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# Punishment: The Civil Perspective of Punitive Damages

Bailey Kuklin

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# PUNISHMENT: THE CIVIL PERSPECTIVE OF PUNITIVE DAMAGES

BAILEY KUKLIN\*

I. HISTORICAL DEVELOPMENT . . . . .	3
II. STANDARDS . . . . .	6
III. PURPOSE . . . . .	8
A. <i>Deterrence</i> . . . . .	12
B. <i>Retribution</i> . . . . .	23
1. Reciprocity . . . . .	27
2. Just Desert . . . . .	54
IV. A. TAXONOMY . . . . .	85
A. <i>Deterrent Damages</i> . . . . .	90
B. <i>Reciprocal Damages</i> . . . . .	96
C. <i>Desert Damages</i> . . . . .	101
V. CONCLUSION . . . . .	107

Punitive, or exemplary damages, have been recognized in the Anglo-American common law systems for two centuries. Even though critics have assailed them from the beginning, most jurisdictions have found a niche for them. They are attacked primarily as being unfair to the defendant.

Disagreement over the role of punitive damages fuels the controversy. Several purposes have been attributed to them although the punishment and compensation are the most prominent. The first and more widely recognized purpose, punishment, is the object of most complaint. The context of the private lawsuit is allegedly inappropriate for the public functions of punishment. Behind this complaint lies a deeper concern that the functions of punishment are not met fairly and effectively by the vehicle of punitive damages. To those familiar with the literature regarding criminal law sanctions, the debate over punitive damages is not surprising. The purposes of criminal punishment and the means to satisfy them also have been long debated.

A cause and effect of the controversy is that the measure of recovery of punitive damages is not clearly enunciated. Unrefined standards are offered to juries for instruction and used by courts to review awards. Although the factfinders' reason is largely unguided, their passions must be controlled.

This Article explores the consequences of treating punitive damages as a private means of punishment. Light is shed on the controversies surrounding, first, the attempt to adopt a standard of punishment, private

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or public, and second, to apply such a standard. The concentration on punitive damages for this exploratory undertaking, instead of criminal sanctions, avoids the need to account for additional imputed public penal purposes, such as rehabilitation and isolation. Insofar as these latter aims act directly on the person of the defendant rather than on his or her bank account, they bring to bear additional considerations with issues of their own. The monetization of deterrence and retribution, the primary purposes of punishment which support punitive damages, will reveal enough problems.

As a preliminary matter, the emphasis of this Article should be made clear. In his valuable inquiry into the principles of punishment, H.L.A. Hart notes that we have inherited over-simplified ways of discussing the justification of punishment. Different principles are relevant at various points in the examination of the moral underpinnings.

What we should look for are answers to a number of different questions such as: What justifies the general practice of punishment? To whom may punishment be applied? How severely may we punish . . . ? Till we have developed this sense of the complexity of punishment . . . we shall be in no fit state to assess the extent to which the whole institution has been eroded by or needs to be adapted to new beliefs about the human mind.<sup>1</sup>

The concern here is essentially with a version of Hart's third question. Assuming that punitive damages are justifiable, and the defendant before the court is properly to be assessed these extraordinary damages, how much is that award to be? In pursuing this task, some common understandings of punishment are modeled. If the models cohere into a unified monetary judgment, this eases the pressure on courts to clearly articulate, pursuant to Hart's first question, the justification for punitive damages. Understanding the proper rationale, or compromises, is of less abiding importance to the extent that the ultimate award is unaffected.<sup>2</sup> Furthermore, clear

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<sup>1</sup> H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 1, 3 (1968). Honderich relied upon Hart's framework in his study of punishment. See T. HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 139 (1969). Among the others who have drawn similar distinctions, Honderich cites W.D. ROSS, THE RIGHT AND THE GOOD 56 (1930); P.H. NOWELL-SMITH, ETHICS 272 (1954); S. BENN & R. PETERS, THE PRINCIPLES OF POLITICAL THOUGHT ch. 8 (1959); and, Rawls, *Two Concepts of Rules*, 65 PHIL. REV. 3 (1955). Honderich concluded: "We are invited to see that there are these three distinct questions, and also to see that different answers are in place with respect to them." T. HONDERICH, *supra*, at 139. Honderich doubted that these questions can be neatly separated. *Id.* at 139-43; see also R. NOZICK, PHILOSOPHICAL EXPLANATIONS 365 (1981); Morawetz, *Retributivism and Justice*, 16 CONN. L. REV. 803 (1984).

<sup>2</sup> Honderich outlined the justifications forwarded for punishment, T. HONDERICH, *supra* note 1, at 138-43. Some of the distinctions are obscure. Philosophers justify punishment on the grounds that more than one purpose, each at least partially justifiable, is served. *Id.* at 10. The title of Honderich's book may suggest his view of the success of this approach.

thinking on the measurement may clarify the problems regarding Hart's second question of who should suffer the punishment. Finally, the jury instructions, which reflect the application of the answer to Hart's third question, may be refined if all models lead to a similar measurement.

For the adoption of a single, precise standard of punishment, its aims, being polycentric, must resolve into common denominators or commensurable elements. By analyzing the imputed purposes of punishment, through representation of them by algebraic models, the unavoidable necessity for gross compromise becomes evident. Therefore, to put into practice the commonly advanced, abstract theories, inherent inconsistencies must be submerged. While there seem to be ways to dissolve, in principle, some of the current antagonisms, others arise in their stead. When isolating the aims, standards of recovery are implied that are different from those now expressed by the courts. Yet even more problems appear when the standard of punishment, however coarse the overarching structure must remain, passes beyond the stage of legal adoption and awaits factual application. The discernment and evaluation of brute facts, especially the crucial ones that fall within the realm of psychological reactions and mental states, produce more troubles for an already troubled endeavor.

In the end, punitive damages, and punishment more generally, can neither be justified nor implemented beyond debate. My conclusion, nevertheless, is that a place remains for punitive damages. To reduce some of the causes for complaint, doctrinal changes are recommended. The jury, as an "aresponsible agency", brings contemporary mores to the judgment and minimizes systematic abuse. The jury must also be properly controlled. This is facilitated by proper jury instructions, not in the form of the complex algebraic models propounded in the analysis, nor by the nebulous instructions commonly provided today, but rather by detailed verbal formulas as suggested in the Appendix.

Before this exploration may properly begin, the setting must be outlined.

## I. HISTORICAL DEVELOPMENT

Punitive damages appear late in the common law. The first reference to them occurs in the latter part of the eighteenth century in two cases involving trespass actions.<sup>3</sup> The original reasoning indicates punitive damages functioned to gloss over imperfections in the legal framework arising from uneven developments often seen in the evolutionary legal process. New trials for excessive damage awards were granted reluctantly in

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<sup>3</sup> See *Wilkes v. Wood*, 95 Eng. Rep. 766 (1763); *Huckle v. Money*, 95 Eng. Rep. 768 (1763). Much of the general discussion of punitive damages, here and elsewhere, comes from J. GHIARDI & J. KIRCHER, *PUNITIVE DAMAGES: LAW AND PRACTICE* (1984) and K. REDDEN, *PUNITIVE DAMAGES* (1980).



cases where the jury found the defendant had acted with malice, oppression, or gross fraud, even though these malefides were not themselves actionable. The appellate courts generally gave deference to jury damage awards; this being a holdover from the period in which the factfinders assessed the remedy based exclusively upon their own personal knowledge and testimony.<sup>4</sup> The courts also reluctantly recognized certain harms as legally protected, particularly when the harms were incapable of exact pecuniary measurement. Punitive damages salved suffering without the overt legal recognition of a new or unmeasurable harm.<sup>5</sup>

The early origins of punitive damages, far from lost in the vagaries of early case reporting, suggest that the courts supported them as a means to find compensation when theory or practice were hindrances. The smarting plaintiff "ought" to recover. Under the Anglo-American common law systems, when the plaintiff's injury warrants recovery, the defendant who caused it ought to pay him.<sup>6</sup> A slight shift of focus would emphasize this latter principle. Further, the defendant ought to pay not only for the backward-looking, corrective justice purpose of compensating persons for injuries suffered,<sup>7</sup> but also for the forward-looking, preventative purpose of deterring the defendant and others from inflicting like injuries.<sup>8</sup> The rationales are easily conflated. The intertwining is evident from the earliest use of punitive damages when there was malice, oppression or gross fraud. Since these harms smart, they should be recompensed, and should be stopped. These principles sufficiently complement one another for the

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<sup>4</sup> See J. GHIARDI & J. KIRCHER, *supra* note 3, at § 5.39; K. REDDEN, *supra* note 3, at § 2.2; 1 SEDGWICK, DAMAGES §§ 348-50 (9th ed. 1912); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12-19 (1982); Mallor & Roberts, *Punitive Damages - Toward a Principled Approach*, 31 HASTINGS L.J. 639, 642-43 (1980); Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel*, 14 ST. MARY'S L.J. 351, 353-54 (1983); Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207, 208-16 (1977).

<sup>5</sup> See, e.g., *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S.W. 351 (Tex. 1885); Mallor & Roberts, *supra* note 4, at 643; Sales, *supra* note 4, at 354-55. The label "smart money" for punitive damages refers to the smart of the plaintiff who suffered a harm not otherwise compensable rather than to that of the defendant in having to pay. See, e.g., *Fay v. Parker*, 53 N.H. 342, 354 (1873).

<sup>6</sup> There is no logical necessity to this conclusion. "In New Zealand, for instance, an injured person has no (legal) right to sue for personal injuries, this right having been replaced by rights against the State." P.S. ATIYAH, *PROMISES, MORALS, AND LAW* 103 n.38 (1981). The distinction is between "being responsible for" and "being responsible to". See Schutz, *Some Equivocations of the Notion of Responsibility*, in DETERMINISM AND FREEDOM 206, 206-07 (S. Hook ed. 1958). See also Coleman, *Moral Theories of Torts: Part I*, 1 LAW & PHIL. 371, 375-76 (1982); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 523 (1957).

<sup>7</sup> See R. EPSTEIN, *A THEORY OF STRICT LIABILITY* 71-75 (1980); Coleman, *supra* note 6, at 374-75.

<sup>8</sup> See PLATO, *Protagoras*, in 4 THE WORKS OF PLATO 121, 155 (B. Jowett trans. n.d.); M. GOLDING, *THE PHILOSOPHY OF LAW* 72-74 (1975).

development of punitive damages to proceed apace in the absence of tightly reasoned underpinnings.

Twentieth century English law separates these backward and forward looking viewpoints. The emphasis on compensation is satisfied by the doctrine of "aggravated damages", while punishment falls to punitive damages.<sup>9</sup> In 1964, the House of Lords ruled that punitive damages are permissible, in the absence of statute, in two instances: (1) where there are oppressive, arbitrary or unconstitutional actions by government servants; and (2) where the conduct of the defendant was calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff.<sup>10</sup>

From the beginning, American courts viewed punitive damages as primarily for punishment.<sup>11</sup> Although criticized strongly in the nineteenth century,<sup>12</sup> and today by the defendants' bar,<sup>13</sup> the insurance industry,<sup>14</sup> and commentators, especially microeconomists,<sup>15</sup> this remedy flourishes.<sup>16</sup> The Supreme Court continues to stand by it.<sup>17</sup>

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<sup>9</sup> See J. GHIARDI & J. KIRCHER, *supra* note 3, § 1.03.

<sup>10</sup> *Rookes v. Barnard*, 1 All Eng. Rep. 367, 407 (1964). Recall that the English constitution is unwritten. See A.V. DICEY, *LAW OF THE CONSTITUTION* (8th ed. 1915).

<sup>11</sup> See J. GHIARDI & J. KIRCHER, *supra* note 3, §§ 4.01, 4.14; K. REDDEN, *supra* note 3, § 2.3(A); D. DOBBS, *REMEDIES* § 3.9 (1973); 1 SEDGWICK, *supra* note 4, § 354. The RESTATEMENT rejects compensation as a purpose of punitive damages. See RESTATEMENT (SECOND) OF TORTS § 908 comment b (1977).

<sup>12</sup> See, e.g., *Fay v. Parker*, 53 N.H. 342, 382 (1873); see generally M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 80-84 (1977) (quoting *A Reading on Damages in Actions Ex Delicto*, 3 AM. JUR. 287 (1830)).

<sup>13</sup> See, e.g., J. DUFFY, *PUNITIVE DAMAGES: A DOCTRINE WHICH SHOULD BE ABOLISHED* (Defense Research Institute 1969), reprinted in K. REDDEN, *supra* note 3, at §§ 7.4 - 7.8.

<sup>14</sup> See, e.g., J. GHIARDI & J. KIRCHER, *supra* note 3, § 7.10; Creedon, *Punitive Damages for Breach of Contract—Does the Punishment Fit the Crime?*, 1983 DET. C.L. REV. 1149 (1983). "The issue of punitive damages and the insurer's liability has rocked the insurance industry in 1979-81. The insurance journals and law reviews are filled with articles that express the outrage of the industry at being held liable for punitive damages." K. REDDEN, *supra* note 3, § 9.1 (1983 Supp.). For research suggesting that no crisis from numerous and excessive punitive damages is indicated by the facts, see Daniels, *Punitive Damages: The Real Story*, 72 A.B.A.J., Aug. 1, 1986, at 60.

<sup>15</sup> See, e.g., Ellis, *supra* note 4; R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.12 (2d ed. 1977) (with qualifications).

<sup>16</sup> For a detailed exposition of the criticisms, and little defense, see generally K. REDDEN, *supra* note 3, §§ 2.4, 7.4-8; J. GHIARDI & J. KIRCHER, *supra* note 3, §§ 2.01-12. The latter two authors intended to be objective. *Id.* at §§ 2.01, 2.13. Their long affiliation with the Defense Research Institute, *id.* at vii, a condemnor of punitive damages, see, *supra* note 13, may have blurred their vision. Or mine may be distorted since my predisposition is to favor punitive damages. Cf. G. MYRDAHL, *OBJECTIVITY IN SOCIAL RESEARCH* (1969). On second thought, it's probably my vision that is blurred since few commentators have much good to say about this extraordinary remedy.

<sup>17</sup> See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (punitive damages upheld on a showing of malice in law in an action for

## II. STANDARDS

No universally accepted standards govern the granting of punitive damages. Some jurisdictions reject them altogether.<sup>18</sup> Generalizations are nevertheless possible. The general comments are foreshadowed by common labels for this damage remedy: extraordinary and punitive.

Punitive damages do not stand alone. They depend upon an underlying cause of action.<sup>19</sup> Not all causes of action will support them. Contract actions will not.<sup>20</sup> Tort actions will.<sup>21</sup> Statutory causes of action, both federal and state, increasingly allow punitive damages, either in general terms, stated amounts, or stated multiples of actual damages.<sup>22</sup>

The ordinary conduct that gives rise to legal relief, either tortious negligence or contractual breach, is insufficient for punitive damages. Instead, they are reserved for that conduct in which their penal effects are more appropriate. The RESTATEMENT (SECOND) OF TORTS states the test: "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."<sup>23</sup>

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slander where there was no issue of public concern); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), *reh'g denied*, 465 U.S. 1074 (1984) (\$10,000,000 punitive award upheld in a state tort action as not being violative of the Atomic Energy Act); *Smith v. Wade*, 461 U.S. 30 (1983) (punitive damages upheld under 42 U.S.C. § 1983 (1976) in an action by a prison inmate against a guard for reckless disregard or indifference to the inmate's rights or safety).

<sup>18</sup> For a list of these jurisdictions, see J. GHIARDI & J. KIRCHER, *supra* note 3, §§ 4.07-12; K. REDDEN, *supra* note 3, § 5.2.

<sup>19</sup> RESTATEMENT (SECOND) OF TORTS § 908 comment c (1977); W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 2, at 9 (5th ed. 1984).

<sup>20</sup> RESTATEMENT (SECOND) OF CONTRACTS § 355 (1979); J. GHIARDI & J. KIRCHER, *supra* note 3, § 5.16; K. REDDEN, *supra* note 3, § 4.3. This doctrine may be questioned, see D. DOBBS, *supra* note 11, § 3.9, at 207; Sullivan, *supra* note 4; Seibert, *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565 (1986).

<sup>21</sup> W. PROSSER & W. KEETON, *supra* note 19, at 9-11; J. GHIARDI & J. KIRCHER, *supra* note 3, §§ 5.17-19; K. REDDEN, *supra* note 3, § 4.2.

<sup>22</sup> See, e.g., 15 U.S.C. § 1681(n) (1970) (Fair Credit Reporting Act); 15 U.S.C. § 1640 (1968) (Truth in Lending Act); CAL. CIV. CODE § 1747.50 (West 1971) (Credit Card Act); N.Y. GEN. BUS. LAW § 380-1 (McKinney 1984) (Fair Credit Reporting Act). See generally J. GHIARDI & J. KIRCHER, *supra* note 3, §§ 5.20-30; K. REDDEN, *supra* note 3, §§ 5.2, 6.1, 6.3.

<sup>23</sup> RESTATEMENT (SECOND) OF TORTS § 908 (1977). Prosser and Keeton said: "There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton." W. PROSSER & W. KEETON, *supra* note 19, § 2, at 9-10 (footnotes omitted). McCormick states a similar test. C. MCCORMICK, *HANDBOOK OF THE LAW OF DAMAGES* § 79, at 280-82 (1935). Compare the English standard at *supra* note 10. For collections of the standards of the various states, see J. GHIARDI & J. KIRCHER, *supra* note 3, § 5.01; K. REDDEN, *supra* note 3, § 5.2. The special circumstances required for exemplary damages dampen the criticism that prospective defendants are provided insufficient notice. *Contra* J. GHIARDI & J. KIRCHER, *supra* note 3, § 2.07. Basic morality does indeed track these guidelines for punitive damages.

When a jury must apply such tests to specific cases, one of the judiciary's continuing concerns is that the jury will succumb to its passions and award undue punitive damages. Since the plaintiff must prove the defendant was "evil" or recklessly indifferent, the courtroom drama is often inherently inflammatory. Nonetheless, the judiciary has done little to guide the jury in the right direction. Jurors are typically told that the setting of an appropriate amount is entirely within their discretion.<sup>24</sup> They may be instructed to consider various factors, including: the wealth of the defendant; his potential criminal liability; other possible civil actions; the nature of the conduct; the severity of the threatened harm; the reprehensibility of the conduct; the profitability of the act; and the costs of litigation.<sup>25</sup> Since these factors provide no formulaic guidelines for the jury, excessive awards are facilitated. The courts then must impose restraints on the awards by second-guessing the juries.<sup>26</sup>

One rule adopted to limit jury awards requires the punitive damages to bear a reasonable relationship to the actual damages.<sup>27</sup> The exact ratio is usually unspecified, but various tests have been adopted as a limitation.<sup>28</sup> A related rule is that nominal damages will not support punitive damages.<sup>29</sup>

The limitations that have evolved are mainly tied to actual damages. The reason for this is not clear. The uncertainty exemplifies the unsettled nature of punitive damages. To the extent that they have a deterrent role, the measure is the amount required to admonish the defendant. This amount is independent of the loss to the plaintiff, i.e., actual damages.

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<sup>24</sup> See J. GHIARDI & J. KIRCHER, *supra* note 3, § 5.38; K. REDDEN, *supra* note 3, § 3.6(A).

<sup>25</sup> See Mallor & Roberts, *supra* note 4, at 667-69; K. REDDEN, *supra* note 3, § 3.5.

<sup>26</sup> See, e.g., D. DOBBS, *supra* note 11, § 3.9, at 211; J. GHIARDI & J. KIRCHER, *supra* note 3, § 5.39.

<sup>27</sup> See RESTATEMENT (SECOND) OF TORTS § 908 comment f (1977); J. GHIARDI & J. KIRCHER, *supra* note 3, § 5.39; K. REDDEN, *supra* note 3, § 3.6(C).

<sup>28</sup> For a brief survey of these tests, see J. GHIARDI & J. KIRCHER, *supra* note 3, § 5.39. Perhaps the reviewing court merely substitutes its hardly fettered judgment for that of the jury. *Id.*

<sup>29</sup> See generally K. REDDEN, *supra* note 3, § 3.4; D. DOBBS, *supra* note 11, § 3.9, at 208-10. Although this rule is often stated, only two jurisdictions, Tennessee and Texas, have firmly so held. See J. GHIARDI & J. KIRCHER, *supra* note 3, § 5.37; RESTATEMENT (SECOND) OF TORTS § 908 comment f (1977). The issue is often mooted, however, since many causes of action themselves will not lie for merely nominal damages and thus the question of punitive damages is not reached. See D. DOBBS, *supra* note 11, § 3.8, at 190-93. "The proof of actual damages requirement is in reality a corruption of the rule that there must be an underlying actionable wrong . . . ." Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307, 316 (1969); see McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C.L. REV. 129, 149-50 (1929). Some statutes have been read as allowing punitive damages without the finding of actual damages. See, e.g., *Anderson v. United Fin. Co.*, 666 F.2d 1274 (9th Cir. 1982) (Equal Credit Opportunity Act, 15 U.S.C. § 1691e (1975)); *Hinkle v. Rock Springs Nat'l Bank*, 538 F.2d 295 (10th Cir. 1976) (Truth in Lending Act, 15 U.S.C. 1640 (1969)).

It depends entirely upon the defendant's own perceived costs of acting which may or may not relate to actual damages.<sup>30</sup> For retribution, punitive damages relate to the injury to the plaintiff or society, or to the blameworthiness of the defendant, or both. The plaintiff's injury is indeed measured, in principle, by actual damages, but the wickedness or culpability of the defendant's act is often quite different from the plaintiff's loss. A vicious, reprehensible act, such as an attempted mass poisoning, may cause little actual damage, whereas an undesirable act based upon a more benign profit motive may cause much damage.<sup>31</sup> A more refined functional analysis is needed.<sup>32</sup>

### III. PURPOSE

This section is the heart of the Article. It contains a survey of the literature on punishment, largely in the footnotes, to glean what is meant by the concept. Broad algebraic models are formulated for each of the common conceptions, or functions, of punishment that relate to punitive damages, for example, "deterrence". The models are broad for two reasons. First, commentators continue to debate the meaning of the conceptions (and justifications). Second, a close examination of the cases reveals wide variation in the application of the conceptions. For the purpose of considering whether punitive damages are a worthy social instrument, the models must be general enough to accommodate the differing views of punishment. Virtues of the views are addressed in later sections. The models are designed simply to draw attention to the important features of the conceptions of punishment, not to draw conclusions by mathematical manipulation, as an economist might do. The features are then examined in detail. The general conceptions of punishment and the assumptions implicit in the models are introduced before unveiling the models.

Punishment, in the criminal context, has several purposes: special deterrence, general deterrence, retribution, isolation and rehabilitation.<sup>33</sup> The

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<sup>30</sup> See R. POSNER, *supra* note 15, at 122, 142-43, 190; Wheeler, *The Constitutional Case for Reforming Punitive Damages*, 69 VA. L. REV. 269, 269-87 (1983).

<sup>31</sup> The latest English standard for punitive damages recognizes this point. See *supra* note 10.

<sup>32</sup> For elaboration of these criticisms, see Ellis, *supra* note 4, at 58-60.

<sup>33</sup> See *Furman v. Georgia*, 408 U.S. 238, 343 (1972) (Marshall, J.); *Gregg v. Georgia*, 428 U.S. 153 (1976); G. FLETCHER, *RETHINKING CRIMINAL LAW* 414-19 (1978). Other purposes have also been forwarded. See, e.g., N. WALKER, *SENTENCING IN A RATIONAL SOCIETY* 1-22 (1969); *infra* note 46. Rehabilitation as an aim is, at least temporarily, out of fashion. See F. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981).

Deterrence is essentially a utilitarian notion, aimed at maximizing the good, whereas retribution is deontological, aimed at achieving justice. See S. CAVELL, *THE CLAIM OF REASON* 299-303 (1979).

Some jurisdictions apparently assign general, not special, deterrence to punitive damages. See J. GHIARDI & J. KIRCHER, *supra* note 3, § 4.14. This may be merely an oversight. *Id.* A few other jurisdictions grant them for deterrence alone, not retribution, *id.* at § 4.15, or vice versa, *id.* at § 4.16.

last two functions are generally ignored in discussions of punitive damages.<sup>34</sup>

Special deterrence makes clear to the defendant before the court that he will obtain no benefit from his proscribed act. No advantage is derived from his past act nor will any follow from a similar future one.<sup>35</sup> General deterrence imparts this message to the public at large. No one will gain from the proscribed act.<sup>36</sup> Because of their relationship, the basic analysis lumps these two functions together under the umbrella label of deterrence. When relevant, differences are noted.

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<sup>34</sup> See Mallor & Roberts, *supra* note 4, at 645 n.38. Rehabilitation as a result of punitive damages should not be written off too quickly. If the actor is specially deterred from committing proscribed acts in the future, the result is indistinguishable from rehabilitation. Furthermore, "an element of expiation or atonement may have rehabilitative effects." Samuels, *The Fine: The Principles*, 1970 CRIM. L. REV. 201, 201. Owen included other purposes as subgoals of the punishment aim of punitive damages: "retribution, moral desert, private and public vengeance, vindication, and the moral education of the offender." Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103, 109 (1982) (footnote omitted). Within the category of deterrence, he included "its little sister, 'law enforcement.'" *Id.* (footnote omitted). Ellis listed: "(1) punishing the defendant; (2) deterring the defendant from repeating the offense; (3) deterring others from committing an offense; (4) preserving the peace; (5) inducing private law enforcement; (6) compensating victims for otherwise uncompensable losses; and (7) paying the plaintiff's attorneys' fees." Ellis, *supra* note 4, at 3. His analysis reduced these seven expressed purposes to two: "(1) that wrongdoers deserve punishment, beyond that provided by reparative damages; and (2) that imposing a detriment on defendants promotes efficiency by deterring loss-creating conduct." *Id.* at 11.

<sup>35</sup> F. ZIMRING & G. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 72-74 (1973). Once the proscribed act has been committed and the actor is before the court to hear the magnitude of the sanction, special deterrence has failed with respect to the prior act. See A. KENNY, *FREEWILL AND RESPONSIBILITY* 76 (1978). Judges, therefore, are commonly lenient on the grounds that they can't undo what has been done. This anomaly in the purpose, that "[d]eterrence as a theoretical model begins to feed on itself," has been claimed as a reason why "[d]eterrence alone is, therefore, an insufficient justification for punishing crime." Kennedy, *A Critical Appraisal of Criminal Deterrence Theory*, 88 DICK. L. REV. 1, 9 (1983) (citing J. SEDGWICK, *DETERRING CRIMINALS: POLICY MAKING AND THE AMERICAN POLITICAL TRADITION* 42 (1980)). The claim ignores the special deterrence of future acts by the actor, to say nothing of general deterrence. See F. ZIMRING & G. HAWKINS, *supra*. Perhaps the function of special deterrence is unconcerned with past acts, and only "means that the punished offender will be deterred from future offenses after his release." G. FLETCHER, *supra* note 33, at 414.

<sup>36</sup> See F. ZIMRING & G. HAWKINS, *supra* note 35, at 72-74. The authors doubt the usefulness of this dichotomy between special and general deterrence, *id.* at 72-74, 224-25. Plamenatz, on the other hand, questions the notion of general deterrence and asserts that the effects on onlookers "come closer to being reform than deterrence." Plamenatz, *Responsibility, Blame and Punishment*, in *PHILOSOPHY, POLITICS AND SOCIETY* 173, 178 (P. Laslett & W.G. Runciman 3d series 1967). Hart made the interesting point that the threat of sanction not only deters one who deliberates on whether to undertake a proscribed act, but also makes one deliberate initially. The known sanction motivates the actor to think of the harmful possibilities. See H.L.A. HART, *Intention and Punishment*, in *PUNISHMENT AND RESPONSIBILITY* 113, 133-34 (1968).

Retribution is a less settled, more controversial function of punitive damages and criminal law sanctions. Two ideas of retribution, although often not clearly differentiated, are prominent within the literature: reciprocity or *lex talionis* (return according to eye-for-an-eye); and just desert (return according to wickedness or blameworthiness). The substantial differences between these two require independent analysis.<sup>37</sup>

The analytical models of deterrence and retribution assume persons are ideally rational.<sup>38</sup> Under deterrence, for example, the potential actor must perceive that the proscribed act is not worthwhile. Costs outweigh benefits. An irrational actor may frustrate this goal by not properly assessing the consequences. A rational person, for this purpose, is one who is fully in-

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<sup>37</sup> But there is a caveat:

The reason we impose punitive damages on nonnatural persons is not to punish them, but simply because they have a powerful effect on our lives. When that power causes injury we become very angry. People who talk about punishment usually distinguish between retribution and vengeance, but that may not be true in this case. We may want to impose punitive damages on Ford not because it deserves punishment, but because we want to express our outrage at the effect it has on our lives, even though we can't blame Ford for having that effect.

*Symposium Discussion*, 56 S. CAL. L. REV. 155, 190 (1982). See also Sullivan, *supra* note 4, at 248-51 (disparate corporate bargaining power explains increase of punitive damages in contract cases). Perhaps "a retributive theory is applied to natural persons, but because it's logically impossible to punish a corporation, an instrumentalist approach, which focuses on deterrence, is applied to corporations." *Id.* at 191. Punishment, along these lines, is symbolic or denunciatory. See J. FEINBERG, *The Expressive Function of Punishment*, in DOING AND DESERVING 95 (1970); N. WALKER, *supra* note 33, at 19-21 (references include Beccaria, Fitzjames Stephen, and Durkheim). The Chinese, in the early years of the Han Dynasty (209-141 B.C.), had this idea. See 1 SU-MA CHIEN, RECORDS OF THE GRAND HISTORIAN OF CHINA 537-38 (B. Watson trans. 1961). Hart rejects this justification for punishment, against natural persons anyway, for its valueless "cost of human suffering". H.L.A. HART, LAW, LIBERTY AND MORALITY 65 (1963).

<sup>38</sup> Notice the criticism of the assumption that:

the criminal law makes no sense unless we suppose the potential criminal to be (more or less) rational . . . In short, the death penalty is the most effective deterrent because it would be rational to be most effectively deterred by it, and we are committed by belief in the criminal law to supposing that people will do what is rational. The problem with this strategy is that a deterrence justification of a punishment is valid only if it proves that the punishment actually deters actual people from committing crimes.

Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PHIL. & PUB. AFF. 115, 144 n.36 (1985).

But Veblen, Ayer and Hart are doubtful about the model of the human "either as at the mercy of mechanical pushes and pulls or as 'a lightning calculator of pleasures and pains'." F. ZIMRING & G. HAWKINS, *supra* note 35, at 76 (discussing Veblen). In Hart's words: "[There is a] growing realization that the part played by calculation of any sort in anti-social behaviour has been exaggerated." H.L.A. HART, *Prolegomenon*, *supra* note 1, at 1. See also Assembly Committee on Criminal Procedure (Cal.), *Public Knowledge of Criminal Penalties*, in PERCEPTION IN CRIMINOLOGY 86 (R. Henshel & R. Silverman eds. 1975). See *infra* note 50.

formed, reasonable, sensible, risk neutral, and unaffected by wealth.<sup>39</sup> The assumption is strong. At times it must be relaxed even in the theoretical discussion.<sup>40</sup>

The defendant-actor is not the only party important to the models. The plaintiff-victim, onlookers, and society in general play roles. The above assumption also applies to these parties. Frequently, the assumption is relaxed as the decision of the actor may be based upon the irrationality of the victim or the public. The victim, for example, is assaulted not because of his rational choice or act. By definition, one is defrauded because of imperfect information. A fully informed, rational person cannot be defrauded. Furthermore, a fully informed and onlooking public, particularly the family and friends of the victim, would, one would hope, frustrate the

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<sup>39</sup> For standard meanings of a "rational actor" or "rational choice", see, e.g., J. RAWLS, A THEORY OF JUSTICE §§ 25, 63, 64 (1971); Oppenheim, *Rationality and Egalitarianism*, in HUMAN NATURE IN POLITICS 280, 280-81 (J. Pennock & J. Chapman eds. 1977). The economic literature has extensively mined the vein of rationality. See, e.g., I.M.D. LITTLE, A CRITIQUE OF WELFARE ECONOMICS ch. II (2d ed. 1957). For objections, see M. HOLLIS & E. NELL, RATIONAL ECONOMIC MAN (1975); Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977).

A criticism of punitive damages is that some people are not rational utility maximizers and therefore will not "get the message". A criminal remedy would at least isolate such individuals when special deterrence fails. See J. GHIARDI & J. KIRCHER, *supra* note 3, § 2.08. In rebuttal, when punitive damages are usually sought, the defendant is not an irrational "antisocial personality". *But see id.* For one, such a person seldom has the resources for the remedy to be worthwhile. Most defendants have less atypical personalities. Are there corporations with antisocial personalities? Regarding the limited deterrability of corporations, see Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 75-84 (1985-86).

Another criticism is that vicarious liability and liability insurance coverage (when punitive damages are not excluded) diminish the efficacy of punitive damages by shifting the burden away from wrongdoers. Of course, the insurance company may later adjust its rates or coverage for the defendant, the employer may discipline the blameworthy agent, and family and associates may be reproachful, but "whether any of those things actually occur will be highly fortuitous and not subject to the control of the legal system." J. GHIARDI & J. KIRCHER, *supra* note 3, § 2.07. Benn and Peters also argue for the unreliability of social pressure. See S. BENN & R. PETERS, *supra* note 1, at 270.

The gist of much complaint about these extraordinary damages is the inadequacy of notice. The expression of the standards in loose terminology, different applications from jurisdiction to jurisdiction, insufficient publicity, and retroactivity have all been attacked. See J. GHIARDI & J. KIRCHER, *supra* note 3, §§ 2.07-2.09. The theoretical analysis of punitive damages ignores these problems; later some are noticed.

<sup>40</sup> An assumption is "weak" when positing a situation seemingly close to actuality and "strong" when seemingly far from actuality. An assumption is "relaxed" when brought closer to actuality by accounting for those factors previously assumed nonexistent. For problems with the distinction between weak and strong assumptions, see M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 45-46 (1982).



defrauding actor by protecting the victim. Instead, the act is often completed before the other parties are sufficiently informed to respond. The rational actor evaluates the irrationalities of others while deliberating on whether to act.

### A. Deterrence

Deterrence occurs when a rational person perceives that the risk of liability for his proscribed act, along with the other costs, exceeds the probable gains.<sup>41</sup> Equation (1) models these calculations.

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<sup>41</sup> Whether sanctions deter at all has been questioned. For a summary of and attack on the evidence supporting deterrence, see Paternoster, Saltzman, Waldo & Chiricos, *Perceived Risk and Social Control: Do Sanctions Really Deter?*, 17 *LAW & SOC'Y REV.* 457 (1983) ("minimal"). See also Kennedy, *supra* note 35, at 5; but see J. HAGAN, *DETERRENCE RECONSIDERED* 7-8 (1982) ("some"); see generally D. PYLE, *THE ECONOMICS OF CRIME AND LAW ENFORCEMENT* ch. 3 (1983). Posner has no doubt that deterrence operates on the responsible actor. See R. POSNER, *supra* note 15, at 163-64; Posner, *An Economic Theory of Criminal Law*, 85 *COLUM. L. REV.* 1193, 1205 (1985). A contrary belief would certainly shake his economic edifice. One of the problems in responding to this question is devising satisfactory empirical studies. See N. WALKER, *supra* note 33, at 56; Shapiro & Votey, *Deterrence and Subjective Probabilities of Arrest: Modeling Individual Decisions to Drink and Drive in Sweden*, 18 *LAW & SOC'Y REV.* 583, 585 (1984). Based upon an experiment which showed people's inappropriate responses to hypothetical evidence of the deterrent value of capital punishment, two commentators posited that if actual evidence is mixed, the effect, rather than moderating opposing views, "may be to polarize public opinion, with proponents of each side picking and choosing from the evidence so as to bolster their initial opinions." R. NISBETT & L. ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 171 (1980) (emphasis in original).

Self-motivation to obey the law may actually decrease with more severe sanctions. See Akerlof & Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 *AM. ECON. REV.* 307, 317-18 (1982). The danger and drama represented by the penalty and proceedings may even create an attraction for the proscribed act. See C. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 211 (2d ed. 1963); H.L.A. HART, *Murder and the Principles of Punishment: England and the United States*, in *PUNISHMENT AND RESPONSIBILITY* 54, 88 (1968). Finally, "whereas certain punishment brings aversion, intermittent punishment of an instrumental response does, rather unexpectedly, reinforce the punished behavior, not suppress it." J. GORECKI, *A THEORY OF CRIMINAL JUSTICE* 15 (1979). See also *infra* note 67.

Be all this as it may, most of these doubts are based primarily upon criminal deterrence; the direct applicability to the civil context is problematic. Whereas the mugger on the street has rarely been known to get out his pocket calculator to do a cost-benefit analysis of his next mugging, see N. WALKER, *supra* note 33, at 68 ("shop-breakers are not conversant with the mathematics of probability"), a corporate manager deciding whether to suppress information on a latent, hazardous defect, rather than correct it, probably does consider the consequences more deliberately, if not ideally so. For corporations,

economic theory provides a plausible first prediction. Corporations after all are economic institutions and these decisions immediately affect the profits and losses the corporations will incur. On the other hand, those predictions may not always prove accurate, since individuals make decisions in corporations and their interest may diverge from the

Before reaching the model, note that deterrence is not an all-or-nothing proposition. Some activities, such as murder, should be completely deterred.<sup>42</sup> Other activities, although properly deterred to some degree, are acceptable, even preferable at certain levels or for particular reasons.<sup>43</sup> For these latter cases, the quantum of partial deterrence maintains the acceptable level or assures a sufficient reason. One example is contract breach.<sup>44</sup> In principle, contract damages will, and should, deter the breaching party if he is unable to realize a gain from the breach after making the non-breaching party whole. If a gain is still realized, the breach is efficient and, arguably, should be encouraged. Under this policy of partial deterrence, misdeterrence may occur, either overdeterrence or underdeterrence. Both must be guarded against.<sup>45</sup>

Now, the model of deterrence:<sup>46</sup>

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interests of the corporation.

Kornhauser, *A Guide to the Perplexed Claims of Efficiency*, 8 HOFSTRA L. REV. 591, 636 (1980). See also Thompson, *Criminal Responsibility in Government*, in CRIMINAL JUSTICE 201, 211 (J. Pennock & J. Chapman eds. 1985) (deterrence of organizations is an empirical question).

<sup>42</sup> The niceties of justifiable and excusable homicide, and other mitigating factors, as well as considerations arising from the costs, social and economic, of enforcement, are ignored.

<sup>43</sup> This is different from the term "partial deterrence" as used by Zimring and Hawkins to denote when the result is "less than fully law-abiding conduct". See F. ZIMRING & G. HAWKINS, *supra* note 35, at 71-72.

<sup>44</sup> See Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52, 373 (1936); R. POSNER, *supra* note 15, § 4.9; cf. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 LAW Q. REV. 193, 197-98 (1978). Kennedy posits other reasons for the usual rules of contract and tort damages, including concerns for windfall gains to victims and factfinding simplification. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1694 (1976).

<sup>45</sup> See generally Wheeler, *supra* note 30, at 306-10.

<sup>46</sup> The modeling in this article is based upon the approaches in G. TULLOCK, *THE LOGIC OF THE LAW* (1971), and Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 167 (1969). Compare G. TULLOCK, *supra*, Equation 12.4, at 232 with Equation 11.1, at 212. The factors in equation (1) are drawn from L. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 62-64 (1975) and F. ZIMRING & G. HAWKINS, *supra* note 35, at 74-89. See also Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions As a Deterrent*, 85 COLUM. L. REV. 1232, 1236-37, 1260-62 (1985); Ehrlich, *On the Usefulness of Controlling Individuals: An Economic Analysis of Rehabilitation, Incapacitation, and Deterrence*, 71 AM. ECON. REV. 307 (1981).

Friedman, under the cost-benefit model of legal behavior, broke the costs of conduct into four categories which are built into equation (1) (factors (b) - (d)). He called them sanctions, social factors, conscience factors, and laziness, habit or inertia. L. FRIEDMAN, *supra*, at 63. Zimring and Hawkins categorized the mechanism of deterrence into direct or simple deterrence ((b) - (d)), "[a]nd among the preventive effects of punishment it is possible to distinguish its functions as an aid to moral education, as a habit-building mechanism, as a method of achieving respect for the law, and as a rationale for obedience." F. ZIMRING & G. HAWKINS, *supra* note 35, at 77. See also N. TIMASHEFF, *AN INTRODUCTION TO THE SOCIOLOGY OF LAW* 6-7 (1939); S. MERMIN, *LAW AND THE LEGAL SYSTEM* 54-56 (2d ed. 1982); Plamenatz, *supra*



repercussions.<sup>48</sup>

Costs are negative benefits and vice versa.<sup>49</sup> The equation uses the cost or benefit notation to reflect the presumptively common impact. Each factor consists of two types of elements: the amount of a particular cost or benefit,  $C_x$  or  $B_x$ ; and the probability or likelihood of incurring the cost or gaining the benefit,  $P_x$ .<sup>50</sup> The elements of probability and amount may interrelate. For example, the amount of the actor's external, social cost,

<sup>48</sup> "Observe: This is not 'pure' economic reasoning, but rather reasoning in favor of using economic techniques to achieve objectives that are themselves ethical rather than economic in character." Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 138 n.29 (1982).

<sup>49</sup> This is overly simple. Some people respond asymmetrically to costs (punishments) and benefits (rewards). See Lane, *Individualism and the Market Society*, in LIBERAL DEMOCRACY 374, 398 (J. Pennock & J. Chapman eds. 1983); R. DWORKIN, *Is Wealth a Value?*, in A MATTER OF PRINCIPLE 237, 238 (1985). Bentham insisted that "the advantage of gaining cannot be compared with the evil of losing." B. BARRY, POLITICAL ARGUMENT 101 (1965) (quoting E. HALEVY, THE GROWTH OF PHILOSOPHICAL RADICALISM 40 (1955)) (emphasis in original). Two reasons for this are given: first, "every man naturally expects to preserve what he has" and thus loss gives rise to "the pain of frustrated expectation"; and second, to put it in modern dress, the declining marginal utility of wealth (i.e., each dollar generates less utility than the previous one) makes a dollar gained less valuable than a dollar lost. *Id.* at 101-02. See also Kelman, *Consumption Theory, Production Theory, and Theology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 678-81 (1979). When the costing occurs under conditions of uncertainty, the asymmetry, in practice, may be reversed. See Kahneman & Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263 (1979); R. GOODIN, POLITICAL THEORY AND PUBLIC POLICY 145 (1982).

<sup>50</sup> Tullock uses the "likelihood" notation, G. Tullock, *supra* note 46, at 267, and Becker the "probability" notation, Becker, *supra* note 46, at 40-41. "[T]he uncertainty of punishment must be compensated by the severity. The ease with which crimes are committed or concealed, must be compensated by the severity." Paley, *Of Crimes and Punishments*, in MORALS AND VALUES 364, 367 (M. Singer ed. 1977). "Whenever then the value of punishment falls short, either in point of *certainty*, or *proximity*, of that of the profit of the offence, it must receive a proportionable addition in point of *magnitude*." J. BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 170 (J. Burns & H.L.A. Hart eds. 1970) (1st ed. Oxford 1789). By "proximity" Bentham points out that costs (and benefits),  $C_x$ , must be discounted to reflect the current value of the future impact. *Id.*

The models weight equally the cost and probability of each factor. Some commentators have asserted that an increase in the probability of a sanction has more deterrent effect than an equal increase in the cost of the sanction. See, e.g., Paley, *supra*, at 367; Singer, *Psychological Studies of Punishment*, 58 CALIF. L. REV. 405, 420-21 (1970); D. PYLE, *supra* note 41, at 39-58; but see S. MAITAL, MINDS, MARKETS AND MONEY 249 (1982); see generally Bailey & Smith, *Punishment: Its Severity and Certainty*, 63 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 530 (1972). Or it is the perceived certainty of punishment that is more important than the severity, even subjective severity. See Kennedy, *supra* note 35, at 5; F. ZIMRING & G. HAWKINS, *supra* note 35, at 144. Overall deterrence notwithstanding, an advantage of the deterrence from a high sanction with a low probability over an equal deterrence from a low sanction with a high probability is that, there being fewer trials, the total transaction costs (attorneys, courts, etc.) are lower. See Becker, *supra* note 46, at 17-18.

such as the toll to reputation and goodwill, increases along with the probability of a larger number of people learning of the proscribed act. There is not one fixed loss whether anyone or everyone learns of the act.<sup>51</sup>

Factor (a) is the direct, in-pocket payoff. Obtaining this benefit may not be the actor's primary motivation. Instead he may act mainly from malicious satisfaction or reward from like-minded family and friends.<sup>52</sup> Factors (c) and (d), the external and internal effects, represent these benefits.

