreme Court’s decisions during the Rehnquist and throughout the Roberts Court reflect a prioritization of the rights of American businesses over the rights of American citizens).

163. *See supra* Part II.

164. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409 (2003).

165. *See supra* Part IV.B.

166. *See supra* Part IV.A.

marginalized communities affected by corporate wrongdoing will never be fully vindicated.

D. The Social Value of Punitive Damages

However, Section 1988 litigation regarding attorneys' fees provisions provides case law from the Supreme Court stating that the measure of success in civil rights litigation is not a bottom-line economic figure.¹⁶⁷ Fee shifting provisions enacted in 1976¹⁶⁸ under 42 U.S.C. § 1988 respond to and remedy the inadequacy of percentage fees for attorneys representing plaintiffs in civil rights cases.¹⁶⁹ Maureen Carroll notes that:

[B]ecause the percentage fee generally reflects a presumption that the value of a case can be measured solely in terms of monetary relief, it is poor fit for statutory fee-shifting cases, especially those involving injunctive relief or low damages amounts . . . as the Supreme Court recognized in *City of Riverside v. Rivera* that 'unlike most private tort litigants, a civil rights plaintiff seeks to vindicate the important civil and constitutional rights that cannot be valued solely in monetary terms.'¹⁷⁰

The Supreme Court's reasoning in *City of Riverside*¹⁷¹ seems to suggest that tort litigants' claims can only be valued in monetary terms. However, in cases in which defendants have intentionally

167. See Maureen Carroll, *Fee Shifting Statutes and Compensation for Risk*, 95 IND. L. J. 1020, 1022 (2020) (noting that "to encourage the enforcement of law deemed to promote the public interest, such as civil rights statutes, Congress has enacted fee-shifting provisions that create a set of exceptions to this default rule").

168. See *id.* (stating that "in support of the Civil Rights Attorney's Fees Awards Act of 1976 . . . "a broad and bipartisan coalition of legislators pointed to the success shifting mobilizing robust private enforcement in the recent civil rights laws"); see also Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2012).

169. Carroll, *supra* note 167, at 1023.

170. See *id.* (citing *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) and quoting *Riverside v. Rivera*, 477 U.S. 561, 574 (1986); see also Moran, *supra* note 20, at 285 (noting that "an economically motivated attorney will take a case only if the expected benefit per hour that she would make on other cases").

171. See *City of Riverside v. Rivera*, 477 U.S. 561, 562–63 (1986) (determining that an attorney fee award under section was not required to be proportionate to the amount of damages a plaintiff recovered).

harmed plaintiffs, punitive damages capture what compensatory damages cannot: the harm to society of the defendant's conduct. In an article on Punitive Damages in Fair Housing Litigation, Timothy J. Moran notes that "punitive damages help ensure that social costs of . . . nonrecoverable secondary harms are absorbed by the wrongdoer . . . requiring the wrongdoers to pay damages commensurate with the total social harms they cause not only deters wrongful conduct, but also expresses social outrage at the actions of grievous wrongdoers."¹⁷² Moran goes on to note that failure to award punitive damages in fair housing cases would only be justified if the court could conclude that society's sole interest is compensation and not deterrence.¹⁷³ Moran analogizes fair housing litigation to intentional torts, stating: "housing discrimination is analogous to an intentional tort that 'should be deterred completely [because] it produces no social gain, only harm."¹⁷⁴

*V. Moving Forward: Reconciling Pro-Corporate Jurisprudence
with Plaintiffs' Rights*

Based on the fact that juries typically do not award grossly excessive awards,¹⁷⁵ the value of the punitive damages award in deterring harmful conduct towards marginalized communities,¹⁷⁶ and the danger the Supreme Court's pro-business jurisprudence poses for a plaintiff's fully recovery,¹⁷⁷ the Supreme Court should not be involved in reviewing punitive damages awards. Instead, I propose that to the extent there is any constitutional review of a punitive damages award, it should take place at the state appellate level.

172. Moran, *supra* note 20, at 294–95.

173. *Id.* at 303.

174. *Id.*

175. *See supra* Part II.B.

176. *See supra* Part IV.D.

177. *See supra* Part III.D.

