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PAINFUL PUBLICITY — AN ALTERNATIVE PUNITIVE DAMAGE SANCTION

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There is not a crime, there is not a dodge, there is not a trick, there is not a swindle, there is not a vice which does not live by secrecy. Get these things out in the open, describe them, attack them, ridicule them in the press, and sooner or later public opinion will sweep them away. Publicity may not be the only thing that is needed, but it is the one thing without which all other agencies will fail.[1]

INTRODUCTION

Much has been written about the propriety and efficacy of punitive damages against business wrongdoers.[2] Even those who consider punitive damages legitimate debate the amount of such awards and the circumstances in which they should be assessed.[3] Whether punitive damages serve their intended goal of deterring and punishing a transgressor, often a culpable business entity,[4] has been extensively argued in scholarly literature, legislatures and the courts. One result of the debate has been legislation limiting the amount of recoverable mone-

1. BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS 1 (1983) (quoting Joseph Pulitzer) (footnote omitted).

2. Punitive damages are imposed for actions which are offenses against both the individual and society. *See generally* RESTATEMENT (SECOND) OF TORTS § 908 (1979). For an annotated bibliography of over 100 scholarly articles written about punitive damages, see 2 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 22.4 (3d ed. 1995).

3. *See infra* notes 27-41 and accompanying text (discussing critiques of the deterrent value of punitive damages and proposals for changing the way in which punitive damages are assessed).

4. Mark Peterson et al., *Punitive Damages Empirical Findings*, 1988 RAND, THE INST. FOR CIVIL JUSTICE, 47-49 [hereinafter RAND study] (discussing the percentage of punitive damage awards assessed against business enterprises); *see also* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1400 (1993) (noting that the majority of punitive damage awards are for economically motivated wrongdoing).

tary sanctions.[5] These limits do not replace the threat of potential large monetary awards with any other sanction.

The narrow conceptualization of options for punishing and deterring socially unacceptable conduct with civil sanctions has unnecessarily limited the debate on punitive damages. Missing from the debate is an examination of alternatives to purely monetary sanctions. One alternative is a "publicity penalty" which would recognize the changing way business is conducted in the 1990s.

We are now in what has been called the "information age." News is broadcast as it happens, twenty-four hours a day, across the world. People all over the world communicate instantaneously by computer. The Internet, a computer communication system known only to a select few just five years ago, has become a household word.[6]

It is against this background that negative publicity, always a threat to businesses, becomes even more menacing. The rapid spread of information, coupled with businesses' fears of the impact of widespread dissemination of their wrongdoings, can be utilized to fashion a powerful civil punitive sanction.

This article proposes a re-examination of punitive damages sanctions in light of current technology. It suggests we move from the current doctrine of monetary awards[7] to a system which supplements monetary awards with mandatory publication of the jury's verdict and the reasons for the verdict. To fully serve today's technologically sophisticated public, the article proposes that companies' wrongdoings should be broadcast over the Internet on a dedicated World Wide Web page entitled "Punitive Damages Awards" as well as in more traditional media forums.[8]

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5. *See infra* text accompanying note 73 (citing resources to a state-by-state breakdown of legislation capping punitive damage awards).

6. Jon Wiener, *Free Speech on the Internet*, THE NATION, June 13, 1994, at 825. The Internet Society reported that in 1994, 1.7 million host computers provided gateways for 17 million Internet users. *Id.*

7. Without some monetary award plaintiffs would have little incentive to prosecute punitive damages claims. *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 383 (Cal. Ct. App. 1981) (noting monetary punitive damages motivate private individuals to enforce rules of law); *see also* Galanter & Luban, *supra* note 4, at 1451-52 (explaining that a crucial function of punitive damages is to provide financial incentives for private parties to enforce the law); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 75 (1992) (noting the high cost of detecting corporate wrongdoing and arguing that punitive damages encourage plaintiffs to serve as private attorneys general).

8. "Access to information in our society, like most things, is related to social class." Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1174 n.57 (1995). To enable the information publicized to reach as wide an audience as possible, it is important that the information be publicized in print and broadcast media forums as well as on the "information superhighway."

This article has four parts. Part I highlights the differences between punitive and compensatory damages. Part II discusses the rationales underlying punitive damages and the ineffectiveness of the current system in fully achieving those rationales. Part III reviews the historical basis of public notification of wrongdoing. Part IV explains why the proposed publication penalty is an important addition to the present system.

I. DISTINGUISHING PUNITIVE AND COMPENSATORY DAMAGES

Public notification of wrongdoing has a well-established history in American jurisprudence.[9] However, it never has been formally used as a sanction in civil punitive damages claims. This first section examines the difference between compensatory and punitive damages and suggests that while notification may be unnecessary, and even inappropriate, in a compensatory damage claim, it may be particularly well-suited to claims in which a jury awards punitive damages.

Civil punitive sanctions operate in a middle ground between traditionally conceived paradigms of criminal and civil law.[10] The reasons for awarding punitive damages are distinct from those for awarding compensatory damages. Punitive damages are money damages awarded for the purpose of penalizing a defendant and deterring others.[11] They differ from compensatory damages in that they are not intended to compensate the plaintiff for any losses.[12]

With an award of compensatory damages, the plaintiff should be restored to the position she would have been in, but for the injury.[13] Compensatory damages are associated with specific losses incurred by the plaintiff[14] and may be assessed for mere negligence.[15]

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9. *See infra* part III (discussing public notification sanctions in various areas of the law).

10. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992). Professor Mann divides the traditional paradigms of civil and criminal law into four main categories: (1) the mental element in prohibited acts; (2) the different purpose of the two systems (punishment v. compensation); (3) the remedy (stigma and incarceration v. restitution and monetary payments); and (4) the procedures used (higher evidentiary standards and burdens of proof in criminal actions).

11. RESTATEMENT (SECOND) OF TORTS § 908, at 464; DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.9, at 205 (1973); James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel*, 14 ST. MARY'S L.J. 351, 352 (1983).

12. RESTATEMENT (SECOND) OF TORTS § 908(1), at 464.

13. *Id.*

14. *Id.* § 903, at 453-54.

15. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164 (5th ed. 1984).

Since punitive damages are intended to punish, they are based upon the degree of egregiousness of the defendant's conduct.[16] Punitive damages may be awarded when the defendant acted fraudulently, maliciously, from ill-will or spite,[17] or when the defendant's conduct demonstrates a conscious indifference to the rights and safety of others.[18] Today, punitive damage awards against businesses mainly occur in cases involving culpable business misconduct such as manufacturer's corner-cutting and ruthless business practices aimed at consumers or competitors.[19]

Punitive damages have implications beyond the bounds of a specific case: "The remedy of punitive damages serves the useful purpose of expressing society's disapproval of conduct which leads to intolerable rates of injuries and deaths."[20] They punish the wrongdoer, thereby exacting retribution.[21] Finally, their deterrent effect reaches beyond the specific defendant to others who might consider engaging in similar misconduct.[22]

Because punitive damages exist for different reasons than compensatory damages, it is appropriate to examine different remedies for each kind of claim. Money damages are particularly appropriate in compensatory damage claims since the purpose of these claims is to make the plaintiff whole. Publication of the underlying wrongdoing, because of its punitive impact,[23] may be inappropriate in compensatory damage claims since the defendant did not act culpably, and thus, the likelihood that the defendant or others may engage in similar future harmful misconduct is minimal. On the other hand, although monetary sanctions also may be an appropriate means to punish and deter egregious misconduct, this type of conduct may warrant an additional sanction—required publication of the reason the damages were awarded. It is the defendant's culpability and the societal desire to

16. *Id.* § 2, at 9.

17. *Id.* at 9-10.

18. RESTATEMENT (SECOND) OF TORTS § 908, at 464-65; RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 3.2 (1991).

19. Galanter & Luban, *supra* note 4, at 1440.

20. Rustad, *supra* note 7, at 86.

21. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 375-77 (1994) [hereinafter Owen, *Punitive Damages Overview*]; *see infra* part II.A.2 (discussing the retributive function of punitive damages).

22. Rustad, *supra* note 7, at 88.

23. *See infra* notes 201-59 and accompanying text (discussing the punitive impact of notification).

deter future similar misconduct[24] which may warrant this additional sanction.

II. CURRENTLY CONSTRUCTED PUNITIVE DAMAGES — DOCTRINE AND APPLICATION

A. Rationales for Punitive Damages

Before examining the proposed publicity penalty, it is helpful to look at the rationales underlying the current system. Most courts and commentators divide the rationales for punitive damages into two principal categories: retribution and deterrence.[25] Yet an analog to punitive damages, the criminal justice system, provides perhaps a more comprehensive framework for understanding the role served by punitive damages.

The criminal system advances four main rationales for punishment: deterrence, retribution, rehabilitation and incapacitation.[26] Punitive damages can serve each of these purposes. Whether and how punitive damages currently address these rationales is discussed in greater detail below.

1. Deterrence

Punitive damages are intended to both specifically and generally deter.[27] Deterrence is premised on the theory that a monetary sanction

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24. Courts and commentators agree that a primary purpose of punitive damages is deterrence. *See, e.g.*, Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991); Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 39 (1985); Sylvia M. Demarest & David E. Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L.J. 797, 802 (1987); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 11 (1982) [hereinafter Ellis, *Fairness and Efficiency*]; Galanter & Luban, *supra* note 4, at 1428.

25. *See* sources cited *supra* note 24. Additional rationales also exist. They include: preserving the peace; encouraging plaintiffs to act as private attorneys general; compensating victims for otherwise uncompensable losses; and paying plaintiffs' attorneys fees. *See* Ellis, *Fairness and Efficiency*, *supra* note 24, at 11.

26. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.5 (1986); Galanter & Luban, *supra* note 4, at 1428.

27. Specific deterrence occurs when the punishment is severe enough that the offender does not want to risk incurring the same punishment again. LAFAVE & SCOTT, *supra* note 26, § 1.5, at 31-32; NIGEL WALKER, PUNISHMENT, DANGER & STIGMA: THE MORALITY OF CRIMINAL JUSTICE 65 (1980). General deterrence occurs when other potential offenders, seeing the punishment, wish to avoid a similar fate. LAFAVE & SCOTT, *supra* note 26, § 1.5, at 33-34. Commentators have noted the specific and general deterrent purpose of punitive damages. *See, e.g.*, Demarest & Jones, *supra* note 24, at 802-03; Ellis, *Fairness and Efficiency*, *supra* note 24, at 8.

will discourage the wrongdoer and others from engaging in the kind of misconduct which led to the punitive damage award.[28]

The deterrence value of monetary punitive sanctions imposed against businesses is the subject of fierce debate. Many argue that uncertainty about both the standard imposing liability and the amount of damages undermines the sanctions' deterrent value.[29]

In many jurisdictions, a defendant is liable for punitive damages upon proof that it acted with a conscious indifference to the rights and safety of others.[30] Some scholars argue that this standard is too vague to provide meaningful guidance to companies wishing to avoid punitive damages liability.[31] Others counter that this standard for liability is sufficiently concrete to yield reliable results.[32] They suggest that tortfeasors know the type of conduct that will subject them to punitive damages, either because of a collective sense of morality,[33] or because the conduct is more clearly proscribed than punitive damage opponents admit.[34]

Even if one accepts that the proscribed conduct is clear, because there is uncertain enforcement[35] and uncertainty about the amount of the penalty, many scholars argue that punitive damages are an eco-

28. RESTATEMENT (SECOND) OF TORTS § 908(1); BLATT ET AL., *supra* note 18, at 8; 1 SCHLUETER & REDDEN, *supra* note 2, § 2.2(A)(1).

29. *See infra* notes 31, 36-38 and accompanying text (discussing the effects of the uncertainty).

30. *See, e.g.*, Carroll Elec. Coop. Corp. v. Carlton, 892 S.W.2d 496, 501 (Ark. 1995); S&S Toyota, Inc. v. Kirby, 649 So. 2d 916, 917 (Fla. Dist. Ct. App. 1995); Stuart v. Mills, 899 S.W.2d 156, 168 (Mo. 1995); Gonzales v. Surgi Dev. Corp., 899 P.2d 576, 590 (N.M. 1995).

31. E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1057-58 (1989); Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 979-80 (1989) [hereinafter Ellis, *The Jury*]; David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 20-28 (1982) [hereinafter Owen, *Problems in Assessing Punitive Damages*].

32. *See, e.g.*, Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269 (1993) (arguing that the conscious indifference standard is viable because, at least in products liability claims, punitive damage awards rarely occur unless the plaintiff proves that a business knew of a risk of danger and failed to take available safety steps to avoid that danger).

33. Angela P. Harris, *Rereading Punitive Damages; Beyond the Public/Private Distinction*, 40 ALA L. REV. 1079, 1110 (1989).

34. Rustad, *supra* note 7, at 66-73. Professor Rustad, relying on a seminal article by Professor David G. Owen, notes that in products liability cases, five recurrent types of corporate misconduct result in punitive damages: (1) fraudulent type misconduct; (2) knowing violations of safety standards; (3) inadequate testing and manufacturing procedures; (4) failures to warn of known dangers before marketing and (5) post-marketing failure to remedy known dangers *Id.* (citing *Punitive Damages in Product Liability Litigation*, 74 MICH. L. REV. 1257, 1329-61 (1976) [hereinafter Owen, *Products Liability Litigation*]).

35. The proportion of tortfeasors who are either not caught or are caught but not found liable, as compared to those who are caught and found liable, is termed the "enforcement error." Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 306 n.11 (1991).

nomically inefficient means of deterrence.[36] Overly cautious companies are over-deterred—they are unwilling to engage in socially useful research and development for fear of unquantifiable liability exposure.[37] Risk takers are under-deterred because they see punitive damages as "a missile in the dark." Given the unpredictability, they are willing to take a chance that the missile will miss them.[38]

Some suggest that overdeterrence, if it occurs at all, is far less than businesses claim.[39] Others contend that uncertainties in enforcement

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36. Elliott, *supra* note 31, at 1062-68; Ellis, *The Jury*, *supra* note 31, at 981-88; Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 943-46 (1989) [hereinafter Wheeler, *Proposal*].

To deal with problems arising from the "enforcement error" and uncertain amounts, many scholars have developed complex formulas and standards for imposing punitive damages. *See, e.g.*, Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence Measured Remedies*, 40 ALA. L. REV. 831, 868-88 (1989) [hereinafter Dobbs, *Ending Punishment*] (arguing that punitive damages should equal the profit gained from misconduct); Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1402-06 (1987) (arguing for higher burden of proof and lower standard of care with high penalties for violations); Wheeler, *Proposal*, *supra*, at 928-60 (proposing a calculation of punitive awards based on the difference between the benefit to the manufacturer from engaging in the misconduct and the cost of the societal harm); Robert D. Cooter, Comment, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 90 (1982) (reasoning that punishment should equal the illicit benefits or extraordinary cost that prompts conduct involving intentional fault).

No single formula has received general acceptance. *See* Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA L. REV. 741, 813-19 (1989) (critiquing Cooter's and Johnston's analyses); David D. Haddock et al., *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1 (1990) (critiquing Cooter, Ellis and Johnston); Jerry J. Phillips, *A Comment on Proposals for Determining Amounts of Punitive Awards*, 40 ALA. L. REV. 1117 (1989) (critiquing Wheeler's proposal). The problem of taking the expected profit from the misconduct, as proposed by a number of these scholars including Professor Dobbs, involves problems in proof, an issue Professor Dobbs raises himself. Dobbs, *Ending Punishment*, *supra*, at 868-88.

37. Ausness, *supra* note 24, at 85-86; Ellis, *The Jury*, *supra* note 31, at 988; Richard J. Mahoney & Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 SCI. 1395 (1989) [hereinafter Mahoney & Littlejohn, *Innovation on Trial*]. Some suggest that large punitive damage awards cause products to be removed from the marketplace, or modified, even though some members of society may be willing to accept the risk. *See* Alex Kozinski, *The Case of Punitive Damages vs. Democracy*, WALL ST. J., Jan. 19, 1995, at A18 (arguing that the decision whether to ban an activity altogether or permit it—subject to payment of compensation to those it hurts—should be made by legislatures, not juries).

38. Elliott, *supra* note 31, at 1063. *But see* Michael Wells, *Comments on Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1073 (1989) (arguing that there is no plausible evidence to support Elliott's empirical claim that punitive damages do not deter corporate misconduct).

