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DEVELOPING RATIONAL PUNITIVE DAMAGES POLICIES: BEYOND THE CONSTITUTION

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I. INTRODUCTION

In the 1980s and 1990s, small businesses, large corporations, and insurance companies began calling for the reform of what they considered anti-business policies and practices in the U.S. legal system.[1] Academic writers likewise started questioning some of the basic tenets of tort law, applying economic analysis and suggesting that doctrines be tested and critically examined for their social utility.[2] Among the practices to have come under the most intense scrutiny and criticism is the award of purportedly excessive punitive damages.[3] Predictably, the

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1. *See, e.g., We All Pay the Price: An Industry Effort to Reform Civil Justice*, INS. REV., Apr. 1986, at 58. Responsibility for tort reform generally and punitive damages reform specifically is attributed most frequently to the insurance industry. *See, e.g.*, Robert A. Prentice, *Reforming Punitive Damages: The Judicial Bargaining Concept*, 7 REV. LITIG. 113, 123 (1988) (associating purported explosion in litigation and punitive damages with alleged insurance crisis, orchestrated in part by insurance industry).

2. *See* Robert L. Rabin, *Law for Law's Sake*, 105 YALE L.J. 2261, 2261-62 (1996) (describing functionalist approach under which "tort law is only legitimate if it serves some useful purpose" by satisfying "independent societal goals"); George L. Priest, *Lawyers, Liability, and Law Reform: Effects on American Economic Growth and Trade Competitiveness*, 71 DENV. U. L. REV. 115, 115 (1993) (noting critics' allegations that expanded liability taxes U.S. companies and impairs their global competitiveness).

3. Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1275-76 (1993). The term "punitive damages" is considered by some to be interchangeable with the terms "vindictive damages" and "exemplary damages." *See* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 517 (1957) ("The terms 'punitive,' 'vindictive,' or 'exemplary' damages, and 'smart-money' have been interchangeably applied to a class of money damages awarded in tort actions beyond what is needed to 'compensate' the plaintiff for his injuries."). This interchangeability is imprecise, as punitive damages entail the discrete, distinguishable functions of vindicating past wrongs and exemplifying them in order to deter future wrongs. Accordingly, the terms "vindictive" and "exemplary" each represent only one of the two most fundamental purposes of punitive damages—retribution and deterrence.

The award of punitive damages has been traced as far back as 2000 B.C., as "multiple damages" exceeding harm to the plaintiff were awarded in Babylon, Greece, Rome and Egypt. David R. Levy, Note, *Punitive Damages in Light of* TXO Productions Corp. v. Alliance Resources Corp., 39 ST. LOUIS U. L.J. 409, 412 n.20 (1994). The practice of awarding punitive damages in the United States goes back at least two hundred years. *See* Coryell v. Colbaugh, 1 N.J.L. 90, 91 (Sup. Ct. 1791) (authorizing jury to award damages both for compensation and to set an example preventing future infractions). Common law British sources of punitive damages include Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763), and Huckle v. Money, 95

scholars, lawyers, and other commentators who seek to curb punitive damages encounter resistance from others, such as consumer advocates, who believe that weakening the force of punitive damages will cause more harm than good.[4] The result of this conflict has been an ideological battle over the utility of punitive damages.

The battle often entails arguments about whether frequency and amounts of awards have gone out of control.[5] The discussion frequently focuses on the problem of outliers—instances in which awards deviate significantly from the median award among a group of otherwise comparable cases,[6] and therefore presumably deviate also from a just assessment. In the legal arena, the battle is fought largely in constitutional terms, as judges determine what restrictions, if any, should be imposed upon awards by such constitutional provisions as the Excessive Fines Clause of the Eighth Amendment[7] or the Due Process Clause of the Fourteenth Amendment.[8]

This Article, while recognizing the importance of these debates, suggests that the egregiousness of past and present punitive damage award abuses, and the status of such abuses under the Constitution, are of limited importance in our attempts to forge sensible punitive damage policies.[9] Instead of focusing on these debates, the following pages contain a zero-based examination of some of the most critical questions concerning punitive damages policy. The emphasis is on understanding the functions, goals, and purposes of punitive damages, as well as the

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Eng. Rep. 768 (K.B. 1763).

4. The reasoning behind this position is predicated on research findings, such as the observations of Rustad and Koenig that punitive damages usually are "richly deserved," as they are consistently assessed against defendants with "some prior notice of a developing or known danger or risk for which they failed to take remedial steps," causing "catastrophic injury or death." Michael Rustad & Thomas Koenig, *Punitive Damages in Products Liability: A Research Report*, 3 PROD. LIAB. L.J. 85, 93 (1992).

5. *See* Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 694-95 (1996) (citing evidence that both amounts and frequency of punitive damage awards are reasonable); Michael W. Kier, Comment, Todd Shipyards Corp. v. Cunard Line, Ltd.: *Procedural Due Process and An Arbitrator's Punitive Damage Award*, 42 CASE W. RES. L. REV. 1085, 1085 (1992) (noting belief of some that frequency and magnitude of punitive damages have recently increased).

6. *See, e.g.*, David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1115-16 (1995).

7. *See infra* notes 96-98 and accompanying text.

8. *See infra* notes 99-138 and accompanying text.

9. In other words, the frequency with which the issue of punitive damages is discussed in terms of constitutional questions is disproportionate to the importance of those questions. Likewise, the relative frequency of public policy analysis in law review articles is low, considering how crucial public policy issues are to the punitive damages debate.

potential negative side-effects. From this vantage, we can forge policies most likely to benefit society—policies that are consistent with legitimate goals, fair to the individuals and institutions immediately affected, and beneficial to the broader communities that may be affected indirectly.

The analysis begins in Part II, which identifies the major arguments, both theoretical and practical, that usually are rendered in support of each side of the punitive damages debate. This discussion is followed by a brief examination of government responses to the battle over punitive damages. The observations in this portion of the Article suggest that opponents have made significant incursions into the size of acceptable punitive damage awards, and that reform has occurred in both judicial and legislative arenas.

The remainder of the Article is dedicated to building a normative framework that addresses one of the most fundamental generic issues related to reform: the calculation of punitive damages, including any appropriate constraints upon assessment processes. Part III discusses the purported benefits and functions of punitive damages. We need to understand and assess the variety of goals behind the institution before we can begin to make policy recommendations.

Part IV discusses various methods of calculating punitive damages or criteria that can be used either separately or collectively to determine awards. These are examined in light of the policy functions and goals discussed and evaluated in Part III. Part IV includes an assessment of the various methods and criteria identified, recommending those that best serve litigants and society in general. The Article concludes with Part V, which summarizes the observations, findings, and recommendations.

II. POSITIONS OF OPPONENTS AND SUPPORTERS OF PUNITIVE DAMAGES AND GOVERNMENT RESPONSES TO THESE POSITIONS

A. *Positions of Opponents*

Growing concern over punitive damages can be attributed to a trend of "significantly larger jury verdicts"[10] and an increase in the number

10. Gregory C. Parliman & Rosalie J. Shoeman, *Punitive Damages: A Discussion of Judicial and Legislative Responses to Excessive Jury Awards*, 20 EMPLOYEE REL. L.J. 177, 177 (1994).

Modern punitive damage awards have been increasing since the 1970s. *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 2-6 (1982) (observing growing size of punitive damage awards in late 1970s and early 1980s). For a review of research showing growth in amounts of punitive damage awards,

of cases in which punitive damages are sought.[11] Demands for reform in the area of punitive damages peaked during the Bush administration years, when Vice President Quayle criticized awards for being capricious and excessive.[12] Ostensibly "skyrocketing"[13] punitive damage awards have been cited as the cause of U.S. company failures[14] and the source of a competitive disadvantage to U.S. firms in global markets.[15] Growing punitive damage awards also may exacerbate the proliferation of socially costly[16] nuisance suits,[17] through which litigants purportedly intimidate opponents by threatening spurious claims for damages of menacing proportions.[18]

Critics from the law and economics school suggest that punitive damages yield economic inefficiencies in the form of "overdeterrence."[19] They reason that optimally efficient deterrence occurs when tortfeasors are held accountable for damages that precisely match the social harms at issue.[20] Punitive damages supposedly push deterrence beyond this optimal level, leading defendants and observers

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see Peter Kinzler, *Recent Studies of Punitive Damage Awards: The Tale of the Tape*, 15 J. INS. REG. 402 (1997).

11. Bruce Hight, *Punitive Awards: Burden on Economy*, AUSTIN AM.-STATESMAN, Apr. 6, 1994, at E1.

12. Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 564 (1992).

13. *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (statement by Justice O'Connor, "awards of punitive damages are skyrocketing").

14. Paul J. Baker, *Tort Reform Is Answer to Years of Lawsuit Abuse*, COLUMBUS DISPATCH, Jan. 9, 1997, at 8A.

15. This competitive disadvantage is a function of increased cost to U.S. firms in areas such as "insurance premiums, attorney's fees, public relations expenditures, and inspection/product testing." Russell G. Murphy, *"Common Sense Legal Reform" and Bell's Toll: Eliminating Punitive Damage Claims from Jurisdictional Amount Calculations in Federal Diversity Cases*, 84 KY. L.J. 71, 92 n.176 (1995).

16. *See* Richard G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 197 (1992) (noting high social cost of litigation generally); Adam F. Ingber, Note, *10b-5 or Not 10b-5?: Are the Current Efforts to Reform Securities Litigation Misguided?*, 61 FORDHAM L. REV. 351, 356 (1993) (citing high social costs of frivolous lawsuits in U.S.).

17. This heading includes litigation labelled "abuse of process." *See* Timothy P. Getzoff, Comment, *Dazed and Confused in Colorado: The Relationship Among Malicious Prosecution, Abuse of Process, and the* Noerr-Pennington *Doctrine*, 67 U. COLO. L. REV. 675, 676 (1996) (noting abuse of process concerns regarding "litigants who use legal actions improperly to extort some benefit, such as money, that is otherwise not warranted").

18. Philip Gold, *How Class Action Lawsuits Are Destroying Us*, WASH. TIMES, Oct. 29, 1996, at A17.

19. *See, e.g.*, William M. Landes & Richard R. Posner, *New Light on Punitive Damages*, REGISTER, Oct. 1986, at 3.

20. Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1772 (1996).

to exercise levels of care that are "inefficiently high."[21] This in turn creates pricing warps whereby purchasers pay not only for the efficient risk premium covering accidents expected to result from a product's use, but also for a super-premium exacted to cover payment of anticipated punitive damages.[22] Some pricing warp allegations target specific industries—contending, for example, that excessive punitive damages contribute to the high cost of health care.[23]

Excessive punitive damages also may impose disproportionately burdensome costs on U.S. businesses, placing them at a disadvantage relative to competitors from other nations.[24] According to one source, civil liability in 1995 totalled $161 billion, a figure comprising 2.3% of gross domestic product, more than twice the average of our competitors in other nations.[25] California governor Pete Wilson recently cited this drain on U.S. business resources in his state-of-the-state speech, pleading for reform of "a legal system that has made the lawyer's briefcase a weapon of terror" that threatens the viability of our economy.[26] If punitive damages indeed are excessive given the ends they seek to achieve, our nation may be paying the cost in terms of impaired profitability, as well as business lost to global competitors operating under less threatening legal systems.[27]

Anxiety over the amount of awards is compounded by suggestions that calculation of punitive damages is vague and uncertain,[28] arbitrary and capricious,[29] particularly in the absence of jury instructions

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21. *Id.*

22. *Id.* at 1773 n.62.

23. *See, e.g., Health Care Priorities, Congress Should Stick to Basic Reforms*, SAN DIEGO UNION-TRIB., Aug. 5, 1994, at B6.

24. *See* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1423 (1994) (tying increased litigation to high economic costs in U.S.); Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 257-58 (1996) (noting economic side effects of "excessive litigation").

25. Ruth Gastel, *The Liability System*, INSURANCE INFO. INST. REP., Jan. 1998, *available in* LEXIS, News Library, Allnws File.

26. John H. Sullivan, *Tort Reform: Unfinished Sacramento Business*, BUS. PRESS CAL., Jan. 20, 1997, at 23.

27. *See* Owen, *supra* note 10, at 6 (raising concern that ostensibly increasing size and number of punitive damage awards may adversely affect future American businesses).

28. Victor E. Schwartz & Mark A. Behrens, *The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform*, 30 SAN DIEGO L. REV. 263, 265 (1993).

29. *See* Quayle, *supra* note 12, at 564 (noting punitive damages are calculated in "random and capricious manner").

providing adequate standards of guidance.[30] The ostensible result is awards that vary substantially among comparable cases,[31] potentially creating a degree of instability and uncertainty that raises insurance costs as institutions try to cover precarious and unpredictable levels of risk.[32] Under this line of reasoning, evidence that many punitive damage awards are reduced or reversed on appeal fails to placate critics, who observe that volatility itself adversely affects U.S. businesses competing against foreign enterprises operating in more stable environments.[33] Moreover, the vagueness and uncertainty in punitive damage awards may have a chilling effect on innovation, as companies fearing unpredictable punitive damage liability shun or discontinue cutting-edge projects.[34]

Philip Howard discusses this phenomenon as a kind of claustrophobia that punitive damages may inflict on professionals who supplant optimizing decisionmaking with a search for safe but uninspired alternatives.[35] Excessive awards thus create a culture of risk-averse cowards who shrink from challenges for decisive action, preferring instead the safer but stodgier course. Excessive risk aversion could impair social advancement and economic development, particularly in fast-paced global markets in which international competitors may feel freer under less constraining legal systems to pursue bold and ultimately successful strategies.

Other critics have challenged punitive damages on principled, philosophical grounds that stand independent of economic arguments. For example, some have suggested that punitive damages are inappropriate to the civil court venues in which they arise. Under this reasoning, the civil law system should limit its purview to the ends of compensa-

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30. John L. Meredith & Brian P. Casey, *Taking Cover: Preserving Error When Hit with a Claim for Punitive Damages*, 47 BAYLOR L. REV. 923, 942 (1995).

31. *Cf.* Hiller B. Zobel, *Settle, Yes—but the "Punitives," Well . . .* , CHRISTIAN SCI. MONITOR, Oct. 28, 1996, at 19 ("[W]hereas judges imposing fines may be subject to some kind of legislatively imposed guidelines designed to encourage uniformity, punitive damages vary with each jury.").

32. *See* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 399 (1994) (acknowledging punitive damages as source of increased insurance costs).

33. *See* Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in* Haslip, 42 AM. U. L. REV. 1365, 1371 (1993) ("Vague and uncertain punitive damages law . . . handicaps American businesses in competition with foreign enterprises.").

34. *Id.* at 1371-72 (citing example of company that stopped working on HIV vaccine due to fear of "unchecked liability [from sources] such as punitive damages").

35. *See* Philip K. Howard, *Congress Must Reduce Jackpot Theory of Justice in Courts*, CORP. LEGAL TIMES, Dec. 1995, at 8.

tion,[36] leaving matters of retribution and deterrence to the criminal law system that was expressly designed and authorized to further these ends.[37]

The fairness of a number of practices in the award of punitive damages also has come into question. Because punitive damages serve a criminal or at least quasi-criminal function,[38] some commentators are concerned that they are awarded without any of the usual procedural safeguards that attend criminal trials, including stringent standards of proof, the right to confront witnesses against oneself, the right to a trial by jury, and the election against self-incrimination.[39] Perhaps most critically, civil punitive liability evades the traditional requirement that criminal punishments be restricted to areas "previously defined by law,"[40] which presumably ensures the distinct and accurate definition of punishable offenses.[41]

Likewise, the Constitution's prohibition of double jeopardy may be a sham if civil juries can exact exorbitant, technically civil penalties against defendants exonerated in the course of criminal trials. Most conspicuous in this regard is the civil jury's $33.5 million damage award against O.J. Simpson in *Estate of Goldman v. Simpson*[42] following Simpson's acquittal in criminal court.[43] By what manner of technical distinction can these severe punitive damages be labelled part of a civil trial designed to "make plaintiffs whole," rather than a second attempt to convict the exonerated defendant using the expedient of

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36. *See* Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079, 1079-80 (1988) (noting "conventional analysis" of punitive damages decries extension of tort law beyond compensatory function).

37. Nicole B. Cásarez, *Punitive Damages in Defamation Actions: An Area of Libel Law Worth Reforming*, 32 DUQ. L. REV. 667, 671 (1994).

38. Paul C. Feinberg, *Federal Income Taxation of Punitive Damages Awarded in Personal Injury Actions*, 42 CASE W. RES. L. REV. 339, 355 (1992) (noting similarity of criminal fines and punitive damage awards, except former paid to government and latter paid to private persons); Paul M. Sykes, Note, *Marking a Road to Nowhere? Supreme Court Sets Punitive Damages Guideposts in* BMW v. Gore, 75 N.C. L. REV. 1084, 1085 (1997) (labeling punitive damages "penal rather than compensatory in nature," and observing that they "introduce a quasi-criminal element into civil law proceedings").