A. *Ingham v. Johnson & Johnson as a Model Case*

The Missouri Court of Appeals for the Eastern District's decision in *Ingham v. Johnson & Johnson*¹⁷⁸ in 2020 serves as a model example of how cases involving high punitive damages awards should be reviewed to protect the rights of the consumer to a full recovery while using the pro-corporate punitive damages jurisprudence. Plaintiffs filed a petition against Johnson & Johnson and Johnson & Johnson Consumer Companies Inc. alleging claims for strict liability, negligence, and other torts.¹⁷⁹ Plaintiffs alleged that they developed ovarian cancer from the use of two of the defendants' talc products: Johnson's Baby Powder and Shower to Shower.¹⁸⁰ Plaintiffs alleged that the defendants:

[K]new for decades that their products contained asbestos fibers and other dangerous carcinogens but persisted in producing and marketing the products despite the dangerous health hazards that they pose. Plaintiffs [also] allege defendants mounted a concerted effort to avoid warning government regulators and public health officials, the scientific and medical community, and the public of the contents of its products.¹⁸¹

At the trial court level, the jury returned a verdict finding the defendants liable on all claims.¹⁸² The jury awarded each plaintiff \$25 million in compensatory damages, coming out to a total of \$550 million in compensatory damages.¹⁸³ The jury also awarded \$4.14 billion in punitive damages, which the defendants appealed.¹⁸⁴ The

178. See *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 724 (Mo. Ct. App. 2020), *reh'g transfer denied* (July 28, 2020), *transfer denied* (Nov. 3, 2020), *cert. denied*, 141 S. Ct. 2716 (2021) (holding that the punitive damages award against Johnson & Johnson is not grossly excessive considering the defendant's actions of knowingly selling products that contained asbestos to consumers).

179. See *id.* at 678 (describing plaintiff's claims against Johnson & Johnson and Johnson & Johnson Consumer Companies).

180. See *id.* (listing the two Johnson & Johnson talc-based hygiene products alleged to be the cause of plaintiff's ovarian cancer).

181. See *id.* (describing the broad allegations in the complaint).

182. See *id.* (explaining the verdict against the defendants at the trial court level).

183. See *id.* (providing the compensatory damages award from the trial court).

184. See *id.* (describing the punitive damages award and the defendants' subsequent appeal).

Defendants made three arguments on appeal regarding the punitive damages award.¹⁸⁵ First, Defendants argued that punitive damages were unwarranted because the plaintiff failed to present clear and convincing evidence that the Defendants knew or should have known that there was a high degree of probability that their talc-based products caused ovarian cancer.¹⁸⁶ Second, Defendants argued that Plaintiffs failed to present clear and convincing evidence that the Defendants improperly influenced regulators, scientists, and the talc industry.¹⁸⁷ Third, Defendants argued that the trial court erred in denying their motion to vacate and remit the jury's punitive damages award because the award violated due process under both the United States and Missouri Constitutions.¹⁸⁸

In response to the defendant's first argument on appeal, the court found that the Plaintiffs proved "with convincing clarity that [the] Defendants engaged in outrageous conduct because of an evil motive or reckless indifference."¹⁸⁹ The Plaintiffs presented several pieces of evidence at the trial court level that the Court of Appeals cited in reasoning that the Defendants not only knew their products contained asbestos, but also took steps to hide this from their customers.¹⁹⁰ First, in a 1969 memorandum, Defendants acknowledge that their products contained asbestos and could be dangerous based on a recommendation from the Defendants' scientist. The Defendants' scientist advised that talc in the Defendants' products should be used at an absolute minimum until more was known about whether talc contained asbestos.¹⁹¹ By the

185. *See id.*

186. *See id.* at 714 (describing defendants' first argument on appeal).

187. *See id.* (describing defendants' second argument on appeal).

188. *See id.* at 719 (arguing that "the jury's \$4.14 billion punitive damages award is grossly excessive and arbitrary, furthering no legitimate purpose").

189. *Id.* at 725.

190. *See id.* (describing how the court concluded that the Defendants acted with reckless indifference).

191. *See id.* at 715 (citing a 1969 memorandum in which Defendants' scientist T.M. Thompson warned that "until there is at least substantial evidence . . . to the effect that the presence of Tremolite in our talc does not produce does not produce adverse effects, we should not extend its usage its usage beyond the absolute minimum").

1970s, Defendants' internal memoranda show that the Defendants knew that their products contained tremolite asbestos.¹⁹² Defendants' knowledge of asbestos in their products continued from the 1980s throughout the 2000s.¹⁹³ For example, Plaintiffs produced evidence that Defendants' "website initially touted their 'talc-based consumer products have always been asbestos free' but was later edited to read their 'talc-based products *are* asbestos free' because they admitted they could not 'say always.'"¹⁹⁴

Plaintiffs also presented evidence that Defendants knew the dangers of asbestos exposure. The Defendants' talc supplier, Rio Tinto Minerals, warned Defendants in the early 2000s that "there is no recognized safe level of exposure to asbestos, the presence of any amount in talc would be a serious problem."¹⁹⁵ Defendants even considered alternate methods that could remove fibers from talc in the 1970s.¹⁹⁶ For example, the Defendants considered substituting talc for cornstarch in their baby powder because cornstarch does not contain asbestos fibers and can be easily assimilated by the body.¹⁹⁷ Defendants ultimately decided against replacing asbestos-containing talc would be too expensive, requiring the development of explosion proof facilities and merchandizing changes.¹⁹⁸ In a 2008 email, an employee for the Defendants stated:

192. *See id.* (noting that defendants hired a consulting firm to examine samples of their products, which found that some of the Defendants' products contained high levels of amphibole asbestiform fibers).

