

# Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction

Dan Markel

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# RETRIBUTIVE DAMAGES: A THEORY OF PUNITIVE DAMAGES AS INTERMEDIATE SANCTION

Dan Markel<sup>8</sup>

*Not long ago, Professor Cass Sunstein and his co-authors lamented that our legal culture lacks “a full normative account of the relationship between retributive goals and punitive damages.” This Article offers that full normative account—through a theory of “retributive damages” as intermediate civil sanctions. Under the retributive damages framework, when people defy certain legal obligations, the state may either seek to punish them through traditional criminal law or make available the sanction of retributive damages, which would be credited against any further criminal sanctions imposed by the state for the same misconduct. Accompanied by an intermediate level of procedural safeguards, retributive damages statutes would empower private parties to act on behalf of the state to seek the imposition of what is in effect a civil fine determined largely by the reprehensibility of the defendant’s misconduct. The base amount of the fine would assess a percentage of the defendant’s wealth (or net value for entities) that increases with the reprehensibility of the defendant’s misconduct, an assessment informed by guidelines and commentary provided by the state. The total retributive damages award should also include gain-stripping amounts, if any, in excess of compensatory damages, as well as lawyers’ fees and a modest and fixed award for the plaintiff for bringing the matter to the public’s attention. These payments (to the state, the plaintiff, and the lawyers) together constitute a sensible way to structure the aspect of extra-compensatory damages designed to advance the public’s interest in retributive justice.*

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*After offering some background on punitive damages and how retributive justice differs from other rationales for punitive damages (such as optimal deterrence or victim vindication), the Article describes the structure of retributive damages and clarifies the comparative advantages of retributive damages vis-à-vis other remedies and mechanisms. Finally, the Article defends the retributive damages framework against possible constitutional objections. Importantly, the account here not only answers Sunstein’s challenge, but also promises to make sense of the Supreme Court’s recent and somewhat puzzling holding in Philip Morris USA v. Williams, i.e., that juries may not calculate punitive damages by considering the amount of harm caused to nonparties to the litigation.*

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## INTRODUCTION

People and the entities they form sometimes commit wrongs against other people and the entities they form. By allowing plaintiffs to seek punitive damages against defendants for centuries, our society has long deployed not only criminal law but also tort law, among other devices, to help punish this misconduct.<sup>1</sup> Depending on how they are structured in a particular jurisdiction, what we typically call “punitive damages” can also serve a range of purposes beyond retribu-

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<sup>1</sup> See David. G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1278 (1976) (observing a “strong historical and functional nexus between tort and crime” and viewing punitive damages “as a particularly flexible tool in the overall administration of justice”).

tive punishment—including cost internalization, specific and general deterrence, and compensation to the victim or her lawyers.<sup>2</sup> Thus, it is often more accurate to refer to these damages generally as “extra-compensatory” damages.

That said, the Supreme Court recently announced that “[r]egardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.”<sup>3</sup> What do these two goals mean? Legal rules authorizing *retributive* punishment—defined here as an authorized coercive condemnatory setback to the defendant’s interests on account of an offense against the legal order—create a message that the offender’s behavior is prohibited. This condemnatory message is *communicated* to the offender through the setback, creating what I call a “confrontational” retributive encounter between the state and the offender. But the socio-legal practice of communication through adjudication and punishment also *expresses* various messages to the public more generally and achieves certain consequences, such as deterrence.

In the context of punitive damages—as in the context of much of the criminal law—there must generally be a threshold finding of culpability to warrant the extra-compensatory damages. Thus courts and scholars have traditionally understood the *deterrent* message as also signaling that the defendant’s conduct is prohibited, i.e., to create a message of “complete deterrence.”<sup>4</sup> Economists conventionally seek to implement the goal of complete deterrence by setting penalties that strip any gain to the defendant from the misconduct, thereby removing any incentive to engage in the conduct.<sup>5</sup> Unlike the retributive position, complete deterrence is not necessarily committed to moving the offender to a worse position than he was prior to the misconduct. Instead, the penalty is set to ensure that the offender simply loses his incentive to commit the misconduct. As Professor Edward Rubin has put it in a slightly different context, “The message [of complete deterrence] is . . . the pragmatic instruction ‘cut it out.’”<sup>6</sup>

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<sup>2</sup> See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982) (noting that there are “at least seven purposes for imposing punitive damages,” including: “(1) punishing the defendant; (2) deterring the defendant from repeating the offense; (3) deterring others from committing an offense; (4) preserving the peace; (5) inducing private law enforcement; (6) compensating victims for otherwise uncompensable losses; and (7) paying the plaintiff’s attorneys’ fees”).

<sup>3</sup> *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621 (2008) (citing sources).

<sup>4</sup> See Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 421 (1998). The retributive and the complete deterrence messages both insist that the punished or deterred conduct be “prohibited” rather than “priced.”

<sup>5</sup> See *id.*

<sup>6</sup> Edward L. Rubin, *Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law*, 1998 Wis. L. REV. 131, 142.

In recent years, however, law and economics scholars have tried to reshape extra-compensatory damages law to advance the goal of optimal deterrence through cost internalization. Indeed, this agenda has driven much of the scholarship about deterrence and punitive damages.<sup>7</sup> Under a cost internalization framework, defendants are required to internalize the costs of their activities so that they face accurate “marginal cost curves,” which facilitate correct pricing of their activity. Thus, extra-compensatory damages (for cost internalization) are best calibrated in reference to a defendant’s likelihood of evading payment of full compensatory damages: the higher the likelihood of not compensating victims, the higher the damages should be.<sup>8</sup> Unlike retributive theories that look at a defendant’s *mens rea* (or culpable state of mind), theories embracing cost internalization do not depend on the defendant’s mental state or the wrongful nature of his action.<sup>9</sup> Put crudely, the underlying message of cost internalization is “pay for the mess you made, but you can continue to make that mess, so long as you pay for it.”

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<sup>7</sup> Cf. Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 10–12 (1990) (“[I]nefficient behavior can be deterred by forcing actors to accurately take account of all the costs of their activities. An award in excess of compensatory damages may efficiently deter wherever compensatories . . . understate the costs the relevant activity imposes upon society.”).

<sup>8</sup> See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998) (using economic analysis to demonstrate that punitive damages should be imposed if and only if the injurer has a significant chance of escaping liability); see also Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1148 (1989) (“In the absence of punitive damages, enforcement errors enable injurers to externalize a portion of expected social costs that they cause. Punitive damages should be set . . . at a level that eliminates the advantage of noncompliance and forces potential injurers to internalize the expected social costs of their actions.”). One article in this genre has extended the cost internalization paradigm by urging that punitive damages be configured to provide for “societal damages”—that is, to use split recovery schemes to compensate society for costs the defendant externalized onto society, independent of the costs borne by particular plaintiffs. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 389–91 (2004). Sharkey views her theory as providing a “nonpunitive” rationale for punitive damages that focuses on compensation and, implicitly, cost internalization. See *id.* at 389–90.

<sup>9</sup> See Polinsky & Shavell, *supra* note 8, at 906 (“That a defendant’s conduct can be described as reprehensible is in itself irrelevant. Rather, the focus in determining punitive damages should be on the injurer’s chance of escaping liability.”). Professor Catherine Sharkey’s account requires fact finders to make a predicate finding of malice or recklessness, but this aspect of her account is inconsistent with the overall goal of cost internalization. Compare Sharkey, *supra* note 8, at 405 (“I envision a bifurcated trial process. In phase one, the jury would consider individual compensatory liability and damages. In [phase two], the same jury would determine whether the threshold requirement of recklessness on the part of the defendant was met.”), with Galligan, *supra* note 7, at 62–63 (“[F]ocus on the evil defendant is . . . not consistent with the deterrence justification for augmented awards. . . . [I]n augmented damages cases the court should not focus on the reprehensibility of the defendant’s conduct, but on whether compensatory damages are too low.”).

In *Philip Morris USA v. Williams*,<sup>10</sup> a recent decision on punitive damages, the Supreme Court seems to have imposed high obstacles to the quest for cost internalization through conventional “punitive damages.” By precluding juries from awarding extra-compensatory damages that consider the amount of harm the defendant caused to nonparties, the Court’s holding in *Philip Morris* appears to necessitate much more litigation to ensure successful cost internalization through punitive damages.<sup>11</sup> Consequently, the *Philip Morris* Court subtly directs our attention to the question of the “punitive” aspect of extra-compensatory damages. Oddly enough, that question has received sparse and insufficient attention.<sup>12</sup> Though a voluminous literature on punitive damages exists,<sup>13</sup> it lacks, as Professor Cass Sunstein and

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<sup>10</sup> 127 S. Ct. 1057 (2007) (prohibiting fact finders from imposing punitive damages awards based on the amount of harm the defendant caused to nonparties).