39. According to a study by Steven Garber of the RAND institute, research and development efforts have been stifled only for a few products, including those with limited profit potential, such as vaccines. Paula Mergenbagen, *Product Liability: Who Sues?*, AM. DEMOGRAPHICS, June 1995, at 48, 48. Garber noted that "[l]iability is unlikely to deter efforts to develop products believed to have exceptionally large profit potential — so-called 'blockbusters' (e.g., Prozac)." *Id.*

and award amounts do not undermine the deterrent effect of the rules. Instead, they argue that the threat of uncertain punitive damages liability is one of the few effective means for convincing businesses not to trade the public good for self-interest.[40] Some also note that, although punitive damages may be an economically imperfect means of deterrence, sometimes absolute economic efficiency must be sacrificed for the more important goal of eliminating conduct society deems reprehensible.[41]

While the debate on the deterrent value of punitive damages rages on, scholars also have examined the value of punitive damages in serving two other goals of the criminal law paradigm: retribution and rehabilitation. The next sections discuss currently constructed punitive damages in the context of these goals.

2. *Retribution*

Punitive damages are intended to serve a retributive function. This function adopts the view that "the defendant's wrong is such that it is *right* in a moral sense, that he be made to suffer, irrespective of whether this will reform his character, deter his misconduct, or set an example for others."[42]

Theoretically, with a punitive damages award, the injured individual receives the satisfaction of seeing the defendant suffer, and society feels vindicated by seeing the court impose a punishment which expresses society's disapproval of serious misconduct and reaffirms society's commitment to maintaining moral and legal standards.[43] For these reasons, some commentators suggest that to fully achieve the goal of retribution, the punishment "must be public and must attempt to shame the wrongdoer."[44] In this way, society and the wrongdoer understand the moral gravity of the offense.[45]

While some scholars argue against awarding punitive damages for purely retributive purposes,[46] some argue that the retributive function of punitive damages coincides with their deterrent goals:

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40. Rustad, *supra* note 7, at 5; Wells, *supra* note 38, at 1075-76.

41. Galanter & Luban, *supra* note 4, at 1450.

42. Dobbs, *Ending Punishment*, *supra* note 36, at 844.

43. Owen, *Products Liability Litigation*, *supra* note 34, at 1280-81.

44. Galanter & Luban, *supra* note 4, at 1444.

45. *Id.*

46. Many argue retribution is best left to the criminal law arena which provides many more procedural safeguards than the civil system. *See* Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 644-47 (1980) (discussing these arguments). However, others argue that exacting retribution through monetary awards is justified because budget constraints in the public sector have produced the need for private enforcers of societal norms. Chapman & Trebilcock, *supra* note 36, at 768-98.

> [V]indictive behavior is particularly irrational in that it seeks to inflict present suffering to 'remedy' past injuries that cannot be undone. Inflicting punishment for past acts, however, tends also to control future behavior, in that the defendant and others in a similar position will wish to avoid the unpleasant consequences of such acts in the future.[47]

Thus, although retribution is not necessarily an end in itself, the retributive function of punitive damages reinforces their deterrent impact.

3. *Rehabilitation*

Another goal of punishment is rehabilitation. Rehabilitation occurs when the punishment causes the wrongdoer to realize the wrongfulness of her conduct, instills in her a sense of social responsibility, and integrates the wrongdoer into a productive social role.[48]

Rehabilitation involves reeducation of the wrongdoer regarding society's rules and the need to abide by them. Professor Owen explains that punitive damages educate in two ways.[49] First, punitive damages certify the existence of a particular right belonging to the plaintiff and a correlative legal duty on the defendant to respect that interest.[50] Second, they emphasize the importance the law attaches to the right and society's condemnation of its violation.[51]

In many ways, the rehabilitative function is inextricably intertwined with both the deterrent and retributive functions discussed above. Ideally, punitive damages, by imposing a sanction for improper behavior, rehabilitate the offender by re-inforcing the wrongfulness of her conduct and encouraging her to act in a socially responsible way in the future to avoid further punishment.[52]

4. *Incapacitation*

The premise of incapacitation in criminal cases is that the defendant presents a risk to society and that to protect the public, the defendant must be removed from situations in which she may cause harm.[53] Traditionally, this is done through incarceration.

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47. Mallor & Roberts, *supra* note 46, at 648.

48. Higdon v. United States, 627 F.2d 893, 899 (9th Cir. 1980).

49. Owen, *Punitive Damages Overview*, *supra* note 21, at 374-75.

50. *Id.*

51. *Id.*

52. *Id.*; *see also* Owen, *Products Liability Litigation*, *supra* note 34, at 1281 (arguing that punitive damages serve as a "reformative device").

53. *See generally* CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS (Rudolph J. Gerber & Patrick D. McAnany eds., 1972).

The need to protect the public is not confined to criminal cases. Many punitive damages cases involve dangerous products[54] or fraudulent business practices.[55] Under the current punitive damages scheme, there is no safeguard analogous to incarceration to protect the public. Currently, incapacitation only occurs with punitive damages in the few cases in which the award forces a company to go out of business.[56] Thus, incapacitation is not usually discussed in the context of punitive damages doctrine. That does not mean that it should be ignored. Although current monetary damages may not incapacitate a wrongdoer, other punitive sanctions, such as the publicity penalty proposed herein, may achieve this goal.

B. Empirical Data on Punitive Damages

To fully understand monetary punitive damages in light of their rationales, it is instructive to examine some empirical data. Given the primary goals of deterrence and retribution, it is not surprising that punitive damage awards occur most frequently in cases involving intentional torts and fraudulent or unfair business dealings and least often in cases involving personal injury,[57] since claims involving personal injury are less likely to involve culpable conduct.

What is more surprising is the amount of the average punitive damage award. Although one might think that a jury's desire to punish and deter egregious misconduct would result in very large damage awards, the opposite appears to be true. The median award in the 1980's in Cook County, Illinois was $43,000.[58] The median in San Francisco was $63,000.[59] Between 1988 and 1990, the median award

54. *See, e.g.*, Dorsey v. Honda Motor Co., 655 F.2d 650 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982) (involving automobile crashworthiness); *Puppe v. A.C. and S., Inc.*, 733 F. Supp. 1355 (D.N.D. 1990) (involving asbestos); Tetuan v. A.H. Robins Co., 738 P.2d 1210 (Kan. 1987) (involving the Dalkon Shield). For an extensive review of the kind of dangerous products cases warranting punitive damages, see Rustad, *supra* note 7, at 65-85.

55. *See, e.g.*, Blue Cross/Blue Shield v. Weiner, 543 So. 2d 794 (Fla. Dist. Ct. App. 1989), *cert. denied*, 494 U.S. 1028 (1990) (involving the fraudulent sale of group health insurance policy and denial of benefits under the policy); Honeywell, Inc. v. Trend Coin Co., 449 So. 2d 876 (Fla. Dist. Ct. App. 1984), *rev'd in part*, 487 So. 2d 1029 (Fla. 1986) (involving fraudulent sale of burglar alarm system).

56. Galanter & Luban, *supra* note 4, at 1428.

57. RAND study, *supra* note 4, at 19; *see also* Stephen Daniels & JoAnn Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 34-38 (1990) (citing study which shows punitive damages were awarded least often in personal injury cases).

58. RAND study, *supra* note 4, at 17.

59. *Id.*

ranged from $10,125 in St. Louis County, MO to $275,000 in Los Angeles, CA.[60]

Products liability awards were higher than awards in other types of cases. In non-asbestos products liability claims, the median award between 1965 and 1990 was $877,000.[61] The higher products liability awards can be explained by noting the relationship of compensatory to punitive damages. Except in cases involving libel and defamation, where actual damages may be quite small, punitive damage awards generally are proportionate to compensatory damages awards.[62] Since products liability cases often involve severe personal injuries, the compensatory damages tend to be higher than in other cases, and therefore, the punitive damages are also higher.[63]

Although punitive damage award amounts in personal injury cases have generally remained stable over the past twenty years,[64] the past decade has seen an increase in awards over a million dollars.[65] Most cases involving higher awards are those in which the harm is financial, rather than physical.[66] This statistic supports the idea that when juries find a defendant purposefully acted in a manner which caused financial harm to an unwitting victim, juries seek to deter and exact retribution by having the wrongdoer suffer the same fate it intended for its victim—substantial financial losses. Juries also have awarded multimillion dollar awards when they have found that a business, out of a desire for economic gain, continued a course of conduct despite its knowledge of a strong possibility that the conduct would result in seri-

60. This data is taken from a study sponsored by the American Bar Foundation (ABF) and reported by Professor Stephen Daniels in: Capitol Hill Hearing Testimony of Stephen Daniels, FDCH, April 4, 1995, at 56 [hereinafter ABF study].

61. Rustad, *supra* note 7, at 45. Professor Rustad controlled for asbestos cases, which skewed his sample, and adjusted the actual median award of $775,000 to 1983 dollars, thus arriving at the $877,000 median damage award figure.

62. RAND study, *supra* note 4, at 56-64; BLATT ET AL., *supra* note 18, at 14; Rustad, *supra* note 7, at 50.

63. Rustad, *supra* note 7, at 50-52, 62-64.

64. RAND study, *supra* note 4, at 25; Daniels & Martin, *supra* note 57, at 58; Rustad, *supra* note 7, at 18-19.

65. BLATT ET AL., *supra* note 18, at 11. A preliminary report from an update of the RAND study indicates that while the number of punitive damage awards is decreasing, the amount of the awards is increasing. *Punitive-Damage Awards Grow in Size, Not Number*, WALL. ST. J., March 8, 1995, at B8.

66. ABF study, *supra* note 60, at 64; Thomas M. Melsheimer & Steven H. Stodgill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 SMU L. REV. 329, 331-32 (1994) (reporting that a study sponsored by Texaco indicates a significant increase in the amount of punitive damages awarded in business litigation cases); *see, e.g.*, TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) (awarding $10 million in punitive damages for slander of title); Ainsworth v. Combined Ins. Co. of Am., 774 P.2d 1003 (Nev. 1989) (awarding $6 million in punitive damages for denial of insurance benefits).

ous physical harm to consumers.[67] Most of these multi-million dollar awards, and in fact, most punitive awards, especially in cases involving personal injury, are reduced after trial, either through settlement or judicial review.[68]

C. *Punitive Damages and Tort Reform*

Empirical data indicates that punitive damages occur most frequently in claims in which they historically have been found proper—intentional torts and business contract cases involving fraudulent or unfair dealings.[69] Despite this empirical data, to protect businesses from the impact of punitive damages, especially in personal injury cases,[70] broad, sweeping reforms in the tort system have included changes in punitive damages law.[71] Reforms have included limits on damage amounts,[72] requirements that a portion of the award be paid to a state fund,[73] and limitations of punitive damages to a single recovery for a single course of conduct.[74] Procedural reforms such as higher evidentiary standards,[75] bifurcated trials,[76] and judge-determined punitive damages awards,[77] also have been enacted.

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67. *See, e.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 390-91 (Cal. Ct. App. 1981) (initially awarding $125 million for defective Ford Pinto design); Tetuan v. A.H. Robins, 738 P.2d 1210 (Kan. 1987) (rendering $7.5 million judgment against IUD manufacturer that marketed the product despite knowledge of the severe health risks it posed).

68. RAND study, *supra* note 4, at 27-29; Rustad, *supra* note 7, at 52-58; *see also* HUMAN RESOURCES DIV., GEN. ACCOUNTING OFFICE, PROD. LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES 33-47 (1989) (discussing a variety of post-trial activities that may result in a payment that differs from the award in the initial verdict).

69. RAND study, *supra* note 4, at 13.

70. *See generally id.* at 56 (noting that businesses' concerns about the unpredictability of punitive damages awards and excessive awards have led to punitive damages reforms).

71. Rustad, *supra* note 7, at 6-10 n.22-31. For an overview of state reforms, see Sandra N. Hurd & Frances E. Zollers, *State Punitive Damages Statutes: A Proposed Alternative*, 20 J. LEGIS. 191, 195-97 (1994). *See also* Martha Middleton, *A Changing Landscape*, A.B.A. J., Aug. 1995, at 59 (listing major tort reforms enacted in each state since 1986).

72. For a state by state breakdown of state laws on caps and limits, see Janet V. Hallahan, *Social Interests Versus Plaintiffs' Rights: The Constitutional Battle over Statutory Limitations on Punitive Damages*, 26 LOY. U. CHI. L.J. 405, 451-54 app. B (1995). *See also* Jimmie O. Clements, Jr., *Limiting Punitive Damages: A Placebo for America's Ailing Competitiveness*, 24 ST. MARY'S L. J. 197, 205-09 (1992); Toy, *supra* note 35, at 325.

In 1995, Congress introduced three bills intended to limit punitive damages in products liability claims. *See* H.R. REP. No. 63, 104th Cong., 1st Sess., pt. 1, at 4 (1995); H.R. REP. No. 64, 104th Cong., 1st Sess., pt. 1, at 5 (1995); S. REP. No. 69, 104th Cong., 1st Sess. 35 (1995).

73. For a state by state breakdown of jurisdictions requiring that punitive damages be paid into a state fund, see Rustad, *supra* note 7, at 8 n.26; Hallahan, *supra* note 72, at 451-54 app. B.

74. Rustad, *supra* note 7, at 9 n.30.

75. *Id.* at 7 n.24.

76. *Id.* at 9 n.27.

77. *Id.* at n.28. For a discussion of the constitutionality of judge versus jury determination of awards, see Alan H. Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh*

Among the more controversial reforms are those limiting the amount of punitive damages.[78] Limits on damage amounts, commonly called "caps," come in two forms: an absolute dollar amount limit, or a penalty based on some multiplier of the plaintiff's compensatory award.[79]

Despite the fact that plaintiffs in personal injury cases rarely collect multi-million dollar awards,[80] those favoring limits on punitive damage awards argue that limits are needed to reduce harm to businesses in personal injury cases. They assert that "[t]he uncertainty and unfairness of the present system discourages employers from investing capital, making better and more innovative products and creating new jobs."[81] They maintain that limits are necessary because large awards in these kind of cases discourage research and development.[82] Further, they harm businesses' ability to compete in the international marketplace.[83] Proponents of limits also contend punitive damage awards harm consumers, since consumers feel the brunt of large awards because businesses pass on the costs of these awards to the consumer in the form of higher prices.[84]

Amendment, and the Politics of Jury Power, 91 COLUM. L. REV. 142 (1991) (arguing that judicial determination of punitive damages violates the Seventh Amendment right to a jury trial). *Cf.* Owen, *Products Liability Litigation*, *supra* note 34, at 1320-21 (arguing that the jury should have the responsibility of determining whether damages should be assessed, but that the trial judge should determine the measurement of such damages); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 302 (1983) (considering the benefits of judicial assessment of punitive damage awards after a jury determination that such awards are appropriate).

78. *See All Things Considered, House Debates Changes in Laws Governing Torts* (NPR Radio Broadcast, Mar. 6, 1995) (noting that punitive damage caps were one of the most bitterly contested items in the 1995 proposed tort reform bill). For a point/counter-point argument on punitive damage caps, see Aubdon M. Pallasch, *Brother, Can You Spare $2.9 Million for a Cup of Coffee?*, CHI. LAW., Mar. 1995, at 5.

79. Hallahan, *supra* note 72, at 414-19; Toy, *supra* note 35, at 331-34. For a discussion of the constitutional issues raised by legislatively imposed caps, see Wackenhut Applied Technology Ctr. v. Sygnetron Protection Sys., 979 F.2d 980 (4th Cir. 1992); Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993); Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635 (Ga. 1993); Bagley v. Shortt, 410 S.E.2d 738 (Ga. 1991); Hallahan, *supra*.

80. RAND study, *supra* note 4, at 26-30. Rustad, *supra* note 7, at 57-64;

81. David Masci, *Broad Changes Pass House, Face Harder Sell in Senate*, CONG. Q. WKLY. REP., March 11, 1995, at 744, 746 (quoting Rep. Henry Hyde). Rep. Hyde echoed sentiments expressed by Former Vice-President Dan Quayle years ago. David Margolick, *Address by Quayle on Justice Proposals Irks Bar Association*, N.Y. TIMES, Aug. 14, 1991, at A1.

82. For a discussion of these arguments, see Mahoney & Littlejohn, *Innovation on Trial*, *supra* note 37; Richard J. Mahoney & Stephen E. Littlejohn, *Lawsuits Becoming Liability for Nation*, ST. LOUIS POST-DISPATCH, Jan. 3, 1990, at 3C; Richard J. Mahoney, *Business Forum: Punitive Damages; It's Time To Curb the Courts*, N.Y. TIMES, Dec. 11, 1988, § 3, at 3.