193. *See id.* (stating that the Mine Safety and Health administration found asbestos in Defendants' talc mines in 1984).

194. *See id.* at 716 (noting changes to Johnson & Johnson's website after asbestos was found in Johnson & Johnson's baby powder in 2003 and 2004).

195. *See id.* (describing Defendants' knowledge of risks posed by asbestos in talc).

196. *See id.* (describing the alternatives that Johnson and Johnson considered to talc after learning of the health risks posed by asbestos in talc, such as improving the flotation technique used to separate talc from asbestos and using a process to remove a large portion of the fine particles found in talc).

197. *See id.* at 716 (discussing proposed alternatives to the use of talc in baby powder).

198. *See id.* (discussing why Defendants decided not to replace asbestos laden talc with cornstarch).

I'm thinking it would be in the brand's best interest to develop a strategy to . . . replace the talc ingredient with cornstarch . . . I understand this is a \$70M business in the US alone, unsupported. So any changes are risky . . . I know this will be controversial and we'll need to work hard to justify the cost implications—I also see great positives associated with it in our challenge to maintain Mom's trust and deliver on our baby expertise.¹⁹⁹

Ultimately, Defendants chose profits over the safety of mothers and their babies. Not only did the Defendants know that their products contained asbestos and about the dangerous health risks associated with asbestos exposure, but Defendants also tried to ensure that the industry did not adopt testing protocols sensitive enough to detect asbestos in every talc sample.²⁰⁰ For example, Defendants recommended that the FDA adopt their J-41 method of testing for asbestos in cosmetic talc products, which uses an x-ray diffraction instrument to detect asbestos.²⁰¹ Defendants consistently found no asbestos using their J-41 testing method.²⁰² Defendants knew of another asbestos testing method, the pre-concentration method, which they consistently avoided.²⁰³ The pre-concentration method uses a heavy liquid to separate the talc particles from asbestos particles so as to prevent the asbestos particles from bidding behind the talc particles, enhancing the ability of imaging equipment to detect asbestos particles in the sample.²⁰⁴ The Court stated:

199. *See id.* (describing an internal email suggesting that Johnson and Johnson replace the asbestos containing talc in their baby powder) (emphasis supplied).

200. *See id.* at 716–17 (noting that “Plaintiffs evidence further showed Defendants worked tirelessly to ensure the industry adopted testing protocols not sensitive enough to detect asbestos in every talc sample.”).

201. *See id.* at 717 (explaining that a talc sample was only analyzed further for asbestos if the x-ray diffraction instrument detects amphibole mineral in the talc sample).

202. *Id.*

203. *See id.* at 717 (explaining that “the pre-concentration method separates talc particles from asbestos particles so imaging equipment can accurately display the amount of asbestos present in a talc sample”).

204. *See id.* (describing why the pre-concentration method is more accurate than the J–41 testing method for asbestos particles in talc).

But defendants deliberately chose not to use the pre-concentration method when testing the Products for asbestos because they feared doing so would cause too much asbestos to be detected . . . Defendants then aggressively recommended that the FDA adopt the J-41 method and not the pre-concentration method as the industry standard for asbestos testing in talc.²⁰⁵

For example, one of Defendants' internal document produced as evidence by the Plaintiffs stated that at the time of the potential adoption of pre-concentration methods, Defendants believed it was critical to recommend "the [J-41 method] to the F.D.A. before the art advance[d] to more sophisticated . . . higher levels of sensitization. [Defendants] deliberately have not included a concentration technique as [they] felt it would not be in the world-wide company interest to do this."²⁰⁶

Finally, plaintiffs produced evidence showing that the Defendants published articles downplaying the safety hazards associated with talc.²⁰⁷ In 2008, Defendants funded an article that concluded that there was no indication that cosmetic talc causes cancer.²⁰⁸ In addition, Plaintiffs discredited scientists who published unfavorable studies regarding their products.²⁰⁹ Based on this evidence, the Court concluded that "motivated by profits, Defendants disregarded the safety of consumers despite their knowledge the talc in their products caused ovarian cancer."²¹⁰

The Defendants also argued that the punitive damages award violated due process, arguing that the jury's \$4.14 billion punitive

205. *See id.* (citing an internal document stating that "[i]t looks like the FDA is getting into separation and isolation methodology which will mean concentration procedures . . . [c]hances are that that this FDA proposal will open up new problems areas with asbestos and talc minerals").