Factor (b) is subdivided to indicate sanction costs from the counteractions of the victim or a third party (private or public) in the form of damage judgments,  $C_r$ , or nondamage remedies,  $C_n$ , such as injunctions, imprisonment, fines, administrative regulations, etc.<sup>53</sup> Furthermore, the damage recovery,  $C_r$ , may include ordinary damages,  $D_a$ , and punitive damages,  $D_p$ . Hence, using these symbols:

$$(2) C_r = D_a + D_p$$

Punitive damages are recoverable by the victim or a third party. The third party may be a government official, although, he or she is more commonly a citizen suing as a private attorney general or a member of a class action. The extraordinary damages interrelate with all the other elements of the equations. Onlookers react to the award, which, in turn, affects the other elements of cost.<sup>54</sup> Generally, the greater the recovery of punitive damages, the more the repercussions increase the other costs.

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<sup>51</sup> For a particular case before the court, the equation factors may be differently subdivided. The facts or legal theory may emphasize components of the amounts and probabilities. See, e.g., G. TULLOCK, *supra* note 46, at 232 (Equation 12.4 (first factor)).

<sup>52</sup> Some evidence shows that crimes of hate and passion are as responsive to deterrence as are crimes against property. See Ehrlich, *Participation in Illegitimate Activities: An Economic Analysis*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 68, 102 (G. Becker & W. Landes eds. 1974). But Ehrlich's studies on the deterrent effects of capital punishment have been criticized. See Reiman, *supra* note 38, at 142 n.34 (with citations).

<sup>53</sup> See C. McCORMICK, *HANDBOOK OF THE LAW OF DAMAGES* § 82 (1935):

Probably the most reasonable plan for the adjustment of the two remedies [i.e., criminal and civil punishment] is that of permitting the defendant, when pursued in either form of punitive action, to prove that he has in fact already been punished by the other method so that present punishment may be avoided or reduced, according as the previous penalty be deemed fully adequate or not . . . .

Some courts allow this. See, e.g., *Wirsing v. Smith*, 222 Pa. 8, 70 A. 906 (1908). In principle, the defendant also ought to be able to show the likelihood of future punishment. When the future punishment takes into account the past one, the measure of the first award becomes regressive.

<sup>54</sup> See *infra* note 90 and accompanying text. Although the probabilities differ for the award of actual damages, punitive damages, and nondamage action remedies, this is disregarded in the formula for the sake of simplification.

The only element in equations (1) and (2) which allows the court to fine tune rational deterrence is punitive damages,  $D_p$ . The court merely controls indirectly the other elements, or considerations other than deterrence determine them. Actual damages,  $D_a$ , addressing the victim's injury, are thereby victim-regarding, whereas deterrence must be actor-regarding. The court, in part to deter specific actions, may allow additional damages by recognizing previously unprotected harms as recoverable injuries.<sup>55</sup> It may, for example, allow damages more expansively for dignitary insults, pain and suffering, attorney's fees or the victim's opportunity costs, either as independent grounds for relief or as compensable items when other grounds are claimed. Despite this flexibility, damages are still appraised from the victim's perspective, not the actor's.<sup>56</sup> Deterrence takes a back seat.

Factor (c) in equation (1),  $F_e(P_e, B_e)$ , draws attention to the actor's external costs and benefits.<sup>57</sup> They emanate from the support or disapprobation of family, friends and other onlookers and, for the commercial actor, from effects on the business.<sup>58</sup> Even the recovery of ordinary damages by the victim can influence reputation and goodwill. Punitive damages have a

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<sup>55</sup> The difference between "harms" and "injuries", generally maintained throughout the article, appears in the RESTATEMENT (SECOND) OF TORTS § 7 (1965). An injury, basically, is a harm that receives judicial protection. Feinberg asserts that the American Law Institute has these labels backwards. See J. FEINBERG, HARM TO OTHERS 106-07 (1984).

<sup>56</sup> A recovery for unjust enrichment is, on the contrary, measured by the gain to the actor rather than the loss to the victim. See generally D. DOBBS, *supra* note 11, § 41. The remedy is a weak instrument for deterrence. If the actor's only duty is returning what he received, he has little to lose by trying to escape liability for the illicit act. The English recognize this. See *supra* note 10.

<sup>57</sup> This factor differs from the microeconomic construct of external effects or social costs. Social costs in that literature are "effects of one person's conduct or consumption on the welfare of others." Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 ETHICS 649, 652 (1984). Here the relevant effects, although emanating from third parties, impinge upon the actor's welfare. Social costs in the microeconomic sense appear later in an expanded form when retribution is analyzed. See *infra* note 93 and accompanying text.

<sup>58</sup> "[T]hough men be much governed by interest, yet even interest itself, and all human affairs, are entirely governed by opinion." D. HUME, *Essays, Moral, Political & Literary*, in 3 THE PHILOSOPHICAL WORKS OF DAVID HUME 54, 54 (A. Black, W. Tait & C. Tait eds. 1826) (emphasis in original). "[T]he greatest restrainer of the anti-social tendencies of men is fear, not of the law, but of the opinion of their fellows." Ashby, *The Search for an Environmental Ethic*, in 1 THE TANNER LECTURES ON HUMAN VALUES 1, 10 (S. McMurrin ed. 1980) (quoting 9 T.H. HUXLEY, COLLECTED ESSAYS 57 (1925)). See generally L. Friedman, *supra* note 46, at 106-08; F. ZIMRING & G. HAWKINS, *supra* note 35, at 213-17 (emphasizing group approval rather than disapproval); J.Q. WILSON & R.J. HERRNSTEIN, CRIME AND HUMAN NATURE 294-99 (1985). For the corporate defendant whose agents may not be subject to the ordinary effects of punishment felt by actors who are natural persons, the agents seeing punishment merely as "taxes", see *infra* note 62, full publicity about the proscribed act and punishment may be particularly useful. See generally B. FISSE & J. BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS (1983).

further-reaching impact.<sup>59</sup> By granting them, society makes a statement about the proscribed act that reflects on the actor and is heard and valued by others accordingly.<sup>60</sup>

Factor (d),  $F_i(P_i, C_i)$ , is the internal, psychological benefit and cost.<sup>61</sup> The

<sup>59</sup> Unfairly stigmatizing the defendant is worrisome. See W. PROSSER & W. KEETON, *supra* note 19, at 11; Wheeler, *supra* note 30, at 281-83; J. GHIARDI & J. KIRCHER, *supra* note 3, § 2.02. For some surprising conclusions regarding the absence of stigma that may relate to punitive damages, particularly against a corporate actor, see Schwartz & Skolnick, *Two Studies of Legal Stigma*, in PERCEPTION IN CRIMINOLOGY 401 (R. Henshel & R. Silverman eds. 1975) (no stigma from medical malpractice action). See also Posner, *supra* note 41, at 1228 ("there is little stigma to corporate punishment"); Stone, *A Comment on "Criminal Responsibility in Government"*, in CRIMINAL JUSTICE 241, 250 (J. Pennock & J. Chapman eds. 1985); Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 411 (1967) ("There is no blank on a job application for listing past punitive damages judgments."); but see Thompson, *Criminal Responsibility in Government*, in CRIMINAL JUSTICE, *supra*, at 201, 213 ("But no matter how precisely targeted the sanction [including, apparently, punitive damages], the stigma of conviction falls in some measure on everyone associated with the organization."); M. WALZER, SPHERES OF JUSTICE 268-69 (1983) (punishment generally).

<sup>60</sup> Notice some of the implications. The victim who is confident of obtaining an award of punitive damages would wish to suppress the notoriety, that is, minimize the actor's internal and external costs, in order to increase the size of the award. The actor who, say, is a businessperson secretly intending to close out the business or who personally values the costs of notoriety less than the factfinder, will wish to increase the publicity in order to decrease the size of the punitive award. Or, if the actor is not worried that evidence of the wickedness of the act would inflame the jury, then an advantage for him would be to submit evidence of the utter reprehensibility of his act. For then he would argue that, this fact being well-known, his other costs are large enough that punitive damages need be small or nothing. In some recent cases, as noted in *Symposium Discussion*, 56 S. CAL. L. REV. 155 (1982), "the judges recommended that the defendants tell the jury whether and to what extent they have been punished previously by punitive damage awards. What defendant is going to do that?" *Id.* at 184. But see *supra* note 53.

If the costs are so high because of the wickedness of the act, or for that matter, for any other reason, why did the actor act at all? Perhaps he didn't appreciate the costs or is a risk preferer. If this is the nature of the explanation, the justice of holding him responsible may be questioned. Neither Hobbes nor Kant could resolve this quandary. See Norrie, *Thomas Hobbes and The Philosophy of Punishment*, 3 LAW & PHIL. 299, 301, 317-19 (1984). Holmes overcame it with bald assertions of the necessary truth that blameworthiness is determined by the reasonable person standard; sometimes individuals must be sacrificed for the social good. Hart was very critical. See H.L.A. HART, *Diamonds and String: Holmes on the Common Law*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 278, 281-84 (1983). Nozick overcame the freewill-determinism aspects of this problem by arguing that retributive punishment is based upon "the degree of flouting of correct values," and whether the action is determined is irrelevant to whether correct values are flouted. R. NOZICK, *supra* note 1, at 393-94. Deontological concerns aside, in coping with these points the model of rational special deterrence eventually becomes powerless. Even then the other reasons for punitive damages remain: general deterrence and, perhaps, retribution.

<sup>61</sup> See generally L. FRIEDMAN, *supra* note 46, at 111-13; F. ZIMRING & G. HAWKINS, *supra* note 35, at 118-25, 142-154, 210-17. Mill refers to the "internal sanction" of morality. See J.S. MILL, UTILITARIANISM, in UTILITARIANISM, LIBERTY, AND

fair-minded person, perhaps by definition, will suffer pangs for actions sufficiently short of morally acceptable to fall within the purview of punitive damages.<sup>62</sup> Because the view one has of one's own practices is related to

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REPRESENTATIVE GOVERNMENT 1, 34-42 (1951)(1st ed. London 1863). The benefit side of this factor may be called "psychic income". See, e.g., G. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 94, 172-73 (1976).

[S]ome writers [seem] to have no qualms about invoking psychic income to explain behavior that seems irrational in terms of the more usual components of an economic utility calculus . . . , whereas others . . . treat psychic income as mere ad hocery that explains nothing at all in terms of rational choice . . . . As far as I have been able to find, there is no generally understood sense of just what 'psychic income' means, or of how it is to be treated in an analysis (i.e., under what conditions it is to appear as an explicit argument in an individual's utility function, and when not). This is the situation we could expect to hold if in fact the notion were only a device for papering over difficulties.

H. MARGOLIS, *SELFISHNESS, ALTRUISM, AND RATIONALITY* 59 (1982) (footnote omitted). See *infra* note 169.

Holmes believed, contrary to this analysis, that the mental state of the criminal defendant is irrelevant to the imposition of criminal sanctions aimed at deterrence since the law only requires outward conformity. See H.L.A. HART, *Diamonds and String*, *supra* note 60, at 283. Hart criticized this position. *Id.* at 283-84. Irrespective of what is required by the law, the mental state may affect behavior. On the other hand, Walker stated that conformity to the law from the urgings of moral scruples does not count as deterrence. See Walker, *The Efficacy and Morality of Deterrents*, 1979 CRIM. L. REV. 129, 131 (1979). Nonetheless, "it is nobler; we prefer those who refrain from wrongdoing because of moral aversion." J. GORECKI, *supra* note 41, at 3. Social learning theorists claim, whether or not it counts as deterrence, "that punishment is effective because conscience is, in part, a conditioned reflex." Rushton, *Altruism and Society: A Social Learning Theory*, 92 ETHICS 425, 437 (1982) (footnote omitted).

<sup>62</sup> But "corporate management often regards a fine imposed in a criminal prosecution as no cause for shame, merely an item of expense in the operating statement." C. REMBAR, *THE LAW OF THE LAND* 41 (1980). In the same vein, "Holmes urged that damages for breach of contract or tort were best treated as taxes on a course of conduct, and at times thought, though with some hesitation, that punishments could also be viewed this way." H.L.A. HART, *supra* note 1, at 239 n.(Page 6) (citations omitted). Hart himself struggled with these thoughts:

Consider the law not as a system of stimuli but as what might be termed a *choosing* system in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways. . . . I do not of course mean to suggest that it is a matter of indifference whether we obey the law or break it and pay the penalty. Punishment is different from a mere 'tax on a course of conduct.' What I do mean is that the conception of the law simply as goading individuals into desired courses of behavior is inadequate and misleading; what a legal system that makes liability generally depend on excusing conditions does is to guide individuals' choices as to behavior by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose.

H.L.A. HART, *supra* note 46, at 44 (emphasis in original) (The last sentence, disclaiming the "tax" view of liability, is obscure.) Rawls revealed no struggle with the "tax" view. He was emphatic: criminal punishments "are not simply a scheme of taxes and burdens designed to put a price on certain forms of conduct and in



the views other have,<sup>63</sup> internal and external effects, factors (c) and (d), are intertwined. Socially disapproved actions cause both guilt and shame, more so as they are cause celebre.<sup>64</sup> The wrong-minded person, especially the one with like-minded family and friends, may, on the contrary, have positive payoffs from malicious acts.<sup>65</sup>

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this way to guide men's conduct for mutual advantage. It would be far better if the acts proscribed by penal statutes were never done." J. RAWLS, *supra* note 39, at 314-15.

<sup>63</sup> "Indeed, it is an old argument that conceptions of the self are nothing but internalized social judgments." M. WALZER, *supra* note 59, at 272. This can be overstated, *see id.* at 272-73, but the basic argument has been empirically supported. Surveyors of one hundred fifty studies concluded that, "people's self-perceptions agree substantially with the way they perceive themselves as being viewed by others." R. GOODIN, *supra* note 49, at 84 n.7 (quoting Shrauger & Schoeneman, *Symbolic Interactionist View of Self-Concept: Through the Looking Glass Darkly*, 86 PSYCHOLOGICAL BULL. 549, 549 (1979)). Although "there is no consistent agreement between people's self-perceptions and how they are actually viewed by others," *Id.*, misperceptions may be more difficult when a clear message is delivered via a court judgment for punitive damages. Since deterrence turns on the actor's perceived costs, if the message remains unclear to him, the measure of punitive damages must be adjusted accordingly.

<sup>64</sup> Notice the regressive nature of this and other points throughout the discussion: the higher the punitive damages, the greater the guilt and shame; the greater the guilt and shame, the greater the internal and external costs; the greater the internal and external costs, the lower the punitive damages; the lower the punitive damages, the lower the guilt and shame; the lower the guilt and shame, the lower the internal and external costs; the lower the internal and external costs, the higher the punitive damages.

<sup>65</sup> *See* Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 5 (1894). To deter socially wasteful costs, "punitive damages should be computed to offset the injurer's illicit pleasure from noncompliance. . . ." Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 80 (1982) (Cooter's formula for deterrence appears *id.* at 89 n.8.). But is malicious pleasure a benefit to the actor?

The immoral person thinks he is getting away with something, he thinks his immoral behavior costs him nothing. But that is not true; he pays the cost of having a less valuable existence. He pays that penalty, though he doesn't feel it or care about it. Not all penalties are felt. R. NOZICK, *supra* note 1, at 409. Penalty or not, not being felt makes it irrelevant to deterrence, although it may be relevant to retribution. How does one deal with an unfeeling actor? "What he needs is not a philosopher but inspiration." *Id.* at 411. A swift kick by the legal system might help also. *See supra* note 34.

Returning to the feeling actor, his felt costs must be monetized accurately to achieve deterrence. This may be monumentally complicated. For example: Temporal consumption externalities can be backward or forward. I begin with the backward ones, since they are in an obvious sense more robust. Backward externalities decompose into several elements. First, there is an 'endowment effect,' i.e. the present welfare effect of having had a certain experience in the past. The effect can be negative or positive, i.e., the person might have been better off or worse off had he not had the experience. Then there is a 'contrast effect' which operates via the impact on the pleasure derived from present experiences. One superlatively good meal can devalue all later meals, with the net result of the endowment and the contrast effects being negative, even if the former by itself is positive. Conversely, the

For legal rules grounded on a policy of partial deterrence, the effects on the actor which are counted within the elements of equation (1) need additional attention. Reconsider the contract breaches which are socially desirable when efficient.<sup>66</sup> Assume a seller is in a position to breach efficiently. For example, a third party is willing to pay above fair market value for goods previously sold but undelivered. Assume also that the potential breaching party will enjoy malicious satisfaction by breaching the prior contract and that malicious breaches under the law call for punitive damages. If the court, in granting the punitive damages, adds as an item of benefit in equation (1) the amount additionally gained by the breaching party in selling the goods to the third party,  $B_d$ , along with the monetized value of the malicious satisfaction,  $B_i$ , then the potential, rational actor would be deterred from the otherwise efficient breach. All his gain is lost; he must hand over his profit from the second sale as well as the value of his internal payoff. The breach, though having some social desirability, is of no benefit to the seller and thereby will be deterred. Should efficient breaches be allowed despite malice, then a rule accommodating both policies would provide that the internal benefit,  $B_i$ , includes the monetized value of the malicious satisfaction while the direct benefit,  $B_d$ , excludes the additional profit from selling to the third party. Then the breach would not be deterred. Even though the seller must hand over some of his gain (from the internal benefit of the malicious satisfaction), he gets to keep the rest (the additional profit from the sale to the third party). Overdeterrence would not occur. On the other hand, if the policy is that efficient breaches are never permissible in the presence of malice, then the extra profit is included in calculating  $B_d$ .

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disutility of illness may be offset by the enhanced enjoyment of health it allows. Finally there is the 'opponent-process effect', i.e., the pain derived from the cessation of a pleasant experience or the pleasure derived from the cessation of a painful one.

Elster, *Weakness of Will and the Free-rider Problem*, 1 *ECON. & PHIL.* 231, 236-37 (1985) (footnotes omitted). Elster goes on to describe forward externalities.

<sup>66</sup> Ellis believes the punitive damages will promote efficiency, that is, deter inefficient acts, in three instances:

(1) when the *ex ante* probability of [the actor] being held liable for the loss is less than the actual probability of the harm; (2) when the compensatory damages for which [the actor] is held liable are less than the actual amount of the loss; and (3) when the subjective cost of avoidance (the cost as [the actor] appraises it) is greater than the cost recognized by the law [that is, when the actor obtains, say, internal benefits that are not offset by actual damages].

Ellis, *supra* note 4, at 25. See also Speidel, *The Borderland of Contract*, 10 *N. KY. L. REV.* 163, 191-93 (1983) (including the factor of "the unethical or outrageous character of the breacher's conduct"). Owen, on the other hand, would not limit the brief for efficiency to Ellis' categories, and, moreover, counters with the observation that these three instances encompass all, or nearly all, cases, whether or not they fall within the reach of punitive damages. Owen, *supra* note 34, at 112-14. For support of Owen's counter regarding the first instance, see Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 *VAND. L. REV.* 1281, 1295-98 (1980).

Summarizing the analysis of deterrence, the rational choice of whether to commit a proscribed act involves a complicated appraisal. The costs and benefits have many sources with various likelihoods. Potential in-pocket monetary gains are perhaps of primary interest to the actor, but he cannot disregard the downside of his act. He must consider whether the victim will fight back, a private third party or a government official will respond, family and friends will think ill of him, business goodwill is in jeopardy, the act will gnaw at his conscience, his future behavior will be affected, or so on. Each element must be costed and discounted by the probability. Once costs outweigh benefits, the rational actor will refrain from the proscribed act.<sup>67</sup> In principle, the determinations are intricate. In practice, the intricacies multiply.<sup>68</sup>

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<sup>67</sup> Even a loss of \$0.01 would deter the rational actor, *ex hypothesis*. For the actor somewhat less than fully rational, but sufficiently rational (and willful) to respond to economic penalties, a net loss of \$0.01 would still be adequate as long as that loss is measured from his vantage point rather than that of the ideal actor. The equation could be adjusted to set the loss to a large sum instead. Although unnecessary to deter specially the actor, there may be a utilitarian need to use him as an example to deter generally the deficiently informed public. *See infra* note 274. He knew that the act was proscribed and therefore has no grounds for a deontological objection since he "consented" to the punishment when he went ahead anyway. *See infra* note 208. Yet, "[a]warding excessive damages . . . may undesirably discourage appropriate conduct that nevertheless lies near the borderline (especially if the actor is worried about inaccurate fact-finding). Additionally, it brings about a seemingly pointless transfer of wealth." Schwartz, *supra* note 48, at 135 n.9. Furthermore, excessively harsh punishments:

[S]eem to be counterproductive: 'Seeing inequitable punishment may free incensed observers from self-censure of their own actions, rather than prompting compliance, and thus increase transgressive behavior.' . . . 'If the society considers a penalty as unjustly harsh, its application . . . brings sympathy and friendliness for the offender.' These feelings may easily become, owing to an association of images, 'extended to the prohibited acts themselves; which undermines disgust for crime and, sometimes, even results in glorifying the criminal and in favoring harmful behavior.' At the same time, by generating resentment in the society, excessively harsh punishments 'undermine the legitimacy' of the punishing agents — respect for and trust in them — and thus further erode the persuasive power of criminal justice.

J. GORECKI, *supra* note 41, at 25 (footnotes omitted). These and additional reasons are summarized in D. PYLE, *supra* note 41, at 108-09. *See also supra* note 41. For humanitarian arguments, see J. BENTHAM, *supra* note 50, at 158 ("But all punishment is mischief: A punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only be admitted in as far as it promises to exclude some greater evil."); N. MORRIS, *THE FUTURE OF IMPRISONMENT* 59-80 (1974); N. WALKER, *supra* note 33, at 4-5. *See also* H.L.A. HART, *supra* note 1, at 24-25; but see Quinn, *The Right to Threaten and the Right to Punish*, 14 PHIL. & PUB. AFF. 327, 346-48 (1985).

<sup>68</sup> The mere fact that the actor undertakes this cost-benefit analysis may be disconcerting to the onlooker. As commentators stated:

Commissioning analyses is not the same as using them. Both bureaucrats and politicians may be reluctant to publicly endorse the painful, callous-sounding balancing of risks and benefits that these

### B. Retribution

The second principal purpose of punitive damages is retribution. The exact meaning of retribution is obviously crucial to any analysis.<sup>69</sup> Commentators on punitive damages, when developing this notion, usually look to the criminal law literature for guidance.<sup>70</sup>

Herbert Packer points out the two main versions of retribution: the revenge theory and the expiation theory. "Revenge means that the criminal is paid back; expiation means that he pays back."<sup>71</sup> Although commentators

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techniques use. In a sense, analysis itself was under attack in the recent trial in which Ford Motor Company was charged with reckless homicide based on its alleged decision to manufacture Pintos with a fuel-tank design known to increase risks in the event of rear-end collisions. People seemed shocked that Ford had used analysis to make explicit tradeoffs between costs and lives.

B. FISCHHOFF, S. LICHTENSTEIN, P. SLOVIC, S. DERBY & R. KEENEY, ACCEPTABLE RISK 118 (1981). This isn't the end of the difficulty: "The Pinto case suggests another problem: Manufacturers may be penalized for keeping good records, thereby making it more desirable to seem or remain ignorant of their products' risks. There should be incentives for collecting data and making conscious decisions, and disincentives for incomplete or fraudulent records." *Id.* at 152. See also Ausness, *supra* note 39, at 88-92.

<sup>69</sup> Providing an exact meaning is no mean task. "The retributive theory of punishment is very difficult to state accurately. Indeed, I shall be concerned to argue that it is impossible to state it coherently . . ." A. KENNY, *supra* note 35, at 69.

<sup>70</sup> See J. GHIARDI & J. KIRCHER, *supra* note 3, § 2.07. Some commentators doubt that retribution is a legitimate function of the private law. See, e.g., W. PROSSER & W. KEETON, *supra* note 19, § 2, at 9 (punitive damages are "anomalous"); J. DUFFY, *supra* note 13, at § 7.6(A); but see *Kink v. Combs*, 28 Wis. 2d 65, 80-81, 135 N.W.2d 789 (1965).

<sup>71</sup> H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 38 (1968). See also Reiman, *supra* note 38, at 119 ("Retributivism — as a word itself suggests — is the doctrine that the offender should be paid back with suffering he deserves because of the evil he has done, and the *lex talionis* asserts that the injury equivalent to that he imposed is what the offender deserves."). Fletcher objects to Packer's language: "Retribution simply means that punishment is justified by virtue of its relationship to the offense that has been committed. It is obviously not to be identified with vengeance or revenge, any more than love is to be identified with lust." G. FLETCHER, *supra* note 33, at 416-17. Nozick also distinguished revenge from retribution. See R. NOZICK, *supra* note 1, at 366-68; see also Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1508-11 (1974) ("retaliation" v. "retribution") [hereinafter Schulhofer]. Nevertheless, "the border between retribution and revenge is blurred . . ." J. GORECKI, *supra* note 41, at 74.

Packer's second emphasis appears in Walker's work: "In its unsophisticated form penal retributivism asserts . . . that the penal system should be designed to ensure that offenders atone by suffering for their offences." N. WALKER, *supra* note 33, at 5 (emphasis deleted). There is no general uniformity among commentators on the labels for these two versions. The term "reciprocity" has been used by some for the idea here distinguished as "desert". The underlying ideas may even be differently aggregated. See, e.g., R. POSNER, THE ECONOMICS OF JUSTICE 207-08 (1981) [hereinafter R. POSNER, ECONOMICS]; Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 71-72 (1980) [hereinafter Posner, *Retribution*]; Quinton, *On Punishment*, in PHILOSOPHY, POLITICS AND SOCIETY 83, 84 (P. Laslett 1st series 1963).

emphasize variations on these themes,<sup>72</sup> these historic versions generally capture the essential features.

The two predominate orientations of retribution are Janus-faced. One evens the score from the victim's or society's perspective and the other from the actor's. However, the standard by which the actor is paid back or pays back, or what is meant by making the score even, remains questionable. Inferences may be drawn, nonetheless. Reciprocity (revenge) means that the victim or society imposes upon the actor in proportion to what he or it lost.<sup>73</sup> Just desert (expiation) means that the actor pays back as he deserves, in proportion to the wickedness or unworthiness of his act.

Another way of expressing this idea, although not entirely consistent with the above, may clarify the concerns of most commentators on retribution. It is the "important distinction that Aristotle was the first to treat with great subtlety: that between the just or unjust *quality* of an act and the just or unjust *effect* of an act on others."<sup>74</sup> What here is called reciprocity focuses on the effect, desert focuses on the quality. Commentators differ as to the relative importance of the two orientations or variations thereon.<sup>75</sup> The distinctions are often unclear or the orientations are treated as interdependent.<sup>76</sup> The conclusions that might be drawn when considering

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<sup>72</sup> See, e.g., T. HONDERICH, *supra* note 1, at 15-22; N. WALKER, *supra* note 33, at 5-19; Haksar, *Excuses and Voluntary Conduct*, 96 ETHICS 317, 318 (1986).

<sup>73</sup> The revenge aspect of punitive damages has been defended as a means of deterring self-help by the victim. See, e.g., *Grey v. Grant*, 95 Eng. Rep. 794 (C.P. 1764) (duelling); *Scott v. Plante*, 641 F.2d 117, 135 (3d Cir. 1981), *vacated and remanded on other grounds*, 458 U.S. 1101 (1982). Tort damages generally are said to have this as a purpose. See RESTATEMENT (SECOND) OF TORTS § 901 (1977). Capital punishment has been justified as a means of avoiding the sowing "of the seeds of anarchy — of self-help, vigilante justice, and lynch law." *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

<sup>74</sup> Feinberg, *Introduction*, in JUSTICE: SELECTED READINGS 2, 6 (J. Feinberg & H. Gross eds. 1977) (emphasis in original). In a similar vein, Bedau specified the "two basic retributive principles: (1) the severity of the punishment must be proportional to the gravity of the offense, and (2) the gravity of the offense must be a function of fault in the offender and harm caused the victim." Bedau, *Classification-Based Sentencing: Some Conceptual and Ethical Problems*, in CRIMINAL JUSTICE 89, 102 (J. Pennock & J. Chapman eds. 1985) (footnote omitted).

<sup>75</sup> "Shall we proportion the degree of suffering [for punishment] . . . to the injury sustained by the community, or to the quantity of ill intention conceived by the offender? Some philosophers, sensible of the inscrutability of intention, have declared in favour of our attending to nothing but the injury sustained." W. GODWIN, ENQUIRY CONCERNING POLITICAL JUSTICE 253 (K. Carter ed. 1971) (1st ed. n.p. 1793) (quoting Beccaria). Notice that Godwin, contrary to Bedau, *supra* note 74, at 102, forwards as the focus in reciprocity the injury to the community rather than the victim alone. This is developed below as the broad conception of reciprocity. See also N. WALKER, *supra* note 33, at 8; Davis, *Harm and Retribution*, 15 PHIL. & PUB. AFF. 236, 238-41 (1986).

<sup>76</sup> Fletcher, for instance, states that "[t]he components of desert are wrongdoing (which [has been called] 'harm') and culpability." G. FLETCHER, *supra* note 33, at 461. This article concentrates on the component of wrongdoing or harm in discussing retributive reciprocity, culpability (attribution) in discussing retributive desert. Fletcher provides little room in his taxonomy for a theory of punishment aimed

the measure of punitive damages require separate analysis of reciprocity and desert.

The symmetry of these two orientations of retribution is imperfect. Equations (3) and (4) represent them.

$$(3) C_A = FR(c_v, c_V, C_s, \text{ or } C_S) \text{ [reciprocity]}$$

$$(4) C_A = F_J(W_a \text{ or } W_A) \quad \text{[desert]}$$

#### Table of Symbols B-1

$C_A$  = Cost to actor (at the time of the judgment,  $t_j$ )

$C_s$  = Social cost (at the time of the act,  $t_a$ )

$C_S$  = Social cost (at  $t_j$ )

$c_v$  = Cost to victim (at  $t_a$ )

$c_V$  = Cost to victim (at  $t_j$ )

$F_J$  = Functional relationship for desert

$FR$  = Functional relationship for reciprocity

$W_a$  = Wickedness of the proscribed act (at  $t_a$ )

$W_A$  = Wickedness of the proscribed act (at  $t_j$ )

Each equation consists of three elements with variations which turn on the time at which the element is measured. In equation (3), reciprocity, two elements are the costs of the act from the perspectives of the actor and the victim or society, and the third is the functional relationship between them. In equation (4), just desert, a new type of element appears. This element is the normative quality of the act, wickedness,  $W_a$  or  $W_A$ . A much closer examination and elaboration is needed, one equation at a time.

As a preliminary matter, the question of timing is addressed. The model equations are encumbered with symbols representing costs at both the time of the act,  $t_a$ , and the time of the judgment,  $t_j$ . Both retributive reciprocity and retributive desert embody the idea that the actor must pay because

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exclusively at reciprocity. *See id.* at 415-18; *see also* Bedau, *supra* note 74. Fletcher observes that, though "the distinction between wrongdoing and attribution (culpability) . . . is of critical importance to the criminal law, it is virtually ignored in Anglo-American and French jurisprudence." G. FLETCHER, *supra* note 33, at 466.

The problems regarding penal theory may be worse than merely a product of differing views and confused thinking. As Hart stated:

A cloud of doubt has settled over the keystone of 'retributive' theory. Its advocates can no longer speak with the old confidence that statements of the form 'This man who has broken the law could have kept it' had a univocal or agreed meaning; or where skepticism does not attach to the *meaning* of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this form is true from those where it is not.

H.L.A. HART, *supra* note 1, at 1 (emphasis in original) (citing B. WOOTTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY (1959)).

his act is socially unacceptable. Simply causing the victim a loss, however, without violating a legally protected right, is not necessarily a socially unacceptable act. The rather benign notion of corrective justice,<sup>77</sup> the goal of "loss spreading",<sup>78</sup> or the resource allocation policy favoring cost internalization<sup>79</sup> may be sufficient justifications, among others,<sup>80</sup> for an obligation on the actor to compensate the victim even when the actor has done nothing "blameworthy". However, when the notion of retribution is invoked, blameworthiness is connoted. Blameworthiness, in turn, suggests a socially unacceptable decision to act.<sup>81</sup> If at the time the actor made the decision, he did not and could not know that the victim would be harmed, the act hardly seems blameworthy. Hence, the time of the act,  $t_a$ , is critical. On the other hand, if the actor's blameworthy decision to act eventuates in a harm to the victim greater than could be reasonably expected at  $t_a$ , to rule that the innocent victim must absorb the additional loss also seems unfair. Though the actor is not *that* blameworthy, the victim is not in the least blameworthy. This hypothetical immediately implies that *whether* the actor deserves retributive punishment depends upon the nature of the act at  $t_a$ , but *how much* punishment he deserves depends upon the consequences at  $t_j$ . Other hypotheticals, unfortunately, suggest greater complications. Before presenting the perplexities, all eight permutations of retribution must be developed.

<sup>77</sup> See *infra* note 137.

<sup>78</sup> "The justification found most often among legal writers today for allocation of accident losses on a nonfault basis is that accident losses will be least burdensome if they are spread broadly among people and over time." G. CALABRESI, *THE COSTS OF ACCIDENTS* 39 (1970).

<sup>79</sup> See, e.g., G. CALABRESI, *supra* note 78, at 68-94. Calabresi called this "general, or market, deterrence." *Id.* at 69. "[T]he economist's objective is . . . simply to assure that any prospective criminal internalizes the full social cost of his activity." Posner, *Retribution*, *supra* note 71, at 74.

<sup>80</sup> As Calabresi stated:

A variant of the notion that secondary losses of accidents can be reduced by spreading them broadly is the deep pocket notion. This holds that secondary losses can be reduced most by placing them on the categories of people least likely to suffer substantial social or economic dislocations as a result of bearing them, usually thought to be the wealthy.

G. CALABRESI, *supra* note 78, at 40. Also: "Adam Smith rightly thought that a person who accidentally and without any negligence causes the death of another is peculiar, that is, he needs to make amends." Haksar, *supra* note 72, at 322.

<sup>81</sup> Haksar disagreed:

The retributive theory attempts to be fair and just to the individual being punished. There are different versions of it, the simplest being an eye for an eye, a tooth for a tooth. This version does not deal with intentions. As long as an individual has inflicted harm, a corresponding evil will be inflicted on him. Hence under this version, animals and even inanimate objects were punished. In ancient Greece if a stone injured someone, they sentenced it to banishment, throwing it across the city's borders!

Haksar, *supra* note 72, at 318. The law of punitive damages certainly rejects this version.

Some of the observations on the notions of retribution will strike the reader as peculiar. The nature of the enterprise, namely, understanding the aims of punishment, must be kept in mind. Equations (3) and (4) represent the distant goals of retribution. The inquiry attempts to approach the goals by taking them at face value and examining them under a microscope. The lesson is that retribution cannot withstand close scrutiny. Not only does the theory of retribution fail to lead to unequivocal principles, but also it fails in practice, as in deterrence, since the factfinder is called upon to perform an impossible task. By the end there should be no doubt that the notions of punishment are unavoidably crude instruments indeed. Perhaps punitive damages, to say nothing of punishment generally, should be abolished. But this conclusion is premature. Meanwhile, caveat reader.

### 1. Reciprocity

The biblical mandate of an eye-for-an-eye, *lex talionis*, entails reciprocity.<sup>82</sup> If the victim dies, the actor must die. The injury to the victim or society does not always correspond easily. The reciprocation for blackmail or defamation is not self-evident. Many advocate pain or distress as the common denominator.<sup>83</sup> The pain inflicted on the actor must relate to the pain of the victim or society. Under a modern view, pain is measured, especially in the context of punitive damages, by the ultimate common denominator — monetized costs.<sup>84</sup>

Equation (3) represents two conceptions of reciprocity, with variations. The primary authorities and commentators support both. Under the narrow conception, either the actor's costs upon judgment must correspond to the costs imposed on the victim,  $c_v$  or  $c_V$ . Under the broad conception, the actor's costs must correspond to the costs imposed on society in general,  $C_S$  or  $C\mathcal{S}$ .<sup>85</sup> The symbol  $C_S$  or  $C\mathcal{S}$  is italicized to indicate that the relevant viewpoint under this broad conception is society's rather than one of the private party's. Perhaps private reciprocity looks to the victim's costs

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<sup>82</sup> The classical Greeks had the same idea. See H. Kelsen, *Causality and Retribution*, in *WHAT IS JUSTICE?* 303, 306-07 (1957). Not all Greeks agreed with it. See PLATO, *supra* note 8 (deterrence only). Kant agreed with the idea of reciprocity. See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100-01 (J. Ladd trans. 1965) (1st ed. Konigsberg 1797); see also Scheid, *Kant's Retributivism*, 93 *ETHICS* 262 (1983); but see Hampton, *The Moral Education Theory of Punishment*, 13 *PHIL. & PUB. AFF.* 208, 211 n.6 (1984) (Kant's justification of law has a "deterrent flavor"). Perhaps all societies generally subscribe to the precept. See E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 89-90 (G. Simpson trans. 1933). At least, all primitive societies. See generally P. BOHANNAN, *LAW AND WARFARE* (1967); E.A. HOEBEL, *THE LAW OF PRIMITIVE MAN* (1954). If the latter only, is American society regressing?

<sup>83</sup> See, e.g., Quinton, *supra* note 71, at 85 (equal injury).

<sup>84</sup> See R. POSNER, *supra* note 15, § 6.14.

<sup>85</sup> For the sake of simplicity, the term "societal" cost, benefit or loss is used when referring to the broad and narrow conceptions of retribution together.



whereas public reciprocity looks to society's.<sup>86</sup> Punitive damages seem to be a hybrid between the private and public viewpoints, therefore both conceptions are analyzed. In light of this, the elements of equation (3) are examined.

a. *Cost to victim,  $c_V$  or  $c_V$ .* The narrow conception of reciprocity is concerned with the cost to the victim of the actor's proscribed act as appraised either at the time of the act,  $c_V$ , or the time of the judgment,  $c_V$ . Thus:

$$(3A) C_A = FR(c_V \text{ or } c_V)$$

The victim's cost includes many items in addition to his out-of-pocket losses. The sources are varied but can be conveniently encapsulated by formulas similar to equation (1). The equation for the second variation, in which costs are measured at the time of the judgment,  $t_j$ , with simplifications and appropriate modifications, is:

$$(5A) c_V = f_D - f_S + f_E + f_I$$

#### Table of Symbols B-2A

$c_V$	=	Cost to victim
$f_D$	=	Direct monetary cost
$f_E$	=	External cost
$f_I$	=	Internal cost
$f_S$	=	Sanction benefit

The elements of equation (5A) and equation (1) are the same except for four variations. First, the amount and probabilities of the particular cost or benefit are suppressed to make the equation more manageable.<sup>87</sup> Second, costs and benefits are interchanged to reflect a supposition about the standard case. Third, whereas in equation (1) the elements are symbolized by capital letters, in equation (5A) they are lower case letters. This

<sup>86</sup> Punitive damages have been held to vindicate private wrongs (torts), whereas criminal sanctions vindicate public wrongs. *See, e.g., Elliott v. Van Buren*, 33 Mich. 49 (1875); *Morris v. MacNab*, 25 N.J. 271, 135 A.2d 657 (1957). The analysis which follows, including statements by other courts, *infra* note 166, casts doubts upon this dichotomy. *See also, e.g., MINN. STAT. ANN. § 549.20* (West 1984) (quoted *infra* note 238). Criminal retribution also may turn on either individual or social harm: "There are, I think, at least two forms of this 'loss-based' approach [to criminal retribution]. One kind would emphasize the harm done to individuals; the other, the loss of social discipline or security." Davis, *Why Attempts Deserve Less Punishment than Complete Crimes*, 5 LAW & PHIL. 1, 6-7 (1986) (footnote omitted). *See also supra* notes 74 & 75. The overlap between public and private law was rejected by Blackstone but recognized by Austin. *See Walther & Plein, Punitive Damages: A Critical Analysis: Kink v. Combs*, 49 MARQ. L. REV. 369, 383-84 (1965) (with citations).

<sup>87</sup> Thus, as in equation (1), the full elaboration of each factor is, for example:  $f_S = f_S(p_C, p_T, b_R, b_N)$ . Though hereinafter suppressed, the elements of costs and probabilities remain and will be discussed when relevant.

is a primary difference between the equations. Equation (1), which models deterrence, is actor-regarding with costs measured from the actor's perspective. Equation (5A) is victim-regarding. Although the equations similarly divide up the universe of costs, the correlation between them is not one-to-one. A fourth difference is symbolized in this variation of the narrow conception of reciprocity when the small subscripts of equation (1) become capital subscripts in equation (5A). The elements of equation (1) are costed at the time of the proscribed act,  $t_a$ . In this variation of equation (5A) they are costed at the time of judgment,  $t_j$ .<sup>88</sup> Since many of the original uncertainties will change during the interim, the measurements differ sufficiently to raise additional considerations. A complete analysis would include a representation by an equation of the first variation of the narrow conception of reciprocity which would be identical to equation (5A) except that the capital subscripts would be small, as in equation (1), to represent the costing at  $t_a$ .

Much of the general explication of equation (1) is incorporated herein by reference, *mutatis mutandis*. A few more points will further clarify the equation.

The first factor in the represented variation of the narrow conception,  $f_D$ , is the victim's direct monetary cost. The (suppressed) retention in this factor of element  $P_D$ , the probability of the costs, may seem superfluous. The costing at the time of judgment,  $t_j$ , intimates that the victim has been injured, the actor has been found liable, and the only question remaining is the amount the actor pays;  $P_D$  must equal one. Yet, there are other possible scenarios. The victim's costs may be incurred in the future, as where the victim is experiencing ongoing injury to business. Speculation on these costs must include an element of probability.

The second factor,  $f_S$  (or  $f_s$ ), is the benefit to the victim from the counteraction by himself and third parties. The benefit to the victim from the damage remedy,  $b_R$  (or  $b_r$ ), as in equation (2), equals actual damages plus punitive damages,  $d_A + d_P$  (or,  $d_a + d_p$ ). The victim's benefits flow most often from his own damage action. He will sometimes share in a class action recovery instituted by a third party. The benefit may result from nondamage actions brought by the victim or third parties.<sup>89</sup>

A court will ultimately rely upon the measure of punitive damages to fine tune retributive reciprocity. Contrary to the calculation of deterrence, in determining this measure the factfinder must keep in mind that the victim's perspective controls for the purpose of reciprocity. That the actor believes he will not injure the victim is small consolation to the victim who, under *lex talionis*, demands the actor pay back in proportion to his

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<sup>88</sup> This notational convention is retained in the later equations.