83. Margolick, *supra* note 81, at A1.

84. Ted Gest & Clemens P. Work, *Sky-High Damage Suits; The Impact on Consumers, Business and Professions*, U.S. NEWS AND WORLD REP., Jan. 27, 1986, at 35; *Battle of the Black Hats*,

Opponents of punitive damage limits argue that the limits lead to a decline in corporate responsibility for consumer safety.[85] Commentators maintain that when punitive damages fail to capture the full economic benefit the defendant derived from the wrongful conduct, there is little economic incentive not to engage in the misconduct.[86] If the total damages recoverable are less than the potential profit, businesses may engage in the prohibited conduct because it is potentially financially beneficial.

Opponents of limits further contend that limiting punitive damages liability allows companies to predict their potential liability and reduce their investment in safety accordingly.[87] This puts ethical corporations that actually test products at a competitive disadvantage.[88]

Punitive damages limits based on compensatory damages raise another set of problems. A mathematical formula which ties punitive damages to compensatory damages disregards the punishment and deterrence functions.[89] In cases with low compensatory damages, such a formula prevents the trier of fact from considering the misconduct's potential harm.[90] Multiplier limits remove a tool society uses to adjust the punishment to the wrong.[91] Thus, connecting punitive damages with compensatory damages eviscerates the moral function served by punitive damages.[92]

Even without caps and limits, punitive damages as the sole means of punishing business misconduct are problematic.[93] Empirical evidence indicates that the current system may not change business misconduct. For example, even after successful punitive damages lawsuits, eighteen percent of the businesses found liable for punitive damages in

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CAL. J., June 1, 1995; *see also* Ausness, *supra* note 24, at 16 (noting Ford's argument in the Pinto case that punitive damages imposed by jury would be passed on to the consumer through higher prices for goods). For additional arguments about the negative impact product liability claims have on businesses, see generally E. Patrick McGuire, *The Impact of Product Liability*, Conference Board Research Report No. 908 (1988).

85. *See* Clements, *supra* note 72, at 212-21; Hurd & Zollers, *supra* note 71, at 199-200.

86. *See* Clements, *supra* note 72, at 212-21; Hurd & Zollers, *supra* note 71, at 199-200.

87. For a discussion of this argument, see Clements, *supra* note 72, at 217-18. *See also* Hurd & Zollers, *supra* note 71, at 200 (suggesting that caps may incite the rational actor to undertake a scheme or fraud that would net substantially more than the amount of the cap). *But see* Hallahan, *supra* note 72, at 443-44 nn.212-13 (noting most states allow judges to override caps when the defendant's actions are malicious or intentional).

88. Clements, *supra* note 72, at 213-221; Hurd & Zollers, *supra* note 71, at 199-206.

89. Hurd & Zollers, *supra* note 71, at 200.

90. *Id.*; Melsheimer & Stodgill, *supra* note 66, at 347-49.

91. Demarest & Jones, *supra* note 24, at 825.

92. For scholars supporting this view, see Galanter & Luban, *supra* note 4, at 1447-50.

93. *See supra* part II.D (discussing the problems with currently constructed punitive damages).

products liability cases continued the conduct leading to the punitive damages award.[94]

With caps and limits, punitive damages' efficacy in deterring business misconduct may be further diminished.[95] Thus, in today's society, especially given current tort reforms, it is questionable whether monetary punitive damages alone are an accurate and effective means of stopping and punishing business conduct that society deems reprehensible.

D. Why the Current System of Punitive Damages Is Less Efficacious than It Could Be

The effectiveness of monetary sanctions against a business is limited for two reasons: (1) the business' ability to avoid the financial detriment the penalty was intended to impose; and (2) the lack of public information about the reason for the punitive damages award.

Many businesses can avoid the financial penalty, either through insurance coverage,[96] through their ability to pass the sanction on to consumers through higher prices,[97] or because the award is too low to have a significant financial impact. If a business can avoid suffering a financial detriment, none of the rationales of punitive damages are satisfied. Businesses are not deterred because the financial incentive underlying deterrence does not exist. Retribution does not occur for at least two reasons. First, the business suffers no public defeat.[98] Second, if society views the punitive damages award as more of a sanction on society, in the form of higher insurance rates[99] or higher

94. Rustad, *supra* note 7, at 78; *see also infra* note 214 (discussing manufacturer's refusal to change warning label even after multi-million dollar punitive damages award).

95. Galanter & Luban, *supra* note 4, at 1452; Rustad & Koenig, *supra* note 32, at 1316.

96. Thirty-three states allow insurance coverage of punitive damage awards in vicarious liability cases, and twenty-four states allow coverage in cases of direct liability. BLATT ET AL., *supra* note 18, Supp. at 21. The trend is to increasingly allow insurance coverage of punitive damages, especially in cases of vicarious liability. *Id.* Supp. at 23.

For a discussion of the policy considerations regarding insurance coverage of punitive damages, see BLATT ET AL., *supra*, at 73-85; Grace M. Giesel, *The Knowledge of Insurers and the Posture of the Parties in the Determination of the Insurability of Punitive Damages*, 39 U. KAN. L. REV. 355, 390-407 (1991); S. Loyd Neal, *Punitive Damages: Suggested Reform for an Insurance Problem*, 18 ST. MARY'S L. J. 1019, 1025-31 (1987); George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1011-19 (1989); Gregory J. Sexto, Note, *Corporate Insurability of Punitive Damages Arising from Employee Acts*, 11 J. CORP. L. 99 (1985).

97. *See supra* note 84 and accompanying text (discussing businesses' ability to pass along punitive damages to consumers).

98. *See* Galanter & Luban, *supra* note 4, at 1432-35 (arguing that the retribution function of punishment is served when the punishment is seen as a defeat of the wrongdoer).

99. *See* BLATT ET AL., *supra* note 18, at 75 (noting that insurance companies recapture punitive damage payouts through increased premiums affecting both businesses and individuals);

prices, society fails to feel vindicated. If a business can avoid the impact of the punishment, the rehabilitative function of punitive damages is not met either. A tortfeasor who is unaffected by the punishment has no reason to re-examine and reform its conduct. Finally, with monetary awards, incapacitation rarely occurs.[100]

Even if a business must absorb the brunt of the monetary damage award, another reason monetary awards fail to fully achieve the rationales for punitive damages is that the facts underlying a punitive damages award often do not become part of the public domain. Today, whether punitive damage awards become public knowledge is based, in large part, on whether the media chooses to publicize an award. This generally only happens when the awards are very large.[101]

Even when the media chooses to cover an award, it may leave out the reasons punitive damages were awarded. For example, the *Atlanta Journal and Constitution* printed a brief story on a $90 million award ($30 million in compensatory damages and $60 million in punitive damages) against Suzuki for injuries incurred when a Suzuki Samurai rolled over.[102] The story failed to explain the evidence which led to the award.[103]

The current failure to publicize the conduct leading to punitive damages awards hampers the awards' ability to deter. Before the awards can deter, people need to know about the awards and understand the reasons for the awards.[104] The lack of information also means that the awards fail to fully achieve the retributive rationale. Public condemnation and its attendant sense of shame are integral to the concept of exacting retribution.[105] A society which does not know of the conduct cannot condemn it. Finally, without full information about the misconduct, the public's ability to protect itself, and thereby

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Rustad, *supra* note 7, at 37 n.189 (explaining how insurance companies encourage the view that large jury awards mean an increase in premiums for all consumers).

100. Incapacitation only occurs in the unusual case in which an award bankrupts a company. Galanter & Luban, *supra* note 4, at 1428. Even then, some argue that bankruptcy is merely a ploy which benefits the business by allowing a corporate reorganization while avoiding payment of legitimate liability claims. *See* Rustad, *supra* note 7, at 44 n.216 (citing the bankruptcies of A.H. Robins and Celotex in support of this argument).

101. For examples of news stories about large awards, see Martin Griffith, *Dow Fined $10 Million in Breast Implant Suit*, AUSTIN AM.-STATESMAN, Oct. 31, 1995, at 45 (reporting the large punitive damages award against Dow Chemical Co. for its leaky silicon breast implants); Deborah Sue Yaeger, *$13 Million Awarded in Rape Slaying*, WASH. POST, Jan. 24, 1975, at A1, A4 (discussing an $11 million punitive damages award against a corporation whose employee raped and murdered a woman while removing furniture from her apartment).

102. *Rollover Victim Awarded $90 Million*, ATLANTA J. AND CONST., July 8, 1995, at 8A.

103. *Id.*

104. *See infra* part IV.B.1 (explaining why this knowledge promotes deterrence).

105. Galanter & Luban, *supra* note 4, at 1444.

incapacitate the wrongdoer from causing further public harm, is severely diminished.

III. Public Notification in Other Areas of the Law

A. Goals of Existing Public Notification Sanctions

Notifying the public of a defendant's wrongdoing or of products which may cause harm is not a novel idea. Public notification currently exists in both the civil and criminal law. The goals of these sanctions mirror the rationales for criminal punishment. Public notification is used as an educational and remedial tool.[106] It also furthers the deterrent goal of punishment,[107] and may further the offender's rehabilitation.[108] Finally, notification sanctions also are intended to protect the public.[109]

B. Current Application of Notification Sanctions

1. Civil Law Notification Sanctions

a. Administrative actions

Public notification of dangerous products or business practices frequently occurs as a result of administrative actions. For example, if

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106. Andrew Cowan, *Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. Cal. L. Rev. 2387, 2396 (1992).

107. *See* S. Rep. No. 225, 98th Cong., 1st Sess. § 3553(a)(2)(A)-(D) (1983) (discussing goals of criminal organizational notification sanctions); *see also* Artway v. Attorney Gen. of N.J., 876 F. Supp. 666 (D.N.J. 1995) (discussing deterrent function of sex offender notification laws); United States v. Danilow Pastry Co., 563 F. Supp. 1159 (S.D.N.Y. 1983) (reasoning that requiring bakery defendant convicted of price-fixing to make monthly donations of baked goods for one year serves to remind executives and workers of violations and to guard against similar future violations); Lindsay v. State, 606 So. 2d 652 (Fla. Dist. Ct. App. 1992) (explaining that publicizing DUI conviction may discourage repetition of the act); Ballenger v. State, 436 S.E.2d 793 (Ga. App. 1993) (noting deterrence value of requiring DUI convict to wear florescent pink bracelet imprinted with the words "DUI Convict").

108. *Ballenger*, 436 S.E.2d at 794-95 (noting that requiring DUI convict to wear florescent pink bracelet serves as a reminder to the defendant of the consequences of driving while intoxicated, and thus hopefully has a rehabilitative effect).

109. *See infra* notes 252-56 and accompanying text (discussing how notification alerts the public to wrongdoing, thus allowing the public to protect itself from future harm); *see also Ballenger*, 436 S.E.2d at 795 (noting that forcing a DUI convict to wear a florescent pink bracelet may protect society in the event that someone notices the bracelet and chooses not to ride with him or refuses to allow him to drive).

Protection of society also is the justification for the recent sex offender notification statutes. *See, e.g.*, Tennessee v. Burdin, No. 02C01-9306-CR-00121, 1994 WL 716262 (Tenn. Crim. App. Dec. 28, 1994). For a review of recent sex offender notification statutes and a discussion of their constitutional implications, see Michelle Pia Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration and the Public's "Right to Know"*, 48 Vand. L. Rev. 219 (1995); Jenny A. Montana, Note, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law*, 3 J.L. & Pol'y 569 (1995).

the National Highway Traffic Safety Administration (NHTSA) determines that a motor vehicle defect relating to motor vehicle safety exists, the manufacturer must notify all registered vehicle owners of the NHTSA's finding,[110] even if the manufacturer contests the finding.[111] For example, in a case in which Ford cars had an alleged defect in the transmissions causing them to slip out of park and into reverse, a negotiated settlement resulted in Ford mailing vehicle owners a letter informing them of the NHTSA's defect determination, along with a self-sticking warning label to affix to their dashboards.[112] The label reminded drivers to set the parking brake and turn off the ignition before leaving the car.[113]

The Consumer Product Safety Commission (CPSC) may insist a manufacturer notify the public and, in some cases, recall a product when the product presents a "substantial hazard" or "substantial risk of injury" to the public.[114] For example, the CPSC required that a notice of a defect in scuba gear be placed in diving magazines,[115] and that a notice of a rototiller's danger be advertised in gardening magazines.[116] A crib manufacturer was required to advertise a strangulation hazard in magazines catering to parents of newborns, to mail notices of the problem to every United States household known to have children up to the age of twenty-one months, and to mail warning posters to all known pediatric clinics and maternity wards in the country.[117]

The National Labor Relations Board (NLRB) may require companies violating the National Labor Relations Act to post a notice that identifies the labor violations and that also expresses a commitment to incur no future violations.[118] In some cases, the NLRB requires employers to read the notice to a gathering of its employees.[119]

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110. 15 U.S.C. § 30119 (1994). For a comprehensive discussion of this statute and cases in which it has been applied, see Teresa M. Schwartz & Robert Adler, *Product Recalls, a Remedy in Need of Repair*, 34 CASE W. RES. 401, 419 (1984).

111. 49 C.F.R. § 577.6 (1994). The notification must contain a clear description of the basis for NHTSA's determination, and must state measures the vehicle owner should take to avoid the hazard created by the defect. *Id.* § 577.6(5)-(7).

112. Schwartz & Adler, *supra* note 110, at 419.

113. *Id.*

114. 15 U.S.C. § 2064 (1994).

115. Schwartz & Adler, *supra* note 110, at 443 n.293.

116. *Id.*

117. *Id.* at 443.

118. 29 U.S.C. § 160(c) (1988). For a discussion of this administrative remedy, see John W. Teeter, Jr., *Fair Notice: Assuring Victims of Unfair Labor Practices that Their Rights Will Be Respected*, 63 UMKC L. REV. 1 (1994).

119. *See* Teeter, *supra* note 118, at 23 (detailing cases in which the NLRB ordered the notice read, as well as posted).

The Federal Trade Commission imposes public notification sanctions when necessary to notify the public of existing dangers or misconceptions created by deceptive advertising.[120] Other agencies with power to order public notification include the Environmental Protection Agency and the Securities and Exchange Commission.[121]

b. Non-administrative civil law cases

Civil public notification sanctions occur in non-administrative agency contexts as well. For example, in *Lorain Journal Co. v. United States*,[122] the United States Supreme Court affirmed a decision in which the trial court had required a newspaper publisher in violation of the Sherman Antitrust Act to publicize, for twenty-five weeks, the terms of an injunction restraining it from further anti-competitive conduct.[123] A recent Georgia case gave the defendant the option of paying a $115 million fine for discovery abuses or paying $14 million and buying newspaper advertisements in which it admitted it wrongly withheld documents during discovery.[124]

Other examples of civil courts ordering notification can be found in cases involving violations of the Fair Housing Act (FHA). It is not unusual for a court to order public notification of non-discriminatory policies as a remedy for past FHA violations.[125]

2. Criminal Law Notification Sanctions

a. Historical roots of public notification

Civil notification sanctions are a relatively recent phenomena. However, public notification of criminal wrongdoing can be traced at

120. *See* Warner Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977) (holding that FTC could require corrective advertisements regarding Listerine's ability to fight colds and sore throats). For additional FTC corrective orders, see Cowan, *supra* note 106, at 2397.

121. Cowan, *supra* note 106, at 2397; *see also* Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. REG. 149, 288 (1990) (noting that the SEC "perceives publicity as an important component of the deterrent effect of its enforcement program . . .").

122. 342 U.S. 143 (1951).

123. *Id.* at 158.

124. Emily Heller & Judy Bailey, *DuPont, A&B Slam Fraud Sanction*, FULTON COUNTY DAILY REP., Aug. 23, 1995, at 1, 6, 7.

125. *See, e.g.*, United States v. Parma, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *see also* United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973), *aff'd in relevant part*, 509 F.2d 623 (9th Cir. 1975).

least as far back as colonial America.[126] At that time, common forms of punishment included stocks and pillories.[127]

People convicted of a crime could be compelled to be placed in stocks in the center of town or to stand in the pillory wearing a sign listing their crimes.[128] Sometimes, punishment involved daily wearing of signs or letters signifying the offense.[129] In some cases, the punishment was even more literal. For example, a baker convicted of selling short loaves of bread was sentenced to wear a loaf of bread around his neck and a fishmonger selling bad fish to wear smelly fish on his collar.[130]

b. Public notification under corporate criminal sentencing guidelines

As the country developed, imprisonment replaced public notification sanctions.[131] Recently, in the search for alternatives to imprisonment, notification sanctions have re-emerged in criminal cases. Corporate criminal sentencing is one area in which public notification sanctions have received official endorsement. The United States Sentencing Guidelines explicitly authorize the use of public notification of organizational[132] wrongdoing in two situations: (1) as a term of sentencing when the notification is necessary to alert victims to potential civil remedies[133] and (2) as a condition of probation in corporate criminal sentencing.[134] Although classified as a condition of probation in the second instance, the publicity sanction actually is considered a punitive option designed to increase corporate deterrence by "playing upon managerial concerns about firm reputations."[135] One example

126. Rosalind K. Kelley, Comment, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing — Are They Constitutional?*, 93 DICK. L. REV. 759, 763 (1989).

127. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913-14 (1991).

128. *Id.* at 113.

129. *Id.* Nathaniel Hawthorne's fictional work, THE SCARLET LETTER, best exemplifies this early form of punishment.

130. Jon A. Brilliant, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1361 n.28 (citing GEORGE IVES, A HISTORY OF PENAL METHODS (1914)).

131. Kelley, *supra* note 126, at 763.

132. Organization means "a person other than an individual" which "includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations." United States Sentencing Comm'n, *Guidelines Manual* § 8A1.1 cmt. n.1 (Nov. 1994) [hereinafter *Guidelines*].

133. *Id.* § 5F1.4.

134. *Id.* § 8D1.4(a).

135. Richard S. Gruner, *Beyond Fines: Innovative Corporate Sentences Under Federal Sentencing Guidelines*, 71 WASH. U. L.Q. 261, 322 (1993) (citing William W. Wilkins, Jr., *Sentencing*

of the formal use of publicity as a corporate criminal penalty can be found in a plea agreement involving violation of the Clean Air Act. Using section 8D1.4a of the Sentencing Guidelines, prosecutors negotiated a plea in which the defendant, charged with unlawful emissions, agreed to pay for advertisements in mass circulation newspapers and trade journals which explained its wrongdoing, conviction, the punishment imposed and steps taken to prevent a re-occurrence.[136]

c. Notification sanctions in non-guidelines criminal cases

Public notification sanctions are not confined to cases coming under the corporate criminal sentencing guidelines. Judges across the country have employed publication sanctions as a condition of probation in a wide variety of non-guideline criminal cases. For example, in drunk driving cases, courts have required defendants convicted of drunk driving to place ads in the local newspapers,[137] to place bumper stickers on their cars,[138] and to wear florescent pink bracelets with the words "DUI Convict" imprinted on them.[139] A convicted sex offender was required to post a sign on his residence and car door stating: "Dangerous sex offender."[140]

Courts also have required police officers making perjurious statements to issue a public apology.[141] In Ohio, some courts require first-time offenders to write a "confessional letter" to the local newspapers.[142] In Tennessee, a defendant convicted of helping someone sell a stolen vehicle was required to confess his crime before a church congregation.[143] A corporation convicted of price-fixing was required to

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Guidelines for Organizational Defendants, 3 FED. SENTENCING REP. 118, 119 (1990)). *But see* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 452-55 (arguing publicity sanctions are not the most effective form of corporate sanctioning).

136. Guilty Plea Agreement, United States v. Norwood Indus. (E.D. Pa. filed Mar. 1, 1994) (No. 94-34).

137. Lindsay v. State, 606 So. 2d 652 (Fla. Dist. Ct. App. 1992).

138. Goldschmitt v. State, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986); People v. Letterlough, 613 N.Y.S.2d 687 (1994).

139. Ballenger v. State, 436 S.E.2d 793, 794 (Ga. App. 1993).

140. State v. Batemen, 771 P.2d 314, 316 (Or. App. 1989) (en banc), *cert. denied*, 777 P.2d 410 (Or. 1989). The court never addressed the defendant's arguments that the sign requirement was an invalid condition of probation, in that it constituted "cruel and unusual punishment," because prior to his appeal, the defendant's probation was revoked.

141. United States v. Clark, 918 F.2d 843 (9th Cir. 1990).

142. Massaro, *supra* note 127, at 1888.

143. *Id.*

make a dozen speeches to civil groups about the evils of price fixing.[144]

Judges are not the only ones imposing notification sanctions. Communities across the country also use publication of wrongdoing as a means to discourage socially unacceptable conduct. In some states, cable TV is used to publicize the names of those arrested for soliciting sex or attempting to buy drugs.[145] In La Mesa, California, pictures of men visiting prostitutes are publicized in local papers.[146] In Alabama's Holman Prison, hot pink uniforms are issued to inmates who expose themselves to female guards.[147] Finally, in small towns across the country, the names of those who fail to pay their property taxes are published in the town newspaper.[148]

C. Problems with Existing Notification Sanctions

Existing public notification sanctions provide one means to alert the public to dangers and to punish and deter wrongdoers. However, for numerous reasons, existing sanctions fail to encompass all wrongdoing of which the public should be made aware. First, lack of resources severely limit regulatory agencies' ability to discover and prosecute all business conduct harmful to the public.[149] Regulatory agencies rely, in large part, on the industries they police to provide information about product hazards.[150] Thus, the initial problem in relying on administrative agencies as the only means of notifying the public about dangerous products is that, in many instances, the agency itself does not discover the problem.

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144. *See* United States v. William Anderson Co., 698 F.2d 911, 912 (8th Cir. 1982) (describing publicity sanctions used by other criminal courts).

Not all judges endorse public notification sanctions. *See, e.g.*, Conair Corp. v. NLRB, 721 F.2d 1355, 1401 (D.C. Cir. 1983) (Ginsburg, J., dissenting) (arguing that forcing company president to read notice of labor violations is so humiliating that it is "incompatible with the democratic principles of the dignity of man") (citation omitted); Vaughan & Sons, Inc. v. State, 737 S.W. 2d 805, 816 (Tx. Crim. App. 1987) (Teague, J., dissenting) (noting that if trial courts utilized Texas statute permitting widespread publication of corporate criminal conviction, it would be "the equivalent of assessing the death penalty for such a corporation").

145. *See* John Larrabee, *Fighting Crime with a Dose of Shame*, USA TODAY, June 19, 1995, at 3A.

146. *Id.*

147. *Id.*

148. *See, e.g.*, THE NORWICH SUN, Norwich, New York; THE STAR HERALD, Presque Isle, Maine.

149. Galanter and Luban, *supra* note 4, at 1442-44; Mallor & Roberts, *supra* note 46, at 649; Rustad, *supra* note 7, at 73-75.

150. *See* Schwartz & Adler, *supra* note 110, at 410, 431, 454 (explaining self-reporting requirements of NHTSA, CPSC and FDA).

Second, even if an agency detects a potential problem, limited resources and political pressures limit the agencies' ability to remedy the problem.[151] Industries often successfully directly lobby regulatory agencies as well as Congress and the administration in an attempt to forestall regulatory action.[152] Third, existing criminal law notification sanctions also do not fully inform the public of a business' dangerous or unethical practices. Criminal prosecutorial offices suffer from the same lack of resources confronting regulatory agencies.[153] Few businesses are ever prosecuted in cases in which civil punitive damage claims are awarded,[154] in part because many situations covered by civil punitive damages awards are beyond the reach of the criminal process.[155] Finally, even when prosecuting businesses, although the power to order notification exists under corporate criminal sentencing guidelines, this power is rarely used.[156] Because of these limitations, existing notification sanctions do not encompass all conduct for which a jury awards punitive damages. Thus, the proposed publicity penalty should complement, rather than duplicate, existing notification sanctions.

IV. WHY PUBLIC NOTIFICATION SHOULD BE USED AS A SUPPLEMENT TO MONETARY PUNITIVE DAMAGES

A. An Overview of the Publicity Penalty

Most agree that some form of monetary punitive damages awards is necessary to achieve the deterrent and punishment purposes of puni-

151. Teresa M. Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1149, 1154-55, 1162 n.207 (1988).

152. *Id.* at 1149. During the Reagan Administration, if direct lobbying was ineffective, businessmen were encouraged to go directly to the Office of Management and Budget or the White House for help in getting regulatory relief. *Id.* at 1154.

Industry leaders also are the impetus behind recent proposed legislation to cut regulatory agency funding and to require agencies to engage in a cost/benefit analysis of new and existing regulations. *See* David Rogers, *GOP Steps Up Efforts to Cut Funding for U.S. Agencies Opposed by Its Allies*, WALL ST. J., July 13, 1995, at A12 (noting that House Republicans are accelerating their efforts to use spending bills to restrict federal agencies that have angered business and conservative groups).

153. Galanter & Luban, *supra* note 4, at 1444; Mallor & Roberts, *supra* note 46, at 649; Rustad, *supra* note 7, at 73-75.

154. In products liability cases between 1965 and 1990 in which punitive damages were awarded, only one defendant was criminally sanctioned for its failure to protect the consuming public. Rustad, *supra* note 7, at 30, 73.

155. Mallor & Roberts, *supra* note 46, at 649.

156. The author found no reported cases in which courts imposed the notification sanctions permitted by the Sentencing Guidelines. *But see* Guilty Plea Agreement, United States v. Norwood Indus. (E.D. Pa. filed Mar. 1, 1994) (No. 94-34).

tive damages,[157] and to encourage plaintiffs to pursue punitive damages claims.[158] The amount of monetary awards necessary to achieve these goals has been hotly debated.[159] As a result, many states currently put limits on monetary awards, and national legislation limiting awards has been proposed.[160] However, while reducing monetary awards, state legislatures are not substituting other means to discourage the egregious misconduct punitive damages are designed to punish and deter. As we reduce monetary sanctions, we need to look at other means to achieve the goals of punitive damages. Thus, this article proposes that current monetary punitive damages awards be supplemented by a "publicity penalty" requiring public notification of the awards and the conduct leading to them. Publication should occur on the Internet as well as in other media.

The proposed publicity penalty contains three essential elements. As a threshold issue, it requires that information about the wrongdoer's misconduct reach the public. Thus, the "information highway" existing today is critical to the penalty's success. Second, the proposed penalty operates under the assumption that businesses value their public images. Finally, concern about public reaction to the wrongdoing, and its consequent impact on the business' public image must influence a change in the corporate culture. When these three building blocks are set in place, the publicity penalty may fulfill the underlying objectives of punitive damages in a way that monetary sanctions alone cannot.

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157. Even those who suggest punitive damage reforms do not call for their outright elimination. *See, e.g.*, Ausness, *supra* note 24, at 92-120 (arguing that an acceptable level of deterrence can be achieved by making various procedural reforms); Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143 (1989) (answering the questions of "When?" and "How much?" by suggesting that a "gross shortfall" of compensatory damages is needed to justify a punitive damages award and that a "rule of reciprocal" be used for computing the award); Ellis, *The Jury*, *supra* note 31 (concluding that various procedural changes are needed to render punitive damages awards fair); Johnston, *supra* note 36, at 1433-39 (asserting that the best way to control corporations' "risky activities" is to use a combination of punitive liability and strict liability); Wheeler, *Proposal*, *supra* note 36, at 946-60 (proposing common law developments which would attempt to channel punitive damages awards to better serve their retributive and deterrent purposes). *But see* Elliott, *supra* note 31 (suggesting abolition of, or severe restrictions on, punitive damages). For additional proposed changes to the current system of awarding punitive damages, see *supra* note 36.

158. Chapman & Trebilcock, *supra* note 36, at 786-89; Galanter & Luban, *supra* note 4, at 1451-53; Mallor & Roberts, *supra* note 46, at 649-50.

159. *See supra* notes 78-92 and accompanying text (discussing proposals to legislatively limit punitive damage awards).

160. *See supra* note 72 (citing sources which delineate state legislation capping punitive damage awards).

1. *The Internet Makes the Publicity Penalty Viable*

Although the proposed penalty involves publication in traditional media, it also requires publication on the Internet on a dedicated World Wide Web page entitled "Punitive Damages Awards." In fact, the continued growth of the Internet makes the publicity penalty particularly viable. This new method of mass communication provides a means of distributing information which was not available just a few years ago.[161]

One benefit of the Internet is that it is inexpensive. Because so many punitive damage awards are under $100,000,[162] meaningful public notification through traditional media forums may be cost-prohibitive. The Internet alleviates this problem.

Publication through the Internet also provides a central depository of information. A consumer considering purchasing a particular product, or a business contemplating entering a course of dealing with another business, may quickly discover facts relevant to their decision by simply accessing the dedicated World Wide Web page.[163]

An announcement on the World Wide Web also has advantages over more traditional means of publication in that the World Wide Web publication can be long-term. This resolves the problem presented by limited short term publication in local media markets, trade journals, or other mediums. A person might not see a short-term notice either because the person does not receive the medium in which the notice is publicized, or because the person is not interested

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161. *See supra* note 6 and accompanying text (discussing the rapid growth of the Internet).

162. *See supra* notes 58-60 and accompanying text (discussing empirical data on the amount of punitive damage awards).

163. For example, a consumer considering buying a particular vehicle can learn about the vehicle's defects and the manufacturer's failure to correct a defect. *See, e.g.*, Leichtamer v. American Motors Corp., 424 N.E.2d 568 (Ohio 1981) (affirming an award of punitive damages for failure to test Jeep's ability to withstand rollovers and advertising the Jeep as safe for all terrains despite the fact that Jeep rolled easily on downhill slopes). The consumer can then investigate whether a defect has been corrected.

A consumer considering investing with a particular brokerage company can discover whether the brokerage company previously engaged in fraudulent conduct, and if so, what occurred. *See, e.g.*, Jordan v. Clayton Brokerage Co., 975 F.2d 539 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1272 (1993) (affirming, on remand from U.S. Supreme Court, an award of punitive damages against a commodities brokerage firm for fraudulent handling of investor's account). Based on this information, the consumer may question the brokerage company about its investment practices and determine whether the practices which led to the punitive damages award have been reformed.

A company considering entering into a contract with another business may discover whether that business previously engaged in unfair business practices. *See, e.g.*, MGW, Inc. v. Fredricks Dev. Corp., 6 Cal. Rptr. 2d 888 (Cal. Ct. App. 1992) (affirming punitive damages award for deceptive practices resulting in failure to pay real estate brokerage fee). With this information, it can take steps to prevent a similar occurrence in its business dealings.

in the offending company at the time of publication. In contrast, information on the Internet can be accessible long after the original publication has ceased. Therefore, the information is available at the time the public needs it—when it is considering doing business with the wrongdoer.

The Internet also provides an easy means for people to express their disapproval through on-line discussions, or to communicate their thoughts directly to businesses through e-mail. Offending companies quickly become aware of the public outcry. Often, this can change the business' behavior.

The Intel pentium processor chip defect aptly illustrates how public notification, combined with use of the Internet, can change a business' conduct. What began as a message over the Internet about an Intel processing chip which inaccurately calculated high level mathematics equations, quickly blossomed into a multiple-day story which was broadcast not only in the traditional media, but also hotly debated on the Internet.[164] As word got out, many businesses began to question the chip's accuracy.[165] Intel, which originally intended to replace the chip only for those using computers for high level mathematical calculations, eventually changed its position.[166] To maintain its positive public image,[167] Intel agreed to replace the chip for any customer upon the customer's request.[168]

One reason the Intel story effected a change in conduct was that the public, through both the Internet and traditional media forums, be-

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164. In October, 1994, a professor discovered discrepancies in high level mathematical research calculations due to an Intel Pentium processor chip. Dr. Thomas R. Nicely, *At the Heart of the Pentium Debate: A Complex Problem, a Simple Solution*, S.F. EXAMINER, Dec. 18, 1994, at B5. The professor posted a warning on the Internet to others working in his area. T.R. Reid, *Personal Computing: It's a Dangerous Precedence To Make the Pentium Promise*, WASH. POST, Dec. 26, 1994, at F14. The "report spawned an outburst of anti-Intel flame mail on the [Internet] bulletin boards." *Id.* Eventually, the popular press picked up the story.

165. Intel became inundated with calls, in part due to the spread of the news about the Pentium flaw to the "information superhighway — the Internet." *Intel Plans No Recall of Chips with "Rare" Flaw*, S.F. EXAMINER, Dec. 7, 1994, at B4. Eventually, public exposure of the problem forced IBM to halt shipments of computers containing the chips based on a determination that the chip could have flaws affecting common mathematical calculations as well. Peter H. Lewis, *IBM Halts Sale of Pentium Chip*, THE COMM. APPEAL (Memphis), Dec. 13, 1994, at 8A; *see also* Leslie Helm, *Pentium Chip Flaw Could Leave Intel Liable for Damages*, L.A. TIMES, Dec. 16, 1994, at D1 (noting that the chips' defect produced responses from the Food and Drug Administration, Smith Barney, and individual entrepreneurs, among others).