<sup>11</sup> To be sure, cost internalization is still possible after *Philip Morris* when a defendant’s misconduct affects only the plaintiffs. But for torts that sweep more broadly, it will be considerably harder to achieve cost internalization through piecemeal litigation because not all injured victims bring suit and because not all harms have identifiable victims.

One scholar, however, argues that states could constitutionally pursue damages meant only to achieve cost internalization so long as the state claimed there was nothing “punitive” to this cost internalization approach. Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 *YALE L.J.* (forthcoming 2009) (manuscript at Part V, on file with author). Colby’s conclusion provides a correct inference from the logic of cost internalization. But the problem with this exceptionally narrow reading of *Philip Morris* is that it effectively nullifies the Court’s holding: it gives with one hand a right that defendants would want and then with the other hand strips away the value of that right. It is hard to believe that an issue with such an apparent lack of consequence would divide the Court and litigants so sharply. And unlike *United States v. Booker*, 543 U.S. 220 (2005), which recognized a defendant’s right only to demolish its significance, *see id.* at 244, 248, there aren’t separate opinions about the merits and the remedy in *Philip Morris*. That renders the *Philip Morris* opinion less susceptible to charges of schizophrenic reasoning. In any event, I should add that I don’t particularly have a dog in the fight; if it turns out Professor Colby’s reading of *Philip Morris* is correct, then I would be happy to have the jury instructions I have appended dealing with cost internalization adjusted accordingly.

<sup>12</sup> Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 *CHI.-KENT L. REV.* 163, 163 (2003) (“The more basic question—what are the purposes or rationales for punitive damages—has not played as great a role as one might think.”).

<sup>13</sup> For challenges raised about the constitutionality of punitive damages, see Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 *MINN. L. REV.* 583, 643–57 (2003); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 *VA. L. REV.* 139 (1986); Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 *EMORY L.J.* 1 (2004). For overviews of empirical studies of punitive damages, see Brief for Neil Vidmar et al. as Amici Curiae in Support of Respondent at 2–21, *Philip Morris*, 127 S. Ct. 1057 (2007) (No. 05-1256) [hereinafter Vidmar Amicus Brief]; Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 *CORNELL L. REV.* 743 (2002) (analyzing state court data on punitive damages and developing a model of the decision to award punitive damages); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 *IOWA L. REV.* 957, 961 (2007) (analyzing recent empirical studies and puncturing various overblown claims about the dangers of extant punitive damages litigation). For studies on juries and punitive damages, see Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valua-*

his co-authors lamented ten years ago, “a full normative account of the relationship between retributive goals and punitive damages.”<sup>14</sup> As a result, the retributive goals of punitive damages stand awkwardly under a spotlight at a time when clarity about the retributive nature of punitive damages still remains largely obscured.

In this Article, I try to address that problem by constructing an account of “retributive damages” as an intermediate civil sanction. While retributive damages constitute just one aspect of the trifurcated extra-compensatory damages scheme I propose,<sup>15</sup> it is the aspect I focus on in this Article because it is the least developed in the literature. Specifically, my goal is to describe and defend a structure for retributive damages as an intermediate civil sanction—a sanction falling between compensatory damages and criminal fines. Depending on the nature of the suit, the remedy of retributive damages would stand alongside other extra-compensatory damages sought for purposes of cost internalization, described above, and victim vindication.<sup>16</sup>

The retributive damages proposal incentivizes plaintiffs and their lawyers in the tort system to help the state obtain a form of civil fines

*tion in Law*), 107 YALE L.J. 2071, 2085 (1998); W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313 (2001) (analyzing a proposal giving juries a mathematical formula for setting punitive damages).

<sup>14</sup> Sunstein et al., *supra* note 13, at 2085; see also Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177, 177 (2006) (noting the “usually neglected” nature of retributive justice in tort law theory). Pace Sunstein et al., however, there have been some valuable efforts in this direction, see *infra* note 16, but these accounts have shortcomings described *infra* Parts I.B and II.D.

<sup>15</sup> As the Appendix to this Article shows, my scheme requires juries to disaggregate the purposes of extra-compensatory damages and segregate the amounts needed to achieve cost internalization or victim vindication from retributive justice.

<sup>16</sup> Some scholars have, in the course of interpreting our current punitive damages law, emphasized the plaintiff’s putative personal right to be vindictive, see Benjamin Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 170 (2005), or a plaintiff’s putative right to “state-sanctioned revenge,” see Sebok, *supra* note 13, at 961; see also Colby, *supra* note 11 (manuscript at 62); John C.P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 HARV. J.L. & PUB. POL’Y 3, 7 (2004) (“What is at stake in [punitive damages] is not [the state’s] interest in obtaining retribution on behalf of its citizens or in deterring sharp business practices, but the [plaintiffs’] interest in vindicating their rights not to be mistreated in the way that they were,” which includes “providing them with *satisfaction*—a remedy adequate to acknowledge and avenge [the defendant’s] predatory conduct towards them”). The interpretive aim of these victim vindication accounts differs from my normative account. Cf. John Finnis, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 55–58 (Jules Coleman & Scott Shapiro eds., 2002) (arguing that recourse theorists like Goldberg and Zipursky fail to engage in “full-blooded normative justification”). Moreover, my own account, which I develop in Parts II–III, is not predicated on vindicating the victim’s interest in autonomy or dignity as much as it is focused on the relationship of obligation between the state and the wrongdoer. Another piece worth substantial attention is Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993). The Galanter and Luban article is more self-consciously normative, and putatively concerned with retributive justice in various respects, but I view most of its rationale and recommendations as indicative of victim vindication. See *infra* Parts I.B and II.D.



and other relevant relief against defendants by proving, under appropriate procedural safeguards, that the defendant committed culpable misconduct. Thus, rather than focusing on a private plaintiff's vindictive interest against the defendant for aggravated injuries to the victim's dignity, or some economists' goal of cost internalization, this account focuses on how some extra-compensatory damages may serve the *public's* interest in retributive justice.

While this account promises to make sense of the Court's holding in *Philip Morris*,<sup>17</sup> the goal of this project is not to interpret punitive damages doctrine as it is. Rather the goal of this project is *to reimagine what the law could be if we wanted it to better reflect the public interest in retributive justice*. As I explain at the end of the Article, the regime of retributive damages I endorse is consistent with the constitutional landscape, but it is not merely a reflection of it.

It bears emphasis that retributive theory not only offers a motivation for reconfiguring punitive damages, but it also establishes a set of constraints. After all, the public's interest in retributive justice, properly understood, is tethered conceptually to concerns for equality, modesty, accuracy, proportionality, impartiality, and the rule of law. These concerns are largely missing from current common law punitive damages practices, and, to varying degrees, from scholars' accounts emphasizing punitive damages as vehicles for vindicating a private plaintiff's interest in "poetic justice" or revenge or a jury's interest in venting its outrage.<sup>18</sup> In some respects, this means ensuring modest and fair sanctions *across the realm of similarly situated defendants*; in other respects, it means ensuring safeguards to achieve accuracy, impartiality, and proportionality *in a particular case*.

This Article unfolds in five Parts. Part I describes some of the familiar features and constitutional requirements associated with contemporary American punitive damages practice. Importantly, the Supreme Court, in developing its rules, has left them under-theorized. Though these rules gesture in the direction of some basic values of fair notice and proportionality, the Court has not extensively articulated how these rules intersect with victim vindication, cost internalization, or retributive justice. Moreover, as a brief survey shows, prior scholarly accounts have not adequately explained both how and why states should pursue retributive justice through extra-compensatory

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<sup>17</sup> Some accounts stressing victim vindication may also be viewed as consistent with the *Philip Morris* holding. See, e.g., Sebok, *supra* note 13, at 1024. But see Galanter & Luban, *supra* note 16, at 1436–38 (endorsing the punitive damage awards that punished defendants for wrongs to nonparties to the litigation).

<sup>18</sup> See, e.g., Galanter & Luban, *supra* note 16, at 1439, 1440; David A. Hoffman & Kaimipono D. Wenger, *Nullificatory Juries*, 2003 Wis. L. REV. 1115, 1119 (defending the role of juries in "protect[ing] us from rule by legal economists" through "relatively unconstrained punitive awards"); Sebok, *supra* note 13, at 1020–23.

damages. This Article tries to do just that; in order to do so, some familiarity with the demands and limits of retributive justice is necessary, particularly with respect to a liberal legal institutional account of retributive justice—as opposed to a personal or moral account of retributive justice.