206. *Id.*

207. *See id.* (describing additional methods Defendants used to convince consumers that their talc based hygienic products carried no risk of cancer development).

208. *See id.* (noting that Defendants hid the fact that they funded this article).

209. *See id.* at 718 (providing an example of Defendants demanding that the Mount Sinai School of Medicine retract results of a study showing that Johnson & Johnsons products did in fact contain asbestos).

210. *See id.* (concluding that the jury could have reasonably concluded that Defendants' conduct was "outrageous because of evil motive or reckless indifference" based on this evidence).

damages award was grossly excessive and arbitrary and furthered no legitimate purpose.²¹¹ Outlining the standard of review as well as case law in support of appellate review of punitive damages, the Court stated: “although the determination of punitive damages is a function primarily left for the jury, we must ensure that the award does not infringe on the Defendants’ constitutional rights.”²¹²

Framing the constitutional issue surrounding the punitive damages award, the appellate court then stated: “[t]he Due Process Clause of the Fourteenth Amendment prohibits grossly excessive damages awards. To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.”²¹³ The appellate court then noted that “to satisfy due process, the amount of damages should reflect the extent of the defendants’ offense and be related to the resulting actual or potential harm.”²¹⁴

Finally, the Court cited the three guideposts provided by the United States Supreme Court for reviewing punitive damages awards: the degree of reprehensibility of the defendant’s misconduct, the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and the difference between the punitive damages awarded by the jury and the civil penalties authorized by or imposed in comparable cases.²¹⁵ In discussing how the three part analysis framework should be applied, the Court noted that the most important of indicator of the reasonableness of a punitive damages awards is the extent and degree of reprehensibility of the defendant’s conduct.²¹⁶ In

211. See *id.* at 719 (describing Defendants’ second argument regarding the punitive damages award on appeal).

212. See *id.*

213. See *id.* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003)).

214. See *id.* (citing *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 410 (Mo. Ct. App. 2014)).

215. See *id.* at 720 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003)).

216. See *id.* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 for the notion that reprehensibility of the defendant’s conduct is the most important factor in a constitutional analysis of a punitive damages award for fairness of the award to the defendant).

determining reprehensibility of the defendant's conduct, the court will consider whether:

the harm caused was physical or economic; the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; *the targets of the conduct had financial vulnerability*; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, deceit, or mere accident.²¹⁷

Using this framework, the court found that there was a high degree of reprehensibility in the Defendants' conduct.²¹⁸ As a result of Johnson & Johnson's asbestos-laden products, the Plaintiffs in this case each developed ovarian cancer, underwent chemotherapy, hysterectomies, and countless other surgeries.²¹⁹ These procedures caused the Plaintiffs to experience hair loss, sleeplessness, mouth sores, loss of appetite, seizures, nausea, neuropathy, and other infections.²²⁰ Several Plaintiffs died.²²¹ Those that survived described constant fears of relapse.²²² Based on Plaintiffs' severe illness and the fact that Johnson & Johnson clearly knew that their products contained asbestos, the court concluded that "the Defendants' exposure of consumers to asbestos over several decades was done with reckless disregard for the health and safety of others."²²³

In this case, the jury awarded \$550 million in actual damages jointly and severally against the Defendants.²²⁴ "The jury recommended, and the trial court awarded, \$990 million in punitive damages against JJCI and \$3.15 billion against J&J,

217. *See id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576–77 (1996) (emphasis added)).

218. *Id.* at 721.

219. *See id.* (describing cancer treatments plaintiffs underwent).

220. *See id.* (describing side effects of cancer treatments).

221. *Id.* at 721.

222. *Id.*

223. *See id.* (relying on evidence that Defendants discussed the presence of asbestos in their talc in internal memoranda over several decades as evidence of reckless disregard for human health and safety).