39. *See generally, e.g.*, Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967).

40. HAROLD J. BERMAN & WILLIAM R. GREINER, THE NATURE AND FUNCTIONS OF LAW 129 (4th ed. 1980).

41. *Id.* at 125.

42. LRP Pub. No. 192584, Jury Verdict Rsch., Feb. 1997, *available in* LEXIS, Verdct Library, Allver File. The award included $8.5 million compensatory damages and $25 million punitive damages.

43. O.J. Simpson was acquitted of murder charges on October 3, 1995. O.J. Simpson Case Chronology, UPI DOMESTIC NEWS, Feb. 5, 1997, *available in* LEXIS, New Library, Allnws File.

another trial—one employing a less burdensome standard of proof, and yet still fundamentally criminal in the punishment it metes out?[44]

A number of commentators have focused on fairness issues that relate more to the ways in which our punitive damages system is implemented than to the ideology behind the institution. Some have voiced concern regarding a trend to permit arbitrators in certain industries to assess punitive damages,[45] thereby ceding quasi-criminal sanctioning power even beyond the civil law's system of judges and juries. Others have focused on so-called "multiple punitive damages,"[46] through which a defendant may be punished redundantly by many plaintiffs for a single wrongful act.[47] The result of this practice may be the imposition of a cumulative excessive punishment—i.e., a punishment incommensurately harsh in relation to the severity of the infraction.[48] Moreover, multiple punitive damages potentially deny compensation to some plaintiffs after oppressive punitive damages have been paid to a number of others, thereby depleting a defendant's resources.[49] Despite such claims of unfairness, multiple punitive damage awards have been upheld under due process analysis.[50]

Other commentators have lodged serious challenges to our punitive damages system based on arguments of social utility. One judge has questioned the effects of the so-called "jackpot theory of justice," through which punitive damage windfalls received by plaintiffs from institutions like HMOs may ultimately harm the public rather than the institutions being castigated.[51] When exorbitant punitive damages cripple the institution against which they are assessed, recipients of the institution's services, in this instance an HMO's patients, may suffer a

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44. For discussion of these concerns regarding the O.J. Simpson civil case, see Nina Bernstein, *Views of a Legal Ordeal*, N.Y. TIMES, Feb. 5, 1997, at A1.

45. *See, e.g.*, John P. Clearly, *Filling* Mastrobuono*'s Order: The NASD Arbitration Policy Task Force Ensures the Enforceability of Punitive Damages Awards in Securities Arbitration*, 52 BUS. LAW. 199, 203 (1996).

46. For detailed discussion of multiple punitive damages, see generally Barbara DiTata, *Multiple Imposition of Punitive Damages*, 14 J. PROD. LIAB. 289 (1992).

47. *See, e.g.*, Testimony by Victor Schwartz, Partner Crowell & Moring, Before the Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee, May 23, 1994, *reprinted in* FED. NEWS SERV., May 24, 1994.

48. *Id.*

49. *Id.*

50. *See, e.g.*, Dunn v. HOVIC, 1 F.3d 1371 (3d Cir. 1993), *modified in part*, 13 F.3d 58 (3d Cir. 1993), *cert. denied sub nom.*, Owens-Corning Fiberglas Corp. v. Dunn, 510 U.S. 1031 (1993); W.R. Grace & Co. v. Waters, 638 So. 2d 502 (Fla. 1994).

51. *See* Howard, *supra* note 35, at 8 (referring to comments of Federal Judge Dickinson Debevoise).

loss in quality.[52] Even when punitive damages are not so devastating as to ravage the quality of critical public services, they nonetheless are likely to be passed on to the public in the form of increased costs assessed to pay for growing insurance premiums.[53]

B. *Positions of Supporters*

Claims of excessive, out-of-control punitive damages have been countered by those who defend the system as it has developed,[54] and by those who believe that the system is not rigorous enough—i.e., that it contains loopholes that weaken the social functions of punitive damages.[55]

Some argue that punitive damage awards are modest[56] and are awarded relatively infrequently.[57] Perhaps partly in response to highly publicized abuses, juries in traditionally plaintiff-friendly regions have

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52. *Id.*

53. *See* Douglas R. Richmond, *An Overview of Insurance Bad Faith Law and Litigation*, 25 SETON HALL L. REV. 74, 138 n.443 (1994) (suggesting cost of huge punitive damage awards is passed on to public to cover defendants' raised insurance premiums).

54. *See generally, e.g.*, Rustad & Koenig, *supra* note 4.

55. Tax deductibility of punitive damages is an example of one such loophole. For critical discussion of this loophole, see Kimberly A. Pace, *The Tax Deductibility of Punitive Damage Payments: Who Should Ultimately Bear the Burden for Corporate Misconduct?*, 47 ALA. L. REV. 825, 825-27 (1996).

56. *See, e.g.*, Brian T. Beasley, *North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?*, 74 N.C. L. REV. 2174, 2190 (1996) (noting research indicating that recent punitive damage awards in North Carolina have been "fairly modest").

A schism exists between public perception of huge awards and the reality of more moderate awards. This discrepancy is encouraged when high-profile excessive jury awards are heavily publicized. The dramatic reductions in awards that frequently follow as a result of post-judgment hearings or appeals are less sensational and therefore are likely to receive less press coverage. The coverage of award reductions that does exist frequently appears in low-profile professional publications. *See, e.g.*, Frederick Schmitt, *Jury Award Against* Liberty Nat'l *Cut from $5 Million to $37,500*, NAT'L UNDERWRITER, Apr. 7, 1997, at 29 (noting judge-ordered award reduction during post-judgment hearing). The public is left with inflated notions of the amounts of punitive damages that are ultimately charged against defendants.

57. *See* Rustad & Koenig, *Demystifying the Functions of Punitive Damages in Products Liability: An Empirical Study of a Quarter Century of Verdicts*, EXECUTIVE SUMMARY 11 (1991) (stating punitive damages were awarded in only 355 products liability cases between 1965 and 1990); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 31 (1990) (observing punitive damages awarded in only 4.9% of 25,627 civil jury verdicts studied in early 1980s); Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 459 (1987) (noting infrequency of punitive damage awards). *But see* Mark A. Hoffman, *Punitive Awards Common in Financial Cases*, BUS. INS., June 23, 1997, at 36 (noting punitive damage awards, while generally infrequent, are much more common in financial injury verdicts).

begun curtailing the size of personal injury awards.[58] A study published by the National Center for State Courts found punitive damages awarded in only six percent of plaintiff victories,[59] suggesting that the lamented frequency of punitive damage awards is exaggerated. Numerous other studies support the contention that punitive damages are awarded only infrequently in both personal injury cases and product liability cases.[60]

Punitive damage supporters suggest that instances of outrageously high awards are the exception rather than the rule.[61] The largest damages tend to be publicized conspicuously,[62] potentially magnifying and distorting public perceptions that exorbitant awards abound. Even in regard to the most astronomical awards, such as the $5 billion in punitive damages awarded against Exxon over the highly publicized 1989 Valdez spill,[63] amounts appearing excessive in absolute terms may be reasonable considering the egregious nature of the actions being punished.

Punitive damage supporters also contend that the tort reform movement of the 1980s has been highly politicized, telling only one side of the story in an unbalanced, partial rendering.[64] Under this supposition, tort reform reflects the power and influence of business and the insurance industry rather than real flaws in the legal system.[65] Arguably missing from the tort reform platform is a recognition of the social benefits of punitive damages.

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58. Mary Flood, *To Many Plaintiffs, Texas Juries Add Only Insult to Personal Injuries*, WALL ST. J., Tex. J. Regional Sec., Mar. 12, 1997, at T1.

59. *See* Thomas A. Eaton & Susette M. Talarico, *A Profile of Tort Litigation in Georgia and Reflections on Tort Reform*, 30 GA. L. REV. 627, 667 (1996) (citing NATIONAL CENTER FOR STATE COURTS, WORK OF STATE COURTS (1993)).

60. *See* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1129-31 (1996) (documenting many studies indicating "low frequency in personal injury cases" and "low frequency in product liability cases").

61. *See* Editorial, *Sensible Damage Awards*, J. COM., Oct. 24, 1991, at 8A ("The image of ignorant juries frivolously awarding millions of dollars to money-grubbing plaintiffs for slight harm is supported only by a few high-profile cases.").

62. Kenneth Ross & Kathryn M. Koch, *Documenting Manufacturer's Safety Is Way to Beat Punitive Damages*, 11 J. PROD. LIAB. 95, 96 (1988).

63. *See In re* the Exxon Valdez, No. A89-0095-CV, 1995 WL 527988 (D. Alaska, Jan. 27, 1995). For discussion of this incident and recent judicial activity related to it, see Helen R. Macleod, *Exxon's Appeal of* Valdez *Damages Based on Confidence, Lawyer Says*, J. COM., Feb. 18, 1997, at 10A.

64. *See* Daniels & Martin, *supra* note 57, at 9-14 (discussing politicization of tort reform debate, casting movement as social construction of organized, well-financed interest groups).

65. *See* Sharon G. Burrows, Comment, *Apportioning a Piece of a Punitive Damage Award to the State: Can State Extraction Statutes Be Reconciled with Punitive Damage Goals and the Takings Clause?*, 47 U. MIAMI L. REV. 437, 441 (1992) (suggesting that business's clout with Reagan administration resulted in "tort reform legislation [that] heavily favors defendants").

For example, punitive damages can improve the behavior of both individuals and businesses by supplementing the law enforcement efforts of district attorneys and attorneys general.[66] A rigorous punitive damages system that stretches the limited resources of public officials arguably encourages the exercise of care on the part of businesses,[67] health care institutions,[68] and insurance companies.[69] Evidence suggests that the majority of defendants who pay punitive damages adopt some kind of safety measures, presumably influenced at least in part by the imposition of the penalty.[70] Punitive damages likewise discourage socially reprehensible behavior, such as sexual harassment[71] and sexual abuse.[72]

Some who support punitive damages for the role they can play in creating a better world are activists moving in a direction diametrically opposed to the activists seeking tort reform. They believe that the impact of punitive damages needs to be strengthened, not weakened. For

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66. *See, e.g.*, Kink v. Combs, 135 N.W.2d 789, 798 (Wis. 1965).

67. One commentator has noted:

> Path-breaking scholars and courts have propelled plaintiffs into new theories not solely to improve the plaintiffs' chances of compensation, but also and explicitly to alter the behavior of providers of goods and services. Thus courts are increasingly willing to entertain the idea of punitive damages in products liability cases, explicitly endorsing relief designed to alter conduct.

Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647, 671-72 (1988).

68. *See, e.g.*, Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters,"* 47 RUTGERS L. REV. 975, 984 (1995) ("[T]here is a continuing need for punitive damages to police the understaffing of hospitals, the denial of appropriate treatment because of a patient's inability to pay, and other types of subordination of the quality of care to the bottom line.").

69. Punitive damage awards against insurance companies are usually related to malice, fraud, or bad faith in allegedly failing to honor policies. *See, e.g.*, Allyson Quibell, *Big Deals, Big Suits*, RECORDER, Feb. 20, 1997, at 5 (reporting California superior court verdict against Travelers Companies, awarding $1.5 million compensatory damages and $25 million punitive damages for wrongful breach of insurance contract).

70. George Gray, *Informing the Public on the Issues*, IND. LAW., Dec. 25, 1996, at 4 (citing Rustad & Koenig, *Demystifying the Functions of Punitive Damages in Products Liability: An Empirical Study of a Quarter Century of Verdicts*, EXEC. SUMMARY 11-15 (1991)).

71. Thus punitive damage prospects are an issue in recent sexual harassment charges against Mitsubishi by as many as 300 women. For discussion of the allegations against Mitsubishi, see Sharon Krum, *Women: The Motor Show*, GUARDIAN, Apr. 15, 1996, at T6.

72. The most highly publicized case in this area culminated during the Summer of 1997 in an $18 million punitive damage award against a local Roman Catholic diocese for allegedly ignoring evidence that one of its priests repeatedly molested altar boys. *See* Peter Steinfels, *$120 Million Damage Award for Sexual Abuse by Priest*, N.Y. TIMES, July 25, 1997, at A1.

example, some critics challenge the tax deductibility of punitive damages,[73] noting that the practice undermines the promotion of product safety and imposes a portion of the cost of infractions on taxpayers rather than wrongdoers.[74] Opponents to deductibility cite specific congressional provisions that disallow deduction of various analogous penalties, such as fines and antitrust treble damages.[75] They reason that Congress's intent to avoid diluting the impact of these punishments is applicable to punitive damages.[76]

Punitive damage supporters also respond to what may be exaggerated or sensational allegations lodged by critics. For example, Jerry Phillips defends the award of multiple punitive damages, citing judicial procedures that can ward off overkill.[77] Likewise, respondents can challenge the notion that punitive damages are driving the proliferation of nuisance litigation.[78] Punitive damages, awarded only for extreme instances of misconduct, would seem unlikely to encourage nuisance actions, which by definition are groundless.[79] Under this line of reasoning, the innocent are unlikely to be intimidated into voluntary compliance with a plaintiff's demands by the implausible threat of punitive damages associated with entirely baseless litigation.

Finally, commentators have responded to critics' suggestions that the infliction of punishment through the civil law system is somehow anomalous. Jane Mallor and Barry Roberts note that some undesirable activities may not be criminalized, and that punitive damages enable society to discourage such behaviors.[80] Marc Galanter and David Luban observe that punishment commonly exists as a social institution beyond the framework of criminal law, and indeed even beyond the framework of formal legal systems.[81] If punishment is legitimately institutionalized in settings such as "workplaces, sports leagues, churches, and

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73. *See* Rev. Rul. 80-211, 1980-2 C.B. 57 (stating that punitive damage payments are a tax-deductible business expense).

74. *See* Pace, *supra* note 55, at 825-27.

75. *See* Catherine M. Del Castillo, Note, *Should Punitive Damages Be Nondeductible? The Expansion of the Public-Policy Doctrine*, 68 TEX. L. REV. 819, 819 (1990) (referring to I.R.C. § 162(f) (1982)).

76. *Id.*

77. Jerry J. Phillips, *Multiple Punitive Damage Awards*, 39 VILL. L. REV. 433, 438 (1994).

78. *See* Gold, *supra* note 18, at A17.

79. Nuisance actions are lawsuits intended to harass defendants. *Cf.* Waldo v. Journal Co., 172 N.W.2d 680, 683 (Wis. 1969).

80. Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 644-47 (1980).

81. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1399 (1993).

schools,"[82] then on what basis can we logically deduce that the presence of punitive mechanisms in the civil law is somehow inappropriate or insupportable?[83]

C. *Government Responses to the Battle Over Punitive Damages*

Opponents of punitive damages appear to be winning the war, as governments adopt a variety of reforms that limit awards.[84] Legislative and judicial branches alike have responded to the critics. At the legislative level, governments are curbing punitive damages through measures related to the broader movement of tort reform.[85] Laws have been enacted raising the burden of proof necessary for the assessment of punitive damages,[86] capping the amounts of permissible punitive damages,[87] eliminating punitive damages entirely,[88] requiring judges rather than jurors to calculate punitive damages,[89] and redirecting the payment of some punitive damages from private plaintiffs to public purposes.[90]

Likewise, the judiciary in recent years has exerted a conservative influence on the calculation of punitive damages. Both trial judges and appellate courts reduce excessive punitive damage awards granted by

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82. *Id.*

83. Indeed, lodging punitive mechanisms in the civil law simply recognizes the impracticability of precise delineations in any effective justice system. Punitive damages are envisioned most accurately as inhabiting an unavoidable "gray area between purely criminal cases and exclusively compensatory civil claims." James R. McKown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419, 423 (1995).

84. Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 6 (1992).

85. Although punitive damage doctrine originally arose out of the common law, many state legislatures passed legislation in the 1980s to clarify and sometimes to reform the remedy. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001-.009 (Vernon Supp. 1994).

86. *See* Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 88 (1992) (noting states that require "clear and convincing evidence" and even "proof beyond a reasonable doubt" as standards for awarding punitive damages).

87. *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, 414-19 (1995) (discussing statutes imposing various forms of punitive damage caps).

88. *See* Shores, *supra* note 86, at 87-88 (citing statutes in Louisiana, Nebraska, and New Hampshire that have been interpreted judicially as restricting awards to compensatory damages).

89. Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 142 n.3 (1991).