Part II provides that familiarity by sketching what I have elsewhere called the confrontational conception of retributivism (or the “CCR”).<sup>19</sup> The virtue of this account is its ability to explain both the internal intelligibility of retributive justice within a liberal democracy and the limits that may reasonably be placed on that social practice to help distinguish it from naked revenge. Significantly, this account explains the public’s interest in reducing two kinds of errors: errors in which people are mistakenly punished or excessively punished relative to comparable offenders and offenses (Type I false positive errors), and errors in which offenders escape punishment altogether or receive too lenient a punishment relative to comparable offenders and offenses (Type II false negative errors). Accounts of both retributive justice and retributive damages ought to demonstrate sustained reflection on the reduction of both kinds of errors. Part II concludes by establishing how the values and constraints of the CCR are helpful in thinking about what structure retributive damages should take, and under what conditions and guidelines they should be awarded to reduce both Type I and Type II errors feasibly.

Part III then begins the hard work of moving from abstraction to policy by devising a structure for retributive damages that reflects these retributive justice values. Section A begins with a framework for thinking about which misconduct ought to be eligible for retributive damages as an intermediate sanction. In contrast to current torts practice, I suggest that, for certain delineated wrongs, non-victims should be able to bring actions for retributive damages under certain conditions. Thus, in cases involving tort victims, retributive damages are merely a remedy; in cases involving non-victims, retributive dam-

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<sup>19</sup> Prior works of mine have addressed how this theory applies to other policy issues such as executive discretion, alternative sanctions, the death penalty, and transitional justice in recovering states. *E.g.*, Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1445–53 (2004) [hereinafter Markel, *Against Mercy*]; Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2183–215 (2001) [hereinafter Markel, *Shaming Punishments*]; Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 425–40 (2005) [hereinafter Markel, *Be Not Proud*]; Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389, 421–40 (1999). More recently, I have extended aspects of this theory to the Supreme Court’s Eighth Amendment jurisprudence, *see* Dan Markel, *Executing Retributivism*, NW. U. L. REV. (forthcoming 2009) [hereinafter Markel, *Executing Retributivism*]; and the role of a defendant’s family status in his criminal liability and punishment, *see* DAN MARKEL, JENNIFER M. COLLINS, ETHAN J. LEIB, *PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES* (forthcoming 2009).

ages would provide a freestanding cause of action. Section B then turns to structuring the *amount* of retributive damages. Here I argue that legislatures should rationalize jury deliberations by scaling the amount of retributive damages to the culpable wrongdoing via a guidelines approach that uses a continuum of reprehensibility. The jury (or judge, if desired) would assess the defendant's reprehensibility without considering evidence of the defendant's financial position; the legislature (or sentencing commission) would also provide a table that would connect that reprehensibility score to a number roughly corresponding to a percentage of an individual defendant's net wealth or a percentage of an entity's net value. The sanction should also separately include gain-stripping amounts, if any, in excess of compensatory damages, as well as partial lawyers' fees and a modest, fixed award for the plaintiff for bringing the matter to the public's attention. I then explain why and how the state should reward lawyers and plaintiffs for their efforts and why the state should receive the bulk of retributive damages. These payments (to the state, the plaintiff, and the lawyer) together constitute a sensible way to structure retributive damages in light of the values and limits of retributive justice discussed in Part II.

Part IV then clarifies how an intermediate retributive civil sanction provides benefits unavailable with other penal or remedial mechanisms, with a specific look at compensatory damages, "aggravated damages" for victim vindication, "deterrence damages" for cost internalization, the traditional criminal justice system, and even a privately enforced criminal justice system. Part V then addresses several constitutional issues raised by the proposed structure of retributive damages.

This Article lays the foundations for retributive damages awards that are situated within a pluralistic structure of extra-compensatory damages. In subsequent companion articles, I will grapple with questions regarding the implementation of the retributive damages framework in simple and complex litigation contexts.<sup>20</sup> But I will also

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<sup>20</sup> Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. (forthcoming 2009) (on file with author) [hereinafter Markel, *How Should Punitive Damages Work?*]; Dan Markel, *Punitive Damages and Complex Litigation* (unpublished manuscript, on file with author) [hereinafter Markel, *Punitive Damages and Complex Litigation*]. In those works, I address various questions given little attention here: Are retributive damages schemes compatible with vicarious liability and the punishment of private or public entities? Which procedural safeguards should defendants and plaintiffs have and why? How should retributive damages be taxed or viewed with reference to bankruptcy? Should an insurance market for retributive damages be permitted? What are the dynamic effects a retributive damages scheme might trigger with respect to criminal prosecutions? How does one avoid the "multiple punishment" problem under a retributive damages regime? What can be done to prevent settlements that hide information about misconduct warranting retributive damages from the state? The project as a whole will come together as a book, tentatively titled *Fixing Punitive Damages*.

explain how retributive damages might simultaneously coexist alongside extra-compensatory damages designed to achieve victim vindication and cost internalization.<sup>21</sup> The Appendix to this Article strives to capture many of the main policy suggestions as they affect the development of jury instructions; in so doing, it provides a glimpse of the aspiration to disaggregate and realize the distinct purposes of extra-compensatory damages.

## I

### A QUICK OVERVIEW OF AMERICAN PUNITIVE DAMAGES LAW AND SCHOLARSHIP

#### A. Legal Patterns and Innovations

Punitive damages have a long history.<sup>22</sup> According to the conventional understanding, early Anglo-American courts awarded “exemplary” damages for a range of purposes, including compensating a plaintiff for suffering “intangible wrongs” such as insults that caused dignitary harms and punishing “the defendant for his misconduct.”<sup>23</sup> In recent years, as the scope of compensatory damages expanded to include intangible harms including hurt feelings and indignities, however, the need to use punitive damages to compensate such harms may have diminished.<sup>24</sup> Indeed, many “intangible harms” initially uncompensated are now covered by compensatory damages.<sup>25</sup>

Consequently, the Supreme Court has cast doubt on the compensatory rationale of punitive damages, explaining that today punitive

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<sup>21</sup> The discussion of how retributive damages work alongside cost internalization and victim vindication appears in Markel, *How Should Punitive Damages Work?*, *supra* note 20, Part II.

<sup>22</sup> See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 25–27 (1991) (Scalia, J., concurring) (furnishing a brief history of punitive damages).

<sup>23</sup> See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2620–21 (2008) (providing sources); Redish & Mathews, *supra* note 13, at 13–16 (discussing early English cases where plaintiffs showed dignitary harms that would otherwise remain uncompensated in the absence of exemplary damages).

<sup>24</sup> See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437–438 n. 11 (2001). *But see* Sebok, *supra* note 12, at 205 (“If punitive damages served a compensatory function [in early cases], it would have been for a category of injury that is still not considered compensable by contemporary tort law, namely the injury of insult that wounds or dishonors.”).

<sup>25</sup> For example, in *Philip Morris*, the jury awarded the decedent’s wife \$21,000 in economic compensatory damages and \$800,000 in non-economic compensatory damages. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1061 (2007). Additionally, the jury awarded the decedent’s wife \$79.5 million in punitive damages. *Id.* After remand from the U.S. Supreme Court, *id.* at 1062, the Oregon Supreme Court recently upheld the jury verdict, claiming there were adequate and independent state grounds for the decision, *Williams v. Philips Morris Inc.*, 176 P.3d 1255, 1260 (Or. 2008). Subsequently, the U.S. Supreme Court agreed, once again, to rehear an appeal brought by Philip Morris—but only on the issue of whether the Oregon Supreme Court failed to abide by the instructions of the remand, not whether the punitive award was constitutionally excessive. See *Philip Morris USA v. Williams*, 128 S. Ct. 2904, 2904 (2008).

damages should be understood as “quasi-criminal” “private fines” designed to punish and deter the misconduct at issue.<sup>26</sup> Interestingly, although courts frequently view punitive damages as serving both and primarily retributive and deterrent functions,<sup>27</sup> analysis of these functions and their implications is often scant: courts rarely instruct juries to decouple these functions by determining the amount of money necessary to serve as the defendant’s punishment and the amount necessary to achieve deterrence.<sup>28</sup> Indeed, the courts rarely bother to distinguish between optimal deterrence (aiming at cost internalization) and complete deterrence (aiming at stopping the misconduct’s commission in the future).

