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TORT LAW'S DETERRENT EFFECT AND PROCEDURAL DUE PROCESS

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ABSTRACT

The defendants in Philip Morris USA v. Williams *and* Wal-Mart Stores, Inc. v. Dukes *claimed a right to present defenses. The defendants also both claimed that the mechanisms in place in those cases—the consideration of nonparties in imposing punitive damages and the use of sampling to litigate a large class action—violated that right. The Supreme Court agreed, a death knell for the advocated use of both mechanisms to counteract tort law's under-litigation problem: the fact that not all injured persons sue, precluding tort law's ability to achieve effective deterrence.*

This Article argues that procedural due process theories do not support such a right. The process-based theory provides only a flexible level of participation and the defendants in both Philip Morris *and* Dukes *had a meaningful opportunity to participate. The outcome-based theory also does not support such a right because the total damage obligations produced by the mechanisms are actually accurate. Even though no procedural due process right precludes the consideration of nonparties and sampling, the mechanisms are still problematic because of how they shift the burden of proof. The burden, however, is based in substantive law; substantive law can be changed to help alleviate the harmful effects of tort law's under-litigation problem.*

I. INTRODUCTION

One of the beneficial effects of civil law is that it indirectly regulates conduct. A manufacturer is dissuaded from falsely representing the safety of its products because, if someone is injured by that misrepresentation, the manufacturer will have to pay damages

in tort. An employer is dissuaded from discriminating against female employees because, if it does so, the employer will again have to pay damages. Not only do the individual victims benefit from the lawsuits, but society does also. The threat of these lawsuits and the actual lawsuits filed help prevent conduct that harms society, conduct like lying and discrimination.

This beneficial effect, however, assumes that injured persons sue, but that is not the reality. For whatever reason, injured persons do not take advantage of the tort system. Because of this, injured persons will not receive any compensation for their injuries. Also, without the lawsuits, the law loses its deterrent effect.

Class actions and creative use of punitive damages are two potential solutions to tort law's under-litigation problem. Class actions help solve the problem by aggregating all injured persons' claims. If the class of injured persons is large enough, the claims could be litigated using sampling, where a sampling of the plaintiffs' claims are tried and the results are applied to the class as a whole. Punitive damages can help the problem by punishing the defendant for harming nonparty injured persons. Through both mechanisms, the defendant should end up paying something close to the total harm it caused, restoring the law's deterrent effect.

How these mechanisms restore the deterrent effect, however, is problematic. Both assume liability. If sampling is used in a class action, the defendant's liability to those plaintiffs whose claims are not tried is assumed. If the defendant is punished for harming nonparties in a punitive damages award, the defendant's liability to those injured nonparties is assumed.

These liability assumptions were at issue in two recent United States Supreme Court cases: *Philip Morris USA v. Williams*[1] and *Wal-Mart Stores, Inc. v. Dukes.*[2] In both cases, the defendants claimed a "right" to a procedural protection. That right was to present defenses to the claims of injured persons whose claims were not tried and to present defenses specific to those plaintiffs to whom the defendant's liability was assumed. In both cases, the Court found such a right, crippling these potential solutions to the under-litigation problem.

The underlying theories of procedural due process, however, do not support such a right. The first main theory of procedural due process is process-based, under which participation is valued regardless of its effect on the outcome. This theory seems fitting for a right to present defenses—a right to further participate. But it does support such a right because these defendants could already meaningfully participate and influence the outcome, even if unable to present the exact evidence desired.

The second main theory of procedural due process is an outcome-based theory, under which a procedure is required if it is necessary to achieve accurate results. An outcome-based procedural due process sentiment is apparent in both *Dukes* and *Philip Morris* as the Court seems concerned about the accuracy of simply assuming liability. To correct this inaccuracy, the Court mandated individualized proceedings in both cases.

1. Phillip Morris USA v. Williams, 549 U.S. 346 (2007).
2. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

But an outcome-based theory does not actually support the existence of this claimed right. The proper utilitarian test asks if the benefits of the procedure justify its costs. Individualized proceedings may seem to add substantial value in the added accuracy, but the due process interest at stake is a defendant's obligation to pay damages. Even if sampling and considering nonparties inaccurately assume liability, both mechanisms still produce accurate total damage obligations. Thus, mandating individualized proceeding actually adds little consequential benefit. Plus, the costs of individualized proceedings are enormous; if individualized proceedings are the only option, potential plaintiffs are unlikely to pursue relief. This hurts injured persons and society generally as defendants lose the incentive to alter tortious behavior. Under the proper utilitarian balancing test, a defendant lacks an outcome-based due process right to present defenses.

Although no procedural due process right precludes the use of sampling and considering nonparties, there is a problem with these mechanisms—they implicitly shift the burden of proof as defined by the substantive law. The good news, however, with respect to the possibility of curing the under-litigation problem is that, unlike a procedural due process right, the substantive law can be changed.

Part II of this Article explores tort law's under-litigation problem and how it hampers the deterrent effect of the law. Part III details *Philip Morris* and *Dukes* and explains the Court's conclusions that a right to present defenses existed in each case. Part IV describes the theories underlying procedural due process, and Part V argues that these theories do not support a right to present defenses. Part VI explores how sampling and considering nonparties are still problematic because they shift the burden of proof, but also argues that changes to the substantive law could rewrite those burdens and alleviate the effects of the under-litigation problem.

II. DETERRENCE AND THE UNDER-LITIGATION PROBLEM

One goal of tort law is deterrence—to deter both the individual defendant and others.[3] Ideally, the possibility of tort liability would discourage would-be defendants from committing torts.[4] Or, the fact of tort liability would deter the defendant from continuing its tortious conduct based on the risk that others injured will sue.[5]

A. For Whatever Reason, People Do Not Sue

Tort law's ability to achieve deterrence, of course, depends on injured persons actually filing tort claims. If injured persons do not sue, there is no possibility or fact of tort liability to deter the defendant and would-be defendants.

It may surprise some to learn, but tort law has an under-litigation problem: In reality,

3. DAN B. DOBBS, THE LAW OF TORTS, HORNBOOK SERIES § 11, at 19 (2000).
4. *Id.*
5. *Id.*

far from all injured persons file suit.[6] Why not? Maybe people are uncomfortable or unfamiliar with the legal system, as Judge Guido Calabresi suggests.[7] Maybe people do not realize that their injury was caused by someone, and that they have a potential legal claim against that same someone.[8] Or, maybe people would just rather not.[9] For whatever reason or reasons, injured persons do not sue.

And as long as "many of those who are injured do not seek redress," defendants will not "internalize the full cost of their tortious conduct."[10] Defendants will not consider that if they commit tortious conduct X, they will end up paying damages to all those injured by X. Instead, only a few injured will sue over X. Why refrain from tortious conduct X, and the possible profit of X, when the defendant will end up paying for only a few of the injuries it causes? The under-litigation problem negates the disincentive that tort law tries to create. If injured persons do not sue, tort liability does not and cannot deter.

B. Filling the Gap Caused by Those Who Do Not Sue

1. How to Use Punitive Damages and Class Actions to Help Solve the Under-Litigation Problem

Both punitive damages and class action litigation are solutions to the under-litigation problem. Punitive damages can fix this problem by making sure the tortfeasor bears the full costs of its harmful acts by considering the likelihood that the defendant will escape

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6. Professor Roger Cramton summarized the results of an American Bar Foundation study conducted in 1974 and updated in 1989 showing how few legal claims are actually filed:

> Individuals report that only a portion of their "legal problems" are taken to lawyers, a percentage that is highly variable. For example, 1 percent of job discrimination problems are taken to a lawyer; 10% of tort problems; 36% of real property problems; and 73% of estate planning problems (wills). The four largest categories of work actually taken to lawyers by individuals involve real property, estate planning, marital problems, and torts, in that order.

Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 542-43 (1994); *see also id.* at 542 n.30 (discussing that a Harvard Medical Practice Study confirmed the under-litigation of tort medical malpractice claims in that about one out of every seven people injured by potential medical malpractice file suit); Keith N. Hylton, *Reflections on Remedies and* Philip Morris v. Williams, 27 REV. LITIG. 9, 31 n.52 (2007) (noting a 1991 New England Journal of Medicine Study finding that "roughly one out of seven patients injured by medical malpractice caused by negligence brings suit").

7. Ciraolo v. City of New York, 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, Circuit Justice, concurring). Professor Roger Cramton summarizes these reasons why injured persons do not seek attorneys:

> Some of the possible reasons for unserved need are: (1) individuals lack information about the legal character of a problem or the value of a lawyer's help in dealing with it; (2) they do not know how to find a lawyer qualified to handle the problem; (3) they believe they cannot afford a lawyer's help; (4) they lack the resources to pay even a small or reasonable legal fee; and, perhaps most important, (5) lay persons fear lawyers and legal proceedings, with attendant loss of control over their own lives.

Cramton, *supra* note 6, at 542-43 (internal citations omitted).

8. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 888 (1998).

9. Thomas C. Galligan, *The Risks of and Reactions to Underdeterrence in Torts*, 70 MO. L. REV. 691, 703 (2005) ("[S]ome people may prefer to do other things than sue, such as to go to the movies, watch TV, or play video games.").

10. Sheila B. Scheuerman, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions*, 60 BAYLOR L. REV. 880, 883 (2008).

liability for its same tortious conduct committed against persons other than the plaintiff.[11] If a defendant is likely to be sued only by 25 percent of the people injured by the defendant's product, consider the uncompensated 75 percent in calculating the punitive damage award.[12] This minimizes the effect of those who do not sue. The defendant should pay, in one judgment, an amount close to the total harm it caused to all injured parties; the same amount it would pay if all injured persons sued.[13] This should help negate the effects of the under-litigation problem.

"[L]ike punitive damages, class actions are premised on the idea that defendants will face less than full liability—and less than optimal deterrence—if all injured parties do not sue."[14] A common reason an injured party may not sue is if the available relief is minimal, making the lawsuit economically inefficient. A class action aggregates those individual claims, making the relief sought larger and the lawsuit economically worthwhile:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[15]

Briefly, under Federal Rule of Civil Procedure 23(a), a party seeking class certification must demonstrate:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims and defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[16]

Assuming the party can show these requirements, the party must still fit into one of the

11. *Id.* at 890-91.

12. Under the cost internalization method of calculating punitive damages, the defendant should end up paying the total amount of harm it has caused. If the defendant has a 50% chance of escaping liability, the amount of his damages should be doubled. Under the gain elimination method, the amount of punitive damages should similarly be multiplied based on the chances of escaping liability.

13. Polinsky & Shavell, *supra* note 8, at 954 (arguing that punitive damages should be calculated based on the amount of compensatory damages "multiplied by a factor reflecting the likelihood of escaping liability"); *see also* Brief for Keith N. Hylton et al. as Amici Curiae Supporting Respondents, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (No. 05-1256), 2006 WL 2688793, at *23 (also advocating the factoring in of the defendant's chances of escaping liability within his gain elimination formula).

14. Scheuerman, *supra* note 10, at 893. The two mechanisms cannot be combined, however. "By definition, a properly certified class will obtain compensatory damages that reflect the total harm of the defendant's wrongful conduct." *Id.* at 934.

15. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997).

16. FED. R. CIV. P. 23(a).

three types of classes enumerated in Rule 23(b).[17] Regardless of which type of class though, most courts are also concerned with whether a class action could be manageably litigated; "no court would certify a class unless it believed that the case could proceed in a manageable fashion."[18]

One way to litigate a very large class action is sampling. The Ninth Circuit affirmed the use of sampling in *Hilao v. Estate of Marcos*.[19] *Hilao* involved a class of approximately 10,000 people seeking relief for human rights abuses.[20] The district court used sampling to determine the amount of compensatory damages.[21] One hundred and thirty-seven of the 9,541 claims were randomly selected by computer to be tried.[22] The amount chosen was based on expert testimony that "examination of a random sample of 137 claims would achieve 'a 95 percent statistical probability that the same percentage determined to be valid among the examined claims would be applicable to the totality of claims filed.'"[23] A court-appointed special master evaluated those claims and found six invalid due to insufficient proof and evidence, a 4.37% invalidity rate.[24] He then recommended the amount of damages to be awarded to the 131 successful claims left in the sampling and used those numbers to determine an average award depending on the injury.[25] He then rounded the invalidity rate to 5% and applied it to the other claims that were not tried.[26] Once he determined the total number of valid claims using the invalidity rate, he multiplied that number by the average award to determine the total compensatory damage award for the class.[27]

The jury was presented with evidence explaining the statistical approach and evidence specific to the tried claims.[28] The special master also explained his recommendations, and the jury was free to reject those recommendations.[29] The jury found only two of the sampled claims invalid and reached different compensatory damage awards than the

17. A 23(b)(1) class is available when separate actions may leave the defendant vulnerable to multiple, inconsistent judgments or when separate actions may substantially impair nonparties from protecting their own interests. FED. R. CIV. P. 23(b)(1). A 23(b)(2) class is available when injunctive remedies are appropriate. *Id*. at 23(b)(2). A 23(b)(3) class is available when common questions of law or fact predominate and a class action is superior to other procedural vehicles. *Id.* at 23(b)(3).

18. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 173 (N.D. Cal. 2004), *rev'd*, 131 S. Ct. 2541 (2011).

19. Hilao v. Estate of Marcos, 103 F.3d 767, 774 (9th Cir. 1996). *See also* Dukes v. Wal-Mart Stores, 603 F.3d 571, 625–26 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011) (referencing a Ninth Circuit decision that affirmed the procedure used in *Hilao*; a district court in the Fifth Circuit tried the same in a consolidation of 160 asbestos cases, but the Fifth Circuit reversed); Alexandra Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571, 609 (2012) [hereinafter Lahav, *Trial by Formula*] ("In the late 1990's, a few trial courts experimented with binding statistical-adjudication procedures."). *See generally* Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319 (5th Cir. 1998) (finding that sampling would violate the defendant's due process and jury trial rights). Lahav, *Trial by Formula*, *supra*, at 610 ("No trial court has followed in the footsteps of these innovators, and the appellate courts continue to express hostility to mandatory statistical adjudication of this type.").

20. Hilao v. Estate of Marcos, 103 F.3d 767, 774 (9th Cir. 1996).

21. *Id.* at 782.

22. *Id.*

23. *Id.*

24. *Id.* at 783 n.8.

25. *Hilao*, 103 F.3d at 783.

26. *Id.*

27. *Id.*

28. *Id.* at 784.