90. *See* Hallahan, *supra* note 87, at 417 (noting nine states directed portions of punitive damage awards into state funds as of 1995).

juries.[91] In perhaps the most highly publicized instance, a woman in New Mexico sued McDonald's after being scalded by a cup of hot coffee and won $2.7 million in punitive damages.[92] The jury award against McDonald's, which evoked "howls of outrage and ridicule nationally," as well as business and insurance group demands for tort reform,[93] was reduced by the trial court judge to $480,000.[94]

Many efforts toward the judicial curtailment of punitive damages have been grounded in constitutional protections. In recent years, appellants have raised the Eighth Amendment's Excessive Fines Clause and the Fourteenth Amendment's Due Process Clause to challenge the constitutionality of awards, with varying degrees of success. Challenges to punitive damage awards under the Eighth Amendment's Excessive Fines Clause fail under a Supreme Court decision holding that "fines" refer only to payments to the sovereign, and not to civil damages paid to a private party.[95] Because it could find no evidence of the intended meaning of the word "fines" in the Constitution, the Court interpreted the term as generally understood when the Eighth Amendment was adopted.[96] A fine at the time meant "a payment to a sovereign as punishment for some offense,"[97] therefore the Excessive Fines Clause was construed not to apply to punitive damage awards in private litigation.[98]

The more promising constitutional basis for tort reform is due process, first identified by Justice O'Connor in 1988 as a potentially successful weapon for foes of excessive punitive damages.[99] Opening

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91. Of course, overly intrusive judicial review of awards raises constitutional issues concerning the role of juries. For discussion of the Seventh Amendment implications of judicial review of jury awards, see generally Roger W. Kirst, *Judicial Control of Punitive Damage Verdicts: A Seventh Amendment Perspective*, 48 SMU L. REV. 63 (1994).

92. Liebeck v. McDonald's Restaurants, No. CV-93-02419, 1994 WL 360309 (N.M. Dist. Aug. 18, 1994).

93. Kim Wessel, *Woman Sues Arby's Over Burns from Coffee*, COURIER-J., Dec. 27, 1996, at 1B.

94. Liebeck v. McDonald's Restaurants, No. CV-93-02419, 1994 WL 782090 (N.M. Dist. Ct. Sept. 1994).

95. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989). For analysis of the decision, see Donald S. Yarab, Comment, Browning-Ferris Industries v. Kelco Disposal, Inc.: *The Excessive Fines Clause and Punitive Damages*, 40 CASE W. RES. L. REV. 569 (1989-90). For discussion of theories under which Eighth Amendment scrutiny of punitive damages in civil cases may be developed, see generally Stephen R. McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 KAN. L. REV. 761 (1995).

96. *Browning-Ferris*, 492 U.S. at 266.

97. *Id.* at 265.

98. *Id.* at 263-64.

99. *See* Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part).

the door for effective constitutional scrutiny of awards, Justice O'Connor noted in a partially concurring opinion that the exercise by juries of "wholly standardless discretion" in establishing punishments appears to violate the strictures of due process.[100]

The due process challenges that followed Justice O'Connor's observation apply a stream of analysis that began with the 1991 Supreme Court decision in *Pacific Mutual Life Insurance Co. v. Haslip*.[101] An agent of Pacific Mutual sold Cleopatra Haslip and her co-workers health insurance policies.[102] After the agent absconded with Haslip's money, Pacific Mutual cancelled the policies for nonpayment of premiums.[103] When Haslip was hospitalized, Pacific Mutual rejected her claims.[104] Meanwhile, the unpaid hospital placed Haslip's account in the hands of collection agents.[105] The jury awarded Haslip $1,040,000, over four-fifths of which comprised punitive damages.[106]

On appeal, the Supreme Court focused on trial court activities as well as Alabama's procedures for reviewing jury awards of punitive damages.[107] Examining jury instructions,[108] post-verdict and appellate court review procedures,[109] and the actual amount of punitive damages,[110] the Court upheld the award.[111]

Although the Court held the punitive damage award in *Haslip* to comply with constitutional requirements,[112] it noted that punitive damage awards in other instances could violate due process.[113] The Court suggested that some degree of jury discretion in assessing punitive damage awards is permissible, especially if instructions constrain discretion to legitimate purposes[114] and the trial court maintains post-verdict procedures for the review of jury awards.[115] By inference, a failure to provide acceptable review processes and safeguards to constrain jury discretion may render some punitive damage awards

100. *Id.*
101. 499 U.S. 1 (1991).
102. *Id.* at 4-5.
103. *Id.* at 5.
104. *Id.*
105. *Id.*
106. *Id.* at 6.
107. *Id.* at 21-24.
108. *Id.* at 19-20.
109. *Id.* at 21-23.
110. *Id.* at 23.
111. *Id.*
112. *Id.* at 19.
113. *Id.* at 18-24.
114. *Id.* at 19-20.
115. *Id.*

vulnerable to due process attack. Accordingly, the Supreme Court reversed a punitive damage award in Oregon because the state's constitution virtually prohibited judicial review of punitive damage assessments.[116]

The *Haslip* decision stated that punitive damages need not be assessed under a standard of proof higher than preponderance of evidence in order to comply with due process.[117] The Court also noted that while reasonableness and adequate court guidance should enter assessments of unconstitutional excessiveness, a "mathematical bright line" cannot be drawn to distinguish between acceptable and unacceptable awards.[118] While a ratio of punitive to compensatory damages exceeding four to one was considered to create a borderline case, Alabama's procedural safeguards rendered the award constitutionally permissible.[119]

A decision rendered two years after *Haslip* further indicated the limited value of examining ratios to determine excessiveness of punitive damages under due process analysis. In *TXO Production Corp. v. Alliance Resources Corp.*,[120] the Supreme Court applied the criteria it had established in *Haslip* to affirm a punitive damage award of $10 million, 526 times the compensatory damage award of $19,000.[121] Conceding that the award was large in comparison to actual injuries,[122] the Court emphasized the severity of the defendant's wrongdoing rather than the amount of compensatory damages in evaluating constitutionality.[123] Noting the great "magnitude of . . . potential harm that the defendant's conduct would have caused" had its fraudulent scheme been successful, the Court determined that the award complied with the requirements of due process.[124]

The most significant punitive damages reform in recent years came from the Supreme Court's 1996 decision in *BMW of North America v. Gore*.[125] The case was brought by the purchaser of a BMW who alleged that BMW fraudulently concealed the partial refinishing of an automobile sold as new.[126] At trial, the Alabama jury awarded the

116. Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994).
117. *Haslip*, 499 U.S. at 23 n.11.
118. *Id.* at 18.
119. *Id.* at 23.
120. 509 U.S. 443 (1993).
121. *Id.* at 453, 466.
122. *Id.* at 460.
123. *Id.* at 461.
124. *Id.* at 462.
125. 116 S. Ct. 1589 (1996).
126. *Id.* at 1593. Upon taking it to a detail shop, the plaintiff discovered that the car he had

plaintiff $4000 in compensatory damages and $4 million in punitive damages.[127] The trial judge denied BMW's motion to set aside the punitive damages award, rejecting arguments that the award was so grossly excessive as to violate Fourteenth Amendment due process.[128] Alabama's supreme court reduced the punitive damages to $2 million under the theory that the jury's calculation wrongfully considered BMW's sales in other states, rather than its sales in Alabama alone.[129]

The United States Supreme Court found the $2 million award "grossly excessive" and therefore in violation of the Fourteenth Amendment.[130] In its assessment, the Court referred to three "guideposts" for assessing punitive damage awards in nondisclosure cases under due process analysis: "the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases."[131]

The impact of *BMW* is registering throughout the federal court system, as circuit courts apply the decision to reduce punitive damages awards viewed as excessive.[132] The Second,[133] Fourth,[134] Fifth,[135] and Tenth[136] Circuits all recently have applied *BMW* in the review of punitive damages awarded by juries. To date, *BMW* has had less effect in the state courts,[137] several of which have emphasized *BMW*'s

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purchased as new had been partially refinished prior to sale. *Id.* BMW did not disclose pre-sale repairs to either the dealer or the plaintiff, under a national policy to disclose only those repairs that equalled three percent or more of the manufacturer's suggested retail price. *Id.*

127. *Id.* at 1593-94. The punitive damages were predicated on jury findings that BMW's nondisclosure policy for repairs falling below the three percent threshold was "gross, malicious, intentional and wanton fraud." Gore v. BMW of N. Am., Inc., 646 So. 2d 619, 622 (Ala. 1994).

128. BMW of N. Am., Inc. v. Gore, 116 S. Ct. at 1594.

129. *Id.* at 1595.

130. *Id.* at 1598.

131. *Id.* at 1598-99.

132. Margaret A. Jacobs, *Federal Courts Use* BMW *Case to Cut Awards*, WALL ST. J., Dec. 27, 1996, at B1.

133. Lee v. Edwards, 101 F.3d 805, 813 (2d Cir. 1996) (holding $200,000 award against police officer for malicious prosecution excessive, and offering plaintiff choice of either reduced award of $75,000 or new trial).

134. Atlas Food v. Crane Nat'l Vendors, 99 F.3d 587, 595 (4th Cir. 1996) (noting appellate judicial discretion in reviewing jury awards).

135. Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 943 (5th Cir. 1996) (remanding case after finding punitive damage award of $150,000 excessive).

136. Continental Trend Resources, Inc. v. OXY USA Inc., 101 F.3d 634, 643 (10th Cir. 1996) (finding Tenth Circuit's own pre-*BMW* punitive damages award of $30 million excessive in tortious interference case, and reducing punitive damages to $6 million).

137. Claudia MacLachlan, "BMW" *Triggers Cuts in Punies*, NAT'L L.J., Jan. 20, 1997, at

mathematical imprecision—i.e., the court's refusal to establish acceptable compensatory-to-punitive damage ratio requirements—as a basis for upholding punitive awards greatly in excess of compensatory damages.[138]

III. ASSESSING PUNITIVE DAMAGES POLICIES: BEYOND THE CONSTITUTION

Researchers who have addressed punitive damages in recent years have tended to focus on the constitutional issues raised in the previous Part.[139] Equally important, though, are issues of public policy. Legislatures and courts must understand the legitimate functions of punitive damages, as well as how the various approaches to their assessment support or undermine these functions, if they are to fashion optimal policies.

In view of the potentially irreconcilable literature attacking[140] and defending[141] the social and economic effects of punitive damages in the late twentieth century, this Article's approach is to avoid labelling problems with sweeping and necessarily inaccurate generalizations. Instead, the goal is to fashion sound policies based on sound reasoning. Accordingly, the Article begins under no assumption that punitive damages are either a force of social evil or a force of social good. Instead, recognizing both the functions and dysfunctions of punitive damages, the remaining pages seek to fashion balanced, reasonable solutions to complex problems.

This Part examines the functions of punitive damages. These include retribution for wrongdoing, deterrence of wrongdoing, supplementation of compensatory damage awards to approximate more closely plaintiffs' true losses and costs, and augmentation of limited state enforcement resources through the encouragement of private actions. The functions discussed below will be applied in Part IV to assess various means of measuring punitive damages.

A1, A17.

138. *See id.* (citing Schaefer v. Jones, 552 N.W.2d 801 (S.D. 1996) (upholding punitive damages equal to 30 times compensatory damages); Walston v. Monumental Life Ins. Co., 923 P.2d 456 (Idaho 1996) (upholding punitive damages equal to 26 times compensatory damages)).

139. An exhaustive catalogue of this research would be excessively long. Indeed, the reader can locate scores of studies dealing predominantly or exclusively with constitutional aspects of punitive damages simply by scanning the titles of law review articles cited in the footnotes throughout this Article.

140. *See supra* pt. II.A.

141. *See supra* pt. II.B.

A. *Retribution for Wrongdoing*

One basic function of punitive damages is retribution.[142] The remedy's nomenclature is telling. We label certain damages punitive because they are intended to punish—"[t]o cause [an offender] to suffer for an offence."[143] This function is predicated upon a sense of balance, justice and desert, in accordance with H.L.A. Hart's admonition that "punishment must . . . match, or be the equivalent of, the wickedness of [the wrongdoer's] offense."[144] This model suggests an ethical component of a just retribution, under a belief that "the return of suffering for moral evil voluntarily done, is itself just or morally good."[145]

Nonetheless, at least since Shakespeare's Shylock extolled the blessings of mercy as it "seasons justice,"[146] skeptics have looked upon vengeance with a doubtful eye. Cynicism regarding revenge spilled into the literature of punitive damages in the 1960s and beyond, evincing itself in a belief that "vengeance is a questionable objective for a civilized legal system,"[147] and a conclusion by some that "[s]ociety has long since progressed beyond the primitive concept of an eye for an eye and a tooth for a tooth."[148] Of course, despite such idealism, many still believe that retribution creates rather than destroys order, balance, and justice.[149]

Nevertheless, even for those who would limit mercy in favor of swift retribution, the application of punishments in civil courts devoted at least nominally to compensation requires a leap in logic. Punishment more closely fits the criminal law system than the civil law system.[150] If retribution is to play a role in civil justice, punitive damages may be most defensible when the wrongdoer has engaged in behaviors that resemble criminal behaviors or at least share some of their key

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142. Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900, 1900 (1992).

143. OXFORD ENGLISH DICTIONARY 1603 (1st Compact Ed. 1971).

144. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 231 (1982).

145. *Id.*

146. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1.

147. Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296, 1298 (1961).

148. *See* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1164 n.214 (1984).

149. *See, e.g.*, Timothy S. Lykowski, Note, *Tightening the Constitutional Noose Around Punitive Damages Challenges:* TXO, *What It Means, and Suggestions that Address Remaining Concerns*, 68 S. CAL. L. REV. 203, 224-25 (1994) (acknowledging benefits and social utility of punishment).

150. *See* Cásarez, *supra* note 37, at 671 (noting belief of some judges and commentators that "punishment and deterrence are more appropriately left to the criminal law system").

characteristics.[151] The Model State Punitive Damages Act thus permits the award of punitive damages only when the plaintiff can prove a defendant's "malice and intent to cause serious harm."[152] Likewise, the Second Restatement of Torts notes that punitive damages can be awarded "for conduct that is outrageous, because of the defendant's evil motive or . . . reckless indifference to the rights of others."[153] While the standards for awarding punitive damages thus vary by source, a common retributive characteristic is a limitation of the remedy to behaviors sufficiently severe to justify application of quasi-criminal principles in civil forums.[154]

Subject to this limitation, the retributive function of punitive damages must rank high among the various purposes typically posited to justify the remedy. Such preeminence is based on the elemental nature of retribution in regard to any system of punishment, be it criminal, civil, or even social (i.e., extra-legal).[155] Given the very fundamental position it occupies in punitive systems, retribution will be considered a weighty function in part IV, which analyzes and assesses various methods of calculating punitive damages.

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151. One might reason that while punishment is more centrally associated with criminal justice than with civil justice, many forms of punishment nonetheless pervade numerous social institutions outside the criminal justice system. While this may rationalize the existence of retribution in civil litigation, it still seems reasonable that the tenor of that retribution be modeled after prototypes established in the criminal justice system, since that system is the most clearly focused, direct source of institutionalized retribution in formalized legal systems.

152. *See* Rustad & Koenig, *supra* note 3, at 1278-79 n.60 (citing MODEL STATE PUNITIVE DAMAGES ACT § 6 (Office of the Vice President 1992)). This model legislation was proposed by Vice President Dan Quayle's office as part of the "Agenda for Civil Justice Reform in America" that came out of the President's Council on Competitiveness.

153. RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).

154. Standards for awarding punitive damages nonetheless vary significantly by state, ranging from "fraud, malice, and oppression to reckless behavior[,] . . . a conscious disregard for the safety of others" and "grossly negligent conduct. . . ." Wendy S. Kennedy, *The Constitutionality of Punitive Damage Awards and Recent Proposed Legislation*, 17 J. PROD. & TOXICS LIAB. 245, 249 (1995). In the area of environmental torts, punitive damage liability may be based on knowledge or awareness of "an extremely high risk of harm." Gerald W. Boston, *Environmental Torts and Punitive Damages (Part One)*, 14 J. PROD. LIAB. 1, 38 (1992).

155. The ancient exhortation to exact "an eye for an eye" reflects the visceral need to increase a penalty in proportion to the severity of the act being punished. *Exodus* 21:24. Whether characterized in the sanitized vernacular of "retribution," or in the less euphemistic but perhaps more ingenuous language of vengeance or retaliation, humans appear to have a need to exact a payment that provides the sense of balance and order of an evened score. *See* Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 660 (1985) (observing victims' and societies' need for retribution).