Moreover, notwithstanding the public nature of the retributive and deterrent functions the Court associates with extra-compensatory damages, only a small number of states have adopted split recovery schemes through which the state shares in the pre-tax award of punitive damages.<sup>29</sup> Consequently, in most states, if a court awards extra-compensatory damages, the plaintiff (and her lawyers) will receive most, if not all, of it.<sup>30</sup>

Despite the variations in who recovers punitive damages, certain practices are well entrenched. For example, in every jurisdiction that allows punitive damages,<sup>31</sup> the fact finder must make a predicate finding about the defendant’s culpable state of mind, i.e., did the defendant’s action show something like “wanton, willful, malicious or reckless conduct [that] shows an indifference to the rights of others?”<sup>32</sup> Moreover, in recent decades, most American jurisdictions have required that courts award punitive damages only if the plaintiff has proven the defendant’s culpable state of mind with “clear and

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<sup>26</sup> *Cooper Indus.*, 532 U.S. at 432; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). That said, if a state passed an enabling statute authorizing punitive damages for the express purpose of compensating a plaintiff or society, the Supreme Court would not likely hold that such a purpose was inherently unconstitutional.

<sup>27</sup> See, e.g., *Exxon Shipping*, 128 S. Ct. at 2621; *Cooper Indus.*, 532 U.S. at 432; *Gertz*, 418 U.S. at 350.

<sup>28</sup> See 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 2.2(A)(1) (5th ed. 2005); see also RESTATEMENT (SECOND) OF TORTS § 908(1) (1979).

<sup>29</sup> See Sharkey, *supra* note 8, at 375–80 (citing statutes).

<sup>30</sup> See 2 SCHLUETER, *supra* note 28, § 20.1 (providing state summaries).

<sup>31</sup> Five states prohibit or substantially restrict punitive damages. See Michael L. Rustad, *The Closing of Punitive Damages’ Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1304 (2005). Professor Rustad’s article provides a comprehensive empirical survey of the punitive damages landscape across the country.

<sup>32</sup> RONALD W. EADES, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS §§ 2-6 to 2-8 (4th ed. 1998). Some variety exists regarding the required level of the defendant’s culpability. For example, Ohio requires a finding of actual malice. E.g., *Rice v. Certaineed Corp.* 704 N.E.2d 1217, 1220–21 (Ohio 1999). Texas, by contrast, allows punitive damages for “gross negligence,” but its definition approximates what other jurisdictions call recklessness. See, e.g., *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 595 (Tex. 1999).

convincing evidence,” rather than the traditional “preponderance of the evidence” standard.<sup>33</sup>

Additionally, in the last fifteen years, the Supreme Court has begun to establish a constitutional framework for regulating punitive damages. The Court’s requirements amount to six rules.

First, when courts review the reasonableness of punitive damages awards, the most important factor they must consider is the reprehensibility of the defendant’s misconduct.<sup>34</sup> In making that assessment, the courts consider the following factors: whether “the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.”<sup>35</sup>

Second, reviewing courts must also consider whether the “disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award” is constitutionally excessive.<sup>36</sup> In *State Farm v. Campbell*, the Court established a presumption that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”<sup>37</sup>

Third, reviewing courts should consider “the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.”<sup>38</sup> Fourth, reviewing courts, under the Supreme Court’s new *Philip Morris* decision, must instruct the jury not to punish defendants with an amount incorporating harms to nonparties.<sup>39</sup> One might see this as related, though not es-

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<sup>33</sup> See 1 SCHLUFTER, *supra* note 28, § 5.3(H), (H)(2). *But cf.* George L. Priest, *Introduction to* CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* 1, 12 n.14 (2002) (indicating skepticism toward the suggestion that these different standards are treated differently by jurors).

<sup>34</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (citing *Gore*, 517 U.S. at 575).

<sup>35</sup> *Id.* (citing *Gore*, 517 U.S. at 576–77). The “existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” *Id.*

<sup>36</sup> *Id.* at 418.

<sup>37</sup> *Id.* at 425.

<sup>38</sup> *Id.* at 418 (citing *Gore*, 517 U.S. at 575).

<sup>39</sup> *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007). Some members of the Court have expressed the view that if the state captured part of the punitive damages award it might trigger review under the Eighth Amendment’s Excessive Fines Clause. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 & n.21 (1989). However, the Utah and Oregon statutes considered in *State Farm* and *Philip Morris* both involved a split-recovery scheme and the Court did not address that issue in either case. See, e.g., Or. Rev. Stat. § 31.735(b) (2007) (requiring that 60 percent of punitive damages go to a crime-victims fund). In his dissent in *Philip Morris*, Justice Stevens stated his continued belief that

sential, to the Court's stated interest in ensuring that one state does not try to punish defendants for conduct lawfully performed in another state.<sup>40</sup> Fifth, judicial review of a jury's award of punitive damages must be available at both the trial and appellate levels.<sup>41</sup> Finally, at least in federal courts, appellate review of punitive damages must adopt a "de novo" standard of review of the jury's award.<sup>42</sup>

Importantly, although the Court developed these rules to improve fair notice to, and proportionality for, defendants facing these sanctions,<sup>43</sup> the Court has not extended defendants any of the protections applicable in the criminal law context. Defendants in punitive damages actions have no right to bifurcated proceedings between liability and punitive damages, no right against vicarious liability,<sup>44</sup> no rights against double jeopardy,<sup>45</sup> no right to counsel, no right to a "beyond a reasonable doubt" standard of proof, and no right to avoid testifying on the grounds that such testimony might lead to punitive damages liability. Moreover, the Court has not stepped in to prohibit multiple awards of punitive damages for the same underlying tortious conduct, such as in mass torts cases.<sup>46</sup> Nor has the Court insisted that the trial court specify its reasons for upholding or remitting the amount of punitive damages.<sup>47</sup> Because such damages effectively punish defendants to advance the public interests in retribution and complete deterrence without the protection of conventional procedural safeguards in criminal cases, some scholars believe that the current practice of punitive damages is unconstitutional.<sup>48</sup>

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the Excessive Fines Clause should regulate punitive damages regardless of who receives the award. See 127 S. Ct. at 1066 n.1.

<sup>40</sup> See *State Farm*, 538 U.S. at 421.

<sup>41</sup> See *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 424-25 (1994) (referencing trial and appellate level review).

<sup>42</sup> See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001).

<sup>43</sup> See *State Farm*, 538 U.S. at 416-17.

<sup>44</sup> See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 13-15 (1991).

<sup>45</sup> In *Hudson v. United States*, the Supreme Court stated that it has "long recognized that the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could . . . be described as punishment. The Clause protects only against the imposition of multiple *criminal* punishments for the same offense." 522 U.S. 93, 98-99 (1997) (citation omitted).

<sup>46</sup> Some federal courts have rejected the "overkill" argument that fundamental fairness protects a defendant from facing limitless multiple punishments. *E.g.*, *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1571 (6th Cir. 1985). However, "the vast majority of courts that have addressed the issue have declined to strike punitive damages awards merely because they constituted repetitive punishment for the same conduct." *Dunn v. Hovic*, 1 F.3d 1371, 1385 (3d Cir. 1993).

<sup>47</sup> See, *e.g.*, *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464-65 (affirming the trial court's unelaborated ruling that the large punitive damages award was acceptable).

<sup>48</sup> See, *e.g.*, Jeffrey W. Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, 242-43 (1985) ("Ostensibly, a determination that punitive damages are penal would activate procedure safeguards available to defendants in criminal proceed-

Looking at the landscape as a whole, one might be tempted to view the Court's jurisprudence here as arcing in the direction of requiring procedurally fair, proportionate, and even-handed retributive punishment—but its jurisprudence is decidedly not yet there.<sup>49</sup> For example, as elaborated in Part V, there is no retributivist justification for the *State Farm* Court's presumption that a single-digit multiplier of compensatory damages is the appropriate limit. Nor is there a reasoned basis for the ongoing common law practice of denying defendants the safeguards necessary for the just imposition of even an intermediate sanction.<sup>50</sup>

To be sure, as a matter of interpreting the Constitution, the Court *should* refrain from embracing a particular theory of justifying extra-compensatory damages. Such an under-theorized position will permit experimentation among the states, leaving a range of constitutionally available policy options. A state could decide it wanted to rely exclusively on criminal law institutions to pursue retributive justice and instead use extra-compensatory damages simply to pursue, within constitutional limits, goals such as victim vindication or cost internalization.<sup>51</sup> More radically, a state could abolish all extra-compensatory damages. Alternatively, as I advocate, a state could decide to provide more substantive and procedural protections to defendants (and plaintiffs) than it does currently to further retributive justice goals. Needless to say, if a state chose to permit extra-compensatory damages for the stated purpose of imposing an intermediate sanction of retributive damages, then the Court would be right to insist on some floor of procedural safeguards (proportionate to the nature of the intermediate sanction) such as the ones I discuss later in this project.<sup>52</sup>

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ings."); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 276–77 (1983). Professor Colby, by contrast, thinks that punitive damages that aim to punish only "the private wrong" instead of "the public wrong" can survive this constitutional concern. See Colby, *supra* note 11, Part IV. I think this is a problematic inference. See Markel, *How Should Punitive Damages Work?*, *supra* note 20, Part III.