29. *Id.*

special master for the sampled claims.[30] The plaintiffs with the valid sampled claims received the actual amounts awarded by the jury.[31] The plaintiffs with the invalid sampled claims received no damages.[32] The claimants with the non-tried claims were eligible to receive the aggregated award that was calculated using the 5% invalidity rate and the average awards.[33] The aggregated award was distributed to the claimants with the non-tried claims pro rata.[34]

For whatever reason, despite sampling possibly making large class actions manageable, courts have use it only rarely.[35] The Ninth Circuit affirmed the use of sampling in *Hilao*. The Fifth Circuit rejected its use in *In re Fibreboard Corp.*[36]

2. Implicitly Assuming Liability

Part of why considering nonparties in imposing punitive damages and using sampling in class actions are able to alleviate the effects of the under-litigation problem is because they assume liability. More specifically, both considering nonparties and sampling involve non-tried claims. For punitive damages, a nonparty's claim is not litigated in the specific plaintiff's case against the tortfeasor. In sampling, the vast majority of the class action plaintiffs' claims are not tried.

Despite the non-trial of these injured persons' claims, the defendant becomes obligated to pay relief as if it would be liable to those injured persons, both nonparties and class action plaintiffs. The punitive damage award imposed assumes that the defendant would be liable to nonparties and deserves punishment for that. The relief resulting from sampling includes payment obligations to class action plaintiffs as if the defendant had been found liable to those class action plaintiffs. The defendant is assumed to be liable to the injured persons even though the injured persons never tried their claims.

The under-litigation is solved because there is no need for injured persons to file suit. Instead, considering nonparties and sampling assume that if those injured persons sued, they would win. Both force the defendant to pay damages based on that assumption.

III. *PHILIP MORRIS* & *DUKES* DESCRIBED

Because injured parties' claims are not tried, the defendant never has the ability to present defenses or evidence specific to those injured parties (nonparties or class action plaintiffs whose claims are not tried). This inability to present defenses is the issue the Court confronted in both *Philip Morris* and *Dukes.*

30. *Hilao*, 103 F.3d at 784.
31. *Id.* at 784 n.10.
32. *Id.*
33. *Id.* at 784 & n.10.
34. *Id.*
35. Lahav, *Trial by Formula*, *supra* note 19, at 609.
36. *In re* Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990).

A. Philip Morris USA v. Williams[37]

Philip Morris USA v. Williams was a basic tobacco products lawsuit.[38] The plaintiff, the widow of a man who died from lung cancer, brought negligence and fraud claims against Philip Morris.[39] The fraud claims were based on the defendant's false representations "that there was a legitimate controversy about whether there was a connection between cigarette smoking and human health."[40] The plaintiff further alleged that the defendant made these representations "[intending] to encourage smokers to continue to smoke and not to make the necessary effort to stop smoking."[41] The jury found the defendant liable for negligence and fraud.[42]

This case stands out as not just another tobacco lawsuit, however, because of the punitive damage award the jury imposed for the defendant's fraud—$79.5 million.[43] That award was the reason this case eventually made it to the United States Supreme Court. The Supreme Court granted certiorari on two questions, one of which was whether a punitive damage award could constitutionally punish the defendant for harming nonparty victims.[44]

At trial, defendant requested a jury instruction that addressed the relevance of smokers other than the plaintiff's deceased husband:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.[45]

Defendant claimed this instruction was necessary to ensure the jury properly considered the plaintiff's attorney's comments regarding how many other people in Oregon smoked, how ten out of every hundred smokers was likely to die because of smoking, and how Defendant maintained one-third of the market share of cigarettes.[46] The trial court

37. Phillip Morris USA v. Williams, 549 U.S. 346 (2007).
38. *Id.*
39. Williams v. Philip Morris Inc., 48 P.3d 824, 828 (Or. Ct. App. 2002), *vacated sub nom*., Philip Morris USA Inc. v. Williams, 124 S. Ct. 56 (2003).
40. *Id.* at 832.
41. *Id.* at 832–33.
42. *Id.* at 828.
43. *Id.*; Philip Morris USA v. Williams, 549 U.S. 346, 350 (2007) (the trial court found the award imposed by the jury "excessive" and reduced it to $32 million); *Philip Morris Inc*., 48 P.3d at 842 (the Oregon Court of Appeals later reinstated the entire $79.5 million award).
44. *Philip Morris USA*, 549 U.S. at 352.
45. Williams v. Philip Morris Inc., 127 P.3d 1165, 1175 (Or. 2006), *vacated sub nom*, Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007).
46. *Philip Morris USA*, 549 U.S. at 350. The plaintiff's attorney made these references in closing argument. Joint Appendix, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (No. 05-1256), 2006 WL 2147483, at *197a ("It's fair to think about how many other Jesse Williams in the last 40 years in the State of Oregon there

rejected the defendant's proposed instruction and instead instructed the jury that the purposes of punitive damages are to punish and deter misconduct and that they "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct."[47] The jury, after being so instructed, imposed the $79.5 million punitive damage award.[48]

Before the Oregon and the United States Supreme Courts, the defendant claimed that the trial court's refusal to give its proposed instruction created a "significant likelihood that a portion of the $79.5 million award represented punishment for its having harmed others"[49] and that such a punishment would be unconstitutional. The Supreme Court agreed. "[T]he Constitution's 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, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."[50]

The Court concluded that the Due Process Clause requires this result because a state cannot "[punish] an individual without first providing that individual with 'an opportunity to present every available defense.'"[51] Applied to the facts, Philip Morris never had the opportunity to present defenses to the nonparties' potential claims, defenses like the nonparties' potential non-reliance on the defendant's misrepresentations or the nonparties' knowledge of the dangers of smoking.[52]

The Due Process Clause also requires this result because "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation."[53] Applied to the facts, how many nonparties would be considered? Only

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have been. It's more than fair to think about how many more are out there in the future."). In the plaintiff's rebuttal closing argument, the attorney also commented:

> In Oregon, how many people do we see outside, driving home, coming to work, over the lunch hour smoking cigarettes? For every hundred, cigarettes that they smoke are going to kill ten through lung cancer. And of those ten, four of them, or three of them I should say, because the market share of Marlboros is one-third of the market.
>
> Market share of Philip Morris is almost 50 percent of that. But three of the hundred are going to die from smoking Marlboros. The other seven are going to die from something else. Another Philip Morris brand? Brown and Williamson? R.J.R.? They aren't here.

Id. at *199a.

47. *Philip Morris USA*, 549 U.S. at 351 (internal citations omitted).

48. *Id.* at 350.

49. *Id.* at 351; *see also* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 352 (2003) (explaining the "increasingly common phenomenon" of juries awarding significant punitive damages in a single plaintiff case, which made the single plaintiff cases "similar to class action cases in that punitive damages are in essence assessed on a putative 'classwide' basis for harms actually or potentially inflicted upon numerous individuals").

50. *Philip Morris USA*, 549 U.S. at 353. Even though punishing the defendant for harming nonparties is unconstitutional, evidence of that harm is relevant to show that the defendant's conduct was reprehensible. *Id.* at 355. Based on the common law, conduct must be reprehensible for punitive damages to be available. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996). And a high punitive damage award is more likely to be constitutional if the level of reprehensibility is high. *Id.* at 582. In *Philip Morris*, the Court made clear that the plaintiff is free to present evidence of nonparty harm because it is relevant to reprehensibility. *Philip Morris USA*, 549 U.S. at 355. The Court was also clear, however, that states must use procedures to ensure that the jury does not use evidence of the defendant's harming nonparties as a basis for punishing the defendant. *Id.* at 357.

51. *Philip Morris USA*, 549 U.S. at 353.

52. *Id.* at 353-54.

53. *Id.* at 354.

those injured to the same degree as the named deceased plaintiff, Jesse Williams? Those deceased and those seriously injured? Unless the trial court answered these questions, "[t]he jury [would] be left to speculate," increasing the "risks of arbitrariness, uncertainty, and lack of notice."[54]

Justice Stevens dissented in *Philip Morris* because of the punitive damage context; he did not believe that punitive damages should be limited to what the defendant did to the plaintiff, thus allowing the damage award to encompass the defendant's harming nonparties.[55] His analysis indicates that he might have ruled differently if the issue was not punitive relief: "To award compensatory damages to remedy such third-party harm might well constitute a taking of property from the defendant without due process."[56] That insufficient process might include the defendant's lack of opportunity to present defenses. If so, this reasoning foreshadows what the Court later held in *Dukes.*

B. Wal-Mart Stores, Inc. v. Dukes[57]

The class of plaintiffs in *Dukes* also sought punitive damages, but that is not the reason the case reached the Supreme Court.[58] The Court agreed to hear the case to evaluate whether the class of plaintiffs could be certified as a class action.[59] The lower court certified a class comprising of "about one and a half million plaintiffs, current and former female employees of petitioner Wal-Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII."[60] The proposed class sought injunctive relief, declaratory relief, back-pay, and punitive damages.[61]

To show commonality—that questions of law or fact common to the class existed—the *Dukes* plaintiffs relied on: 1) "statistical evidence about pay and promotion disparities between men and women at the company"; 2) "anecdotal reports of discrimination from about 120 of Wal-Mart's female employees"; and 3) the testimony of a sociologist who analyzed Wal-Mart's "'culture' and personnel practices" and concluded that Wal-Mart was "'vulnerable' to gender discrimination."[62] The lower courts found this evidence sufficient to show commonality.[63] Additionally, the plaintiffs sought certification under Rule 23(b)(2), requiring them to show that the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[64]

The lower court also evaluated the manageability of the proposed class action given

54. *Id.*
55. *Id.* at 357-58 (Stevens, J., dissenting) (referring to punitive damages as punishing for the "public harm" caused by the defendant's conduct).
56. *Phillip Morris USA*, 549 U.S. at 359.
57. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).
58. *Id.*
59. *Id.* at 2547.
60. *Id.*
61. *Id.*
62. *Dukes*, 131 S. Ct. at 2549.
63. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 166 (N.D. Cal. 2004), *rev'd*, 131 S. Ct. 2541 (2011).
64. *Dukes*, 131 S. Ct. at 2549. Certification under Rule 23(b)(2) is a mandatory class, meaning class members cannot opt-out. *See In re* Monumental Life Ins. Co., 365 F.3d 408, 417 (5th Cir. 2004).

the size of the proposed class. The trial court explained that the standard approach to employment discrimination class actions is to bifurcate the trial into a liability and a remedy stage.[65] In the liability stage, "plaintiffs are required to prove that the defendant engaged in a pattern or practice of discrimination against the class."[66] At the trial court, Wal-Mart argued that due process required mini individual trials in the liability stage.[67] But the trial court did not agree, concluding that individualization is not necessary because the focus at this stage is "a company-wide pattern or practice."[68]

The remedy stage posed more manageability problems. Even if the plaintiffs can prove that the defendant engaged in a pattern or practice of discrimination, the plaintiffs are not all automatically entitled to monetary relief. Only the class members who can show they were actually harmed by the discrimination are eligible to receive lost pay.[69] The amount of that lost pay must also be determined.[70] Those determinations are normally made in individualized mini-trials.[71] The plaintiff has only a minimal burden.[72] She must show that she was qualified but denied for a promotion, as opposed to showing that the denial was because of discrimination.[73] If the plaintiff can meet this minimal burden to show eligibility, the burden shifts to the employer, who then can put forth individual affirmative defenses or show that the employee was denied an opportunity for a lawful reason.[74]

Individualized mini-trials were obviously not possible for the female employees. The trial court concluded that Wal-Mart's corporate records could be used to determine who was eligible to receive relief and the amount of that relief, making the proposed class action manageable.[75]

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65. *Dukes*, 222 F.R.D. at 173-74.

66. *Id.*; *see also* HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE, HORNBOOK SERIES § 3.25, 240 (2001).

67. *Dukes*, 222 F.R.D. at 173-74. The trial court rejected that argument and discussed that Wal-Mart could defend itself in the liability phase by showing that its "more decentralized store sub-unit by store sub-unit statistical analysis refutes the existence of any company-wide policy of discrimination" and by presenting other evidence that would rebut Plaintiff's claim of a centralized, nationwide policy. *Id.*

68. The court explained that the liability stage "focuses on the existence (or not) of a company-wide pattern or practice of discrimination against the class" and "the class is not required to prove that each member suffered discrimination." *Id.* at 174.

69. *Id.* at 175. "These proceedings typically consist of mini-hearings presided over by a special master or the court. While the burden on individual class members at this point is minimal, they must at least identify themselves and make some showing (less than a prima facie case) that they suffered an adverse employment decision." *Id.* at 175-76. If the individual class member can show an adverse employment decision, the "burden then shifts to the employer to prove that the class member was denied the job or promotion for lawful reasons." *Id.* at 176.

70. *Id.* at 175.

71. *Id.* at 175-76.

72. *Dukes*, 222 F.R.D. at 176.

73. *Id.* The trial court determined that Wal-Mart's records could be used to determine which class members were qualified for job openings. *Id.* at 180. This same information, however, would not demonstrate that the class members were actually interested in a job opening. *Id.* Wal-Mart lacked any records documenting interest for many positions because it did not have a comprehensive system of posting and accepting applications for many positions. *Id.* If no such information existed, the trial court found no manageable method to try the class members' eligibility. *Id.* at 181. But for those positions that Wal-Mart did have this information, the eligibility phase could be tried using that information. *Id.* at 182.

74. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011).

75. *Dukes*, 222 F.R.D. at 184–85.

The Ninth Circuit affirmed the lower court's certification of the proposed class.[76] It did not comment on the trial court's specific plans to use Wal-Mart's corporate records but noted that "there are a range of possibilities . . . that would allow this class action to proceed in a manner that is both manageable and in accordance with due process."[77] As an example of one of those possibilities, the Ninth Circuit mentioned sampling and cited *Hilao*.[78] There was no reason "why a similar procedure to that used in *Hilao* could not be employed" in *Dukes*.[79] Thus, "there [existed] at least one method of managing this large class action that, albeit somewhat imperfect, nonetheless protects the due process rights of all involved parties."[80]

The Supreme Court reversed the Ninth Circuit's certification of the class, finding that the proposed class could not show commonality.[81] At the end of the opinion, the Court also rejected the Ninth Circuit's "Trial by Formula" suggestion for managing the litigation.[82] The Court described the proposed sampling solution and quickly noted its "[disapproval of] that novel project."[83] Trying only a random sampling of the claims and applying those results to the rest of the class is impermissible because it would deprive Wal-Mart of "individualized determinations of each employee's eligibility for backpay," to which Wal-Mart is "*entitled*."[84]

The Supreme Court focused on the remedy stage of an employment discrimination class action where the individual plaintiff must show her eligibility for a promotion. These individualized determinations will simply not occur in sampling, where all claims are not tried. Without individualized determinations, Wal-Mart would be deprived of its "[entitlement] to litigate its statutory defenses to individual claims."[85] The Rules Enabling Act mandates that Rule 23, the rule allowing claims to proceed as a class action, cannot "abridge, enlarge, or modify any substantive right."[86] Rule 23 can thus not be used to deprive Wal-Mart of its "right" to present defenses to the individual employees' claims.