<sup>89</sup> A third party, either private or governmental, may seek criminal penalties or injunctive relief from a court or administrative tribunal. Depending upon the relief granted, the victim may benefit, especially when the relief is affirmative.

actual harm.<sup>90</sup>

The third factor,  $f_E$  (or  $f_e$ ), is the external cost of the victim in terms of reputation, goodwill, etc. Both costs and benefits ensue. For the fraud victim, some onlookers will feel disdain and antipathy for one so foolish. Others will feel compassion and sympathy. Possible responses are wide-ranging. The dynamics of the interaction between actor and victim come into play. When the victim begins to counteract, rather than passively swallowing his injury, the attitude and number of onlookers change as publicity increases. During the ebb and flow of the dispute between the parties, the responses of informed onlookers fluctuate. Finally, should the victim vindicate his claim with a resounding award of punitive damages, reactions such as admiration or envy accrue to his additional benefit or cost. Those onlookers who support the actor respond very differently. The external costs and benefits may continue to accrue long after the interaction is complete. The permutations interrelate with the other factors as well.

The fourth factor,  $f_I$  (or  $f_i$ ), is the victim's internal cost. Whereas conscience pangs previously were advanced as a prime component for the actor, many other emotions are possible for the victim. Along with guilt and shame one might also expect indignation, anger, sadness, fury, disappointment, exasperation, and so forth. Less wholesome responses include the victim's feeling that he deserved what he got, that the actor is worthy of respect for his powerful high-handedness or masochistic pleasure.<sup>91</sup> The dynamics of the counteraction also elicit many emotions from the terror of the trial to the glow of collecting a large award. The social responses within the third factor, external cost,  $f_E$  (or  $f_e$ ), interrelate with the internal reaction encompassed by the fourth factor. Depending upon the circumstances, the bottom line for the victim may be a debit or credit.

Notice the relationship between the idea of the cost to the victim,  $c_V$  (or  $c_v$ ), and the theories of actual damages in tort or contract. If the victim's loss is one that ought to be absorbed by the actor, irrespective of the actor's malefides, shouldn't the victim be made whole, but not more than whole, as conceptualized by  $c_V$  (or  $c_v$ )?<sup>92</sup> The legal principles surrounding the recovery of actual damages, however, do not conform to equation (5A). The discussion above raises one source of the divergence. Actual damages exclude the prospect of the victim's benefit from later actions by third parties. In this respect, the victim may be overcompensated. Other sources of divergence will lead to undercompensation. Many of the victim's costs are usually unrecoverable. The courts may ignore them because of myopia

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<sup>90</sup> The probabilities,  $p_C$  and  $p_T$  (or,  $p_c$  and  $p_t$ ), are left (suppressed) in factor (b), as  $p_D$  (or  $p_d$ ) is left (suppressed) in factor (a), to account for later counteractions by the victim and third parties. The victim who recovers in a damage action might still obtain benefits from, say, a future governmental proceeding.

<sup>91</sup> See *infra* note 104 and accompanying text.

<sup>92</sup> See R. Nozick, *supra* note 1, at 363.

(e.g., attorney's fees and opportunity costs), the difficulties of costing mental states (e.g., pain and suffering, and harm to reputation and, perhaps, dignity), or secondary effects (e.g., admissibility of inflammatory or easily manufactured evidence). For whatever reasons, doubtlessly only the rare victim feels totally "whole" after a judgment in his favor for actual damages alone. Nevertheless, to simplify the discussion, the victim's costs are equated to actual damages, either as actually occur at  $t_j$ , or as are rationally anticipated at  $t_a$ .

*b. Social cost,  $C_S$ .* Under the second, broad conception of reciprocity, attention turns to the wider impacts of the proscribed act beyond those on the victim alone. This idea of reciprocity is not merely victim-regarding but also society-regarding.<sup>93</sup> Thus:

$$(3B) C_A = F_R(C_S \text{ or } C_S)$$

Social cost,  $C_S$  or  $C_S$ , can be further expanded. To simplify the expansion and the discussion, only the second variation in which costing is done at  $t_j$  is represented:

$$(5B) C_S = F_D + F_S + F_E + F_I$$

#### Table of Symbols B-2B

$C_S$	= Social cost
$F_D$	= Direct economic social cost
$F_E$	= External social cost
$F_I$	= Internal social cost
$F_S$	= Sanction social cost

<sup>93</sup> As Reiman stated:

Note also that the harm caused by an offender, for which he is to be paid back, is not necessarily limited to the harm done to his immediate victim. It may include as well the suffering of the victim's relatives or the fear produced in the general populace and the like.

Reiman, *supra* note 38, at 119 n.8. See also G. FLETCHER, *supra* note 33, at 101.

Kenny considers both the narrow and broad conceptions of reciprocity, and then rejects them both by unpacking the metaphor that "the criminal is regarded as contracting by his crime a debt which is paid off when he is punished." A. KENNY, *supra* note 35, at 72.

A debt may be remitted just as a crime may be forgiven. None the less there are other difficulties peculiar to this metaphor. It is by no means clear to whom the debt is due. One would expect the offender's debt to be to the person whom he has injured. But if A has assaulted B he cannot avoid sentence on the ground that B has forgiven him for his attack. Should we say then that the debt is owed to society? But in what way does society profit from the suffering of one of its members, unless that suffering is either deterrent or remedial? . . . The essential element in punishment, according to such a theory, is the harming of the criminal . . . as an end in itself, and not as a means to deter or correct. But to seek the harm of another as an end in itself is the paradigm case of an unjust action. Retribution of this kind . . . would increase, instead of diminishing, the amount of injustice in the world.

*Id.* at 72-73. Contrary to Kenny's point, the invasion giving rise to punitive damages may be forgiven by the victim.

Although this conception is concerned with the cost to society,  $C_S$  or  $C_S$ , a close look at the costs to the actor and the victim is required. They are members of society. The consequences of the proscribed act normally center on the victim and actor, rippling outward with diminishing impact on family, friends, onlookers and an uninformed society. Still, the costing is most plausibly done from a social viewpoint. The appraisals again need not conform to the actor's, victim's or other parties' self-perceptions, although a case can be made for costing consequences from the perspective of the persons absorbing them. The broad conception of reciprocity goes much beyond this by insisting that the negative impact which warrants extraordinary damages need not be felt by the victim. Where, for example, the act is motivated by *in terrorem* effects on third parties, a societal loss occurs even when the victim ducks the actor's strike.<sup>94</sup> The inclusion of third party effects not felt by the victim is the primary distinction between the broad narrow conceptions.

When the proscribed act does not lead to a net social loss, but only to a wealth transfer from the victim to the actor, punitive damages, as implied above, are inappropriate. The victim may suffer a loss, but society does not. The usual breach of contract is paradigmatic. By breaching, the actor intends to avoid a loss or capture a gain at the victim's roughly equal expense.<sup>95</sup> For example, by breaching a contract in order to sell the goods at a higher price to a third party, the actor hopes to gain an additional profit as a result of which the opportunity is lost by the victim himself to obtain the gain by selling to the third party. Wealth is effectively transferred from the victim to the actor, but the victim does not lose more than the actor gains, nor are basic social values disregarded. In the view

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<sup>94</sup> Another example is where a manufacturer deliberately puts or keeps in the market a product known to have a latent defect that is life threatening. The manufacturer may believe it cheaper "to pay compensatory damages . . . than it would be to remedy the product's defect." *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 47 (Alaska 1979), *modified*, 615 P.2d 621 (Alaska 1980), *remanded*, 627 P.2d 204 (Alaska 1981), *cert. denied*, 454 U.S. 894 (1981). See Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 27 (1982). Society is harmed, even without a physical injury, because of the knowing undermining of security. The risk of harm, if sufficiently high, is itself a harm, whether or not the risk eventuates. See R. NOZICK, *ANARCHY, STATE AND UTOPIA* 74-75 (1974); J. FISHKIN, *TYRANNY AND LEGITIMACY* 51 (1979); H. GROSS, *A THEORY OF CRIMINAL JUSTICE* 433-34 (1979); J.J. THOMSON, *Some Questions about Government Regulation of Behavior*, in *RIGHTS, RESTITUTION, AND RISK* 154 (1986); J.J. THOMSON, *Imposing Risks*, in *id.* at 173; Schulhofer, *supra* note 71, at 1506 ("upsets the social equilibrium, giving rise to a certain tension or disorder"). Aid in pinpointing this idea of "security loss" comes from Fletcher who writes that by thinking of the concept of risk in abstract terms, "apart from the conduct itself," it may be reified and better evaluated. "This process of reification leads us to think of risks as a type of harm." G. FLETCHER, *supra* note 33, at 484. For interesting analyses of punishment that may be criticized for failure to accommodate this notion, see Quinn, *supra* note 67, at 347-49; Davis, *supra* note 75.

<sup>95</sup> The social loss from transaction costs is ignored.

of everyday mores, no significant societal loss centering on the victim results.<sup>96</sup> Breaches of contract alone do not give rise to punitive damages.<sup>97</sup> Malicious breaches of contract, on the contrary, do.<sup>98</sup> The malice harms both the victim and society.<sup>99</sup> The costing is done from a social viewpoint and need not conform to the victim's (or actor's) own appraisals.<sup>100</sup>

Society appraises the effects of the act on the actor and his supporters, in addition to the effects on the victim and his sympathizers.<sup>101</sup> The actor's

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<sup>96</sup> The possibility that the victim values the goods above his purchase price is overlooked.

Notice that the measure of the narrow conception of societal loss,  $c_v$  or  $c_V$ , depending upon circumstances, may be smaller or greater than the measure of the broad conception,  $C_S$  or  $C_S$ .

<sup>97</sup> See *supra* note 20.

<sup>98</sup> See J. GHIARDI & J. KIRCHER, *supra* note 3, § 5.16; K. REDDEN, *supra* note 3, § 4.3.

<sup>99</sup> As Owen stated:

Punishable misconduct—conduct that is very wrong—often appears to me to involve a form of theft. The object of the theft may take any form of value, such as wealth, bodily security, or mental security—including happiness and its underlying values such as privacy, reputation, freedom of choice and locomotion, and other such intangibles. The diminution in these values may be said to result from 'theft' when the actor knows before his choice to act or not to act that the losses which are likely to result to others will most likely exceed the benefits likely to be achieved.

Owen, *supra* note 34, at 109-10. The actor's malicious satisfaction is not counted, of course, as a benefit when deciding whether the losses to others exceed the benefits.

<sup>100</sup> As MacCormick stated:

When a person suffers harm that he resents, as the result of the act of another person, and when the impartial spectator can enter into and fully share in the ensuing resentment in degree and kind, or rather, to the extent that the impartial spectator can enter into that resentment, we may say that the harm-causing act was an injury. From the impartial spectator's point of view, an appropriate act of retaliation is then justified, and indeed constitutes a just punishment for the injury. Thence we derive our basic notion of injury, and our notion of justice and the punishment or other correction of injuries.

N. MACCORMICK, *Law and Economics: Adam Smith's Analysis*, in LEGAL RIGHT AND SOCIAL DEMOCRACY 103, 108 (1982).

<sup>101</sup> Posner makes a similar point when he considers "whether the utility that a thief obtains from theft should be taken into account in the design of an efficient system of penalties." R. POSNER, *Economics*, *supra* note 71, at 66-67 (footnote omitted). He concludes that the answer is "no" in the usual situation but "yes" in special ones, as where the thief is a starving person lost in the woods who breaks into a cabin to take necessary sustenance. *Id.* See also Wittman, *Punishment as Retribution*, 4 THEORY & DECISION 209, 236 n.16 (1974). Society decides when the situation is special. See also J. FEINBERG, *Voluntary Euthanasia and the Inalienable Right to Life*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 221, 229-30 (1980) (same hypothetical). For arguments against allowing individual actors to make these society-weighted evaluations at  $t_a$ , see Fletcher, *The Separation of Powers: A Critique of Some Utilitarian Justifications*, in CONSTITUTIONALISM 299, 318-21 (J. Pennock & J. Chapman eds. 1979). But see Lewis, *Comments on George P. Fletcher's "The Separation of Powers: A Critique of Some Utilitarian Justifications,"* in *id.* at

internal, psychological payoff with respect to the proscribed act,  $F_1$ , is critical to societal loss. Society loses when the actor injures the victim and then "dances on his grave." Society may lose more when the actor invites his like-minded friends to join the dance. His benefit from their psychological payoff ought to be ignored, or count as a negative. The malicious satisfaction of others ought to be ignored as well, or tallied on the debit side, regardless of the effect on the actor. For that matter, though the actor may be indifferent to his malicious act, and have no friends who enjoy it, there still is a societal loss from the malice.<sup>102</sup> For this reason alone, a more fecund, robust model of reciprocity must look beyond the actor's internal state and the social impact on the victim and include the wider impacts on society,  $C_s$  or  $C_S$ .

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325, 330-31. Tullock asserts a view which is not as refined as those above: Almost anyone interested in designing an efficient legal system would argue that the punishment should be calculated by a function that takes into account both the benefit the criminal gets out of the crime and the likelihood that he or she in fact will be punished. On occasion I have had discussions with people with strong ethical feelings in this area who argue that this is simply wrong. They claim that the grievousness of crime is the only thing that should be considered and this should be measured by the injury inflicted on *society*, not by the benefit to the criminal and certainly not by the probability that he or she will be caught.

Tullock, *Two Kinds of Legal Efficiency*, 8 HOFSTRA L. REV. 659, 662 n.9 (1980) (emphasis added).

<sup>102</sup> Williams described different types of malevolence:

Counterethical motivations, a significant human phenomenon, come in various forms, shaped by their positive counterparts in the ethical. Malevolence, the most familiar motive of this kind, is often associated with the agent's pleasure, and that is usually believed to be its natural state; but there exists pure and selfless malevolence as well, a malice transcending even the agent's need to be around to enjoy the harm that it wills. It differs from counterjustice, a whimsical delight in unfairness. That is heavily parasitic on its ethical counterpart, in the sense that a careful determination of the just is needed first, to give it direction. With malevolence it is not quite like that. It is not that benevolence has to do its work before malevolence has anything to go on, but rather that each uses the same perceptions and moves from them in different directions. (This is why, as Nietzsche remarked, cruelty needs to share the sensibility of the sympathetic, while brutality needs not to).

B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 13-14 (1985). Kant is appalled by the indifferent, malicious actor: "The very coolness of a scoundrel makes him, not merely more dangerous, but also immediately more abominable in our eyes than we should have taken him to be without it." I. KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 62 (1st ed. Riga 1785) (references are to Kant's second edition as translated by H. PATON, under the title *THE MORAL LAW* (3d ed. 1956)). See G. FLETCHER, *supra* note 33, at 254 ("Killing without a motive can usually be just as wicked as killing after detached reflection about one's goals."); see also *infra* note 199.

These last thoughts illustrate the magnitude of the complexities of retributive principles. Since not all costs and benefits are counted,<sup>103</sup> but only those that are cognizable from a social viewpoint, or those that are cognizable are monetized from a social viewpoint, a distinguishing line must first be drawn. Despite the principle that the actor takes the victim as he finds him, among the easier impacts to ignore or discount are the increased costs caused by the self-flagellating victim,<sup>104</sup> or the perceived benefit of the victim who experiences masochistic pleasure from being victimized.<sup>105</sup> Nor, arguably, is the pleasure experienced by the actor's like-

<sup>103</sup> Regardless of whether some of the wrong-minded costs and benefits are ignored for the purpose of determining reciprocity, for the purposes of deterrence they must be considered. Those that impact on the actor or victim may be the very results that motivated the actor originally.

A strict utilitarian would count these socially unacceptable benefits as much as any other ones. Undesirable or not, they still are benefits to the recipients. Utilitarianism is criticized for counting such benefits. See J. RAWLS, *supra* note 62, at 30-31; Posner, *Retribution*, *supra* note 71, at 83; T. NAGEL, *Equality*, in *MORTAL QUESTIONS* 106, 112-13 (1979). Instead, most believe society must ignore or discount some costs and benefits. See Hill, *Servility and Self-Respect*, in *RIGHTS* 111, 114-15 (D. Lyons ed. 1979). Even J.S. Mill, the staunch utilitarian, tried to get away from blindly counting all pleasures equally. See W.D. ROSS, *supra* note 1, at 145; McPherson, *Mill's Moral Theory and the Problem of Preference Change*, 92 *ETHICS* 252, 254 (1982). For criticism of utilitarian ploys of "excluding 'antisocial' preferences" or counting only "perfectly prudent preferences", see B. WILLIAMS, *supra* note 102, at 86-89. See also Sen & Williams, *Introduction*, in *UTILITARIANISM AND BEYOND* 1, 9-11 (A. Sen & B. Williams ed. 1982).

<sup>104</sup> "The relevant principle here is that we discount a loss when there is a method of avoiding the loss that the agent [*i.e.*, victim] could reasonably have been expected to use." Haksar, *supra* note 72, at 325 (footnote omitted). How much is the loss discounted?

Moral claims based upon "[c]ruel and sadistic interests, morbid interests, wicked and sick interests, if there are such things, can be peremptorily ruled out of court, and put aside." J. FEINBERG, *supra* note 55, at 111. They may be too trivial. See *id.* at 48. Moreover, "[i]n tallying up the merits of a practice one must toss out the satisfaction of interests the claims of which are incompatible with the principles of justice." Rawls, *Justice as Fairness*, in *PHILOSOPHY, POLITICS AND SOCIETY* 132, 149 (P. Laslett & W.G. Runciman 2d series 1962). Though ruled out as claims, they are considered when circumscribing duties, for example, the duty not to perform sadistic acts. Hence, for narrow reciprocity as well as broad reciprocity and desert, the appraisals of costs and benefits may be partially society-regarding. When reciprocity, or any other damage theory, adopts society's assessment of the cognizable effects, rather than the victim's, a public function is assumed, partially at least.

<sup>105</sup> The victim is "double dipping". He not only gains the masochistic pleasure, but also, if this pleasure is ignored for all purposes, he receives an award of punitive damages as if there was no such benefit to him. Whether or not the damage award diminishes the pleasure of being victimized, remember that, according to one view, the victim is awarded these damages not because he deserves or has a right to receive them, but because the actor deserves or has a Hohfeldian liability to pay them, and the victim is a convenient private attorney general for implementation of this goal. See *infra* note 215.

The measure of actual damages raises some of the same problems. Certain harms suffered by the victim are noncompensable for lack of worthiness of judicial



minded friends counted as a benefit.<sup>106</sup> Nonetheless, even in extreme cases society may wish to split hairs.

In searching for a principle by which to differentiate among costs and benefits, Mill's famous, utilitarian-based "harm principle" comes to mind. This circumscribes the legitimate concerns of society in choosing whether to intervene in citizens' affairs.<sup>107</sup> The best known version is: "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."<sup>108</sup> Hence, in the usual terms for this distinction, "self-regarding" harm is

recognition. The purposes of actual damages and retributive reciprocity being divergent, convenience may be the strongest reason to suppose that the lines drawn for these unsavory impacts ought to be identical for both remedies.

<sup>106</sup> Sometimes the law does protect against harms ensuing from wrong-mindedness. "There have been many cases, in southern courts especially, for example, in which a white man has recovered damages for the assertion or insinuation, in print, that he is a Negro. While the esteeming group need not be reasonable, however, it must be minimally 'respectable.'" J. FEINBERG, *Noncomparative Justice*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 265, 299-300 (1980) (footnote omitted). This is close to the line, however. On the other side are cases like *Loving v. Virginia*, 388 U.S. 1 (1967), where the sensibilities offended by interracial cohabitation were found unworthy of protection. See also J. Rawls, *supra* note 62, at 152-55 (advantages of slaveholder ignored). For an interesting discussion of the problems of "double-counting" when "Sarah-lovers" prefer whatever Sarah prefers, see R. DWORKIN, *Do We Have a Right to Pornography?*, in *A MATTER OF PRINCIPLE* 335, 359-68 (1985).

<sup>107</sup> See J.S. MILL, *ON LIBERTY*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 81, 176-200 (1951) (1st ed. London 1859). "[N]o responsible theorist denies the validity of the harm principle . . ." J. FEINBERG, *supra* note 55, at 14. There are other liberty-limiting principles, along with Mill's harm principle, that may be embraced. Feinberg lists nine of them, *see id.* at 26-27. See also J. FISHKIN, *THE LIMITS OF OBLIGATION* 20-24 (1982) ("zone of indifference"); C. FRIED, *RIGHT AND WRONG* ch. 1 (1978) ("discretionary domain"). For one example at work, see Dworkin's distinction between personal and external preferences as crucial to the determination of constitutional rights, in R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 231-39, 266-78 (1978).

<sup>108</sup> J.S. MILL, *supra* note 107, at 95-96. Mill, in his several expressions of the idea, was not entirely consistent. Compare *id.* with *id.* at 206-07; see generally R. TAYLOR, *FREEDOM, ANARCHY, AND THE LAW* ch. IX (2d ed. 1982); J. FEINBERG, *supra* note 107, at 14. As Dworkin stated:

This distinction between acts that are self-regarding and those that are other-regarding . . . was intended to define political independence, because it marked the line between regulation that connotated equal respect and regulation that denied it. That explains why he [Mill] had such difficulty making the distinction, and why he drew it in different ways on different occasions. He conceded what his critics have always labored: that any act, no matter how personal, may have important effects on others.

R. DWORKIN, *supra* note 107, at 263. For historical criticism of the distinction, see Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 *Wis. L. Rev.* 975 (1982).

society's proper concern, "other-regarding" harm is not.<sup>109</sup> When, however, the harm is a question of controversial immoralities, such as certain sexual practices, there is little agreement as to the proper role of societal cognizability.<sup>110</sup> The effect may not be a "harm", but rather mere "offensiveness", the legal cognition of which involves a weighing process.<sup>111</sup> Moreover, when the question of recognizing a harm relates not to the specific regulation of a practice fraught with moralisms, such as the example above, but rather to the random repercussions of an act largely free of immediate, controversial moralisms, such as the breach of a contract with a victim who is sadomasochistic, the proper weighing of harm, or even whether the "harm principle" should control,<sup>112</sup> is further complicated by

<sup>109</sup> Feinberg stated:

In the sense of the verb that is of interest and use to the law, A harms B if and only if: 1. A acts (in a sense wide enough to include omissions and extended sequences of activity). 2. A's action is defective or faulty with respect to the risks it creates to B, that is, it is done either with the intention of producing the consequences for B that follow, or similarly adverse ones, or with negligence or recklessness in respect to those consequences. 3. A's acting in that manner is indefensible, that is, neither excusable nor justifiable. 4. A's action is the cause of an adverse effect on B's self-interest (a 'state of harm'). 5. A's action is also a violation of B's right. . . . 6. B's personal interest is in a worse condition . . . than it would be had A not acted as he did.

Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, 4 Soc. PHIL. & POL'Y 145, 148-49 (Autumn 1986) (In the footnote deleted, Feinberg stated that "[t]his fifth condition might be redundant because it is implied by conditions 3 and 4.")

<sup>110</sup> The famous Hart-Devlin debate on law and morality evidences the controversy. Hart argued, basically, that the factfinder from the Clapham omnibus should not be in the business of making these determinations based upon general notions of immorality. See H.L.A. HART, *supra* note 37. Devlin disagrees. See P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965). Even if a clear line can be drawn by a constitutional mandate, keeping officials on track, and discerning when they are not, is quite another matter. See Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113, 134 (S. Hampshire ed. 1978); see also R. DWORKIN, *LAW'S EMPIRE* 385-86 (1986). Furthermore, sensibilities improperly noticed by society may be redressed in "proper" attire and thereby protected. See G. FLETCHER, *supra* note 33, at 382-84 (converting transcendental interests into secular ones).

<sup>111</sup> See, e.g., J. FEINBERG, *OFFENSE TO OTHERS* 25-49 (1985).

<sup>112</sup> Comparable problems exist with guidelines other than the "harm principle" and related liberty-limiting principles. Davis, for example, is critical of the notion of "harm", and attempts at its quantification. See Davis, *supra* note 75, at 241-60. He forwarded instead an "unfair-advantage principle" for punishing the person who, by breaking the law, "does not bear the same burden the rest do." *Id.* at 240. His method of quantifying the "unfair-advantage principle" is by means of market research surveys of the public to help establish a shadow or hypothetical market to determine the fair market value of a license to commit each crime. *Id.* at 265-66. Davis conceded his method is "rough-and-ready". *Id.* at 266. Shadow or hypothetical markets are generally crude, see *infra* note 155, and thus one might question whether Davis' method is less so than reliance more directly on the "harm" principle. For another example, imagine quantifying Nozick's standard based upon the "flouting of correct values". See R. NOZICK, *supra* note 1, at 374-80.

the indirectness of the institutional ramifications that concerned Mill and others. The courts, nevertheless, must draw a bright, sharp distinction between legally cognizable harms and benefits, and ones beneath society's notice. Political and ethical philosophers have not succeeded.<sup>113</sup> To prevent the factfinders and courts from succumbing to personal and local biases the courts must accomplish what other experts have not.<sup>114</sup>

Once the line is drawn, the issue is whether unsavory impacts beyond the line are totally ignored,<sup>115</sup> or, if merely discounted, in what manner.<sup>116</sup> For those effects that are cognizable, the due, discounted weight must be specified. This, also, has not been done lucidly.

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<sup>113</sup> For example, even Dworkin's admirable attempt at line drawing, see R. DWORKIN, *supra* note 107, at 231-39, 266-78, is not beyond criticism. See, e.g., H.L.A. HART, *Between Utility and Rights*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 198, 210-21 (1983).

<sup>114</sup> If the struggle the courts have had in defining constitutional rights in the pornography cases is any indication, there is little basis for optimism. Compare *New York v. Ferber*, 458 U.S. 747 (1982) and *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) with *Smith v. United States*, 431 U.S. 291 (1977).

<sup>115</sup> Holmes would have ignored them, at least for purposes of determining liability by blameworthiness: "The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men." O.W. HOLMES, *THE COMMON LAW* 86 (M. Howe ed. 1963). Goodin offered reasons, doubtlessly different from Holmes', for ignoring them:

While rights guarantee that public actions show citizens no disrespect, something more is required if we are to prevent the sort of humiliation that comes from socially sanctioning mean motives. Respecting people's dignity thus requires us to filter the *inputs* into the social decision machinery as well as the *outputs*. Ordinarily we would count all preferences without prejudice — humiliating and degrading ones included — in coming to a social decision. Only at the very last moment might we say, 'Alas, the socially preferred outcome is not within the feasible set; it violates someone's rights.' The state would thereby be saved from *doing* anything that shows its citizens disrespect. But by counting degrading preferences in the first place, it has already shown them disrespect. Only by censoring the sorts of demands of which society will even take cognizance — only by refusing even to consider certain sorts of choices and preferences, much less to act upon them — can we spare people the sort of humiliation that comes from the mean motives of others . . . .

R. GOODIN, *supra* note 63, at 93-94 (emphasis in original) (footnote omitted).

<sup>116</sup> "[H]ow much weight should we give to people's patently irrational and/or antisocial preferences? Indeed, how much weight should we give to their socially very desirable altruistic preferences?" Harsanyi, *Rule Utilitarianism, Equality, and Justice*, 2 *Soc. PHIL. & POL'Y* 115, 116 (Spring 1985).

Although one may adopt "the approach of discounting, ignoring or even devaluing 'bad' pleasures or desires, for example, those related to sadism," Sen believes this to be "inadequate fundamentally" because these give rise to different moral perspectives and difficult questions of discerning whether violations of rights "involve 'bad' pleasures or desires." Sen, *Rights and Agency*, 11 *PHIL. & PUB. AFF.* 3, 13 n.17 (1982) (citing Harsanyi, *Rule Utilitarianism and Decision Theory*, in *DECISION THEORY AND SOCIAL ETHICS* 8 (H.W. Gottinger & W. Leinfellner eds. 1978)).

Social cost must be expounded further. The sources of the social cost can be examined in general terms in a manner parallel to that of the costs to actor and victim.

The economic social cost,  $F_D$ , may be pervasive. In the prior example of the nonmalicious contract breach by the actor selling to the third party at a higher price, a party who apparently values the goods more highly than the victim will obtain them.<sup>117</sup> The goods are moved to a higher state of utility. The victim is made legally whole by actual damages. The third party need not search for the victim in order to bargain for the goods.<sup>118</sup> A Pareto superior position results,<sup>119</sup> which counts as an economic benefit.

In all events, a simple wealth transfer from the victim to the actor has no direct, economic cost. The wealth of society remains unchanged after the interaction. Who has the wealth is altered, but the amount is not. Even in the case where legal damages are inadequate to compensate the victim wholly for his harm, there may be no direct, social loss. As long as the actor captures all of the wealth lost by the victim, there is no net change. Punitive damages are not available. A social loss results only when the interaction creates a friction that is dissipated to the advantage of no one (e.g., the rational victim values the infringed right more than the rational actor values infringing it).

The atmosphere of the marketplace in which ordinary contract breaches are only partially deterred by means of actual damages may, however, discourage economic activity. Parties wish to purchase goods, not "bads" (lawsuits). But if they purchase a lawsuit they want to be fully compensated. Insofar as they fear these wishes will be disappointed, they will be inclined to back away from the marketplace. Malicious breaches exacerbate the risks. The volume of business decreases. This is a social loss.

Certain types of business are of no value to society or are of actual disvalue. Illegal contracts provide an obvious example. Whether illegal or not, economic activity increased by discrimination against disfavored minorities is not a social benefit.<sup>120</sup> The effects are deleted from the calculus of benefit, or counted as a cost.

The sanction social cost,  $F_S$ , looks to the consequences of the dispute processes. On the plus side is the public sense that justice is done by correcting unfairness.<sup>121</sup> The vindicated victim and his sympathizers feel this

<sup>117</sup> See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

<sup>118</sup> This point presupposes the relaxation of the assumption of perfect information.

<sup>119</sup> "A change is said to be Pareto superior if it makes at least one person better off and no one worse off." R. POSNER, *ECONOMICS*, *supra* note 71, at 54. The move will not be superior if the nonbreacher values the goods more than the third party. See *supra* note 96.

<sup>120</sup> This might be treated more accurately, or at least partially, as external and internal social costs,  $F_E$  and  $F_I$ .

<sup>121</sup> "How can the monetary value of corrective justice be measured?" Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 646 (1980). Rizzo pointed out how impossible this measurement is, as is true for other moralisms, *id.* at 643-48.

benefit most strongly. Should the actor and his supporters feel rightly that he was unfairly penalized or stigmatized, there would be a social cost. Arguably, the same feelings on a nonrightful basis would be ignored. The jurors and other members of the public at the trial are heartened by their participation in a successfully working part of the democratic process. This is a social benefit.<sup>122</sup>

The transaction costs absorbed by the public through taxes to pay for the judicial apparatus are debits. The litigation and opportunity costs of the actor, victim and other participants are also social losses. The actor's imposition of these costs on society counts against him.<sup>123</sup>

The external and internal social costs,  $F_E$  and  $F_I$ , are the most problematic. The difficulties of costing mental states are multiplied because the factfinder is not appraising the internal and external manifestations of the psychological impact on just the actor or victim,<sup>124</sup> but instead to all of society. Although the imponderables of subjectivity are better left to the devil,<sup>125</sup> the factfinder must do these assessments. The costs and benefits to each psyche must be evaluated and aggregated to measure internal social cost.<sup>126</sup> The effect on interpersonal relations and social dynamics are appraised as external social cost.<sup>127</sup>

<sup>122</sup> As Patterson stated:

Let me point out however, that *even if* it were shown that the jury in personal injury cases is inefficient, capricious, and inaccurate, it would still be arguable that the jury should be retained because of such intangible effects as the 'education' of laymen and their feeling of shared responsibility.

E. PATTERSON, *LAW IN A SCIENTIFIC AGE* 41-42 (1963) (emphasis in original).

<sup>123</sup> If the victim brings the actor into court to seek actual damages even without the possibility of punitive damages, then many of the dispute costs are attributable to the underlying cause of action and not to the extraordinary relief. The attribution is often not obvious. Actual damages alone may be insufficient to induce the victim to counteract. The actor may more readily settle a claim only for actual damages. Strategies and costs change considerably with the prospect of punitive damages.

<sup>124</sup> When the actor or victim is a corporate entity, the costing of its internal state verges on incoherency. Is the felt impact on the corporate agents, shareholders and customers what counts? The answer to this may be of less importance under this broad conception of societal loss than under the narrow one of the victim's net costs since at least some of the impact on these individuals will be picked up as part of the cost to society in general, irrespective of their relationship to the actor or victim.

<sup>125</sup> See *infra* note 181.

<sup>126</sup> Recall that the factfinder is not simply asking what value, say, the actor gives to his socially undesirable internal state. Society may highly disvalue his internal state even though he personally feels little internal benefit from the act. But "different pleasures and different happinesses are to a large degree incommensurable: there are no scales of quality or quantity on which to weigh them." A. MACINTYRE, *AFTER VIRTUE* 62 (1981).

<sup>127</sup> The behavioral costs discussed in note 46, *supra*, are prominent here. The legal rules create expectations which inform behavioral patterns. The social value of these patterns is an important part of the calculus. If the actor's conduct undermines desirable behavior or conditions undesirable behavior, that counts against him. But how much?

c. *Cost to actor, C<sub>A</sub>*. Notice first that the cost to the actor at  $t_a$ ,  $C_a$ , is not forwarded as a variation. Reciprocity is ultimately reckoned when the actor is before the court. His costs upon judgment,  $t_{j+}$ , are to relate to societal costs as measured prior to the judgment,  $t_{j-}$ . All the effects of the act on the actor as appraised by society, whether anticipated by the actor or whether the product of official action, arguably are counted.<sup>128</sup>

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<sup>128</sup> This is debatable. Whereas Bentham counted all resulting pains as penal costs, John Austin, his disciple, "complains of Bentham speaking of physical or natural sanctions in addition to religious, legal and moral ones." W.L. MORRISON, JOHN AUSTIN 77 (1982). Morris agrees with Austin.

Feeling guilty we feel badly. . . . Sometimes it is even said that the 'pangs of conscience' are punishment. . . . Punishment is of course an extremely elastic concept and a social practice with a highly overdetermined justification. Still, the pain we suffer when feeling guilty and the pain involved in the expression of these feelings differs from pain that is inflicted with the significance for us of punishment.

H. MORRIS, ON GUILT AND INNOCENCE 103-04 (1976).

Clearly, we would not be willing to describe as 'punishment' just *any* misfortune which fell upon a wrongdoer subsequent to his misdeeds. . . . Sufferings consequent upon misdoing, even if imposed precisely on account of the misdeeds, is still not punishment unless those who inflict it have authority over the offender. A child who revenges himself on cruel parents by strewing thistles in their bed is not thereby punishing his parents, however much their cruelty may have merited punishment.

A. KENNY, *supra* note 35, at 74-75 (emphasis in original). See also N. WALKER, *supra* note 33, at 165; Quinn, *supra* note 67, at 332-33.

Along these lines, Hart adopts similar strictures in defining

[T]he standard or central case of 'punishment' in terms of five elements:

(i) It must involve pain or other consequences normally considered unpleasant. . . . (iv) It must be intentionally administered by human beings other than the offender. (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

H.L.A. HART, *supra* note 1, at 4-5. For a different collection of elements, see R. NOZICK, *supra* note 1, at 369-70. Hart is careful to insist that discussions of punishment are not to rely upon the "definitional stop" which declares out-of-bounds by definition, penal practices that run afoul of the standard or central case. He therefore lists certain possibilities, among others, as part of "sub-standard or secondary case": "(a) Punishments for breaches of legal rules imposed or administered otherwise than by officials (decentralized sanctions)." H.L.A. HART, *supra* note 1, at 5. The analysis of the costs and benefits falling within the model equations may run afoul of the three quoted elements of the central case of punishment. The quoted secondary case would then become relevant, if not fully adequate, to bring the analysis of punitive damages into Hart's specified framework. In arguing that punitive damages may be exceptional, two warrants come to mind. First, the civil aspect of the extraordinary remedy by itself takes it outside the central case of punishment and allows for the consideration of secondary possibilities. Note that neglecting the non-official impacts may result in the actor being either over- or under-punished, and the victim being either over- or under-requited, at least as measured against the standard adopted in the model equations. Ignoring the question of practical application, what justification is there for this neglect of some consequences other than tautological principle? Second, even if society qualitatively differen-

The cost to the actor of the interaction with the victim already has been treated at length in the context of deterrence. Since cost is negative benefit, equation (1), with simplifications and modifications, provides appropriate foci:

$$(6) C_A = -F_D + F_S + F_E + F_I$$

Table of Symbols B-3

$C_A$	= Cost to actor
$F_D$	= Direct monetary benefit
$F_E$	= External cost
$F_I$	= Internal cost
$F_S$	= Sanction cost

Along with the interchange of cost and benefit signs, the lower case subscripts of equation (1) are capitalized in equation (6) to denote that the costing has shifted from the time of the act,  $t_a$ , to the time of judgment,  $t_j$ . This may greatly affect the valuations. Otherwise, the actor's costs are appraised essentially as in equation (1).<sup>129</sup> One important exception follows.

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tiates among costs and benefits for the purpose of retribution, civil or criminal, nevertheless, for the purpose of deterrence, the monetization of impacts is what counts, irrespective of their sources. If the actor and society are sufficiently deterred by non-official costs, there is no need and justification to impose additional, official sanctions in the name of deterrence. Furthermore, if non-official benefits lead to underdeterrence, why must society in principle accept that passively? (This second point applies to criminal punishment as well.)

<sup>129</sup> *But see supra* note 128. Taking into account all the actor's costs and benefits, even those due to personal quirks, seems reasonable enough for purposes of deterrence. Overlooking benefits will underdeter while ignoring costs will overdeter, or, at some point, perhaps underdeter. For the latter, *see supra* notes 41 and 67. When speaking of retribution, the case for incorporating the actor's personal traits is less obvious. Murphy made the case this way:

A basic demand of justice is that like cases be treated alike, and that morally relevant differences between persons be noticed and our treatment of those persons be affected by those differences. This demand for individuation—a tailoring of our retributive response to the individual natures of the persons with whom we are dealing—is a part of what we mean by taking persons seriously as persons and is thus a basic demand of justice.

Murphy, *Mercy and Legal Justice*, 4 Soc. PHIL. & POL'Y 1, 7 (Autumn 1986). Nozick made a related point:

Consider next a person who (before capture) sincerely repents of his wrongful act and, on his own, makes amends to the victims, goes off and does extraordinary good deeds—works in a leper colony or whatever—from a desire to add good to the world. Does such a person now deserve to be punished, should he be punished? Again, retributivists feel uneasy in saying so. (What would deterrence theorists say of these cases?)

R. Nozick, *supra* note 1, at 385.

Ross considered going further and accounting not only for the isolated interaction but also for the entire history of the actor:

What we perceive to be good is a condition of things in which the total

Whereas for deterrence purposes all the actor's actually felt costs and benefits are monetized regardless of their social cognizability because, worthy or not, they are motivators,<sup>130</sup> for retribution purposes, society may prefer to discount or ignore some as improperly recognized factors in a deontological judgment.<sup>131</sup>

One point must be emphasized. The actor's reciprocal costs are not simply to consist of a disgorgement of the gains he obtained from the illicit act so that he ends up even. Instead, his position upon judgment,  $t_{j+}$ , is an overall loss. His penalty assures that his loss relates to the net societal

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pleasure enjoyed by each person in his life as a whole is proportional to his virtue similarly taken as a whole. Now it is by no means clear that we should help bring about this end by punishing particular offences in proportion to their moral badness. Any attempt to bring about such a state of affairs should take account of the whole character of the persons involved, as manifested in their life taken as a whole, and of the happiness enjoyed by them throughout their life taken as a whole, and it should similarly take account of the virtue taken as a whole, and of the happiness taken as a whole, of each of the other members of the community, and should seek to bring about the required adjustments.

W.D. Ross, *supra* note 1, at 58-59. He rejects this step as impractical and beyond the bailiwick of the state. *Id.* at 59-60.

<sup>130</sup> See *supra* note 103.

<sup>131</sup> For example, if the actor is excessively remorseful, he may have "suffered enough". See Hampton, *supra* note 46, at 235. Guilt has even been held out as a logically necessary requisite to punishment. Without guilt the distress imposed upon the actor cannot properly be called punishment. See Quinton, *supra* note 71, at 86-91. Furthermore, a strict retributivist may hope that criminals do indeed suffer substantial conscience pangs from the prospect of punishment, for otherwise the deterrent measure of punishment, without this internal cost, is likely too great from a retributive viewpoint. One may doubt, however, that the retributivist can escape this hard problem by reliance upon a criminal's conscience. See Goldman, *Toward a New Theory of Punishment*, 1 LAW & PHIL. 57, 62 (1982). Moreover, Walker noted a paradox for those retributivists who argue that the actor must see and accept the justness of the punishment: "Is the severity of the penalty to be regulated by the offender's conscience? If so, is the man with the tender conscience to suffer a more severe penalty than the man who does not admit that he deserves his punishment?" N. WALKER, *supra* note 33, at 13. See also R. NOZICK, *supra* note 1, at 373-74. The actor may feel distress because his family suffers from the ordeal of the litigation process and public censure. Questions of fairness with respect to the family members then arise. Cf. H.L.A. HART, *supra* note 1, at 5-6.

Ignoring "improper" responses may leave the actor inadequately punished as where the actor's sensibilities are contrary to those of the "right-minded" citizen. For example, a thoroughly committed bigot whose circle of family and friends are like-minded may obtain a positive return to his reputation and conscience from committing a reprehensible act against a member of the disfavored group. This may cut two ways. The victim himself, acculturated to unfair treatment, may be calloused to the actor's invasion and suffer felt losses less than would be otherwise costed. Conceivably the victimization may have a positive payoff to him as his circle of family and friends, fellow members of the disfavored group, rally around him. Cf. L. FRIEDMAN, *supra* note 46, at 106-08. Masochism suggests other possibilities. What are commonly costs may turn out to be benefits, and commonly benefits, costs.



cost he imposed on the victim or society as measured at judgment,  $t_j$ .<sup>132</sup>

*d. Functional relationship for reciprocity,  $F_R$ .* The appropriate relationship between the costs of the victim,  $c_v$  or  $cV$ , or society,  $C_s$  or  $CS$ , and the costs of the actor,  $C_A$ , is a debated issue. Revenge or vengeance may be an instinctive reaction that allows the actor's costs to exceed the victim's or society's. Under this view, said to be primitive, the apt ratio is greater than one.<sup>133</sup> The vendetta is exemplary; its history lays bare the weakness of implementing the underlying proposition. The biblical mandate of an eye-for-an-eye limits this primitive view. The costs of the actor should equal, but not exceed, the costs of the victim or society.<sup>134</sup> Some commentators argue for a further reduction of the actor's relative costs.

<sup>132</sup> Reiman stated:

Retribution is not to be confused with *restitution*. Restitution involves restoring the *status quo ante*, the condition prior to the offense. Since it was in this condition that the criminal's offense was committed, it is this condition that constitutes the baseline against which retribution is exacted. Thus retribution involves imposing a loss on the offender measured from the *status quo ante*. For example, returning a thief's loot to his victim so that thief and victim now own what they did before the offense is *restitution*. Taking enough from the thief so that what he is left with is less than what he had before the offense is *retribution*, since this is just what he did to his victim.

Reiman, *supra* note 38, at 119 n.8 (emphasis in original).

<sup>133</sup> For a phylogenetic reason, see N. TIMASHEFF, *supra* note 46, at 113-15; cf. Posner, *Retribution*, *supra* note 71, at 75-83 (retribution is important since "[a] society whose people lack incentives to produce or invest because they cannot (at least without incurring tremendous costs in self-protection) appropriate the fruits of their labors is unlikely to survive in competition with societies that discover and adopt methods of imparting such incentives—and some will."). For an ontogenetic reason, see J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 320-24 (1965). These different viewpoints reflect the distinction between social learning theory and cognitive development theory and suggest questions of sociobiology. See generally *Symposium on Moral Development*, 92 *ETHICS* 407 (1982); cf. H. PITKIN, *WITTGENSTEIN AND JUSTICE* 175-76 (1972).