<sup>49</sup> Of course, to the extent the Court's jurisprudence avoids gross disproportionality and unfair surprise, then those are goals that Benthamite utilitarians might embrace too. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 142 (Batoche Books 2000) (1781) ("The punishment should be adjusted in such manner to each particular offence, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it.").

<sup>50</sup> *Haslip*, 499 U.S. at 42 (O'Connor, J., dissenting) ("Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category.").

<sup>51</sup> See *supra* note 11 and accompanying text.

<sup>52</sup> In the sequel to this article, Markel, *How Should Punitive Damages Work?*, *supra* note 20, I analyze the desirability of procedural safeguards relevant to any basic retributive damages case, including: double jeopardy; access to counsel; bifurcated proceedings; trial by jury; confrontation of adverse witnesses; standards of review; and standards of proof. In the third installment of the trilogy, I address the procedural safeguards necessary for cases



## B. Recent Normative Scholarship

Unsurprisingly, the complex and rapidly evolving nature of punitive damages law has attracted the attention of many scholars. Some legal economists, like Professors A. Mitchell Polinsky and Steven Shavell, think extra-compensatory damages should focus on advancing the goal of cost internalization, also referred to as optimal deterrence (or here, just as “deterrence”).<sup>53</sup> As I explained earlier, under this framework, a defendant’s culpability or state of mind is immaterial to her obligation to pay for the harms that she causes.<sup>54</sup> Instead, this approach focuses on the likelihood the defendant will evade paying compensation for the harms she caused. If there is such a possibility, then the amount of “deterrence damages” should be calibrated to the likelihood of her evading compensation.<sup>55</sup> This particular cost internalization approach, however, is clearly at odds with the existing doctrine, which, as the previous Section discusses, generally requires some finding of malice or recklessness before a court can award punitive damages.

As a matter of policy prescription, of course, the cost internalization approach’s inconsistency with extant doctrine is obviously not a knock against its merits. Generally, people and entities *should* have to pay for the messes they make; if they can exploit gaps in private and public enforcement, they will have an incentive to take insufficient care, creating a risk of under-deterrence.<sup>56</sup> But the cost internalization approach, which is conceptually unconcerned with *mens rea* or culpability, is better thought of as pursuing “deterrence” damages rather than “punitive” damages.<sup>57</sup> This separate nomenclature help-

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involving wrongdoing to multiple persons arising from a single course of culpable action or inaction. See Markel, Punitive Damages and Complex Litigation, *supra* note 20; see also *infra* note 123.

<sup>53</sup> Polinsky & Shavell, *supra* note 8, at 873–75. But see Hylton, *supra* note 4 (arguing that in most cases complete deterrence is the better way to approach such damages from an economic perspective). With optimal deterrence/cost internalization, there is deemed an appropriate non-zero number of instances of misconduct because the net social benefit of the activity outweighs its net social costs. In large part, the decision to seek optimal deterrence for an activity is predicated on a determination that the gains to the violator are socially licit. Conceptually it is worth separating optimal deterrence (or cost internalization) from other goals, such as complete deterrence, which is a goal that, if realized, means no instances of the particular misconduct would occur. It is also important to see the difference between complete deterrence, which is supposed to remove the incentive to perform such misconduct, and complete enforcement, which calls for enough resources to detect and enforce a sanction for each violation.

<sup>54</sup> See *supra* note 9 and accompanying text.

<sup>55</sup> *Id.*

<sup>56</sup> See Thomas C. Galligan, Jr., *The Risks of and Reactions to Underdeterrence in Torts*, 70 Mo. L. Rev. 691, 695 (2005).

<sup>57</sup> See generally Galligan, *supra* note 7 (advocating a re-casting of punitive damages for optimal deterrence as “augmented” damages).

fully allows us to contrast deterrence damages from other extra-compensatory damages.

Other scholars have provided an alternative to the cost internalization rationale for punitive damages by instead discussing punitive damages awards in terms of how they *vindicate* the victim's dignity and autonomy interests, which the defendant's misconduct injured.<sup>58</sup> Some common law jurisdictions more precisely label these extra-compensatory damages as "aggravated" damages—and they award them to plaintiffs for injuries to their dignity.<sup>59</sup> Some supporters of these non-economic accounts have defended large parts of extant common law punitive damages law as vehicles by which victims or their allies can take measures to persuade juries to avenge the victim's interests through ad hoc, and therefore unpredictable, awards of money damages to victims.<sup>60</sup> Indeed, for some social justice tort theorists, the awarding of common law jury-driven punitive damages serves as a way for an ordinary person to fight malefasant entities and their lobbyists seeking business-friendly "tort reform."<sup>61</sup> Drawing on the work of Jean Hampton's victim vindication justification for punishment, some scholars, such as Professors Thomas Colby, Marc Galanter and David Luban, even view themselves as committed to the goals or values of retributive justice, though to my mind somewhat mistakenly.<sup>62</sup>

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<sup>58</sup> See generally Colby, *supra* note 11 (arguing that punitive damages vindicate insult or moral injury to plaintiff); Sebok, *supra* note 13 (arguing that punitive damages should be viewed as "state-sanctioned revenge" for citizens who have suffered wrongs in private laws); Zipursky, *supra* note 16 (arguing that punitive damages can be understood as a remedy that allows victims a right to be punitive against those who have wronged them).

<sup>59</sup> See Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 763 (1989).

<sup>60</sup> At times, the works of Marc Galanter and David Luban, see generally Galanter & Luban, *supra* note 16 (discussing how juries can punish wrongdoers and express community norms through monetary damages), and David Hoffman and Kaimipono Wenger, see generally Hoffman & Wenger, *supra* note 18 (explaining how juries can act as policymakers as well as fact finders), speak in this register. For example, Galanter and Luban endorse imposing punitive damages in a single case against a defendant for all the harm the defendant's misconduct caused in similar situations even if the defendant may have had viable defenses against those other parties. See Galanter & Luban, *supra* note 16, at 1436–38 (providing examples of "expressive defeat" of defendant through punitive damages). They also think judges should extend "great deference" to juries' determinations because of their special competence in sending "the community's message through the medium of damages." *Id.* at 1439. The view I take circumscribes jury decision making considerably more.

<sup>61</sup> See, e.g., THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 38–40 (2001) (providing a paradigmatic account of the social justice theory of tort law as weapon against profit-focused corporations); Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 540–43 (1999) (providing examples of how organized defendants have persuaded legislatures to limit corporate tort liability); Rustad, *supra* note 31, at 1301 (arguing that tort reform of punitive damages is "special legislation to help corporate America").

<sup>62</sup> See Colby, *supra* note 11, Part IV; Galanter & Luban, *supra* note 16, at 1432. At times, Colby understands the distinction between the public aspects of retributive justice and the private aspects of revenge but nonetheless his account mistakenly conflates these

But as shown in the insightful interpretive accounts of tort law and punitive damages by Professors Benjamin Zipursky and Anthony Sebok,<sup>63</sup> the tort system conventionally empowers victims to either *pursue* punitive damages or *forbear* from pursuing such damages. This is important because it shows that no one forces punitive damages on the victim in the common law approach; rather, leaving the decision to seek recourse to the victim is said to vindicate the victim's autonomy. The same may be true for allowing victims to have almost unfettered control over settlements with the defendants.

These two practices reveal some illuminating space between victim vindication accounts and the interests underlying a retributivist account.<sup>64</sup> Retributivists, as I will explain shortly, care about reducing both Type I errors—in which people are mistakenly punished (or excessively punished relative to comparable offenders)—and Type II errors—in which wrongdoers escape their punishment altogether (or receive too lenient a punishment compared to other similar offenders in the jurisdiction).<sup>65</sup> Importantly, the accounts defending punitive damages as vehicles for victim vindication or jury expressions of outrage say little about the need for building a system that tries to reduce both Type I and II errors. Indeed, to the extent these accounts are interested in invoking retributive justice values to bolster their arguments, this silence is a real weakness.<sup>66</sup> After all, failing to defend

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values by suggesting that his private revenge account can give a satisfactory response to what I earlier referred to as Professor Sunstein's challenge. See *supra* text accompanying note 14. As to Galanter and Luban, notwithstanding their stated professions of fidelity to and inspiration from retributivist theory, I view Galanter and Luban's account of punitive damages as primarily a victim vindication account, and only secondarily as an account about vindicating the public's interest in retributive justice. They rely chiefly on the victim vindication account of punishment provided by Jean Hampton, *supra* note 16, at 1432–33; they consider the wrong by offenders as injuries “to the honor” of the victim, *see id.* at 1433; they urge no additional procedural safeguards for defendants because punitive damages suits are privately initiated, *see id.* at 1455–60; they fail to see the tension created by a plaintiff's right to settle or forbear from seeking punitive damages and the public interest in retributive justice; and they envision plaintiffs as the appropriate recipient of punitive damages, even in cases involving multiple punitive damages awards, *see id.* at 1460 n.302. Indeed, they pay almost no attention to reducing mistaken punishment or over-punishment relative to comparable offenders (Type I errors) and they provide little basis for reducing non-punishment or under-punishment relative to comparable offenders (Type II errors) other than the increased incentive to litigate created by extra-compensatory damages for the plaintiff.