IV. THE UNDERLYING, THEORETICAL CONCEPTIONS OF PROCEDURAL DUE PROCESS

The Fourteenth Amendment of the Constitution provides that no person "shall be

76. Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1174 (9th Cir. 2007), *rev'd sub nom*, Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541 (2011). The Court later reheard the case en banc and affirmed the district court. *See generally* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc), *rev'd*, 131 S. Ct. 2541 (2011).

77. *Dukes*, 603 F.3d at 625.

78. *Id.* at 625–26.

79. *Id.* at 627.

80. *Id.*

81. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2556–57. The Court defined commonality to mean that "[t]heir claims must depend on a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor." *Id.* at 2551. The plaintiffs, however, were unable to point to any common reason for the employment decisions that allegedly disfavored women—there was no issue central to the validity of each class member's discrimination claim. Wal-Mart's policy gave discretion to local supervisors and plaintiffs were unable to show that any common mode of exercising that discretion existed. *Id.* at 2554. Necessarily, one supervisor's decision had little to do with another's. *Id.* at 2554–55.

82. *Id.* at 2561.

83. *Id.*

84. *Id.* (emphasis added).

85. *Id.*

86. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b) (2011)).

deprived of life, liberty, or property without due process of law."[87] In the civil context, a person cannot be deprived of property without receiving some procedural protections. What procedural protections are required, however, is not set in stone. Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances."[88] To the contrary, due process "is flexible and calls for such procedural protections as the particular situation demands."[89]

The need for and extent of procedural protections can also vary depending on the underlying theory of why procedures are necessary in the first place. Generally speaking, two types of procedural due process theories exist: outcome-based and process-based.[90] The Supreme Court used a process-based theory of due process to recognize a plaintiff's right to day in court.

A. The Outcome-Based Theory

An outcome-based theory is concerned with improving the accuracy of an outcome.[91] "The procedural system is designed to ensure that in each case the substantively correct outcome actually issues."[92] Procedures are a "means of assuring that the society's agreed-upon rules of conduct . . . are in fact accurately and consistently followed"; the purpose of procedures "is less to assure *participation* than to *use* participation to assure *accuracy*."[93] This is an instrumental theory, where procedures are just instruments to achieve accuracy: "notice, hearing, and right to counsel are valuable because they contribute to the goals of accuracy."[94]

Perfect accuracy might be ideal, but it is not the goal. Practically, perfect accuracy is not possible.[95] Regardless, if there were a right to a perfectly accurate outcome, we would be able to demand that accuracy regardless of cost.[96] "Any system that recognized

87. U.S. CONST. amend. XIV, § 1.
88. Cafeteria Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961).
89. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
90. Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1889 (2009).
91. *Id.*
92. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 244 (2004); *see also* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 201 (1992) [hereinafter Bone, *Rethinking*] ("An outcome-oriented theory evaluates participation for what it adds to the quality of the outcome."); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 476 (1986) ("According to the instrumental conception of due process, the purpose of the clause is to ensure the most accurate decision possible."); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 895 (1981) (describing the dominant due process analysis as instrumental, determining the "goodness of a procedure . . . by assessing its capacity for accurate factfinding and appropriate application of substantive legal norms to the facts as found."). With respect to that accurate outcome, "[m]ost conventional accounts assume that the relevant outcome of adjudication is the final judgment, consisting of the legal remedy and the determination of legal and factual issues, and that the proper measure of outcome quality is the degree to which the decision accurately reflects the underlying facts and conforms to pre-existing norms." Bone, *Rethinking*, *supra*, at 201.
93. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 666-67 (2d ed. 1988) (emphasis in original).
94. Redish & Marshall, *supra* note 92, at 476.
95. Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1017 (2010) [hereinafter Bone, *Procedure*] ("Obviously, parties cannot have a right to perfect accuracy since perfection is impossible.").
96. Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 599 (1993) [hereinafter Bone, *Statistical Adjudication*] ("[I]f a substantive right implied a

such a right [to perfect accuracy] could easily find itself morally committed to a disastrous level of financing for adjudication."[97] Instead, the analysis recognizes a flexible idea of accuracy and is utilitarian: comparing the procedure's likely production of accurate outcomes versus the procedure's costs.[98] If the benefits with respect to accuracy outweigh the costs, then due process requires that procedure.[99]

The Supreme Court used this very analysis in *Mathews v. Eldridge*.[100] In *Mathews*, the plaintiff had been receiving Social Security benefits due to his disability.[101] The state agency later determined, however, that his disability had ceased, and terminated his payments.[102] The recipient challenged the constitutionality of the procedures the government used within its decision to terminate his benefits.[103]

The Court explained that "[p]rocedural due process imposes constraints on government decisions which deprive individuals of 'liberty' or 'property' interests."[104] At the same time, "due process is flexible and calls for such procedural protections as the particular situation demands" depending on the interests affected.[105] Specifically, the Court identified the interests to be weighed:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens

right to a perfectly accurate outcome, parties would be entitled to demand that the community invest resources in procedure at a level that maximized accuracy regardless of cost."); *see also* Bone, *Procedure*, supra note 95, at 1017 ("[I]f the right guaranteed perfect accuracy, every case would involve a rights violation, which hardly fits common intuitions of procedural fairness."); Solum, *supra* note 92, at 247 ("If we were to make perfect accuracy our higher commitment, we would find that as we got closer and closer to our goal, the cost of reducing the marginal rate of error would become higher and higher. We would reach a point where society would be required to invest enormous resources for an infinitesimal gain in accuracy.").

97. Bone, *Statistical* Adjudication, *supra* note 96, at 599.

98. Bone, *Procedure*, *supra* note 95, at 1017.

99. *Id.*

100. Mathews v. Eldridge, 424 U.S. 319 (1976). Commentators agree that "*Mathews v. Eldrige* and its progeny are all but explicit in their utilitarianism." Solum, *supra* note 92, at 254; *see also* Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 414 (2000) (describing that the *Mathews* test has "usually been viewed solely as a means to ensure procedures whose accuracy is commensurate with the interests at stake"); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48 (1976) ("The Eldridge Court . . . views the sole purpose of procedural protections as enhancing accuracy, and thus limits its calculus to the benefits or costs that flow from correct or incorrect decisions."); Harvey Rochman, Note, *Due Process: Accuracy or Opportunity?*, 65 S. CAL. L. REV. 2705, 2734 (1992) ("[T]o understand what is really going on in procedural due process decisions and to predict what the Supreme Court will do, it is necessary to think principally in terms of accuracy."); *see also* Redish & Marshall, *supra* note 92, at 472 ("The word 'fairness' did not appear in the [*Mathews*] balancing test; the Court apparently chose to focus upon considerations of economic efficiency instead.").

101. *Mathews*, 424 U.S. at 323.

102. *Id.* at 324.

103. *Id.* at 324–25.

104. *Id.* at 332.

105. *Id.* at 334.

that the additional or substitute procedural requirement would entail.[106]

The Court found the private interest at issue was the uninterrupted receipt of disability benefits, which was not based on financial need.[107] The Court also found only a limited risk of erroneous deprivation given the detailed questionnaires that the agency already used.[108] Although a hearing may be helpful, "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases" and "[t]he potential value of an evidentiary hearing" was minimal.[109] Last, the Court looked to the "incremental [costs] resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision."[110] Ultimately, the Court determined that a hearing is not constitutionally required before a recipient's disability benefits may be terminated.[111]

B. The Process-Based Theory

Commentators were not impressed with the Court's utilitarian approach to procedural due process. After *Mathews*, "[t]he unifying thread in the literature [was] the perception that the effects of process on participants, not just the rationality of substantive results, must be considered."[112] Generally, commentators introduced process-based theories focused on the "value in permitting individuals to participate in the adjudication of the rights."[113] Enabling participation not only creates "the much-acclaimed *appearance* of justice," but because of the intrinsic value of the participation itself, enabling that participation is "the very *essence* of justice."[114]

There are numerous values underlying the process-based theory of procedural due process—namely, the litigant's autonomy and dignity, the legitimacy of the results of the adjudication, and the equality of participation opportunities for all litigants. These values, however, do not translate to any set extent of guaranteed participation, as is reflected in the Court's delineation of a plaintiff's right to her day in court.

106. *Mathews*, 424 U.S. at 335. For cases involving only private parties, the Court refined the third factor to focus primarily on the plaintiff's interest along with consideration of the government's interest. *See* Connecticut v. Doehr, 111 S. Ct. 2105, 2112 (1991).
107. *Mathews*, 424 U.S. at 340-41.
108. *Id.* at 345.
109. *Id.* at 344-45.
110. *Id.* at 347.
111. *Id.* at 349.
112. Mashaw, *supra* note 92, at 886.
113. *Id.*; *see also* Solum, *supra* note 92, at 259 ("The participation model holds that procedural fairness requires that those affected by a decision have the option to participate in the process by which the decision is made."); Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545, 554 (2012) [hereinafter Lahav, *Due Process*] ("The dignitary theory of due process focuses on the importance of individual participation in litigation.").
114. TRIBE, *supra* note 93, at 666 (emphasis in original); *see also id.* (explaining that a "hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her").

1. The Underlying Values

Numerous values underlie the process-based theory of procedural due process—mainly, autonomy, dignity, legitimacy, and equality.

a. Autonomy

As described by Professor Robert Bone, the due process "ideal in American adjudication is linked to a process-oriented view of adjudicative participation that values participation for its own sake. Participation is important because it gives individuals a chance to make their own litigation choices."[115] More directly, litigants should not only have a chance to make their own litigation decisions, they should retain control over their claims. "[T]he true relationship between participation and self-respect is that participation . . . gives the participant *control* over the process of decisionmaking."[116] Professor Redish describes this autonomy value as "a foundational belief in the value of allowing individuals to make fundamental choices about the judicial protection of their own legally authorized rights."[117]

b. Dignity

Related to ensuring that litigants retain control over their claims is the dignity value underlying a process-based theory of due process. Emphasizing a litigant's control also emphasizes a litigant's dignity. This dignity value is best developed by Professor Jerry Mashaw. Plainly, "[w]e all feel that process matters to us irrespective of result" and "[w]e do distinguish between losing and being treated unfairly."[118] He continues, "it is commonplace for us to describe process affronts as somehow related to disrespect for our individuality, to our not being taken seriously as persons."[119] Professor Michelman has also explored the importance of the participation itself, explaining that "a participatory opportunity may also be psychologically important to the individual: to have played a part in, to have made one's apt contribution to, decisions which are about oneself."[120] In the same way, providing the opportunity for participation itself has intrinsic value because it enables litigants "an opportunity that expresses their dignity as persons."[121]

115. Bone, *Statistical Adjudication*, *supra* note 96, at 619.
116. Mashaw, *supra* note 92, at 903 (emphasis added).
117. Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1578 (2007).
118. Mashaw, *supra* note 92, at 888.
119. *Id.*
120. FRANK I. MICHELMAN, FORMAL AND ASSOCIATIONAL AIMS IN PROCEDURAL DUE PROCESS, *in* DUE PROCESS: NOMOS XVII 127 (J. Roland Pennock & John W. Chapman eds., 1977). Professor Michelman also explains that participation is important because of its external consequences, like possibly "persuading the agent away from the harmful action." *Id.* But participation is also psychologically important even if "the decision, as it turns out, is the most unfavorable one imaginable and one's efforts have not proved influential." *Id.* at 128; *but see* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in Federal Courts*, 63 HASTINGS L.J. 127, 130 n.10 (2011) (noting that Professor Michelman's conclusion is made "without exploring empirical data or psychological research").
121. TRIBE, *supra* note 93, at 666.

c. Legitimacy

Another value underlying a process-based theory of due process that is less related to autonomy and dignity is legitimacy. Providing the opportunity to participate has a "legitimizing effect in the eyes of the litigant."[122] "Individuals are presumed to have no legitimate complaint if they were allowed to present their case in the way they chose to present it—or, to put it another way, had their 'day in court.'"[123]

Legitimacy is important because if laws are seen as illegitimate, citizens feel free, morally, to disregard them.[124] Only when legitimate laws are "authoritative" do they "create content-independent obligations of political morality, to obey judicial decrees, and to respect the finality of judgments."[125]

Professor Solum looks to legislation as an analogy for the need for legitimacy within adjudication. Required procedures must be followed for legislation to be viewed as legitimate; even if good policy, legislation will be seen as illegitimate if proper procedures were not followed.[126] The same is true for adjudication, which is really just a different form of lawmaking.[127] The procedures that must be followed in adjudication include "affording those who are bound a right to participate."[128] Regardless of the accuracy of the result, it will only be legitimate if an opportunity to participate was provided.

d. Equality

The last main value underlying a process-based theory is equality. The equality value is simply the idea that all individuals should have equal opportunities to participate.[129] It demands that "the techniques for making collective decisions not imply that one person's or group's contribution (facts, interpretation, policy argument, etc.) is entitled to greater respect than another's merely because of the identity of the person or group."[130] Like the dignity value, the equality value has an expressive function, not of litigants' individual dignities, but of "the equal worth of individuals."[131]

Equality is valuable regardless of the outcome; if unequal, "the procedure itself is

122. Redish & Katt, *supra* note 90, at 1889; *see* Solum, *supra* note 92, at 286 (concluding that the process-based theory of procedural due process focusing on participation derives from legitimacy, and not from dignity, equality, or autonomy).

123. Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 769 (2007).

124. Solum, *supra* note 92, at 277-78.

125. *Id*. at 278.

126. *Id.* at 276-77.

127. *Id.* at 278.

128. *Id*. at 279.

129. Lahav, *Due Process*, *supra* note 113, at 555-56; *see also* Solum, *supra* note 92, at 263 (explaining that equality is a value "invoked in connection with the day-in-court ideal").

130. Mashaw, *supra* note 92, at 899. Professor Redish argues that the equality value is dependent on the instrumental view of due process because the concern about unequal procedures matters only because the inequality may alter the substantive outcomes of cases. Redish & Marshall, *supra* note 92, at 484-85.