B. *Deterrence of Wrongdoing*

Punitive damages theoretically discourage undesirable, morally culpable, or anti-social behavior.[156] In this guise, they are more accurately classified as "exemplary damages," in accordance with the emphasis among some courts that the award is assessed as "an example to others in like cases."[157] Although the term "punitive damages" would imply a primary function of retribution and the term "exemplary damages" would suggest a primary function of deterrence, the two functions frequently are classified in tandem under either heading.[158] Regardless of the term chosen, retribution and deterrence are the most salient functions of damages assessed in excess of compensation.[159]

The intended deterrent effect of punitive damages is twofold. Offenders are less likely to repeat their offenses after being punished, and others are less likely to engage in similar behavior as they watch and learn from offenders' experiences.[160] Deterring the wrongdoer from repeating an infraction is labelled "specific deterrence," whereas deterring others from engaging in the same or similar activities is called "general deterrence."[161]

Although deterrence provides a classic rationale for both criminal and civil punitive institutions in society,[162] justification of punitive damages solely on the basis of deterrence is potentially dangerous. As David Partlett has observed, deterrence is entirely unrelated to individual responsibility.[163] If deterrence alone were used to justify punitive damages, utilitarian calculation of net social welfare[164] could be

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156. Peter M. Mundheim, Comment, *The Desirability of Punitive Damages in Securities Arbitration: Challenges Facing the Industry Regulators in the Wake of* Mastrobuono, 144 U. PA. L. REV. 197, 233 (1995).

157. McKeon v. Citizens' Ry., 42 Mo. 79, 87 (1867).

158. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (defining punitive damages as "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence").

159. *See* Andrew M. Kenefick, Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699, 1721-22 (1987) (noting most courts recognize these two functions of punitive damages).

160. Bradford D. Kaufman & Anne Tennant Cooney, *Punitive Damages in Securities Arbitration: An Undue Process*, 958 PLI/CORP. 599, 610 (1996).

161. Rustad & Koenig, *supra* note 68, at 1043.

162. *See* Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U. L. REV. 395, 419 (1990) (denoting deterrence as one of the "classic justifications for punishment").

163. David F. Partlett, *Punitive Damages: Legal Hot Zones*, 56 LA. L. REV. 781, 797 (1996).

164. Utilitarian processes, typically associated with normative philosophy, are built on the premise that "society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals

employed to impose punitive damages in a manner bearing little relationship to any conception of justice or desert.[165] This potential for unfairness would be tempered to the degree that punitive damage deterrence relies on making examples out of the most egregious and therefore deserving offenders.[166] Still, the prospect of economically rational but socially unjust use of punitive damages for deterrence purposes remains a theoretical possibility whenever issues other than desert enter the calculation.[167] Unless deterrence functions are tempered with conceptions more directly related to individual culpability and responsibility, such as the function of retribution, the risk of injustice remains.

How to optimize deterrence of undesirable behavior through assessment of punitive damages is viewed by many in terms of economics.[168] The rational actor seeks to maximize utility by comparing the expected returns of various levels of care.[169] Within this calculation of the marginal costs and benefits of care options, the likelihood and predicted magnitude of a punitive damage award increases predicted costs, thereby deterring a group of infractions that otherwise would have been profitable.[170]

It bears noting that while compensatory damages are not intended to deter undesirable behavior, they nonetheless can serve that function.[171] In some instances, the threat of litigation and its burdens, combined with

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belonging to it." JOHN RAWLS, A THEORY OF JUSTICE 22 (1971).

165. Indeed, the deterrence function of punishment is fundamentally utilitarian in its service as a means to an end. *See* Alan H. Goldman, *The Paradox of Punishment*, 9 PHIL. & PUB. AFF. 42, 42 (1979) ("A utilitarian thesis is that the justification for punitive institutions is deterrence. . . .").

166. In other words, the most serious infractions are most likely to trigger the most severe deterrents, so that the extremity of punishments aimed at retribution should tend to move in the same direction as the extremity of punishments aimed at deterrence.

167. An effective deterrent may not be fair from the standpoint of apposite retribution. Hyper-severe punishments fall in this category. While consistently enforced capital punishment may be an effective deterrent to graffiti artists on New York City subways, such a sanction would be insupportably harsh and therefore retributively unjust.

168. *See generally, e.g.*, Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79 (1982).

169. This particular observation follows from the more general economic tenet that decision makers seek choices that maximize net gain. *See* Paul B. Taylor, *Encouraging Product Safety Testing by Applying the Privilege of Self-Critical Analysis When Punitive Damages Are Sought*, 16 HARV. J.L. & PUB. POL'Y 769, 773 (1993) ("Individuals . . . will generally engage in conduct if the contemplated conduct will result in a net gain to themselves. . . .").

170. Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 305-06 (1991).

171. *See* Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 24 (1990) (discussing role of compensatory damages as deterrent).

the prospective responsibility for compensating a victim's losses, may constitute a disincentive sufficient to thwart bad behavior.[172] In other cases, however, compensatory damages alone will be insufficient to prevent socially harmful acts. Damages that simply require a defendant to undo injuries may be seen as low-risk or no risk propositions. Consider, for example, cases of fraud or theft. The defendant subject solely to compensatory damages is encouraged to engage in these activities under economic analysis. The defendant's only risk is having to return what he or she took, and this risk is discounted by the possibilities of (i) not being caught, or (ii) not being sued if caught.[173]

Likewise, in many tort cases, the anticipated profits to be derived from injurious behavior may exceed the predicted cost of compensating victims of that behavior. Consider Ford Motor Company's decision to market the Pinto without fixing an inexpensively reparable design flaw that management knew to be extremely dangerous.[174] Such a socially undesirable decision is less attractive if substantial punitive damages exist as a real threat to decisionmakers. In the absence of punitive damages, companies employing pure cost-benefit analysis may decide to engage in dangerous activities when projected profits exceed projected payments of compensatory damages. States may find the peril of punitive damages necessary to avert behavior that most would consider dysfunctional or even horrifying.

Accordingly, despite the risks of injustice that exist when deterrence is the sole motive for assessing punitive damages, deterrence remains an important function of the remedy. Along with retribution, it is one of the two classic goals of any punitive system, and it encourages actors in social situations to exercise caution and to avoid social harms. Provided that retribution is considered along with deterrence to ensure that punitive damages are fair and justifiable, the latter function ranks high as a defense of the remedy. Deterrence therefore will be treated in Part IV as commensurate with retribution in assessing methods of calculating punitive damages.

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172. Galligan categorizes these potential costs as "accident costs." *See id.*

173. Mundheim, *supra* note 156, at 219.

174. Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (4th Dist. Ct. App. 1981). According to testimony, Ford management decided "to go forward with the production of the Pinto, knowing that the gas tank was vulnerable to puncture and rupture at low rear impact speeds creating a significant risk of death or injury from fire and knowing that 'fixes' were feasible at nominal cost." *Id.* at 361.

C. *Supplementing Compensatory Damage Awards to Approximate More Closely Plaintiffs' True Losses and Costs*

Some courts[175] and commentators[176] suggest that another function of punitive damages is to permit plaintiffs to recoup their real losses accurately and fully.[177] I shall refer to this as the "compensation-augmentation rationale." The logic here is that gaps exist in the assessment of compensatory damages, through which plaintiffs with good cause must suffer net losses after litigating their cases.[178] Punitive damages can narrow or close the difference between actual costs and costs covered by compensatory damages.

Historically, the compensation function of punitive damages was related to the failure of compensatory damages under early common law to cover intangible injuries such as pain, suffering, and emotional distress.[179] In 1872, the New Hampshire Supreme Court validated the award of "smart money," meant to cover "any blemish which remains after the first smart or pain is over."[180] This variety of damages reflected the court's recognition of an injured party's "right to be free from such blemishes or from the uneasiness which any deformity may occasion him."[181] Courts evoke punitive damages to circumvent compensation limitations for other elusive harms, such as the loss of

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175. *See* TXO Prod. Corp. v. Alliance Resources, 509 U.S. 443, 463-64 (1993) (observing trial court instruction that punitive damages serve not only to punish and deter, but also "to provide additional compensation for the conduct to which the injured parties have been subjected"); *id.* at 490 (criticizing trial court's instruction, noting that "[p]laintiffs are compensated for injuries they have suffered," and that "one cannot speak of additional compensation unless it is linked to some additional harm").

176. *See, e.g.*, John A. Sebert, Jr., *Punitive and Nonpecuniary Damages in Actions Based on Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1570-71 (1986) (noting compensatory function of punitive damages in tort law, and recommending same in contract law).

177. *See* Joan T. Schmit et al., *Punitive Damages: Punishment or Further Compensation?*, 55 J. RISK & INS. 453, 456 (1988) (noting courts use punitive damages to compensate plaintiffs for otherwise unrecoverable expenses).

178. Burrows, *supra* note 65, at 448 ("To ignore the compensatory aspects of punitive damages is to assume that the injured party is being fully compensated in the current compensatory damages system.").

179. Gregory A. Williams, Note, Tuttle v. Raymond: *An Excessive Restriction upon Punitive Damages Awards in Motor Vehicle Tort Cases Involving Reckless Conduct*, 48 OHIO ST. L.J. 551, 554 (1987). The debate over the compensability of such injuries remains alive today. *See* Michael K. Carrier, *Federal Preemption of Common Law Tort Awards by the Federal Food, Drug and Cosmetic Act*, 51 FOOD & DRUG L.J. 509, 610 (1996) (suggesting debate over compensability of pain, suffering, and emotional distress continues today).

180. Fay v. Parker, 53 N.H. 342, 354 (1872).

181. *Id.*

honor.[182] So-called "aggravated damages" also may compensate for "loss of enjoyment of life" or a loss of dignity, as when the plaintiff suffers a racial epithet or inappropriate sexual interest from a doctor in a doctor/patient relationship.[183] Of course, as the law becomes increasingly receptive to awarding compensatory damages for intangible losses,[184] this justification of punitive damages approaches obsolescence.[185]

Another aspect of the compensation-augmentation rationale suggests that litigation is so precarious and strenuous that enhancements such as treble damages simply permit victims to recover their real losses and costs.[186] We can understand this justification for punitive damages by dividing the costs of the plaintiff into two distinct categories—primary costs of the wrongdoing and secondary costs of the wrongdoing. The primary costs refer to the immediate burden of the injuries that support the litigation under a particular cause of action. For example, the primary costs in a serious accident would include the bodily harm rendered by the accident, medical bills, loss of wages, and the like. Secondary costs refer to the injuries the plaintiff suffers from being subjected to conflict and its resolution. These might include the costs of nervousness regarding uncertainty of compensation for primary costs; worry over the stresses of litigation; and time, effort, and concern expended in resolving the dispute. Secondary costs generally are not covered in calculations of compensatory damages.[187] Punitive damages arguably fill the breach, as the plaintiff who receives something above and beyond compensatory damages is more likely to recover for the ephemeral, generalized distress that accompanies involvement in litigation. Presuming that punitive damage awards are limited to egregious violations, a mechanism that helps plaintiffs recover for basic conflict-related suffering may not be unreasonable.[188]

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182. *See, e.g.*, Tullidge v. Wade, 95 Eng. Rep. 909 (K.B. 1789).

183. Partlett, *supra* note 163, at 793-94.

184. *See, e.g.*, Berry v. City of Muskogee, 900 F.2d 1489, 1507 (10th Cir. 1990) (stating compensatory damages can cover such intangible injuries as mental pain and harm to reputation).

185. *See* Lisa M. Sharkey, Comment, *Judge or Jury: Who Should Assess Punitive Damages?*, 64 U. CIN. L. REV. 1089, 1103 (1996).

186. Michael Goldsmith & Mark Jay Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 VAND. L. REV. 735, 744 (1990).

187. *See* Park-Ohio Indus. v. Tucker Induction Sys., No. 82-2828, 1987 U.S. Dist. LEXIS 15642, at *12-13 (E.D. Mich. Oct. 21, 1987) (discussing ordinary absence of cause of action for litigation-related stress).

188. Of course, the contrary argument is that the law does not and can not compensate individuals for the amorphous pressures that living closely in a complex society will inevitably create. Indeed, this may be the reason why compensatory damages ordinarily do not cover the kinds of secondary costs discussed in this Part.

Finally, the compensatory model suggests that punitive damages can operate to reimburse plaintiffs for attorneys' fees and other litigation-related expenses that otherwise are non-compensable.[189] An analogy from contract law may be helpful in explaining the logic here. Economists have long recognized that contracts bear not only the cost of performing substantive promises, but also the cost of negotiating, drafting, and enforcing agreements.[190] The latter class of costs, labeled transaction costs, concern implementation procedures that must be calculated if a party is to know the true costs and benefits of any interaction or relationship with others.[191] This concept can be applied by analogy to litigation, where compensation for the wrongs inflicted under a cause of action are only part of the total cost borne by a plaintiff. Expenses associated with use of the legal system and its procedures to obtain redress can add substantial transaction-related costs to the plaintiff's search for justice,[192] particularly in a legal system in which litigation and representation can be very expensive.[193]

Because the charging of legal expenses to the losing party is discretionary[194] and generally discouraged[195] in the United States, compensatory damages purporting to "make the plaintiff whole"[196] may fall short of true compensation. In the especially outrageous cases in which they are assessed, punitive damages arguably enhance justice

189. Williams, *supra* note 179, at 554.

190. *See, e.g.*, George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1242-43 (1994).

191. *Id.*; *see* Manuel A. Utset, Essay, *Back to School with* Coase*: The Production of Information and Modes of Knowledge Within and Across Academic Disciplines*, 75 B.U. L. REV. 1063, 1065 (1995) (addressing need to incorporate both costs of production and costs of transference in valuation of transactional commodities).

192. *See* David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 651 (1994) (suggesting rational victims decline to litigate when transaction costs of legal process exceed compensable harm).

193. For discussion of the high impact of attorneys' fees on litigation costs, see Clinton W. Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840*, 80 NW. U. L. REV. 807, 865 (1986).

194. Discretion to charge attorneys' fees to a losing party is generally limited in the United States to instances of bad faith, such as the pursuit of groundless litigation. *See* Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1029 (1986) ("[C]ourts have discretion to make plaintiffs who file frivolous claims liable for the defendant's expenses.").

195. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1575-78 (1993) (discussing American rule constraining attorney fee shifting).

196. Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 16 (Tex. 1994) ("Compensatory damages are intended to make the plaintiff 'whole' for any losses resulting from the defendant's interference with the plaintiff's rights.").

by charging to a clearly identified wrongdoer the procedural expenses that have been paid by the victim seeking redress.

Ostensible shortcomings in compensatory damages, however, are a poor justification for punitive damages. The fundamental premise behind this justification—i.e., the idea that punitive damage awards should serve to bolster otherwise insufficient compensatory damage awards to serve more accurately a just compensation function—is seriously flawed. Some arguments against conceptualizing punitive damages in terms of supplementing or correcting compensatory damages are based on the idea of outmodedness. Under this reasoning, because many former limitations on compensable injuries have been lifted, punitive damages are no longer needed to augment compensatory damages.[197] While this observation is certainly true, one can argue persuasively that compensation-augmentation was never a legitimate justification for the institution of punitive damages, even when more serious impediments to complete compensatory awards were firmly entrenched in our legal system.

This argument is based on a fundamental disjunction between the stated punitive function and the purported compensation function. Use of punitive damages to round out actual compensation is irrational and imprecise, as well as duplicitous and disingenuous. The essential misfit between a punitive remedy and compensatory functions leads to results that are likely to be inconsistent and indefensible.

The fundamental difficulty in lodging a compensatory function within the rhetoric of a punitive mechanism is the basic disjunction between compensation and punishment. Punitive damages awarded to supplement otherwise inadequate compensatory damages will achieve this end only sporadically. Presume for the moment that compensatory damages do indeed fall intolerably short of compensating plaintiffs for their true losses. Making up the shortfall through punitive damages will adjust disparities between real and compensatory damages in only a limited set of cases—i.e., those cases in which the jury finds the defendant's actions to be sufficiently reprehensible to justify awarding punitive damages.[198] Under this model, availability of a special bonus adjusting compensatory damages upward to approximate true plaintiff costs depends on the severity of the defendant's behavior. The result is that

197. Sales & Cole, *supra* note 148, at 1130 (noting recent expanded availability of compensatory damages undermines rationale behind supplementary role of punitive damages).

198. This presumes that jury instructions for the award of punitive damages will require some degree of special defendant culpability to justify punishment. Jury instructions could, of course, include permission to assess punitive damages in order to cover incidental or intangible costs to the plaintiff. Apart from the misnomer of designating this function as punitive, such a system would avoid the problem of selective supplementation only if judges indeed were to include such a clause in their instructions to juries.

only an arbitrarily select portion of plaintiffs receive damages enhanced to cover true costs. This makes no sense—either all plaintiffs should receive an enhancement to approximate what are arguably the actual costs, or no plaintiffs should. It is difficult to fathom convincing reasons for confusing the functions of compensation and punishment, such that differences in comprehensiveness of plaintiff recovery are made to be a function of unrelated variables concerning defendant culpability.