<sup>63</sup> See generally Sebok, *supra* note 13, at 1005 (“Plaintiffs who may have a valid legal claim for punitive damages are under no obligation to pursue them. In theory, a plaintiff could request a sanction smaller than what justice might otherwise require the wrongdoer to repay.”); Benjamin Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

<sup>64</sup> See *supra* note 62.

<sup>65</sup> See *infra* Part II.

<sup>66</sup> To its credit, however, Professor Anthony Sebok's state-sanctioned revenge account is consistent with a desire to reduce “piling on” (or Type I over-punishment) errors that occur through introducing evidence apart from that which relates to the plaintiff's injury. See Sebok, *supra* note 13, at 1032–36. But he does not address the *public's* interest in reduc-

procedural safeguards or to create any real guidelines for cabining jury discretion and judicial review is a recipe for Type I error creation. Moreover, giving only victims the right to pursue retributive damages or giving all victim plaintiffs the unfettered authority to settle a case involving allegations of reckless or malicious misconduct writes a blank check for Type II errors. This should be of concern to non-retributivists as well: certainty of punishment has, for the last generation or so, been thought to have an appreciable effect on reducing misconduct, perhaps more so than the severity of punishment.<sup>67</sup>

If we want a retributive scheme of punitive damages, it has to reflect some concern for reducing both types of errors. Of course, a pluralistic scheme of extra-compensatory damages could be designed to provide space for the pursuit of both cost internalization and victim vindication. These two goals have received generous and shrewd coverage in the scholarly literature,<sup>68</sup> and thus I do not spend much time analyzing them here. But what's really missing is a better understanding of what a *public* retributive justice theory entails for punitive damages. For that to happen, we must first have an account of retributive justice. To that task, I now turn.

## II

### THE CONFRONTATIONAL CONCEPTION OF RETRIBUTIVISM

This Part focuses attention on the meaning of the public's interest in retributive justice. In particular, I sketch a theory called the "confrontational conception of retributivism" (CCR).<sup>69</sup> The CCR is designed to show both the internal intelligibility of retributive punishment situated in a liberal democracy and the limits that attach to the

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ing Type II errors of either sort, or the procedural safeguards necessary to prevent Type I errors of the mistaken punishment sort. Similarly, Professor Colby's recent efforts to defend punitive damages for private wrongs exhibits little concern for the reduction of Type II errors or Type I errors associated with inconsistency across cases.

<sup>67</sup> See, e.g., Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 *ECON. INQUIRY* 297, 308 (1991). See generally Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 *CRIMINOLOGY* 865 (2001) (analyzing the varying deterrent effects of certainty, severity, and celerity of punishment).

<sup>68</sup> See sources cited *supra* note 8 (works urging the use of punitive damages to pursue cost internalization); sources cited *supra* note 16 (works urging the use of punitive damages to allow for victim vindication).

<sup>69</sup> I have elsewhere begun to work out how this theory applies to other issues in criminal justice. See sources cited *supra* note 19. On account of space constraints, this Article will not address some questions raised by a theory of retributive justice, but I invite curious readers to consult my other works for further explanation of my views regarding the theory presented here and how it relates to issues including victims, deterrence, failures of the state, proportionality, discretion, and unjust laws.

pursuit of that social project of retributive justice.<sup>70</sup> As the notes that follow reveal, this account builds upon prior accounts of retributive justice, but it also departs from them in various ways. My point here, however, is not to trumpet or explicate these differences or claim originality on the whole account right now. It is enough if I can simply paint a rough sketch of retributive justice that is sufficiently sympathetic and attractive to warrant thinking about how to restructure punitive damages in light of it.<sup>71</sup>

The late John Rawls once defined retributive justice as a view of punishment based on the idea that “wrongdoing merits punishment.” Specifically, Rawls wrote,

It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing . . . and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.<sup>72</sup>

As Professor Michael Moore summarized, retributivism is the “view that punishment is justified by the moral culpability of those who receive it.”<sup>73</sup> Underlying this description is a sense that imposing punishment for wrongdoing is a self-evidently attractive obligation.<sup>74</sup>

The problem with this view is that many people think the nature of this obligation still needs more explication. Imagine Jack. He has spitefully run over his neighbor’s prize-winning dog. If the state seeks to punish Jack on account of his purported moral desert, several questions arise. First, why does Jack deserve *punishment*? Why shouldn’t

<sup>70</sup> My goal here is only to explain the attractiveness of retributive punishment within liberal democracies against offenders who have violated laws that have a just and reasonable basis for their enactment.

<sup>71</sup> These differences with other theorists are largely insignificant with respect to the scheme of retributive damages that I propose, except in some of the details associated with whether non-victims should be able to bring claims and recover more than a reward for bringing the claims to adjudication. As far as I can tell, Professor Jean Hampton is the other retributivist whose work has been relevant to working out an understanding of what is punitive about punitive damages. See, e.g., Galanter & Luban, *supra* note 16, at 1432–33; Sebok, *supra* note 13, at 961 & n.9. Hampton’s work has had a profound influence on my own work, but there are places where I depart from her work or view it as insufficiently developed to provide a complete normative defense of retributive justice in a political context. See, e.g., Markel, *Be Not Proud*, *supra* note 19, at 431 n.109.

<sup>72</sup> John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955).

<sup>73</sup> Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179 (Ferdinand Schoeman ed., 1987). For Moore, moral culpability is the same as desert. *Id.* at 181–82; cf. also H.L.A. HART, *Postscript: Responsibility and Retribution*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 210, 231 (2d ed. 2008) (identifying premises of a moral retributivist theory).

<sup>74</sup> See, e.g., Robert Blecker, *Rethinking the Death Penalty: Can We Define Who Deserves Death?*, 24 PACE L. REV. 107, 123–24 (2003) (providing an example of retributivist intuitionism).

Jack undergo some form of “treatment,” where we can cure his anti-social condition or disease?<sup>75</sup> Skeptics might ask why one *should* embrace the pursuit of retributive justice *qua* authorized coercive condemnatory deprivations or setbacks to the defendant’s interests.

Second, even if one agrees with the claim that Jack deserves to endure some punishment in the form of a coercive condemnatory deprivation, it does not follow that the state has a right or a duty to punish Jack.<sup>76</sup> Why is the state adjudicating and punishing Jack—and not the victim or her allies? We need an account that can help us understand what it is about Jack’s past offense that might entail the state’s *prima facie* right and obligation to punish him. Third, we need to figure out the relative weight of the obligation to achieve retributive justice: is it absolute or weighed against other duties and projects?

The account below tries to situate retributive justice as a socio-legal practice whose value is internally intelligible, that is whose value is realized by the communicative experience that occurs when the state inflicts some level of coercion upon an offender who has been adjudicated through fair and reasonable procedures of violating an extant legal norm. In contrast to the account alluded to by Rawls,<sup>77</sup> whose description neither mentions the state nor limits the scope of wrongdoing to legal offenses, the account I offer is essentially a legal or institutional view of retributive punishment.

### A. The Animating Principles of Retributive Justice

Though there is a rich philosophical literature about the nature of moral desert and its relationship to punishment,<sup>78</sup> my sense is that we need to look elsewhere to understand why punishment against legal wrongdoers is justified in liberal democracies. Someone who is industrious, wise and kind may deserve plaudits, after all, but liberals (among others) tend not to believe that it is the state’s responsibility to bestow those plaudits as a matter of social programming. Conversely, one might be miserly and indolent, but one’s viciousness is generally not considered a compelling reason for the state to condemn a person through punishment. So a person’s moral desert,

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<sup>75</sup> E.g., TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 81–89 (1969); Henry Weihofen, *Punishment and Treatment: Rehabilitation*, in THEORIES OF PUNISHMENT 255, 255–61 (Stanley E. Grupp ed., 1971).

<sup>76</sup> See, e.g., David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1627–28 (1992).

<sup>77</sup> See *supra* text accompanying note 72.