131. Lahav, *Due Process*, *supra* note 113, at 554.

unfair, for the adjudicator does not accord equal procedural rights to parties similarly situated in relevant respects."[132] Professor Mashaw introduced this idea of equal opportunities to participate. Others have extended the equality value to an equality of outcomes "that litigation reaches with respect to similarly situated individuals."[133]

2. A Flexible Level of Participation

The Supreme Court has recognized a plaintiff's procedural due process right to her day in court.[134] Scholars agree this "has always been tied in an essential way to a process-oriented theory of participation, one that values freedom of strategic choice apart from its impact on outcome quality."[135] The day in court right that the Court has recognized exemplifies the flexibility of a process-based right. The right is necessarily flexible because the values underlying process-based procedural due process do not translate to any certain level of participation. Participation could mean as much as actually appearing and arguing in court, or it could mean as little as doing so only through a representative.[136]

132. Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 25 (1974).

133. Lahav, *Due Process*, *supra* note 113, at 556. Professor Lahav separately advocates the use of damages sampling techniques in mass tort cases to achieve outcome equality. *See generally*, Lahav, *Trial by Formula*, *supra* note 19.

134. Taylor v. Sturgell, 553 U.S. 880, 892-93 (2008); *see also* Redish & Katt, *supra* note 90, at 1877 (discussing that the Court has expressed "its support for the day-in-court ideal as a dictate of due process"). In *Taylor*, the Court noted that a "deep-rooted tradition" supports "that everyone should have his own day in Court. *Taylor*, 553 U.S. at 892-93. Many question, however, whether history supports this "tradition." Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1110-11 ("[P]roponents of a 'long-standing tradition of individual claim autonomy' do not provide any historical support for it. In fact, many procedures, both antiquated and modern, do not respect a 'day in court.'"); Lahav, *Due Process*, *supra* note 113, at 549-50 (questioning the tradition supporting the day in court ideal, but suggesting that "the perception of tradition may be more important than the true history").

135. Bone, *Rethinking*, *supra* note 92, at 205; Campos, *supra* note 134, at 1060 (explaining that the Court has "[emphasized] the importance of protecting the claim and, in particular, a plaintiff's control, or autonomy, over it"); Redish & Larsen, *supra* note 117, at 1573 ("With the melding of multiple individual claims into a single class proceeding necessarily comes a dramatic reduction in an individual's ability to control her lawsuit--or, indeed, to decide whether to pursue her claim in the first place."); Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 72 (2003) ("The due process requirements of notice, hearing, and opportunity to opt out in 23(b)(3) class actions, combined with Rule 23(a)(4) representation requirements, indicate that the rule makers saw some autonomy value for individual claims in class action litigation, but the strength of that value is uncertain and the reasons for it are not clarified in the case law."). There is some inherent concern regarding the accuracy of judgments produced in aggregated litigation because of the lack of a relationship between absent class members and the class attorney. Woolley, *supra* note 100, at 414 ("Our system treats representation in a class setting as posing a greater risk of erroneous deprivation of a claim than representation of an individual by an attorney."). In an individualized lawsuit, a client has the authority to fire her attorney; this power to terminate should cause the attorney to vigorously pursue her client's interests. *Id.* In a class action, however, an absent class member lacks control over the class attorney, reducing the incentive for vigorous pursuit of the absent class member's interests. *Id.*; *but see* AM. LAW. INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07, cmt. e (2010) (explaining that the opt-out right "generates pressure for the representative parties and their lawyers to act faithfully on behalf of the represented claimants"); *but see* Campos, *supra* note 134, at 1116 (explaining that "protecting litigant autonomy facilitates sweetheart settlements" for the class attorney). And practically, the class attorney may not be able to vigorously pursue the interests of all class members; "the strategic goals and preferences of some class members may have to be sacrificed by class counsel." Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 591 (1997).

136. *See* Campos, *supra* note 134, at 1111.

> [I]t is important to distinguish between a right to control a claim and the right to participate in a proceeding. For example, a plaintiff may still have her 'day in court' in the context of

The Court encountered a plaintiff's potential right in having a day in court in the class action context—what procedural protections must be afforded to an absent class action plaintiff before she can be deprived of her property, mainly her claim for compensatory damages. The Court concluded that due process requires notice, the ability to opt-out, and adequate representation in class actions "wholly or predominantly for money judgments."[137] Plainly, if these three things are provided, an absent plaintiff participates enough—he "does, in fact, receive his 'day in court' in the class proceeding."[138]

These specific rights—notice, opt-out, and adequate representation—further the values underlying process-based procedural due process. Without the rights to notice and to opt-out, the plaintiff loses her autonomy over decisions regarding how to pursue her claim; in fact, she loses control over whether to even file suit. Notice and the right to opt-out are necessary to preserve the plaintiff's decision whether to proceed on her own and protect "the individual's interest in having power to make choices about the protection of her own legally authorized or protected rights through resort to the litigation process."[139] Similarly, the rights further the dignity value by respecting class members by giving them a choice whether to let the claim be litigated within the class action. The choice is empowering; even if the class action is unsuccessful, the class plaintiff was treated with dignity by being given the choice of whether to remain in that class action.

The rights to notice and opt-out also fulfill the legitimacy and equality values. If a class member was unable to opt-out, that class member likely will not see the results of

> a bifurcated class action with a common-issue proceeding and individual-issue determinations. Even in a non-bifurcated class action, a plaintiff can otherwise appear to present her own legal arguments or evidence. Admittedly, preclusion doctrine can effectively destroy this participatory right, but participation can still be fairly well accommodated in most cases . . . without giving plaintiffs control over their claims.

Id.

137. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12, 811 n.3 (1985); *see also* AM. LAW INST., *supra* note 135, § 2.07 cmt. c (listing the absent plaintiff's due process rights as "exit, voice, and loyalty" rights). Rule 23 mirrors this holding; notice and opt-out rights are not required when the requested relief is wholly non-monetary. *See* FED. R. CIV. P. 23(c)(2). There is no constitutional right to notice or to opt-out if the class action is certified under Rule 23(b)(1) or Rule 23(b)(2). Thus, an absent plaintiff in an action seeking injunctive relief, like in *Dukes*, has no right to notice or to opt-out. The issue of whether notice and opt-out rights are required when a class seeks injunctive relief and "incidental" monetary relief was present in *Dukes*. Before *Dukes*, "[a]ll federal circuits that had addressed the issue had permitted back pay in employment discrimination actions under (b)(2)." Robert H. Klonoff, *Reflections on the Future of Class Actions*, 44 LOY. U. CHI. L.J. 533, 538 (2012). In its brief, Wal-Mart argued that the lack of an opt-out right meant that the class representatives could "extinguish the rights of millions of absent class members without even telling them about it." Brief for Petitioner, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277), 2011 WL 201045, at *2. The Court noted the "serious possibility" that Due Process requires notice and opt-out rights even if the class seeks monetary relief only incidentally. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011). But the Court did not pursue that serious possibility further, however, because it found that the plaintiffs' request for monetary relief was more than incidental. *Id.* at 2560.

138. Redish & Larsen, *supra* note 117, at 1600; *see also* Geoffrey P. Miller, *Rethinking Certification and Notice in Opt-Out Class Actions*, 74 UMKC L. REV. 637, 641 (2006) (doubting "whether an interest in participating in litigation has significant due process weight in cases where the class member is receiving adequate representation through the class representative and class counsel").

139. Redish & Larsen, *supra* note 117, at 1579; *see also* AM. LAW. INST., *supra* note 135, § 2.07 cmt. e (recognizing that the right to opt-out reflects that "an individual's ability to control the manner of adjudicating that individual's claim is important" and that those who exercise it "[place] a premium on claim control").

the litigation as legitimate.[140] Just like legislation that was produced by the wrong procedures, the result of litigation in which the plaintiffs did not get to participate will be seen as illegitimate even if it produced a result good for society. The equality value is also furthered in that all class plaintiffs who can be contacted through reasonable effort are treated equally by being given notice and the right to opt-out.[141]

Even though notice, the right to opt-out, and adequate representation further the values underlying process-based procedural due process, these rights provide little, if any, actual participation. Even though an absent plaintiff retains autonomy over her decision whether to opt-out, she has no control over the day-to-day litigation decisions if she remains in the class action.[142] She does not participate personally, only through a representative. Numerous commentators have questioned how adequate representation can be the procedural protection guaranteed by a theory that emphasizes actual participation.[143] Other mechanisms would better further the values. As an example, an opt-in right would likely be more respectful of the plaintiff's dignity because it implies dissent from inaction.[144] The opt-out right, on the other hand, implies consent from inaction.[145] It also requires affirmative conduct to preserve the right; a right that cannot so easily be lost would better express the plaintiffs' self-worth and respect.[146]

But the values underlying a process-based theory do not dictate any level of participation necessary to provide the plaintiff with her day in court.[147] For example, "legitimacy

140. Solum, *supra* note 92, at 316-17 (discussing that a mandatory class action, from which plaintiffs cannot opt-out, may violate the participatory legitimacy thesis); *see also* AM. LAW. INST., *supra* note 135, § 2.07 (listing opt-out rights as a method of participation within aggregation).

141. AM. LAW INST., *supra* note 135, § 2.07 cmt. f (explaining that notice is required only "to persons whose names and addresses are known and who can be contacted directly by mail or other means with reasonable effort," which reflects the due process notion that "the best notice that is practicable under the circumstances" is what's required).

142. Redish & Larsen, *supra* note 117, at 1586 (explaining that absent plaintiffs "remain passive, ceding the control of litigation strategy to those who serve as named parties").

143. Bone, *Statistical Adjudication*, *supra* note 96, at 589 ("[T]he day-in-court right is supposed to guarantee each class member the opportunity to make her own litigation choices, and it is hard to see how this guarantee is met by someone making litigation choices for the class."); Bone, *Rethinking*, *supra* note 92, at 204 ("[R]epresentation can never be fully consistent with a personal day in court when the day in court is conceived, as it has been for more than a century, in terms of the individual's freedom to make her own litigation strategy choices."); Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 606 (1987) ("Participatory values, however, are antithetical to the idea of representative litigation, if participation is taken to mean literal presence before the court.").

144. Bone, *Statistical Adjudication*, *supra* note 96, at 592. Plus, the requirement of notice is only that it be sent properly—not that the plaintiff actually receive it. *Id*. at 593. Despite a lack of actual receipt, the class member will still be bound if she does not opt-out. *Id.*

145. Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 592 (2011).

146. *Id.*; *see also* Redish & Larsen, *supra* note 117, at 1575 (arguing that the opt-out procedure may be unconstitutional because it amounts to a passive waiver of the litigant's autonomy due process right).

147. Bone, *Statistical Adjudication*, *supra* note 96, at 585 (explaining that "[d]ignity and legitimacy by themselves have no necessary implications for the precise level of control" courts are not clear regarding "how much control the day-in-court right guarantees"); *see also* Bone, *Rethinking*, *supra* note 92, at 265 (explaining that the day in court ideal is based on a process-oriented theory, but "courts have never clearly spelled out the values served by [the] process-oriented theory"); *see also id.* ("[A]t no point has [the Court] articulated any firm conceptual grounding or theoretical rationale for the precept. It is almost as if the Court simply intuits the normative basis for this important requirement of procedural due process.").

does not require actual participation."[148] And requiring adequate representation likely does increase the legitimacy of results, even though it provides very little actual participation for the absent plaintiff. The values underlying a process-based theory of procedural due process promote participation. But the "participation" that results from their application can be something much less.

V. A DEFENDANT'S RIGHT TO DAY IN COURT?

Returning to the claimed right in *Philip Morris* and *Dukes*—the right to present defenses—does either theory of procedural due process support it? In *Philip Morris*, the Court claimed to base the right in procedural due process.[149] In *Dukes*, the Court referred to a "right" on the defendant's part, but did not identify its basis.[150] In both cases, it is clear that the defendant's interest in paying damages is a protected property interest of which the defendant cannot be deprived without due process.

Neither theory of procedural due process, however, supports a defendant's right to

148. Solum, *supra* note 92, at 275. Legitimacy also results because the trial court takes extra precaution in ensuring that the class representatives and their attorneys vigorously litigated the absent class members' interests. AM. LAW INST., *supra* note 135, § 2.07 cmt. d (explaining the "practical need for judicial scrutiny" and "the importance of judicial oversight" of whether the absent class members are adequately represented).

149. Philip Morris USA v. Williams, 549 U.S. 346, 354-55 (2007). Many conclude, however, that *Philip Morris* was actually based in substantive due process. *See e.g.*, Jill Wieber Lens, *Procedural Due Process and Predictable Punitive Damage Awards*, 2012 B.Y.U. L. REV. 1, 19 n.12 (2012); Jeremy T. Adler, *Losing the Procedural Battle but Winning the Substantive War: How* Philip Morris v. Williams *Reshaped Reprehensibility Analysis in Favor of Mass-Tort Plaintiffs*, 11 U. PA. J. CONST. L. 729, 745 (2009) (arguing for a substantive due process component of the Philip Morris decision); Erwin Chemerinsky, *The Constitution and Fundamental Rights*, 18 U. FLA. J.L. & PUB. POL'Y ix, xii (2007) (listing *Philip Morris* as a substantive due process case); Sheila B. Scheuerman & Anthony J. Franze, *Instructing Juries on Punitive Damages: Due Process Revisited After* Philip Morris v. Williams, 10 U. PA. J. CONST. L. 1147, 1150, 1157-89 (2008) (describing the Philip Morris decision as imposing a substantive limit on punitive damages). Some suspect that the Court forced the procedural due process basis for practical reasons; if the decision was expressly based in substantive due process, the majority may not have been able to muster enough votes. Keith N. Hylton, *Due Process and Punitive Damages: An Economic Approach*, 2 CHARLESTON L. REV. 345, 371 (2008) (explaining that Philip Morris imposes a substantive limit and that "the use of procedural due process language . . . was somewhat inappropriate and at worst insincere"). If the basis of the Court's holding were really procedural due process, the solution to the problem should be to provide those deprived procedural protections—define the dimension and allow the defendant to present the defenses. *See e.g.*, GA. CODE ANN. § 51-12-5.1(e)(1) (2003) (limiting punitive damages to only one award in a products liability claim and defining that one award as punishing the defendant for the harm it caused to society as a whole). Instead, the Court limited the substantive scope of the punishment. *See infra* note 219 and accompanying text.

150. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2544 (2011). Professor Judith Resnik classified the defendant's right to present defenses to the individualized claims as "court-based." Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 150 (2011). Another has suggested that it's based in substantive due process. Andrew J. Trask, Wal-Mart v. Dukes: *Class Actions and Legal Strategy*, 2011 CATO SUP. CT. REV. 319, 348 (2011). In its petition for certiorari to the Supreme Court, Wal-Mart cited *Philip Morris* as authority that procedural due process includes a right to present defenses. Brief for Petitioner, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277), 2011 WL 201045, at *56. It also cited two other cases. *See id.* at *43. The first was *United States v. Armour & Co*., which involved the enforcement of a consent decree entered into by a private party and the government settling potential antitrust issues. United States v. Armour & Co., 402 U.S. 673 (1971). The second case, *Lindsey v. Normet*, was a civil action between two parties and the Court did state that "[d]ue process requires that there be an opportunity to present every available defense." Lindsay v. Normet, 405 U.S. 56, 66 (1972). The Court found no due process violation on this idea because there was no showing that the defendant was unable to litigate any defense Oregon law recognized as "available." *Id.* at 69.

present defenses.[151] No such right exists under the process-based theory because the defendants were able to meaningfully affect the outcome even if unable to present specific evidence. And no such right exists under the outcome-based theory because the inaccuracy produced by sampling and considering nonparties is insignificant for due process purposes and individual proceedings are costly to society.

A. Little Support from the Process-Based Participation Values

"In the class action realm today, the threads of [a process-based] theory are picked up in defendants' assertions of their rights to present individualized defenses against each of the plaintiffs."[152] Even if the threads are apparent in the defendants' assertions, a process-based theory of procedural due process does not support a defendant's right to present defenses. Defendants, especially in the contexts of *Philip Morris* and *Dukes*, are able to meaningfully influence the outcomes of their adjudications, and are thus receiving all of the procedural protections due under the process-based theory.

As an initial matter, the values underlying a process-based theory of due process do not apply as well to a defendant as they do to a plaintiff. The autonomy value seeks to protect a litigant's control over her claims and litigation, but a defendant does not have the right to control the litigation. The defendant does not choose the venue, the resulting procedural rules, the legal claims, etc. After the plaintiff has made those decisions, the defendant reacts. The defendant develops a responsive litigation strategy and controls that defense, but the plaintiff dictates the scope of that defense through its choice of legal claims and its presentation of evidence. Similarly, consider the legitimacy value. Normally, parties can have little complaint if "they were allowed to present their case in the way they chose to present it."[153] But defendants do not present a "case," they present a defense, and how they present that defense will depend on how the plaintiff proceeds.

Assuming that the values do apply to a defendant's right, though, a process-based

151. In a recent article, Professor Mark Moller argued that there is no historical support for a right to present defenses. *See generally* Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 UTAH L. REV. 319 (2012). "In the old common law, there was simply no absolute right to present any particular quantum of evidence." *Id.* at 348. Instead, courts were free to use their judgment to "forbid, not just restrict, the defendant's power to submit any probative rebuttal evidence." *Id.*; *see also id.* at 320 ("[C]lass action defendants' arguments are not rooted in the historical meaning of the Due Process Clause. Their arguments, instead, feed off intuitions about good policy."). There is likely similarly no historical support for a right to present defenses in the more specific punitive damages context. "In 1868, when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts. It is just as clear that no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount." Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 26-27 (1991) (Scalia. J., concurring); *see also id.* at 25-26 (discussing that a large majority of appellate courts had followed the views of Theodore Sedgwick that punitive damages "could impose a punishment on the defendant and hold up an example to the community") (internal citations omitted); Pac. Ry. Co. v. Humes, 115 U.S. 512, 521 (1885) (citing Theodore Sedgwick's view that punitive damages serve both public and private law functions); Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 204–206 (2003) (explaining that punitive damages in the 19th century above all redressed "the injury of insult that wounds or dishonors").

152. Lahav, *Due Process*, *supra* note 113, at 555.

153. Redish & Berlow, *supra* note 123, at 769.

theory would protect a defendant's right to participate *meaningfully*. Participation is meaningful only if it provides the opportunity to influence the outcome.[154] Only through meaningful participation does a party retain autonomy, is a party able to express her dignity, and will the adjudication create legitimate results.

Even if unable to present specific evidence, the defendants in *Philip Morris* and *Dukes* were able to influence the outcome. Unlike an absent class plaintiff, these defendants are in court and free to present evidence. Considering Wal-Mart first, in the trials of the sampled claims, Wal-Mart would have been free to present general evidence of its lack of a discriminatory purpose—that it did not discriminate against the plaintiffs whose sampled claims were tried or against any of the other plaintiffs.[155] If successful, Wal-Mart would have been able to show that it did not engage in a practice or pattern of discrimination and would not have been liable to any plaintiffs. Additionally, Wal-Mart's success in showing that the plaintiffs in the sampled claims were denied a promotion for a non-discriminatory reason would have a direct effect on the non-tried claims. The invalidity rate from the sampled claims would be applied to the relief distributed to the plaintiffs whose claims were not tried. If Wal-Mart was able to establish a high invalidity rate, that rate would directly reduce the total amount of relief it would have been obligated to pay.[156] Similarly, the average awards resulting from the sampled claims would be applied to the relief distributed to the rest of the plaintiffs. If Wal-Mart was able to show that those damages were minimal, that would again directly reduce the total amount of relief Wal-Mart would have been obligated to pay.

Similarly, Philip Morris was able to meaningfully influence the outcome. Philip Morris could present evidence about its conduct that would effectually negate any plaintiff's claim—that it did not make any misrepresentation or did not realize its falsity. Similarly, evidence that the falsity of the misrepresentation was well-known would negate any plaintiff's claim.[157] Philip Morris may have also been free to present general evidence that its conduct was not tortious; only two cases filed against Philip Morris in Oregon had ever gone to trial, and Philip Morris had "prevailed in a significant majority of the individual smoking-and-health cases that [had] ever gone to trial" throughout the nation.[158] Any of this evidence could persuade the jury to find Philip Morris not liable at all, or even if liable, to find that Philip Morris did not deserve a steep punishment.

154. Lahav, *Trial by Formula*, *supra* note 19, at 598; *see also* Woolley, *supra* note 100, at 415 ("Participation values are implemented through procedures that afford individuals an opportunity to safeguard their interests in a particular case by placing before the court information that may affect the outcome."); *see also* Redish & Marshall, *supra* note 92, at 487 ("We value participation because we believe it can bring about a different outcome."); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 78 n.413 (1992) ("[T]he right to be heard includes the chance actually to affect the outcome of the decision.").

155. Moller, *supra* note 151, at 330 (explaining that Wal-Mart would have been able to "[contest] the statistical 'pattern or practice' evidence and the lost pay formula").

156. Admittedly, this would not affect the liability determination, which would have been assumed, but it would affect the total damages paid.

157. *See* Am. Tobacco Co. v. Grinnell et al., 951 S.W.2d 420, 429 (Tex. 1997) (concluding that the "general health dangers attributable to cigarettes were commonly known as a matter of law" before 1952, and thus the defendant would not have any duty to warn of those general health dangers after 1952).

158. Brief for the Petitioner, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (No. 05-1256), 2006 WL 2190746, at *13.

Further, the values underlying a process-based theory of procedural due process are furthered by the extent of participation that Wal-Mart would have been given and Philip Morris was given. Depriving the defendant of the ability to present evidence specific to the injured parties' whose claims were not does limit the defendant's autonomy, but not by much. Wal-Mart and Philip Morris still would have had control over the evidence they presented—the general evidence that would apply to all injured parties, and the evidence specific to the plaintiffs whose claims were tried.

Similarly, some level of respect would still be accorded to Wal-Mart and actually was accorded to Philip Morris. Both defendants would have still had the psychological satisfactions of actually being able to participate. These defendants' situation is not similar to the class plaintiff who would lose her claim without even the psychological satisfaction of choosing to remain in a class; these defendants are in court.

The key to the dignity value is whether parties, even if they lose, still feel as if they were treated fairly within the proceedings.[159] As long as there's enough evidence that the results of the sampled claims truly represent what would be the results if all claims were tried, there is little affront to Wal-Mart's dignity.[160] If a defendant was unable to present any defenses relevant to whether its conduct was tortious, yet was still punished as if its conduct to everyone was tortious, then that would offend the defendant's dignity. But that also was never the case. Even if unable to bring up defenses specific to a nonparty, the defendant was always able to present evidence that its conduct was not tortious—evidence that would negate both the plaintiff's and any other injured person's claims. Again, the affront to dignity was minimal.[161]

Although Wal-Mart and Philip Morris may have found the results illegitimate because of their inability to present specific evidence, legitimacy does not depend on subjective desires.[162] Legitimacy also "is not an 'all or nothing' concept. Procedures with full rights of participation may confer a greater degree of legitimacy, but procedures with minimal participation still confer some legitimacy."[163] And the procedures provided—the ability to present defenses specific to the tried claims and those applicable generally to the

159. *See supra* text accompanying notes 118-119.

160. *See* Hilao v. Estate of Marcos, 103 F.3d 767, 782 (9th Cir. 1996) (mentioning the expert testimony that "examination of a random sample of 137 claims would achieve 'a 95 percent statistical probability that the same percentage determined to be valid among the examined claims would be applicable to the totality of claims filed'").

161. Defendant was unable to argue that "Nonparty Jane Smith would be unable to prove fraudulent misrepresentation because she could not show justifiable reliance due to her knowledge of the dangers of smoking." At the same time, the plaintiff also hadn't presented evidence that "Nonparty Jane Smith was also injured as a result of the defendant's tortious conduct."

162. *Cf.* Solum, *supra* note 92, at 274 ("Satisfaction that is merely subjective cannot confer normative legitimacy.").

163. *Id.* at 319. In making this statement, Professor Solum is assuming that further participation would be impracticable, like how further participation by absent class members would be impracticable because of management issues. Under this theory, if participation is impractical, adequate representation will still achieve the desired legitimacy. *Id.* at 317. The same analysis could apply to a defendant's presentation of defenses. It is theoretically possible—through many individualized trials. But it would be impracticable because of management issues. When impracticability is considered, less participation is acceptable. But that lower amount of participation will still achieve some level of legitimacy.

tried and untried claims—do confer some legitimacy.[164]

The process-based due process value least apparent in the defendants' inability to present evidence specific to other injured persons is the equality value. This is because only large defendants will face this inability. Sampling and punishment for harming nonparties will only be relevant in situations where a defendant has committed tortious conduct against many, many people. Defendants not in class actions will obviously never have to face sampling. And defendants whose conduct has affected only one individual will not face any possibility of being punished for harming nonparties. At the same time, the equality value assumes equality among similarly situated parties.[165] Potentially all defendants whose conduct is state or nation-wide could be subject to sampling or the imposition of an all-encompassing punitive damage award. These defendants are, in that way, similarly situated and are all equally affected.

Thus, all of the values are furthered in the extent of participation the defendants would have had, even if unable to present evidence specific to the injured persons whose claims are not tried. True, the values underlying process-based procedural due process would be furthered more by allowing the defendant to present that evidence, but a process-based right is flexible. One need look no further than a plaintiff's day-in-court right to see that. Plaintiffs seeking compensatory damages can be precluded from pursuing their claims because of a prior class judgment if the plaintiffs were sent notice, were informed of their right to opt-out, and were adequately represented. If given those protections, the plaintiff has participated enough. Similarly, the defendants in *Philip Morris* and *Dukes* were able to participate meaningfully even if unable to present evidence specific to injured persons whose claims are not tried. The flexibility of process-based procedural due process means this theory does not support the defendant's right envisioned in *Philip Morris* and *Dukes*.

B. Little Support from an Outcome Based Theory

As a refresher, an outcome-based view of procedural due process requires procedures necessary to achieve substantively accurate outcomes. An outcome based concern is apparent in both *Dukes* and *Philip Morris* because of how the defendant's liability to injured persons is simply assumed. Sampling assumes liability to all whose claims are not tried, and considering nonparties in imposing punitive damages assumes liability to all persons injured by the defendant's conduct.

The concern is apparent, but an outcome-based procedural due process right does not exist unless the benefits of the procedure outweigh the costs. Even though individualized proceedings would lead to more accurate liability determinations, that added accuracy

164. The idea of degrees of legitimacy is especially relevant to the punitive damages context. Regardless of the procedures used, the damages may always be seen as illegitimate. Numerous complaints exist—why does the plaintiff get the entire award, why does the state get to take a portion of the award (if state law allows this), why doesn't the award have any direct relationship to the facts of the case, why is a jury empowered to hand out punishment, why is the jury not given more directions regarding how to set the amount of the award, why is the award arbitrarily capped at a certain amount (if state law mandates this), why is the jury still able to hear evidence of the defendant's harming nonparties even though it can't punish the defendant for it, etc.

165. Mashaw, *supra* note 92, at 899.

is inconsequential. That is because, even if liability is inaccurately assumed, the damage obligations produced by both sampling and considering nonparties are accurate. Individualized proceedings thus do not improve the accuracy of the interested protected by due process—the obligation to pay damages.

The extensive costs of individualized proceedings easily outweigh the inconsequential added accuracy. Those costs are the same consequences as tort law's under-litigation problem—uncompensated injured persons and the crippling of tort law's deterrent effect. And thus, even though the Court seems concerned about substantive accuracy in both *Dukes* and *Philip Morris*, an outcome-based procedural due process theory does not support a defendant's right to present defenses in either case.

1. Individualized Proceedings Cure Only an Inconsequential Inaccuracy

Sampling and considering nonparties produce inaccurate liability determinations. But the inaccurate liability determinations produced by sampling and considering nonparties have little consequence because they do not translate to inaccurate total damage determinations. To the contrary, the total damage obligations—the interest protected by due process—produced by sampling and considering nonparties are accurate. Thus, using individualized proceedings would not provide an improvement in a way that actually matters from a due process perspective.

a. Inaccurate Liability Determinations

Sampling results in payment to plaintiffs whose claims were not tried; payment to those plaintiffs means liability to those plaintiffs.[166] Liability to those plaintiffs means, legally, Wal-Mart denied each of those plaintiffs a promotion for a discriminatory reason. This is likely factually inaccurate. Surely at least some of the female employees were denied a promotion because of poor work habits. Rationally, the Court was troubled by this likely factual inaccuracy. It specifically mentioned that there was never any showing that Wal-Mart denied those plaintiffs a promotion for a discriminatory reason—the same showing that triggers Wal-Mart's need to show a non-discriminatory reason for the non-promotion.