The sentiment of justice, in that one of its elements which consists of the desire to punish, is thus, I conceive, the natural feeling of retaliation or vengeance, rendered by intellect and sympathy applicable to those injuries—that is, to those hurts—which wound us through, or in common with, society at large. This sentiment in itself has nothing moral in it . . . .

J.S. MILL, *UTILITARIANISM*, *supra* note 61, at 63-64. Mill goes on to civilize the sentiment since the victim "certainly does feel that he is asserting a rule which is for the benefit of others as well as for his own." *Id.*

<sup>134</sup> See *Exodus* 21:23-25; *Deuteronomy* 19:19ff; *Leviticus* 24:19-21. The gloss is in the Talmud. See TALMUD, *TRACTATE BABA KAMMA* 83b (Soncino ed. 1964). The Greeks generally agreed, see H. Kelsen, *supra* note 82.

An eye-for-an-eye is also barbarian.<sup>135</sup> Under a rehabilitative ideal, no costs *must* be imposed upon the actor. In the end, retribution may not be an acceptable aspect of punishment; the appropriate ratio is zero (0:1).<sup>136</sup>

<sup>135</sup> Reiman stated:

But the *lex talionis* is not the only version of retributivism. Another, which I shall call 'proportional retributivism,' holds that what retribution requires is not equality of injury between crimes and punishments, but 'fit' or proportionality, such that the worst crime is punished with the society's worst penalty, and so on, though the society's worst punishment need not duplicate the injury of the worst crime.

Reiman, *supra* note 38, at 119-20 (footnote omitted).

<sup>136</sup> Plato, in the voice of Protagoras, wrote that "only the unreasonable fury of a beast acts in [retaliation]." PLATO, *supra* note 8, at 155. "Even Plato thought that looking back to the past deed (except as a symptom indicating what was likely to cure or prevent) was irrational. To measure punishment by reference to it was, he said, like 'lashing a rock'." H.L.A. HART, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY 158, 163 (1968) (citing Plato). (This metaphor quoted by Hart does not appear in Plato's original Greek). See also *Furman v. Georgia*, 408 U.S. 238, 343 (1972) (Marshall, J., concurring) ("Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society."); Hampton, *supra* note 82, at 235-37; but see *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (Stewart, J.) (punishment may be justified by retribution, "an expression of society's moral outrage at particularly offensive conduct"). Although imposing a cost on the actor may not be demanded, rehabilitation, when requiring confinement, will be costly to the actor (unless, in the long run, it works?). If the actor suffers no distress, the practice might not rightfully be called "punishment". See *supra* note 128; T. HONDERICH, *supra* note 1, at 77. In any event, the times favor more pain for the injurer. See F. ALLEN, *supra* note 33, at 66-72. Perhaps this is because of disillusionment with the rehabilitative ideal and "the natural ebb and flow of intellectual history". G. FLETCHER, *supra* note 33, at 416.

Plamenatz approaches this question as a utilitarian pragmatist:

The less we punish and the more we seek to cure—so [some people] seem to think—the better. To punish is to use the old method, the method that smacks of vindictiveness, the method that gives to those who use it a sense of superiority, often not justified. . . . By all means, let us use the methods best suited to prevent the evils we wish to prevent; let us abandon the old punitive methods as soon as we find others more effective and not disproportionately expensive. But it is surely beside the point to speak of vindictiveness and superiority. Where punishment is the most effective method and the cheapest, does it matter what feelings accompany its use, so long as they do not lead to the abuse of it?

Plamenatz, *supra* note 36, at 187-88. Moreover, eliminating vindictiveness may be impractical.

Society cannot exercise complete control over the considerations which influence the agents in the Penal system. . . . [S]ince a fine or a sentence of imprisonment can be imposed either for reductive [i.e., deterrent, reformatory, etc.] or for retributive reasons it would be impossible to infer the intentions behind most sentences. . . . It would be equally out of the question to ensure that the penal system was *invoked* only for reductivist purposes. Most of the victims who report an offence which has affected them personally do so in order to retaliate against the offender.

N. WALKER, *supra* note 33, at 10 (emphasis in original). See also Posner,

These comments imply that the idea of reciprocity is different from the idea of corrective justice whereby the victim must be made whole by the actor.<sup>137</sup> If, say, the victim loses much but the actor loses even more owing to internal and external costs, the punitive award under this standard is zero even though the victim is left with a loss.

Now that the basic meanings of reciprocity are outlined, some of the consequences may be noticed. First, the narrow conception is further examined, where the actor's costs relate to the victim's, either at  $t_a$  or  $t_j$ , i.e.,  $c_v$  or  $c_v$ . For the sake of simplicity, assume the functional relationship,  $FR$ , equals 1:1, biblical *lex talionis*. Assume also that the act realizes no net gains or losses for the actor, other than the dollar amount of the court's judgment. If then, the judgment equals the victim's loss at  $t_j$ , this simply means that the actor pays the victim's actual damages (under the strong assumption that actual damages truly reflect all of the victim's actual costs and benefits). In other words, the measure of reciprocal punitive damages is zero since the actor fully reciprocates by compensating the victim with actual damages. When the actor suffers no other net effects, reciprocal damages at  $t_j$  do indeed resolve into damages based upon corrective justice. Or, since the courts talk in terms of giving punitive damages in addition to actual damages, perhaps, under this hypothetical, they mean that the victim is awarded double damages, actual damages plus an equal amount as reciprocal punitive damages. Or, perhaps the courts mean, despite the expressed rejection by the vast majority of a compensatory function for punitive damages,<sup>138</sup> that since actual damages are known to undercompensate the victim,<sup>139</sup> the award, by including reciprocal damages, assures that the victim recovers true damages in this circumstance of maliciousness. In all events, quite contrary to legal practice, reciprocal damages appear in principle to top out around twice actual damages in the case, intuitively not far from average, where the actor's other costs and benefits are roughly equal. Leaving this hypothetical for the moment, even when the actor's non-judgment costs and benefits do not cancel each other, the reciprocal award would be substantially below the amount

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*Retribution*, *supra* note 71, at 80-81 ("thirst for revenge" prompts police assistance).

Perhaps deterrence legitimates the declaration that certain acts should be proscribed, but as for who suffers the sanction and its measure, reciprocity or desert controls. See M. GOLDING, *supra* note 8, at 82-83.

<sup>137</sup> See ARISTOTLE, *ETHICA NICOMACHEA* bk. V, ch. 4, in 5 *THE STUDENT'S OXFORD ARISTOTLE* (W.D. Ross ed. 1942); R. EPSTEIN, *supra* note 7. N. MACCORMICK, *The Obligation of Reparation*, in *LEGAL RIGHT AND SOCIAL DEMOCRACY* 212, 214 (1982):

The argument of this section is that the justifying ground of obligations of reparation, from a moral point of view, is that individuals have as a matter of principle a right to reasonable security in their persons and possessions, and accordingly a right to be compensated when that reasonable security is infringed. No argument from retribution or deterrence can satisfactorily justify the obligation of reparation.

<sup>138</sup> See *supra* note 11.

<sup>139</sup> See, e.g., D. DOBBS, *supra* note 11, at 138, 146.

now considered acceptable by the courts except in bizarre cases, as, perhaps, where the rich actor gets enormous malicious satisfaction without feeling social disapproval.

The narrow conception of reciprocity based upon the monetization of the victim's costs at  $t_a$ , rather than  $t_j$  as above, may be discussed by continuing with the hypothetical. The actor, under this variation, pays in reciprocal damages not for the losses the victim actually suffers, but instead for the losses that the actor rationally anticipates at  $t_a$  that the victim will suffer. When the victim does suffer what the actor rationally anticipates he will suffer, the reciprocal damages will then be less than actual damages. The only exception is where the actor can be absolutely sure that the anticipated losses of the victim will fully eventuate, in which case, as in the paragraph above, the reciprocal damages equal the actual damages. By way of illustration, assume the actor rationally anticipates that his act may cause the victim actual damages of \$1000, the probability of this occurrence being 0.5. The threatened risk to the victim at  $t_a$  then is \$500, one-half of actual damages (anticipated harm times its probability). The more certain the threatened risk, the closer reciprocal damages approach actual damages.<sup>140</sup> Unless the risk of the harm is measured differently from the anticipated harm times its probability, in the common case, as in the example above, the reciprocal award will fall woefully below the amounts now routinely granted by the courts as punitive damages. In sum, the problem with both variations of the narrow conception of reciprocal damages, if legal practice is the standard, is that the reciprocal awards fall short of the amount recognized as proper.<sup>141</sup>

In attending to the broad conceptions of reciprocal damages, whereby all social losses are reciprocated,  $C_S$  or  $C\bar{S}$ , the worry is the opposite of that for the narrow conceptions. Unless the functional relationship for reciprocity,  $F_R$ , is kept quite small, the reciprocal award may easily be exceedingly high. The problem is in finding an appropriately limited scale.

To clarify this point with an example, assume a drug manufacturer, whose own studies indicates a particular drug is carcinogenic, suppresses the information and sells the drug to many people over the years.<sup>142</sup> Once the facts are known, the actual damages of the class of victims are very high, even when discounted by the probability of harm as determined at

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<sup>140</sup> Changing the facts of the hypothetical can lead to a measure of reciprocal damages at  $t_a$  that are greater than actual damages. Assume the actor rationally anticipates causing the victim enormous harm. The act, instead, misfires and the victim is hardly affected, or even benefitted. Reciprocal damages are then greater than actual damages, the more so as the actor is certain (though mistaken) that the victim will be greatly harmed.

<sup>141</sup> This could be avoided, of course, by adopting the "primitive" view that the functional relationship for reciprocity,  $F_R$ , is greater than 1:1, that is, higher than biblical *lex talionis*.

<sup>142</sup> This hypothetical is inspired by the DES litigation. See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

the time of the manufacturer's initial decision at  $t_a$ . When the reactions of the frightened, outraged public are monetized and added to the calculus, the total social cost,  $C_S$  or  $CS$ , is enormous, conceivably billions of dollars. Wealth effects aside,<sup>143</sup> to bring this case within the range of recognized punitive damage awards, the functional relationship for reciprocity,  $FR$ , must be quite small. Yet if, in response to an example such as this, a small, single ratio for  $FR$  is adopted for all cases, the punitive award in the run-of-the-mill case may be minuscule.

In this carcinogenic drug hypothetical, additional problems with the meaning of social cost,  $C_S$  or  $CS$ , are suggested. First, the larger the onlooking public, seemingly the larger the social loss. If the entire country is aware of the manufacturer's misdeed (assuming that the proper public is not, say, the state), the social loss appears higher than if few persons are aware.<sup>144</sup> All else equal, the larger the country, the higher the social loss. The more publicity, the higher the social loss. Or, the more negative (sensationalized) the publicity, the higher the social loss. This also shows that the variation of social cost at the time of the act,  $C_S$ , may diverge from the social cost at the time of the judgment,  $CS$ , owing to facts that arguably are morally neutral, such as the amount or nature of the intervening publicity. Conversely, insofar as the manufacturer's cost,  $C_A$ , reflects goodwill losses and other internal and external costs, the increasing numbers increase the actor's credit when calculating punitive damages. But whether social losses and the actor's costs increase correspondingly with the number of onlookers is a contingent matter. If, for example, the corporate actor doesn't deal directly with the consuming public, or under its own name, goodwill and many other losses may not be felt. Moreover, a cost-benefit analysis for retributive reciprocity, which is based upon a deontological orientation rather than a utilitarian one, is a peculiar starting point.

Second, in the drug hypothetical the public reactions were characterized as "fright" and "outrage". "Fright" was used to intimate the security, self-regarding losses that are said to be the legitimate concerns of society and hence properly thrown into the calculus.<sup>145</sup> "Outrage", on the contrary, intimates an other-regarding harm that is not society's business under a

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<sup>143</sup> Wealth effects on the corporation, even one this large, would be substantial and thereby reduce the award. See *infra* note 152. In *Pennzoil Co. v. Texaco, Inc.*, 729 S.W.2d 768 (Tex. Ct. App. 1987), where a jury award of three billion dollars in punitive damages in a suit for the intentional interference with a contract was reduced by two-thirds, the court found that "punitive damages of one billion dollars are sufficient to satisfy any reason for their being awarded, whether it be punishment, deterrence, or encouragement of the victim to bring legal action." *Id.* at 866.

<sup>144</sup> These comments imply that the assumption of perfect information by the parties and the public has been relaxed. It had even been relaxed initially with the suppression by the manufacturer of its studies. Other assumptions regarding the rationality of the parties are also about to be relaxed.

<sup>145</sup> See *supra* note 124.

liberty-limiting principle such as Mill's "harm" principle.<sup>146</sup> Therefore, when an act is despicable, not because it threatens the public or causes other self-regarding harm, but for other reasons, the cognizable social loss under the "harm" principle may be quite small. For example, horrendous acts against a tiny minority, performed by a xenophobic organization, may cause the public an insignificant self-regarding loss since the general public need not fear that they will be the next victims. Yet the actions seem no less deserving of punitive damages than if the organization directed them at the same number of persons who could not be differentiated from the general public, so that everyone felt threatened. No liberty-limiting principle draws a completely satisfactory line.

Third, once the assumption of ideal rationality is relaxed, a host of considerations give rise to intricacies which make it virtually impossible for the factfinder to accurately cost and determine the probabilities. In addition to the permutations based upon information shortfalls explored above, the relative information or misinformation of the parties affects the probabilities of the victim's counteraction and the actor's resistance, as well as the resources committed to the litigation by both parties, and hence the amount of the recovery or settlement.<sup>147</sup> Among the other factors that affect costs and probabilities are the transaction costs,<sup>148</sup> and the characteristics of the parties, such as their sensitivities,<sup>149</sup> reasonability,<sup>150</sup>

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<sup>146</sup> See *supra* note 107 for discussion.

<sup>147</sup> See *infra* note 264.

<sup>148</sup> As long as the actor imposes minor injuries, or operates near the shadowy fringe of the law, he is fairly safe from reprisals in the absence of significant punitive damages to make counteraction worthwhile. See *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 47 (Alaska 1979), *modified*, 615 P.2d 621 (Alaska 1980), *remanded*, 627 P.2d 204 (Alaska 1981), *cert. denied*, 454 U.S. 894 (1981). The transaction costs of the actor are often asymmetrical to those of the victim and third parties. Cf. Posner, *The Behavior of Administrative Agencies*, in *ESSAYS IN ECONOMICS OF CRIME AND PUNISHMENT* 215, 220 (G. Becker & W. Landes ed. 1974) (agency's costs are less). Economies of scale exist for the corporate actor and repeat player. House counsel, retainers, complaint departments, printed forms, customized software, and, generally, the efficiencies from previous experience are among the items reducing the actor's costs of each dispute.

<sup>149</sup> All four factors of deterrence in equation (1) are susceptible to the variable sensitivities of the actor, victim, onlookers and society. The actor may experience great satisfaction from his own malice or may anticipate with relish the acute sensitivity of the victim to being the object of malice. Conversely, the actor's excessive remorse may make him "suffer enough". See *supra* note 131. Unusual anger or indignation of victim or onlookers may increase the direct sanction and external costs, whereas diffidence may decrease them. The reactions of the many parties interrelate. The sophisticated actor takes account of his own particular responses and the atypical but predictable ones of victim and public.

<sup>150</sup> By "reasonability" is meant the fair ability to reason. Self-deception and cognitive dissonance are among the distortions that interfere with accurate reasoning. The actor, for example, may be unreasonable even under his own conscious measure of utility. This point may be clarified in the context of deterrence. The actor may not be deterred when he would say, if he thought clearly, that he should be (or vice versa). (This may also be a question of will, not reason. The conclusion,

risk disposition,<sup>151</sup> and their wealth.<sup>152</sup> All of these factors seem morally neutral and yet they may have a substantial impact on the outcome of the claim for punitive damages, whether the theory be deterrence or retribution.

Fourth, under both variations of the narrow and broad conceptions of reciprocity, where the loss to be reciprocated is either the victim's,  $c_v$  or  $c_V$ , or society's,  $C_S$  or  $C_S$ , a correspondence to the actor's cost,  $C_A$ , must be achieved. The factfinder must measure and commensurate the costs of

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nevertheless, is the same.) The goal of deterrence is not then necessarily frustrated, although it will be if the actor is far beyond the reach of reason. Short of this, aberrations of reasonability can be monetized and accommodated in the factors of equation (1). The actor, unable to resist the temptation to act even when his refined calculations would show no benefit, may respond appropriately to the additional deterrent of higher anticipated punitive damages. Sufficient evidence is the problem, not theory.

<sup>151</sup> "Risk disposition" refers to whether parties are risk preferrers, risk neutral, or risk avoiders. "The risk preferrer is stimulated by and enjoys risk taking. The risk avoider finds risks distasteful and hazardous courses of action unwelcome." F. ZIMRING & G. HAWKINS, *supra* note 35, at 104. The authors also discuss the related distortions of the perceiver from being an "optimist" or a "pessimist", *id.* at 101-06, and from being "future-oriented" or "present-oriented," *id.* at 98-101. See also Becker, *supra* note 46, at 178. The law treats sufficiently high risk aversion or preference as evidence of irrationality, and then considerations of legal responsibility are activated. Risk neutrality may even be evidence of irrationality, for "no attitude toward risk is particularly rational. The appropriate attitude toward risk depends on the circumstances." Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice*, 34 STAN. L. REV. 1105, 1130 (1982). For an analysis of rational risk, see Von Magnus, *Preference, Rationality, and Risk Taking*, 94 ETHICS 637 (1984).

With respect to deterrence, the actor's risk disposition is highly significant. As much as he prefers risk, offsetting deterrent damages must increase; for the risk averter, damages decrease. The risk disposition of the victim also appears relevant to deterrence. The victim's reaction to risk may influence his counteraction,  $P_C$ , and the likelihood of the actor gaining his expected benefit,  $P_D$ . Even the amount of direct benefit,  $B_D$ , and sanction costs,  $(C_r, C_n)$ , may turn on the victim's litigiousness as informed by risk disposition. As risk disposition affects the calculation of deterrence, so it affects retributive reciprocity. The factors of costs and benefits for actor, victim, onlookers and society are skewed by reactions biased by attitudes towards risk.

<sup>152</sup> "Wealth effects occur in situations in which a person places a high value, relative to his wealth, on the loss or gain in question." A.M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 124 (1983). Some of the wealth effects may be mentioned. Under equation (1) for deterrence, there are four factors: direct, sanction, external and internal costs and benefits. The wealth effects may be different for one factor (or element) than for another. For example, the effects on internal or external reputation costs felt by a wealthy actor may not be symmetrical to the effects of direct, in-pocket benefits. He may sorely feel a slight reputation loss from the litigation notoriety after being nearly indifferent to the large, expected monetary gain from the proscribed act. A related effect arises when the actor's reachable assets are smaller than the measure of punitive damages. An impecunious actor who suffers few external and internal costs appears not to have the reachable assets to counter his internal benefit from malicious satisfaction or direct benefit from an anticipated wealth transfer. Short of criminal sanctions he has little to lose.

at least two persons under the narrow conception, and all of society under the broad one. This task entails an interpersonal utility comparison thought by commentators to be impossible.<sup>153</sup> No market exists for many of the goods (and bads) that are felt by the parties and society. Persons are not forced to reveal their preferences in the marketplace by voting with their dollars. Economists have reduced aspects of this hurdle by means

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“This means that the criminal law is designed primarily for the nonaffluent; the affluent are kept in line, for the most part, by tort law [including punitive damages].” Posner, *supra* note 41, at 1204-05. Still, under the notion of the declining marginal utility of wealth, the little to lose may be adequate to deter. For example, should the malice be monetized at \$10,000 when the actor has only \$2000 of reachable assets, punitive damages of \$1000, half of the actor’s reachable wealth, may be an adequate deterrent. The actor’s wealth is also relevant to the measure of reciprocity and desert. See I. KANT, *supra* note 82, at 101-02, 132 n.3. Under either conception of societal loss, the appraisals of the victim’s harm, for example, may depend upon the circumstances. A victim may be less offended by an invasion out of desperation by a pauper than by a similar invasion by an unneedy prince. Or, a destitute actor may get more satisfaction from harming a princely victim, “as setting right, to some degree, inequitable social arrangements in general.” J.Q. WILSON & R.J. HERRNSTEIN, *supra* note 58, at 59. Without detailing other wealth effects on the actor and victim, the wealth of society which establishes the background in which values are embedded and evaluated should not be forgotten. Reputation and goodwill, for example, are monetized in response to public perceptions and attitudes. See Schwartz & Skolnick, *supra* note 59. A developing society may wish to encourage entrepreneurship and therefore find sharp business practices acceptable while a more economically advanced society finds them unacceptable.

<sup>153</sup> See, e.g., R. POSNER, *supra* note 15, at 345-46; Bentham himself had doubts about the appraisal of pleasure, it “not being ponderable or measurable”. J. BENTHAM, A FRAGMENT ON GOVERNMENT WITH AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION lii n.2 (W. Harrison ed. 1948). Rejection of the comparisons has been rejected itself as unacceptable. See, e.g., Pennock, *Epilogue: Some Perplexities further Considered*, in LIBERAL DEMOCRACY 408, 414-15 (J. Pennock & J. Chapman eds. 1983); B. BARRY, *supra* note 49, at 44-52; R. GOODIN, *supra* note 49, at 16-18, 246; I.M.D. LITTLE, *supra* note 39, at 52-53; Arrow, *Values and Collective Decision-Making*, in PHILOSOPHY, POLITICS AND SOCIETY 215, 231-32 (P. Laslett & W.G. Runciman eds. 3d series 1967); Harsanyi, *Morality and the Theory of Rational Behaviour*, in UTILITARIANISM AND BEYOND 39, 49-52 (A. Sen & B. Williams eds. 1982); Mirrlees, *The Economic Uses of Utilitarianism*, in *id.* at 63, 70-74. Even Posner has come around, see Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 113-19 (1979). Much of the counterattack (other than: “Yes we can do it. Period.”) boils down to: “What choice do we have but to assume we can compare utilities?”, or, ask the nay-sayer “whether he is himself attracted by a theory which leaves out such considerations entirely.” R.M. HARE, MORAL THINKING 118 (1981). Society may assume utilities are equal, although it knows better, on the grounds that this assumption is “fundamental to egalitarian justice.” See Bedau, *supra* note 74, at 104.



of hypothetical markets,<sup>154</sup> but this device is far from exact<sup>155</sup> and not readily applicable here.<sup>156</sup>

The magnitude of the task of first deciding what reciprocity means in principle, and second, monetizing it accurately in practice, should be readily apparent by now. Before going on to retributive desert, it may be useful to see how reciprocity as modeled by equation (3) works in (theoretical) practice and compare the results to the model of deterrence. For the sake of simplification, assume the variation of the narrow conception of reciprocity is adopted in which the cost to the victim at the time of the judgment controls,  $c_V$ , and that the ratio between the costs of the two parties,  $F_R$ , is 1:1 — biblical *lex talionis*.

As an example, assume that the costs and benefits of the victim have been plugged into equation (5A) and, with punitive damages yet to be

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<sup>154</sup> Another type of nonexplicit market, the hypothetical market, is also important in analyzing the wealth of society . . . [For example, a] court applying the Learned Hand formula of negligence liability would ask whether the expected cost to you of the accident was greater or less than the expected gain to me of whatever activity produced the accident as a by-product. To answer, the court would have to make a judgment as to how much [your goods lost in the accident] were worth to you, how much [my gain] was worth to me, and so on. The purist would insist that the relevant values are unknowable since they have not been revealed in an actual market transaction, but I believe that in many cases a court can make a reasonably accurate guess as to the allocation of resources that would maximize wealth.

R. POSNER, *ECONOMICS*, *supra* note 71, at 61-62 (footnote omitted). One may also draw on "shadow prices" which may be used to "refer to the prices society *would* assign in perfect markets to commodities for which, in reality, no market exists." Rizzo, *supra* note 121, at 643 n.5 (emphasis in original).

<sup>155</sup> "Inevitably, moreover, the assumptions officials make about how people would behave in a hypothetical market reflect the officials' own beliefs about how people should behave." Dworkin, *Liberalism*, *supra* note 110, at 131. "The measurability of private or public goods' prices on hypothetical markets spans a continuum from the completely unmeasurable to perhaps the easily measurable." Rizzo, *supra* note 121, at 647. Rizzo believes reliance upon shadow prices for moralisms is unworkable. *Id.* at 646. See R. POSNER, *ECONOMICS*, *supra* note 71, at 77-80. For extensive criticism of this general approach to discovering preferences, see R. DWORKIN, *Can a Liberal State Support Art?*, in *A MATTER OF PRINCIPLE* 221 (1985); R. DWORKIN, *supra* note 49, at 237.

<sup>156</sup> The market here is filled with the moralisms which are notoriously difficult to monetize even in hypothetical markets. See *supra* note 121.

In the end, perhaps, "delinquency and punishment are, in all cases, incommensurable." W. GODWIN, *supra* note 75, at 253; see generally *id.* at 253-59; S. BENN & R. PETERS, *supra* note 1, at 217-19. Nonetheless, under one view of retributive reciprocity: "Each man must be done by as he has done. What a man shows, that let him reap. Ideally, he should suffer exactly as much harm as he has done. Fallible human justice rarely achieves this ideal: being unable, in many cases, to measure the exact harm done, human authority has to be content with broad approximation." A. KENNY, *supra* note 35, at 70. Kenny rejects this "crude" view, *id.* at 70-74.

gauged, the net costs to the victim,  $c_V$ , are zero. For instance, he received external benefits that offset his out-of-pocket and other losses. Assume that under equation (6) the net cost to the actor,  $C_A$ , excluding punitive damages, are found to be  $\$-200$ , that is, instead of a loss he gained a net benefit of  $\$200$ . For retributive reciprocity, equation (3A) then works out:<sup>157</sup>

$$\begin{aligned} \text{(example 1)} \quad C_A &= FR(c_V) \text{ (equation 3A)} \\ \$-200 + D_p &= (1)(0 - dp) \\ 2d_p &= \$200 \\ d_p &= \$200/2 \\ &= \$100 \end{aligned}$$

Thus, for the purpose of reciprocity, punitive damages equal  $\$100$ . For deterrence, equation (1) is employed. The actor must gain no benefit. Putting into it the figures assumed above for equation (3A), gives;

$$\begin{aligned} B_a &\geq \$200 - D_p \text{ (equation 1)} \\ 0 &\geq \$200 - D_p \\ D_p &\geq \$200 \end{aligned}$$

One sees that the level of punitive damages for reciprocity may differ from the measure of punitive damages for deterrence. Reciprocity alone leads here to underdeterrence. Under the hypothetical facts the actor is, in effect, sharing the advantage of the external benefits to the victim. Equation (1), unlike equation (3A), ignores the victim's external benefits. It includes only the actor's external benefits (costs).

Another hypothetical, based upon plausible costs and benefits, could easily be constructed to show that sometimes the standard of reciprocity may lead to overdeterrence rather than underdeterrence. By way of summary, two reasons generally explain why punitive damages for deterrence diverge in principle from punitive damages for reciprocity. First, elements of cost (benefit) are encompassed in reciprocity that are not in deterrence. Second, the time at which elements are costed may differ for the two purposes ( $t_a$  versus  $t_j$ ). The difficulties of monetizing the elements, assumed away in the hypotheticals, must be added to this problem. Nor, the next section reveals, will the substitution of the goal of retributive desert for that of reciprocity bring relief. If anything, the hope of finding an overarching structure to the concept of punishment will be further frustrated.

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<sup>157</sup> The probability of punitive damages, roughly  $P_C$ , has been dropped out of the equation for simplicity. As far as the punitive damages in the suit before the court,  $P_C = 1$ , *ex hypothesis*. Punitive or other damages, and nondamage action benefits to the victim are still possible from future actions against the actor, but these improbables are ignored. Thus,  $D_p = dp$ . Note that punitive damages are a cost to the actor ( $+D_p$ ) while a benefit to the victim ( $-dp$ ).

## 2. Just Desert

The desert theory of retributive punishment aims to inflict pain or costs upon the actor in proportion to the wickedness or evil of the proscribed act.<sup>158</sup> As a reminder, the model equation is:<sup>159</sup> (4)  $CA = FJ(W_A \text{ or } WA)$ .

The specification and monetization of the elements of wickedness are necessary to parallel and compare the prior analysis of the purposes of punitive damages. One can then decide whether the various aims cohere into an overarching determinate calculus. The steps here are more difficult than in the prior analysis of purposes. Above, the notion of what is a cost, in the sense of what affects a person's choice to act, is largely self-evident or subject to fair agreement. Although controversy remains, the nature of the elements is somewhat clear even if the quantification is not. For the desert theory of retribution, both identifying and quantifying elements are more problematic.<sup>160</sup>

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<sup>158</sup> See, e.g., ARISTOTLE, *supra* note 137, bk. V, ch. 5; N. WALKER, *supra* note 33, at 14-19; but see *infra* note 236. Commentators use various words to denote this idea, such as "culpability", see, e.g., H. GROSS, *supra* note 94, at 77-82 (The four "dimensions" of culpability are intentionality, harm, dangerousness and legitimacy), or "wickedness", see, e.g., Davis, *How to Make the Punishment Fit the Crime*, 93 ETHICS 726, 742 n.16 (1983); Haksar, *supra* note 72, at 317-318, or "accountability" and "attribution", see, e.g., G. FLETCHER, *supra* note 33, at 459.

The character of the actor does not warrant punishment, for that is socially improper as contrary to corrective justice, instead the character of his act draws the fire. See ARISTOTLE, *supra*, bk. V, ch. 4; H. GROSS, *supra*, at 76-77; but see B. WOOTTON, CRIME AND THE CRIMINAL LAW 42 (1963); D. HUME, A TREATISE OF HUMAN NATURE 477, 575 (L. Selby-Bigge ed. 1888) (1st ed. London 1739 & 1740); Brandt, *Blameworthiness and Obligation*, in ESSAYS IN MORAL PHILOSOPHY 3, 16-19 (A.I. Melden ed. 1958); Bayles, *Character, Purpose, and Criminal Responsibility*, 1 LAW & PHIL. 5 (1982). But once the act is sufficient to justify punishment, then, under the models in this analysis, the character of the actor is relevant to the measure because it affects his costs and benefits. Criminal sentencing must also consider the history and characteristics of the defendant. See 28 U.S.C. § 994 (1989). Yet, "the purpose of imposing criminal liability is in no way advanced by an administration of punishment according to character or reputation." H. GROSS, *supra*, at 452. Fletcher also is concerned about the "insidious implications" of this, see G. FLETCHER, *supra*, at 459-66; but cf. *id.* at 802 ("The only way to work out a theory of excuses is to insist that the excuse represent a limited, temporal distortion of the actor's character."). Though the logic of looking to character is questionable, all penal systems do it anyway, see N. WALKER, *supra*, at 165.

<sup>159</sup> See Table of Symbols B-1 *supra* at 19. For a different approach to a model of retributive desert, see Wittman, *Punishment as Retribution*, in 4 THEORY & DECISION 209 (1974).

<sup>160</sup> "To explicate the concept of desert and its implications one must construct a comprehensive moral theory, a task not to be undertaken here." Ellis, *supra* note 4, at 4. I won't undertake it either. Walker argued that

[i]f possible these justifications [of criminal proscriptions] should not appeal to moral sentiments of the sort that condemn certain kinds of behaviour. They should not assert that the criminal code should prohibit this or that because it is wicked. To assert this is to invite argument as to what is or is not wicked, and in any society . . . areas of

A promising place to begin this analysis is with the practical manifestations of the theories of wickedness which appear in case doctrine and model jury instructions for punitive damages. These guidelines, although mainly directed to the question of when acts are wicked and should be punished rather than how much punishment deserves to be inflicted,<sup>161</sup> provide a useful base. A look there may avoid some difficulties with theory.<sup>162</sup>

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disagreement will quickly be found.

N. WALKER, *supra* note 33, at 37. In light of the legal doctrine of punitive damages, the invitation seems unavoidable. Though the emphasis is on the measurement of the severity of punishment, rather than its justification, the discussion will make it clear, as Honderich suggested, that the two cannot be neatly divided. See *supra* note 5.

<sup>161</sup> This is not always true. See, e.g., MINN. STAT. ANN. § 549.20 (West 1984) (quoted *infra* at note 238); Jenkins v. Arab Termite & Pest Control, Inc., 442 So. 2d 922, 923 (Fla. Dist. Ct. App. 1982) ("reasonable proportion to the malice, outrage, or wantonness of the tortious conduct"); Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036 (5th Cir. 1984) (Texas Courts consider five factors in evaluating whether a punitive damages award is excessive; (1) nature of the wrong; (2) character of the conduct involved; (3) degree of culpability of the wrongdoer; (4) situation and sensibilities of the parties; (5) extent to which defendant's conduct offends public sense of justice and propriety).

<sup>162</sup> The varied dogma and philosophy regarding the role of desert, wickedness, culpability, responsibility, and related notions, seem beyond uniform resolution. One might compare the biblical standards with contemporary views by: J. FEINBERG, *Justice and Personal Desert*, in DOING AND DESERVING 55 (1970); Brandt, *supra* note 158, at 16-17; G. FLETCHER, *supra* note 33, at 454-504; J. RAWLS, *supra* note 62, at 310-15; H. GROSS, *supra* note 94, at 74-88; and R. NOZICK, *supra* note 1, at 363-97. "It has often been objected that such assessments [of responsibility for actions] are impossible or exceedingly difficult." T. HONDERICH, *supra* note 1, at 26 (with citations). For nine different analyses (with criticisms) of what is meant by the statement that a person deserved a penalty, see *id.* at 15-22. Honderich concluded that the best analysis includes five elements, the first one being that the person "behaved culpably." *Id.* at 23. This hardly helps. To try again: "And the basis of desert can be any characteristic of an individual (or any of his past actions) which is esteemed or (in the case of deserved punishment) disesteemed." Soltan, *Empirical Studies of Distributive Justice*, 92 ETHICS 673, 678 (1982). Other versions of retribution may help: "Wrongdoing [is measured] by the *unfair advantage* the criminal takes by breaking the law rather than by the harm done or risked." Davis, *supra* note 86, at 8-9 (emphasis in original). See also Murphy, *Retributivism and the State's Interest in Punishment*, in CRIMINAL JUSTICE 156, 160-61 (J. Pennock & J. Chapman eds. 1985) ("principle of fair play"). How would this be quantified? Perhaps the chicken has been confused for the egg: "We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it, if not by law, by the opinion of his fellow creatures, if not by opinion, by the reproaches of his own conscience." J.S. MILL, *supra* note 61, at 87. "It has been suggested that we do not blame and punish men for what they do because they are responsible for doing it, but rather that we hold them responsible because we are accustomed to blame and punish them." Plamenatz, *supra* note 36, at 187. On the other hand, philosophical theory may be irrelevant: Malice "means something different in law from what it means in morals . . ." Holmes, *The Path of the Law*, in JURISPRUDENCE IN ACTION 275, 282 (1953). See also *id.* at 292-93. This last position may be preferred, for "ambiguity, contradiction, conflict of social purpose, compromise, and incoherence' inherently characterize modern day discussions of moral culpability." Ellis, *supra* note 4, at 5 n.15 (quoting Allen, *The*

Courts, legislatures and commentators have used a limited range of labels to pinpoint the conduct triggering punitive damages. They center on the notions of malice and reckless disregard of the interests of others.<sup>163</sup> Two leading authorities on punitive damages find a conceptual uniformity among the jurisdictions:

The conduct which the varying terms are used to describe is generally of two distinct types. The first type is that in which the defendant desires to cause the harm sustained by the plaintiff, or believes that the harm is substantially certain to follow his conduct. With the second type of conduct the defendant knows, or should have reason to know, not only that his conduct creates an unreasonable risk of harm, but also that there is a strong probability, although not a substantial certainty, that the harm will result but, nevertheless, he proceeds with his conduct in reckless or conscious disregard of the consequences.<sup>164</sup>

Summarizing in a form more in accordance with the prior models, the various verbal formulas show that not just any proscribed act is sufficient for punitive damages. Many intentional acts drawing sanctions may be said to be wicked, or at least *prima facie* wicked, but more is necessary.

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*Law as a Path to the World*, 77 MICH. L. REV. 157, 163 (1978)). Allen, however, tried to pinpoint the common denominators of the modern doctrines of just desert:

A comparatively full-blown version of the doctrine . . . is likely to include two principal assertions. First, the primary object of criminal sanctions is to punish culpable behavior. Although punishment may result in certain utilitarian benefits, notably the reduction of criminal behavior, the justification of punishment does not require such a showing; for it is moral and just that culpable behavior be punished. Second, the severity of the sanctions visited on the offender should be proportioned to the degree of his culpability. The notion of desert both justifies the selection of the offender for penal treatment and also determines the severity of the penalty imposed on him.

F. ALLEN, *supra* note 33, at 66 (footnotes omitted). Allen further discussed the appeal of the idea of just deserts. *Id.* at 66-70.

<sup>163</sup> The terms include the following: circumstances of aggravation or outrage; spite; malice; fraudulent or evil motive; conscious and deliberate disregard of the interests of others; wilful or wanton; conscious indifference to harmful consequences; bad motives; reckless indifference to the interests of others; gross and oppressive conduct; intent to vex, injure or annoy; wanton and reckless disregard of the injured party's rights and feelings; gross fraud; complete indifference; offensive. These labels, and citations for them, come from J. GHIARDI & J. KIRCHER, *supra* note 3, § 5.01. For a discussion of these terms, and their vagueness, see Ellis, *supra* note 4, at 34-37. Utah's standard, one of the more specific ones, is that punitive damages are "for particularly grievous injury caused by conduct which is not only wrongful, but which is willful and malicious so that it seems to one's sense of justice that mere recompense for actual loss is inadequate." *Kesler v. Rogers*, 542 P.2d 354, 359 (Utah 1975) (quoted in J. GHIARDI & J. KIRCHER, *supra*, § 5.01).

<sup>164</sup> J. GHIARDI & J. KIRCHER, *supra* note 3, § 5.1 (footnotes omitted). Notice how closely these tests verge into standard contract and tort liabilities. But for a strong interpretation of the word "unreasonable" in the second type of conduct, arguably all intentional contract breaches would meet it. See *infra* note 193 for discussion. Compare the standard proposed by Sebert, *supra* note 20, at 1656-59. For other versions of the test for punitive damages, see *supra* note 23.

From the guidance offered by the courts, two conceptions are discernible, however dimly: the actor "deserves" to suffer punitive damages in the name of retribution for wickedness when the actor is culpable, owing to his iniquitous mental state, and the act is oppressive,<sup>165</sup> that is, socially harmful, under the first conception, to the victim, or, under the second conception, to society as a whole.<sup>166</sup> In short, the act is culpably oppressive.<sup>167</sup> The actor's deserved punishment becomes a function of this culpable oppression.

The model of the two conceptions, with variations, of culpable oppression is loosely represented by equation (7). It will be combined with the model for the deserved punishment, equation (4).

$$(4) C_A = FJ(W_a \text{ or } W_A)$$

$$(7) W_a \text{ or } W_A = M_i[c_v, c_V, C_S, \text{ or } C_S]^{168}$$

#### Table of Symbols B-4

$C_A$  = Cost to actor

$C_S$  = Social cost (at  $t_a$ )

$C_S$  = Social cost (at  $t_j$ )

$c_v$  = Cost to victim (at  $t_a$ )

$c_V$  = Cost to victim (at  $t_j$ )

$FJ$  = Functional relationship for desert

$M_i$  = Actor's mental state

$W_a$  = Wickedness of the proscribed act (at  $t_a$ )

$W_A$  = Wickedness of the proscribed act (at  $t_j$ )

<sup>165</sup> "Wrongdoing" in Fletcher's parlance. See *supra* note 76.

<sup>166</sup> The first conception of wickedness concentrates on the impact on the victim, the second one on the impact on society in general. This duality, like the one for retributive reciprocity, is required because some of the verbal formulas refer to injury to "the plaintiff" or "the injured party", while others refer to "another person" or, less ambiguously, "others". The latter set of labels and their judicial explications, along with a reading between the lines, implies wider consequences.

<sup>167</sup> The key words used so far to describe wickedness are not very elucidating. In a thesaurus they are closely associated with the central concept and thus are little better than synonyms. Elaboration is just ahead. To anticipate the thrust of the discussion, compare Feinberg's formula for the commission of a wrong:

One person, A, can be said to *wrong* another, B, when he treats him unjustly. More precisely the injustice occurs when A's act or omission has as its intention to produce an adverse effect on B's interests, or is negligent or reckless in respect to the risk of such an effect; and A's conduct is morally indefensible; and B's set-back interest is one that he has a *right* to have respected.

J. FEINBERG, *supra* note 55, at 107-08 (emphasis in original). A succinct version is: The purpose of sentencing is to "assure that the severity of the sentence is proportionate and directly related to the culpability of the defendant and the harm done." H.R. 6915, 96th Cong., 2d Sess., § 3101 (1980).

For a different economic approach to the malice and reckless conduct that triggers punitive damages, compare Ellis, *supra* note 4, at 24-33.

<sup>168</sup> Brackets represent the idea that the mental state is not a function of the individual or social cost, but rather the mental state is with respect to this cost.

Some factors are symbolized by italicized letters to represent the fact that they are, at least partially, society-regarding. The small subscripts indicate that the valuation of these costs may take place at the time of act,  $t_a$ , whereas the capital subscripts indicate that the valuation may take place at the time of judgment,  $t_j$ . The factors within these two conceptions of culpable oppression, with variations, are separately elaborated.

a. *Actor's mental state,  $M_j$* . Wickedness consists of more than the intention merely to invade rights or cause harm. Most intentional torts and breaches of contract embody harmful rights invasions. The actor typically knows both that the act invades the victim's rights and that the victim will be injured. Legal doctrine indicates that this alone will not support punitive damages. The standards for punitive damages adumbrate an additional factor. Among the words and phrases commonly used that intimate it more clearly are: aggravation or outrage; spite; malice; evil; willful and wanton; wickedness as amounted to criminality; cruel and unjust hardship.<sup>169</sup> The run-of-the-mill knowledge of rights and harms alone does not meet these qualities.

The labels are more actor-regarding than act-regarding. Despite the hornbook rule of criminal law that intention, not motivation, is crucial to the element of *mens rea*,<sup>170</sup> the descriptive labels of the mental state triggering punitive damages strongly imply the motivation behind the act rather than only the intention to do it.<sup>171</sup> The mental state is characterized

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<sup>169</sup> See *supra* note 163. Malice and other emotions cannot be written off as "irrational". Cf. S. FREUD, *THE PROBLEM OF ANXIETY* 27-28 (1936) (secondary gains of neurosis). This may be called "psychic income." See *supra* note 61. Furthermore, "[p]erfectly rational individuals can have 'unreasonable desires' as judged by other perfectly rational individuals . . . Particular unreasonableness, then, can hardly be strong evidence of general irrationality." Feinberg, *Legal Paternalism*, in *PATERNALISM* 3, 18 n.8 (R. Sartorius ed. 1983).

<sup>170</sup> See, e.g., R. PERKINS & R. BOYCE, *CASES AND MATERIAL ON CRIMINAL LAW AND PROCEDURE* 546-48 (6th ed. 1984); but see *infra* note 179. The various meanings of "intention" in the civil context, which spill into "motivation", are explored in W. PROSSER & W. KEETON, *supra* note 19, § 8.