<sup>78</sup> See, e.g., Russ Shafer-Landau, *Retributivism and Desert*, 81 PAC. PHIL. Q. 189, 189 n.1 (2000) (providing citations to the relevant philosophical literature); Owen McLeod, *Desert*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (rev. ed. 2003), <http://plato.stanford.edu/entries/desert>.

whether negative or positive, is generally insufficient by itself to motivate state action in a liberal democracy.

The CCR, by contrast, explains the attractiveness of retributive punishment in reference to three other principles that have broader acceptance as specifically, though not necessarily only, political ideals: first, responsibility for choices of unlawful actions; second, equal liberty under law; and third, democratic self-defense. On this view, subject to the constraints of culpability and context,<sup>79</sup> retributive punishment effectuates these ideals that are widely understood and embraced *ex ante* by citizens of complex liberal democracies such as ours.<sup>80</sup> So when I make the following claims, I am not trying to justify punishment to people who already know they are offenders. I am trying to appeal to a person's sense of justice in the absence of particular knowledge about his or her station in life. Under this veil of impartiality, we can assess whether a liberal democracy's failure to create credible institutions of retributive justice—when it has the means to do so—undermines our commitment to these principles by fostering a sense of impunity and contributing to the conditions that erode our belief in the free and equal nature of persons.

What's important to see is that the good achieved by punishment is bound up in the faithful practice of retributive punishment itself, so that the practice of punishment has an intrinsic value that makes the practice and its limits both internally intelligible and attractive. Equally important, the account offered below explains why the state, rather than the victim or her allies, ought to be the agent that both adjudicates the case of the offender and ensures adequate but not excessive punishment.

### 1. *Responsibility for Choosing Unlawful Behavior*

Retributive punishment for legal wrongdoing is justified in part because the punishment communicates to the offender that we are respecting him by holding him responsible as a moral agent capable of choosing to act in an unlawful, and therefore blameworthy, manner.<sup>81</sup> Imagine again Jack's attack on the dog and assume that such attacks are illegal. If the state knew of Jack's attack and did nothing in

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<sup>79</sup> Assessments of culpability are driven by analysis of *mens rea* and mental competence. Context constraints look at whether the defendant's conduct was excused or justified by factors such as duress or self-defense.

<sup>80</sup> By "*ex ante*" I refer to a situation of decision making where a person internalizes all available information about possible outcomes except what position she will occupy after the decision is made. Balancing and choosing should be done through the *ex ante* perspective to ensure that the rules and institutions we choose are not the product of biases that typically arise when we make choices "*ex post*," that is, aware of what position we will occupy after the decision is made.

<sup>81</sup> See Philip Pettit, *Responsibility Incorporated*, 117 *ETHICS* 171, 173–77 (2007) (discussing conditions of responsibility in context of punishment).

response, its citizens might read its inaction as signaling two social facts: first, an indifference to the legal rights of its citizens, particularly to the security of their persons and property; and second, a statement of condescension to Jack that the state did not take his actions seriously. But when the state makes a credible effort to find and punish people like Jack for their offenses, it signals that it cares about the norm violated and takes the offender's behavior seriously. In this way, the attempt at punishment tells citizens *ex ante* that they are all autonomous agents capable of responsibly choosing between lawful and unlawful actions. When offenders are caught, punishment communicates this message to them *ex post*.

Communication to the offender is of fundamental importance here. Indeed, the practice of retribution would not be internally intelligible if the offender could not understand the message that the state was sending during its confrontation with the offender after its adjudication. The offender must be able to understand the communication, though he need not be persuaded by it. He may proclaim his innocence notwithstanding the evidence to the contrary, but if he cannot understand the basis for his punishment, then the punishment is not retributive, but merely a coercive deprivation whose condemnatory character is lost to the offender.<sup>82</sup>

This argument may seem similar to moral desert, but it is not exactly the same. Think of Jack. Imagine at time  $t_1$ , Jack crushes his neighbor's dog but then at time  $t_2$ , he accidentally bangs his head and cannot understand why he is being punished. Arguably, nothing has happened to change his moral desert; but the point of punishment would be lost—not because he's already suffered a trauma, but because the state punishment would lose its communicative significance to him (even if not to others).<sup>83</sup>

Of course, through the institution of its *communicative* practice, the state's retributive punishment also performs an important *expressive* function. That is, when the state issues plausible threats of coercive condemnatory deprivation through institutions of retributive justice, those threats signal that our actions and interests matter to the state and to society. But the point of retributive punishment is not at its core designed to achieve general psychological satisfaction, reduce private violence, or educate the public about norms of right conduct—all of which are contingent goals attainable through a variety of means.<sup>84</sup> Rather its intrinsic value is the intelligibility and attractive-

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<sup>82</sup> Without that understanding, the punishment might still serve contingent goals such as incapacitation, but it then loses its retributive character because it loses its intrinsic worth and is performed for contingently achieved goals.

<sup>83</sup> This point is developed in greater detail in Markel, *Executing Retributivism*, *supra* note 19.

<sup>84</sup> Moore, *supra* note 73, at 180–81.



ness the punishment has independent of those consequences. But we might wonder if punishment itself seems unnecessary to communicate the value of being held responsible in particular instances to particular offenders. We might, for instance, envision an offender who, immediately after committing his misconduct, came forward, made restitution, accepted responsibility, and evinced his awareness of this ideal through his own process of repentance. So something else is at stake when we say that state coercion is justifiable even where the offenders have apparently internalized the significance of the first ideal.

## 2. *Equal Liberty Under Law*

Even against a quickly repentant offender, retributive punishment is desirable to effectuate our commitment to the principle of equal liberty under law. In a liberal democracy, punishment serves to fulfill part of equality's promise because we are each burdened by a legal obligation as citizens to obey the law. (As I mentioned earlier, I am assuming that the laws being enforced are reasonable, legitimately generated, and applied. The account here may alter as applied in contexts that depart from these conditions.) When someone flouts the law, he elects to untether himself from the common enterprise of living peaceably together under a common law. He is not merely flouting a particular law that he may disagree with, but rather he defects from an agreement about the basic structures of liberal democracy that he would have made as a reasonable person in concert with other reasonable people. By his act, the offender implicitly says, "I have greater liberty than you, my fellow citizen." He cuts himself off from the established social order to impose a new order through his acts against people who should enjoy equal liberty as guaranteed by the state's rule of law in a liberal state.

By making credible the threat to impose some level of punishment, the state is making its best reasonable efforts to reduce the plausibility of people's false claims of superiority over their victims—if there are any—or against the state. The state's coercive measures exhibit our public fidelity to the norm of equal liberty under law. Moreover, the measures are communicated to the person most in need of hearing that message: the offender who has been held to violate the law. This account reveals in part, then, the intelligibility of the practice of retributive punishment—apart from the other beneficial consequences that may contingently arise from its practice.

On this view, it does not matter that few people, if given the chance, would seek to steal, rape, or murder.<sup>85</sup> All that matters is that

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<sup>85</sup> For a discussion of how this account sidesteps the criticisms of the "fair-play" theory of punishment associated with Herbert Morris's famous essay, *Persons and Punishment*, in PUNISHMENT AND REHABILITATION 40, 42 (Jeffrie G. Murphy ed., 1973), see Dan Markel,

*ex ante* the offender can be seen as defecting from a legal order to which he has good reason to give allegiance, and that he defects in such a way that expresses that he has taken license to do that which others are not entitled to do. If the state establishes no institutions to punish the offender, his implicit or explicit claim to superiority and license commands greater plausibility than it would had the state created such an institution.<sup>86</sup> This rationale helps explain both the notion of equal liberty and its reciprocal obligation of restraint.

### 3. *Democratic Self-Defense*

The reasons mentioned so far—effectuating responsibility and instantiating equal liberty under law—are insufficient to explain why the state should decide and implement matters of punishment. All that has been hitherto explained is why punishing an offender for his unlawful action has some intrinsic intelligibility. But why should the state play the central role in meting out retributive justice?

One answer lies in the notion of *democratic self-defense*. Recall from the previous sub-section how an offender's misconduct implicitly or explicitly serves to substantiate a claim of superiority made by an offender. That claim of superiority is not merely a claim against his victim—for some offenses, there may not even be an identifiable victim. Rather, the offense is a rebellion against the *political order* of equal liberty under law. Each time an offense occurs, the offender tries to shift where the rules of property and inalienability lie, at least with respect to him.<sup>87</sup> In doing so, the offender can be seen *ex ante* as revolting against the determinations of what those rules are and the constitutional rules governing who gets to adjust those rules. In other words, the offender can be viewed as usurping the sovereign will of the people by challenging their decision-making structure.<sup>88</sup>

The misconduct, then, is not merely against the victim but also against the people and their agent, the state, whose charter mandates the protection not only of the persons constituting the political order, but also of the decision-making authority of the regime itself.<sup>89</sup> It's

Misguidedly Merciful? A Reply To Professor Meyer (unpublished manuscript, on file with author).