Similarly, considering nonparties when imposing punitive damages results in payment for harming those nonparties in the form of punitive damages. Punishment for injuring nonparties effectually means that Philip Morris tortiously injured—and would be liable to—all Oregonian smokers. Again, this is likely factually inaccurate. Surely, at least a few of the smokers knew that smoking was dangerous but still did it. Again, the Court was rationally troubled. There was no chance to present evidence that the nonparty "was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary."[167] The reference to "damages" is the

166. Payment of damages after sampling is not like a settlement; there is no denial of liability that accompanies the payment.

167. Philip Morris USA v. Williams, 549 U.S. 346, 353-54 (2007).

nonparty's compensatory damages. If the nonparty did not rely on the defendant's statements, the nonparty could not even establish tort liability, much less be entitled to punitive damages.[168]

These assumed liabilities—Wal-Mart to every female employee and Philip Morris to every Oregonian smoker—include some "false positives," meaning "findings of liability where there are none under existing law."[169] False positives are problematic because they can create "huge, undeserved reputation losses."[170] Although civil liability determinations are not thought to create the same type of stigma as criminal convictions, depending on the nature of the wrongdoing, a stigma can still result.[171]

This is especially true in cases like *Dukes* and *Philip Morris*. A finding that a company engaged in discrimination is stigmatizing.[172] And that finding in *Dukes* would be especially broad: Wal-Mart, "the Nation's largest private employer," discriminated not only against the 1.5 million female employees in the certified class but against *all* of its female employees.[173] Similarly, a finding that a manufacturer is liable because its product injured or killed someone hurts that manufacturer's reputation.[174] Again, consider the

168. This depends on the treatment of the nonparty's conduct. If it did not rely at all on the defendant's statements, it should be unable to establish liability. But if the evidence showed reliance plus that the nonparty had some knowledge of the dangers of smoking that could likely be the basis for assigning the plaintiff some fault. Even if assigned fault, the plaintiff is still able to establish the defendant's liability, but she receives a decreased compensatory damage recovery. *See e.g.*, Williams v. Philip Morris Inc., 48 P.3d 824, 828 (Or. Ct. App. 2002), *vacated sub nom*, Philip Morris USA Inc. v. Williams, 124 S. Ct. 56 (2003) (explaining that the plaintiff was assigned "50 percent of the cause of his harm" on the negligence claim and was not awarded punitive damages on the same, and that the jury awarded $79.5 million on the fraud claim). But the defendant would still be liable. Thus, the assumption of liability may be accurate. Also, the plaintiff's assigned level of fault would not be applied to reduce any punitive damages awarded. *See e.g., id.*

169. Richard A. Epstein, *Of Pleading and Discovery: Reflections on Twombly and Iqbal with Special Reference to Antitrust*, 2011 U. ILL. L. REV. 187, 195-96 (2011).

170. *Id.*

171. Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 283 (1983) (describing the stigma of a criminal conviction); *but see* Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 332 (1996) (arguing that the stigma resulting from a civil action brought by the government or even by a private individual can create a stigma very similar to one resulting from a criminal conviction); Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395, 418 (1991) ("The empirical evidence suggests that civil enforcement of laws regulating corporate behavior is just as effective in imposing reputational penalties."). Punitive damages are also traditionally thought to create a stigma. *Id.* at 281–82 ("Thus, a punitive damages award, unlike a compensatory award, seems always to constitute a 'badge of disgrace' and to jeopardize the defendant's good name, reputation, honor, and integrity."); *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting) ("[T]here is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character means that there is more than just money at stake."); *but see* Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 879 (1991).

172. *See* Donald C. Langevoort, *Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Promotion Tournament*, 61 WASH. & LEE L. REV. 1615, 1618 (2004) ("Firms have complex motives to take nondiscrimination and the promotion of diversity seriously. First, at least certain forms of discrimination are both unlawful and socially illegitimate and hence present threats of potential liability and injury to reputation."); Scott B. Goldberg, *Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 U. PA. L. REV. 571, 586 (1994) ("[T]he need to maintain a good reputation in the public eye hopefully provides most employers with enough incentive to deter their agents from discriminating, regardless of the potential for legal liability.").

173. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011). *See supra* text accompanying note 62 (describing plaintiffs' attempts to show commonality).

174. Jefferey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 B.Y.U. L. REV. 537, 550 (1997) ("[P]roduct liability lawsuits can have tremendous negative effects

scope of the finding in *Philip Morris*: that the "country's largest manufacturer of cigarettes" lied to and injured every smoker in Oregon and deserves punishment for all of those torts.[175] The liability determinations would reveal a broad "pattern of misconduct" and will, inevitably, "lower the value of the firm."[176]

In both *Philip Morris* and *Dukes*, the Court mandated individualized proceedings to cure the false positives resulting from assuming liabilities.[177] And individualized proceedings should uncontroversially lead to more accurate liability determinations in both cases.[178] Individually trying each plaintiff's claim in *Dukes* would lead to more accurate liability determinations regarding whether the defendant actually denied the plaintiff a promotion for a discriminatory reason. Similarly, individually trying each Oregonian smoker's claim against the defendant would lead to more accurate liability determinations than what occurred in *Philip Morris*—essentially, the plaintiff's attorney just mentioned the fact of other Oregonian smokers and left it to the jury to impose a greater punishment because of those smokers.[179]

b. Sampling and Considering Nonparties Produce Accurate Total Damage Determinations

The only effect of the inaccurate liability determination, however, is reputational. Harm to defendant's reputation resulting from an inaccurate liability determination is not even an interest protected by procedural due process. In *Paul v. Davis*,[180] the Supreme Court clarified that reputation alone is not the type of interest protected by the Due Process

on defendants' reputations, or even upon entire industries . . . ."); *id.* ("When a product is implicated in causing death or injury, fear and loss of public confidence can destroy years of effort spent promoting and creating a good reputation among consumers.").

175. Williams v. Philip Morris Inc., 48 P.3d 824, 828 (Or. Ct. App. 2002), *vacated sub nom,* Philip Morris USA Inc. v. Williams, 124 S. Ct. 56 (2003).

176. Fischel & Sykes, *supra* note 171, at 332.

177. Donald G. Gifford, *The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court's Mass Tort Jurisprudence*, 44 ARIZ. ST. L.J. 1109, 1136 n.85 (2012) (describing the Court's constitutionally based bounding of adjudication, which limits "common tort adjudication to cases between individual parties or well-defined and carefully-circumscribed groups," and pointed to Philip Morris and Dukes as examples of this bounding).

178. Risk of error still exists with individualized proceedings obviously. Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 345 (1994) ("Mistakes in determining liability can arise in many ways. There may be uncertainty concerning the identity of the person who committed an act, whether an act was committed, whether an act in fact caused the victim's injury, or whether an act was justified in some manner recognized by the law.").

179. In the nonparty's individualized proceeding against the "specific tortfeasor, the defendant will have 'reasonable notice of the plaintiff's allegations of facts supporting liability,'" and be able to respond by producing the best information and enabling the jury to accurately determine liability. Gifford, *supra* note 177, at 1112. In *Philip Morris*, on the other hand, the plaintiff's attorney just mentioned that other Oregonians had been harmed by the defendant's conduct. Philip Morris was free to respond but practically had little ability to do so given the lack of notice. Was Philip Morris supposed to, on its own, investigate and conduct discovery on the potential claims of other Oregonian smokers?

180. Paul v. Davis, 424 U.S. 693 (1976).

Clause.[181] Thus, a person may be deprived of his reputation and have no claim to procedural protections.[182]

The interest that due process protects is the defendant's obligation to pay damages. An outcome-based theory of procedural due process seeks to minimize "mistaken deprivations of property."[183] Thus, an outcome-based theory of procedural due process would protect a right to present defenses by mandating individualized proceedings if necessary to minimize mistaken deprivations of property—inaccurate damage obligations.

Individualized proceedings are not necessary, however, to produce accurate damage obligations; the damages were already accurate. Even though sampling and considering nonparties rely on inaccurate liability determinations, both mechanisms still produce accurate damage determinations.

Numerous commentators believe that sampling can increase accuracy, mainly because of its use of "extremely accurate" "probabilistic prediction."[184] That probabilistic prediction produces "an amount of damages that is accurate overall."[185] The amount each plaintiff receives is arguably inaccurate: "at least some high damage plaintiffs will receive verdicts substantially lower than the verdicts they would receive from an individual trial."[186] But the *total* amount of damages the defendant will be obligated to pay is accurate. Because of this, "[n]o commentator has suggested that *defendants* have any ground to object to sampling" based on the inaccuracy of the damages.[187] Once the invalidity rate and

181. *Id.* at 701; *see also* Schulze v. Broward Cnty. Bd. of Cnty. Comm'rs, 190 F. App'x 772, 773 (11th Cir. 2006) (finding that business reputational interests, including goodwill, are not protected property or liberty interests); WMX Techs., Inc. v. Miller, 80 F.3d 1315, 1319 (9th Cir. 1996) ("Damage to business reputation without more does not rise to the level of a constitutionally protected property interest."). A protected property or liberty interest may exist if government conduct injures reputation in conjunction with other interests. *Paul*, 424 U.S. at 701. But there is no other interest, given that there is no concern about the accuracy of the damages the defendant is obligated to pay. *See supra* Part IV.A.

182. *Paul*, 424 U.S. at 712-13.

183. Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972). An outcome theory of procedural due process aims to ensure "that plaintiffs receive what they are entitled to under the substantive law." Lahav, *Trial by Formula*, *supra* note 19, at 580. Or put differently, the their aims to ensure that defendants pay the amount the substantive law dictates.

184. Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 851 (1992) (arguing that "[d]one well, aggregation . . . can systematically increase accuracy"). Hilao v. Estate of Marcos, 103 F.3d 767, 786 (9th Cir. 1996); *see also* Bone, *Statistical Adjudication*, *supra* note 97, at 584 (explaining that "if outcome quality is all that matters," then "statistical sampling would not run afoul of due process, at least when the negative externalities created by individual litigation are severe and the sampling procedure is designed properly").

185. Bone, *Statistical Adjudication*, *supra* note 97, at 572-73 ("[Sampling] can yield an extremely accurate average damage figure and thus an accurate total damage figure for the whole aggregation when the sample average is multiplied by the total number of plaintiffs.").

186. *Id.* at 600; *see also* Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 32 (2011) ("Indeed, to the extent that statistical sampling is problematic at all, it is problematic for plaintiff's: While it produces an amount of damages that is accurate overall, it may distribute those damages in a less than a perfect fashion."); Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 TEMP. L. REV. 1013, 1050-51 (2007) ("Under statistical sampling, plaintiffs with relatively good claims receive less money under a method that averages their claims with other claims likely to receive less money."); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 588 (2008) ("It is furthermore certain that the average award this procedure provides to extrapolation plaintiffs will differ from what they would have received in an individual jury trial.").

187. Sherry, *supra* note 186, at 32; *see also* Saks & Blanck, *supra* note 184, at 837 ("From the defendant's perspective, it is hard to conceive of a reasonably well done aggregation procedure that would not deliver equally

average awards produced by the sampled claims is applied to the remaining plaintiffs, the result is an accurate amount of total damages that the defendant is obligated to pay.[188]

Considering nonparties within the imposition of punitive damages does not rely on statistics and thus statistics cannot show that the punitive damage award imposed is accurate despite the inaccurate liability assumptions. But there is also no way to show that relying on the inaccurate liability assumptions will produce a substantively *in*accurate punitive damage award. That is because there is no definitive substantive law defining an accurate punitive damage award.

Tort law is the substantive law governing punitive damages. Under tort law, the damages are proper to punish and deter, if necessary. The jury decides both whether to impose punitive damages at all, and if so, the size of the award. The imposition of the damages "is not controlled by any very definite rules."[189] And the law "[furnishes] virtually no yardstick for measuring the amount of the award . . . against the purpose of the award."[190] It is thus impossible to determine if an award is substantively accurate. "[I]t is possible for a jury to hear the evidence in the case, make findings of fact, *correctly* apply the law, and still, albeit unwittingly, assess damages that bear no reasonable relationship to the accomplishment of [punishment and deterrence] goals."[191]

Famously, two Alabama juries heard cases with strikingly similar facts, where plaintiffs had purchased a car misrepresented as new.[192] One jury imposed no punitive damages, but the other imposed $4 million.[193] Is either award substantively inaccurate? Plainly, tort law does not provide an answer. The same is true for a punitive damage award that arguably encompasses punishment for harming nonparties. That punitive damage award is no more substantively inaccurate than any other punitive damage award imposed.[194]

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or more accurate outcomes.").

188. This assumes that all of the claims would be tried—the total damage award produced by sampling would be the same as the total of all the damage awards if all of the plaintiffs pursued their separate claims. The Court assumes that the female employees would actually pursue their claims against Wal-Mart, as do I with this conclusion.

189. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 16 (1991) (emphasis added).

190. *Id.* at 57 (O'Connor, J., dissenting) (citing Green Oil Co. v. Hornsby, 539 So.2d 218, 222 (Ala. 1989)). Court review of awards is necessarily deferential to the jury. For example, an Alabama jury's imposition of punitive damages is "presumed correct" by reviewing courts. *Id.* The fact that review is deferential also shows that the goal is not "accurate" awards. *See* Solum, *supra* note 92, at 246 (pointing out that any sort of deferential review on appeal is inconsistent with an outcome-based theory of procedural due process because its main purpose is not accuracy). If an award is challenged constitutionally, courts review the award de novo, a standard of review more concerned with achieving the accurate result. Even if a court is able to declare an award unconstitutional, meaning it is substantively inaccurate constitutionally, a court rarely takes the next step of determining the substantively constitutional amount.

191. Solum, *supra*, note 92, at 246 (emphasis added). Professor Lahav recently raised the issue of whether "accurate" compensatory damages are even possible. In her words, the assignment of tort damages is "an art more than a science." Lahav, *Statistical Adjudication*, *supra* note 19, at 596. The goal of an accuracy-based view of procedural due process is "that plaintiffs receive what they are entitled to under the substantive law. With respect to the assignment of damages, [however,] that entitlement is not dictated by precise legal standards and has a strong cultural and contextual element." *Id.* at 613. Without precise legal standards, it's difficult to define an accurate result.

192. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 565, 565 n.8 (1996).