Moreover, the kind of award that fairly covers true cost is a policy issue for legislatures to decide. When courts employ punitive damages to effect what they may consider to be fairer compensation on a case-by-case basis, they only increase inconsistency, subvert legislative intentions, and remove some of the impetus for legislatures to revisit the question of what kinds of costs should be covered by compensatory damages.[199]

Consider, for example, the U.S. convention under which parties ordinarily pay their own litigation costs and associated expenses.[200] This approach can be contrasted with a "loser pays" convention, under which the loser must cover the winner's litigation expenses.[201] The U.S. presumption against attorney fee shifting differs from the position of most industrial democracies, and has been subject to much criticism.[202] Scholars have suggested that fee shifting enhances fairness and

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199. Use of punitive damages to supplement compensation is disingenuous. The common law, followed by legislatures, has determined the limitations and qualifications of compensatory damages. For better or worse, states may expressly restrict the kinds of factors that can go into the calculation of compensatory damages. Some of these restrictions may be wise; others may be foolhardy. Even in the latter instance, the appropriate way to cure inadequacies in the calculation of compensatory damages is to recognize them, identify them for what they are, discuss them, and then honestly and directly make any recomendations considered advisable.

Courts evoking punitive damages as an end-run around even admittedly dysfunctional compensatory damages restrictions raise numerous concerns. Foremost, by circumventing statutory edict, the process flouts the legitimate authority of legislatures. *See* Clay R. Stevens, Comment, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 PEPP. L. REV. 857, 865 (1994) ("[P]unitive damages circumvent the current system of compensatory damages by allowing victims who are being compensated for all damages for which the legislature chooses to compensate them to recover this additional compensation.").

Regardless of whether a statute's compensatory damage restrictions are optimal, they are the law. Legislatures should not be thwarted by the judiciary's second guesses. Lawyers, scholars, and citizens can alert their lawmakers to any inadequacies in policy, which legislators can then reconsider and alter using the judgment they were elected to exercise.

200. Donald Baker, *Litigation: Sucking the Blood of U.S. Businesses*, INT'L CORP. L., July/Aug. 1993, at 13.

201. *Id.* For discussion and comparison of the two approaches, see generally Vargo, *supra* note 195.

202. Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 651.

equity by permitting the winning party to recoup all the costs necessary to be made truly whole, including the transaction costs of litigation.[203] Some also note that fee shifting discourages nuisance litigation by increasing the risks and costs of bringing spurious suits.[204] Yet despite these arguments, the U.S. approach avoids some potential disadvantages of fee shifting. For example, fee shifting can discourage good-faith litigation when outcomes are uncertain.[205]

Ultimately, the decision to permit winners to recoup their litigation expenses from losers is a political decision that properly falls within the dominion of legislatures. Attempts to achieve more complete compensation for plaintiffs through the awarding of punitive damages therefore circumvent proper political channels. Legislatures should be left free to weigh the costs and benefits of the different approaches to fee shifting, and to develop the policies that they consider to be in the best interests of the constituencies that elected them.

In recognition of all these problems, the assessment of punitive damages for compensatory purposes has been roundly and justifiably criticized by numerous judges and legal scholars.[206] Accordingly, compensatory functions will be weighed very low in Part IV, as we analyze the utility of various calculation methods.

D. *Augmentation of Limited Government Enforcement Resources Through the Encouragement of Private Actions*

To some authorities, punitive damages exist primarily to benefit society rather than plaintiffs.[207] One purported social benefit of punitive damages is the creation of a corps of private litigants who

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203. *See* David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847, 851 (1986) ("Fee-shifting provides the dual benefits of making deserving plaintiffs whole and discouraging frivolous suits.").

204. *See id.*; *see also* Lorraine Wright Feuerstein, Comment, *Two-Way Fee Shifting on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits*, 23 PEPP. L. REV. 125 (1996).

205. *See* Gregory A. Hicks, *Statutory Damage Caps Are an Incomplete Reform: A Proposal for Attorney Fee Shifting in Tort Actions*, 49 LA. L. REV. 763, 790 (1989) (arguing acceptable fee-shifting systems must be designed to avoid this effect).

206. *See* James A. Breslo, Comment, *Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis*, 86 NW. U. L. REV. 1130, 1135 (1992) (noting virtually unanimous sentiment among legal scholars that punitive damages should not serve the function of compensation).

207. Thiry v. Armstrong World Indus., 661 P.2d 515, 518 (Okla. 1983) (observing compensatory damages exist for benefit of plaintiffs, whereas punitive damages exist for benefit of society). For discussion of the societal benefit perspective generally, see Janet Malloy Link, *When a Sting Is Overkill: An Argument for the Discharge of Punitive Damages in Bankruptcy*, 94 COLUM. L. REV. 2724, 2740 (1994).

effectively serve as auxiliary law enforcement officials.[208] Under this line of reasoning, parties seeking punitive damages supplement public law enforcement efforts which, constrained by limitations on state resources, are frequently inadequate. The system allows civil juries to assess "private fines."[209] The prospect of receiving the revenues thereby generated encourages victims to serve as private, supplemental attorneys general, so that the institution of punitive damages helps uncover and penalize wrongs that might otherwise escape detection.[210]

The utility of using plaintiffs as supplemental police and prosecutors has been grounded in presumed power disparities. Individual victims of wrongdoing suffer from a power asymmetry relative to large corporations, and governments constrained by tax-based declining budgets cannot realistically pursue actions against all those individuals and entities technically subject to their control.[211] If defendants indeed bear these claimed advantages over their victims and the officials charged with protecting the public, a gap may exist in the effective maintenance of the social order. The reasoning concludes that punitive damage awards encourage private litigation, which is tantamount to private enforcement of the law.

Encouraging private actions to augment limited state enforcement resources is controversial. The power disparity argument makes a number of assumptions that can be faulty. For example, not all defendants are corporations having asymmetrically great power in need of curbing; not all plaintiffs are relatively powerless individuals in need of protection. Likewise, one can question the assumption that the size and power of government law enforcement agencies can do nothing to balance the presumed power asymmetry between victim and wrongdoer.

Perhaps more significantly, the use of punitive damages to encourage private attorneys general to bring socially beneficial lawsuits presumes that punitive damage awards indeed are directed to violations that could have been prosecuted by public officials but for constraints upon their time and resources. When punitive damage awards seek to punish wrongs for which civil liability obtains but for which no criminal or

208. This social benefit falls under what is commonly called the "private attorney general rationale," under which the impetus of punitive damages encourages plaintiffs to sue wrongdoers who might otherwise avoid prosecution. E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 851 (1993).

209. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

210. Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 11 n.40 (1995).

211. *See* Sandra L. Nunn, Casenote, *The Due Process Ramifications of Punitive Damages, Continued:* TXO Production Corp. v. Alliance Resources Corp., *113 S. Ct. 2711 (1993)*, 63 U. CIN. L. REV. 1029, 1044 n.61 (1995).

quasi-criminal liability has been designated, the awards arguably extend rather than augment the efforts of attorneys general. When legislators have not designated wrongs as actionable and therefore subject to the enforcement power of public officials, the supposed supplementation of government forces may function more as a usurpation by the court system of what is commonly viewed as legislative prerogative.[212]

Such criticism notwithstanding, the supplementary enforcement function of punitive damages is an important one. This will be true, however, only if retribution is a fundamental motive behind punitive damages, and the retributive function seeks and indeed provides the imposition of a just remedy. Under these conditions, punitive damages expand the reach of justice beyond the scope that law enforcement entities can provide. The benefits of this dynamic obtain regardless of the existence or absence of size and power disparities between plaintiffs and defendants. In other words, the private enforcement argument does not depend upon the "plaintiff as victim, defendant as colossus" assumptions that can be challenged by punitive damage critics. Likewise, criticism that punitive damages usurp legislative prerogatives are unconvincing because legislatures are not the sole source of justice in common law systems.[213] Accordingly, for the purposes of the analysis in the next Part, the function of supplementing law enforcement efforts will be viewed as an important ancillary to the two classical functions of retribution and deterrence. Because this function is secondary, it should be moderately influential in shaping punitive damages policy.

IV. METHODS OF CALCULATING PUNITIVE DAMAGES

This Part discusses and assesses the various methods used and criteria applied to calculate punitive damages.[214] Compared with the calculation of compensatory damages, the calculation of punitive damages is imprecise and potentially arbitrary.[215] Compensatory damages are explicitly related to a plaintiff's loss.[216] Despite differences in how loss is measured, the goal of compensation—i.e., to make the

212. *See* Meredith & Casey, *supra* note 30, at 960-61 (describing certain court and jury awards of punitive damages as usurpation of legislature's exclusive power to determine crimes and fashion punishments).

213. *See* Brown v. City of Omaha, 160 N.W.2d 805, 808 (Neb. 1968) (containing detailed discussion of latitude of courts under common law to supplement legislative efforts at justice).

214. *See* Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 27-28 (Tex. 1994) (discussing factors that juries are permitted to consider in calculating punitive damages).

215. Vagueness of standards used to determine punitive damages has been evoked to criticize them. *See, e.g.*, Owen, *supra* note 32, at 384.

216. *See* Feinberg, *supra* note 38, at 355.

aggrieved party whole again—is relatively clear and straightforward.[217] In contrast, the concept of damages calculated to punish a defendant is slippery. This relative imprecision of punitive damages results from a number of factors.

First, punitive damages are discretionary by definition. Whereas juries must award compensatory damages fashioned to recompense the plaintiff's loss,[218] they are free to exercise a degree of judgment and discretion[219] in deciding whether to grant punitive damages, and if so, how much to award.[220] Second, courts have not embraced a single measuring criterion for punitive damages commensurate with the loss-amelioration standard that exists for compensatory damages.[221] Courts explicitly or implicitly seek different ends when they apply various tests or standards to assess punitive damages. Then, within each possible test

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217. Compensation for losses varies for a number of reasons. First, not all losses are equally tangible. For example, the loss of property commonly sold on the market may be relatively easy to measure, whereas the loss of enjoyment of various activities resulting from an accident is subjective. Second, varying ways of measuring losses will result in different assessments. Replacement value is different from cost minus depreciation, for example. Third, fairness of compensation is restrained by the inability of some monetary rewards to achieve the desired end of making the plaintiff whole. Thus, a compensatory award cannot restore a life, so that the money received by a family in a wrongful death accident as compensatory damages can hardly be said to compensate for the loss.

218. Smith v. Wade, 461 U.S. 30, 52 (1983) ("Compensatory damages . . . are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.").

219. This freedom is not unbounded, of course, as has become apparent in some of the recent decisions discussed in Part II.C. Accordingly, the Supreme Court has stated that "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991). Thus while juries have traditionally been given substantial discretion in determining punitive damage liability, the Constitution now guards against excessive arbitrariness by encouraging such mechanisms as guidelines and instructions. Stephanie L. Nagel, Recent Development, BMW v. Gore: *The United States Supreme Court Overturns an Award of Punitive Damages as Violative of the Due Process Clause of the Constitution*, 71 TUL. L. REV. 1025, 1029 (1997).

220. Smith v. Wade, 461 U.S. at 52.

221. The classic function of compensatory damages is to restore the plaintiff to the position she occupied before a wrongdoing, or would have occupied had the wrongdoer acted properly. This function is couched in terms so routinely used and so consistent as to be second nature to most students of law. *See, e.g.*, Bellsouth Telecomm., Inc. v. Johnson Bros. Corp., 1997 U.S. App. LEXIS 12680, *20 (5th Cir. 1997) (quoting jury charge at trial: "The purpose of compensatory damages is to make the plaintiff whole; that is, to compensate the plaintiff for the damage that the plaintiff has suffered . . . [,] to place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred.").

or standard, the same disparities and inaccuracies that can afflict calculation of compensatory damages, particularly differences in approaches to measurement, also can afflict calculation of punitive damages.[222] Third, while courts typically issue instructions concerning the factors juries may consider in determining punitive damages,[223] decision processes are likely to vary enormously.[224] Courts ordinarily cannot train juries to apply standard decision models that would weigh factors consistently across cases. Such an effort would be confounded by constraints on the time and financial resources needed to instruct lay jurors to do complex, rigorously consistent analysis.[225]

In other words, whereas conflict and imprecision in determining compensatory damages exist primarily in the single dimension of measurement, conflict and imprecision in determining punitive damages exist at three levels—measurement, choice of a goal and the standards to achieve the goal, and consistent application of complex decisionmaking models. Moreover, all three of these sources of imprecision are potentially exacerbated by institutional factors that can obscure the relationship between the punitive damages assessed by juries and their actual punitive effect. These include mechanisms such as

222. For example, it was noted earlier that a loss can be measured by replacement cost or original purchase cost minus depreciation, resulting in very different results. *See supra* note 217. The same kinds of measurement problems exist in assessing punishments, with disparities possible even among two different approaches that seek to achieve identical ends. Thus punishment intended to be large enough to be felt by a particular defendant could be fashioned according to net worth or according to annual income, two different measures that would likely result in different punitive damage calculations.

223. *See, e.g.*, Pacific Mut. Ins. Co. v. Haslip, 499 U.S. 1, 6 n.1 (1991) (noting trial court's instructions to jury to take into account in fixing any punitive damages "the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong").

224. As one commentator observes, calculation of punitive awards is confounded when instructions lack guidance regarding "how to pull the numbers together." Lykowski, *supra* note 149, at 207.

225. Because of these constraints on fair, equitable, consistent jury awards of punitive damages, some states have shifted the authority to award punitive damages from juries to judges. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-240b (West 1991); KAN. STAT. ANN. § 60-3701 (1994). These statutes raise the issue of whether judicial punitive damage assessment violates constitutional rights to trial by jury. *See* Zoppo v. Homestead Ins. Co., 644 N.E.2d 397 (Ohio 1994); Smith v. Printup, 866 P.2d 985 (Kan. 1993). For arguments favoring constitutionality of judicial punitive damage assessment, see Sharkey, *supra* note 185.

liability insurance coverage[226] and bankruptcy discharge,[227] each of which can nullify or reduce the intended punitive impact.

The translation of this imprecision into potential arbitrariness becomes evident when we examine the various models that are used to calculate punitive damages. The following Parts examine and evaluate the major approaches, which include calculation of punitive damages (1) to reflect the seriousness of the infraction, (2) to supplement shortcomings of compensatory damages, (3) to reflect the economic condition of the defendant, (4) as a multiple of compensatory damages, and (5) subject to the imposition of statutory caps. As we address each of these approaches individually, it is important to remember that courts frequently apply them in some combination.

A. *Punitive Damages Calculated to Reflect the Seriousness of the Infraction*

Perhaps the most obvious factor in assessing punitive damages is the nature and severity of the violation underlying a jury's decision to fashion a punishment. Seriousness of infraction is a valuable, highly justifiable criterion for measuring punitive damages because it aids the rational implementation of the most defensible, central functions of punitive damages, while bearing no relationship to the weakest and least supportable functions. Specifically, egregiousness of behavior is highly relevant to both of the classic punitive functions—retribution[228] and deterrence[229]—as well as to the ancillary and supporting function of enabling private attorneys general.[230] Likewise, egregiousness is unrelated to the insupportable function of providing supplementary compensation.[231]

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226. Prosser and Keeton suggest that sound public policy precludes the coverage of punitive damages under liability insurance policies. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 2, at 13 (5th ed. 1984). Not all courts, however, have banned insurance coverage of punitive damages. Joe McKay, Comment, *Texas Public Policy on Insuring Punitive Damages: Time for a Fresh Look*, 2 TEX. WESLEYAN L. REV. 205 (1995). For discussion of liability insurance as it relates to punitive damages generally, see Alan I. Widiss, *Liability Insurance Coverage for Punitive Damages? Discerning Answers to the Conundrum Created by Disputes Involving Conflicting Public Policies, Pragmatic Considerations and Political Actions*, 39 VILL. L. REV. 455 (1994).

227. For discussion of the current debate over dischargeability of punitive damage awards under bankruptcy adjudications generally, see Constance C. Vaughan, *The Dischargeability Debate: Are Punitive Damages Dischargeable Under 11 U.S.C. § 523(a)(2)(A)?*, 10 BANKR. DEVS. J. 423 (1994); Link, *supra* note 207.

228. For discussion and ranking of this function of punitive damages, see *supra* pt. III.A.

229. For discussion and ranking of this function of punitive damages, see *supra* pt. III.B.

230. For discussion and ranking of this function of punitive damages, see *supra* pt. III.D.

231. For discussion and ranking of this function of punitive damages, see *supra* pt. III.C.

Retributive justice demands that a wrongdoer's payment be commensurate with the violation or wrong committed.[232] In the vernacular of retribution, the magnitude of a punishment is fair when it is scaled to match the magnitude of the culpability of an offense; conversely, a punishment may be unjustly inadequate or excessive if it is scaled to match other factors. Implicit in this observation is the fundamental notion that a just punishment is associated most closely with degree of malicious intent or volition, and not with more random aspects of bad behavior, such as the nature of the injuries that happen to result from the wrong.[233] Accordingly, as the due process standards established in *BMW* suggest,[234] reprehensibility of conduct is an important and valid consideration in assessing fair punitive damages.