166. John Markoff, *Intel Bows to Pressure, Offers To Replace Faulty Computer Chips*, SAN DIEGO UNION-TRIBUNE, Dec. 21, 1994, at A1.

167. As publicity increased and consumers learned about the problems, many became angry when they learned Intel knew about the problem and failed to disclose it. *See* Helm, *supra* note 165, at D1.

168. *Id.*

came aware of the problem and Intel's attitude about the problem. It is this kind of exposure, with a full disclosure of facts,[169] that the publicity penalty is designed to engender. Therefore, the penalty requires not only that the award itself be published, but also that the reasons underlying the award[170] become part of the notification, in whatever forum the notification is publicized.[171]

2. *Businesses Fear Sanctions Affecting Their Public Image*

As the Intel experience illustrates, in addition to the importance of the "information highway," the effectiveness of the publicity penalty depends in large part upon the importance a business places on its public image. Companies spend millions each year building and solidifying their public image, separate and apart from money spent on specific product advertisements.[172]

> The climate of opinion, and therefore the projection of the company as a moral, useful, and likeable member of society, which creates and sustains it, becomes (as it were) a *direct* objective of management. It does not contradict the purely business objectives as they are classically understood, but it is not simply subservient or intermediate to those objectives. It exists in its own right as an operational goal of prime importance.[173]

Businesses have strong reason to believe that a positive public image has value in itself. A positive image reflects positively on employees, especially senior executives, who generally are status-conscious people.[174] When a company suffers from a bad public image, its em-

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169. Some argued that the chip defect story got blown out of proportion, resulting in many unnecessary replacement requests. Reid, *supra* note 164, at F14. Others argued that Intel could have avoided the public relations nightmare by disclosing the flaw upon its original discovery. Nicely, *supra* note 164, at B5. Then, if users decided the flaw was a threat to their work, Intel should have offered to supply a replacement chip. *Id.*

170. Although traditionally, we have not required an explanation of the jury's verdict, this proposal is not without precedent. Many jurisdictions permit special interrogatories which seek the factual basis of the jury's verdict. *See, e.g.*, KAN. STAT. ANN. § 60-249 (1994) (allowing, pursuant to the judge's discretion, written interrogatories to be submitted to the jury upon written request); OHIO R. CIV. PRO. 49(B) (1995) (same); S.C. R. CIV. P. 49(b) (1991) (permitting interrogatories at the court's discretion); S.D. CODIFIED LAWS ANN. § 15-6-49(b) (1995) (same).

171. The content of the publication obviously is case specific. However, it should contain basic factual information about the case, such as the name of the defendants, a synopsis of relevant facts, the harm the conduct caused, the amount of the award, and most importantly, the reasons the jury found the conduct warranted punitive damages.

172. FISSE & BRAITHWAITE, *supra* note 1, at 289-90. Advertisements often promote the company, rather than a specific product (e.g. "Maytag is dependable," or "You're in good hands with Allstate").

173. *Id.* at 248 (quoting Charles Channon, *Corporations and the Politics of Perception*, 60 ADVERTISING Q. 12, 13 (1981)).

174. *Id.* at 152, 232, 240; *see also* Coffee, *supra* note 135, at 389 n.12 (citing Daniel Nagin & Alfred Blumstein, *The Deterrent Effect of Legal Sanctions on Draft Evasion*, 29 STAN. L. REV.

ployees, particularly senior executives, may feel like they have lost status in the community.[175] Although lower level employees may not believe that their status in the community is as directly linked to their company's reputation as higher level management, even lower level employees get satisfaction from working with what they deem to be a reputable company.[176] A positive image thus affects employee morale.[177]

A positive image also has other benefits. Credibility within the community makes it easier for businesses to influence legislators. A good image may make company lobbyists "be seen as more credible when they lobby for or against legislation affecting industry."[178] On the other hand, a negative image may not only make it difficult to influence legislators, it may also lead to legislation businesses perceive as harmful.[179]

Another reason businesses fear negative publicity is that a negative public image may have serious financial repercussions. For example, in the weeks following the Lockerbie disaster in which terrorists bombed a Pan Am airliner, the public's perception of Pan Am as an unsafe airline led to a significant drop in the airline's transatlantic business.[180] Similarly, the negative publicity surrounding the Exxon Valdez oil spill caused thousands of enraged consumers to return their Exxon credit cards.[181] Thus, while a positive image may bring with it

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241 (1977) as support for the proposition that social stigmatization is the primary deterrent for middle-class white-collar criminals).

175. FISSE & BRAITHWAITE, *supra* note 1, at 71.

176. *Id.* at 152-53.

177. For example, a key strategy of Drexel Burham during the two year junk bond crises was aimed at building employee morale. JACK A. GOTTSCHALK, CRISIS RESPONSE — INSIDE STORIES ON MANAGING IMAGE UNDER SIEGE 8-16 (1993). "When employee morale is up you can fight back. When it's not up everything stands still. Employees don't work, productivity slides precipitously, and defections start." *Id.* at 9. Although some companies believe employee morale has an impact on the companies' economic performance, many organizations value employee morale as an end in itself. FISSE & BRAITHWAITE, *supra* note 1, at 232.

178. Cowan, *supra* note 106, at 2398.

179. For example, after the Three Mile Island disaster, there was "an immediate congressional outcry calling for more effective licensing and oversight by the [U.S. Nuclear Regulatory Commission]" of nuclear power plants. GOTTSCHALK, *supra* note 177, at 120. Following the Pinto collisions, a federal bill was introduced requiring corporate managers to disclose life-threatening defects in any of their companies' products. FISSE & BRAITHWAITE, *supra* note 1, at 51. After a General Electric price-fixing scandal became widely publicized, several bills were introduced to strengthen antitrust laws. *Id.* at 191. After publicity surrounding an inadequate security case, and its attendant multi-million dollar punitive damages award, the Texas legislature enacted legislation requiring apartment owners to install more effective security devices. Michael Totty, *Valid Litigation Will Be a Victim of Tort Reform Bills, Critics Say*, WALL ST. J., Jan. 18, 1995, at T1.

180. GOTTSCHALK, *supra* note 177, at 259-60.

181. *Id.* at 133.

economic benefits that are difficult to quantify, a negative image may result in direct economic repercussions such as those illustrated above.

Furthermore, studies show that negative publicity about a product's safety may affect consumer confidence and lead to a decline in sales, profitability, and stock market values.[182] Studies also suggest that negative publicity surrounding indictments for fraudulent business dealings often results in higher costs of obtaining suppliers.[183]

Corporations "that perceive that adverse publicity threatens their good will will go to great length to correct internal deficiencies and publicize their actions."[184] Because businesses place such high value on their reputations, their fear of negative publicity is palpable.[185] In fact, opinion surveys suggest "corporations fear the sting of adverse publicity attacks on their reputations more than they fear the law itself."[186] With the advent of such technological advances as the Internet, leading to the rapid spread of information, the impact negative information can have upon a company's image is greater today than ever before. These factors—business' focus on image, the ease of widespread publication, and the public reaction to the notification—indicate that a publicity penalty may be an effective means to achieve the underlying rationales of punitive damages.

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182. Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395, 411-12 (1991); *see also* Gregg Jarrell & Sam Peltzman, *The Impact of Product Recalls on the Wealth of Sellers*, 93 J. POL. ECON. 512 (1985) (finding that the loss of goodwill resulting from a company's product recall far exceeds the specific cost of recalling the product).

183. Block, *supra* note 182, at 412.

184. Donald J. Miester, Jr., Comment, *Criminal Liability for Corporations that Kill*, 64 TUL. L. REV. 919, 943 (1990).

Such efforts are illustrated by Chrysler's conduct following a criminal indictment for fraud based on employee odometer tampering. The indictment charged that Chrysler employees disconnected odometers on approximately 60,000 new cars that were then driven by Chrysler executives. *Chrysler Faces $7.6 Million Fine for Mail Fraud*, WALL ST. J., Aug. 13, 1990, at C9. Following the publicity that the charges received, Chrysler polled 800 people, finding that 69% were aware of the charge and that more than half regarded it as a serious issue. *Id.* In response, Chrysler began a major public relations campaign, including a public apology, in the hope that it could reduce the negative effect that the odometer tampering charges had on the company's reputation. James Risem, *Iacocca Steps in To Close Chrysler Credibility Gap*, L.A. TIMES, July 13, 1987, § 4, at 1.

185. Many businesses hire newspaper clipping services and are particularly sensitive to compilations of adverse publicity collected by these services. FISSE & BRAITHWAITE, *supra* note 1, at 292. To combat negative publicity, many major companies have 'crises management teams' in place which are trained and ready to respond to negative publicity. *See* GOTTSCHALK, *supra* note 177, at 8, 11, 84, 95 (providing illustrations of public relations strategies implemented in response to crises generating negative publicity at companies such as Drexel Burnham Lambert, CBS, and Penzoil).

186. FISSE & BRAITHWAITE, *supra* note 1, at 249.

3. *Interplay Between Public Image and Corporate Culture*

The final key to the publicity penalty's effectiveness is that the widespread dissemination of misconduct and resulting threat to a company's public image must result in a change in the organizational culture which led to the misconduct. An organization's culture dictates the organization's behavior, both in the way it deals with its employees,[187] and in the way it deals with the public: "Companies develop their own distinctive personality and ethos which is so ingrained, so much a part of them, that the corporate identity expresses itself in their every action."[188] Those who do not adapt to the company culture do not advance and often do not last long at the company.[189]

Various studies of corporate criminality show that certain organizational cultures embrace internal social structures and processes that encourage unlawful behavior.[190] In one study, sixty-four middle-management employees of various Fortune 500 companies were interviewed.[191] These employees indicated that those companies most likely to engage in unethical or unlawful business practices were those in which: (1) middle management was under substantial pressure to show a profit; (2) employee relations were unsatisfactory; and (3) top management encouraged, condoned, or turned a "blind eye" to the unethical or unlawful behavior.[192] The employees maintained that top management's attitudes were primarily responsible for most cultures in which unethical or illegal practices were likely to occur.[193]

The publicity penalty relies on the concept that internal values affect the way in which an organization deals with the public. If an organization's culture led to the misconduct subjecting it to punitive damages, or the misconduct was caused by a deviation from stated values, it will often take more than monetary sanctions to force the

187. *See, e.g.*, JAMES C. COLLINS & JERRY I. PORRAS, BUILT TO LAST: SUCCESSFUL HABITS OF VISIONARY COMPANIES 127-31 (1994) (citing the Walt Disney Company as one example of a firm that instills pride in its employees by constantly emphasizing to them that Disney is "special," "different," "unique," and "magical").

188. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1123 (1991) (quoting WALLY OLINS, THE CORPORATE PERSONALITY 82 (1978)).

189. *See, e.g.*, COLLINS & PORRAS, *supra* note 187, at 129-31 (describing the Walt Disney Company's culture as "cult-like," and noting that non-conformance to the company's "sacred ideology" was "punishable by immediate and unceremonious termination").

190. Bucy, *supra* note 188, at 1125-26.

191. *Id.* at 1126 (citing study reported in MARSHALL BARRON CLINARD, CORPORATE ETHICS AND CRIME 122 (1983)).

192. *Id.*

193. *Id.*

company to re-examine its values, or the manner in which its values are communicated to the organization's employees.[194] The publicity penalty may provide a company with the impetus to re-examine its values.[195] This impetus would be the threat to the company's public image.

B. The Publicity Penalty Increases Punitive Damages' Effectiveness in Achieving Underlying Objectives

This section discusses the publicity penalty's ability to effectuate each of the four objectives of punitive damages: deterrence, retribution, rehabilitation, and incapacitation. The criticisms of the penalty's ability to achieve each objective also is addressed.

1. Deterrence with the Publicity Penalty

> The deterrent effect of punishment is heightened if it inflicts disgrace and contumely in a dramatic and spectacular manner. . . . [P]ainful publicity is not relished by corporate tycoons. Public opinion can be sharply focussed on culprits engaged in antisocial anticompetitive conduct by means of "creative" sentencing. Measures are effective which have the impact of the "scarlet letter" described by Nathaniel Hawthorne, or the English equivalent of "wearing papers" in the vicinity of Westminster Hall like a sandwich man's sign describing the culprit's transgressions.[196]

a. Public notification promotes specific deterrence

Publication of misconduct, especially publication via the Internet which already reaches millions of people,[197] means that the public and other businesses will have the means to quickly learn of the misconduct leading to the award. With this information, the public and other

194. *See supra* part II.D (discussing the reasons why monetary sanctions may have an inadequate impact on businesses). Most scholars of corporate criminal behavior, although employing different models and methods of analysis, agree that to reform corporate criminal conduct, one must examine the internal conditions leading to the misconduct and employ a sanction aimed at affecting the internal corporate structure. For an overview of the different models of corporate criminal culpability, see William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647 (1994).

195. Scholars of corporate criminal behavior have spent years researching and debating the most effective means to reform corporate criminal conduct. *See* Laufer, *supra* note 194 (examining the strengths and limitations of several models of corporate culpability). I do not presume to suggest adverse publicity, alone, will change corporate culture from one in which unethical practices are encouraged to one in which they are condemned. However, for the reasons explained in this section, the increased scrutiny that comes with adverse publicity may have a significant impact on a business' motivation to examine and change the culture which led to the misconduct resulting in a punitive damages award.

196. United States v. William Anderson Co., 698 F.2d 911, 913 (8th Cir. 1982).

197. *See supra* note 6 (discussing the rapid growth of the Internet).

businesses dealing with the defendant may scrutinize the defendant's business practices more closely,[198] thereby reducing the potential for repetition of the wrongdoing.

Publication also specifically deters by ensuring that more than the top executives and the people involved in the litigation become informed. Public notification forces a company to confront and deal with the misconduct internally as well as externally. It compels the company to discuss the misconduct,[199] which may lead employees to consciously avoid the kind of misconduct which can harm the company.[200]

b. Public notification promotes general deterrence

The public notification sanction promotes general deterrence because it educates other potential tortfeasors about the type of conduct juries find reprehensible. Armed with this knowledge, businesses may tailor their conduct to avoid imposition of this sanction.

One explanation for the prevalence of business misconduct is that companies faced with high costs and uncertainty in devising strategies imitate the observed behavior of other similarly situated companies.[201] When an industry commonly adheres to a particular custom or practice, corporate managers may incorrectly conclude that the practice is socially acceptable.[202] Alternatively, managers may estimate that the consequences for engaging in the practice will not be serious even when they know a particular practice is unacceptable.[203] The notification sanction may disabuse managers of this idea.

198. Gruner, *supra* note 135, at 298 (noting that with greater information about a firm's offensive conduct, potential consumers of a firm's products or services "can adjust their subsequent dealings with a convicted firm to better detect and prevent corporate crimes").

199. For example, the publicity surrounding the indictment of many of its employees during the junk bond crises forced Drexel Burnham to update and educate its employees about the allegations and government investigations. GOTTSCHALK, *supra* note 177, at 11-12. Many of the companies studied by Fisse and Braithwaite not only addressed the misconduct, but also instituted reforms requiring more communication between lower level management and top executives. FISSE & BRAITHWAITE, *supra* note 1, at 234.

200. *See infra* part IV.B.1.c.iii (discussing the deterrence impact of the publicity penalty on middle management). *But see* Coffee, *supra* note 135, at 394-400 (discussing why mid and lower level employees may not be responsive to penalties assessed against the corporation even in the face of top management directives to change behavior). Professor Coffee argues that publicity sanctions best deter if they expose the misconduct of the employee as well as the corporation. *See* Coffee, *supra*, at 407-11.

201. Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315, 329-30 (1991).

202. *Id.* at 329.

203. *Id.*

With the proposed publicity sanction, the details concerning a company's misconduct and the resulting punishment would be communicated. It would be publicized that, even though it may be industry custom to wait for federal government money before fixing a dangerous railroad crossing,[204] or to fail to use flame retardant on children's pajamas,[205] or to discharge suicidal mental health patients when their insurance limits are reached,[206] such choices may be severely penalized. Businesses would learn that even if certain practices are common in an industry, these practices are socially reprehensible and can lead to serious consequences.