193. Exxon Shipping Co. v. Baker, 554 U.S. 471, 500-01 (2008).

194. The Supreme Court's redefinition of the constitutional scope of a punitive damage award in *Philip Morris* could make punitive damages more "accurate" in the sense that the jury can now at least be instructed on what it

Because the damage obligations resulting from sampling and the consideration of nonparties in imposing punitive damages are already accurate, using individualized proceedings will not add consequential value to the accuracy of the proceedings. Individualized proceedings would lead to more accurate liability determinations, but that inaccuracy affects only reputational interest, which due process does not protect. The interest that due process does protect is the defendant's property interest in being obligated to pay damages. That interest is already accurately defined even when sampling is used or when the jury considers nonparties when imposing punitive damages.

2. Reigniting the Under-Litigation Problem with Mandatory Individualized Proceedings

In *Dukes*, the Court envisions that, after its ruling, each female class member will file her own individualized proceeding. The chances of each woman's individual success, however, depend greatly on her ability to hire an attorney.[195] And no attorney would likely be willing to take the case because the woman's individual relief is so minimal. "Professionals . . . would not likely invest in individual efforts to seek the small amount of back pay owed (at two dollars an hour, even if several years)."[196] An attorney may be interested if the aggregation were possible,[197] but aggregation is not possible because the class action is simply too large (and unmanageable because sampling is unavailable).[198] Mandating individualized proceedings requires the women to proceed individually, but they are unable to do so because of their inability to hire an attorney. Thus, mandating individualized proceedings means claims against Wal-Mart will not proceed.

A similar consequence results from *Philip Morris*. Nonparties are free to pursue their own claims against Philip Morris. The reality is, though, that they likely will not. For whatever reason, injured persons do not sue, and thus claims will likely not be brought against Philip Morris.

The costs of mandating individualized proceedings are the same as the costs of tort law's under-litigation problem. The first cost is specific to injured parties. Mandating individualized proceedings means that injured victims will get no redress. The women in *Dukes* are unable to obtain any relief if sampling is unavailable.[199] This consequence falls

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is punishing. A defendant is now also more able to tailor its defenses to the specific plaintiff's allegations. Arguably, however, the defendant already had this procedural ability before *Philip Morris*. Similarly, the defendant likely already had the procedural ability to present defenses regarding its harming nonparties. Regardless, no amount of procedural protections can make the award more accurate; the amounts the defendant will be punished, whether in each case or total, however, remains unverifiable substantive law wise.

195. Resnik, *supra* note 150, at 150.

196. *Id.*

197. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.").

198. *Id.*; *see also* Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1240 (E.D.N.Y. 2006), *rev'd sub nom,* McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008) ("The consequence of requiring individual proof from each smoker would be to allow a defendant which has injured millions of people and caused billions of dollars in damages to escape almost all liability.").

199. *See* Hilao v. Estate of Marcos, 103 F.3d 767, 771 (9th Cir. 1996) (identifying an injured plaintiff's interest

mainly on the injured parties themselves as they are left without any ability to obtain compensation, but it also falls upon society, which has an interest in ensuring that injured persons are compensated.

The second cost falls on society more generally. If legal claims against a tortfeasor are not pursued, or if just a few of the injured persons file suits, tort law loses its chance of achieving deterrence. Because the defendant is likely to never face any repercussion for harming the nonparty, the defendant will likely never face any repercussion for harming the nonparty.[200] Without the threat of a lawsuit, the defendant loses any motivation to alter its wrongful behavior. Tort law becomes a non-factor in the defendant's evaluations of possible conducts. This undermines the chances of achieving the purposes of the substantive law, as the defendant feels free to commit tortious conduct without fear of recourse.

The Court's goal was to reduce false positives, but the effect of mandating individualized proceedings is that few lawsuits will occur. Instead of reducing inaccurate findings of liability, liability will not be determined one way or the other. *Zero* findings of liability (or non-liability) will occur because the claims will never reach a jury. This creates systemic accuracy problems.

Ironically, given the goal to increase accuracy, the resulting lack of lawsuits creates the same effects as false negatives—inaccurate findings of no liability. If a defendant is inaccurately found not liable, it lacks any incentive to alter its tortious behavior. False negatives thus undermine the underlying substantive law's ability to achieve its purposes.[201] The same is true if injured persons do not sue, which they will not do if individualized proceedings are their only choice.

3. The Extensive Costs of Mandatory Individualized Proceedings Easily Outweigh the Inconsequential Benefits

The outcome-based theory of procedural due process requires that the benefits of an additional procedure be weighed against the costs of the same procedure. The Court used

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in sampling as "enormous" considering that the alternative is likely no redress at all).

200. *See* Campos, *supra* note 134, at 1108 ("The mandatory class action is preferable for plaintiffs because it provides optimal deterrence."); Dan Markel, *How Should Punitive Damages Work*, 157 U. PA. L. REV. 1383, 1410 (2009) (explaining that the cost-internalization calculation survives *Philip Morris* if the calculation is limited to "the likelihood that the defendant would escape having to pay for that harm" to the specific plaintiff). Many commentators believe that *Philip Morris* will hurt punitive damages' ability to achieve deterrence. *See e.g.*, Hylton, *supra* note 13, at *28 ("Instead of grappling with the theory of deterrence, the Court adopted a theory of procedural due process under which it is unconstitutional to do precisely what deterrence theory indicates one should do in the case of a recidivist, infrequently punished wrongdoer."); Micah L. Berman, *Smoking Out the Impact of Tobacco-Related Decisions on Public Health Law*, 75 BROOK. L. REV. 1, 57 (2009) (explaining that "defendants will almost by definition be under-deterred (because not nearly all of those harmed by the conduct will bring their own lawsuits)"); Scheuerman, *supra* note 10, at 932 ("The Supreme Court has essentially stripped punitive damages of any general deterrence function."); Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 GEO. WASH. L. REV. 774, 804-05 (2010) (explaining that *Philip Morris* leaves little reason to take "socially optimal care if you are only required to pay for a portion of the harm you actually cause").

201. *See e.g.*, Jennifer L. Peresie, *Toward A Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 780 (2009) ("False positives are onerous for employers who must bear the burden of justifying their practices or facing liability, while false negatives undermine the role of Title VII in identifying and eliminating discrimination.").

this utilitarian approach in defining the *Mathews* balancing test to evaluate the need for additional procedural protections.[202]

Plaintiffs obviously have an interest in the use of sampling and/or considering nonparties in imposing punitive damages. Without sampling, a plaintiff might practically be unable to bring her claim—a class action is impossible because it is unmanageable if too large and she cannot find an attorney if forced to proceed individually.[203] Society likely has a similar interest in that it wants injured parties to have some mechanism to obtain compensation. Society also likely has an interest in the deterrent effect achieved by the use of sampling and the consideration of nonparties. Without sampling and/or considering the nonparties in imposing punitive damages, defendants will simply not face any repercussions for committing tortious or other unlawful conduct; defendants would have no incentive to comply with the substantive law. These are the costs of mandating individualized proceedings—injured persons denied compensation and the crippling of tort law's deterrent function.

At the same time, the defendant has an interest in accurate outcomes.[204] There is little doubt that sampling and considering nonparties produce inaccurate liability determinations; liability is simply assumed and not tried. But individualized proceedings, the "additional or substitute procedural [safeguard]," adds little, if any, "value."[205] This benefit is minimal because of its non-effect on the already accurate damage determinations. Sampling and the consideration of nonparties produce accurate damage obligations. Sampling ensures this using statistics, and considering nonparties produces just as accurate of punitive damages as the system produces generally.

In *Mathews*, part of why the defendant was not entitled to hearings before his disability benefits could be ended was because the questionnaires already used produced accurate results.[206] The same is true for individualized proceedings. Sampling and considering nonparties will already produce accurate damage obligations—the obligations about which an outcome-based theory is concerned.

Last, the government likely has an interest in the use of sampling and considering nonparties. In *Hilao*, the Ninth Circuit concluded that the government had an interest in using sampling because "the time and judicial resources to try the nearly 10,000 claims in this case would alone make resolution of the claims impossible" and trying the claims separately would be "wasteful" because of "[t]he similarity in the injuries suffered by many of the class members" and because the defendant lacked the financial assets to cover the damages suffered by all of the class members.[207] The same sentiment can apply to

202. Mathews v. Eldridge, 424 U.S. 319 (1976).
203. *Hilao*, 103 F.3d at 786 (labeling the plaintiff's interest in the use of sampling as "enormous").
204. In *Hilao*, the Court characterized the defendant's interest as "not paying damages for any invalid claims." *Id.* The Court was not very concerned about harming this interest because the statistical analysis used by the trial court, however, was "extremely accurate." *Id.* Based on the analysis in this Article, the defendant's interest can be broader—not just about accurate damages, but also about accurate liability determinations. At the same time, procedural due process only attaches to an interest related to the payment of damages.
205. *Mathews*, 424 U.S. at 344.
206. *Id.* at 345.
207. *Hilao*, 103 F.3d at 786.

considering nonparties when imposing punitive damages if the state imposed a one-award provision.[208] In addition to the government's practical interests, the government likely also shares society's interest to avoid the costs of individualized proceedings: uncompensated injured parties and the crippling of tort law's deterrence function.

In all, the costs of individualized proceedings outweigh their benefits.[209] This conclusion is unavoidable because of the minimal benefits of individualized proceedings. Using individualized proceedings will not lead to any more accurate damage obligations; the total damage obligations produced by sampling and considering nonparties are already accurate. Compare this very minimal increase in accuracy to the extensive costs of individualized proceedings and the result is that a defendant lacks a right to individualized proceedings.

The Court did not undertake the *Mathews* utilitarian balancing test in either *Dukes* or *Philip Morris*.[210] Perhaps this is because it wanted to define a categorical outcome-based procedural due process right—regardless of the costs, a defendant is entitled to present defenses.[211] This is obviously inconsistent with the utilitarianism exemplified in *Mathews*, where the Court recognized a flexible idea of accuracy.[212] *Mathews* acknowledged that improved accuracy cannot be the only consideration—perfect accuracy is not attainable and constitutionality should not be based on attempts to achieve the impossible. Plus, a categorical right would also be absurdly broad; the defendant would be entitled to any procedural protections that might improve the accuracy of the results, perhaps even only infinitesimally. But perfect accuracy is not possible and the Court recognizes so. Thus, the Court likely did not mean to define some new broad outcome-based right for defendants.

Regardless of why the Court avoided weighing the costs and benefits of individualized proceedings, the result of that weighing is that a defendant does not have an outcome-based procedural due process right to individualized proceedings. Those proceedings do

208. *See e.g.*, GA. CODE ANN. § 51-12-5.1(e)(1) (2003) (dictating that "[o]nly one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission").

209. *See Hilao*, 103 F.3d at 787 (finding no due process violation in the use of sampling); *see also* Saks & Blanck, *supra* note 184, at 828-29 (arguing that sampling is constitutional under *Mathews*).

210. Generally speaking, "[c]ourts have not applied the *Mathews* balancing test to class actions. . . . ." Campos, *supra* note 134, at 1104-05; *see also* Solum, *supra* note 92, at 255 (explaining that the Court has not used a balancing test to determine what process is due besides in *Mathews*). The Supreme Court has also never applied *Mathews* to a case involving a challenge to a punitive damage award. See generally Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (resolving a procedural due process challenge without using *Mathews*); see *id.* at 54-57 (O'Connor, J., dissenting) (using *Mathews* to find a procedural due process violation in the procedures used in imposing punitive damages).

211. The Court did not entertain any possibility of a compromise solution—perhaps allowing Wal-Mart to put forth evidence of the invalidity of claims not chosen within the random sampling. See Resnik, *supra* note 150, at 150 ("[T]he Wal-Mart court offered no explanation of why rights to raise defenses could be instantiated only through single-file procedures"). Similarly, there was no discussion of a compromise solution in *Philip Morris*, something like allowing the defendant to "[proffer] survey research that would have informed the jury about the percentage of nonparty victims who would not have stopped smoking even if the defendant had not misrepresented facts and the percentages of claims to which the defendant had other viable defenses." Gifford, *supra* note 177, at 1151.

212. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

not add meaningful accuracy and their costs are far too extensive.

VI. STILL A PROBLEM—THE IMPLICIT BURDEN SHIFT

Even though a defendant likely does not have a procedural due process right to individualized proceedings, there is still a problem with sampling and considering nonparties when imposing punitive damages, a problem that the Supreme Court missed in both cases. That problem has to do with the burdens in civil litigation.

A. Excusing the Plaintiff from Showing Liability

In civil litigation, the plaintiff has the burden to show the elements of her claim. Each female employee alleging discrimination against Wal-Mart would have the burden to show that discrimination, namely by showing a pattern of discrimination as Title VII dictates. Each female employee would also have to show that she was eligible for a promotion that she was denied. Each smoker alleging fraudulent misrepresentation against Philip Morris would have the burden to show that the defendant made a misrepresentation, that the plaintiff actually and justifiably relied on it, and that the plaintiff was injured as a result.

Placing the burden on the plaintiff naturally helps protect against false positives.[213] It minimizes the chances of inaccurately finding the defendant liable because there is no chance of the defendant being liable unless the plaintiff can meet her burden to establish the elements.

If the burden were on the defendant, on the other hand, that would increase the chances of false positives as the defendant would have the burden to negate liability. Placing the burden on the defendant, however, would also decrease the chances of false negatives, where a defendant is inaccurately found not liable.[214] This is true because the default for every defendant would be liability and the defendant would be left to disprove it, increasing the chances of all defendants being found liable accurately or inaccurately so.

But in civil litigation, the defendant has no burden with respect to the prima facie elements; it does not have to disprove discrimination or justifiable reliance.[215] The default is non-liability and the plaintiff has to prove liability. If the plaintiff cannot fulfill her burden, the defendant wins. Thus, the defendant may win the lawsuit without ever saying a word.

213. *See* Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505, 1544 (2009) ("[R]elative to the general rule that imposes the burden of proof on the plaintiff, the incidence of false negatives (decisions erroneously denying the claim of independent creation) will increase, while the incidence of false positives (decisions erroneously granting the claim) will decrease.").

214. *See e.g.*, Michael D. Green, *Introduction: The Third Restatement of Torts in a Crystal Ball*, 37 WM. MITCHELL L. REV. 993, 1008-09 (2011) (discussing how the placement of the burden to prove causation on the plaintiff or the defendant affects the incidences of false positives and negatives).

215. Tort law is supposedly indifferent to false positives and false negatives; the goal is to reduce errors generally, regardless of whether those errors benefit plaintiffs or society or defendants. Carl F. Cranor, *Discerning the Effects of Toxic Substances: Using Science Without Distorting the Law*, 38 JURIMETRICS J. 545, 548 (1998).