<sup>171</sup> As seen in the quotes at note 23, *supra*, explicitly pronouncing evil motive as necessary for punitive damages are the tests of the RESTATEMENT (SECOND) OF TORTS § 908 (1965) and of W. PROSSER AND W. KEETON, *supra* note 19, § 2 at 9. "It is usually the defendant's mental state that is said to justify a punitive award against him, rather than his outward conduct." D. DOBBS, *supra* note 11, § 3.9, at 205; but see discussion at note 206, *infra*. In discussing the penal law, Bentham wrote:

In every transaction, therefore, which is examined with a view to punishment, there are four articles to be considered: 1. The *act* itself, which is done. 2. The *circumstances* in which it is done. 3. The *intentionality* that may have accompanied it. 4. The *consciousness*, unconsciousness, or false consciousness, that may have accompanied it . . . There are also two other articles on which the general tendency of an act depends: and on that, as well as on other accounts, the demand which it creates for punishment. These are, 1. The particular *motive* or motives which gave birth to it. 2. The general *disposition* which it indicates.

by a pejorative epithet, meaning that society considers it unworthy and unacceptable. Immediately raised is the question of the time at which the societal loss is costed. The answer suggested by the discussion thus far is that the time of the act,  $t_a$ , is critical.<sup>172</sup> For if the actor did not know, and had no reason to know, that his act would cause a societal loss, his act hardly seems wicked and deserving of punishment.<sup>173</sup> Yet before the variations of culpable oppression as measured at  $t_j$  are deleted, one must ask whether unexpected societal losses are to be ignored entirely. When the actor at  $t_a$  intends to commit a culpably oppressive act, but a greater or lesser societal loss actually eventuates, is this contingency irrelevant to just punishment? Putting the implication in other words, *whether* the actor deserves punishment may depend upon the anticipated societal loss, whereas *how much* the actor is justly punished may depend upon the actual societal loss. To keep this option under consideration, the variations are retained.

Even if the measure of the actor's deserved punishment turns on the societal loss that eventuates, it is clear that the initial question of whether the actor deserves punishment turns on the anticipated societal loss.<sup>174</sup> Musing on the notion of a mental state with respect to an unknown and unknowable future state of affairs provides reason enough. The proposed conclusion is that the sanction is imposed because the actor was motivated by a socially unworthy mental state which caused a cognizable societal

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J. BENTHAM, *supra* note 50, at 75 (emphasis in original). Most of these factors relate to the motivation, broadly defined, of the actor, which is more clearly seen in Bentham's explication of the six articles, *id.* at 75-142. Nozick has been criticized for ignoring the actor's motives for violating rights in his measurement of retributive desert. See Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 LAW & PHIL. 1, 3-4 (1987).

<sup>172</sup> The labels were described as identifying the actor's motivation. "A motivation is a belief which at the time of deliberating or acting is part of an acceptable explanation for the agent's behavior (whether the agent so regards it or not)." Rudinow, *Manipulation*, 88 ETHICS 338, 345 (1978).

<sup>173</sup> In considering a hypothetical in which dire consequences follow from an act done with a rather benign mental state, Smart stated: "A very wrong action is usually very blameworthy, but on some occasions . . . a very wrong action can be hardly blameworthy at all. This seems paradoxical at first, but paradox disappears when we remember Sidgwick's distinction between the utility of an action and utility of praise of it." Smart, *An Outline of a System of Utilitarian Ethics*, in J.J.C. SMART & B. WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 3, 55 (1973). See also G.E. MOORE, *ETHICS* 79-82 (1912). The notions underlying foreseeability and proximate cause, and Aristotle's distinction between the quality and the effect of an act creep into this discussion. See *supra* note 137 and accompanying text.

<sup>174</sup> Feinberg, looking to Aristotle, offered this view: "For an act to have an unjust quality (whatever its effects) it must be, objectively speaking, the wrong thing to do in the circumstances, unexcused and unjustified, voluntarily undertaken, and deliberately chosen by an unruined actor who is well aware of the alternatives open to him." Feinberg, *supra* note 74, at 6.



loss, concentrating either upon the victim,  $c_v$ , or upon society as a whole,  $C_s$ . Regardless of the tradeoff between actor and victim, society suffers from the interaction. The actor's mental state alone makes society wary.<sup>175</sup> Though a societal loss may often be tolerated to allow sufficient range for individual liberties,<sup>176</sup> the actor is not in a position to claim offsetting societal benefits. An unworthy mental state which accompanies and leads to net societal loss should not be neglected. All else equal, the higher the anticipated loss, the more wicked the act, which is not to say that intuitions regarding wickedness are independent of actual societal losses. So the test that originally appeared as act-regarding and then actor-regarding turns out to be, under this analysis, also society-regarding. Both mental state and societal loss are necessary. The consequences to society (concentrating upon, or including, the victim) count. Since the actor cannot say enough socially worthwhile about the deliberate or reckless, harmful act, he is relegated to silence as he reaches for his wallet.

The factfinder must first appraise the actor's mental state in determining whether punitive damages are appropriate. It must be emphasized that the actor's appraisal of his own mental state is not considered by the factfinder, but rather society's appraisal is.<sup>177</sup> The mental state is akin to the *mens rea* requirement of the criminal law.<sup>178</sup> The kinship with *mens rea* brings along the same difficulties of, first, agreeing upon what it is,<sup>179</sup> and

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<sup>175</sup> The mental state itself, regardless of the consequences of the act, anticipated or actual, may be considered a societal loss:

[If a person acts] from a good motive, *that* adds to the sum of values in the universe; if from a morally indifferent motive, *that* leaves the sum of values unchanged; if from a bad motive, *that* detracts from the balance of values in the universe. Whatever intrinsic value, positive or negative, the action may have, it owes to the nature of its motive and not to the act's being right or wrong; and whatever value it has independently of its motive is instrumental value, i.e., not goodness at all, but the property of producing something that is good.

W.D. Ross, *supra* note 1, at 132-33 (emphasis in original). Punitive damages are not aimed at mental states alone.

<sup>176</sup> See *supra* note 61 for the discussion of Mill's "harm" principle, and other liberty-limiting principles.

<sup>177</sup> See *infra* notes 188 & 191. Recall the discussion of the different types of malevolence. See *supra* note 102.

<sup>178</sup> Akin, but apparently not identical. See *supra* note 170. It is akin to the social view of the actor's internal payoff,  $F_1$ . Mental state here is distinguished from internal payoff since there are internal effects on the actor that are irrelevant to the question of whether he has a culpable mental state. For example, that he may have ambivalent feelings about his malicious act which include distressful guilt, doesn't eliminate the maliciousness.

<sup>179</sup> Commentators have formed no consensus on the slippery concept of *mens rea*. Some use the term to denominate whatever mental element is required to convict for a particular crime. See, e.g., A. KENNY, *supra* note 35, at 1-2. Others use it as a contrast to the specific intent or negligence needed for some crimes. A few quotes convey the idea: "[T]o constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will." 4 W. BLACKSTONE, COMMENTARIES \*21. "There can be no crime, large or small,

second, assuming agreement that it is a mental state,<sup>180</sup> attempting to discern and evaluate it.<sup>181</sup> But, as in the criminal law, whether or not one can actually do this well, society generally proceeds as if one can. Much controversy is glossed over by asking, what other choice is there? Signifi-

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without an evil mind. In other words, punishment is the sequence of wickedness . . ." 1 J. BISHOP, *CRIMINAL LAW* 192 (9th ed. 1923). Hart provided his usual insightful comments in H.L.A. HART, *supra* note 46, at 28. For the historical use of the term, see generally Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932).

<sup>180</sup> Strict and vicarious liability may shed doubt upon this proposition.

<sup>181</sup> "It is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man." Y.B. Pasch. 17 Edw. 4, f. 2a, pl. 2 (1477) (Brian, C.J.). Yet St. Peter knows, see N. MORRIS, *MADNESS AND THE CRIMINAL LAW* 155 (1982). See also Coons, *Compromise as Precise Justice*, in *COMPROMISE IN ETHICS, LAW, AND POLITICS* 190, 194-95 (J. Pennock & J. Chapman eds. 1979); Brandt, *supra* note 158, at 28. Godwin despaired of reconciling this problem with the demands of just punishment, see W. GODWIN, *supra* note 75, at 253-57. "Even at the level of economism, scientific description applies only to 'perfectly' economic behavior, which both abstracts from all forms of error and also relates to motives assumed as given, but these in fact cannot possibly be accurately known, even to the behaving subject himself." F. KNIGHT, *Fact and Value in Social Science*, in *FREEDOM AND REFORM* 225, 237 (1947). Hart, following a discussion of proof of the mental element of criminal responsibility, concluded:

For these practical reasons, no simple identification of the necessary mental subjective elements in responsibility with the full list of excusing conditions can be made; and in all systems far greater prominence is given to the more easily provable elements of volitional control of muscular movement and knowledge of circumstances or consequences than to the other more elusive elements.

H.L.A. HART, *supra* note 46, at 33. This problem exists to some degree in satisfying all of the purposes of punitive damages. See, e.g., Willoughby, *Theories of Punitive Justice*, in *MORALS AND VALUES* 370, 375-76 (M. Singer ed. 1977).

This task is similar to the utilitarian one of costing mental states to see what effect an act has on overall happiness. The practice presupposes omniscience. See 2 F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 17-23 (1976); R. POSNER, *ECONOMICS*, *supra* note 71, at 54. Economists prefer to avoid this type of problem by creating a market in the goods to force people to reveal their preferences by their dollars. That is not possible here; an economist would be relegated to a hypothetical market, see *supra* note 154. Hypothetical markets don't solve many of the costing problems. See R. POSNER, *supra* at 79-80. Holmes, the great objectifier, avoids the problem of discerning the mental state of malice in this way:

The standard applied is external, and the words malice, intent and negligence, as used in this connection, refer to an external standard. If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance.

Holmes, *supra* note 65, at 1. Another indirect technique is: "For if malevolence in fact actuated the defendant, he will frequently have no basis for justifying his conduct." Note, *The Prima Facie Tort Doctrine*, 52 COLUM. L. REV. 503, 507 (1952) (footnote omitted).

cant societal loss is intolerable when the primary antecedent is malice.<sup>182</sup> Otherwise, social disintegration is threatened.<sup>183</sup>

For assessment of whether the actor deserves punitive damages, an object of the actor's knowledge or unworthy mental state is, under the narrow conception, the victim's net cost,  $c_v$ , or, under the broad one, overall social cost,  $C_s$ . The imposition of losses on the victim or on society, even when done with an unworthy mental state, is not by itself a societal loss within the two conceptions of wickedness. An interaction where one party knows he will gain a significant advantage at the other's cost is not prohibited for that alone. For example, there is generally no redress for a buyer who pays a foolish price to a knowing seller innocent of improper inducement, even though there may be efficiency losses. Bad bargains are not remediable. If the actor, however, knows or has reason to know that he is harmfully infringing the victim's rights, say, the harm is a product of the actor's illegal deceit, then he is liable not only for actual damages but also has the requisite unworthy mental state,  $M_j$ , which bears on the issue of punitive damages.<sup>184</sup>

The social view of the actor's mental state involves the actor's knowledge of the victim's rights. Harm is also stressed. To summarize, the courts and legislatures use two tests of the necessary mental state for punitive

<sup>182</sup> The debate over whether *mens rea*, and the related idea of what triggers punitive damages, are based upon motivation or intention, is outside the scope of this article, as much as possible. See H.L.A. HART, *supra* note 46, at 28; H.L.A. HART, *Intention and Responsibility*, in PUNISHMENT AND RESPONSIBILITY 113 (1986). See *supra* notes 170 & 179 for a discussion of mental states. At bottom, the debate cannot be avoided altogether if one wishes to generalize:

One of the persistent tensions in legal terminology runs between the descriptive and normative uses of the same terms. Witness the struggle over and the concept of malice. The term has a high moral content, and when it came into the law as the benchmark of murder, it was presumably used normatively and judgmentally. Yet . . . English jurists have sought to reduce the concepts of malice to the specific mental states of intending and knowing . . . For the English, malice is a question of fact: did the actor have a particular state of consciousness (intention or knowledge)? In California, malice is a value judgment about the actor's motives, attitudes and personal capacity.

G. FLETCHER, *supra* note 33, at 396. The analysis here roughly follows the English. Part of societal loss includes the California value judgments.

<sup>183</sup> Also threatened, alas, is the tyranny that may follow from holding persons to exact account for their mental states. In Adam Smith's words, "every court of judicature would become an inquisition." A. SMITH, *THEORY OF MORAL SENTIMENTS* 153 (New ed. 1966) (1st ed. Glasgow 1759) (quoted in Haksar, *supra* note 72, at 321).

<sup>184</sup> If the actor's deceit results only in a wealth transfer from the victim, without transaction costs, the nature of the harm supporting punitive damages might be questioned. After all, the victim's ordinary civil remedy should be fully compensatory and thus no net societal loss would remain *ex post*. And indeed this is the rule. Deceit, like intentional breaches of contract, does not automatically trigger punitive damages. For an argument against this view, see *infra* note 217.

damages. First, the actor must know or have reason to know that his act will invade the victim's rights,<sup>185</sup> while being indifferent to whether there will be a societal loss,  $c_v$  or  $C_S$ .<sup>186</sup> Second, he must know or have reason to know that his act is substantially certain to cause a societal loss,  $c_v$  or  $C_S$ ,<sup>187</sup> while being indifferent to whether the harm is protected by the victim's rights.<sup>188</sup>

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<sup>185</sup> This might be put more accurately, though inelegantly, that the actor must know or have reason to know that his act will invade rights of the victim about which the actor knows or has reason to know. Thus the crucial knowledge is one, that the victim has a relevant right, and two, that the act will invade that right.

The line between "reason to know" and "indifference" is not sharply drawn. Apparently "reason to know" means that the knowledge is readily accessible but ignored, perhaps consciously, by the actor. "Indifference" suggests the actor's effort to obtain the knowledge would need to be more extensive or that the information, though readily available, is unconsciously ignored. "Indifference" does not mean that the actor cannot obtain the knowledge, or that an unreasonably extensive search is required, for then he would be subject to punitive damages without adequate notice. See RESTATEMENT (SECOND) OF TORTS § 12 (1977) (defining "reason to know" and "should know").

<sup>186</sup> This new factor, the rights of the victim,  $r_v$ , can be put into symbols previously used. This may help find common denominators. Rights imply remedies, if not necessarily in all events, see D. DOBBS, *supra* note 11, § 1, at least for these events in which the remedy of punitive damages is granted. The victim's remedy occurs as factor (b) in equation (5), in its unsuppressed form,  $f_S(p_C, p_T, b_R, b_N)$ . Borrowing that factor requires some modifications. First, the actor's knowledge is determined at the time of the act,  $t_a$ , not at the time of the judgment,  $t_j$ . Second, whether the rights will be vindicated is of no concern. Their existence is the only question. The probabilities of the remedies, ( $p_C, p_T$ ), may be ignored, or assumed to equal one. Thus:  $r_v = f_S(b_R, b_N)$ .

This analysis weakens the criticism of punitive damages that the actor is unfairly penalized because of the lack of notice. See *supra* note 39. He may be able to claim that he didn't sufficiently appreciate the risk of punitive damages, but he can hardly claim that he believed or had reason to believe there was nothing wrong with his act. See Ellis, *supra* note 4, at 22. Similarly, for common law crimes that exist in many states, "in order to permit prosecution for conduct that has not been made punishable by statute, the conduct would generally have to strike the court as clearly falling within some residual broad category of conduct whose 'criminality' seems unmistakable." S. MERWIN, *supra* note 46, at 270-71. Vagueness, nonetheless, remains, and with it questions of fairness and efficiency. For some of the disturbing ramifications, see *id.* at 39-57.

<sup>187</sup> A circumlocution similar to the one in note 185, *supra*, might clarify the required knowledge.

<sup>188</sup> These two tests suggest an interesting interweaving with the goal of deterrence. Adequate deterrence requires a rational choice based upon a cost-benefit analysis of consequences. The tests of the actor's mental state for the purpose of retributive desert imply that the actor is either in no position to make a rational cost-benefit analysis, or is in such a position but refuses to do so. Being indifferent to the societal loss or the victim's rights, the actor does not internalize these costs because he refuses to become aware of them. Or, to take an extreme case of malice (viciousness) where the actor knows (or has reason to know?) both that there will be a societal loss and that the harm is protected by the victim's rights, the actor is in a position to base his choice to act upon a cost-benefit analysis, but instead the actor says, effectively, "I don't care about the bottom line; I'm going to 'get'

Legal doctrine instructs that the relevant knowledge of the actor with respect to rights and harms ranges from "indifference", through "reason to know", up to "know". This clearly smacks of quantity.<sup>189</sup> The more the actor knows, or should know, that the act will invade the victim's rights and cause him harm, the closer the mental state reaches the maximum blameworthiness.<sup>190</sup>

This test of the necessary mental state, though it remains inevitably nebulous, may suffice: the mental state is quantified by an amount which reflects the degree of the actor's knowledge at  $t_a$  with respect to the victim's rights invasion and harm. On a scale of 0 to 1, for example, for the absolutely vicious actor who is correctly certain that the victim's rights will be invaded and the victim will be harmed by the amount he turned out actually to be harmed, the degree of knowledge is 1. For the actor who is correctly certain that the victim's rights will be invaded, but who is com-

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you anyway." In other words, pursuing these deterrent overtones of the test for retribution, the law may be saying to the actor, as in the old joke about the stubborn mule that won't obey until struck by a heavy club, "since you won't pay attention to the bottom line under the measure of deterrence alone, we will hit you with a cost high enough to make sure that you will attend to it." Under this view retributive damages may be some multiple of deterrent damages. One might suppose that countering indifference would require a smaller multiplier than would countering viciousness.

<sup>189</sup> Even "indifference" or "disregard" connote knowledge. For example, "reckless disregard" has been defined as "conduct manifesting a *conscious*, flagrant indifference to the safety of those persons who might be harmed by a product and constituting an extreme departure from accepted practice." Product Liability Act, H.R. 1936, 100th Cong., 1st Sess. § 11 (1987) (emphasis added) (not enacted as of Nov. 15, 1989). But "whether recklessness is to be defined subjectively (the accused actually foresaw) or objectively (he ought to have foreseen) is still unsettled in [Canadian] case law." Baker, *Mens Rea, Negligence and Criminal Law Reform*, 6 LAW & PHIL. 53, 59 (1987) (citation omitted). Furthermore,

[t]hose who claim to find a distinction [between reckless and grossly negligent conduct] state that recklessness applies only to the conscious creation of substantial risks; gross negligence encompasses an excessive degree of carelessness. To an untrained observer, as well as many sophisticated commentators, this distinction seems tenuous at best. Yet many commentators assert it, and many jurisdictions allow sanctions to be imposed for reckless conduct but not for negligent behavior.

Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1164 (1966) (footnotes omitted).

<sup>190</sup> For the centrality of knowledge in the meaning of *mens rea*, with criticism for ignoring the normative aspect, see Baker, *supra* note 189, at 53. The relationship between knowledge and culpable oppression may be nonlinear; a harm with a known probability of, say, 1.0, may be more than twice as culpably oppressive as a harm with a probability of 0.5. "Psychologists report that people feel disproportionately more responsible for results that are certain than for those that are just probable consequences of their actions." R. GOODIN, *supra* note 63, at 138 (citation omitted). The relationship between knowledge and harm may be different from that between knowledge and rights. Knowledge that one is invading another's rights may seem less wicked than an equal knowledge that one is harming another (beyond merely a technical invasion of his or her rights).

pletely unaware of, and perfectly indifferent to, whether the victim will be harmed, which he will be, the degree of knowledge might be 0.5. Unless the degree of knowledge is, say, 0.5, the threshold for the granting of retributive damages has not been surpassed.<sup>191</sup> As the knowledge falls short of perfect (1), the desert damages decrease, down to the threshold point (0.5), beyond which the damages are zero.<sup>192</sup> The reason for a required minimum threshold of knowledge is evident once the court doctrine is taken literally, especially when one adds the legal principle that ignorance of the law is no excuse.<sup>193</sup> Without this excuse the actor is effectively presumed to know of the rights invasion.<sup>194</sup> Since all rights invasions give rise to a "harm" at least in a nominal sense, most, if not all, intentional torts or contract breaches appear to satisfy the literal test unless a minimum threshold of knowledge is necessary. The cases make it abundantly clear that more is required.

In order to bring one's intuitions to the notion of culpable mental state, hypotheticals will be examined. First, consider the "mental state" of the

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<sup>191</sup> Compare Nozick's formula:

The punishment deserved depends on the magnitude *H* of the wrongness of the act, and the person's degree of responsibility *r* for the act, and is equal in magnitude to their product,  $r \times H$ . The degree of responsibility *r* varies between one (full responsibility) and zero (no responsibility), and may take intermediate numerical values corresponding to partial responsibility . . . . The magnitude *H* is a measure of the wrongness or harm, done or intended, of the act.

R. NOZICK, *supra* note 1, at 363 (citing R. NOZICK, *supra* note 94, at 59-63, and G. FLETCHER, *supra* note 33). Pegging the multiplier for the culpability of the mental state somewhere between zero and one is less evident in the formula here than in Nozick's, for the mental state is not the same as responsibility. The mental state may be part of what determines responsibility, but under the instant formulation it is also part of Nozick's *H*, "the wrongness or harm, done or intended, of the act." With respect to simplification, Nozick may not come out ahead in the long run by his formula which fixes *r* somewhere between zero and one, for the difficult question of mental state then must be confronted in his elaboration of *H*, which is not his main concern. *Id.* He did, however, notice the complexities of *H* (and his reinterpretation of *r*). *Id.* at 388-93. On the other hand, short shrift to his question of responsibility is given here. It is struggled with in the context of the actor's mental state, but other aspects, such as cause in fact, proximate cause, notice, vicarious liability, etc., are largely neglected. Note, however, that these mentioned factors of responsibility go to the question of knowledge, broadly defined. The more attenuated the cause in fact, proximate cause, and notice, the less the actor knows or has reason to know of societal loss. Similarly, vicarious liability raises questions of knowledge. See *supra* note 39.

<sup>192</sup> Fletcher observed that "the maximum level of punishment is set by the degree of wrongdoing; punishment is mitigated according as the actor's culpability is reduced." G. FLETCHER, *supra* note 33, at 462; see also R. NOZICK, *supra* note 1, at 382. Hart's notions of justification, excuse and mitigation result in a similar conclusion. See H.L.A. HART, *supra* note 1, at 13-24.

<sup>193</sup> See W. PROSSER & W. KEETON, *supra* note 19, at 759.

<sup>194</sup> This is an overstatement. The distinction between knowing of the victim's rights, and knowing that the act will violate a right (foreseeability), is disregarded.

corporate defendant. The corporate agent who instigates the proscribed act may indeed have a mental state that falls within the connotations of "malice". Nevertheless, the issue of desert is muddled by vicarious liability which ascribes responsibility for the extraordinary remedy to a corporate entity that can hardly be said to be capable of mental states.<sup>195</sup> The corporate agents, on the other hand, may be individually free of "malice". A decentralized decision-making process, undertaken in bits and pieces that provide no single agent with an overview of the facts and consequences, is another instance that sorely tests the notion of a blameworthy mental state.<sup>196</sup>

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<sup>195</sup> "A corporation is incapable of malice or of motive." *Abrath v. North E. Ry.*, 11 App. Case. 247, 251 (1886). Realities forced the English courts to reject the conclusion from Lord Bramwell's observation that corporations are incapable of committing torts involving mental states. See P. VINOGRADOFF, *COMMON-SENSE IN LAW* 78-80. But, "[p]artly for this reason [that 'mental state has no meaning when applied to a corporate defendant'], in virtually all civil law countries the general rule is that corporations are not criminally liable." Thompson, *supra* note 59, at 211 (footnote omitted). "The intention of an organizational mind exists only by virtue of conventions stipulating that the statements and actions of individuals in certain positions will count as expressing the purposes of the organization." *Id.* For questions regarding Thompson's doubts about the notion of retribution against an organizational entity, see Stone, *supra* note 59, at 249; see also Wolf, *The Legal and Moral Responsibility of Organizations*, in *CRIMINAL JUSTICE* 267, 275-86 (J. Pennock and J. Chapman eds. 1985). Today, vicarious liability for punitive damages draws much flak, not from Bramwell's reasoning alone, but also because the corporate structure is said to make the general penal goals unattainable. See, e.g., J. GHIARDI & J. KIRCHER, *supra* note 3, §§ 2.04, 2.08; K. REDDEN, *supra* note 3, §§ 2.4(B), 4.5(A); Ausness, *supra* note 39, at 46-57; but see *supra* note 41.

<sup>196</sup> Dobbs' analysis offers assistance:

There are a few cases that may suggest that punitive damages could be awarded against a defendant who commits some serious abuse of a position of privilege or power, even without guilty state of mind . . . . [His examples mainly involve corporate defendants.] The tendency in these cases, not surprisingly, is to try to make them fit the general rule, by attributing some bad motive to the defendant. And it is quite possible that such motives did in fact exist, and that the cases are explicable on that ground. But the pattern of special liability for those who abuse positions of authority and privilege is a strong one, showing up in a similar group of cases where attorneys' fees are assessed against the defendant, as well as in the substantive tort law concerning mental anguish and in the substantive law of duress, and unconscionability. Allowance of punitive damages on the basis of this special kind of conduct rather than on the basis of the defendant's mental state, would be entirely consistent with the idea that punitive awards should serve the purpose of encouraging suit by the plaintiff as a "private attorney general" on issues of special importance. All of this gives ground for at least a suspicion that in the abuse-of-power cases, a subjective evil motive may not be required.

D. DOBBS, *supra* note 11, § 3.9, at 206-07 (footnotes omitted). See *supra* note 37; but see Thompson, *supra* note 59, at 203-04 ("Official crime is better conceived as conduct authorized or supported by the organization, either formally through instructions and procedures or informally through the norms and practices of the organization."). These problems shall be returned to.

Consider also these hypotheticals. When the actor is unaware or indifferent to the effects of his act on the victim or third parties, this may seem to diminish the wickedness of the act. He didn't appreciate fully what he was doing. Only if he acts with the knowledge of, or, perhaps, reason to know of, or particularly when he is motivated by these effects, will the measure of wickedness include these societal costs without diminishment.<sup>197</sup> To raise a contrary intuition, contemplate the aware actor coldly indifferent to the consequences of his action. His cold indifference seems to increase the wickedness. Such a psychopathic action is frightening.<sup>198</sup> In the third case, the naive, thoughtless actor with reason to know of the victim's rights and harms who acts, say, out of laziness, although he may be recklessly indifferent, seems less culpably oppressive than the shrewd, deliberate actor seeking personal aggrandizement who acts with equal, even less, reason to know of the victim's rights and harms.<sup>199</sup> The mental state, then, appears not simply as a quantification of knowledge that diminishes the wickedness as it falls short of knowing certainty. There seems to be an irreducible quality about mental state.

But the intuitions raised by these noncorporate hypotheticals, by concentrating on mental state,  $M_i$ , have ignored what is meant by societal loss. As will be seen, societal loss itself accounts for the cognizable reactions of the victim and, under the broad conception, others. The appraisal of the actor's mental state, insofar as it has self-regarding, third-party impacts, is part of the internal societal costs,  $f_i$ ,  $f_I$ ,  $F_i$  or  $F_I$ , or external societal

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<sup>197</sup> One must distinguish the "quantification" of the actor's knowledge from the quantification of the likelihood of harm, since "we ordinarily *define* crime in a way that implies that the probability of harm is high." Shavell, *supra* note 46, at 1239 (emphasis in original) (footnote omitted). Though society may require a high probability of harm before proscribing an act, it doesn't follow that the penalized actor must "know" of the high probability.

Notice that this discussion of the actor's mental state implies that his knowledge is not perfect, otherwise he would always know of the victim's rights and harms, and all invasive acts would satisfy the mental requirement of wickedness. The assumption of perfect information again must be relaxed immediately.

<sup>198</sup> The actor who is not shrewd, the one who is malicious for "no reason", is even more wicked:

We are naturally disposed to be angry at the selfishly cruel, the ruthlessly self-aggrandizing man; but that anger is frustrated when we learn that the criminal, for no reason *he* could understand, was hurting *himself* as well as his victim. That is simply not the way properly self-respecting wicked persons are supposed to behave! . . . We blame him now for our own frustration—not only for the harm he has caused, but for his not getting anything out of it.

J. FEINBERG, *What Is So Special about Mental Illness?*, in *DOING AND DESERVING* 272, 287 (1970) (emphasis in original).

<sup>199</sup> A greater societal injury occurs from the act of a shrewd, deliberate actor than from a naive, thoughtless actor performing the same act because the former defies society's authority or values. See R. NOZICK, *supra* note 1, at 374-80 (flouting correct values); but see G. FLETCHER, *supra* note 33, at 465-66. Or, the actor's consciousness of what he is doing, and thus refusal to desist, increases the injury. See *id.* at 711. One way or the other, one may intuit that the shrewd actor is more deserving of punishment, or deserving of more punishment, than the naive one.



costs,  $f_e$ ,  $f_E$ ,  $F_e$  or  $F_E$ . The appraisal of the actor's malice is from the vantage of an outsider, not from that of an "omniscient observer" inside the actor's mind who monetizes the feelings of the actor as the actor himself would, or as would the the rational or reasonable actor. To increase retributive damages because of the inside view of a particularly wicked mental state would be to count the mental state twice.<sup>200</sup> Mental state is quantified instead by an examination of the extent of the actor's knowledge with respect to the victim's rights and the societal loss. The more the actor knows or has reason to know, the more "malicious" the act, irrespective of how that knowledge may be described. Mental state,  $M_j$ , is a matter of degree only. It is more or less, not better or worse.<sup>201</sup> Although there is a regressive feature to this relationship between mental state and societal loss — the mental state entails knowledge with respect to societal loss and societal loss includes an evaluation of the nature of the actor's mental state — the "quality" of the mental state, such as the social value of indifference or viciousness, is essentially quantified as part of societal loss. Nevertheless, there is something shadowy about the quality or quantity of the actor's mental state, even beyond differences in societal loss, that should be captured in the conceptions of desert. Elusiveness remains.<sup>202</sup>

In considering the threshold test of wickedness,  $t_a$  was advanced as the more reasonable time to control, that is,  $W_a$  is determinative. For the quantification of the award based upon retributive desert, seemingly  $t_j$  should

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<sup>200</sup> When society chooses to count the mental state at two different points, it effectively declares the functional relationship of desert,  $F_J$ , to be greater than the functional relationship of reciprocity,  $F_R$ . Most commentators have insisted that strict reciprocity is barbarous, see *supra* notes 135 & 136, *supra*, and that the proper proportion for deserved punishment is less, that is,  $F_J$  is smaller, not larger, than  $F_R$ . Even the more vindictive will hold the proportions equal, that is,  $F_J = F_R$ . The actor should never pay more than the costs he imposed, especially in a civil context.

These general statements hide complexities. Remember that the actor may value slightly what society appraises as a viciously savage mental state. A small sanction may deter him. When he perceives no threat of sanction, he may coolly perform the disgusting act. Whereas the actor would monetize his internal payoff in small coin, the social loss may be in large bills. The point is that the actor's culpably oppressive mental state,  $M_j$ , that is, knowledge or reason to know of the violation of rights and imposition of harms, does not translate neatly into monetizable societal loss as does, say, his internal, malicious pleasure from the act. The conclusion that wickedness is a limiting factor on deterrence and reciprocity stands, arguably, nevertheless.

<sup>201</sup> This implies that the actor who knows of the rights invasion and societal loss from his act, but persists in order to "get" the victim, has a more wicked mental state than the actor who knows of either the rights invasion or the societal loss, but, owing to indifference, not both. Would one say that this second actor, through indifference totally unaware of the second object of knowledge, thereby has a mental state only one-half as wicked as the fully aware malicious actor?

<sup>202</sup> "[F]or any ideal it is easy to construct cases where the implications of that ideal seem implausible. This shows *not* that the ideal is implausible, but that morality is complex." Tempkin, *Intrasensitivity and the Mere Addition Paradox*, 16 PHIL. & PUB. AFF. 138, 177 n.45 (1987) (emphasis in original).

control. If the act is sufficiently wicked as settled at  $t_a$ , and the victim's costs,  $c_V$ , are greater than expected, as between the wicked actor and the innocent victim the actor should absorb the additional loss when actual damages are not fully compensatory. This appears proper whether the broad or the narrow conception of wickedness,  $c_V$  or  $C_S$ , is adopted. If, on the other hand, under the broad conception of wickedness, when the unexpected social loss falls upon third parties and not the victim, the victim's claim to the additional social loss is more problematic. He has not suffered more harm, others have. Nor has the actor been more wicked inasmuch as wickedness is based upon the actor's mental state at  $t_a$ . Perhaps the policies underlying private attorney generalship and the argument that the actor, by choosing to knowingly perform a wicked act, has "consented" to suffer whatever loss eventuates will support an assessment based upon  $C_S$ . Should the actual societal loss,  $c_V$  or  $C_S$ , be less than expected, parallel arguments justify the assessment of the lower award. The victim has no claim to an amount greater than he has actually suffered nor, under the broad conception, has society been actually harmed as much as was expected.<sup>203</sup> In sum, for the sake of simplicity if not irrebuttable argument, in measuring desert damages,  $C_A = FJ(W_A)$ , irrespective of the actor's mental state at  $t_a$ .

Taking the next step in this model building based upon assessing societal loss at  $t_j$  runs into difficulty. In detailing the notion of wickedness, this variation of equation (7) would seem to follow:  $W_A = M_j[c_V \text{ or } C_S]$ . How can one have a mental state at  $t_a$  with respect to an unanticipated societal loss that actually occurs afterwards? It will not help to build in the mental state at  $t_j$ ,  $M_I$ , by positing that  $W_A = M_I[c_V \text{ or } C_S]$ . The actor's mental state at  $t_j$  may have no relationship to his wicked mental state at  $t_a$ . This complication might be avoided by urging that the actor's mental state is irrelevant to the measure of desert damages.<sup>204</sup> Once the threshold test of wickedness is surpassed at  $t_a$ , the assessment of punitive damages depends exclusively on the societal loss,  $c_V$  or  $C_S$ , that is,  $M_1$  effectively equals 1.<sup>205</sup> One other possibility remains which seems more consistent

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<sup>203</sup> The threat of a greater harm than actually occurs is a harm itself even at  $t_j$  when it is known that the threat misfired. Putting persons through such anxiety harms them. This is to be monetized as part of the award.

<sup>204</sup> Wickedness aside for a glance at deterrence, the incentive for the actor to avoid courses of action more socially harmful is undermined when the measurement of punishment ignores the mental element of the actor. See A. KENNY, *supra* note 35, at 90-93.

<sup>205</sup> This conclusion may not appear to gel well with some hypotheticals previously considered. Suppose the actor chooses to act, certain of invading the victim's rights, but because of indifference, he does not know whether there will be a societal loss. This seems less wicked than when the actor chooses to act while certain of both the invasion of the victim's rights and the consequent, societal loss. The more the actor knows of both rights and societal loss, the more wicked the act seems, thereby calling for higher desert damages. The direct measure of the actor's mental state may, however, be dropped out of the monetization since it is reflected in the appraisals of societal loss. The actor's malice will affect the felt harm of the victim or society. See *supra* note 101. Still, this doesn't entirely satisfy intuitions.

with the sense of the discussion and hypotheticals. The mental state is to be settled at  $t_a$  for both the threshold test and the measurement at  $t_j$ . Once it is quantified at  $t_a$  for the purpose of deciding whether punitive damages are to be granted, that quantification is to be applied also to the societal loss that ultimately occurs when determining how much the award will be. For example, if at  $t_a$  the mental state,  $M_j$ , is 0.6 on the scale of knowledge with respect to an anticipated societal loss,  $c_v$  or  $C_S$ , of \$10,000, but at  $t_j$  a societal loss,  $c_v$  or  $C_S$ , of \$1000 has eventuated, the wickedness,  $W_A$ , is measured by  $0.6[\$1000]$ , or \$600.

Culpable oppression, to recapitulate, turns on what the actor knows or has reason to know. Under the previous model equations the actor's ideal rationality, and thus knowledge of all relevant facts, was assumed. This assumption, along with the principle that ignorance of the law is no excuse, cannot be indulged here even as a first approximation. Whenever there is a harmful violation of rights, the rational actor, *ex hypothesis*, always knows he is invading rights at a societal loss and thereby all such harmful acts are necessarily culpable oppressive.<sup>206</sup>

The brief in opposition argues that culpable oppression is measured at least partially by the standard of the rational actor rather than by a less demanding standard. The two objects of knowledge, rights and societal loss, are satisfied by different standards. For example, if as a reasonable person the actor should know of the rights invasion, then he will be liable if a rational person would know of the societal loss,<sup>207</sup> or vice versa. He has subjected himself to punitive damages by his culpable knowledge of one of the objects. The only question is how much, if any, are the damages. He must absorb the societal loss as it occurs just as an intentional tort-feasor must take the victim as he finds him and compensate accordingly. If the actor is lucky and the other object of knowledge does not exist, then

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<sup>206</sup> On second thought, perhaps one should stick to "rationality", since "the law pays no heed to criteria that make a voluntary, intentional act arguably more culpable in some persons than in others." G. FLETCHER, *supra* note 33, at 463. (footnote omitted). But his last comment may mislead, for "[c]ulpability is not a matter of intending or not intending, but a question of degree. And the degree of culpability is gauged by the actor's interaction with his victim and the relative dependence or independence from the surrounding environment." *Id.* at 711. Finally, [a]s the descriptive theory of culpability relates symbiotically to a conception of conduct abstracted from surrounding circumstances, the normative theory of culpability thrives on emphasizing conduct in context. Assessing culpability is not a matter of appealing to moral rules of thumb, but of refining one's sensitivity to the complexity of facts that permit us either to blame or to excuse harmful conduct.

*Id.* at 712-13. See *supra* note 192.

<sup>207</sup> This assumes that ignorance of the law, *viz.*, the victim's rights, or ignorance that the act will invade a right, is an excuse.

Reasonability as used here is distinguished from rationality. It is less stringent. The idea of reasonability includes a relaxation of the strong assumptions underlying the "rational actor" by bringing into sight the limitations that make us human. Hence, the litmus test for fault in tort law: the reasonable person standard.

punitive damages are zero. The actor's plea of unfair sanction sounds weak when the actor, as a reasonable person, had knowledge of either the victim's rights or the societal loss. Everyone knows of the potential of extraordinary damages. The actor must live with his choice.<sup>208</sup>

Still, at some point, to make the actor live with his choice may be impossible or monstrous. Especially if wickedness is more than just a threshold test of liability, if it is also quantified as a measure of the punitive damages to be assessed, there will be some shockingly high awards. This is evident by looking again at the example of the manufacturer that sells for many years a drug which its own studies revealed was carcinogenic. The societal loss, although perhaps foreseen in only an attenuated sense by the corporate management, may be enormous. Unless, once again, the functional relationship for desert, FJ, is quite small or variable, the extraordinary damages will be out of line with recognized punitive awards. The human condition precludes practical, normative judgments based upon ideal rationality. Rather than the ideally rational actor one must look to another standard, say, of the reasonable actor, who is judged by what he actually knows or actually has reason to know.<sup>209</sup> Against corporate ac-

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<sup>208</sup> This point relates to the deontological argument in defense of criminal punishment. As an autonomous being, once the actor chooses to act in a manner knowingly proscribed by law, he thereby "consents" to the sanctions. See, e.g., I. KANT, *supra* note 82, at 99-108; E. VAN DEN HAAG, PUNISHING CRIMINALS 182 (1975); Scheid, *Kant's Retributivism*, 93 ETHICS 262, 276 (1983); see also Lingren, *Criminal Responsibility Reconsidered*, 6 LAW & PHIL. 89, 107-08 (1987) (known risk that act is proscribed). The argument is too formal. On the other hand, there are plenty of formal arguments in this article. Something can be said for formality. See, e.g., Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 378 (1973). For a less formal version of the consent theory, see Nino, *A Consensual Theory of Punishment*, 12 PHIL. & PUB. AFF. 289 (1983). For criticisms of various "consent" theories, see, e.g., J.J. THOMSON, *Imposing Risks*, *supra* note 94, at 188-91 ("consent to risk imposition"); Goldman, *supra* note 131, at 63-65 (criminal punishment); Dyke, *Freedom, Consent, and the Costs of Interaction*, in IS LAW DEAD? 134, 155-57 (E.V. Rostow ed. 1971) ("consent" to social contract); Johnson, *The Idea of Autonomy and the Foundations of Contractual Liability*, 2 LAW & PHIL. 271, 299-302 (1983) ("consent" to complex and lengthy contracts); Coleman, *supra* note 151, at 1117-31 (economic efficiency).

<sup>209</sup> These intuitions point towards the distinction between objectivity and subjectivity in criminal law. Holmes would apply an entirely external, objective standard, disregarding the actual mental state of the actor as irrelevant, and thereby rejecting the Kantian mandate by treating the actor as a means to the end of greater social utility. See O.W. HOLMES, *supra* note 115, at 42-62. Fletcher attacked Holmes' position by noting his failure to analyze carefully the various ideas behind the dichotomy and concluding that:

the analysis of liability consists of both an objective and a subjective dimension. The objective dimension focusses on the act and, in some cases, on the harm that the actor causes. The subjective dimension focusses on the actor and the question whether the particular actor is accountable for the act of wrongdoing . . . . [The standard of accountability] has a variety of forms, but it always recurs to the same normative question: could the actor have been fairly expected to avoid the act of wrongdoing.

tors, furthermore, imputations of malice ought not ignore the actualities of oftentimes decentralized, haphazard decision-making. Culpable oppression cannot be placed alongside the equations for deterrence and reciprocity until the assumption of ideal rationality is relaxed.

*b. Cost to victim,  $c_v$  or  $c_V$ .* The verbal formulas of some courts and legislatures imply that the actor's culpable mental state with respect to the victim's harms and rights, and a consequent harm to the victim, are what counts. Thus, under the narrow conception of wickedness: (7A)  $W_a$  or  $W_A = M_i[c_v$  or  $c_V]$ .

Equation (5A) has already been advanced as the model for calculating the victim's costs. To represent only the variation based upon a monetization at  $t_a$ , equation (5A) accordingly may be modified by changing the subscripts to small letters. Hence: (8A)  $c_v = f_d + f_s + f_e + f_i$ . Recall that:  $c_v$  = cost to victim;  $f_d$  = victim's economic cost;  $f_e$  = victim's external cost;  $f_i$  = victim's internal cost;  $f_s$  = victim's sanction cost. The explication of the four factors of equation (8A) is similar to that of equation (5A), the main difference being the the relevant times of appraisal, here  $t_a$  rather than  $t_j$ .

*c. Social cost,  $C_s$  or  $C_S$ .* The broader conception of wickedness, with variations, of a wider compass than modeled above, might capture better the overtones of the idea of retributive desert as expressed by primary and secondary authorities. It is the analog to the second conception of retributive reciprocity. The social loss caused by the culpably oppressive act, rather than measured by the impact upon the victim alone, is measured

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G. FLETCHER, *supra* note 33, at 510; *see generally id.* at 504-14. For more on Fletcher's distinction between objective and subjective wrongfulness (or justification), see *id.* at 118-22, 233-34, 388-89, 470-72, 558-60, 562-66. Fletcher's analysis may be mapped onto the model equations: for the two views of retribution, the cost to the actor,  $C_A$ , the cost to the victim,  $c_v$  or  $c_V$ , and the social cost,  $C_S$  or  $C_s$ , are based upon objective standards, whereas the actor's mental state,  $M_i$ , is based upon a subjective standard. The fact that the model forwards the social view of the actor's mental state as critical need not preclude the subjective standard, for the social view may merely appraise the actor's actual (subjective) mental state by an objective measure, independent of the actor's own self-appraisal of it but dependent nonetheless on his actual mental state. This hardly answers all questions for:

[e]ven if the distinction between wrongdoing and attribution were properly acknowledged in the Anglo-American tradition [which it isn't], there would be some difficulty comprehending how the process of attribution could take full account of individual differences . . . . If the reasonable person were defined to be just like the defendant in every respect, he would arguably do exactly what the defendant did under the circumstances.