Another reason why the publicity penalty generally deters is that it makes information about other punitive damage awards easily available to businesses. With central publication on a single page on the Internet, a business can readily review recent punitive damages awards and discover the kinds of conduct resulting in awards. Armed with this knowledge, potential tortfeasors may re-assess their own conduct.

For example, following the highly publicized punitive damages verdict of $7.1 million against the law firm of Baker and McKenzie for workplace sexual harassment,[207] individuals across the country engaged in an on-line discussion about the verdict and the ways in which a business can avoid liability for workplace sexual harassment.[208] It is not unreasonable to assume that the discussion following the verdict against Baker and McKenzie was generated, at least in part, by the widespread publicity and the size of the verdict. If caps limiting puni-

204. *See* Johnson v. Missouri Pac. R.R. Co., No. C-91-441 (Okla.) (awarding $3 million in punitive damages for failure to place crossing signal at railroad crossing despite known danger that crossing presented).

205. *See* Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn. 1980), *cert. denied*, 449 U.S. 921 (1980) (upholding an award of $1 million in punitive damages despite finding that the company was following industry custom which did not require using flame retardant on children's pajamas).

206. *See* Muse v. Charter Hosp. of Winston-Salem, 452 S.E.2d 589 (N.C. App. 1995), *aff'd per curiam*, 464 S.E.2d 44 (N.C. 1995). In *Muse*, punitive damages totalling $6 million were awarded against a psychiatric hospital and the corporation which owned the hospital when a prematurely-released teenager committed suicide. *Id.* at 593. The patient was still suffering from severe depression at the time of his discharge. *Id.* The jury determined that the hospital had a policy of discharging patients when their insurance ran out, regardless of the patient's psychiatric condition. *Id.* at 594-95.

207. For a discussion of the case and the jury's reasons for the award, see Mark V. Boennighausen, *$7.2 Million Secretary*, AM. LAW., Oct. 1994, at 76.

208. *See On-Line Roundtable: Learning from Baker & McKenzie*, AM. LAW., Oct. 1994, at 83 (excerpting dialogue from an on-line discussion on LEXIS COUNSEL CONNECT). As a result of the verdict, many "[f]irms with a sexual harassment policy in place [said] they intend[ed] to strengthen it or enforce it more rigorously; those without such a policy [said] they intend[ed] to devise one." *Huge Punies*, NAT'L L.J., Sept. 26, 1994, at A20.

tive damages to three times compensatory damages had been in place, the verdict would have been only $150,000[209] and likely would have received much less publicity. Thus, especially with the advent of punitive damage caps, the notification sanction may play an important role in deterring business misconduct because it insures publication of the misconduct, regardless of the size of the verdict. It is through this publication that a dialogue and examination of conduct can begin.

Fear of the financial consequences of public notification[210] also plays a significant deterrent role. Potential tortfeasors will be concerned about loss in sales, profits, and stock values that could occur as a result of public notification. Businesses also may fear that the publicity penalty will alert potential plaintiffs, criminal prosecutorial staffs, and regulatory agencies to a company's misconduct.[211] Concern that public notification may lead to additional investigations and lawsuits may deter businesses in a way that purely monetary sanctions do not.

Of course, it is possible that punitive damages awards generate publicity even without the proposed notification sanction.[212] However, because publicity currently occurs sporadically, and usually only in cases of very large awards, the fear of negative publicity does not play as big a role in the present system as it would under the proposal herein.

Finally, threat of publication on the Internet compounds the deterrent effect of this sanction. Publication on the Internet would involve more than a one day news story. Instead, the Internet would provide a constant form of negative publicity which may have a long term impact on a business' reputation. Concern about this impact may provide deterrence in cases where a single fine or a briefly-run news story may not.

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209. The jury awarded $50,000 in actual damages for emotional distress. Boennighausen, *supra* note 207, at 76.

210. *See supra* notes 180-83 and accompanying text (discussing the potential financial impacts of adverse publicity).

211. *See* Gruner, supra note 135, at 297 (noting that when convicted corporations must send notices to potential victims, it not only furthers civil claims against the offender, it also may alert regulatory or state enforcement agencies to corporate misconduct); Schwartz & Adler, *supra* note 110, at 416-17 (asserting that adverse publicity stemming from a company's failure to recall a defective product can, at times, adversely affect sales and increase the number of products liability claims).

212. *See* Rustad, *supra* note 7, at 77-78 (discussing "public relations nightmares" resulting from negative publicity surrounding conduct leading to punitive damages awards).

c. Critiques of the deterrent impact of public notification

The potential criticisms of the deterrent impact of the publicity penalty coincide with criticisms of monetary sanctions. Some may argue that the proposed penalty fails to overcome either uncertainty in enforcement or uncertainty about the financial impact of the sanction. Opponents may further contend that the public notification sanctions, like monetary penalties, have a limited effect on middle management. The following discussion responds to these criticisms.

i. Enforcement is uncertain

Some tortfeasors inevitably will escape detection. However, the notification sanction may lead to greater enforcement, especially in states which limit monetary awards. One result of caps and limits is that by reducing the plaintiffs' financial incentive to pursue the claims, they may result in a decline in plaintiffs' motivation to bring punitive damages claims.[213] Even though their financial return would remain uncertain, the proposed notification sanction might make plaintiffs more willing to pursue punitive damages claims for at least two reasons.

First, many plaintiffs want to see the defendant's misconduct stopped.[214] If a plaintiff believes that publication of misconduct may force an end to the misconduct or at least warn other potential victims, the plaintiff may pursue a punitive damages claim even with the possibility of minimal financial return. Second, plaintiffs often desire that a wrongdoer's punishment go beyond financial penalties. A plaintiff may seek the psychological satisfaction of seeing the defendant subject to widespread public scrutiny and watching the defendant have to deal with the consequences of that scrutiny.[215] For these rea-

213. Galanter & Luban, *supra* note 4, at 1451-54.

214. For example, in General Chem. Corp. v. De La Lastra, 815 S.W.2d 750 (Tex. Ct. App. 1991), *modified*, 852 S.W.2d 916 (Tex. 1993), a wrongful death case, a jury found the defendant grossly negligent in failing to adequately warn users of its chemical solution of the risk of death the chemical posed. *Id.* at 753. The jury awarded the decedents' families $44.6 million, including a punitive damages award of $30 million. *Id.* at 758. After the verdict, the plaintiffs offered to reduce the award by $15 million if General Chemical would change its warning label. Janet Elliott & Diane Burch Beckham, *Damages Slashed in Chemical Case; but Justices Uphold $8M in Punitives*, TEX. LAW., Mar. 1, 1993, at 6. The decedents' families were willing to substantially reduce their monetary return if, in exchange, they could prevent other families from experiencing a similar fate. They believed a more explicit warning label would do this. Telephone interview with Ray Marchan, one of the plaintiffs' attorneys (Nov. 11, 1995). The defendants rejected the offer because they felt the existing label was proper and gave adequate warning. Telephone interview with Royal H. Brin, one of the defendant's attorneys (Nov. 11, 1995).

215. *See* Galanter & Luban, *supra* note 4, at 1406-07 (providing examples of plaintiffs seeking punitive damages for vindication and punishment rather than for a financial benefit).

sons, especially as legislatures limit the amount of recoverable awards, the publicity penalty may encourage plaintiffs to bring punitive damages claims in cases they otherwise might not.

ii. The financial impact is uncertain

The criticism that the publicity penalty does not eliminate uncertainty regarding the amount of the sanction has some merit.[216] Legislatures, concerned that uncertainty in the amount of the sanction unacceptably overdeters businesses, have enacted statutes limiting the amount of recoverable monetary sanctions.[217] The publicity penalty introduces an element of uncertainty that monetary limits were designed to eliminate.

It is impossible to predict public reaction to the information publicized. The impact of the publicity may depend upon the specific misconduct, the availability of other sources of the product or service, the kind of business and its market, and the perceived danger in continuing to deal with the penalized business,[218] as well as the defendant's "spin control."[219]

Presently, no hard data exists on whether current monetary sanctions fail to deter effectively,[220] or whether they significantly overdeter.[221] In fact, such empirical evidence may be impossible to

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216. For a discussion of the uncertain financial impact of negative publicity, see FISSE & BRAITHWAITE, *supra* note 1, at 310-12; Gruner, *supra* note 135, at 322-23. Even without the publicity penalty, some contend that uncertainty about the amount of a punitive damages award causes a defendant to settle claims it otherwise would have defended. James A. Breslo, Comment, *Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis*, 86 NW. U. L. REV. 1130, 1164-66 (1992).

217. *See supra* part II.C (discussing punitive damages and tort reform).

218. *See* Block, *supra* note 182, at 412. A study by Karpoff and Lott indicated that different kinds of criminal fraud had different marketplace effects. *Id.* For example, consumer fraud resulted in lost future sales. *Id.* Defrauding a supplier resulted in higher costs for input. *Id.* Frauds involving misrepresentation of the firm's financial condition and frauds involving regulatory violations had other financial effects. *Id.*; *see also* FISSE & BRAITHWAITE, *supra* note 1, at 310-12 ("Unlike the fine, no certain penalty is imposed [by a sanction implemented by publicity] at the time of conviction; sentence is determined later by the capricious jury of public opinion.").

219. *See infra* part IV.D.1 (discussing counter-publicity issues).

220. A study by Professor Rustad found that in products liability claims, 18% of the defendants found liable failed to take remedial steps even after an adverse verdict. Rustad, *supra* note 7, at 79. In a study for the Conference Board, Nathan Weber found that one-third of the 232 major United States corporations polled implemented changes in the safety design of their products in response to product liability awards. Elliott, *supra* note 31, at 1061.

221. The information available regarding the extent of over-deterrence is anecdotal, rather than scientific. "One of the few areas of agreement among businesses pushing for limits on lawsuits and consumer groups urging caution is that better statistics are needed." Margaret A. Jacobs, *Reliable Data About Lawsuits Are Very Scarce*, WALL ST. J., June 9, 1995, § B, at 1; *see* Mahoney & Littlejohn, *Innovation on Trial*, *supra* note 37 (claiming that companies' research and development efforts have been restricted due to the "uncertainties of law"). *But see*

gather because business interests seeking to reduce the amount of potential monetary sanctions claim that large awards overdeter,[222] while others claim business interests are exaggerating the amount of overdeterrence.[223]

Without empirical data, the debate on whether uncertain amounts of sanctions unacceptably affect a business' decisions[224] or whether uncertainty is necessary to prevent a business from engaging in a socially irresponsible cost/benefit analysis[225] may be impossible to resolve. However, if we accept that some sanction is necessary to deter conduct society finds unacceptable, then we must look for the sanction that best achieves the goals underlying the penalty. This article suggests that there are numerous benefits to fully informing the public about the reasons why a jury awarded punitive damages.[226] Even though the effect of the publicity penalty may be uncertain, we may be willing to accept that uncertainty because of the benefits gained when the public is fully informed.

iii. The deterrence impact on middle management

Another criticism of the publicity penalty is it may be ineffective in deterring middle management. Public notification of misconduct may have little impact on lower level employees. These employees, often responsible for the misconduct subjecting a company to liability,[227] will continue a course of wrongdoing if they believe they will personally benefit, in terms of income, status or security, by committing the misconduct.[228] Deterrence occurs only when employees perceive that

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Mergenbagen, *supra* note 39 (quoting Steven Garber of the RAND Institute who notes that over-deterrence usually occurs only when the product does not have a huge profit-making potential).

222. *See supra* notes 36-37, 81-83 and accompanying text (discussing the over-deterrence argument).

223. *See supra* notes 38-39 and accompanying text (discussing the lack of empirical data to support the over-deterrence argument).

224. *See supra* part II.A.1 (discussing arguments regarding the deterrent value of punitive damages).

225. A cost benefit analysis is an important part of the business decision-making process. Owen, *Problems in Assessing Punitive Damages*, *supra* note 31, at 22-23. What concerns opponents of punitive damage limits is that limits will lead businesses to choose unethical or dangerous conduct when the financial benefits of that conduct are seen to outweigh the financial penalty. *See supra* notes 85-94 and accompanying text (discussing the different views of opponents of punitive damage limits).

226. *See generally* part IV (discussing the potential benefits of a formal publicity sanction).

227. *See* Coffee, *supra* note 135, at 397 (noting that the "locus" of corporate criminal activity is "predominantly at the lower to middle management level").

228. Barry D. Baysinger, *Organization Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 341, 353 (1991); Coffee, *supra* note 135, at 398-99.

the risk of violating a social norm is so high that it outweighs the potential benefits.[229]

The publicity penalty may change the calculus in this risk/benefit analysis. Since senior management views the threat of negative publicity as a serious one,[230] top level management may readjust internal incentives so that middle and lower level employees no longer perceive it to be in their best interest to engage in the egregious conduct which leads to punitive damages awards.[231]

2. *Retribution with the Publicity Penalty*

a. Public notification promotes retribution

The public notification sanction satisfies society's need for retribution. Publicizing a company's wrongdoing and subsequent punishment means society sees that the company has been punished for its conduct which affronted societal values. Society is told the reasons why the punishment was imposed.[232] Seeing the company subjected to public shame and stigmatization for its misdeeds satisfies the desire for retribution.[233]

Public notification furthers the retributive goal of shaming so that both the wrongdoer and society understand the moral gravity of the wrongdoer's offense.[234] Shame occurs when those whose opinions one values become aware of one's wrongdoing.[235] Publication of the

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229. The problem is compounded because the degree of risk people will take "increases dramatically when the decision is reached collectively within a small group—exactly the context in which most business decisions are made." Coffee, *supra* note 135, at 394-95 (citations omitted).

Professor Coffee further notes that the manager responsible for operational and production decisions is increasingly divorced by corporate organization from those planning and directing the corporation's future. *Id.* at 399-400. He explains that "[t]his tends both to insulate upper executives . . . and to intensify the pressures on those below by denying them any forum in which to explain the crises they face." *Id.*

230. *See supra* notes 184-186 and accompanying text (discussing corporate executives' concern about the impact of negative publicity).

231. *See* FISSE & BRAITHWAITE, *supra* note 1, at 234 (providing examples of institutional changes occurring after widely publicized criminal prosecutions).

232. Professors Galanter and Luban propose that juries be asked to explain how they arrived at the amount of a punitive damages award. Galanter & Luban, *supra* note 4, at 1439-40. They suggest that an explanation of the award amount will demonstrate that the jury is not acting from blind vengefulness, but instead has a rational basis for the award. *Id.* The proposal herein builds on Professors Galanter and Luban's work and suggests that we require juries to explain why they felt punitive damages were warranted in the first place. As discussed in this section, this explanation aids society in achieving the goals underlying punitive damages.

233. *See id.* at 1431-38 (discussing how a publicly visible defeat of a wrongdoer serves both the retribution and prevention functions of punishment).

234. *See supra* notes 42-45 and accompanying text (discussing the societal need for retribution).

235. Galanter & Luban, *supra* note 4, at 1444.

reasons for the business' punishment means that those people important to the company—consumers, suppliers, business associates, and shareholders—would become aware of the morally reprehensible conduct and the punishment imposed. This publication of wrongdoing may shame the business and thus serve a retributive purpose.

> [I]t is fanciful to suggest that corporate entities inherently lack the capacity to be stigmatized because they are fictitious beings, without friends and neighbors . . . . The force of loyalty and collective sentiment can lead to soul-searching and loss of morale within organizations just as it can within the family of an individual convict. Were the position otherwise, one would hardly expect corporations themselves to sponsor so large an industry of corporate image-making.[236]

With the publicity penalty, a company concerned about its reputation would not be able to hide its misdeeds. Instead, it may find that to redeem itself, it needs to acknowledge its wrongdoing, express remorse, and explain its intention to remedy the problem leading to the misconduct.[237] This public "mea culpa," although serving a retributive function, has other benefits. A company forced to go through this process once is unlikely to want to do it again. Although retribution occurs, it is not an end in itself. It becomes a means to control future behavior because the defendant and others will want to avoid the consequences attendant with the wrongdoing. Thus, retribution is no longer an irrational attempt to inflict present suffering to remedy past wrongs. Instead, it becomes intertwined with the deterrent function of punishment.[238]

b. Critiques of the retributive impact of public notification

One criticism of the publicity penalty's ability to exact retribution is that in many cases, publication of the misconduct will fail to shame the wrongdoer.[239] The lack of humbling does not, however, eliminate the retributive effect of the notification sanction. Society may feel

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236. FISSE & BRAITHWAITE, *supra* note 1, at 289; *cf.* Coffee, *supra* note 135, at 429 (arguing that stigmatizing a corporation is difficult because the consumer cares about the product, not the producer). Professor Coffee and other scholars' views about the ability to stigmatize a corporation are addressed by Professors Fisse and Braithwaite. FISSE & BRAITHWAITE, *supra*, at 288-90.