The procedures in place in *Dukes* and *Philip Morris*, however, reposition that burden.[216] In *Dukes*, the class plaintiffs whose claims were not tried would never have to show eligibility for a promotion that they were denied (nor would this evidence be presented in the tried claims). Similarly, in *Philip Morris*, no one ever showed that the nonparties' actually or justifiably relied on the defendant's misrepresentations. Instead, the elements—the class plaintiffs' eligibility for a promotion and the nonparties' reliance—were just assumed.

In turn, the defendants would be, or were, left to try to disprove those elements.[217] That is where the Court was focused in both cases—that the defendants never had a chance to disprove those elements.[218]

But the defendant should not have even had to think about disproving the elements. That obligation should be triggered only once plaintiffs meet their initial burden. The plaintiffs not included in the sampling never did so in *Dukes* and the nonparties never did so in *Philip Morris* (nor did the named plaintiff do so on the nonparties' behalf). The defendants did not need a "right" to disprove liability because there had not been even an initial showing that the defendant would be liable to either the class plaintiffs whose claims were not tried or the nonparties. In short, a defendant's right was not even at stake in either case.

The Court did not identify this problematic burden shift in either *Dukes* or *Philip Morris*. But the Court's solution in *Philip Morris* acknowledges it. The Court's solution in *Philip Morris* was not a mechanism to protect the defendant's right, but was instead a mechanism to reinforce the plaintiff's obligation.

The Court mandated individualized proceedings while redefining the substantive scope of punitive damages. Before *Philip Morris*, it was unclear whether punitive damages could punish the defendant just for what it did to the plaintiff, or more generally for what it did. And in *Philip Morris*, the Court answered that question: the damages can punish the defendant only for what it did to the particular plaintiff.[219]

This substantive limitation reinforces that every injured plaintiff has the burden to establish the defendant's liability, both for compensatory and punitive damages. This solution is not so much about the defendant's right; it is instead focused on the plaintiff's obligation. Only once an individual plaintiff has established the defendant's liability for its conduct to the plaintiff can the defendant also be punished for that conduct.

The Court's holding in *Dukes* does not at all reflect this burden shift issue. The Court

216. *See* Moller, *supra* note 151, at 326-27 (discussing courts' use of "irrebutable presumptions" in class actions).

217. This implicit shifting of the burden also relates to the problem of false positives versus false negatives. *See supra* Part V.B.2. A shift of the burden onto the defendant increases the chances of false negatives, inaccurate findings of liability. *See e.g.*, Green, *supra* note 214, at 1008-09 (discussing how the placement of the burden to prove causation on the plaintiff or the defendant affects the incidences of false positives and negatives).

218. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560 (2011) (referring to the defendant's entitlement to present defenses); Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (focusing on the defendant's lack of opportunity to present defenses).

219. *Philip Morris USA*, 549 U.S. at 353.

concluded that sampling would violate the defendant's right, which a procedural rule cannot do.[220] The Rules Enabling Act dictates that a procedural rule cannot "abridge, enlarge, or modify any substantive right."[221] "What matters is what the rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not."[222]

Sampling does violate the Rules Enabling Act, but not because of a defendant's right as the Court identified. Instead, sampling violates the Rules Enabling Act because it alters a plaintiff's entitlement to relief.[223] Plainly, a class plaintiff whose claim is not tried, meaning that plaintiff's eligibility for a promotion is never shown, still receives compensation. Sampling excuses that class plaintiff from showing eligibility, yet still gives her relief. A procedural rule cannot rewrite the substantive law in this way. The Court was correct that sampling would violate the Rules Enabling Act; it just missed that the Rules Enabling Act violation was based on the changes to the plaintiff's entitlement to relief, not based on changes to any right of the defendant.

The Fifth Circuit recognized this problematic change in the plaintiff's entitlement to relief in *In re Fibreboard Corp*.[224] The district court planned to use sampling to try over three thousand asbestos cases that had been consolidated.[225] The Fifth Circuit rejected sampling partly because of how it would alter Texas substantive law, which requires that an individual plaintiff prove both causation and damage.[226] "The inescapable fact is that the individual claims of 2,990 persons will not be presented. Rather, the claim of a unit of 2,990 persons will be presented."[227] Testimony on causation would concern only general causation, meaning population-based studies as opposed to evidence specific to an individual.[228] This impermissibly altered the "substantive principle" of Texas law that requires individual causation.[229]

B. The Implications

Sampling and consideration of nonparties in imposing punitive damages are impermissible, but, importantly, not because of some procedural due process right of the defendant's. Instead, the problem is the substantive law. Unlike a defendant's right, however, substantive law can be changed to maximize its deterrent effect and accommodate mechanisms like sampling and considering nonparties.[230]

220. *Dukes*, 131 S. Ct. at 2561.
221. *Id.*
222. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407 (2010).
223. *Id.* at 408 (mentioning that a procedural rule that would alter a plaintiff's "entitlement to relief" would violate the Rules Enabling Act).
224. *In re* Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990).
225. *Id.* at 708-09.
226. *Id.* at 711.
227. *Id.*
228. *Id.* at 712.
229. In re *Fibreboard Corp.*, 893 F.2d at 712.
230. *See Id.* at 712 (noting the cries for "innovation and judicial creativity" to enable litigation of mass torts,

A change in substantive law to maximize the substantive law's purposes is not unprecedented.[231] Numerous states excused plaintiff's traditional burden to establish causation if the plaintiff was injured due to ingestion of Diethylstilbestrol (DES).[232] DES was a drug prescribed to prevent miscarriage. It was later determined that DES caused various health problems to the child in the womb when the mother took DES; those health problems would not be apparent until long after the mother took DES. For many reasons including the factual difficulty of showing which manufacturer's version of DES that the mom took and the need to compensate injured persons, courts simply excused plaintiffs from showing causation—from showing that their mothers took one of the specific defendant's version of DES. Instead, the defendant was left to disprove that fact.[233]

Shifting the burden like this helped reduce false negatives and fulfilled the underlying purposes of tort law. Instead of a defendant (inaccurately) escaping liability because a plaintiff was unable to establish which drug her mother took, the defendant was held liable unless able to establish that it was not causally related. Tort law's substantive purposes were also fulfilled because shifting this burden helped ensure that people injured by DES were actually able to get compensation; that would likely not have been possible if courts had not altered the burden. Shifting the burden also aided tort law's deterrent effect as defendants no longer wished to gamble with tortious conduct; they could still be held liable even if the plaintiff could not fulfill her traditional burden.

Something similar could be done when the circumstances are such that the defendant's conduct affects many people, like the conducts in both *Philip Morris* and *Dukes*. Because of the under-litigation problem, these are the types of defendants unlikely to be deterred. In cases against those defendants, the burdens could be rewritten to accommodate the decreased deterrence. For example, plaintiffs whose claims are not tried in the sampling, in a case like *Dukes*, could simply be excused from having to demonstrate eligibility. This is rational, public policy wise, given that those plaintiffs will receive average awards anyway. Similarly, in a case like *Fibreboard Corp*., Texas substantive law could be rewritten to require only general causation. Again, this seems rational because the plaintiff would receive only average awards and because even in individual claims, the plaintiffs

but stating that the arguments "are better addressed to the representative branches—Congress and the State Legislature").

231. Substantive law sometimes recognizes burden shifts in certain circumstances. *See e.g*., Summers v. Tice, 199 P.2d 1, 5 (Cal. 1948) (requiring a defendant to disprove causation when a plaintiff is injured as a result of multiple tortious conduct and there is an equal chance that any of the defendants caused the injury, but the plaintiff is practically unable to show which defendant was a but-for cause).

232. *See e.g*., Martin v. Abbott Labs., 689 P.2d 368, 382 (Wash. 1984) (shifting the burden to the defendants to show that "they did not produce or market the particular type" of drug taken by the plaintiff under a theory of market share liability); Sindell v. Abbott Labs., 607 P.2d 924, 937 (Cal. 1980) (holding that a defendant "will be held liable for the proportion of the judgment represented by its share of the market unless it demonstrates that it could not have made the product which caused plaintiff's injuries"); Collins v. Eli Lilly & Co., 342 N.W.2d 37, 50 (Wis. 1984) (same); Hymowitz v. Eli Lilly & Co., 541 N.Y.S.2d 941, 512 (N.Y. Ct. App. 1989) (same).

233. Under the substantive law change that New York courts adopted for the DES situation, a defendant could not exculpate itself from liability even if it could show that its drug did not cause the plaintiff's injury. "It is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill, or sold only to certain drugstores. These fortuities in no way diminish the culpability of a defendant for marketing the product, which is the basis of liability here." *Hymowitz*, 541 N.Y.W.2d at 512.

rely heavily on population-based epidemiological studies to establish that exposure to asbestos caused their injuries.[234]

With respect to punitive damages more specifically, the law could be rewritten so that if a plaintiff were able to prove some defined threshold regarding how the defendant's conduct affected nonparties, then the burden could shift to the defendant. Or, punitive damages could be defined as specifically aimed at deterring the defendant from committing the conduct generally, shifting the burden and enabling the defendant to show why its conduct does not merit punishment. For example, Georgia law allows only one award of punitive damages in a products liability case to punish the defendant for all of the harm it caused by selling a defective product. Through the one award, that defendant could be deterred even though not all injured persons would sue.[235] The constitutionality of this type of limitation is not guaranteed after *Philip Morris*, but it may be permissible given that only one award would be allowed.[236]

Most importantly, though, procedural due process does not preclude the use of sampling and considering nonparties. Similarly, procedural due process does not preclude the use of these mechanisms to alleviate the under-litigation problem. The underlying substantive law poses a problem, but, unlike a procedural due process right, substantive law can be changed.

VII. CONCLUSION

A defendant's potential procedural due process right to present defenses would necessarily cripple efforts to alleviate tort law's under-litigation problem. This is because a procedural due process right, at least as interpreted in *Philip Morris* and *Dukes*, mandates the trial by individualized proceedings. If individualized proceedings are required, the under-litigation problem will run rampant. Plaintiffs will not sue—maybe their relief is so minimal that they cannot obtain an attorney, or maybe they do not even realize that they could sue someone. Regardless of the reason, plaintiffs do not sue. That means uncompensated injured persons. But maybe even more importantly from a societal perspective, the fact that plaintiffs do not sue means that defendants are undeterred. Without the lawsuits,

234. Steve Gold, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 YALE L.J. 376, 379 (1986) ("The basic impossibility of proving individual causation distinguishes toxic tort cases from ordinary personal injury suits. Cancers and mutations provide no physical evidence of the inducing agent, so direct observation of individual plaintiffs provides little or no evidence of causation in many instances. Often, parties must rely on epidemiological evidence, which may become the centerpiece of toxic tort litigation."); Robert J. Berlin, *Epidemiology as More than Statistics: A Revised Tool for Products Liability*, 42 TORT TRIAL & INS. PRACTICE LAW J. 81, 86-87 (2006) (discussing how plaintiffs' attorneys can use epidemiological studies to help show individual causation even though the studies concern populations).

235. *But see* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 659 (2003) (listing problems with one-award provisions, including that "often the first case will produce a verdict before the full extent of the defendant's malice and the full scope of the harm that it caused are understood").

236. *See* Catherine M. Sharkey, *The Future of Classwide Punitive Damages*, 46 U. MICH. J.L. REFORM 1127, 1132, 1148 (2013) (concluding that *Philip Morris* does not preclude certification of punitive damages classes "based on a societal, deterrent conceptualization of punitive damages," meaning punitive damages focused on "[forcing] an actor to internalize the full costs of the harms that it has inflicted upon groups-or classes-of individuals").

defendants lack any reason to avoid committing tortious conduct; it is not as if the defendants will face any repercussion for committing tortious conduct.

Despite what the Court concluded or intimated in *Philip Morris* and *Dukes*, however, the underlying theories of procedural due process do not support such a right. A process-based theory would seem to support such a right because it emphasizes the importance of participation itself. But the process-based theory recognizes a flexible level of protection; that is why an absent class plaintiff's right is satisfied merely through notice, the right to opt-out, and adequate representation. Similarly, the defendants in *Philip Morris* and *Dukes* were able to meaningfully influence the outcomes even if unable to present certain, specific evidence.

An outcome-based right would likely better support the right claimed in *Philip Morris* and *Dukes*. It is rational to question the accuracy of results where liability is not tried, but assumed. At the same time, the inaccuracies in assuming liability do not translate to inaccurate total damage obligations. Because of the use of statistics, sampling will still produce an accurate amount that the defendant is obligated to pay. Because of the lack of defining substantive law, no punitive damage award can be shown to be substantively inaccurate. Thus, the interest that due process protects—the obligation to pay damages—is determined accurately in sampling and in considering nonparties.

Using individualized proceedings would not lead to any more accurate damages; the added benefit of using individualized proceedings is thus minimal, if not nonexistent. Compare that to the extensive costs of individualized proceedings. These costs include injured persons not receiving compensation, possibly because they are simply unable to—a class action is not possible because sampling is unavailable and no attorney is interested in pursuing only the individual claim. The second cost is the loss of the law's deterrent effect. If injured persons do not sue, the defendant is not deterred. Without the lawsuits, the defendant has no reason *not* to commit tortious conduct. These costs are extensive and easily outweigh the minimal benefit that individualized proceedings provide.

Even though procedural due process does not actually support a defendant's right to present defenses, sampling and considering nonparties does still pose a problem—they alter the burdens in the substantive law. Both mechanisms excuse injured persons from proving elements of the claims. In sampling, there is never any showing that the class members whose claims are not tried are entitled to relief. When injured nonparties are considering for punitive damages purposes, there is never any showing that those injured nonparties would be entitled to relief against the defendant. Despite the lack of these showings, the defendant is liable. That cannot be. These procedural mechanisms have altered the substantive law, which requires a plaintiff to establish the elements of her claim. More specific, the procedural mechanisms have altered the substantive law that requires an injured person to establish liability.

Actually, this is still good news in the battle against tort law's under-litigation problem. Even though the substantive law poses a problem with using sampling and punitive damages to combat the under-litigation problem, substantive law, unlike a procedural due process right, can be changed. Legislatures and even courts are free to alter the burdens to

improve tort law's deterrent effect in cases where the defendant's conduct affects many, but the defendant is unlikely to face any civil legal repercussions for that conduct. If something like this is not done, tort law will continue to be unable to achieve any deterrence in cases where a defendant has possibly harmed many, the types of cases where tort law's deterrent effect is most desperately needed.