*Id.* at 513. The quick rebuttal to this may be that this reasonable person is then to be punished. Freewill versus determinism also raises its ugly head. *Id.* at 513-14. Ryle, and others, would question this reification of mental states. *See* G. RYLE, *THE CONCEPT OF MIND* (1949).

by the overall social cost,<sup>210</sup> whether or not the victim is affected.<sup>211</sup> Hence in equation (7),  $C_S$  or  $C_S$  is substituted for  $c_v$  or  $cV$ :  $(7B) W_a$  or  $W_A = M_i[C_S$  or  $C_S]$ .

To model the first variation only, social cost,  $C_S$ , can be expanded:  $(8B) C_S = F_d + F_S + F_e + F_i$ . Recall that:  $C_S$  = social cost;  $F_d$  = economic social cost;  $F_e$  = external social cost;  $F_i$  = internal social cost;  $F_S$  = sanction social cost.

The model of social cost must confront the same knotty problems in the discussion of the broad conception of reciprocity, which also concentrates on the overall impact on society. One still must look beyond the effects on the victim and put the costs and benefits to all of society through the filter of social appraisal. Since not all the actual costs and benefits of actor, victim and onlookers are counted, but only those that warrant social cognizability, the same difficulty of drawing a line appears.<sup>212</sup>

Under either the broad or narrow conception of societal cost, an act pursuant to an unworthy mental state (essentially, knowledge), either invading

<sup>210</sup> Here, social cost is more expansive than the microeconomic construct of the same name. The latter idea treats only effects on the welfare of the parties other than the actor. See *supra* note 71. Here the welfare effects on society, including the actor and the victim, are put through the filter of social appraisal and then aggregated. *But cf.* Shavell, *supra* note 46, at 1234 ("The commission of an act will be said to be socially undesirable if the expected social benefits are exceeded by the expected harm.").

<sup>211</sup> Harms or costs enter at two points in this analysis of desert. First, as an object of the actor's mental state (knowledge), and second, as the consequence of the culpably oppressive act. Since there are two conceptions of harms (with variations), a narrow one looking to the victim,  $c_v$  or  $cV$ , and a broad one looking to society in general,  $C_S$  or  $C_S$ , there are four permutations possible in the full expansion of the conceptions of desert (excluding variations). In the one spelled out first, the narrow view of harm fits in at both places—the mental state regards the victim's anticipated harm and the consequent social loss includes only the victim's anticipated costs. In this second one, the consequent social loss adopts the broad version of harm, but whether the mental state regards the broad or narrow view of harm is left ambiguous. The four permutations, excluding variations, will not be spun out inasmuch as the complexities and essential points are sufficiently outlined without further detail.

<sup>212</sup> Perhaps even greater ones. For example, it may be considered more wicked to impose knowingly a loss, say, of \$10,000 on a single victim than on 100 persons shared equally. Principles of loss spreading offer one reason for this, whether the cost is monetary or otherwise. If so, the societal loss under the broad conception of desert differs from the pure(r) monetization that applies under the narrow conception. To state the idea with doubtful coherence: the "costs to society" are not counted; instead, the monetized wickedness of imposing such costs on society is counted. Another example shows more of the complexities. First, assume the actor derives no malicious satisfaction from the proscribed act but is aware that his friends derive great satisfaction from his act; therefore, net malicious satisfaction is monetized, on the basis of what the actor's friends would be willing to pay for the act, at, say, \$10,000. Second, assume the actor derives \$10,000 worth of malicious satisfaction from his act but no other person derives satisfaction from it; therefore, the net malicious satisfaction may be, as in the first case, \$10,000. These two cases may not appear equivalent. If not, the quantification of the difference is puzzling.

the victim's rights or causing a harm, ought alone, it may seem, be determinative of punitive damages. The extent of the actual impact or whether the victim's rights are actually invaded appears irrelevant. When a right is invaded, whether punitive damages will be assessed and how much will be granted depends only upon the victim's or society's anticipated costs,  $c_V$  or  $C_S$ . Entirely ignored are the costs that eventuate,  $c_V$  or  $C_S$ . Should the act entirely fail to cause harm,<sup>213</sup> the knowledgeable intent at  $t_a$ , followed by the misfired act, are enough. Retribution, after all, is grounded on deontological principles, not teleological (consequentialist) ones.<sup>214</sup> The culpable mental state underlying the act is necessary and sufficient. Rights and harms must be taken seriously.<sup>215</sup> Despite this first impression, even in strictly deontological terms, anticipated and actual consequences are both relevant to deserved punishment.

The elusiveness of taking rights and harms seriously may be demonstrated with an example. Suppose the actor with the most single-minded, unalloyed maliciousness does everything in his power to "get" the victim. Indeed, his actions are well-aimed to accomplish his goal, but,

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<sup>213</sup> Included as nonexistent is the harm from unsettling the victim and onlookers. See *supra* note 126.

<sup>214</sup> See, e.g., S. CAVELL, *supra* note 33, at 299-303.

<sup>215</sup> Before concluding that rights are not being taken seriously, one must ask what rights are in question. The victim is uniformly held to have no legal right to a punitive award. See J. GHIARDI & J. KIRCHER, *supra* note 3, § 5.38; K. REDDEN, *supra* note 3, § 7.5(E). Nor would he seem to have a moral right. The victim doesn't "deserve" the remedy, he is fully compensated in principle by ordinary damages, but rather it is granted him from public convenience implicitly in the name of private attorney generalship. This fits closer to the Hohfeldian concepts of power and privilege than of right. See W. HOHFELD, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in *FUNDAMENTAL LEGAL CONCEPTIONS* 23, 35-36, 50-60 (1923). If society chooses to eliminate the victim's standing to seek punitive damages (power), or recover them personally (privilege), perhaps by turning the award over to the state, his plea of unfairness would ring hollow. Cf. Ellis, *supra* note 4, at 10-11. This conclusion reveals the criminal aspects of the remedy.

The actor, to the contrary, will have trouble claiming a consequentialist over-riding of his rights by the grant of punitive damages. Continuing the Hohfeldian terminology, the relevant interest of the actor is not a right but rather a liability and a "no right". He is liable to the victim (and some private third parties) if he maliciously breaches the underlying duty (e.g., malicious breach of contract), and he had no right which is infringed by their personal recoveries. That society grants another the power to privately enforce this duty, and the privilege to personally recover, is not grounds for complaint by the actor any more than it would be for the extraordinary liability to a public functionary.

The rights at stake, if any, are the rights of the victim that support the underlying cause of action. Once one acknowledges that ordinary damages are not fully compensatory, punitive damages reinforce the protection of the underlying rights even though there is no independent private right to the remedy. One might conceivably even analyze this in terms of a right of society which is the correlative of the actor's duty. But dispute arises once one talks in terms of "communitarian" or "social" rights.

owing to the actor's bad luck, his undertaking misfires and actually benefits the victim. Say, the actor fraudulently induces the victim to purchase land thought to be worthless, but the property is later found to have mineral deposits which make it worth millions. Despite this unexpected turn of events, one is inclined to believe that the actor was wicked and ought to be punished.<sup>216</sup> One may think the fates, through poetic justice, have punished him enough; nevertheless, that punishment is fit. In a less extreme case, where, for example, the victim suffered neither gain nor loss because the property value unexpectedly equaled the purchase price, one may think that the fates have not punished the actor enough. After all, these malicious acts will not always misfire. That the actor would knowingly invade the victim's rights—would try to get away with something illegal—is unsettling to the victim as well as to onlookers. Security is undermined and the victim and onlookers may be disconcerted in a variety of other self-regarding ways. The marketplace may be affected. These consequences are societal losses.<sup>217</sup> Insofar as this is true, how does this

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<sup>216</sup>“A doctor should be blamed for doing what was very likely to kill his patient, even if his act in fact saves this patient's life.” D. PARFIT, *REASONS AND PERSONS* 25 (1984). Ross did not share this view:

It is difficult, no doubt, to define the nature of the relation which the punishment should bear to the crime. We do not see any *direct* moral relation to exist between wrong-doing and suffering so that we may say directly, such and such an offence deserves so much suffering, neither more nor less. But we do think that the injury to be inflicted on the offender should be not much greater than that which he has inflicted on another.

W.D. ROSS, *supra* note 1, at 62 (emphasis in original). The law of criminal attempts runs contrary to Ross' intuition. H.L.A. Hart would sometimes punish attempts equally to completed crimes. See *infra* note 226. This point depends, however, on what is meant by “injury”. If this term includes the security losses that result from criminal attempts, see *supra* note 94, or, as discussed below, the security, and thus economic, losses that come from unsuccessful attempts to infringe one's civilly-protected rights, then Ross' and Hart's propositions may stand together. The difference between anticipated harm and actual harm separates corrective justice from retributive desert. See Alexander, *supra* note 171, at 4-5; cf. *supra* note 137 (distinguishing corrective justice from retributive reciprocity).

<sup>217</sup> Cf. *supra* note 94. This general problem may be put in terms of “moral luck”. See B. WILLIAMS, *Moral Luck*, in *MORAL LUCK* 20 (1981); T. NAGEL, *Moral Luck*, in *MORTAL QUESTIONS* 24 (1979). “Notice how, in both law and morals, chance and luck mitigate if not eliminate responsibility.” R. GOODIN, *supra* note 63, at 137 n.2. But not always: “Moral luck is a problem for the sophisticated version [of retributive theory, i.e., the desert theory] because it is trying to make the state play God and apportion suffering to the total moral guilt of the victim [sic], but this is not the concern of the primitive versions [e.g., reciprocity].” Haksar, *supra* note 72, at 320. Moral luck, barely touched upon in this discussion, extends beyond simply misfired acts:

Many people may just be unlucky in the genes they are born with, the broken homes they are brought up in, and the bad education they receive; how can we tell how far their conduct is a result of the exercise of their free will and how far due to these contingencies? Often people who have not done evil are just lucky in not having to face temptations and moral dilemmas that those who have done evil had to face.

*Id.* at 319.



affect the question of desert?<sup>218</sup> A middle ground must be found.<sup>219</sup>

Even if one should not seek the middle ground, but, insofar as serious rights are at stake, instead try to finesse consequentialism altogether, the problem arises that a principled deontological attempt to ignore consequences cannot be fully satisfactory. Moral questions—and retribution is a moral question—cannot be resolved entirely analytically. Kant made the most noteworthy attempt to do it. Yet his construct, centering on the categorical imperative, is inadequate. It holds: "Act as if the maxim of your action were to become through your will a universal law of nature."<sup>220</sup> Say two maxims are being considered for universalization. One is, "always tell lies," and the other is, "always tell the truth." How does one choose between them? Not by an *a priori* reasoning but rather by a look at the surmised consequences.<sup>221</sup> A potential moral or legal right, say, the right of free speech, may be an important right to one society while of little worth to another.<sup>222</sup> The way that decision is made in fact is by a social evaluation of the supposed consequences of recognizing the right and the ordinal ranking of the supposed consequences of finding one right more important

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<sup>218</sup> The difficulty of quantifying desert might explain why it may play a threshold role or triggering test for punitive damages rather than serve as a scalar measurement.

<sup>219</sup> "[I]t is wrong to suggest that the material consequences of our actions count for everything, morally speaking, and it is equally absurd to suggest that they count for nothing. Plausible policy prescriptions can come only from cultivating the middle ground between utilitarianism and Kantianism." R. GOODIN, *supra* note 63, at 246. Nagel discussed the difficulty of freeing one's intuitions from moral judgments based partially on consequences, even under Kantian reasoning. See T. NAGEL, *supra* note 217. "Dozens of efforts to justify emphasis on results can be found; dozens more can be conceived. Each rests ultimately on a particular view of what the criminal law is supposed to accomplish." Schulhofer, *supra* note 71, at 1507. Schulhofer concluded that the defensibility of the emphasis on results depends upon the crime and the perspective. *Id.* at 1606-07.

<sup>220</sup> See I. KANT, *supra* note 102, at 30 (emphasis deleted). For criticism of Kant's theory of punishment, see Falls, *Retribution, Reciprocity, and Respect for Persons*, 6 LAW & PHIL. 25 (1987). See also *supra* note 82.

<sup>221</sup> See Rawls, *Kantian Constructivism in Moral Theory*, 78 J. PHIL. 515, 552 (1980). Dworkin commented that: "Posner . . . [in Posner, *supra* note 153] defines 'Kantian' so as to describe a political theory that rejects 'any form of consequentialism' (p. 104). Kant is not, on this definition, a Kantian." R. DWORKIN, *supra* note 49, at 411 n.10. "Consequentialism," as first used as a philosophical term by G.E.M. Anscombe in 1950, "stands for the doctrine that the moral rightness or wrongness of actions depends solely on the goodness or badness of their consequences." Donagan, *Comment on Wheeler*, 96 ETHICS 876, 877 (1986) (footnote omitted) (emphasis in original). The term, however, is ambiguous. See MacCormick, *On Legal Decisions and Their Consequences: From Dewey to Dworkin*, 58 N.Y.U. L. REV. 239, 241 n.3 (1983).

<sup>222</sup> This is with limits. "Though different cultures may take different actions in repression of, retaliation for, or correction of the wrongdoing, we need postulate no substantial degree of cultural relativity in the recognition that a wrong has been done." N. MACCORMICK, *supra* note 100, at 108.

than another when they come into conflict.<sup>223</sup> Deductions from deontological premises, such as the inherent autonomy of ethical beings in conjunction with the categorical imperative, are important steps, but the preanalytical assumptions are based upon consequences, as are common legal arguments in the courtroom.<sup>224</sup> The factfinder decides, with little guidance, the issue of punitive damages not on abstract principle, but rather on the basis of common values reflected by the usual lawyerly arguments on policy and principle as applied to concrete cases. Lawyers emphasize consequences.

This argument, however, goes too far towards converting deontological morality into consequentialism. It is one thing to declare acts wrongful that tend to have undesirable consequences, and quite another thing to declare that the anticipated consequences are entirely controlling. An-

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<sup>223</sup> A common objection to Kantian ethics is that there is no specific rule one would wish to be followed without exception. See Abelson & Nielsen, *History of Ethics*, in 3 *ENCYCLOPEDIA OF PHILOSOPHY* 81, 95-99 (P. Edwards ed. 1967). The exceptions occur when universalized rules come into conflict. See R.M. HARE, *supra* note 153, ch. 2.

Some rights society takes most seriously. Even here only one right can be theoretically absolute, that is, trump every other conflicting right. See Searle, *Prima Facie Obligations*, in *PRACTICAL REASONING* 81, 87 (J. Raz ed. 1978). One might intuit that there is not even one absolute right. One right may be supreme over every other single right but in some instances, when arrayed against more than one, even it succumbs. Cardinal weight counts. Rawls disagrees. He, as a Kantian, would protect some rights against all arrays by fixed lexical ordering. See J. RAWLS, *supra* note 30, at 42-44. When society hears bids for proposed trumping rights, it chooses based upon surmised consequences. Once accepting a bid, society may stick to it even though the consequences in a particular instance are unfortunate. For example, the right of privacy may be protected even when the invasive revelation results in net good by warning the public of a dangerous person. If the invasion of the right of privacy is with malice, a court may reject the additional award of punitive damages if the net result is a public good. See Ellis, *supra* note 4, at 21 n.112 ("the social benefits from such acts override any culpability attributable to the actor's mental state"). Under the common law, punitive damages are not warranted for invasions of recognized, trumping rights alone, but rather the common law requires more than the invasion itself. Hence, mental state. In principle, however, there seems to be no reason why a legal system could not define a right in terms of freedom from invasive acts done with certain mental states, thereby eliminating the dependency of punitive damages upon an underlying right.

<sup>224</sup> The typical defenses of free speech provide an example: *Board of Educ. v. Pico*, 457 U.S. 853 (1982); *New York Times v. United States*, 403 U.S. 713 (1971); *Rosenblum v. Metromedia*, 403 U.S. 29 (1971); *Wood v. Georgia*, 370 U.S. 375 (1962); see also J. MILTON, *AREOPAGITICA* (London 1644); J. LOCKE, *A LETTER CONCERNING TOLERATION* (Gouda, London 1689); R. DWORKIN, *The Forum of Principle*, in *A MATTER OF PRINCIPLE* 33, 61-65 (1985). Or, to turn this upside down and give a deontological flavor to a consequentialist choice, a utilitarian may defend the absolute right to free speech, as did J.S. Mill, because of the difficulty in discerning the good or bad consequences of proscribing speech in a particular instance thereby creating the possibility of abuse. See Sartorius, *Paternalistic Grounds for Involuntary Civil Commitment: A Utilitarian Perspective*, in *PATERNALISM*, 95, 99-100 (R. Sartorius ed. 1983).

anticipated and actual consequences both have roles to play in the question of deserved punishment. When deciding whether certain classes of acts should be proscribed, society will consider their probabilistic consequences, along with the consequences of proscribing them. Once proscribed, rights and duties may follow irrespective of the consequences of a particular act.<sup>225</sup> But once a class of acts is proscribed owing to these surmised consequences, an actual act within the class warrants closer examination. For if its outcome falls along one of the tails of the probabilistic curve, that is, it causes much greater or much less harm than is usual, one feels disquieted by ignoring this atypicality. Inasmuch as the harm is less, as in criminal attempts, the punishment should be lessened;<sup>226</sup> inasmuch as it is greater, the punishment should be increased.<sup>227</sup> As seen in the justification

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<sup>225</sup>For example, defamation gives rise to a cause of action regardless of whether the plaintiff was actually damaged. See W. PROSSER & W. KEETON, *supra* note 19, § 116A, at 843. On the other hand, some rights are defined partially in terms of consequences. For example, under the RESTATEMENT (SECOND) OF TORTS § 870 comment e (1977), a critical factor in a prima facie tort is "the nature and seriousness of the harm to the injured party."

<sup>226</sup>Still: "It is clear that a major problem posed by the differential punishment of [criminal] attempters and consummators is the apparent lack of a moral difference between the two classes of men." H. MORRIS, *supra* note 128, at 118. Hart believes that the penalty for a criminal attempt and a completed offence ought not to differ, in some cases anyway. See H.L.A. HART, *supra* note 182, at 127-31; see also Schulhofer, *supra* note 71, at 1517; but see G. FLETCHER, *supra* note 33, at 362, 472-81; H. GROSS, *supra* note 94, at 430-34; Davis, *supra* note 86. Bentham, arguing from his utilitarian concern with deterrence rather than desert, insisted that attempts, causing less "mischief" than completed crimes, must be punished less as an inducement to attempters not to complete the crime. See J. BENTHAM, *supra* note 50, at 168-69. For refinements of Bentham's point, see Shavell, *supra* note 46, at 1249-53.

<sup>227</sup>See, e.g., J. GORECKI, *supra* note 41, at 106 ("[A]ll other factors being equal, the more harmful a criminal act [actually is] for others, the more blameworthy it is . . ."). The ambivalence about whether punishment should relate to expected or actual societal loss seems to be irresistible. For example, under the A.B.A. model instructions for assessing punitive damages, relevant factors include "the nature and extent of the harm to plaintiff which defendant caused or intended to cause . . ." A.B.A. MODEL JURY INSTRUCTIONS FOR BUSINESS TORT LITIGATION INSTRUCTION 1.07(7) (1980).

As long as the harm was estimable, though not foreseen with certainty, punishment based upon the actual outcome may be justified. See T. NAGEL, *supra* note 217, at 30-31. Notions such as foreseeability, causation and proximate cause limit this point. See, e.g., G. FLETCHER, *supra* note 33, at 362-65, 588-610; H.L.A. HART & T. HONORE, CAUSATION IN THE LAW (2d ed. 1985); W. PROSSER & W. KEETON, *supra* note 19, §§ 41-44.

Perhaps the most difficult issue in the theory of causation is whether the issues of causation and culpability should be kept rigidly distinct or whether the presence of a particularly heinous motive should influence the analysis of causation. The shift from a harm-oriented to an act-oriented mode of analysis would tend to support the interweaving of criteria of causation with criteria of culpability; this interweaving might lead to the view, for example, that those who intentionally cause harm should be liable for more remote consequences than those

of nominal damages,<sup>228</sup> the middle ground beckons.

An overview of this analysis of culpable oppression is now needed. Certainly, although far from complete, the analysis is complex. The structure of the idea has been generally outlined and a few windows have been opened for glimpses inside. Much remains blurry and hidden. Yet enough has been seen to understand why detailed, practical tests of wickedness have not appeared. The proposals are unlikely to still the debate, if for no other reason than because society's view of societal loss or wickedness is not static.<sup>229</sup> For the purpose of this article a few points must suffice. First, the culpable mental state of the actor has qualitative aspects that may defy quantification. Second, the question of wickedness requires an examination of the act's effect on either the victim alone or the actor, victim, onlookers and the general public, at  $t_a$  or  $t_j$ , or both. Third, the impacts relevant to the question of wickedness require the factfinder to pick and choose among all the actual costs and benefits to count and value only those of social significance to the normative judgment at hand.<sup>230</sup>

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who negligently cause harm. This seems to be the position today in the law of torts.

G. FLETCHER, *supra* note 33, at 370. The same view has been urged in determining damages for breach of contract. See Note, *The Inadequacy of Hadley v. Baxendale as a Rule for Determining Legal Cause*, 26 U. PITT. L. REV. 795, 802 (1965).

<sup>228</sup> "Nominal damages can be awarded when the defendant has invaded an interest of the plaintiff protected against nonharmful conduct of the sort committed by the defendant and no harm has been proved." RESTATEMENT (SECOND) OF TORTS § 907 comment b (1979).

<sup>229</sup> See generally A. MACINTYRE, *supra* note 126. During transitional periods, punishing persons for acts that are soon to be acceptable is morally unsettling. See J. FEINBERG, *supra* note 111, at 47-48.

<sup>230</sup> Fletcher provides an insightful analysis of these intuitive threads that weave in and out of the conceptions of retributive punishment. He refers to them as "the three patterns of liability":

The patterns of manifest criminality, of subjective criminality and of harmful consequences each focusses on a different aspect of criminal conduct. Manifest criminality starts with an examination of the criminal act, subjective criminality with the intent to violate a legal interest and the pattern of harmful consequences with the accrual of harm. Thus each of the patterns attaches to one of three prominent facts of crime—act, intent and harm. Yet it would be a mistake to think that these three patterns are different perspectives on the same phenomenon. The argumant [sic] of this book is that these are different species of criminal conduct and despite the nominal overlap of terms like 'act' and 'intent,' the critical difference must be seen for what they are.

G. FLETCHER, *supra* note 33, at 388. After brief discussion of the three patterns, he continues: "The implication of there being at least three patterns of liability is that the criminal law must be grasped as a polycentric body of ideas. There is no single mode of thinking that accounts for all crimes. Not even the three patterns account for more than many of the major offenses." *Id.* at 389 (footnote omitted).

d. *Cost to actor,  $C_A$* . No reason is apparent for distinguishing the measure of the cost to the actor in the context of retributive desert from its measure in the context of retributive reciprocity.<sup>231</sup> Again:  $C_A = -F_D + F_S + F_E + F_I$ ; when  $F_D$  = direct monetary benefit;  $F_S$  = sanction cost;  $F_E$  = external cost;  $F_I$  = internal cost. The actor's net loss after the award of punitive damages,  $t_{j+}$ , is to reflect the net societal loss prior to the award,  $t_{j-}$ .

e. *Functional relationship for desert,  $F_J$* . When a proscribed act is performed with culpable oppression, the discussion above shows that two questions arise. First, was the act sufficiently wicked to trigger punitive damages? Second, if so, insofar as retributive desert is the measure of the punitive award, what is the relationship between the wickedness and the amount of the recovery?

Summarizing the discussion, the first question of whether the actor deserves to be assessed a punitive award may be addressed by examining model equation (7):  $W_a$  or  $W_A = M_j[c_v, c_v, C_s, \text{ or } C_S]$ . Once the wickedness surpasses a certain threshold, the factfinder will determine the amount of the award. With respect to whether the triggering wickedness is determined at  $t_a$  or  $t_j$ , the stronger brief supports  $t_a$ . Wickedness turns on what the actor knows or has reason to know, not on the eventualities as seen with hindsight at  $t_j$ . Hence, the threshold test is:  $W_a = M_j[c_v \text{ or } C_S]$ .<sup>232</sup> The quantity of wickedness sufficient to satisfy this test has eluded explicit formulation. The notion of the quantity of the actor's wicked mental state is nebulous. When ideas of wickedness are tested by hypotheticals, intuitions resist the dismissal of the quality of the act.

Once punitive damages are warranted, equation (4),  $C_A = F_J(W_a \text{ or } W_A)$ , posits a functional relationship between wickedness and the actor's just costs.<sup>233</sup> Specification of the exact relationship is difficult, perhaps

<sup>231</sup> See *supra* text accompanying note 128. Consistent with the analysis here, Nozick notes that the actor "may find the process of doing what is necessary to provide monetary compensation to his victim so unpleasant . . . [that] no further punishment is appropriate since the (magnitude of the) deserved punishment has been visited upon him in the course of his paying compensation." R. NOZICK, *supra* note 1, at 364. When the actor's unpleasantness is even greater than his just deserts, "full compensation still is extracted—why should it be the victim who bears the undeserved cost?—but no further penalty is visited." *Id.* (footnote omitted).

<sup>232</sup> Another permutation under either conception of desert is that two thresholds must be surpassed at the time of the act,  $t_a$ , one for societal loss and one for mental state. Once the thresholds are met, the measure of the extraordinary damages may then be measured by societal loss at the time of judgment,  $t_j$ . Since there are two conceptions of desert (narrow and broad), two factors within each conception (mental state and societal loss), and two times at which to measure the factors ( $t_a$  and  $t_j$ ), many permutations are possible.

<sup>233</sup> Aristotle rejected for just desert the rule "like for like." It is not equality but proportionality that controls. ARISTOTLE, *supra* note 134, bk. V, ch. 5. "But this again is merely a presentation, not the solution, of the problem." H. Kelsen, *supra* note 82, at 131. See also M. GOLDING, *supra* note 8, at 86. Perhaps, once more, the culpability and the penalty are incommensurable. See T. HONDERICH, *supra* note 1, at 17, 23, 28; W. GODWIN, *supra* note 75, at 253; Quinton, *supra* note 71, at 85;

unavoidably controversial.<sup>234</sup> Even attempting to specify it may be misguided. Desert may determine whether punitive damages are assessed, not how much they are.<sup>235</sup> Instead, the measure turns on notions of deterrence or reciprocity.<sup>236</sup>

The model or pattern jury instructions offer little assistance on the question of relationship. The terms quoted above from the instructions appear largely act- or actor-regarding, instead of victim- or society-regarding. Societal loss is not ignored but the main focus is on the actor's motivation

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Flathman, *On the Alleged Impossibility of an Unqualified Disjustificatory Theory of Property Rights*, in PROPERTY 221, 234 (J. Pennock & J. Chapman eds. 1980); see also H. GROSS, *supra* note 94, at 438-40.

<sup>234</sup> Bedau stated:

[T]here seems to be no way in principle for two retributivists, who agree completely in their ordinal judgments of offense ranking (e.g., rape is a graver crime than robbery), of offender fault (e.g., a two-time recidivist deserves a more severe punishment than a first offender), and of penalty ranking (e.g., ten years in prison is more severe than five years), to resolve a dispute over which of two cardinal judgments of deserved punishment (the first-time rapist deserves five years in prison versus ten years in prison) is correct.

Bedau, *supra* note 74, at 102. "[T]he retributive theory at best gives only an ordinal theory . . ." Brandt, *A Motivational Theory of Excuses in the Criminal Law*, in CRIMINAL JUSTICE 165, 188 (J. Pennock & J. Chapman eds. 1985). For a practical approach to reliance upon ordinal comparisons to avoid the incommensurability of cardinal ones, see Davis, *supra* note 158, at 726. See also the "proportional retributivism" of Reiman and others, *infra* note 239.

<sup>235</sup> "[P]erhaps . . . desert is a necessary condition of a justified punishment, but not in itself a sufficient condition." T. HONDERICH, *supra* note 1, at 14. "[T]he concept of *desert* function [sic], not as a goal or aim of punishment, but simply as a side-constraint on the permissible means that may be employed in the pursuit of whatever goals are properly pursued by the practice of punishment." Murphy, *Retributivism and the State's Interest in Punishment*, in CRIMINAL JUSTICE 156, 159 (J. Pennock & J. Chapman eds. 1985) ("negative retributivism") (emphasis in original). Or, "considerations of desert should always *determine* the ordinal magnitudes [of punishment] while only *limiting* the cardinal magnitudes . . ." Burgh, Book Review, 6 LAW & PHIL. 129, 131 (1987) (emphasis in original) (citation omitted).

<sup>236</sup> See N. MORRIS, *supra* note 181, at 149; Sher, *Antecedentialism*, 94 ETHICS 6, 10-11 (1983); Davis, *Sentencing*, 1 LAW & PHIL. 77, 87-89 (1982); M. GOLDING, *supra* note 8, at 96-102; H.L.A. HART, *Diamonds and String*, *supra* note 60, at 283-84; Rawls, *supra* note 1, at 7; J.B. WHITE, HERACLES' BOW 196-97 (1985). MacCormick forwarded a version of retributivism, "perhaps unauthorized by Hart's texts," whereby the commensurability is not between the harm to the victim or society and the actor, but rather "that there should be some commensurability of kind as between the harm done by legal punishments and the harm thereby averted. This seems a sound line of argument, although it interestingly blurs the line between utilitarianism and retributivism." N. MACCORMICK, H.L.A. HART 153 (1981). In Hart's framework desert may answer the question "who may be punished," whereas the amount of punishment is left to other justifications. See H.L.A. HART, *supra* note 1, at 8-13. The sense of fairness and fitness manifested in this article counsels that, however difficult, desert should not be left out of the question of amount. Hart, under the rubric of "mitigation", arrives at a similar conclusion. See *id.* at 13-24.

or mental state. Both wickedness and deterrence are emphatically actor-regarding, while reciprocity is mainly victim- or society-regarding. A convenient conclusion drawn from this similarity is that if wickedness is a threshold test only, the purpose of the measure of punitive damages is deterrence and not reciprocity. Yet the court tests and jury instructions send a mixed message. A closer look reveals that although some offer no guidance to the jury in setting the award, and even afford unfettered discretion,<sup>237</sup> others urge the jury to measure the extraordinary damages in accordance with retribution and deterrence.<sup>238</sup> In setting a proper proportion, if any, between the punitive award and the actor's culpable oppression, there is little help from primary authority.

Suppose there is a direct, proportional relationship between wickedness and deserved punitive damages. Equation (4) measures the award by quantifying the actor's wickedness,  $C_A = FJ(W_A \text{ or } W_A)$ . Under the two conceptions of equation (7), with variations, the wickedness is:  $W_A$  or  $W_A = M_i[c_V, c_V, C_S, \text{ or } C_S]$ .

As in the discussion of the functional relationship for reciprocity,  $F_R$ , no set relationship is self-evident for  $F_J$ . One might posit a relationship such as this: at the minimum threshold of the culpable mental state, the factor of societal loss is multiplied by, say, 0.1, while at its maximum level (where both rights and societal loss are correctly known to be certain) the societal loss is multiplied by, say, 1.0. But this won't do. Relating  $F_J$  in equation (4) to  $M_i$  in equation (7) effectively counts  $M_i$  twice, once in each equation. The mental state is fully accounted for in equation (7).  $F_J$  seems

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<sup>237</sup>See, e.g., California BAJI 14.71 (1977 Rev), J. GHIARDI & J. KIRCHER, *supra* note 3, § 11.03; New York PJI 2:278, J. GHIARDI & J. KIRCHER, *supra* § 11.03; Wisconsin WJI-Civil 1707, J. GHIARDI & J. KIRCHER, *supra*, § 11.10.

<sup>238</sup>See, e.g., A.B.A. MODEL JURY INSTRUCTIONS FOR BUSINESS TORT LITIGATION Instruction 2.09(3); MINN. STAT. ANN. § 549.20 (West 1984), J. GHIARDI & J. KIRCHER, *supra* note 3, § 11.05. The Minnesota statute provides unusual detail to guide the jury with language that emphasizes wickedness and deterrence but not reciprocity, although reciprocity is not entirely neglected (e.g., the first factor):

Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject. (emphasis added)

to be a fixed proportion to wickedness.<sup>239</sup> Or, perhaps, this question is better left to the unguided intuitions of the factfinder.<sup>240</sup>

Before waving the white flag to the seemingly insuperable complexities of retributive desert, a completely different approach may be mentioned. The quantification of retribution, either reciprocity or desert, may have no correlation to societal loss. Another idea is suggested by the term "retribution" that has some support from the commentators. The term "vindication" more clearly denotes it. The Oxford English Dictionary includes among the first definitions of "vindicate" the notions of avenge or revenge and punish, and then adds another: "To assert, maintain, make good, by means of action, esp[ecially]. in one's own interest; to defend against encroachment or interference."<sup>241</sup> The gist is that one vindicates rights or interests. The term is essentially rights-regarding, not act- or actor-regarding, nor victim- or society-regarding.<sup>242</sup> The victim may vindicate

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<sup>239</sup> "The important consideration in this instance, however, is not precision, but is the perception that limits exist and that the principle of limitation is one that confines the penalty within a range defined by the concept of just deserts." F. ALLEN, *supra* note 33, at 71. See also N. WALKER, *supra* note 33, at 14. What might these limits be? "[T]he upper limit of the range of just punishments is the point after which more punishment is unjust to the offender, and the lower limit is the point after which less punishment is unjust to the victim." Reiman, *supra* note 38, at 128. How is this range fleshed out? "Proportional retributivism, then, in requiring that the worst crime be punished by the society's worst punishment and so on, could be understood as translating the offender's just desert into its nearest equivalent in the society's table of morally acceptable punishments." *Id.* at 129. See also H.L.A. HART, *supra* note 1, at 25; H.L.A. HART, *supra* note 136, at 161-73; Ellis, *supra* note 4, at 6-9 (with citations); Sadurski, *Social Justice and Legal Justice*, 3 LAW & PHIL. 329, 335 (1984); Davis, *supra* note 158. Compare Fletcher's discussion of the levels of deserved punishment, *supra* note 206.

<sup>240</sup> See *supra* note 156. Walker has the reductivist, who favors the reduction of crime by efforts which include deterrence and rehabilitation, arguing with the retributivist about the weaknesses in implementing the other's purpose:

It is true that the difficulties of measuring the success of reductivist measures are all too great. But this is a debating point rather than a genuine *tu quoque*. In the first place, the difficulties of assessing reductive efficacy are practical rather than theoretical, and are therefore not impossible to overcome, . . . whereas the difficulties of assessing retributive accuracy are theoretical, fundamental, and insuperable. Secondly, even if this difference did not exist, the reductivist is aiming only at efficacy, whereas the retributivist is aiming at accuracy. In other words, reductivists' mistakes at worst make them less effective than they would like to be, but retributivists' mistakes have consequences which, on their own assumptions, are moral "injustices", and therefore more serious.

N. WALKER, *supra* note 33, at 11.

And what happens when one tries to satisfy both purposes at once?

<sup>241</sup> As an example of usage, the OED provides an 1821 quote from Sydney Smith: "Prevention of intrusion upon private property is a right which every proprietor may act upon, and use force to vindicate."

<sup>242</sup> The right belongs to the victim, so in a sense it is victim-regarding. Vindication is characterized as rights-regarding in order to emphasize that the important center is the nature of the right and not the impact of the violation of it on the possessor or society.



his right without necessarily avenging the actor for failure to respect it. The court might recognize the right by granting a declaratory judgment while finding the infringing actor free of liability.<sup>243</sup> Or the court might award the plaintiff damages from public funds appropriate to the right, while assessing the actor a different amount appropriate to the violation of his duty.<sup>244</sup>

Without burdening the discussion with an algebraic model, the difficulty of aligning this idea of vindication with the prior models of the purposes of punitive damages may be indicated. There are several ways in which the victim's right may be vindicated. Vindication may prevail whenever and however a court recognizes the right, whether by declaratory judgment, nominal damages, etc. Vindication, on the other hand, may require an award of damages as a symbolic statement of the importance of the right, or in proportion to the extent of the invasion, or a combination of both.<sup>245</sup> If so, how one monetizes the importance of a right or measures the extent of the invasion of that right is not obvious. Without attempting elucidation, enough has been said to demonstrate the nature of the problem of resolving the idea of vindication into terms that can be satisfied along with deterrence and, if retribution means something different, reciprocity and desert.

The analysis of deterrence and retribution, based upon idealized algebraic models, is over. Now hoist the white flag. Many problems remain unresolved. An overarching model seems beyond reach. The functions, or aspects of functions, have different viewpoints, either actor-regarding, act-regarding, victim-regarding, society-regarding, or even to some extent rights-regarding. Costing is done either at the time of the act,  $t_a$ , or the time of judgment,  $t_j$ , or conceivably, sometime in between, or some combination thereof.<sup>246</sup> There is no common denominator. The attempt to

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<sup>243</sup> "But if our intention [by the message of retributive punishment] is to mean his [actor's] act was that (magnitude of) wrong, why don't we just say so and spare him the penalty?" R. NOZICK, *supra* note 1, at 371.

<sup>244</sup> See *supra* note 6; cf. *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("Even assuming that a punitive 'fine' should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff — who by hypothesis is fully compensated.").

<sup>245</sup> See *supra* note 37; N. MACCORMICK, *supra* note 236, at 135.

<sup>246</sup> There is no obvious linear relationship between the costs measurable at  $t_a$  and those at  $t_j$ . For example, at  $t_a$  a reasonable calculation may be that the victim will suffer little loss. But, the twists of fate turn the loss into the straw that jeopardizes the victim's entire empire. The reasonable victim is highly distraught by the prospect, i.e., there are great internal costs. Later, another fortuitous twist saves the empire and the victim lives happily ever after. Perhaps even the happiness of redemption completely offsets the pain of the abyss. Hobbes suggested that the true value of a good isn't known until imperilled. See L. STRAUSS, *THE POLITICAL PHILOSOPHY OF HOBBS* 132-33 (1936). Emily Dickinson thought similarly: "Success is counted sweetest/ By those who ne'er succeed./ To comprehend a nectar/ Requires sorest need." E. DICKINSON, *POEMS* #67, at 7 (T. Johnson ed. 1961). The victim comes out ahead.

The question remains whether there was a societal loss from the victim's ordeal.

unpack our notions of punishment has failed to bring bright light to this dark instrument of society. Nonetheless, a few lessons have been learned. In the next section, taxonomy, they will be put to use.

#### IV. A TAXONOMY

The analysis of the measure of punitive damages has been tortuous. Even when professed purposes are taken at face value and idealized with strong assumptions about the qualities of the parties, problems irresolvable other than by gross compromise are evident. Once the remedy is brought into the courtroom by considering variant meanings of the aims of punishment and relaxing some of the assumptions, the difficulties are exacerbated. Special and general deterrence, retributive reciprocity and desert, whether under the narrow or broad conceptions, or under the variations, do not mesh together into an overarching synthesis. Moreover, inconsistencies and unfairnesses in theory and practice blunt punitive damages, or, for that matter, punishment in general, as an instrument of social policy. The question remains whether the extraordinary remedy does more bad than good. With the realization that reasonable persons may differ, in this section I offer my personal views. I contend that by modifying the current doctrine in light of the quandaries, this legal tool may be honed enough to warrant continued use.<sup>247</sup>

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See Woodward, *The Non-Identity Problem*, 96 ETHICS 804, 809-10 (1986) (richness of life owing to personal strength gained in a Nazi concentration camp is not justificatory). Looking from the vantagepoint of  $t_a$ , the victim might choose not to experience what lies ahead even though he is confident that he will believe it worthwhile at  $t_j$ . Future benefits are typically discounted with respect to immediate losses. See, e.g., D. PARFIT, *supra* note 216, at 158-63; R. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* 78-81 (1979). If there is a societal loss from this scenario, an appropriate time to measure it may be at some time between  $t_a$  and  $t_j$ , say, at the time when the loss was maximal.

<sup>247</sup> I say this with trepidation.

In my own ruminations, I have so far not been able to form any combination of deterrence and punishment that would adequately explain existing punitive damages legal practices. Moreover, the inability of the deterrence rationale to clarify almost anything in the common law of punitive damages leaves me skeptical about the likely success of any full-blown inquiry into the 'hybrid' possibility.

Schwartz, *supra* note 48, at 148. J.B. White was even more damning of criminal punishment:

For the contradictions in the criminal law are not merely competing statements of value that can serve as a rhetorical topic, but give a contradictory character both to the institution itself and to those who must act within it. They thus define impossibly incompatible ways to proceeding. They order the judges, as it were, to be, to do, and to feel inconsistent things at the same time. The contradiction destroys the very world the language seeks to constitute, the coherence of which is a necessary precondition to all else it seeks to achieve.

J.B. WHITE, *supra* note 236, at 203. Nevertheless, relying upon debatable intui-

The virtue of ascribing to punitive damages several simultaneous purposes is questionable. Deterrence and retribution are uncomfortable bedfellows. Deterrence is actor-regarding and partially costed at the time of the act,  $t_a$ . Retributive reciprocity seemingly is mainly victim- or society-regarding, which includes actor- and victim-regard, somewhat actor-regarding and costed at the time of judgment,  $t_j$ . Retributive desert seemingly is partially act- or actor-regarding, partially victim- or society-regarding, and costed at  $t_a$  or even partially at  $t_j$ . Without reiterating other differences, these alone are sufficient to show why the imputed purposes of punitive damages are unlikely to hang together.<sup>248</sup> The different purposes may be better kept in separate chambers, or one or more discarded altogether.<sup>249</sup>

A useful device to refine one's intuitions while pursuing this line of inquiry, is to keep in mind polar cases in which punitive damages may be beneficial. One pole is where the act is entirely the product of ill will. The actor has no thought of monetary gain. He may have considered in passing the potential financial benefit and even the discounted risk of legal sanctions, but these possibilities evaporate before his consuming motivation. With a cool, acidic passion, he has only one thought: "to get" the victim. Then he acts with certainty that the victim will be harmed and with knowledge of the extent of that harm. The act is purely wicked.<sup>250</sup> The

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tion, herein is my proposed hybrid, however untidy. "In many cases our intuitions are rather shaky, and then they have to conform to the theory rather than the other way around." J. ELSTER, *ULYSSES AND THE SIRENS* 121 (rev. ed. 1984) (footnote omitted). For this problem, the shaky intuitions are nothing compared to the shaky theory.

<sup>248</sup> This incoherence in the theory of punishment has long been recognized. See, e.g., G.W.F. HEGEL, *NATURAL LAW* 60 (T.M. Knox trans. 1975) (Jena 1802-03). Peczenik asserts that some of these types of impossible compromises result from logical (deductive) and empirical incompatibility. Peczenik, *Cumulation and Compromises of Reasons in the Law*, in *COMPROMISE IN ETHICS, LAW, AND POLITICS* 176, 177 (J. Pennock & J. Chapman eds. 1979). See also Becker, *supra* note 46, at 33; D. LYONS, *ETHICS AND THE RULE OF LAW* 146-48 (1984); Goldman, *supra* note 131. Perhaps incoherence isn't worrisome:

The elaborate efforts of lawyers and academics to sort offences into precise categories and to fit crimes to punishments on impeccable theoretical grounds may well strike a layman as resembling an attempt to make a town clock accurate to a millisecond in a community most of whom are too shortsighted to see the clockface, too deaf to hear the hours ring, and many of whom set no great store on punctuality in any case.

A. KENNY, *supra* note 35, at 93.

<sup>249</sup> "In my view, such a [punitive] damage regime would be justified if it were clearly successful in achieving *either* of these two purposes [of intelligent deterrence or fair punishment.]" Schwartz, *supra* note 48, at 134 (emphasis in original).