This approach is probably the most intuitively appealing means of establishing punitive damages because it most clearly reflects a core principle of punishment derived from our criminal justice system.[235] Since punitive damages serve quasi-criminal functions,[236] it seems fitting that their assessment be patterned after a criminal system that fashions payments largely in terms of blameworthiness. Andrew Kenefick notes this consistency, observing that criminal and civil punishments alike "are assessed with respect to the defendant's culpability and the egregiousness of his conduct."[237]

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232. Rustad & Koenig, *supra* note 3, at 1320.

233. *See* Galanter & Luban, *supra* note 81, at 1432 ("A retributivist scales punishment to the heinousness of the offense, and that is not measured by the magnitude of harm."). Of course, the degree of malicious intent and the extent of injuries can be correlated. Their relationship is likely to be somewhat connected, somewhat random. Consider the tortfeasor (and criminal) who plunges a dagger into a plaintiff's heart. The degree of injury is hardly random here, and the likelihood is that the plaintiff will suffer serious or deadly harm. Nonetheless, there are elements of fortune that enter into the nature of the injuries. Sometimes the battery will lead to immediate death, because the impact on the heart was extremely pernicious. At other times, luck will intervene and the point of impact will result in injuries short of death, from which a plaintiff may recover fully. The difference between the lethal impact and the almost lethal impact from which full recovery occurs may be the difference of an inch in the accuracy of the tortfeasor's aim. Yet in terms of punishment, the tortfeasor's culpability is the same in either instance, and a just retribution logically should be tied much more closely to the tortfeasor's malice and intent than to the vicissitudes of actual injuries sustained from one case to the next.

234. *See supra* text accompanying note 131. As one commentator writing for an insurance trade publication notes, multi-million dollar awards may be excessive when assessed for relatively minor offenses such as "bad paint jobs." Editorial Comment, *Punitive Damages Battle Is Far from Over*, NAT'L UNDERWRITER, June 3, 1996, at 30. While "bad paint jobs" may be an oversimplified characterization of the practices that were the subject of litigation in *BMW*, the observation that punishments should reasonably match infractions is valid.

235. Rustad & Koenig, *supra* note 3, at 1320.

236. *See supra* note 38 and accompanying text.

237. Kenefick, *supra* note 159, at 1703.

The nexus between culpability measures and just retribution in itself suggests a reasonable connection between culpability measures and effective deterrence. A prospective wrongdoer deciding whether to engage in socially undesirable behavior can apply any of a number of analytical processes. These include moral analysis, whereby some decisionmakers will reject the behavior for classically ethical reasons, such as its net negative utility under teleological analysis[238] or its abrogation of recognized moral duties under deontological analysis.[239] An amoral or immoral decisionmaker may reject a behavior based on personal risks and costs. This is where the deterrence function of punitive damages fits. Of course, cost measures such as the projected degree of harm resulting from an activity are highly unreliable sources for a decisionmaker to consult, since variance in injuries is so unpredictable across cases.[240] Culpability of the act itself is a more reliable and accessible factor for the prospective wrongdoer to consider, because malice and intent are fully fixed before the act occurs, and can be measured according to examples provided by punitive damages assessed in earlier cases on the basis of the egregiousness of like behavior. Accordingly, degree of wrongful intent is a relatively unambiguous, accessible, and potentially reliable yardstick, the use of which should yield effective deterrence of potential wrongdoers, subject, of course, to constraints upon their ability to extrapolate rationally from analogous historic instances.

Culpability measures likewise are consistent with punitive damages' ancillary function of creating in civil litigants a corps of private attorneys general.[241] Prospective plaintiffs can identify malice, wrongful intent, recklessness, and other breaches that fall within the other relatively severe culpability standards that tend to be required for the award of punitive damages.[242] Using this information, their attorneys should be able to assess the prospects of litigation readily and reasonably accurately, provided historic returns are predicated in part on culpability measures.[243] This dynamic enhances the potential and the

238. For explanation of teleological approaches to ethical decisionmaking, see RAWLS, *supra* note 164, at 22-27.

239. For explanation of deontological approaches to ethical decisionmaking, see *id.* at 30.

240. Uncontrollable and unforeseeable elements such as luck can have a tremendous effect on injuries sustained. The grossly negligent tortfeasor who sets a dangerous instrumentality in motion may cause deadly injury or no injury, and the difference can be a function of the fortuitous direction of the instrument in either of two directions separated by mere inches.

241. *See supra* pt. III.D.

242. *See supra* notes 152-53 and accompanying text.

243. This capability of plaintiffs' attorneys is deduced from the relative ease with which malicious and wrongful intentions can be identified, combined with the attorney's use of stare

incentives for plaintiffs in civil suits to supplement official law enforcement efforts. Accordingly, culpability measures, which are consistent with the two primary punitive functions of retribution and deterrence, also are likely to enhance the reach of public officials whose efforts are aimed towards the same ends.

Finally, consulting the wrongful intent of the defendant to calculate punitive damages is entirely unrelated to the undesirable end of enhancing compensatory damages. The defendant's culpability bears no logical connection to the effectiveness of compensatory damages in making fair and full restitution. Because compensation-augmentation functions of punitive damages are an undesirable usurpation of legitimate legislative and common law prerogatives,[244] the disjunction between egregiousness measures and true compensation should weigh positively in our assessment of the value of the measures.

B. *Punitive Damages Calculated to Supplement Compensatory Damages in Order to Compensate Plaintiffs Accurately and Fully*

We discussed in Part III.C. the theory that punitive damages allow plaintiffs to recover losses and recoup costs that are not covered by compensatory damages. This reasoning suggests that punitive damages supplement a remedial system that fails to compensate plaintiffs fully, and therefore falls short of the compensatory goal of rendering plaintiffs whole.[245] The areas of omission typically subsumed in this category are unrecoverable intangible losses, damages associated with the riskiness and the stress of litigation, and noncompensable attorneys' and other court-related fees and expenses.[246] If a supplemental compensatory function of punitive damages is legitimized and accepted, a logical implication is that plaintiffs' unrecovered expenses can be a consideration in determining the amount of punitive damages that should be awarded.

The discussion in Part III.C. demonstrated that the compensatory rationale for punitive damages is seriously flawed, and therefore should

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decisis to locate analogous precedents and the awards granted under similar circumstances.

244. *See supra* note 199 and accompanying text.

245. *See* Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67, 68 (1992) ("[I]f the plaintiff is not successful in recovering a substantial sum of money for [intangible losses] . . . , then the compensatory damages award will have neither the desired compensatory nor deterrent effect."); Aaron D. Twerski, *Punitive Damages: Through the Five Prisms*, 39 VILL. L. REV. 353, 353 (1994) (discussing supplemental compensation achieved by punitive damages for potentially uncovered items such as suffering and attorneys' fees).

246. *See supra* text accompanying notes 179-93.

be ranked low as a function that might justify a particular method of calculation. Recall that the basic problem with compensation-augmentation models of punitive damages is their disingenuousness and their tendency to undermine legislative or other legitimate policymaking prerogative.[247] The dishonesty of couching compensation in a nominally punitive remedy is sufficient reason for rejecting the use of compensation-augmentation measures to assess punitive damages. More pragmatically, such measures also are unlikely to yield fair awards that accurately serve the purported compensatory ends.

For example, the duplicity of applying punitive damages to adjust compensation can confuse jurors or confound their deliberative processes. Consider that a judge might take either of two tracks in providing jury instructions. The first is to profess candidly that in calculating punitive damages, the jury should consider costs to the plaintiff that cannot be recovered as compensatory damages. Under this approach, the judge openly acknowledges and validates the compensation-augmentation function. The second track is to instruct jurors to consider only a number of other issues, such as the severity of the defendant's violation, the amount of compensatory damages, and the defendant's financial wherewithal.[248] A judge using this latter approach may approve of the compensation-augmentation function of punitive damages as an overall justification of the remedy, but may not approve of compensation-augmentation as a consideration for juries as they calculate punitive damage awards.

While either of these instructional options is troublesome, we focus here on the first option, since it is the one in which compensation-augmentation is authorized as a factor for juries to consider in calculating punitive damages.[249] Instructions that legitimize the compensation-

247. *See supra* text accompanying notes 199-206.

248. Under this latter approach, the judge who accepts a compensatory function of punitive damages would simply hope that the assessment happens to cover otherwise noncompensable plaintiff costs.

249. The shortcomings of the second instructional option are not directly relevant to our assessment of using compensation-augmentation to measure punitive damages, since the second option declines to include a compensation-augmentation function in jury instructions. It bears mentioning, however, that the second option is troublesome. Recognizing shortcomings in the first instructional option, a judge might omit compensatory factors from the jury instructions. The result, however, would remain unsatisfactory in regard to reaching some kind of compensatory result. The jury's deliberative processes would be confounded by the existence of an unstipulated goal that bears no connection to the factors designated in the instructions. If punitive damages are to help fully compensate the plaintiff, then calculation via consideration of severity of offense, wealth of defendant, or other punitive factors may or may not serve the purpose. Under this scenario, the judge is asking for one thing and hoping, incidentally, to achieve an unrelated goal. The problems that attend either set of instructions, like all problems

augmentation function are likely to confuse jurors, who are asked on one hand to assess something that is labelled punitive, but on the other hand to consider compensation in the process. An intelligent juror would reasonably ask herself, "What exactly are we supposed to be doing here?" The murkiness could be exacerbated if manifestly punitive factors, such as the severity of the defendant's offense, were combined with compensatory factors in the jury instructions.

Despite its weaknesses, the compensatory model of punitive damages bears one advantage missing from all the other calculation methods discussed in this section. It avoids the "windfall critique" of punitive damages, which suggests that payment of punitive awards to plaintiffs is unfair and undeserved.[250] When punitive damages are fashioned to supplement inadequate or constrained compensatory awards, any amounts received by plaintiffs cannot be challenged as providing them with an unjustifiable premium.

For two reasons, avoidance of the windfall critique is insufficient to salvage punitive damages that are calculated to provide accurate compensation. First, the minor advantage of averting a windfall cannot compensate for all the disadvantages of compensatory calculations that have been identified in this Part and in Part III.C. Second, to the extent that windfalls may be considered an intolerable by-product of punitive damages calculated on the basis of other factors,[251] such as defendant culpability or defendant wealth, awards or portions of awards can be

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associated with compensation-seeking punitive damages, result directly from dishonest designation.

250. Specifically, the critique questions awarding plaintiffs hundreds of thousands or even millions of dollars above and beyond compensation, simply because the defendant's behavior happens to have been particularly egregious. Dating back decades, critics have suggested that awarding punitive damages to plaintiffs is irrational. In the 1920s, one judge observed that "a frequent objection to the doctrine [permitting punitive damages] is in allowing an individual to recover and appropriate damages for an offense against the social order and the interest of society." Eshelman v. Rawalt, 131 N.E. 675, 677 (Ill. 1921). Consistent with these comments, critics of punitive damages have argued that receipt by plaintiffs is a windfall. *See, e.g.*, Sales & Cole, *supra* note 148, at 1165 (referring to punitive damages as windfall to plaintiff, given wide extent of and access to compensatory damages). One British commentator characterizes punitive damages as "a lottery whereby a handful of victims benefit hugely, over and above any compensation for their injuries," depriving the Exchequer of "what is in reality a fine." Simon Jenkins, *These Damages Must Be Wrong*, TIMES, Dec. 14, 1996, at Features, *available in* LEXIS, News Library, Allnws File.

251. The conditional nature of this clause is to suggest that the windfall critique of punitive damage awards may be relatively unimportant within the framework of the policy issues addressed in this article. Punitive damage supporters might wonder who is harmed by plaintiff windfalls if the damages are calculated fairly in terms of the imposition they place upon defendants.

redirected to state funds that are less vulnerable to the windfall critique.[252]

C. *Punitive Damages Calculated as a Function of the Economic Condition of the Defendant*

In some states, courts are permitted to consider a defendant's net worth[253] in assessing punitive damages.[254] The logic here is simple: if a defendant is to be punished and deterred, she must register the imposition of punitive damages.[255] For this to occur, the damages must be fashioned with an eye toward the defendant's financial wherewithal.[256]

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252. Judges and commentators in the 19th century began suggesting that a more just distribution of punitive damages might direct at least some of the award to the public rather than to private litigants. In the words of one Wisconsin judge, "it is . . . difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished." Bass v. Chicago & N.W. Ry., 42 Wis. 654, 672 (1877).

Accordingly, a number of states have passed extraction statutes, which direct a portion of punitive damages to the state rather than the plaintiff. Also known as split recovery statutes, they require the state's share of punitive damages to go into the state treasury or into special pools. Mathew J. Klaben, Note, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 CORNELL L. REV. 104, 105 (1994).

The logic behind extraction statutes is simple—when awarded to plaintiffs, punitive damages yield undeserved profits that can be directed to more deserving recipients. The most obvious and deserving alternative recipients are tort victims who have been unable to receive compensation for reasons such as defendant insolvency. *See* Leo M. Stepanian II, Comment, *The Feasibility of Full State Extraction of Punitive Damages Awards*, 32 DUQ. L. REV. 301, 317 (1994) (discussing tort victim compensation funds derived from punitive damage awards, intended to compensate plaintiffs "who could not have their compensatory judgments satisfied because of the defendant's insolvency"). If some or all punitive damages are funneled to such alternative recipients, the reasonable result is to approach but not surpass full compensation for all tort victims.

253. Use of defendant's net worth as a factor in the assessment of punitive damages is complicated when the award would be paid either fully or partially by an insurance company through some form of liability policy indemnification. While the implications of indemnification go beyond the purview of this article, courts have addressed the admissibility of alternative sources of payment in punitive damage cases. *See, e.g.*, Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986).

254. *See* Comment, *Discovery of Net Worth in Bifurcated Punitive Damages Cases: A Suggested Approach After* Transportation Insurance Co. v. Moriel, 37 S. TEX. L. REV. 193, 194 n.4 (1996) (citing state and federal cases in which evidence of net worth admitted for purposes of calculating punitive damages).

255. *See* Lunsford v. Morris, 746 S.W.2d 471, 472-73 (Tex. 1988) (noting $100 awarded against single mother with three children can be greater deterrent than $100,000 awarded against large corporation); Baldus et al., *supra* note 6, at 1247 ("What may be a substantial punishment to a defendant of limited means could be negligible to a rich defendant.").

256. *See* Michael J. Pepek, Note, TXO v. Alliance: *Due Process Limits and Introducing*

In evaluating the use of a defendant's wealth to fashion punitive damages, the criminal law provides an interesting point of comparison. It is the fining aspect rather than the sentencing aspect of criminal law that is relevant to punitive damages calculations. Because both fines and damages are monetary, the punitive and deterrent effect of each logically should vary with the wealth of the defendant.[257] The punitive and deterrent effects of incarceration logically should be unaffected by, and independent of, a defendant's net worth.[258] Accordingly, assets would be an irrational consideration in sentencing a defendant to a particular amount of time in prison.

Ordinarily, a defendant's wealth is not a consideration in assessing penalties under the U.S. criminal justice system. Fines in criminal cases are determined without regard to a defendant's financial holdings, and if the issue ever is permitted to be raised, it is only after a fine has been imposed.[259] Indeed, defendant wealth is the only variable in regard to which the punitive damages calculation fails to track variables applied to criminal sentencing.[260]

Criminal sanctions and punitive damages serve like functions of retribution and deterrence. Why would two parallel systems seeking the same ends differ in regard to consideration of defendant wealth? Some possible inferences regarding the disparity are that (1) the criminal system's resource blindness serves legitimate ends that are pertinent to punitive damage calculations, (2) the civil system's consideration of

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a Defendant's Wealth When Determining Punitive Damages Awards, 25 PAC. L.J. 1191, 1227-28 (1994) (discussing need to link punitive damages with defendant wealth if remedy is to serve punitive and deterrent functions).

257. Obviously, the relationship between the deterrent effect of punitive damages and consideration of a defendant's net worth is prospective, and operates because a defendant is aware of the generic use of net worth as a calculation variable. A defendant weighing socially undesirable behavior will acknowledge the use of net worth in punitive damage assessment, and therefore will use personal net worth as a factor in estimating possible costs associated with litigation. Theoretically, if net worth is a predictable assessment factor, it will be incorporated in such risk assessment activities, thereby affecting decision outcomes and serving the ostensible deterrence function.