237. Miester, *supra* note 184, at 943; *see also supra* note 184 and accompanying text (discussing Chrysler's response to widespread publicity of the criminal indictment for odometer tampering).

238. Mallor & Roberts, *supra* note 46, at 648.

239. A wrongdoer found liable by the jury often becomes defensive about its actions and feels maligned by the verdict. FISSE & BRAITHWAITE, *supra* note 1, at 247. Instead of feeling ashamed, the wrongdoer feels it has been unjustly punished. *Id.*; *see also* Massaro, *supra* note 127 (arguing that the effectiveness of publicly shaming a wrongdoer depends on various social and psychological factors, and that in most cases, shaming sanctions do not effectively deter crime).

vindicated because it will view the wrongdoer as having been defeated, even if the wrongdoer expresses no shame.[240]

A counter-veiling criticism is that the publication may not reassure society that the rights of individuals are being protected by the justice system. In fact, it may have the opposite effect. If awards are limited by punitive damage caps, the notification about the amount of the award may actually convey the message that the law does not truly value the rights of individuals.

For example, consider the following hypothetical case:[241] A young woman suffers from Pelvic Inflammatory Disease, caused by a birth control device, and undergoes a hysterectomy. She sues the device's manufacturer claiming it purposefully marketed the device as safe and effective, even though it knew the device could cause the injuries she suffered. The jury finds the manufacturer knowingly marketed the device despite its potential for severely injuring women because it wanted a larger market share, and thus awards punitive damages. Assume punitive damages are capped at a specific amount, for example $350,000.[242] If this occurred, members of the public, reading about this verdict may feel that the punishment of $350,000 is only a slap on the wrist when the company makes millions of dollars each year from the sale of the defective product.

As the above hypothetical case illustrates, instead of satisfying society's desire for retribution, publication may reinforce a sense of powerlessness and disillusionment with the protection provided by the legal system. The solution to this problem is not to abandon the concept of notification, but to re-examine the concept of award limits. The notification sanction will not only educate the public about the types of wrongdoing society condemns, but may also enlighten them about the effects of tort reform.

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240. For example, even after the verdict in the Ford Pinto case, Ford refused to acknowledge any culpability. FISSE & BRAITHWAITE, *supra* note 1, at 43-48. In fact, it waged a major battle in the criminal courts and press in which it denied any wrongdoing. *Id.* at 41-48. Despite Ford's efforts, Professors Galanter and Luban argue that the Pinto verdict is an example of a publicly visible defeat — one in which the public's desire for retribution was satisfied. Galanter & Luban, *supra* note 4, at 1436-38.

241. This hypothetical case is based on the Dalkon Shield litigation. *See* Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984); Tetuan v. A.H. Robins Co., 738 P.2d 1210 (Kan. 1987).

242. *See, e.g*, VA. CODE ANN. § 8.01-38.1 (Michie 1987) (capping punitive damage awards at $350,000).

3. Rehabilitation with the Publicity Penalty

a. Public notification promotes rehabilitation

The publicity penalty also furthers the rehabilitative purpose of punitive damages. In attracting public attention to the background and relevance of corporate violations, publicity sanctions enable society to engage in moral reflection about corporate offenses instead of keeping them from the public eye.[243] This reflection should lead the offender, and other potential offenders, to understand the jury's moral outrage and reasons for their verdict. In this way, publication and its resulting impact on corporate prestige may lead to a "collective soul-searching" and examination of the reasons the conduct occurred in much the same way that families of individual convicts examine "how they went wrong."[244] This reevaluation furthers the rehabilitative goal of punishment.

In order to change the conduct, the culture of the organization must change from one in which the unethical or illegal conduct is condoned by top management to one in which the conduct is condemned and procedures are instituted which insure that middle managers do not receive mixed messages concerning the risks and benefits of managerial misconduct.[245] Companies which have felt the sting of publicity accompanying their criminal misconduct have engaged in re-evaluation and internal restructuring.[246] In the Fisse and Braithwaite study, following the onslaught of publicity resulting from numerous companies' criminal misconduct, those companies instituted various reforms designed to prevent the misconduct from reoccurring.[247] These reforms changed the culture of the corporation from one in which management turned a blind eye to the misconduct to one in which management took an active role in preventing the misconduct.[248] The publicity penalty may produce a similar result.

b. Critique of the rehabilitative impact of public notification

Many of the same criticisms of the ability of the publicity penalty to deter and serve a retributive function can be said about its ability to

243. FISSE & BRAITHWAITE, *supra* note 1, at 294.

244. *Id.* at 289.

245. Coffee, *supra* note 135, at 398-400; *see also* Baysinger, *supra* note 228, at 350-55 (discussing the relationship between managerial risk-taking and an organization's internal control system).

246. *See* FISSE & BRAITHWAITE, *supra* note 1, at 233-36 (providing an overview of internal reforms resulting from widespread publicity of certain companies' wrongdoing).

247. *Id.*

248. *Id.*

rehabilitate.[249] Specifically, some companies may decide to "proceed as usual" despite the notification sanction. Whether the publication causes a re-examination of corporate values may depend on the impact, or perceived impact, it has on the organization's decision makers.[250] If those with the power to effectuate internal changes perceive no adverse consequences from the notification sanction, then the publicity penalty may not rehabilitate the offender any more than monetary sanctions would.

4. Incapacitation with the Publicity Penalty

a. Public notification incapacitates a wrongdoer

Finally, the publicity penalty may incapacitate a wrongdoer.[251] When the misconduct continues after the jury's verdict, public notification of the wrongdoing would allow market forces to dictate whether the conduct needs to change.[252] If the conduct is on-going and the public is made aware of the potential harm, consumers may not purchase the product or do business with the tortfeasor.[253] In this way, public notification "incapacitates" a wrongdoer.

b. Critique of the incapacitative impact of public notification

i. Need for incapacitation disappears once the misconduct ceases

One argument against using the publicity penalty to incapacitate is that the need for public notification ends when the misconduct ceases. However, if the case involves a product which remains in the public domain, owners of the product should be alerted to the risk so that

249. *See supra* parts IV.B.1.c, IV.B.2.b (discussing, respectively, the critiques of the deterrent and retributive effects of the publicity penalty).

250. *See supra* notes 175-78 and accompanying text (discussing reasons a business' decision-maker may fear adverse publicity). *But see* Coffee, *supra* note 135, at 455 (arguing that only by motivating corporations to use internal discipline against wrongdoers, or by prosecuting wrongdoers directly, can society reach corporate decision-makers).

251. One purpose of the jail sentence is to remove the dangerous individual from society, thereby protecting the public. No similar method of protecting the public exists when a business is found civilly liable for egregious misconduct which results in death or serious injury. Not only does that business continue doing business, but the public often never finds out about the misconduct.

252. *See* Block, *supra* note 182, at 411 (noting the reputational effects of sanctions); Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U. L. REV. 247, 266-67 (1991) (discussing the marketplace penalties against organizations).

253. *See* Block, *supra* note 182, at 412. One concern raised by commentators is that adverse publicity about one instance of misconduct or one harmful product may mean that consumers are unwilling to deal with the business altogether. This "spillover" effect thus goes far beyond the purpose of ending the harmful conduct and results in unacceptable financial repercussions. For a discussion of this argument and responses to it, see Cowan, *supra* note 106, at 2403-04.

they may make an informed choice as to whether to continue using the product. Because administrative agencies often lack the resources to provide this notification,[254] the publicity penalty may result in more widespread notification than currently exists.

Also, since the misconduct warranting punitive damages involves a degree of culpability not present in compensatory damage cases,[255] the notification sanction informs the public not only of an existing danger, if there is one, but also of the company's attitude toward subjecting the public to that danger. It is this attitude, either toward a known danger or about a company's ruthless business practices, that is communicated. With knowledge of this attitude, people considering future dealings with the wrongdoer would have an opportunity to take precautions against future harm by the wrongdoer.[256]

ii. Information "overload"

Some may argue that the sanction's ability to incapacitate is limited because the public, already bombarded with information, would pay little attention to the notification.[257] Yet, because punitive damages awards are relatively rare,[258] the instances of notification would similarly be low. Since these notices are not common place, they may receive more attention. As commentators note:

> Formal publicity sanctions conceivably might reduce the problem of communication noise. An accurate and authoritative message transmitted under court order could provide a homing signal rather than merely another buzz.[259]

Finally, publication on a World Wide Web page would not "inundate" the public. Rather, it would provide a convenient resource that the public could refer to when seeking information about a particular business.

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254. *See supra* notes 149-50 and accompanying text (noting the inability of agencies to discover harmful conduct).

255. *See supra* part I (distinguishing punitive damages from compensatory damages).

256. *See* Gruner, *supra* note 135, at 298 (suggesting that information about past criminal wrongdoing allows potential consumers to protect themselves when dealing with the wrongdoer).

257. This argument has been raised in the context of corporate criminal notification sanctions. *See* Coffee, *supra* note 135, at 426; *cf.* Miester, *supra* note 184, at 944 (arguing that even opponents of publicity agree that it may work for corporate homicide and other violations which threaten health and safety).

258. Punitive damage awards occur in only about 4.5% of all cases tried to a verdict. ABF study, *supra* note 60, at 48.

259. FISSE & BRAITHWAITE, *supra* note 1, at 294.

C. Other Benefits of the Publicity Penalty

1. Society as Well as the Plaintiff Benefits

Under the proposed publicity penalty, society, not just the plaintiff, would benefit. Some argue that when a plaintiff receives a punitive damages award, the plaintiff gets a "windfall," while society, also harmed by the conduct, receives nothing.[260] With the notification sanction, society, as well as the plaintiff, would benefit because members of society would acquire the information necessary to make informed decisions about a business or product and thus would be better equipped to protect itself against dangerous or unethical business practices.

2. Allows Public To Make Informed Decisions About Tort Reform

Many argue that juries act irrationally[261] or with an incomplete understanding of how businesses operate.[262] For these reasons, they argue that punitive damage awards must be limited or even eliminated.[263] The rationale is that the less effective society believes the legal process is in uncovering and punishing wrongdoing, the more concerned it should be about the system and the more cautious it should be in using the system's results to punish.[264]

The publicity penalty attempts to address this concern. One reason why society believes that the system is irrational may be that society does not understand the reasons why a jury makes a particular award. The classic example is the McDonald's "hot coffee spill" case. In that case, a seventy-nine-year-old woman purchased a cup of McDonald's coffee while she was a passenger in her grandson's automobile.[265] After her grandson stopped the car, the woman attempted to hold the coffee securely between her knees and open the lid.[266] The cup tipped over, and scalding coffee poured on her, causing third degree burns which required an eight-day hospitalization, debridement, and skin

260. For a discussion of these arguments, see Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards To Eliminate Windfalls*, 44 ALA. L. REV. 61, 90 (1992); Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 474-75 (1993). In response to this argument, many states now require the plaintiff to give a portion of any punitive damages award to the state. *See infra* notes 294-96 and accompanying text.

261. Ausness, *supra* note 24, at 57; Elliott, *supra* note 31, at 1064-65.

262. Owen, *Problems in Assessing Punitive Damages*, *supra* note 31, at 10-12.

263. Elliott, *supra* note 31, at 1062-68.

264. This rationale is implicit, if not explicit, in the critiques of currently constructed punitive damages.

265. S. Reed Morgan, *McDonald's Burned Itself*, LEGAL TIMES, Sept. 19, 1994, at 26.

266. *Id.*

grafting, and caused scarring and a two-year disability.[267] The jury awarded the plaintiff $200,000 in compensatory damages (reduced to $160,000 because the jury found she was twenty percent at fault) and $2.7 million in punitive damages.[268] Many pointed to the verdict as an example of why our tort system so urgently needs reform.[269]

While the award itself was widely publicized, many stories omitted the underlying facts.[270] For example, McDonald's sells its coffee at 180 to 190 degrees Fahrenheit, and coffee at that temperature, if spilled, causes third degree burns in two to seven seconds.[271] These serious burns require skin grafting, debridement, and whirlpool treatments costing tens of thousands of dollars, and often result in permanent disfigurement and cause extreme pain.[272] McDonald's admitted that it knew of the risk of serious burns from its scalding hot coffee for more than ten years before the plaintiff was injured, and in the ten years before the injury, had received complaints from more than 700 people who had been burned, many in the genital area.[273] McDonald's knew about the risk of serious burns from the scalding coffee and did not warn customers of this risk.[274] An additional fact that did not receive wide-spread publicity was that the award was drastically reduced post-trial.[275]

If people had understood the facts underlying the award against McDonald's, would they still have felt the award was unjustified? It may be that they would have, or it may be that public opinion would have been different. What the publicity penalty could do is lead to an informed discussion about the need for tort reform—a discussion that cannot occur unless people have all the underlying information about why a jury is awarding punitive damages.[276]

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267. *Id.*

268. *Id.* The trial judge later reduced the punitive award to $480,000. *Id.*

269. The American Tort Reform Association ran radio ads highlighting the case as part of its Tort Reform campaign. Richard B. Schmitt, *Truth Is First Casualty of Tort-Reform Debate*, WALL ST. J., March 7, 1995, at B1, 10.

270. *See, e.g.*, *McDonalds Cup of Scalding Coffee: $2.9 Million Award*, CHI. TRIB., Aug. 18, 1994, at 1 (reporting only the amount of the damages award and the fact that the coffee was served at an unusually hot temperature); *Hot Cup of Coffee Costs $2.9 Million*, ORANGE COUNTY REG., Aug. 19, 1994, at C1 (noting only that the coffee spilt was unusually hot, and that the plaintiff spilt the coffee while trying to remove the cap from the cup).

271. Morgan, *supra* note 265, at 26.

272. *Id.*

273. *Id.*

274. *Id.*

275. Schmitt, *supra* note 269, at 10.

276. *See id.* at 1, 10 (providing other examples of misinformation concerning punitive damages awards).

3. *Alerts Other Victims to Potential Claims*

When a business publicizes its wrongdoing, others harmed by similar wrongdoing learn of potential civil claims.[277] Public notification aids the potential plaintiffs in pursuing remedies they may not have known existed. For example, the Senate Committee noted that criminal organizational notification sanctions[278] facilitate private actions that may be warranted for recovery of losses due to fraud or intentionally deceptive practices.[279] The Senate Committee also noted that "without such a provision, many victims of major fraud schemes may not become aware of the fraud . . . until it is too late to seek legal redress, or may not be able to ascertain the perpetrator's current whereabouts. . . ."[280]

Some may argue against the publicity penalty because the potential for "copycat" litigation can lead to severe financial consequences for the tortfeasor and others engaged in similar practices. Although the threat of copycat litigation is a real problem, it is a problem that calls for balancing competing interests—those of a defendant found liable for punitive damages for egregious conduct and those of the injured plaintiff who discovers a potential remedy for a wrongfully inflicted injury. The purpose of our tort system is to compensate individuals wrongfully injured.[281] Particularly when the conduct is egregious enough to warrant the imposition of punitive damages, others injured by similar culpable conduct ought to have the opportunity to seek compensation. Moreover, the threat of multiple suits also decreases the incentive to engage in the misconduct.[282]

In wholly unmeritorious cases, Rule 11 sanctions should deter plaintiffs.[283] In other questionable cases, defendants may move for summary judgment.[284] Although these procedural remedies do not solve the potential problems caused by unmeritorious copycat litigation, they do provide some degree of protection for defendants.

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277. *See* Miester, *supra* note 184, at 944 (citing Fred L. Rush, Jr., *Corporate Probation: Invasive Techniques for Restructuring Institutional Behavior*, 21 SUFFOLK U. L. REV. 33, 89 (1986)).

278. *See supra* notes 132-34 and accompanying text (discussing the use of public notification of organizational wrongdoing in the context of federal sentencing guidelines).

279. S. REP. NO. 225, at 83.

280. *Id.*

281. *See supra* notes 13-15 and accompanying text (discussing the functions of compensatory damages).

282. *See* S. REP. NO. 225, at 84.

283. *See* FED. R. CIV. P. 11 (allowing the parties to invoke by motion, or the court to invoke on its own initiative, sanctions for frivolous claims).

284. *See* FED. R. CIV. P. 56 (requiring courts to dismiss claims if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law).