<sup>250</sup> On the other hand, this character sounds pretty pathological. If he is, the policies underlying, for example, the "irresistible impulse" test of criminal law, suggest that his total indifference to economic consequences evidences personal qualities giving rise to diminished responsibility. That lessens wickedness. Seemingly every hypothetical showing pure wickedness entails this countervailing limitation.

mental state is maximally culpable. Here, if ever, punitive damages are based upon retribution.<sup>251</sup> As much as he gave (to the victim or society), so much he ought to receive, as a first estimate anyway. Deterrent damages are impractical.<sup>252</sup> Although the prospect of a punitive damage recovery will give pause to a (legally competent) monomaniac, the award must be extraordinarily large. Our Solonian society balks at granting a recovery sufficient to deter fully.

A case for punitive damages at the opposite pole is where the actor is perfectly rational and makes a purely pecuniary choice. The manufacturer which is aware that one of its products has a latent, hazardous defect but declines to correct the defect in order to save time and money, is exemplary. Supposedly, most people would not consider this action as blameworthy as other actions usually denoted as "malicious".<sup>253</sup> The manufacturer is not out to harm a particular victim. It may be aware that some consumers will be harmed inevitably, but they are invisible, faceless statistics rather than flesh and bones individuals. There is no personal spite or viciousness.<sup>254</sup> The corporate actors have decided that payment of the actual damages of the victims is more efficient than correction of the defect. The decision may be made in good conscience, arguably, as perfectly consistent with socially sanctioned choices in the past. The history of the industrial revolution, for example, can be read as being partially fueled, with

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<sup>251</sup> Something can be said for subjecting this type of act to criminal sanctions only.

<sup>252</sup> *But see supra* note 52.

<sup>253</sup> An example of a purely economic choice giving rise to punitive damages is not possible since punitive damages require malice. The hypothetical involves the more benign form of malice, "legal malice", as distinguished from "actual malice".

<sup>254</sup> As Posner stated:

We must be careful to distinguish intent from awareness. Otherwise we could fall into the trap of thinking that the managers of a railroad are murderers because they know with a fair degree of confidence that their trains will run down a certain number of people at railroad crossings this year. They know, but they derive no benefit from killing. They only derive a benefit from saving the resources necessary to prevent the killing, and the benefit, social as well as private, may exceed the cost. Criminal intent is the intent to bring about a forbidden object by investing resources in its attainment.

Posner, *supra* note 41, at 1221. If by this Posner is making a means-ends distinction, it may be questioned. Negligent homicide, for example, is a crime though the killing is typically only a means, say, to reach a destination more quickly. *But cf. Shavell, supra* note 46, at 1234. ("Where the private benefits (for example, benefits from reaching a destination in time) are not obtained from the enjoyment of the victim's disutility, society seems more likely to credit them in the social calculus."). Where, however, as surmised by Posner, the social benefit does exceed the cost, the broad conception of desert argues against retributive punishment. If by "private benefit" Posner included the net costs to the victim, then the same conclusion appears under the narrow conception of desert.

the approval of courts, by the carnage of employees and others alongside factories and transportation arterials.<sup>255</sup> Without examining this hypothetical too closely, the point is, when the motivation for the proscribed act is purely economic in a strong sense, the goal of deterrence can most easily be met in principle. If deterrence ever works, it works in this case.<sup>256</sup> The act, moreover, by causing a societal loss without sufficiently redeeming advantages, under today's mores if not yesterday's, ought to be deterred. The deterrent measure of punitive damages will put an end to such acts to the extent possible in fairness under the civil law.<sup>257</sup> A retributive measure of punitive damages seems unrequired, the viciousness of the

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<sup>255</sup> See, e.g., Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975). Some believe the carnage goes on in some industries. See, e.g., Demprest and Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L.J. 797, 806-07 (1987) (asbestos industry). According to some intuitions, the blameworthiness of the choice to leave the defect uncorrected may be further reduced (at the risk also of reducing its purely economic motivation) by identifying the corporate agents with grounds for knowledge of the defect as other than persons in high authority. They may be lower level bureaucrats, engineers or scientists who decline to report the facts to superiors for fear of compromising their advancement opportunities or job security. They may be saving face or have rationalized doubts as to the latency or hazardousness of the defect. Cognitive dissonance operates.

<sup>256</sup> A close examination of the motivation of the corporate actors, as in the note above, and their responsiveness to sanctions imposed upon their principal instead of themselves, raises serious questions regarding deterrence that are beyond the scope of this article. One is supposedly less concerned with penalties suffered by another, even one's principal, than those suffered by oneself. See *supra* note 39. Pursuing this may lead to the conclusion that corporate actors are, or ought to be, in effect, strictly liable. This alone doesn't short circuit the aim of deterrence:

Strict liability is most in place when it is brought to bear on corporations. In such cases there may not be, in advance, any individual on whom an obligation of care rests which would ground a charge of negligence for causing of the harm which the statute wished to prevent: the effect of the legislation may be to lead corporations to take the decision to appoint a person with the task of finding out how to prevent the harm in question.

A. KENNY, *supra* note 35, at 93. See also Ausness, *supra* note 39, at 84.

<sup>257</sup> Commentators have argued that deterrence does not work well against corporations. See *supra* notes 39 & 41. Furthermore, the penal award is unfair to those affiliated with the corporation, such as shareholders, employees, suppliers and customers, who must absorb (partially) the award. See Ausness, *supra* note 39, at 41-46. Even if true, that's not the end of the argument. Before getting to the end, the unfairness must be analyzed more closely. First, it may be dissolved. Insofar as these parties voluntarily affiliated themselves with the knowledge that awards of punitive damages may be granted, they have "consented" to the award. The conditions of the affiliation manifest this consent; the price of the shares and the terms of the employment and customer contracts reflect the risk of the award. There is no unfairness. See Stone, *supra* note 59, at 249-50. Compare *supra* notes 208 & 274.

This same argument may be turned against some of the victims. Insofar as they have entered into consensual arrangements with the corporation, they have "consented" to future malicious actions by waiving their claim for punitive damages,

actor's mental state being nearly zero.<sup>258</sup>

Summarizing the conclusions drawn from the polar hypotheticals, when the act is actuated purely by a culpable mental state without pecuniary motivation, punitive damages should be based upon retribution alone. When the act is essentially pecuniary and without other wickedness, the deterrent aim alone of punitive damages should apply.<sup>259</sup>

Nearly all of the actual cases of punitive damages, if not all of them, are nonpolar ones. They involve mixed motivations, partially wicked, partially pecuniary. A convenient rule of thumb in these circumstances would be to measure retribution as if the case was at the one pole, and deterrence as if it was at the other, and then take whichever measure is higher, or lower, or the average of the two. Unfortunately, an asymmetry in the polar cases precludes this easy solution. As seen in the examples, at one pole, where deterrent damages are appropriate, the wickedness, and thus desert, is nearly zero, thereby calling for negligible retributive damages. At the other pole the gross wickedness justifies a high measure of retributive damages while deterrent damages, to capture the attention of the inattentive actor, must be exceedingly large. Hence, deterrent damages are always the higher of the two and a simple combination of the deterrent and retributive valuations of the polar motivations will range from the level of rational deterrence upwards towards infinity if the higher or an average is taken, or be nearly zero if the lower is taken.<sup>260</sup> This is not fitting. The quick fix won't do. Solutions require a different approach.

The various hypotheticals and analytical complexities arouse intuitions that must inform the reconstruction of punitive damages. My obvious

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this consent being reflected in the terms of the contract. (This argument is inapplicable against victims who have not entered into consensual arrangements, although an assumption of risk analysis may be attached to even noncontractual activities. For example, by choosing to walk down the street, the victim assumes the risk of a malicious car driver.)

Since this microeconomic thrust and parry may wash out, my support for punitive damages against corporations boils down to these points: (1) deterrence doubtless works somewhat, *see supra* note 256, (2) corporations play such important, powerful roles in citizens' lives that substantial cost and effort to keep them in check is warranted, *see supra* note 37; (3) the corporation is usually a better loss spreader and risk avoider; (4) the private attorney generalship of the victim is to be encouraged, *see supra* note 196; (5) as between the corporate affiliates and the victim, intuitively the victim is relatively less blameworthy and ought not absorb losses that would be unrecompensed but for the extraordinary award.

<sup>258</sup> For the hypothetical in *supra* note 253, "[t]he word 'malicious' . . . is virtually meaningless as applied to passive, institutional failures to consider the implications of their activities . . ." Owen, *supra* note 34, at 116.

<sup>259</sup> A later hypothetical showing a peculiarity of deterrence theory, *see infra* text accompanying note 267, reveals that desert cannot justly be divorced entirely from deterrence.

<sup>260</sup> Notice that reference is made to special, not general, deterrence. Retributive reciprocity and retributive desert also are not distinguished. The broad strokes blur the distinctions for the moment.

groping for consistency and clarity, as is true of others, will be far from fully satisfactory. Many threads remain untied. Disclaimer behind, by treating independently the functions of punitive damages and variations, I draw with coarse, eclectic strokes a general taxonomy for punitive damages.<sup>261</sup>

### A. Deterrent Damages

1. *Special deterrence.* As shown in the discussion of equation (1) for special deterrence, a rational actor, appraising consequences at the time of the act,  $t_a$ , is deterred in principle even though the possibility remains that greater benefits than costs may eventuate. Nevertheless, requiring the actor to disgorge all of the monetary payoff obtained from the illicit act as determined at  $t_j$ , even when unanticipated at  $t_a$ , is fair and convenient under special deterrence. The victim's actual damages may themselves require this. When the case is one in which the actor's actual payoff, irrespective of the anticipated payoff, is greater than the victim's loss, for several reasons he still must remit the extra. One, he is not in a position to make a moral claim to it. Two, if he has in the back of his mind the thought that he can keep an unexpected profit because it falls in the interstices of damage remedies, he may not be fully deterred. Three, there are evidentiary problems with proving probabilities anticipated at  $t_a$ .<sup>262</sup> By means of a "second look" at  $t_j$ , most of the probabilities become irrelevant. The actor must forfeit all profits, even fortuitous ones. Such gains must be turned over without being discounted by their improbability in order to

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<sup>261</sup> Morawetz stated:

It is the nature of theoretical investigation to view eclecticism with suspicion, to view it as capitulation in the face of difficulty. Eclecticism is the theorist's admission of failure unless the theorist's job is reconceived not as the job of finding a theory but of finding out whether it is possible to find a theory.

Morawetz, *supra* note 1, at 805 (footnote omitted). Morawetz criticizes some theories of punishment, including Hart's and Rawls', for their unsuccessful attempts to reconcile forward-looking (deterrent and rehabilitative), utilitarian purposes with retributive ones. *See id.* at 805-15. He then pointed toward a new methodology "by reconceiving the terms of a forward-looking theory." *Id.* at 815. His discussion remained at an analytical level that doesn't confront the quantifications addressed here. Until he adds flesh to his skeletal theory, one may still doubt "whether it is possible to find a [practically implementable] theory."

<sup>262</sup> [Since] the courts' knowledge of the expected harmfulness of an act is poor . . . , courts must infer these from, among other evidence, the occurrence and magnitude of the actual harm. Thus, the sanction can reasonably rise with the actual harm. In addition, marginal deterrence might not be adequate unless the sanction rises with the level of actual harm.

Shavell, *supra* note 46, at 1245.

achieve deterrence fully.<sup>263</sup>

Two additional sets of the complex interdependencies of this analysis must be mentioned. Notions of fairness, desert, refuse to be excluded from the consideration of deterrence. Examined first are problems that arise from rationally anticipated, but unlikely occurrences, and second, ones from the actor's factually incorrect anticipations.<sup>264</sup>

First, unlikely occurrences. Under "second look" the actor's fortuitous gains not disgorged by actual damages will not be multiplied by their improbability. Neither will they be multiplied by the improbability of the punitive award, despite first appearances. Notice, by way of clarification, that a fortuitous gain will be turned over to the victim only if there is an award of punitive damages. When, for example, the probability of such an extraordinary award is rationally anticipated to be 0.1, then nine times in ten the actor will keep the bonus. The punitive award must take this possibility into account to prevent the actor from believing that if he is lucky he will get away with something. Simply to multiply the actual, unanticipated benefit by, under the above example, ten is unfair to the

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<sup>263</sup> Under the doctrine of "second look" the actor is taught that: "from everything I can rationally determine at this point ( $t_a$ ), and which will eventuate between now and any possible judgment against me, it will not pay me to do the proscribed act." That is, any unanticipated gains must be forfeited at  $t_j$ . The rational actor is indifferent, at one level, to the rule change. He simply incorporates the new "entitlement" into his algorithm of rational costing and then acts upon the calculus of the bottom line.

The jury in a California product liability case involving the Ford Pinto based its punitive damage award of \$125 million on a disgorgement of profits theory. The jury allegedly felt that since Ford had saved \$100 million by marketing the unsafe fuel tanks, only an amount in excess of that figure would properly penalize the defendant. See *The Wall Street Journal*, Feb. 14, 1978, at 1, col. 4. The trial judge subsequently reduced the punitive damages award to \$3.5 million, holding the jury award excessive as a matter of law.

Mallor & Roberts, *supra* note 4, at 653 n.89 (referring to *Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d 757, 174 Cal. Rptr. 348 (1981)). For more details of Ford's economic calculation, see Ausness, *supra* note 39, at 89-92.

<sup>264</sup> For example, the actor may wrongly expect the probability of the victim's counteraction,  $P_c$ , to be 0.1 when, in fact, it is 0.5. This differs from improbable outcomes as where, say, although in fact  $P_c = 0.1$ , this particular instance is an uncommon one in which the victim chooses to counteract.

Uncertainty in the standards for the recovery of punitive damages might also be briefly addressed. Ellis argues persuasively that this uncertainty will induce actors to overinvest in avoidance ploys and generally reallocate resources in such a way as to reduce overall social welfare. Ellis, *supra* note 4, at 33-57; See Kennedy, *supra* note 35, at 6. But the same uncertainty might induce victims to underinvest in lawsuits. If so, fairness and efficiency aside, whether the sum of the distortions will lead generally to over- or underdeterrence, over- or underretribution is an empirical question. See *supra* note 186. Whether "complete uncertainty about the severity of the penalty is a more effective deterrent . . . or not has never been scientifically investigated." N. WALKER, *supra* note 33, at 72-73. When, under vicarious liability, the principle is liable for the acts of its agents despite attenuated knowledge, the uncertainty will have similar effects. See Ellis, *supra*, at 63-71.



actor. This may be shown by continuing the example: if the actor expected a return of \$100, but actually gained \$10,000, to account for the improbability of punitive damages by multiplying his gain by ten (\$100,000) seems unduly harsh when he anticipated an extraordinary liability of only \$1000 ( $10 \times \$100$ ). Perhaps one (crudely) escapes the quandary thusly: the anticipated gain is multiplied by the improbability of the punitive award ( $10 \times \$100 = \$1000$ ); the unanticipated, but actual gain is multiplied by a number between one (certainty) and the improbability of the punitive award (10), that number being higher in accordance with the extent the actor deliberated on and was motivated by the chances of recovering an unlikely gain (however one proves this);<sup>265</sup> finally, the higher or sum of these two calculations is awarded as deterrent damages.<sup>266</sup>

An unlikely occurrence also arises when a recovery of punitive damages is granted for the first time for a particular type of act. For example, a court may declare them allowable against a defendant for knowingly including an unenforceable term in a lease.<sup>267</sup> The first recovery of deterrent damages, to compensate for the unlikelihood, must approach infinity. This indisputable unfairness may be averted by this solution, even cruder than the one advanced above: when the constructive notice of the possibility of punitive damages is attenuated, the actor's anticipated gain is multiplied by a number which reflects the extent to which the actor, as a rational, right-minded person, would believe that a just society should not tolerate the act about to be committed. In other words, the more "overdue" the extraordinary award, the higher the multiplier. The important point, in any event, is that contrary to current practice in some jurisdictions,<sup>268</sup> deterrent damages, being actor-regarding, relate to the actor's anticipated gain, not to actual damages, which are victim-regarding.

The problems arising from unanticipated costs and benefits ( $C_x$ ,  $B_x$ ,  $D_p$ ) are dwelled upon above. The discussion implies that the potential payoffs interrelate with the various probabilities ( $P_x$ ).<sup>269</sup> As a means of coping with manifest unfairness to the actor stemming from improbable but actual payoffs, adjustments were proposed which considered actual eventual-

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<sup>265</sup> Thus, if the gain is totally unexpected, the multiplier is 1. This same analysis may be applied to unexpected, nonmonetary payoffs. Notice the relationship of this problem to the issue under desert damages of the actor's mental state.

<sup>266</sup> Under this approach, if the actor unexpectedly suffers a loss from his act (not counting the punitive damages), he will still be liable for a deterrent award of \$1000. Something can be said for reducing this because of his (rationally anticipated) bad luck. For a related problem, see *supra* note 216.

<sup>267</sup> Cf. Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. Cin. L. Rev. 845, 892 (1988).

<sup>268</sup> See *supra* note 238.

<sup>269</sup> For example, the actor may anticipate the direct, in-pocket benefit,  $F_d$ , as a curve on a graph with one axis being amounts,  $B_d$ , and the other being probabilities,  $P_d$ , with points such as:  $B_d = \$100$ ,  $P_d = 0.4$ ;  $B_d = \$1000$ ,  $P_d = 0.05$ ;  $B_d = -100$ ,  $P_d = 0.1$ ; etc.

ities.<sup>270</sup> Contrary to these "second look" adjustments, recall that examples (2) and (3) show that the probabilities of counteraction by the victim,  $P_c$ , and a third party,  $P_t$ , must be fixed as those anticipated by the actor at  $t_a$ , not as those which exist at  $t_j$  (viz.,  $P_c$  and/or  $P_t = 1$ ). Otherwise, if the illicit gain is multiplied by the improbability of the punitive award as determined at  $t_j$  when the extraordinary damages are certain, the actor will have nothing to lose by the proscribed act: at worst he will have to pay back what he received, at best he will pay back nothing.

Second, problems arise from the actor's incorrect anticipations. The issue is whether deterrence is measured by the actual expectations of the actor, by a reasonable person standard, or by a rational person standard. The recommendation that the actor always disgorge all profits implies that neither his actual motivation nor the motivation of a reasonable person apply since a reasonable person also may not expect the profits. That leaves the rational person standard. One may argue that an unexpected financial benefit cannot occur to a rational actor. First, the rational actor, being perfectly informed *ex hypothesi*, cannot fail to expect any possible consequence. Or second, the problem may be dissolved by insisting that the rational actor expects the unexpected; he knows that occasionally unanticipated results occur and this possibility is valued appropriately.<sup>271</sup>

The converse case, where the actor expects a return much higher than that expected by a reasonable or rational person, is also troublesome. The application of these latter two standards may seem to underdeter the actor. He anticipates a profit, say, of \$1000 where a reasonable or rational person expects \$100. The award of only \$100 in deterrent damages would seem to be insufficient to get his full attention at  $t_a$ . On further thought, "second look" doesn't work that way. The actor at  $t_a$  does not know the appraisals of the reasonable or rational actor. He knows only his own and, under the rigid application of deterrent damages, that his anticipated gain will be fully offset, if it eventuates, and any unanticipated gain will also be lost. That he overappraised his likely profit is irrelevant for deterrence so long as he knows that any actual profit, higher or lower as determined by hindsight at  $t_j$ , will be turned over to the victim.<sup>272</sup>

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<sup>270</sup> The invocation of the notion of "fairness" as the reason for raising these concerns with deterrence, reaffirms the inextricable interrelationship in a just society between the teleological and deontological purposes of punishment.

<sup>271</sup> That one expects the unexpected might not mean that one would rationally cost it at  $t_a$  at the exact level of the actor's actual, unexpected profit under the circumstances determined at  $t_j$ . To do so requires a strong, prescient type of rationality. Another path to the conclusion is the "consent" argument: the rational actor expects the unexpected and by acting with this knowledge, he "consents" to the legal consequences, whatever they are.

<sup>272</sup> The actor may have difficulty proving to the factfinder that he anticipated a gain of only \$100 when a reasonable or rational person would have anticipated \$1000.

Whether the payoff is offset by the standard of the rational, reasonable, or the actual actor may make no difference if examined from another angle. As discussed below, the benefit that is not canceled by deterrent damages may be considered a social loss covered by retributive damages.

2. *General deterrence.* General deterrence will align with special deterrence when all members of society are rational onlookers who understand the actor's motivation for the proscribed act. Whether or not the actor is rational, so long as the punishment is ideal, these onlookers will appreciate the refinements in the actor's punishment and realize that for them, too, the proscribed act will not pay.

In practice, members of society are not rational onlookers in the sense of being perfectly informed of the circumstances and the actor's reasoning. The question then arises whether deterrent damages ought to be increased, or decreased,<sup>273</sup> to compensate for the misimpressions of onlookers. Continuing with the last train of thought under special deterrence, general deterrence may be furthered by measuring deterrent damages under the standards of the rational or reasonable actor, even though the actor is known to be neither, and special deterrence can be satisfied by adjustments for the actor's personal peculiarities. Where proper adjustments would decrease the deterrent damages from those measured by the standards of the rational or reasonable actor, the issue boils down to whether one should make an example of the actor to better discourage the public.<sup>274</sup> If the public

<sup>273</sup> A decrease may be an apt counter to the attraction of crime from notoriety and the undermining of self-motivation owing to severe sanctions. *See supra* note 41.

<sup>274</sup> The classic criticism of utilitarian penal theory, that it allows the conviction of a person known to be innocent if the good from the example outweighs the bad kept small by secrecy, is not met here in full force. The actor in this case did subject himself under the rules to liability for punitive damages. The unfairness, if any, is with the size of the award, not with whether there is an award. Some commentators, in the context of criminal penalties, seem untroubled by making the actor an example to others in this way. *See* F. ZIMRING & G. HAWKING, *supra* note 35, at 44-50; *see generally* N. MORRIS, *supra* note 181, at 187-88; N. WALKER, *supra* note 33, at 68-70. Perhaps the "absolute fairness" to the actor is appropriately sacrificed to promote the "comparative fairness" of others saved from harm by the deterred actions. *See* Haksar, *supra* note 72, at 326. Plamenatz states the underlying idea starkly: "I can see no reason why it should be worse to make the first mistake [of holding persons responsible when they are not] than the second [of holding them not responsible when they are]." Plamenatz, *supra* note 36, at 187. Most other commentators have trouble with this. *See, e.g.,* H.L.A. HART, *supra* note 1, at 24-25; J. FEINBERG, *supra* note 106, at 282-83; Honore, *Social Justice*, 8 MCGILL L.J. 77, 86-91 (1962); G. FLETCHER, *supra* note 33, at 415-16.

That doing so may in some cases have a sufficient utilitarian justification does not mean that after all there is no injustice done. It merely means that sometimes even injustice might be an acceptable price to pay for social peace. But that is a claim whose credentials need severest examination on any occasion when it is advanced.

N. MACCORMICK, *supra* note 236, at 147 (emphasis in original). White was so disturbed by this problem that he insisted that:

[w]e should stop talking of deterrence as a 'goal' of punishment that should in any way affect individual judgments of guilt, grading, or disposition. Of course it is true that deterrence will continue to be one of the effects of the practice of punishment, and we can be pleased that that is so. But the criminal law proper concerns itself only with instances of violation, and these should be punished only as blame requires, never for exemplary or deterrent reasons.

perceives the actor as underpunished, some will not be generally deterred. My stand on this question is influenced by Kantian predispositions. I disfavor making an example of the actor for the utilitarian benefits that may flow from heightened general deterrence.<sup>275</sup> Flawed or not, general deterrence in this case should merge into special deterrence.<sup>276</sup>

Two additional points must be raised regarding the standard for general deterrence. First, a troublesome case when general deterrence is tied to special deterrence is where the actor is aware of the divergencies between the two forms of deterrence stemming from practical application and takes advantage of the imperfections. The solution is to counter the attempt when discovered by increasing the actor's punishment under special deterrence. Special and general deterrence still stand together.

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J.B. WHITE, *supra* note 236, at 211.

The problem may be dissolved by building into equation (1) the probability and cost of being made an example to others. By knowing of this possibility and accommodating it, the actor has "consented" to the loss and thus is not unfairly used. See *supra* note 208. This theoretical solution is far down the slope of *reductio ad absurdum*, as are other parts of the analysis in this article. The risk of this reductionist approach is apparent from the next step: "For we don't always suppose that those who will judge our conduct will be fair — that they will give us what we deserve. Nor need we to think they will be fair if they will be rational." F. SCHICK, *HAVING REASONS: AN ESSAY ON RATIONALITY AND SOCIALITY* 79 (1984) (emphasis in original). The actor, then, need only build into his calculus the general risk of being treated unfairly; if he perseveres in the act, he has "consented". Posner made arguments like this. See R. POSNER, *supra* note 71, at 94-95; Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 *HOFSTRA L. REV.* 487, 492 (1980); Posner, *supra* note 41, at 1213. Dworkin called Posner to task for the ploy. See Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 *HOFSTRA L. REV.* 563, 576-77 (1980).

<sup>275</sup> If society wishes to promote general deterrence by sending a clear signal to the public that such proscribed acts will not be tolerated, let officials publicize this resolution through the usual political methods. The imposition of an excessive, exemplary punishment on the actor as a means of sensationalizing society's resolution and thereby obtaining "free" publicity, or otherwise capturing the public's attention, transfers the cost of law enforcement from the public coffers to the actor.

<sup>276</sup> Where adjustments for the actor's peculiarities would increase deterrent damages beyond those measured by the standards of the rational or reasonable actor, utilitarian rather than Kantian considerations come to the forefront. The misperceiving public will be distressed to see the actor as "overpunished". This is a social cost that must be weighed against the loss in special deterrence of the actor.

The adjustments discussed are based upon the public's misinformation. Related problems arise when considering adjustments to the actor's punishment to compensate for the public's other irrationalities, such as from unreasonability, insensitivity or risk disposition. If, say, the public is more risk preferring than is the reasonable or rational person, or the actual actor before the court, then general deterrence would call for increased damages beyond that necessary to specially deter the actor. The Kantian issue arises again. Compensating for the other public irrationalities may cut the other way and raise the utilitarian problem in the paragraph above. I would avoid all these problems, at some utilitarian cost, by basing general deterrence upon the standard of special deterrence.

Second, whether general deterrence is based upon the rational, reasonable, or actual actor may make little difference from a utilitarian perspective. The harm to society ensuing from general misdeterrence which results from the misimpressions and other irrationalities of onlookers regarding special deterrence is a social loss. The loss is accounted for when measuring reciprocal and desert damages under the broad conceptions.<sup>277</sup>

3. *Net deterrence damages.* Special deterrence incorporates "second look". The damages are lowered when unanticipated eventualities would make a strict measure unfairly high. General deterrence, also with a Kantian overlay, resolves into special deterrence. Net deterrence damages are pegged to special deterrence alone.

### B. Reciprocal Damages

1. *Narrow conception of reciprocity.* In the polar case above of maximal wickedness, where the actor, without excuse or justification, deliberately invades the victim's rights and harms him, he clearly ought to even the record as examined at  $t_j$ . There is no reason to leave the victim with a loss. For that matter, in the other polar case where the knowledgeable actor, from purely pecuniary motivation, harmfully invades the victim's rights, as between the actor and the victim, the ultimate loss, whether or not anticipated at  $t_a$ , should be visited upon the actor. No satisfactory justification is apparent for why the utilitarian goal of deterrence or some other principle must be operable before the innocent victim is placed in his *ex ante* position. For the "malicious" acts in question, the actor has no private moral grounds to resist the victim's full recovery for all harms.<sup>278</sup>

Apparent from these observations is that the question of whether reciprocal damages are awarded is based upon a costing at the time of the act,  $t_a$ , instead of the time of judgment,  $t_j$ . The malefides of the actor are based upon what he knows or has reason to know at the time of choosing to act,  $t_a$ . The more difficult issue is whether, once the actor has subjected himself to the extraordinary remedy by passing this threshold test at  $t_a$ , the measure of reciprocation should be appraised at  $t_a$  or  $t_j$ . The victim's monetized risk of harm would be determined at  $t_a$ . This implies

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<sup>277</sup> Yet insofar as this social loss is offset by increasing the actor's punishment beyond that called for by special deterrence, Kantian problems remain. First, there are overtones of making an example of the actor. Second, the actor doesn't deserve to suffer for the irrationalities of the public.

<sup>278</sup> These points imply deontological (Kantian) groundings. Retribution, it will be recalled, is deontologically based whereas deterrence is teleological (utilitarian). See *supra* note 33. The actor's strongest moral responses are teleological. "The reason I ought not be liable for retributive reciprocity damages," he might say, "is that the public and private costs of the judicial process outweigh the social benefits that eventuate from the award. The social disadvantages include a chilling effect on acceptable acts at the margin which flows from the inexactitude of the measure of, and standard for, reciprocal damages."

the earlier time as crucial for the measure of the extraordinary award. Hence, for example, if the actor threatens the victim with a harm of \$1000, with a probability of 0.5, the actor is subject to reciprocal damages of \$500 whether or not the harm eventuates. Yet this seems unsatisfactory. The victim who is actually harmed more than anticipated at  $t_a$ , even reasonably anticipated at  $t_a$ , should not be required to absorb the additional loss. Thus, though not entirely retributive,  $t_j$  should control the question of amount of recovery in this case. When, however, the victim's actual harm at  $t_j$  is less than anticipated, intuitions may vacillate. A case for asymmetry can be made. Perhaps  $t_j$  should control here as well. The victim has no moral claim to a recovery greater than his harm. The actor was morally lucky.<sup>279</sup>

The introductory observations above are mooted by rejecting altogether the narrow conception of retributive reciprocity. In principle, actual damages already are to fully compensate the victim for his injury as appraised at  $t_j$ .<sup>280</sup> That certain harms are not legally recognized as compensable injuries, such as the dispute transaction costs and many of the nonpecuniary, internal and external costs, should be rectified by an expansion of ordinary damages, not by subsumption under punitive damages. The courts may neglect these costs to the victim for various reasons,<sup>281</sup> but if they are to be compensated, the umbrella of actual damages is fully as satisfactory as the currently unguided nebulosity of punitive damages.<sup>282</sup> From moral conviction rather than fear of incoherence and inconvenience, the narrow conception of reciprocity may be declared out-of-bounds for punitive damages and in-bounds for actual damages.<sup>283</sup>

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<sup>279</sup> See *supra* note 126. A similar moral luck is important to the criminal law. If, for example, the actor performs an act with the intention to murder the victim, and, though the act is well-aimed, the victim is unharmed, the actor is liable for attempted homicide even though his wickedness, from one perspective, is equal whether or not the act misfires. Another actor, on the other hand, who satisfies the minimal requirements for homicide, will be liable for homicide even though, for example, he imposed a considerably smaller risk on the victim than did the attempter above. He is morally unlucky. See *supra* note 226.

<sup>280</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 901 comment a (1979); RESTATEMENT (SECOND) OF CONTRACTS § 344 comment a (1981).

<sup>281</sup> See *supra* text accompanying note 103.

<sup>282</sup> See Schwartz, *supra* note 48, at 139-40.

<sup>283</sup> MacCormick also struggled with the idea of the moral foundations of reparation. He concluded that "[n]o argument from retribution [desert] or deterrence can satisfactorily justify the obligation of reparation." N. MACCORMICK, *The Obligation of Reparation*, in LEGAL RIGHT AND SOCIAL DEMOCRACY 212, 214 (1982). Even when the actor is quite blameless, the victim is relatively less deserving of the loss. He did not "cause" it.

We may well regret that A [actor] has incurred this obligation; we may sympathize with him in his predicament; we shall be glad if he is able to recover from an insurer the cost to himself, for that will not be a way of dodging a just punishment, but a way of meeting an unfortunate liability.

*Id.* at 217.

The dismissal of narrow reciprocity was a bit too quick. The extent this function can be turned over to actual damages may not be very great. First, the costing of actual damages occurs at  $t_j$ ,<sup>284</sup> but, contrary to the position above, the costing of reciprocal damages may be (sometimes) fixed at  $t_a$ , or even at a time in between. Second, the victim will not be returned to his *ex ante* position under narrow reciprocity where, for example, the actor's internal and external losses fully satisfy the aim without the need to add a damage award. Placing the victim in his *ex ante* position would then punish the actor beyond that required by retributive reciprocity.<sup>285</sup> Third, because the victim's and the actor's costs under reciprocity are appraised from the viewpoint of society, that is, effects on the parties are filtered before evaluation, the monetization diverges from the costing under the standards of actual damages. Actual damages are also doubtlessly filtered, but insofar as different policies sustain the two remedies, different filters may be expected. Costs arising from the peculiarities of the parties, for example the "egg-shell" skull victim, may be appropriate under actual damages while inappropriate or discounted as part of societal loss. Fourth, the functional relation (proportion) to reciprocity,  $F_R$ , that appears in equation (3) may be different from the functional relation (proportion) for actual damages. Actual damages implicitly require a proportional relation of 1:1 whereas reciprocity may, though seemingly not, require a higher or lower relation. Fifth, although narrow reciprocal damages may place the victim in his *ex ante* position, nevertheless, under reciprocity the actor suffers losses in proportion to the victim's losses. In the common case where the proscribed act leads only to a wealth transfer between the victim and the actor, the *ex post* consequence of actual damages alone is that the actor has not been penalized beyond having his illicit gain eliminated. No loss with respect to his *ex ante* position has occurred. In another case, where the actor obtains benefits not derived from the victim, say, from *in terrorem* effects on members of the victim's group or goodwill from onlookers like-minded to the actor, then the actor's gains may be greater than the victim's losses. In both of these cases, the actor suffers no loss even after the reconstructed actual damages are granted the victim. This

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<sup>284</sup> This must be detailed. Although the measure of actual damages may be based upon the injury at  $t_a$ , such as for the breach of a sales contract where the fair market value of the goods at the time of the breach is determinative, D. DOBBS, *supra* note 11, at 159, nevertheless, if the extent of the injury at  $t_a$  is one that is uncertain owing to contingencies, the factual eventualities at  $t_j$  are relevant to the award, *see id.* at 540 (personal injuries). Though the uncertainties at  $t_a$  may resolve at  $t_j$  exactly as reasonably anticipated, the factual eventualities are, in principle, irrelevant to reciprocity.

<sup>285</sup> Continuing the moral discourse over the loss at the private level between the actor and the victim, which is unrelated to the public moral concerns of punishment, one may insist upon "over-punishing" the actor anyway. Deterrence and desert aside, as between the two parties, the actor ought to absorb the loss. *See supra* note 92. But society need not be persuaded to adopt this position. Actual damages already are independent of the actor's other costs.

doesn't sound like eye-for-an-eye when the Janus-faced aspect is kept in mind. Only when the victim suffers losses fully compensable under actual damages, and the actor obtains no benefits from any source as a result of the proscribed act, including from the victim, will actual damages and narrow retributive damages coincide. The hypotheticals do not involve the idea of moral luck. In the latter one, the actor's third-party benefits did not arise because the fates were kind to him. The actor knew very well at  $t_a$  of these third-party effects and they came to fruition as anticipated. The victim's harm is not reciprocated by an equal net harm to the actor under the narrow conception of reciprocity. In order to impose upon the actor an equal harm, the actor must turn over an amount that offsets the third-party effects even when the victim recovers more than he was harmed.<sup>286</sup>

The narrow conception of retributive reciprocity lives, at least until a place for desert is found. For the time being, when its measure is greater than actual or deterrent damages, let the actor be prepared to hand over the excess.

2. *Broad conception of reciprocity.* Continuing with the observations which introduce the narrow conception of retributive reciprocity, when the actor, from motivation either purely pecuniary or maximally wicked, knowingly and harmfully invades the victim's rights, why, under the broad conception of retribution, should society suffer a loss left uncovered by the narrow conception?<sup>287</sup> The actor in defense cannot muster overriding (deontological) moral arguments.<sup>288</sup>

Actual damages may not be advanced as a glib counter to the observations. These damages, reconstructed or not, diverge from the broad conception of retributive reciprocity since this conception looks to social loss, not merely the victim's costs as in actual damages.<sup>289</sup> Furthermore, for

<sup>286</sup> For other reasons why compensatory damages diverge from punitive damages, see Ausness, *supra* note 39, at 68-69.

<sup>287</sup> One reason is to keep society civilized. If the social loss is enormous, it may be preferable to stay out of the gutter in which some individual savages prefer to wallow. This is one argument against capital punishment. See Bedau, *Capital Punishment*, in MATTERS OF LIFE AND DEATH 148, 176 (T. Regan ed. 1980); Amsterdam, *Capital Punishment*, in THE DEATH PENALTY IN AMERICA 346, 348 (3d ed. 1982); Schwarzschild, *In Opposition to Death Penalty Legislation*, in *id.* at 364, 369-70. Another reason is "that a society might attain such a consciousness of power that it could allow itself the noblest luxury possible to it — letting those who harm it go unpunished. What are my parasites to me? It might say. May they live and prosper: I am strong enough for that!" F. NIETZSCHE, ON THE GENEALOGY OF MORALS 72 (W. Kaufmann ed. 1967) (quoted in Haksar, *supra* note 72, at 329 n.20).

<sup>288</sup> The actor may forward the moral arguments supporting the standard criminal safeguards. Some of these protections warrant adoption.

<sup>289</sup> Insofar as the victim suffers losses that are uncompensated, right-minded onlookers would object. This is a social loss. The monetization of the social loss relates roughly to the uncompensated losses of the victim. One reason for a difference is that social loss must be put through a filter, such as the "harm" principle. Assuming Mill's principle controls, the extent to which the objection of right-minded onlookers to the victim's uncompensated loss is other-regarding is unclear.



basically the same reasons given in the discussion of the narrow conception, the question of whether the actor is liable for broad reciprocal damages should turn on the costing of social loss at  $t_a$ , but how much is awarded should be based on the costing at  $t_j$ .<sup>290</sup>

When the social loss under the broad conception is greater than the victim's loss under the narrow one, the actor may be penalized the extra amount. Since punitive damages have a public penal function as well as a private one, this may be defended. The social loss under the broad conception may be less than the victim's loss under the narrow conception. Society may even reap a gain when the victim loses. For example, essential natural resources may be brought into the stream of commerce by means of the actor's malicious fraud of the victim, such gains offsetting the disruptions caused by sanctioning the fraud.<sup>291</sup> In this case, adoption of the broad conception alone would free the actor of liability for reciprocal damages. The private aspects of punitive damages point the other way.

3. *Net reciprocal damages.* When the reconstructed, actual damages coincide with the narrow conception of reciprocity, this goal of punishment is satisfied without bothering with extraordinary damages. When actual damages fall short of the narrow conception of reciprocity, the actor must be prepared to hand over the additional amount.

The measure of reciprocal damages under the broad conception may be less or more than the measure under the narrow conception. When it is less, I favor the award of the larger amount under the narrow conception. Although the actor is liable for more than the measure of harm to society, the private aspect of punitive damages should not be neglected.

When the measure of reciprocal damages under the broad conception is more than under the narrow conception, something can be said for adopting the higher measure in this event, too. Punishment, even as achieved under the private remedy of punitive damages, has a public function that is not fulfilled unless the broad conception is invoked. If the victim's recovery does not offset the social loss, the actor's punishment seems inadequate. On the other hand, punitive damages still are a private remedy that under current doctrine places the proceeds in private hands. The victim is fully compensated for all losses by actual damages or even granted a bonus under the narrow conception of reciprocal damages. As long as the victim continues to pocket the entire punitive award, and this should

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Conceivably, under the broad conception of reciprocity as well as the narrow one, the victim is returned at least to his *ex ante* position. The uncompensated losses are covered either as actual damages or under one of the two conceptions of reciprocity.

<sup>290</sup> Since there are both private and public aspects to punitive damages, one might adopt the rule that, say, whether reciprocal damages are awarded is to turn on the narrow conception as costed at  $t_a$ , but how much is to be assessed is based on the broad conception as measured at  $t_j$ . Eight permutations are possible.

<sup>291</sup> A strict deontologist or rule utilitarian may reject this hypothetical as incorrect. They may argue that the use of the victim as a means only to these social benefits disqualifies the benefits from being credited in the calculus.

not long continue, arguably the dominance of the narrow conception over the broad one should generally be maintained. One instance remains in which the court might opt for the broad conception of reciprocity, partially at least, when it is higher than the narrow one. This is the case mentioned above where the actual, deterrent or narrow reciprocal damages are insufficient to induce the rational victim to assume the role as a private attorney general.<sup>292</sup>

In conclusion, if the doctrines change whereby the victim is not always allowed to keep the entire punitive award and the actor is granted some criminal safeguards, the question of whether the actor is liable for reciprocal damages should turn on the costing at  $t_a$  of the higher of either the victim's loss or the social loss, and the measure of the damages should be based on the greater of the two losses at  $t_j$ . But all this is tentative. Just desert must be considered explicitly.

### C. Desert Damages

Briefly summarizing, reconstructed actual damages fully compensate the victim for all harms. When the judgment is granted there will be no reason to feel sympathy for the victim. He will be fully paid for his trouble (plus, perhaps, a bonus in the form of deterrent and, tentatively, reciprocal damages). Deterrent damages will fully offset at least all the monetary gain expected or actually obtained by the actor. He had reason to believe that he would not make a nickel from his illicit endeavor, and this transpired. The idea of desert has not yet entered.

However perplexing these questions of deterrence and reciprocity may be, once desert is added to the hopper, irresolute intuitions, counterintuitions and regressions must be confronted. I cannot neatly resolve them. Still, they must be confronted, as much as possible. Deterrent and reciprocal damages (beyond that provided by actual damages) clearly should not be imposed fully each time the victim's rights are invaded. Efficiency aside, to hang a sword of Damocles over every action isn't fair. No matter how clearly expressed are the standards for punitive damages, there remain cases at the margin where reasonable people may differ on whether there is liability.<sup>293</sup> Even away from the margin, there is wickedness and *there is wickedness*. Venial sins need not be expiated by extreme penalties. Desert

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<sup>292</sup> Economists disagree whether the private enforcement of the law will lead to optimal enforcement. See Kuklin, *supra* note 267, at 875 n.95. For arguments against overdeterrence, supported by empirical evidence, see Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 220-27 (1983).

<sup>293</sup> In these circumstances, the deterrent damages may be commensurately increased to discourage the actor from performing the marginally proscribed act. This, however, deters persons from marginally acceptable behavior as well. See *supra* note 67.

must play a role. Once it enters stage right, all hope of simplicity, if any remains, exits stage left.<sup>294</sup>

Now that the sword is out, one might use it, rather than a more delicate instrument, to cut through the purposes of punishment in order to find a place for desert. The arrangement of the pieces will leave rough edges. Deterrence and reciprocity make them unavoidable in any event.

Recall the roles ascribed to just desert. Similar to the possible use of reciprocity, some commentators employ desert in one or both of two ways. First, as a threshold test. Unless there is a certain quantity (quality?) of wickedness, the actor does not deserve to be punished at all. Second, as a scalar measure. The quantity of punishment must be proportional to the actor's desert. Facile intuitions mislead at this point. They may suggest: the more wicked the act, the higher the deserved punishment. Upon deeper reflection the inverse view expressed before will materialize: the less wicked the act, the lower the damages.<sup>295</sup> A reexamination of the polar examples averts the simple tautology.