258. This idea builds on a basic presumption that freedom is equally valued across social strata, subject to random disparities among individuals within a stratum. Some economists might contend that the value of freedom is dependent on the revenues that freedom can produce, and hence is related to measures correlated with net wealth. I reject this valuation system under a presumption that so fundamental an end of freedom is precious to all alike, and that an individual's relatively low revenue generation would have an insubstantial or nonexistent effect on her valuation of freedom to pursue whatever ends she considers desirable. To calculate the value of freedom in terms of the money one would make if one were free is to devalue alternative uses of time and liberty.

259. Kezemy v. Peters, 79 F.3d 33, 34 (7th Cir. 1996).

260. Baldus et al., *supra* note 6, at 1154.

defendants' resources is sensible and superior to the criminal system's resource blindness, (3) the two approaches are equally functional, so the disparity is really irrelevant, or (4) the differentiated systems are based on some different needs of the criminal and civil justice systems, so that resource blindness best serves the criminal system while resource consciousness best serves the civil system.

Alternative (2) makes the most sense. The civil system's consideration of defendant resources is both sensible and superior to the criminal system's resource-blind approach. The logic behind consideration of defendant's net worth for punitive purposes is simple and sound. Punitive damages are intended to punish and deter. The effectiveness of these functions is based not on the absolute quantity of punitive damages, but rather on the quantity of punitive damages relative to the financial strength of the defendant.[261] A poor defendant is threatened and harmed by the assessment of a relatively small punitive damage award that would have little impact on a person or company with greater resources.[262] For example, $50,000 in punitive damages might cost an individual of modest means to lose her home or business—a compelling consequence that effectively punishes past acts and shapes future behavior. In contrast, a Fortune 500 corporation would be impervious to the same assessment. Its punitive and deterrent effects would be inconsequential because the company could bear such a loss with only the most negligible ramifications.

Net worth also is a reasonable factor for evaluating the possible excessiveness of a punitive damage award. As one judge has observed, "an award should not be so high as to result in the financial ruin of the defendant."[263] Moreover, "it [should not] constitute a disproportionately large percentage of a defendant's net worth."[264] Both of these assertions are sensible, especially if their logic is tempered by considerations of other relevant factors such as the egregiousness of the wrongdoing.

Some influential commentators have criticized the use of defendant worth as a factor in the calculation of punitive damages, particularly in regard to enterprise defendants. A report issued by the American Law

261. As one commentator observes, "different people may require different sanction levels to be deterred." Stephen G. Bene, Note, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907, 929 (1991). While some of the differences among people will be idiosyncratic, the most salient systematic difference is likely to be tied to the variable of net worth.

262. *See* Gierman v. Toman, 185 A.2d 241, 245 (N.J. 1962) ("[W]hat would amount to punishment visited upon a poor man would be a mere trifle to a man of wealth.").

263. Vasbinder v. Scott, 976 F.2d 118, 121 (2d Cir. 1992).

264. *Id.*

Institute in 1991[265] (Report) recommends eliminating consideration of enterprise defendants' assets from the assessment process.[266] It reasons that the stated wealth of an enterprise defendant is a variable substantially affected by the way the organization is structured, and is therefore an inaccurate reflection of the entity's true means.[267] The Report further suggests that consideration of an enterprise's worth may be prejudicial to large corporate entities, under the theory that such entities "incur proportionately more instances of wrongdoing simply because of their greater *volume* of business."[268] Moreover, the report notes that punitive damages enhanced to reflect enterprise wealth are borne ultimately by innocent parties of modest means, such as employees, customers, and shareholders.[269]

The Report's reasoning is unpersuasive. While differences in corporate structuring certainly can affect the accuracy of inferring true wealth from the assets listed on a balance sheet, it is reasonable to begin with the assumption that a company's assets serve at least as a rough proxy for its wealth.[270] This presumption can and should be subject to evidence that the connection between assets and wealth is attenuated in a particular case. Provided that assessments of financial strength are not limited exclusively to net worth, so that other forms of evidence that help clarify the relationship between assets and true wealth are admissible or even mandated,[271] the accuracy critique is exaggerated.

Additionally, the Report's observation regarding disproportionality of enterprise wrongdoing is irrational. There is no reason to believe that increased volume of business creates a disproportionate increase in wrongdoing. Rather, as the Report itself notes, increased volume of

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265. 2 A.L.I. REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE (1991).

266. *Id.* at 254-55.

267. *Id.* at 254.

268. *Id.* at 254-55.

269. *Id.* at 255.

270. Indeed, pertaining to the insurance industry, the IRS defines assets as "all of the company's wealth." INTERNAL REVENUE SERVICE MANUAL HANDBOOK HB 4232.1(10). *Cf.* Note, *Class Actions for Punitive Damages*, 81 MICH. L. REV. 1787, 1795 (1983) (noting evidence detailing defendant's assets can lead jury to render appropriate award).

271. Of course, the critique of using net worth to assess punitive damages does raise important concerns if net worth provides the only data regarding the impact an award is likely to have on a defendant. And it remains possible that other indicators may be proven to reflect defendant wherewithal more accurately than net worth. If so, these can be built into models that can be used as better proxies. For example, Schilit describes an economic model based largely on cash flow analysis that could either substitute or supplement net worth assessments. *See generally* Howard M. Schilit, *A Model to Assess the Economic Consequences of Punitive Damages*, 14 J. PROD. LIAB. 265 (1992).

business should create a *proportionate* increase in wrongdoing, assuming that two companies are morally comparable. Indeed, any disproportionality of wrongdoing among the larger of the comparison companies would suggest that the company is more culpable than the smaller company. The very use of proportionality instead of absolute measures permits us to make fair comparisons among entities of different sizes.[272] Moreover, since the purpose of considering net worth is to fashion punitive damages that are capable of truly punishing, the entire issue of proportionality is a red herring.

Finally, the Report argues that the little people who own, work for, and purchase from corporations will be harmed by punitive damages enhanced to account for corporate worth.[273] This observation is both inaccurate and irrelevant. It is inaccurate because it makes assumptions that can be false—for example, the assumption that a company will be able to pass the costs of punitive damage awards on to customers,[274] or the assumption that shareholders will suffer from large punitive damage awards.[275] One of the statement's implications—that little people suffer inordinately from corporate-sized punitive damage awards—likewise may be inaccurate, presuming that the per capita impact on the many individuals affected is not exorbitant or excessive.[276]

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272. Businesses themselves understand this basic premise and build it into their financial analysis. Vertical or common size analysis permits companies to view various financial measures as a percentage of a total—for example, income as a percentage of sales revenues, or "return on sales." This in turn facilitates comparisons of companies of different sizes, by rendering various measures proportional. The basic premise behind vertical financial analysis applies to comparisons of corporate wrongdoing. Just as equally profitable companies would evince identical returns on sales, so equally culpable companies would tend to have identical ratios of wrongdoings-to-size.

273. *See supra* text accompanying note 269.

274. The idea that corporations readily can pass the costs of large punitive damage awards to customers in the form of higher prices is simplistic. It ignores the realities of supply and demand in competitive markets, where the seller's ability to raise prices is always checked by the buyer's ability to find alternative sources of supply.

275. The notion that shareholders ultimately pay for large punitive damage awards can be inaccurate on a number of levels. Shareholder value is a complex goal that is a function of many elements that may or may not be affected by a large punitive damage award. For example, whether stock prices suffer as a result of punitive damage awards can depend on amount and nature of publicity and the spins that public relations specialists can place on events. Moreover, if large punitive damage awards serve their intended function and improve management's exercise of care, later abuses and wrongs may be averted so that the punitive damage award ultimately benefits both the company and its shareholders.

276. Consider the case in which punitive damages do incur costs against purchasers in the form of price hikes or against shareholders in the form of stock devaluation or dividend shrinkage. The effects will be negligible, and certainly justifiable in view of the goals of punitive

The "little people" critique is irrelevant because, both legally and functionally, corporations are entities, and as such their behaviors can and will be shaped and altered by punishments that fit the size and means of the entity. That owners and other stakeholders of the entity may be average individuals should be viewed as an incidental, secondary concern. To treat large organizations as if they are identical with the smaller persons and entities that own them would lead to a world of corporate unaccountability, based on a convenient but misplaced populism that denies the size, power and influence of the private firm in modern society.

D. *Punitive Damages as a Multiple of Compensatory Damages*

A common method of assessing punitive damages is to multiply compensatory damages by some factor.[277] This model forms the basis of federal and state statutory provisions that permit treble damages in the areas of antitrust, racketeering, patent infringement, and unfair trade practices.[278] Treble damages are calculated by tripling the actual damage—in effect, tendering the plaintiff compensatory damages plus the same sum two times over again.[279] While treble damages are the common statutory prototype, punitive damages obviously can be assessed using any other factor, such as two (yielding double damages) or four (yielding quadruple damages). What distinguishes treble or other multiple damages from more generic punitive damages is a precise, statutorily preordained arithmetic mode of assessment.[280]

Calculating punitive damages as a multiple of compensatory damages suggests some relationship between the two. This relationship is spurious[281] because compensatory damages and punitive damages are

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damages, when large costs are spread over so many consumers or shareholders that the impact per person is slight.

277. *See* Sandra N. Hurd & Frances E. Zollers, *State Punitive Damages Statutes: A Proposed Alternative*, 20 J. LEGIS. 191, 200 (1994) (discussing punitive damages as multiple of compensatory damages).

278. *See, e.g.*, N.C. GEN. STAT. §§ 75-1.1, -16 (1994).

279. *See* Barbara Shander, *Punitive Damages—Addressing the Constitutionality of Punitive Damages in the Third Circuit*, Dunn v. Hovic *(1993)*, 39 VILL. L. REV. 1105, 1108 (1994).

280. Otherwise, treble and punitive damages serve the same functions. The primary purposes of each are retribution and deterrence. David A. Nelson, Comment, *Attorney-Client Privilege and Procedural Safeguards: Are They Worth the Costs?*, 86 NW. U. L. REV. 368, 395 (1992).

281. *See* People *ex rel.* Fahner v. Climatemp, Inc., 428 N.E.2d 1096, 1098 (Ill. App. Ct. 1981) ("Since 'actual damages' are intended to make the plaintiff whole, any multiplication of the amount of actual damages serves to increase the award beyond the merely compensatory."); Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 794 (1987) ("[T]he penal portion of treble damages, in dollar terms, bears no

intended to achieve entirely distinct ends.[282] Compensatory damages redress the plaintiff's loss, whereas punitive damages punish and deter particular defendant behaviors.[283] The amount of compensatory damages necessary to render a plaintiff whole again is determined by considering a number of factors that bear no logical connection to the culpability of the defendant. In tort actions, compensatory damages may be measured in terms of loss of wages, health care and hospitalization costs, pain and suffering, and the like.[284] In contract actions, compensatory damages ordinarily are calculated as the amount necessary to place the plaintiff in the position she would have occupied had the contract terms been fulfilled.[285] By what stretch of logic do these considerations, valid and rational when the goal is to compensate a plaintiff, bear any relationship to the assessment of appropriate, effective penalties and deterrents?[286]

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necessary relation to economic harm imposed . . . ."); *Judge Denies JNOV Motion After $19 Million Award in Bendectin Action*, MEALEY'S LITIGATION REPORTS: DRUGS & MEDICAL DEVICES, Jan. 10, 1997, *available in* WESTLAW, 2 No. 1 MLRDMD 4 (noting court's observation that it is "'well established' that the reasonableness of a punitive award is not evaluated in relation to a compensatory award").

282. Of course, this statement becomes inaccurate if supplementary compensation is considered a legitimate end of punitive damages. Because compensatory functions of punitive damages have been rejected in Part III(C), punitive and compensatory damages can be considered to serve discrete functions for the purposes of this article.

283. According to Hurd and Zollers, confusion of these two functions "works great mischief." Hurd & Zollers, *supra* note 277, at 200.

284. Joseph M. Dodge, *Taxes and Torts*, 77 CORNELL L. REV. 143, 145 (1992).

285. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 (noting purpose of contract remedies to protect promisee's "'expectation interest' . . . in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed . . . ."); John A. Sebert, Jr., *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1565 (1986) ("The stated objective of contract remedies is to compensate the aggrieved party fully for breach by putting her as closely as possible in the same position as she would have been had the contract been performed.").

286. Related to the use of compensatory damage multipliers is any less formalized system that uses compensatory damages loosely as a determinant or a factor in assessing punitive damages. This process is largely comparable to the use of multipliers because it retains the irrational connection between the plaintiff's injuries and the defendant's penalty. Accordingly, using compensatory damages as an aspecific consideration in fixing punitive damages is no more defensible than the more explicit use of specific multipliers. The only difference between the two practices lies in the rigidity of multipliers. Since they establish a uniform formula to be applied across differing cases, multipliers add a layer of arbitrariness that can be averted with more flexible systems that use compensatory damages as a guideline. These flexible systems are less rigid in two ways—first, they allow ratios between compensatory and punitive damages to vary, presumably based on differences among cases; second, they allow other factors to temper the use of compensatory damages in establishing punitive damages, permitting more defensible factors to improve ultimate results. Thus the Supreme Court of New Jersey has noted that

Given the different functions they serve, we should expect the relationship between punitive and compensatory damages to be highly variable under rational calculations. Justifiable disproportionality between punitive and compensatory damages should exist, for example, when injuries are minor but conduct is especially severe, or occurs repeatedly, or has the potential to yield extensive harm.[287] These latter factors, which should be considered in meeting reasonable punishments, have no systematic relationship to injuries suffered. Accordingly, discrepenaices between compensatory and punitive damages should be seen as normal rather than troublesome.

If a nexus between compensatory damage and punitive damage amounts is spurious, then ratios of the two forms of damages should vary. Consider the example of two defendants in two separate suits, indistinguishable on all grounds except the injuries the plaintiff happens to have suffered. This hypothetical could exist, for example, if the only difference between two lawsuits is that Plaintiff *A* is a normal plaintiff and plaintiff *B* is an eggshell-skull plaintiff.[288] Because of Plaintiff *B*'s particular vulnerability, her injuries are ten times greater than Plaintiff *A*'s injuries. Health treatment, hospitalization, and lost wages for *B* total $1 million, and for *A* total $100,000. Under the doctrine of the eggshell skull plaintiff, higher compensatory damages will be granted to plaintiff *B* to compensate her for the relatively serious injuries she sustained, given her peculiar sensitivity.[289]

Assume that the defendants' wrongful acts in the two cases are absolutely indistinguishable, in each instance evincing exactly the same degree of malice and gross negligence. If a multiplier is used to calculate the punitive damages, the punishments in cases *A* and *B* will be grossly disparate, despite identical patterns of culpability. If treble

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punitive damages should be reasonably related to the injury and its cause, but that this does not logically "call for a fixed ratio between compensatory and punitive damages awarded." Leimgruber v. Claridge Assoc. Ltd., 375 A.2d 652, 656 (N.J. 1977).

287. *See* Denise M. Barton, *The Evolution of Punitive Damage Awards in Securities Arbitration: Has the Use of Punitive Damages Rendered the Arbitration Forum Inequitable?*, 70 TUL. L. REV. 1537, 1558 (1996) ("[C]ourts may uphold a large punitive damage award for the following reasons: the action of the defendant was repeated conduct or part of a larger scheme [or] . . . the harm suffered . . . could potentially harm a large population . . . .").

288. An "eggshell skull" plaintiff refers to a plaintiff who is particularly sensitive or especially subject to manifestation of exaggerated injuries. *See* Woodhams v. Moore, 840 F. Supp. 517, 519 (S.D. Ohio 1994) (referring to eggshell-skull plaintiffs who "may have a pre-existing condition which makes [them] . . . more susceptible to injury").

289. This result obtains because, under the doctrine of the eggshell-skull plaintiff, the defendant takes the plaintiff as she finds her, and is responsible for all the damages she causes through her negligence, even if the plaintiff is inordinately fragile or frail. Packard v. Whitten, 274 A.2d 169, 177-78 (Me. 1971).

damages are assessed, for example, the punitive awards will be $200,000 for Plaintiff *A* and $2 million for Plaintiff *B*.

On what basis can this disparity be justified? Certainly, the difference cannot be rationalized on any principled basis associated with the notion of retribution. For example, one logical conception that operates in the area of criminal law is that lesser wrongs should merit relatively lesser punishments, and greater wrongs should merit relatively greater punishments.[290] If punitive damages were fashioned to fit the infraction, we would expect identical wrongs to garner identical penalties. The hypothetical we have just examined dramatizes the fact that multipliers of compensatory damages yield punitive damages that have no connection to the dimension of deserts. This attenuation occurs because a plaintiff's injuries are not systematically correlated with a defendant's culpability. Great evils can yield insubstantial wrongs, and small evils can wreak enormous havoc. In such a world, tying punitive damages to the extent of injury is a poor mechanism to punish and deter.