224. *Id.*

yielding ratios of 18:1 for JJCI and 5.72:1 for J&J.”²²⁵ The Court then noted that the trial court erred in exercising personal jurisdiction over JJCI on two Non-Resident Plaintiff’s claims²²⁶ and found that due to this error, JJCI was only liable for “500 million in actual damages (\$25 million multiplied by twenty plaintiffs) and J&J is jointly and severally liable for \$125 million in actual damages with JJCI (\$25 million multiplied by five plaintiffs).”²²⁷ The court then went on to note that “[g]iven our reduction of actual damages, we must reduce the punitive damages awards against Defendants proportionally to reflect the ratio of punitive damages to actual damages assessed originally by the trial court.”²²⁸ Finally, the Court reduced the punitive damages award to account for the procedural error at the trial court level while still honoring the compensatory to punitive damages ratio set at the trial court level.²²⁹ Finally, the Court reduced the punitive damages award to account for the procedural error at the trial court level while still honoring the compensatory to punitive damages ratio set at the trial court level.²³⁰ Using this rule, the court reduced the punitive damages award to \$900 million against JJCI and \$715,909,091 against J&J.²³¹

In defending its review of the punitive damages award in this case, the appellate court noted that “high-ratio punitive damages awards are sometimes necessary to have sufficient deterrent affects . . . a much larger amount of punitive damages is required to have a deterrent effect on a multi-billion dollar corporation than

225. *Id.* at 721–22.

226. *See id.* at 722 (noting that “any judgement entered without personal jurisdiction over a party is void.”) (citations omitted).

227. *See id.* at 722 (discussing what J&J and JJCI are actually liable for following a reduction in the compensatory award due to a procedural error at the trial court level).

228. *Id.* (internal citations omitted).

229. *See id.* (noting that this approach in reducing the award in light of a procedural error at the trial court level “ensures the original judgement of the jury is given effect, while excessive damage awards are avoided”).

230. *See id.* at 724 (noting that this approach in reducing the award in light of a procedural error at the trial court level “ensures the original judgement of the jury is given effect, while excessive damage awards are avoided”).

231. *Id.*

a smaller business.”²³² The Court found that a larger punitive damages award was justified in this case to promote Missouri’s legitimate interest in deterring companies from knowingly selling dangerous products.²³³ Ultimately, the Court concluded that “because Defendants are large, multi-billion dollar corporations . . . a large amount of punitive damages is necessary to have a deterrent effect in this case.”²³⁴ The Supreme Court denied certiorari in this case, suggesting that the Court “may want to leave the law where it is.”²³⁵

VI. Conclusion: Leaving the Law Where it is

The Supreme Court should leave the law where it is. The Appellate Court in *Johnson & Johnson* correctly notes that punitive damages awards should be left in the hands of the jury at the trial court level.²³⁶ But then the Appellate Court goes on to invoke the Supreme Court’s due process jurisprudence, stating that: “to the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.”²³⁷ The appellate court then noted that “to satisfy due process, the amount of damages should reflect the extent of the Defendants’ offense and be related to the resulting actual or potential harm.”²³⁸

This reasoning is flawed. A high award furthers the legitimate purpose of signaling to society that intentional targeting of marginalized communities is a wrong that our legal system will

232. *Id.* at 723.

233. *See id.* (providing justifications for upholding the punitive damages award).

234. *Id.*

235. *See* Kimberly Strawbridge Robinson, *Justices Sticking to Punitive Damage Limits After J&J Case*, U.S. L. WEEK., June 4, 2021 (noting that the Supreme Court denied certiorari in the *Johnson & Johnson* Case on June 1, 2021).

236. *See* *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 717 (Mo. Ct. App. 2020), *reh’g transfer denied* (July 28, 2020), *transfer denied* (Nov. 3, 2020), *cert. denied*, 141 S. Ct. 2716 (2021).

237. *See id.* at 719.

238. *See id.* (citing *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 410 (Mo. Ct. App. 2014)).

vindicate.²³⁹ The purpose of a large punitive damages award is to *deter* predatory and dangerous company conduct.²⁴⁰ However, the Supreme Court has created a system in which companies can cut corners and injure consumers and then have their “rights” protected at the expense of a full recovery for the plaintiff.²⁴¹ When the Court states that the punitive damages award should be related to the resulting actual or potential harm of the defendant’s conduct, the Appellate Court misses the fact that reducing a punitive damages award runs the risk of signaling to companies that their behavior is fine, ultimately exacerbating inequality, and leading to a cycle of predatory company behavior in which low-income individuals are disproportionately less likely to have the resources to sue. The Court should be worried about the potential harm of reducing a punitive damages award to the plaintiff, not the potential harm to a defendant who has shown complete disregard for human lives. Until the court adequately accounts for the harm done to plaintiffs by sustaining punitive damages awards, plaintiffs across the country will continue to be denied a full recovery.

239. See discussion *supra* Part II.A.

240. *Id.*

241. See discussion *supra* Part III.B, Part III.C, & Part III.D.