D. Other Critiques of the Publicity Penalty

1. Counter-publicity dilutes effects

One criticism of the proposed publicity penalty is that the efficacy of publicity would depend upon whether offenders engage in counter-publicity campaigns.[285] Especially wealthy defendants may spend millions in "spin control" hoping to stem the tide of adverse public opinion.[286] Since the court has no right to reply, the defendant's "spin" may be the message the public gets.

For numerous reasons, this concern, although valid, does not mean the publicity penalty should be discounted. First, having to invest significant time, energy and money in a concerted public relations effort is a punishment in itself. Second, although the defendants may be able to engage in a publicity campaign in traditional media forums, they cannot alter the facts memorialized on the dedicated World Wide Web page. A person receiving mixed messages will be able to return to the World Wide Web page—which may help counter the defendant's public relations campaign. Finally, many businesses faced with negative publicity choose not to engage in counter-publicity campaigns for fear of "fanning the flames."[287] Thus the threat of counter-publicity may not be as great as anticipated.

2. Spillover Effect

Another criticism of public notification is that the effect of notification may harm stockholders and innocent employees, as well as those responsible for the misconduct.[288] These individuals may be harmed by loss of profitability accompanying notification and the social stigmatization that may occur when a company's misdeeds become public.[289]

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285. Cowan, *supra* note 106, at 2407; Miester, *supra* note 184, at 945 (citing Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions*, 56 S. CAL. L. REV. 1141, 1231 (1983)).

286. *See, e.g.*, GOTTSCHALK, *supra* note 177, at 3-16 (discussing Drexel Burnham Lambert's response to the junk bond crises); *id.* at 126-28 (detailing Suzuki's response to a Consumer Reports magazine press conference during which it was announced that the Suzuki Samurai was "not acceptable" and should be recalled).

287. *See* FISSE & BRAITHWAITE, *supra* note 1, at 295-98 (discussing the counter-publicity argument).

288. Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1055 (D.N.J. 1989) (stating that punitive damages which render a company insolvent harm innocent employees and creditors); *see also* Coffee, *supra* note 135, at 429 (commenting that stigmatizing a corporation is dangerous because of the uncontrollable nature of the penalty).

289. This may be especially true in mass tort cases if the information is rebroadcast following each jury verdict. Because of the special circumstances of mass tort claims, implementation of this proposal in those situations may require further exploration. For a discussion of the power-

The plight of employees and shareholders must be put in perspective. One must remember that shareholders and employees likely benefit from the misconduct, because generally the misconduct involves attempts to increase a business' profitability.[290] Furthermore, shareholders and employees who become aware of the misconduct and its consequences may be much more likely to take an active role in remedying the problems that led to the misconduct.[291]

E. Potential Constitutional Concerns

The proposed publicity penalty raises some constitutional concerns.[292] For example, some may argue that requiring a defendant to pay advertisement costs may increase the total amount of damages awarded by the jury. This increase could be viewed as analogous to constitutionally impermissible additur.[293] To avoid additur issues arising in the context of payment of the costs of advertising, the notification costs should be paid from the award itself.[294]

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ful effects of multiple punitive damage awards in mass tort cases, see Galanter & Luban, *supra* note 4, at 1414-15.

290. *Id.* at 1440. Stockholders' plight also draws considerably less sympathy than that of low level employees. *See, e.g.*, Wangen v. Ford Motor Co., 294 N.W.2d 437, 453 (Wisc. 1980) (noting that loss of investment is a risk stockholders take); Acosta v. Honda Motor Co. Ltd., 717 F.2d 828, 839 n.17 (1983) (noting that shareholders benefit from conduct redounding to manufacturer's fiscal advantage).

291. *Wangen*, 294 N.W.2d at 453-54; 1 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 6.10 (1988). *But see* Republic Ins. Co. v. Hires, 810 P.2d 790, 796 n.5 (Nev. 1991) (Springer, J., concurring) (arguing small shareholders have little power over corporate officers and directors).

292. An in-depth analysis of all the constitutional issues raised by this proposal is beyond the scope of this Article. This section, in the notes and the text, simply attempts to raise, and briefly address, some of those issues.

293. Adding money damages to the jury's award is an impermissible additur which violates the Seventh Amendment. Dimick v. Schiedt, 293 U.S. 474, 486-87 (1935). On the other hand, it could be argued that payment of the cost of notification is no different from other situations in which a judge may impose additional costs on the losing party (e.g., 42 U.S.C.A. § 1988(b) (1995) which provides for attorneys fees in civil rights cases), and thus payment of the costs of notification has no Seventh Amendment implications.

294. An unresolved question is whether, if the notification sanction has financial implications beyond the monetary award itself, the imposition of this sanction violates the Seventh Amendment right to a jury trial by imposing a sanction not considered by the jury. One potential solution to this problem is that juries be instructed on the fact that if they award punitive damages, the award and their reasons for the award will be publicized. In fact, legislatures enacting this proposal may want to allow defendants subject to the sanction to present evidence of the potential financial impact of the negative publicity attendant with the publication of the award. The more juries are informed about the publicity sanction and its potential impact, the more connected they are to the resulting sanction. Direct jury involvement in the sanction weakens, if not eliminates, the argument that imposition of the publicity penalty violates a defendant's right to a jury trial. Instructing the jury and allowing the defendant to present evidence about the potential impact of the notification sanction also goes a long way towards addressing a defendant's concern that its due process right of "notice and opportunity to be heard" is not violated.

For guidance on how to pay the costs of notification, one could look to the split award statutes some states have enacted.[295] While preserving the financial inducement necessary to encourage plaintiffs to spend the time and money required to prosecute punitive damages claims,[296] the split award statutes also require that a portion of the award be paid to the state.[297] The same idea may be utilized in implementing the publicity penalty. A portion of the jury's award may be used to publicize the defendant's misconduct, thus eliminating the concern that the proposal directly increases the amount of the jury's award.[298]

An analogous issue is whether a legislature, in assessing a non-monetary penalty which can have serious financial repercussions, interferes with the jury's function to determine the true amount of damages, thus violating the doctrine of separation of powers. One response to this concern can be found in opinions addressing this issue in the context of legislation limiting compensatory damage awards. Some courts have noted that since the legislature has the power to modify, or even eliminate, existing common law claims, it also has the power to determine remedies. Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1331-32 (D. Md. 1989); Etheridge v. Medical Ctr. Hosp., 376 S.E.2d 525, 532 (Va. 1989). This determination of remedies does not violate the separation of powers doctrine. *Franklin*, 704 F. Supp. at 1331; *Etheridge*, 376 N.E.2d at 531-32. In the context of this proposal, rather than limiting an existing remedy, a legislature would be creating a new one. However, the arguments regarding a legislature's power to do so are, in many ways, the same arguments used to uphold the constitutionality of limits on punitive and compensatory damage awards. For a discussion of those arguments, see Edmonds v. Murphy, 573 A.2d 853, 861 (Md. 1990); Hallahan, *supra* note 72, at 434-46.

295. Numerous states have enacted statutes requiring that a portion of punitive damages be paid to the state, while preserving an attorney's right to collect his or her fee. *See* Shores, *supra* note 260, at 88-89 (discussing six state statutes which allocate punitive damages awards); Sloane, *supra* note 260, at 477-78 (noting that as of 1993, nine states had enacted "split award" statutes).

296. Most split award statutes recognize the need for financial incentives to bring the claims and only allocate a percentage of the award to public coffers. *See, e.g.*, COLO. REV. STAT. § 13-21-102 (Supp. 1995) (requiring that one-third be paid to the state general fund); FLA. STAT. ANN. § 768.73(2)-(4) (West Supp. 1995) (earmarking 35% of the award to the state); GA. CODE ANN. § 51-12-5. (e)(1)-(2) (Supp. 1994) (awarding 75% to the state); KAN. STAT. ANN. § 60-3402(e) (1994) (mandating 50% payable to the state treasurer); OR. REV. STAT. § 18.540(c) (1993) (allocating 50% to the state).

If a split award statute exists, the notification costs should be paid for from the state's portion of the award. Because the purpose of the notification sanction is the same as that which justifies paying a portion of the award into a public fund, it is not inconsistent with the intent of a split award statute to require payment of notification costs from the state's portion of the recovery.

297. Like the split award statutes, an issue raised by this proposal is whether requiring that a portion of the award be used to pay for notification constitutes an unconstitutional "taking" under the Fifth Amendment. For cases dealing with this issue in the split award statute context, see Kirk v. Denver Publishing Co., 818 P.2d 262, 270 (Colo. 1991) (finding taking). *Cf.* Gordon v. State, 585 So. 2d 1033, 1035-36 (Fla. Dist. Ct. App. 1991), *aff'd* 608 So. 2d 800, 801-02 (Fla. 1992) (finding no taking); Shepherd Components v. Brice Petrides-Donohue & Assoc., 473 N.W.2d 612, 619 (Iowa 1991) (finding no taking); *see also* E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 871-75 (1993) (discussing substantive due process and takings); Sloane, *supra* note 260, at 495-99 (analyzing *Kirk* and *Gordon*).

298. *See supra* note 294 and accompanying text (discussing the Constitutional implications of the indirect financial burden this proposal may cause).

Another constitutional issue arising with the proposed publicity penalty is that it may infringe on a defendant's First Amendment rights. The First Amendment prohibits the government from forcing a speaker to endorse a particular view.[299] Sometimes, even the appearance of endorsement violates the First Amendment. For example, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[300] the United States Supreme Court held that a Utility Commission could not force a public utility to include in its mailed bills a newsletter from a ratepayer's group even if the newsletter had a disclaimer.[301]

A defendant may argue that if it must handle the logistics of the publication, it is being asked to endorse the jury's verdict and the notification thereof.[302] To avoid First Amendment problems altogether, the notice could be publicized by the administrative office of the court.[303]

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299. Pacific Gas and Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 16 (1986); Wooley v. Maynard, 430 U.S. 705, 717 (1977). *See* United States v. Clark, 918 F.2d 843, 848 (9th Cir. 1990) (discussing First Amendment issues arising when a public apology is imposed as a condition of probation); Goldschmitt v. Florida, 490 So. 2d 123, 125 (Fla. Dist. Ct. App. 1986) (holding that sanction of affixing "Convicted D.U.I.—Restricted License" bumper sticker on car did not violate the defendant's First Amendment rights); Cowan, *supra* note 106, at 2408-09 (discussing First Amendment issues in the context of the Corporate Criminal Sentencing Guidelines); Jaimy M. Levine, Comment, *"Join The Sierra Club!": Imposition of Ideology as a Condition of Probation*, 142 U. PA. L. REV. 1841, 1845-48 (1994) (discussing the First Amendment implications of notification).

300. 475 U.S. 1 (1986).

301. *Id.*

302. *Id.* at 15-16 n.12. One could argue that this publication requirement is akin to a publication requirement of legal notices, which does not violate the First Amendment. However, given the content of the notification, it is much more "ideological" than traditional legal notices. Another argument is that because the proposed notification sanction provides consumers with factual information regarding a corporation's unsafe products or unethical business practices, "it has more in common with truth-in-advertising laws and labelling requirements than with attempts to impose ideological messages on unwilling carriers." Cowan, *supra* note 106, at 2409. However, again, because of the content of this notice, that argument may fail.

303. However, management of the logistics of publication by the administrative office of the courts raises another issue. That is, whether the imposition of the publicity penalty, especially if mandatory and administered by the courts, has Double Jeopardy implications. *See* United States v. Halper, 490 U.S. 435, 441-42 (1989) (noting that if a state's actions are punitive, the Double Jeopardy clause applies, even if the action is labelled a "civil" action).

A related issue, if the courts become involved in administering the penalty, will be whether required publication violates the Eighth Amendment's prohibition on "cruel and unusual punishment," or whether the potential financial effects of publication implicate the Eighth Amendment's "excessive fines" clause. U.S. CONST. amend. VIII. The Supreme Court has held that the Eighth Amendment's excessive fines clause does not apply to punitive damages in cases between private parties when the government has no share in the recovery. Browning-Ferris Indus. v. Kelso Disposal Inc., 492 U.S. 257, 259-60 (1989). It based its decision, in part, on the long accepted common law practice of awarding punitive damages and the history underlying the enactment of the Eighth Amendment. *Id.* at 268-76. Because the proposed notification sanction does

CONCLUSION

Public notification adds an essential powerful punch to monetary sanctions in two ways. First, companies cannot pass along to the consumer the costs they suffer from public notification.[304] Second, it strikes a chord that motivates businesses to change unethical or improper business practices—the threat posed by negative public reaction to these practices.[305]

Currently, no systematized method exists to inform the public about the business' misconduct. This lack of information dissemination means a business' image may remain untarnished despite its wrongdoing.

In earlier times, word rapidly spread when a business' practice resulted in problems for customers. A business owner in a small town quickly became aware that the tide of public opinion was hurting his business. If he wanted to continue doing business, he knew he would have to discontinue the practice disapproved of by the community.[306]

The industrialization of society has not diminished businesses' concerns about the damaging impact of dissemination of negative information. Businesses still worry about the impact of negative publicity on their images.[307] However, in today's society most consumers no longer live in closely knit communities. Nor do they primarily frequent small local businesses. Likewise, suppliers and others patronizing a business may be dealing with a multi-national corporation rather

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not enjoy the same common law history as monetary punitive damage penalties, how the Court's decision in *Browning-Ferris* relates to this proposal is unclear. Additionally, in *Browning-Ferris*, the Court left undecided the issues whether the excessive fines clause applies to the states through the Fourteenth Amendment or if the Eighth Amendment protects corporations as well as individuals. *Id.* at 276. If this proposal becomes part of the public debate on an effective means to punish and deter corporate misconduct, these issues should be explored in greater depth.

Finally, in addition to the constitutional issues discussed above and those discussed earlier in this section (*see supra* notes 293-96 and accompanying text), legislation enacting this proposal will have to be drafted in such a way that the penalty does not violate the defendant's procedural or substantive due process rights. *See* TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2718-24 (1993) (discussing substantive and procedural due process issues in punitive damages claims); Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18-24 (1991) (discussing substantive and procedural due process issues in punitive damages claims). As a starting point in addressing due process issues, as suggested above, legislatures should require that juries be instructed about the mandatory imposition of the sanction, and defendants should be allowed to present evidence on the sanction's potential impact.

304. *See supra* note 84 and accompanying text (discussing companies' ability to pass the cost of punitive damages awards on to consumers).

305. *See generally* FISSE & BRAITHWAITE, *supra* note 1; Rustad, *supra* note 7, at 76.

306. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 888 (W. Va. 1992).

307. *See supra* notes 172-86 and accompanying text (discussing businesses' concern about their image).

than a local concern. Because of these societal changes, a business' egregious misconduct is less likely to be known by those with whom the business deals. Without information about the misconduct, the public has neither the ability, nor the perceived need, to influence a change in the business' practice.

Public notification would use today's technology to return to yesterday's means of eliminating misconduct. Outstripping traditional media, such as television, radio and the press, the "information superhighway" makes us more like a "global village"[308] today than at any time in the past.[309] Publication of a business' misconduct on a single page on the World Wide Web would mean that millions quickly would be able to learn of the misconduct.

In today's world, individuals as well as businesses deal with national and international corporations. Broadly publicized notification is essential to inform the public about a business' wrongdoing. The proposed publicity penalty could achieve widespread dissemination of the facts surrounding a business' misconduct. Armed with information about why a business is liable for punitive damages, a knowledgeable public may individually, and ultimately collectively, express disapproval of the misconduct. The business' sensitivity to this disapproval would provide a powerful incentive for change.

The advent of the Internet and other technology which rapidly spreads information across the globe present us with an opportunity to reevaluate punitive damages and fashion sanctions that serve all parties and society. This article attempts to open the debate about alternative means to accomplish the goals of punitive damages.

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308. For example, in the Sunday New York Times business section, a full page ad announced: "Hi there! We're your new neighbor. HIROSHIMA Now on Internet." The ad went on to explain that various enterprises in Hiroshima, Japan joined the Internet community because they "thought it would be the best way to get out and really communicate with the rest of the world . . . ." The ad then listed e-mail addresses for various local government agencies, universities and regional companies in Hiroshima. N.Y. TIMES, Oct. 1, 1995, at F3.

309. *See supra* note 6 and accompanying text (providing statistics on the number of Internet users). The Internet crosses state and national boundaries. The number of people and businesses using this means of communication continues to grow rapidly. However, as stated earlier, because access to the Internet is less available to the economically disadvantaged (*see* Menkel-Meadow, *supra* note 8), the existence of the Internet does not eliminate the need to publicize the information in traditional media forums.