Towards one pole where, say, for purely pecuniary reasons a manufacturer sells a hazardous product, the social loss may be substantial though the action may fall low on the scale of culpability. Suppose also for this hypothetical that at  $t_a$  the likelihood of punitive damages is small and the profitability of the product, from leaving the hazard uncorrected, is large. Under these circumstances equation (1) shows that, when the multiplier for the improbability of the punitive award is applied, the deterrent damages are great indeed. Depending upon the conception of reciprocity and the eventuality of the external and internal costs, equation (3) may lead to an even greater award for reciprocal damages. Although punitive damages may be warranted, to award them on the basis of pure reciprocity appears unfair. The measure of deterrence may alone sorely test the notions of fairness. The actor doesn't deserve that enormous sanction. This is especially true in the example where the corporate actor, through its various agents, did not deliberate on the act in a fully rational manner; it was not in a position to appreciate the calculus of deterrence or reciprocity. One may object to the corporation making a profit from such an action, but deontological moral principle hardly screams for vindication. The wickedness of the "mental state", being insubstantial, ought to be a discounting factor on the reciprocal measure, and arguably on the deterrent award also.

Towards the other pole where the act is motivated entirely by ill will, the actor being consumed with the passion "to get" the victim, the deter-

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<sup>294</sup> As an example of an attempt to accommodate the various aims, Walker spoke of "compromising retributivism": "[t]hat the penal system should be designed to exact atonement for offences in so far as this would not impose excessive unofficial retaliation, or inhumane suffering on the offender, and in so far as it would not increase the incidence of offenses." N. WALKER, *supra* note 33, at 6.

<sup>295</sup> See *supra* notes 192 & 206; *infra* note 297.

rent damages again are enormous.<sup>296</sup> This is the case even in the attempt-like situation where the act misfires and occasions no actual damages.<sup>297</sup> Although the evil is great, approaching the top of the scale, still society is too civilized to impose the full measure of deterrent damages. Even in this extreme case, fitness is a limiting factor on deterrent damages. The same can be said with respect to the relationship between retributive reciprocity and desert. When the victim's nonmonetary costs are nearly infinite (for example, an agonizing death by a malicious act), irrespective of the degree of wickedness one is reluctant to impose reciprocal damages in full measure. The greater the malice, the less these enormous reciprocal damages are diminished, but diminished they are nonetheless.

Is there ever the case where wickedness sanctions the increase, rather than the decrease, of reciprocal or deterrent damages? Arguably not, whether the narrow or the broad conception of retribution is adopted, if the distinction between the two conceptions is maintained. In sum, the role of retributive desert is to diminish the calculus of punitive damages as determined by reciprocity and deterrence.

1. *Narrow conception of desert.* The function of the narrow conception of retribution, concerned only with the victim's costs,  $c_v$  or  $c_v'$ , is largely that of private punishment. The actor's cognizable felt costs after judgment ( $t_j+$ ) must relate to the victim's felt costs (at  $t_a$  or  $t_j-$ ). Self-regarding, third-party effects about which the actor and the victim are indifferent will not enter directly into the calculus of reciprocity. Nor will they enter into the calculus of deterrence, since the actor's cost-benefit analysis does not include costs not felt by him. That some cognizable, negative impacts on third parties are disregarded in the measure of deterrence and narrow

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<sup>296</sup> Unless one is talking about the totally mad actor who has little touch with reality, deterrence works somewhat at least. The sword of Damocles may be placed in the hands of a bloody executioner who is screaming in the ear of the actor: "If you perform that proscribed act, I will immediately torture you to a miserable death." From conceptions of hell are added other embroideries that here cannot be discounted by doubts and distance. These will get the attention of the most malicious, competent actor. See Creighton, 14 Can. Crim. Case. 349 (1909) ("If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes, and perhaps that will help.") (quoted in J. SMITH & B. HOGAN, CRIMINAL LAW 139 n.5 (3d ed. 1973)); Henshel & Silverman, *Introduction*, in PERCEPTION IN CRIMINOLOGY 1, 6 (R. Henshel & R. Silverman eds. 1975). The problem is, among others, that the tender-minded person may have qualms about imposing this nearly infinite deterrent sanction.

<sup>297</sup> Reciprocal damages under the narrow conception of social loss as measured exclusively by the victim's net social costs here may be slight, even when accounting for the harm from the threat.

The retributive approach is now often represented by the formula  $H \times R = P$  (where  $H$  represents the harm the criminal did;  $R$ , the degree of his responsibility; and  $P$ , the deserved punishment). Given that representation, the problem attempts poses for retributivism is obvious. If  $H$  is zero (that is, if attempts do no harm), then deserved punishment must be zero too.

Davis, *supra* note 86, at 6. Davis apparently wrote off the threat as itself being a harm. See *supra* note 226.

reciprocity may be troubling. This is because one's intuitions easily stray from the idea that narrow retribution is aimed at private punishment. If society believes that these purely third-party effects should be internalized in the judgment against the actor, then the broad conception of retribution must be adopted. Under the broad conception of societal loss, despite the actor's and victim's indifference to the third-party effects, they are accounted for by retributive damages, accordingly covering all the cognizable consequences of the act.

The notion of desert results in a diminishment of the measure of punishment as determined by reciprocity. Under the fuzzy test already advanced,<sup>298</sup> desert decreases narrow reciprocity by an amount which reflects the degree of the actor's knowledge at  $t_a$  with respect to the victim's rights invasion and harm. On a posited scale of 0 to 1, once a threshold of, say, 0.5 is passed, the reciprocal measure of damages is to be granted but reduced as the actor's mental state at  $t_a$  falls short of 1 on the scale.

2. *Broad conception of desert.* Whereas the private aspects of punitive damages point to the narrow conception of reciprocal damages, as with the broad conception of reciprocity, social losses may remain unmet after judgment under this standard. The cognizable, other-regarding effects of the act felt by third parties are excluded from the narrow conceptions of retribution, thus, after judgment in those cases in which the third-party effects are negative, a right-minded onlooker may feel that justice has not been served: the actor has not received, or paid, entirely what he deserved.

One might leave this residual social loss to the bailiwick of the criminal law. On the other hand, since the parties are in court already, there is no need to bother with a second, criminal trial.<sup>299</sup> For that matter, many other trials may also be dispensed with when the proscribed act was part of a standard practice that subjects the actor to liability to other victims. One recovery for all the punitive damages will save the actor the extra litigation costs of defending subsequent actions for punitive damages, and save society the additional administrative costs.<sup>300</sup>

For the narrow conception of desert, 0.5 on a scale of 0 to 1 was posited as the threshold of knowledge sufficient for the extraordinary damages. When the broad and narrow conceptions are both relevant, the thresholds may diverge. For example, assume the actor is correctly confident, say, 0.9 on the scale, that his act will cause a rights invasion and harm to the victim. The threshold for narrow desert damages is surpassed. However, the actor reasonably believes that there will be a net social gain since,

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<sup>298</sup> See *supra* text accompanying note 191.

<sup>299</sup> I agree with others that the penal aspects of the trial warrant the adoption of some criminal safeguards for the actor. See *infra* note 320.

<sup>300</sup> Under the narrow conception of desert, the one-time punitive award for the entire practice might also be required. The narrow conception in principle, however, apparently isolates the victim's cost and the actor's, not third party costs that have no impact on the actor's decision at  $t_a$ . To add the costs to other victims from similar acts seems peculiar. It is a close question.

although he plans to maliciously deceive the victim, the result will be to bring scarce, needed resources into the market. The actor is incorrect, in fact, because the scarce resources aren't there. Consequently, a substantial social loss occurs without offsetting gain. In this case, where the knowledge under narrow desert is 0.9, the knowledge of the broader social loss may be only, say, 0.4. The threshold is met under the narrow conception, but not under the broad conception. On the other hand, perhaps 0.4 meets the threshold under the broad conception. There is little reason to assume the threshold must be the same under both conceptions. If they are not identical, how they differ is unclear.

3. *Net desert damages.* As advanced in the discussion of reciprocal damages, when the broad conception of desert is costed at a higher amount than the narrow conception, the broad one controls. All of the cognizable impacts of the act are monetized. Now desert enters the calculus. Insofar as the actor does not deserve the assessment of the punitive award as measured by broad reciprocity, it is decreased. The scale of that diminishment is . . . . Ah, that damn problem keeps popping up.<sup>301</sup>

Though a single trial may lump together the private and public aspects of punitive damages, that the actor should pocket the punitive award beyond that measured by the narrow conception of desert doesn't necessarily follow. Let him keep some extra, as discussed above, when an inducement is necessary for service as a private attorney general.<sup>302</sup> Beyond that, the victim has no claim, either in the names of justice or efficiency, to the deterrent damages or to the desert damages under the broad conception. In some cases, as where there are other victims of the actor's standard practice, a better claim to the excess will be heard from third parties. In other cases, where there are not other identifiable victims with significant harms, no private party can make a proper claim. The impact on each third party may be de minimis even when the overall social loss is substantial. The judge, under his or her discretionary powers, should segregate the part of the punitive award which reflects this public aspect and turn it over to a fund for other victims or for public interest projects which relate to

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<sup>301</sup> "The grading of wrongdoing is patently an evaluative and irreducibly political issue." G. FLETCHER, *supra* note 33, at 461.

<sup>302</sup> The extra inducement was supposed above to be necessary, for example, when the internal and external effects on the actor or victim were sufficient to satisfy the purposes of deterrence and reciprocity without the addition of a significant punitive award. *See supra* note 217. If the public function of punishment is carried out in the same trial, another reason follows for an extra inducement for the victim to serve as a private attorney general when he doesn't pocket the public part of the penalty. He is personally unconcerned about going to the expense of proving negative effects on third parties on other victims of the actor's proscribed, standard practice, if none of this monetization goes to him. He must be paid for his trouble. On second thought, a trial practitioner would be delighted to get before the jury evidence of these negative impacts on third parties even if the monetization goes elsewhere. The jury will not compartmentalize well the impacts of the actor's overall wickedness. Additional monetary incentives to the private attorney general may be unnecessary.

the subject matter of the case.<sup>303</sup>

Desert, that is, the aspect of it which addresses the degree of the actor's knowledge at  $t_a$ , must also play a role in deterrent damages. Equation (1) shows that the less the actor knows a punitive award will be granted, the higher must be the award in order to deter him. When knowledge approaches zero, the actor has slight reason to worry about punitive damages, and therefore the multiplier for the improbability of the award approaches infinity. Infinite punitive damages are obviously repugnant to notions of fairness and justice.

More specifically, the less the actor knows or has reason to know, the less the act is culpably oppressive. Therefore, he deserves the less punishment regardless of conclusions drawn from deterrence alone. This raises additional complications. For one, although deterrence itself does not require a minimum threshold of knowledge before punitive damages are recoverable, the overlay of desert demands one. The threshold of knowledge for deterrent damages, surmised above to be 0.5 for retributive damages, need not be the same as for retributive damages. The prior examples of corporate actors support this. When a decentralized, haphazard decision causes rights invasions or harms, arguably the corporate profits from the proscribed act should be disgorged in the name of deterrence, even when the degree of the corporate actor's "knowledge" is low. Such a decision-making process by the corporation, which may have had in "mind" the advantages of the three Buddhist monkeys' proclaimed innocence, should be discouraged.<sup>304</sup> On the prior scale of knowledge, 0.3, say, may be sufficient to trigger deterrent damages. As the degree of knowledge increases beyond this, the full measure of deterrence as calculated by equation (1) is reduced less.

Another complication from combining deterrence and desert is more serious. The suggestion above is that once the threshold of knowledge which triggers deterrent damages is surpassed, as his mental state at  $t_a$  falls short of 1 on the posited scale, the multiplier in equation (1) for the improbability of the award of punitive damages ( $P_c$ ,  $P_t$ ) is reduced. In other words, at the minimum threshold the actor must pay perhaps only his actual gains as deterrent damages. As his knowledge increases, the multiplier for the improbability is decreased less for desert reasons. When his knowledge reaches 1 on the scale, that is, he is correctly certain of the rights invasion and harm, the multiplier is not decreased at all. Equation (1) is

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<sup>303</sup> For example, if the punitive award of \$125,000,000 stood against Ford in the Pinto gas tank case, *see supra* note 68, the judge may turn over the lion's share to a fund for the other victims and, perhaps, Ralph Nader's automobile industry watchdogs. The public coffers might also be considered, though when the third party effects are national in extent, whether one state or local treasury has a proper claim is questionable.

<sup>304</sup> That the corporation may have generally deliberated on the legal advantages of ignorance would be a societal loss, not an increase in the degree of knowledge of the rights invasions and harms from a particular act.

applied in full force at this level of knowledge.

This superimposition of desert over the measure of deterrent damages leads to an inconsistency. At the maximum degree of knowledge, 1 on the scale, the multiplier in equation (1) for the improbability of the punitive award ( $P_c$ ,  $P_t$ ) is low, approaching 1. As the actor becomes more certain that there will be a rights invasion and harm, he can also be more certain that the victim or third party will bring an action and recover punitive damages. When the actor is correctly certain that punitive damages will be recovered, deterrent damages need only require the rational actor to disgorge his actual gains, plus incrementally more to dissuade him from performing the proscribed act. In other words, the multiplier for the improbability of punitive damages is 1. While in this context the certainty that punitive damages will be recovered is not identical to the certainty that there will be a rights invasion and harm, they track one another. Hence, the demands of rational deterrence and the demands of desert work against one another irreconcilably.

The simple solution is to reject one of these functions in favor of the other. I find this unacceptable. From the hypotheticals discussed, it appears to me that one should not completely trump the other. Both deterrence and desert have important functions. They must be crammed together, warring partners, by means of nebulous instructions to the factfinder to keep both aims in mind, but not too clearly, when calculating the punitive award.<sup>305</sup>

In summary, reciprocity is rejected altogether in favor of deterrent and desert damages. The victim will be awarded at a minimum ordinary damages plus desert damages under the narrow conception. Punitive damages under the broad conception of desert and deterrent damages, with desert superimposed, are also independently calculated. When under broad desert or overlaid deterrence, whichever is higher, the actor deserves to pay more than required by narrow desert, the excess beyond the inducement needed to interest a private attorney general is funneled to other victims or to a fund distributed in the public interest.

## V. CONCLUSION

After this extensive effort to clarify the idea of punishment, perhaps only one thing has become clear: punishment is an irredeemably murky notion. While this study is far from exhaustive, it demonstrates that the more closely one examines punishment, the more complex and inconsistent it appears.

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<sup>305</sup>For an attempt to accomplish this, see the Appendix.



The weak foundations for such a salient social instrument are disconcerting.<sup>306</sup>

One neat, quick response to the unsatisfactory foundations is to abolish altogether the remedy of punitive damages. The purposes of punitive damages may instead be implemented by means of fines and criminal sentences. At least this will provide the actor with additional safeguards. On the other hand, perhaps not enough is to be gained by this. The main problem is with punishment itself, not just punitive damages.

Fines and sentences work crudely. Fines are often authorized at a fixed level,<sup>307</sup> or at a multiple of actual damages.<sup>308</sup> These ignore the accurate calculations of costs and benefits which the purpose of deterrence and retribution imply. Other fines are authorized within a broad range for the court to fix.<sup>309</sup> These raise all the same problems of refined reckoning as confronted by punitive damages.<sup>310</sup> Similar criticisms have been leveled against criminal sentences. The criticisms claim the sentences are either too rigid to satisfy their purposes with any sophistication or they are

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<sup>306</sup> Perhaps more clarity in the topic was hoped for than it can bear.

For centuries, philosophers have debated principles of punishment generated from two dominant considerations, either the backward-looking concerns of retributive justice or the forward-looking concerns of general welfare. Meanwhile, officials charged with the day-to-day development and administration of criminal justice have had to rely on actual schemes to mete out sentences to convicted offenders, typically based on some unarticulated and eclectic combination of retributive and utilitarian considerations.

Bedau, *Classification-Based Sentencing: Some Conceptual and Ethical Problems*, in *CRIMINAL JUSTICE* 89, 89 (J. Pennock & J. Chapman eds. 1985).

<sup>307</sup> See, e.g., I.R.C. § 7201 (West Supp. 1988) and 15 U.S.C. § 70i (1973). Consequently, inflation may make the fixed fines insignificant and, therefore, treated as "mere taxes" not taken seriously. See H.L.A. HART, *supra* note 1, at 163 n.1. See also E. VAN DEN HAAG, *supra* note 208, at 230.

<sup>308</sup> See R. POSNER, *supra* note 15, at 166-67.

<sup>309</sup> Stigler made much of the erratic nature of public penalties for the violation of economic statutes. He provided a table of examples. Stigler, *The Optimum Enforcement of Laws*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 55, 64-65 (G. Becker & W. Landes eds. 1974). Nevertheless, "[v]ariation in enforcement provides desirable flexibility in public policy." *Id.* at 67.

<sup>310</sup> See N. WALKER, *supra* note 33, at 82-83; Wheeler, *supra* note 30, at 298-300; Becker, *supra* note 46, at 28; D. PYLE, *supra* note 41, ch. 5. See generally Samuels, *The Fine: The Principles*, 1970 *CRIM. L. REV.* 201, 268 (pts. 1 & 2). Corporate defendants can bring special pressures against public enforcers. See Coffee, *No Soul to Damn; No Body to Kick: An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 *MICH. L. REV.* 386, 405-12, 434-48 (1981). The overall transaction costs may be less with punitive damages than with fines. One trial, covering both compensation to victim and punishment of actor, rather than a second criminal trial, is all that is needed. See Spitzer, *The History of Punitive Damages*, 56 *S. CAL. L. REV.* 155, 195 (1982). Yet in setting fines, "[t]he legislature has an institutional capacity to take into account factors that the judicial process, in the course of a civil suit, does not have." *Id.* at 196. And vice versa.

too broad or open-ended, especially indeterminate sentencing, to avoid the human limitations in discerning subjective facts and dispassionately implementing ambiguous punitive goals.<sup>311</sup>

Discretionary criminal sanctions, both fines and imprisonment, are indicted for allowing the judicial administrators discretion that may be abused.<sup>312</sup> The abuse can become institutionalized, since within each system, the persons who determine the punishment will rely upon the known custom and precedent. Leaving the sanction to the bailiwick of the jury avoids these institutional habits. The jury has little memory of past fines or sentences and no concern for establishing precedent. As an "arresponsible agency", it may be in the best position to reflect the mores

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<sup>311</sup> Recent attacks on judicial discretion in sentencing have been quite vehement. See, e.g., M. FRANKEL, *CRIMINAL SENTENCES* (1972); W. GAYLIN, *PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING* (1974); Hogarth, *Magistrates' World Views and Sentencing*, in *PERCEPTION IN CRIMINOLOGY* 319 (R. Henshel & R. Silverman eds. 1975). Judges have been accused of being too inconsistent, too harsh to defendants, and, to the contrary, too generous. In this last regard, one problem is that judges, seeing the distress of the defendants before them, but less that of the victims, past and future, may miscalculate the fit proportion of crime to punishment. See Wertheimer, *Criminal Justice and Public Policy: Statistical Lives and Prisoners' Dilemmas*, 33 *RUTGERS L. REV.* 730, 738-41 (1981); Posner, *supra* note 41, at 1213. Another may be the consequences of recognizing that special deterrence has already been thwarted as evidenced by the defendant's presence before the court. See *supra* note 35. For a succinct review, see H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 469-71 n.14 (1966). For a review with some suggestions, see N. WALKER, *supra* note 33, at 148-64.

<sup>312</sup> Allen worried about the view whereby:

a whole platoon of societal interests and values stands waiting to influence decisions concerning where, within those [established, acceptable] limits, penalties will be set in individual cases. . . . The reflection and reconciliation of such social purposes in individual sentencing decision . . . requires the exercise of judgment of officials possessed of some range of discretionary choice. It is at this point that serious controversy arises, for few contemporary attitudes are more evident than the suspicions and revulsions stimulated by the notion of official discretion.

F. ALLEN, *supra* note 33, at 72. My contention, on the contrary, is that to eliminate discretion aimed at the individual case is to impose an unjust and revolting system by ignoring the differences among individuals. Discretion is required not only in imposing penalties, but also in determining liability:

[I]n the final analysis the criminal law cannot generate definitive criteria about who is liable and who is not. The problem of imprecise standards is mitigated by the sound discretion of prosecuting officers. Thus the more difficult problems of assessing liability may be ignored, for in the end we have to trust in the personnel that administer the system. No one could doubt that in any body of criminal law there would be some play in the human joints of the system. Yet the whole problem is how much play we should allow.

G. FLETCHER, *supra* note 33, at 719. For punitive damages the only relevant personnel administering the system are the judges.

to the public in evaluating the defendant's act.<sup>313</sup> If the aresponsible becomes irresponsible, the court is available to second-guess the judgment, giving due deference to the jury's role. Systematic abuse of discretion

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<sup>313</sup> Calabresi and Bobbitt characterize the jury as an "aresponsible agency": The aresponsible agency generally has three features: It is representative, decentralized, and it gives no reasons for its decisions. Its representative quality is supposed to give effect to what society views as relevant differences among individuals. Because the agency is decentralized, it is able to make individuated decisions. And giving no reasons, it avoids, or at least mitigates, the conflict between the wish to recognize differences and the desire to affirm egalitarianism in all its forms . . . . The jury's representativeness and lack of responsibility have at times been identified as the reason why certain decisions are committed to it. It is the combining of these elements which is the source of the characteristic and powerful way in which the jury operates: Juries apply society standards without ever telling us what these standards are, or even that they exist . . . . Something of the same purpose was served by the untrammelled discretion which allowed juries to impose the death penalty within certain defined classes of cases.

G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* 57-58 (1978) (footnotes omitted).

Max Weber labels the jury an "irrational" agency, although he seems to mean by this an idea similar to that of Calabresi and Bobbitt by their label "aresponsible". Yet the pejorative connotation is far from absent. See M. WEBER, *ON LAW IN ECONOMY AND SOCIETY* 63, 79-80 (M. Rheinstein ed. 1954); C. MORRIS, *THE JUSTIFICATION OF THE LAW* 144 (1971). Weber is hard to pin down; his use of the word "rational" and its cognates "is irredeemably opaque and shifting." Lukes, *Some Problems about Rationality*, in *RATIONALITY* 194, 207 n.1 (B.R. Wilson ed. 1970).

"Primitive" law, like early English courts of equity, by the flexible application of loose legal concepts without concern for precedent, facilitates the resolution of each case on its own merits. R. GOODIN, *supra* note 63, at 68-70. "Attempts at reintroducing loose, principled law proved abortive for a variety of reasons," *id.* at 70, which include high case loads and threats to the interests of those in power in the legal and political system, *id.* at 70-71.

In the eighteenth century the American jury played an even greater role with respect to ordinary contract damages than is here suggested for extraordinary damages. Not only did the court defer to the jury's findings of actual damages, but also this followed the court's refusal to instruct the jury in strict damage rules. This was in the belief that it was the jury's sense of "morality, equity, and good conscience" that ought to prevail. See Horwitz, *The Historical Foundations of Modern Contract Law*, 87 *HARV. L. REV.* 917, 925-26 (1974).

White hasn't given up on this jury role:

The jury should be retained, for the properly instructed community of lay men and women is in fact peculiarly competent at the practice of blaming that lies at the center of the criminal process. It is more competent at this practice than any one person could be, for collective judgment reduces idiosyncrasy; and it is more expert than any professional, for whom each case necessarily tends to be just one of many, the material upon which his or her profession or the bureaucratic institution of the criminal law acts.

J. B. WHITE, *supra* note 236, at 211.

is curtailed.<sup>314</sup>

Were the chore of fixing the level of fines handed over to the jury, the criminal sanction would look like punitive damages.<sup>315</sup> Even if the court assumes the task of assessing the extraordinary award, some other points can be mustered in support of retaining punitive damages over only criminal sanctions. First, since much of the award goes to the victim rather than the state, punitive damages create incentives for private attorneys general, thereby effectively expanding the resources allocated to the elimination of proscribed behavior.<sup>316</sup> Second, the jury and, seemingly,

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<sup>314</sup> Even if systematic abuse is curtailed, nonsystematic abuse may remain. The death penalty, which is generally imposed by juries, has drawn much fire on these grounds. See, e.g., C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974); Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U.L.Q. 573 (1985). Following the quote from Calabresi and Bobbitt in the note above, they continued: "Indeed, the Supreme Court's curtailment of this discretion [in death penalty cases] may be illuminated by our subsequent discussion of the defects of aresponsible agencies." G. CALABRESI & P. BOBBITT, *supra* note 313, at 58 (footnote omitted). Among the problems they discussed which are applicable here are those relating to privacy costs, egalitarianism, and predictability (arbitrariness). See *id.* at 58-64. But the problems may not be as severe as they are when the jury must make true tragic choices affecting applicants for scarce resources since here the jury is to determine retributive, absolute worthiness rather than allocative, relative worthiness. See *id.* at 62-63.

There is some indication that judges have special doubts, unlike for other matters, that juries handle well the imposition of punitive damages. See Schwartz, *supra* note 48, at 146. Moreover, some people believe that "[j]udges have more familiarity than do juries with distinguishing 'wrong' from 'very wrong' behavior (and fixing the appropriate level of punishment therefor) upon a formal social scale, and judges should have in general less rigid preconceptions that may bias the result." Owen, *supra* note 34, at 120. Rather than abolishing them, this would argue for allowing judges to set the punitive award despite institutional bad habits. There is, however, some evidence that the views of laypersons and judicial officers regarding the seriousness of offenses and relative punishments generally correlate. See Stevens, *A Metric for the Social Consensus*, 151 SCIENCE 530, 536-38 (1966). In general, "[t]here seems to be a surprising degree of agreement among [the general population] concerning the ranking of crimes according to 'seriousness'." Davis, *supra* note 75, at 263 (with citations). But when these rankings are compared to statutory schemes of punishment, there are some "striking disparities." *Id.* at 262-65.

<sup>315</sup> Punitive damages are "private fines." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). In most jurisdictions the criminal penalty is not the decision of the jury except for capital punishment cases. H. KALVEN & H. ZEISEL, *supra* note 311, at 301 n.1 (with citations).

<sup>316</sup> One would think that the legislatures would allocate to the enforcement of criminal fines at least as much as the net gain from the fines that would be returned to the public coffers. (After an exhaustive search, I have turned up no facts relating to this point.) Even if they did, it seems that a private party may more cheaply, and thus more often, bring an appropriate action because his information cost is lower than that of the public prosecutor. *But see* Coffee, *supra* note 292, at 220-26 (securities, trade and antitrust cases). This savings may be offset by the public prosecutor's economies of scale. Owing to the allocation of woefully insufficient public resources, white collar crime, an obvious target for punitive damages, is not punished in proportion to its gravity or volume. See Lindgren, *supra* note 208, at 95-96.

judges, are less subject to the political predispositions, pressures and special pleading that is endemic to the political processes, particularly the legislatures,<sup>317</sup> and also to a lesser extent, the public prosecutors.<sup>318</sup> Third, the flexibility of punitive damages facilitates the implementation of established mores without the updating delays common to legislative enactments.<sup>319</sup>

When the jury makes punitive judgments in the name of private damages rather than public fines, some criminal safeguards are lost to the defendant. These enforcement shortcomings of punitive damages can be reduced. The factfinder can be offered more guidance, evidentiary matters can be modified, and alternative procedures can be adopted.<sup>320</sup>

<sup>317</sup> See R. DWORKIN, *Political Judges and the Rule of Law*, in A MATTER OF PRINCIPLE 9, 24-25 (1985).

<sup>318</sup> See Coffee, *supra* note 292, at 227. The virtues of prosecutorial discretion may be lost by putting the enforcement into the hands of private parties. See *supra* note 312. Yet if this discretion is exercised because the act is perceived as not wicked even though a technical violation, the standard of culpably oppressive, social loss, but not deterrence, would obviate the inappropriate private remedy, if not all of its nuisance value to a litigious plaintiff.

<sup>319</sup> See *supra* note 307. In discussing the retributivist's difficult assessment of fit punishment, Walker writes:

Some seem to appeal to a kind of intuition . . . [while others] seem to appeal to a consensus of opinion: if they are judges they consult their colleagues; so do criminals. Legislators consult a wider variety of people and organizations, short of actually holding plebiscites. In any case, one logical consequence of the appeal to consensus is that a sentence which was retributively right in 1969 could become excessive or inadequate as opinions change — a position which retributivists as well as others would find uncomfortable.

N. WALKER, *supra* note 33, at 10.

My personal concern is with the large corporate actor that is in a position to exercise powerful political pressures on the legislative process and that would treat the "typical", *i.e.*, relatively trivial, criminal fine as a mere incidental cost of business as usual. In my view, against a billion dollar corporation, punitive damage awards in the millions, even tens of millions, impose a reasonable spillover cost to society when the consequence is, for example, that I can rest more assured that I will not unknowingly purchase a car with a gas tank which explodes easily. As between me and this corporation, who deserves to suffer the loss in question? Even if the defect is efficient, am I merely a means to society's end of maximized social wealth? By these questions, my Kantian orientation ought to be clear.

<sup>320</sup> The critics of capital punishment remain skeptical about the efficacy of these nostrums. See, *e.g.*, W.S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES* 51-74 (1987); Bentele, *supra* note 314, at 576-85. Additional safeguards for corporate defendants may not be called for:

Since, however, corporate criminal punishment is purely monetary, it is not clear why the corporation should be entitled to the elaborate procedural safeguards of the criminal processes. Those safeguards make economic sense only on the assumption that criminal punishments impose heavy social costs rather than merely transfer money from the criminal to the state.

Posner, *supra* note 41, at 1229. That Posner believed there are no heavy social "costs for corporations," see *supra* note 59.

The unfettered discretion of the factfinding jury in determining punitive damages is one of the greatest causes of complaint.<sup>321</sup> One remedy is for the courts to settle upon a single purpose for each case of punitive damages and clearly instruct the jury as to that purpose. That single purpose may not even be one of those elaborated; instead we may wish to jettison deterrence and retribution and adopt, say, the symbolic purpose of imparting society's disapproval.<sup>322</sup> Sticking to the purposes analyzed here, a more sophisticated and complicated approach is suggested above to deal with the primary polar motivations. The algebraic models used in this article are inappropriate (even law professors are put off by such formulas), but verbal versions can suffice. A preliminary attempt at this appears in the Appendix. An additional advantage of more lucid instructions is that potential defendants are given more adequate notice.<sup>323</sup>

The analysis has shown that there are facts about each case that are relevant in principle to accurate costing, but kept from the factfinder owing to evidentiary doctrines. Some may be highly inflammatory to the jury, such as prior criminal punishment of the actor, especially as portrayed during the adversarial process. Others are too subjective to be solidly demonstrated, such as purely internal, psychological costs.<sup>324</sup> Perhaps a few more of these relevant facts can be safely admitted than is the current practice. A fuller awareness by the court of their significance may encourage more generous admission.

Other theoretically important facts, while not inherently inflammatory, are typically still not brought to the courtroom. For example, for the business actor the economics of the proscribed act control the decision. The jury is unlikely to be familiar with financial calculations that include valuations of goodwill and costs discounted by probabilities. Expert testimony would help.

The standards of proof may be revised to reflect the special nature of punitive damages. Although a private remedy, it has a public function with overtones of a criminal sanction. To protect the defendant from unfair stigma, the burden of proof on the issue of whether the defendant deserves to be assessed punitive damages may be elevated to the standard of "clear

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<sup>321</sup> See *supra* note 26.

<sup>322</sup> See *supra* note 37. I am not convinced this will get us beyond the problems discussed. In punishing for the sake of symbolism, are all sanctions to be the same irrespective of the details of the act, say \$1000? That strikes me as not very symbolic. If we want to differentiate among acts by varying the penalties, aren't we right back into the kinds of problems raised by deterrence and retribution?

<sup>323</sup> See *supra* note 39 (third criticism).

<sup>324</sup> Mentioned only in passing were a host of relevant considerations relating to the characteristics of the parties and society, such as their wealth and risk disposition. See *supra* text accompanying note 148.

and convincing evidence".<sup>325</sup> This can be done while retaining a preponderance of the evidence standard for the measure of damages once liability is found.<sup>326</sup> A specially cautious court may adopt other criminal safeguards as well.<sup>327</sup>

Court procedures may be reformed to mitigate admissibility fears. A two step process may be adopted to allow in possibly inflammatory evidence relevant to punitive damages only after the jury has already decided the underlying liability.<sup>328</sup> Or, once the jury recommends them, the entire measure of the extraordinary damages may be turned over to the judge with his or her supposedly more disciplined emotions.<sup>329</sup>

Finally, more overt recognition of the public function of punitive damages may lead to reform. Complaints of unfairness over multiple liability can be stilled, for example, if, as in other penal contexts, the actor were subject to only one punitive award for each act or completed series of acts.<sup>330</sup> In principle, the rational actor is indifferent to this reform since the measure of the award may take into account either the possibility of

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<sup>325</sup> Some courts and legislatures adopted this standard. *See, e.g.,* *Acosta v. Honda Motor Co.*, 717 F.2d 828 (3d Cir. 1983); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437 (1980); MINN. STAT. ANN. § 549.20 (West 1947) (jury instructions for punitive damages); *see also* MODEL UNIFORM PRODUCT LIABILITY ACT § 120(A) (1983); Product Liability Act, H.R. 1936, 100th Cong., 1st Sess. (1987) (not enacted as of Nov. 15, 1989); *Wheeler, supra* note 30, at 272. The Colorado legislature has gone further by requiring the plaintiff to prove punitive damages "beyond a reasonable doubt." COLO. REV. STAT. § 13-25-127(2) (1974).

<sup>326</sup> By increasing the standard of proof for liability the public will perceive punitive damages as more nearly criminal in nature. The stigma enlarges. This additional cost of the remedy to the actor should be offset by a smaller judgment against him. On the contrary, "the fewer guilty persons convicted, the greater the punishment has to be to maintain an effective deterrent. Thus, as the burden of proof requirement is raised, the amount of punishment also needs to be raised to maintain an equal deterrence." Bayles, *Principles for Legal Procedure*, 5 LAW & PHIL. 33, 46 (1986).

<sup>327</sup> Some believe criminal safeguards are unnecessary, *see, e.g.,* *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App.2d 689, 60 Cal. Rptr. 398 (1967); Note, *Criminal Safeguards, supra* note 59, at 434-35; at least for corporations, *see* Posner, *supra* note 41, at 1229 (quoted in note 320, *supra*). The trend among commentators may be to the contrary. *See, e.g.,* *Wheeler, supra* note 30; Defense Research Institute, *supra* note 13, at 15-22; *see also* Mallor & Roberts, *supra* note 4.

<sup>328</sup> *Wheeler, supra* note 30, at 320-22.

<sup>329</sup> *See* MODEL UNIFORM PRODUCT LIABILITY ACT § 120(B) (1983). Many commentators have recommended this. *See* Mallor & Roberts, *supra* note 4, at 664-66, and *cites* therein.

<sup>330</sup> There is authority, primary and secondary, for this innovation. *See* Aussen, *supra* note 39, at 99-101 (with citations and various proposals).

multiple awards or, by increasing the amount, a single award.<sup>331</sup> In practice, however, the transaction and nuisance costs are minimized by the restriction. Insofar as the public interest is concerned, little is gained by empowering more than one person to serve as a private attorney general.<sup>332</sup>

After all is said and done about reducing the practical problems, the bottom line still is that human limitations leave punitive damages (and, not incidentally, criminal sanctions) as a crude instrument. How is a factfinder actually to compare the pain of the victim's shame before disapproving onlookers to the actor's loss of goodwill? What evidence is there of purely internal costs, and how reliable is it? These questions, and many others, suggest that improvements in legal doctrine will not eliminate a margin of incommensurability and indeterminacy. At bottom, the unavoidable debate remains over the ultimate issue of whether punitive damages do more good than bad, and whether they increase or decrease injustice.

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<sup>331</sup> For example, equation (1) for deterrence is based upon the costing of a single act. Even if it is modified to encompass the costing of a standard practice, the judgment of liability by another court for one of the other acts need not be considered by the later court when setting a deterrent award of punitive damages. To make this point clearer, consider the case in which the actor decides to perform one thousand acts which might subject him to punitive damages. Assume he rationally determines that for each act the probability of a punitive damage award against him is 0.00001. Statistically, despite the low odds of any punitive award, there still is a significant chance of more than one such award for the practice. This statistical conclusion is related to the point that in flipping a fair coin ten times, occasionally ten straight heads will fall (the probability being  $2^{-10}$ ). As long as the actor makes this calculation, from a deterrence perspective the court need not back away from a second or more punitive award. The same can be said for prior criminal penalties for the same act.

Equation (1) could incorporate, on the other hand, the principle that once the actor suffers a sanction for a particular act or for one act in a series, he is free from further similar liability. Simply by increasing the punitive damages,  $D_p$ , in equation (2), the reduced costs of being free from multiple liability can be offset. Analytical support for the single award for retributive damages is easy. In summary, there is nothing within this analysis which requires or restricts either single or multiple potential liability.

<sup>332</sup> When the plaintiff-victim, in seeking punitive damages, acts as a private attorney general, there is slight reason for allowing a second victim to "bounty hunt." The second one partially freeloads in that the first victim, by recovering the extraordinary damages, has already gone to the trouble of establishing the precedent for the particular act or series, and perhaps, turning up crucial evidence. The public subsidy of the subsequent causes of action, in the form of the judicial machinery, is superfluous since deterrence and retribution can be fully satisfied in a single suit which treats all the effects of the actor's act or series.

In favor of multiple liability is that actual damages to other victims may not be worth recovering because of the relatively high transaction costs of the dispute process. When actual damages are small, without punitive damages as an additional incentive, the other victims may not bring suit, thereby apparently leaving the actor ahead. But since the rational actor has fully considered this contingency, the deterrent damages offset the possible gain by increasing the first punitive award. The question remains of fairness to the victims discouraged from bringing suit. Perhaps punitive awards after the first one should be "limited to an amount equal to attorneys' fees and other litigation costs." Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 49 n.227 (1982).



## APPENDIX

To help begin the process of reconstructing punitive damages into a worthier instrument of social policy, I present this offering. It pulls together some of the prior suggestions to overcome stumbling blocks. The reconstruction is dressed as jury instructions.

“Ladies and gentlemen of the jury. The plaintiff is also seeking deterrent damages. It is his contention that the defendant’s action fell far short of social acceptability and therefore public disapproval should be expressed and similar acts should be discouraged by the imposition of extraordinary damages. This requires you to decide two questions: first, whether the act was sufficiently blameworthy to warrant extraordinary damages; and second, if so, the amount of the award necessary to deter other parties from similarly acting and to indicate publicly the degree of society’s disapproval of the unworthy behavior. These two questions are independent of one another and require separate attention.

“In deciding whether to grant these damages, the extraordinary nature of them must be kept in mind. They are not to be granted lightly. They are often known as punitive damages and the penal aspect of them requires you to be confident of your decision in order not to unfairly penalize and stigmatize the defendant. Therefore, there must be clear and convincing evidence that they are warranted under the guidelines I am about to give you.

“For these damages to be allowed, the defendant’s act must have been culpably oppressive and have caused a social loss. ‘Culpably oppressive’ basically means the defendant’s action was malicious. An act is malicious when it is done either deliberately with knowledge of, or with reckless indifference to, two things: one, the rights of the plaintiff; and, two, the possible harm to the plaintiff and society.

“Culpable oppression alone will not support these damages. In this world, we are all quite familiar with the callousness from others that we frequently encounter and, too often, our own callousness to others. Instead, there must be more for these extraordinary damages. There must be malice, spite, circumstances of aggravation or outrage, wilful or wanton conduct, or, more generally, an unacceptable disregard of basic social obligations.

“A substantial social loss must be found as well. ‘Social loss’ means that you, as fair-minded representatives of society, unbiased by private views of morality or the particular characteristics of the parties before the court, and remembering that the plaintiff’s monetary losses are largely recompensed by the award of actual damages, find clear and convincing evidence that the act is injurious to society as a whole by significantly frustrating the public goal of justly governing personal interactions. The common foibles of the human condition can hardly be addressed in the courtroom, but the inhumanity of culpably oppressive, social loss need not be condoned.

“If you find the threshold of culpably oppressive, social loss to be surpassed by clear and convincing evidence, then you must find by a

preponderance of the evidence the amount of damages that would admonish and deter a rational person from performing the proscribed act. Here you must make an economic decision based upon the assumption that a party normally will not perform an act if the costs to him are greater than the benefits. The purpose of deterrence is not to punish the person for his act beyond that required to make him realize that this type of action is not worthwhile.

“There are two centers of attention of rational deterrence. One is the amount of the costs and benefits anticipated by the actor when he performed the improper act, and the other is the probability or likelihood that these amounts will actually be realized. The deterrent damages must equal the net expected benefit of the act discounted by its probability.

“The expected benefit to the actor may have various sources. The most obvious one is the direct, in-pocket gain received from the plaintiff. There are other possible benefits as well that may have been part of the motivation. The actor may have obtained an internal, malicious satisfaction, an external payoff from supportive sympathizers, or advantages from third parties in positions similar to the plaintiff's. The negative costs of the act to the defendant also must be looked for in diverse directions. As a businessperson the actor may suffer injury to his reputation and goodwill. Even the publicity of this trial, if it reflects badly upon the defendant, is a cost he may have rationally anticipated. Of course, any judgment of actual damages you find for the plaintiff is also a cost to the defendant. These mentioned sources of costs and benefits are not meant to be exhaustive or necessarily applicable to the case before you. Rather, they are to indicate the breadth of the search you must undertake to uncover the possible impacts on the thinking actor that will be considered when deliberating on the initial choice to act.

“Once you have identified the sources of expected costs and benefits and have valued them, then you must discount each sum by its probability of being realized, as reckoned at the time of the act. For example, if an actor believes that as a consequence of a proscribed act he might gain \$100, but he expects the chances of this gain are only one-in-ten, then the value to him of the act at the time it is performed is \$10, that is, \$100 times 0.1. Each item of cost or benefit may have a different likelihood for you to appraise.

“On occasion parties will act maliciously, not for the purpose of monetary gain, but instead out of viciousness, gross indifference to others, or other motivation highly destructive of the workings of social order. Should you find that this defendant was motivated, entirely or partially, by these socially disintegrating purposes which are directly hurtful of others, you are to assess an amount in addition to that required to deter the economic incentives. This supplementary amount is to represent and serve as an indication of public disapproval of the action. It is appraised by the extent of disapproval of the motivation that ought to be expected from a society founded upon fairness and justice, but which has not lost sight of the

weaknesses of the human condition.<sup>333</sup>

"To be kept in mind during your appraisals is that even economic motivations for actions sufficiently malicious to warrant an extraordinary award are not all equally blameworthy. Among individuals and institutions, improper choices often result not from a deliberate or viciously indifferent attitude towards injurious consequences, but from lack of consciousness of the full ramifications. Insofar as an action, though unworthy, falls short of deserving total public condemnation, you are to decrease the award of extraordinary damages as otherwise measured by deterrence and social loss. Ultimately, the extraordinary award must not shock our sensibilities of fairness and justice. It must be reasonable despite any calculations made item by item or purpose by purpose."

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<sup>333</sup> This instruction for retributive desert is not very specific, as is true of those used today by courts, and thus may be criticized for allowing the jury too much leeway. In discussing the comparable difficulty of expressing the tort standards of cause-in-fact and proximate cause, Malone found greater specificity unnecessary by relying upon an argument similar to one supporting the invocation of the jury as an "aresponsible agency":

[I]n most instances the individual judgment passed on the controversy at hand has little or no value for future litigation, since the policy questions are too closely related to the factual issues to be segregated from them. Any effort to make a formal explanation of such policy decisions overtaxes the power of language and is productive only of confusion. Once the judge has denied a nonsuit, it is better that judgments of this kind should be handed down without explanation by the jury, which is then dissolved back into society.

Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 99 (1956). At the bottom of the slippery slope, however, where there aren't "substantive rules of sufficient specificity to support orderly and rational argument on the question of liability . . . , principled decision will have been replaced with decision by whim, and the common law of negligence will have degenerated into an unjustifiably inefficient, thinly disguised lottery." Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L. J. 467, 468 (1976).