Another logical conception of punishment is that the penalty must hurt the defendant to act as retribution for past wrongs and a disincentive to future wrongs.[291] We have seen that under this reasoning, a logical case can be made for anchoring punitive damages to the defendant's economic wherewithal.[292] Here again, the use of compensatory damage multipliers bears no rational connection to the calculation of punitive damages that the defendant will truly feel. Compensatory damages, determined solely on the basis of the plaintiff's injuries, tell us nothing about the assessment needed to have an impact on a particular defendant.

If multipliers are ineffectual at measuring either the defendant's deserts or the defendant's sensitivity to a given penalty, how else can they be justified? The only remaining, logical justifications are poor ones: that multiples of compensatory damages are expedient measures, stable measures, or both. Statutory provision for treble or other multiple damages is expedient because courts need not assess circumstances on a case-by-case basis. One size fits all punitive damages situations, or at most, two or three sizes might be created to fit a type[293] or a variety

290. *See* Teresa A. Pesce, Note, *Defining Witness Tampering Under 18 U.S.C. Section 1512*, 86 COLUM. L. REV. 1417, 1431 n.92 (1986) (noting Eighth Amendment requirement that punishments fit wrongdoings, and H.L.A. Hart's defense of tying degree of punishment to degree of wickedness).

291. *See supra* note 255 and accompanying text.

292. *See supra* pt. IV.C.

293. This scenario suggests a range of possible multipliers for a single infraction, which imparts a limited degree of discretion to juries. For example, punitive damages can be stipulated at between three and five times compensatory damages, inclusive.

of types[294] of situations. In either instance, economies of time and labor are realized as judges and juries apply prefabricated formulas without need to reflect, evaluate, examine, or think in any other way.

Use of multipliers also provides stability of measurement. Potential violators know, at least constructively, that certain behaviors can trigger punitive damages calculated in a predictable, established way.[295] On the positive side, this certainty could deter some people from engaging in undesired activities. On the negative side, others may consider the predetermined risks of violation to be either acceptably low or inherently manageable. In these instances, the manageability of punitive damages that are fixed by law can bear the arguably undesirable side effect of enabling actors to assess costs and benefits of violation, and to determine that the possible rewards more than justify the predictable risks of bad behavior.[296]

In any event, while expediency and stability may be desirable ends under at least some circumstances, they are unacceptable as the primary drivers of a system for calculating punitive damages. Minor infractions should not be over-penalized by prefabricated treble damages simply in the interests of speed and economy. Likewise, serious violations ought not to be under-penalized simply to keep the justice system moving efficiently.[297]

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294. This scenario suggests that a range of multipliers can be stipulated for use with a variety of different situations. For example, a multiplier of five could apply to acts the jury concludes are extreme and outrageous, and a multiplier of three or four could apply to gross misconduct that falls short of being extreme and outrageous. This approach obviously entails even less discretion than the approach discussed *supra* note 293. Here, discretion would be limited to juries' subjectivity in labelling the conduct. Once the conduct is labelled, the multiplier is precisely prescribed.

295. Unlike some forms of constructive notice, the constructive notice here would likely coincide with actual knowledge, particularly in cases involving large corporate defendants. This result is because the use of multipliers is noted in media reports, and the awards rendered under the formulas maintain a degree of consistency that alerts observers of typical magnitudes of awards. Equivalency of constructive notice with actual knowledge should apply especially to large corporate defendants, given the necessity of well-developed legal functions within such firms.

296. Observers will vary in their beliefs of whether this phenomenon really is a problem. Commentators from the law and economics school might suggest that calculations of social costs and benefits are a rational component of efficient markets and yield optimal results as long as damages are assessed to measure true social costs accurately. Critics might respond that social cost-benefit analyses are as flawed as the results they sometimes yield, such as the manufacture of dangerously defective Ford Pintos in the 1970s. For discussion of the Pinto case, see *supra* note 174 and accompanying text.

297. The problem of over-penalization via application of fixed multipliers can be addressed by moving to the kinds of statutory caps discussed in the next Part. Since these operate as maxima, juries can adjust punitive damages down from the caps in order to avoid over-

E. *Subjecting Punitive Damages Calculations to the Imposition of Statutory Caps*

In the 1980s, critics of large punitive damage awards proposed the statutory imposition of maximum awards, or caps.[298] Some state legislatures followed these recommendations, setting ceilings above which punitive damages are not permitted to extend. Congress likewise has established damage limitations provisions in specific areas, such as employment discrimination litigation.[299] In this Part, I shall refer to such ceilings as "statutory caps."

Statutory caps on punitive damage awards take a variety of forms. Some are absolute dollar-amount caps; other are formulated as multiples of compensatory damage awards.[300] Absolute caps establish ceilings that apply across all cases, or across those cases that fit into a prescribed category. Virginia, for example, enacted legislation in the late 1980s establishing a punitive damage award ceiling of $350,000 that applies across all cases regardless of individual merits or idiosyncracies.[301] In other states, such as Alabama,[302] absolute caps apply in the absence of aggravating circumstances. Alabama caps punitive damages at $250,000 unless there has been malice, defamation, or a pattern of intentional wrongful acts.[303]

Multiple or ratio caps limit punitive damage awards to some multiple of the compensatory damage award.[304] The multiples used by states employing ratio caps vary, as do the particular rules specifying how and

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penalization. Obviously, the problem of under-penalization is not alleviated by replacing fixed multipliers with statutory caps, since either can limit punishment of particularly egregious infractions to unacceptably low levels.

298. *See* Ronald Brownstein, *Domestic Policy Council Sprints to Liability Insurance Decision*, NAT'L J., June 28, 1986, at 1585 (noting 1986 proposal to cap punitive damages, made by Domestic Policy Council's Tort Policy Working Group).

299. *See* 42 U.S.C. § 1981(b)(3)(A)-(D) (1997) (capping compensatory and punitive damages in applicable discrimination cases at various stages from $50,000 to $300,000, depending on size of employer). For discussion generally, see R. Slaton Tuggle III, *EEOC Policy Guidance on Compensatory and Punitive Damages*, EMPLOY. REL. TODAY, Autumn 1992, at 327.

A congressional attempt to limit product liability awards through the Common Sense Product Liability Legal Reform Act of 1996 was thwarted by President Clinton's veto. Christine D'Ambrosia, *Punitive Damages in Light of* BMW of North America, Inc., v. Gore: *A Cry for State Sovereignty*, 5 J.L. & POL'Y 577, 577-78 (1997).

300. *Developments in the Law—The Civil Jury: Jury Determination of Punitive Damages*, 110 HARV. L. REV. 1513, 1533 (1997) [hereinafter *Jury Determination*].

301. VA. CODE ANN. § 8.01-38.1 (1987).

302. ALA. CODE § 6-11-21 (1993).

303. *Id.*

304. *See Jury Determination, supra* note 300, at 1533.

under what circumstances the multiples are to be applied. Three is a common statutory multiple cap.[305] Some states adopt a hybrid absolute-ratio cap, limiting punitive damages to the higher of either an absolute ceiling or a "compensatory damage multiple" ceiling. New Jersey, for instance, adopted legislation in 1995 that limits punitive damages to the greater of five times compensatory damages or $350,000, except for specified classes of infractions such as discrimination and sexual abuse.[306]

Proponents defend the adoption of statutory caps as a remedy for a number of the ills of an overly litigious society that may threaten the viability of businesses and the economy those businesses support. They suggest that without caps, juries can and do render excessive awards[307] that expose businesses to undue volatility[308] and unjustifiable risk[309] at best, and potential financial ruin at worst.[310]

Opponents are moving to eliminate some of the statutory caps that have been enacted since the 1970s.[311] They suggest that statutory caps undermine the deterrence function of punitive damages.[312] This argument suggests that defendants calculate the moderate, predictable costs of flat caps and incorporate them into their budgets and activities.[313] Viewed most cynically, companies operating under this scenario

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305. For statutes employing some form of treble damage cap, see, e.g., COLO. REV. STAT. § 13-21-102(1)(a), (3) (1996) (permitting juries to assess exemplary damages equal to compensatory damages and permitting courts to increase exemplary damage awards to a maximum of three times compensatory damages); NEV. REV. STAT. ANN. § 42.005(1)(a) (Michie Supp. 1995) (limiting exemplary and punitive damage awards to three times compensatory damages when compensatory damages total or exceed $100,000).

306. N.J. STAT. ANN. § 2A:15-5.14.

307. David G. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CAL. L. REV. 665, 672 (1985).

308. Toy, *supra* note 170, at 323.

309. *See* Peter Kinzler, *Recent Studies of Punitive Damage Awards: The Tale of the Tape*, 15 J. INS. REG. 402 (1997) (citing businesses diverting funds from innovation to avert liability risk).

310. *See* Judith Camile Glasscock, Comment, *Emptying the Deep Pocket in Mass Tort Litigation*, 18 ST. MARY'S L.J. 977, 994 (1987) (noting "possibility of financial ruin faced by manufacturers threatened with multiple punitive awards").

311. *See, e.g.*, Joan R. Rose, *Would the Demise of Caps on Damages Treble Premiums?*, MED. ECON., May 12, 1997, at 37 (discussing bills before California legislature to waive certain statutory caps established under state's Medical Insurance Compensation Reform Act of 1975).

312. *See* Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 355 (1996) ("Opponents of punitive damage limits argue that the limits lead to a decline in corporate responsibility for consumer safety."); Allison D. Johnson, Note, Crookston v. Fire Insurance Exchange *and the Utah Punitive Damage Act: Toward a Sounder Law of Punitive Damages?*, 1993 UTAH L. REV. 513, 525 (suggesting rigid caps undermine deterrence function).

313. *See* Hallahan, *supra* note 87, at 443 ("One common challenge to statutory restrictions

decline to curb dangerous or irresponsible activities, passing the predictable, contained, and therefore highly manageable cost of those activities to customers who then effectively underwrite insurance for the company's wrongdoings. Statutory caps arguably facilitate this process by keeping punitive damage costs small enough that they can be absorbed in relatively moderate price increases.[314] Indeed, for very wealthy defendants, flat caps may eliminate entirely any possible deterrent effect of punitive damages, no matter how egregious the wrong being punished.[315]

These arguments for and against statutory caps are consistent with each other, and are derived alike from a single, basic premise—that uncapped punitive damages can seriously hurt a defendant. The policy direction to which this observation leads depends mostly on perspective. Those who sympathize with the survival needs of businesses see the pain inflicted by punitive damages as threatening.[316] Those who sympathize with plaintiff victims see this same pain as beneficent in the retribution and deterrence functions it supports.[317] Because the utility of uncapped punitive damages hinges largely on a commentator's allegiances, we must get beyond effects to evaluate caps fairly. In an attempt to infuse subjective assessments with some objectivity, we should examine whether statutory caps seem reasonable or logical, given the ends we have already determined to be legitimate goals for punitive damages to serve.

Viewed objectively, statutory caps make little sense. Applying some multiple of compensatory damages as a punitive damages cap bears the

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contends that defendants simply calculate the flat caps into the costs of their actions, undermining the award's deterrent effect as well as decreasing safety standards.").

314. In other words, a business's ability to pass punitive damage expenses to customers depends on how much extra cost is being shared among how many customers. With caps presently set at around three to five times compensatory damages according to state variations, capped awards may be so small as to serve no deterrent effect. Conversely, at some point, an uncapped award will be too large to build into prices without harmfully undermining market share. This result will obtain whenever the cost of business lost by passing punitive damage expenses to customers outweighs the cost of remedying the wrong underlying the assessment of the punitive damages.

315. *See* David C. Berry, Comment, *Untwisting New Jersey's Cap on Punitive Damages*, 27 SETON HALL L. REV. 167, 195-96 (1996) (recognizing caps' potential to eliminate jurys' ability to create truly deterrent punitive damage awards against wealthy defendants).

316. *See, e.g.*, Hearing of Senate Judiciary Committee: Punitive Damages in Financial Injury Cases, June 24, 1997, *available in* LEXIS, News Library, Allnws File (citing concern of Senator Charles R. Grassley (R-IA) that high punitive damages can threaten survival of small businesses).

317. *See, e.g., Alabama Holds Session for Tort Reform*, NAT'L L.J., Jan. 22, 1996, at A8 (noting Alabama Trial Lawyers Association's opposition to tort reform bill because uncapped punitive damages necessary to thwart corporate misdeeds).

same shortcomings as using such multiples to determine punitive damages, as discussed in the preceding Part. While the goal of ensuring reasonableness of punitive damages is laudable, this end bears no logical proportional relationship to the amount of the compensatory damages award. Again, the difficulty in tying these two categories together rests in the basic difference in the functions of compensatory and punitive damages.[318] The amount needed to punish the wrongdoer, and to deter future wrongdoings by the defendant and others, will be related to a number of variables. These logically would include the severity of the wrongful act, the perceived fit between the act and the punishment, and the impact the punishment has on the particular defendant's finances. They would not include the extent of injury the plaintiff happens to suffer. Accordingly, statutory caps are an arbitrary mechanism for containing punitive damage awards. They are no more supportable than the compensatory damage multipliers rejected earlier.

V. CONCLUSION

The preceding Part found substantial variation in the validity of factors used to assess punitive damages. The merits of each factor were evaluated by examining how effectively its use fosters legitimate rather than indefensible policy ends of punitive damages, as rated in Part II. Specifically, the classic ends of retribution and deterrence were viewed as the most important goals; maintenance of a corps of private litigants for the furtherance of justice was considered an important ancillary end; and supplementation of compensatory awards to reimburse plaintiffs more accurately for their true losses was seen as an indefensible end.

In terms of their ability to enhance the aforementioned legitimate goals and not the inappropriate supplemental compensation goal, two factors rank highest—calculation of punitive damages to reflect the seriousness of an infraction, and punitive damages calculated as a function of the economic condition of the defendant. Seriousness of infraction has the clearest nexus to the two classical purposes of retribution and deterrence, and is consistent with the empowerment of supplemental attorneys general who can further the two classical ends. The economic condition of the defendant is a consideration that can help fine-tune the effectiveness of penalties so they can achieve the two classic goals with material impact. Consideration of defendant wealth as a factor in assessing punitive damages likewise encourages litigants to pursue their rights and thereby supplement official law enforcement mechanisms. Finally, neither of these highest-rated factors for calculat-

318. *See supra* notes 281-90 and accompanying text.

ing punitive damages bears any direct or explicit relationship to the indefensible goal of supplementing compensatory damages.[319] The absence of a connection between the factors and the rejected compensation-augmentation goal likewise operates in the factors' favor.

Two other factors rate substantially lower in their ability to further the legitimate ends of punitive damages. These are the use of multiples of compensatory damages and the imposition of statutory caps. They are grouped together in this summary evaluation Part because they bear identical weaknesses—both factors presume a legitimate connection between punitive damages and compensatory damages where no defensible relationship can be found.[320] The retributive and deterrence functions of punitive damages have no systematic association with the reimbursement of plaintiffs for the injuries they have sustained. At best, the two principal punitive functions might be advanced randomly by punitive damage assessments that are derived as a multiple of compensation. Accordingly, the only purpose of multiples and caps is a restraining one—in a blunt way, they can keep juries from awarding unreasonably high punitive damages. While this function keeps the two factors from falling into the lowest ranking, it is but a poor justification for the factors' use. Judicial review has served to curb outrageous jury verdicts in the past,[321] and remains a more appropriate mechanism towards that end than arbitrary multiples and caps that otherwise have no logical bearing on the most critical functions of punitive damages.

The lowest-ranked factor we have considered is supplementation of compensation to approximate more accurately the true losses realized by plaintiffs. The factor has no direct bearing on the most valuable functions of punitive damages—retribution and deterrence—or even on the ancillary function of private supplementary enforcement. The only end to which this factor is directly linked is the insupportable end of mitigating the ostensible harshness of a supposedly inadequate compensatory damages system. This end was rejected as an inappropriate end-run against legitimate, honest legal procedures for the alteration of public policy. Any measurement criterion that is based on this unacceptable goal likewise must be evaluated as unacceptable.

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319. The emphasis on a "direct" and "explicit" relationship here suggests that while any measure that may yield punitive damages can inadvertently raise the payment to plaintiffs and thereby coincidentally move compensation closer to supposedly true loss, these measures do not in any way seek to achieve this end.

320. The relationship here is most explicit in the use of multiples, which of course directly tie punitive damages to compensatory damages. The somewhat less explicit relationship in the imposition of statutory caps applies when the caps are defined in terms of multiples of compensatory damages rather than in an absolute dollar amount.

321. *See supra* notes 91-138 and accompanying text.

These appraisals are not perfect. Indeed, no system of damages attempting to moderate human behavior ever can be perfect. Instead, the recommendations in this Article suggest an effort toward greater rationality, to be achieved by carefully assessing the utility of punitive damages and then modeling the rules that govern their calculation accordingly. The further we can refine this endeavor, the better the remedy of punitive damages can serve its reasonable public policy ends.