<sup>86</sup> On the point of diminishing the plausibility of an offender's claims to superiority, see generally Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY 111 (Jeffrie G. Murphy & Jean Hampton eds., 1988) [hereinafter Hampton, *The Retributive Idea*]; Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992) [hereinafter Hampton, *Righting Wrongs*].

<sup>87</sup> See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1126–27 (1972) (discussing the need for punitive sanctions to discourage the flouting of property and inalienability rules).

<sup>88</sup> See JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW* 116 (1990).

<sup>89</sup> See Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19, 25–26 (2003); John Finnis, *Retribution: Punishment's Formative Aim*, 44 AM. J.

interesting that the principle of democratic self-defense is embodied in the oath taken by federal officers,<sup>90</sup> the substance of which obligates them to protect the decision-making structure of the nation. The oath illuminates the idea that the Constitution must be defended against attack by those who shift the rules unlawfully, thus revealing offenses as, to some degree, forms of rebellion.

One might wonder what work the word *democratic* is doing in this explanation: why not simply *political* self-defense? As I noted earlier, this account doesn't purport to justify punishment for all laws broken in all regimes. Its power lies in trying to understand what's condemnable about breaking reasonable laws fairly passed in liberal democracies that are generally respectful of persons' rights and liberties. If "democratic" were substituted with a broader word, such as "political," it could lend itself to warranting punishment even for laws that reinforce tyranny or oppression.

To be sure, if we asked the ordinary offender who commits a typical "smash and grab," he would deny that he is making any "implicit" or "explicit" claim of superiority over the victim or society, deny that he is engaging in rebellion, and definitely deny that he is trying to "shift" the rules of property or usurp the will of the sovereign. He would instead likely claim that he is violating the law and hoping to get away with it only because he wants the money. Consequently, there might be something implausible about viewing proscribed conduct as a rebellion. But it only looks implausible when trying to explain why punishment is justified to an offender who already knows he is an offender. To my mind, that objective seems misplaced. As noted earlier, my goal is to explain the attractiveness of retributive punishment to a person trying to secure the conditions for human flourishing *ex ante*—that is, to a person who does not know whether he's rich or poor, an offender or a victim, but who does know that he will be able to control his conduct and be punished only for actions reasonably proscribed by law through legitimate political institutions. Speaking to that person, the attempt to read such misconduct as rebellious seems a lot more plausible.<sup>91</sup>

What's more, to see the offense as a rebellion is not to say that all rebellions need be quashed with maximum resources. Quite the contrary, the scarcity of social resources in a society committed to pursuing various projects of moral significance requires a principle of frugality regarding the use of retributive punishment, such that the

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JURISPRUDENCE 91, 99–101 (1999) (analyzing the nature of the public's interest in retribution);

<sup>90</sup> *E.g.*, 5 U.S.C. § 3331 (2006) (setting forth the requirement that public officials swear to support and defend the Constitution).

<sup>91</sup> I am grateful to Brian Tamanaha for pushing me on this point.

state pursues and punishes only those acts that are necessary for securing the conditions conducive to human flourishing.<sup>92</sup>

Of course, prior to imposing sanctions, the state also must make an adjudication of whether such sanctions are appropriate. What justifies the state's involvement instead of some private ordering arrangement? For one thing, the modern liberal democratic state serves to regulate and thereby permit the diverse ends of citizens within a heterogeneous society. And because private citizens rarely know who will violate their rights to security and property—and thus cannot reach agreement on a dispute resolution mechanism *ex ante*—the state has the best claim to be: impartial in resolving disputes among its citizens; acceptable to its citizens as the judge of the disputes among the citizenry; and impartial in the imposition and enforcement of sanctions against the wrongdoer. Thus, we now have a set of reasons to respect the state's involvement in both the adjudication and sanction of wrongful misconduct—so long as we can establish a judiciary independent of the executive and capable of ensuring fidelity to liberal constitutional norms that reasonably divide power between prosecutors and judges. The use of juries may facilitate this division of labor, especially when there is doubt about the state's capacity to avoid tyranny or restrain zeal.

#### 4. *Why Punish the Guilty and Not the Innocent?*

Commitments to the three ideals described above explain not only why it is attractive to create *institutions* of retributive punishment, but also why certain people should be punished. Specifically, we can see why—without recourse to or reliance upon mere intuitions or emotions of vengeance, anger, or hatred—the state must take care to punish only the guilty, and not the innocent.<sup>93</sup> After all, only an actual, convicted offender has been judged to have made claims denying his responsibility, his status as an equal under the law, and his proper role in the chain of democratic decision making. Those found guilty *should* be held responsible and punished to contest their false claims. To not punish when we reasonably could is to signal that we do not care about the actions of the offender or the rights and interests underlying the rule the offender breached, or the integrity of our democratic decision-making structure. That presents the concern about reducing Type II errors caused by our failure to punish violations of

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<sup>92</sup> See Hugo Adam Bedau, *An Abolitionist's Survey of the Death Penalty in America Today*, in *DEBATING THE DEATH PENALTY* 15, 34–35 (Hugo Adam Bedau & Paul G. Cassell eds., 2004) (discussing the principle of Minimum Invasion, which states that societies ought to abolish any lawful practice that imposes more violation of liberty, privacy, or autonomy than necessary “when a less invasive practice is available and is sufficient” to satisfy the objective).

<sup>93</sup> See Markel, *Be Not Proud*, *supra* note 19, at 425–40 (collecting sources that locate desire to punish in these “hot” emotions).

those laws whose underlying values we have committed to protect through this structure of punishment—and not simply vanilla moral vices such as smugness or a nasty demeanor that themselves don't constitute a breach of law.

Additionally, to under-punish or over-punish relative to comparable offenders is to create (rebuttable) claims that the state grants some people favors, violating a basic liberal commitment to treat all people with equal concern and respect under the law. These values of consistency and even-handedness call for reducing the Type I and Type II errors involving under- and over-punishment relative to comparable offenders that often result from unrestrained discretion. Finally, society should not punish the innocent because they have neither made claims of legal superiority through their actions nor can they plausibly be deemed to have usurped power from the decision-making structure to which they have good reason to obey *ex ante*.

Two points bear emphasis. First, we now have good reasons to reduce both Type I and Type II errors (including problems of under- and over-punishment) in a system reflecting retributive values in a liberal democracy. There will obviously be tragic choices associated with how to balance the need for reducing one sort of error against the other, but at the very least we have good retributivist reasons to be concerned with both kinds of errors—a point that has been largely lost on those who push for a victim vindication model of punitive damages.<sup>94</sup> Second, the internal intelligibility achieved by punishing a guilty offender explains the conceptual linkage between legal guilt and retributive punishment. That does not mean that other self-consciously utilitarian theories are wholly inappropriate bases for thinking about what conduct to criminalize or how to conceive punishments. It just means that they cannot provide a conceptual linkage between legal guilt and punishment for proscribed offenses.

## B. The Internal Limits on Confrontational Retributivism

Thus far, I have explained the motivation for retributive justice and I have gestured at some of its limits. But more still needs to be said about those limits and constraints. These limits will necessitate some substantive and procedural safeguards if we try to translate the lessons from this discussion about retributive justice to retributive damages.

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<sup>94</sup> See generally Colby, *supra* note 11 (arguing that “punitive damages are a form of legalized private revenge”); Sebok, *supra* note 13 (suggesting that “the point of punitive damages can be understood as a form of private retribution”).

1. *Modesty with Power: One Institutional Duty Among Many*

First, the practice of retribution is only one attractive social practice among many. Every person interested in social planning must realize that at the margins, resources spent on the project of retributive justice are resources unavailable for feeding the hungry, housing the homeless, and healing the sick. Thus, to say that retributive justice validates institutions of punishment in liberal democracies does not mean that society ought to impose punishment in all circumstances, such that the ceaseless or careless pursuit of retributive justice consumes all of its resources.<sup>95</sup> This need for moral balancing is consistent with retributivism's animating ideals because far from being unconcerned with consequences, retributivism urges on offenders the maxim that one cannot disclaim responsibility for the reasonably foreseeable results of one's freely chosen actions. That maxim applies to retributivist social planners as much as to offenders.

Relatedly, the practice of retribution poses significant risks of error and abuse by authorities.<sup>96</sup> When these errors or abuses occur, they stand at odds with the animating principles of retributive justice. Consequently, retributive punishment is commendable only when sufficient measures are taken to substantially and reasonably reduce or eliminate those risks. For that reason, retributive practices must be conducted with a degree of modesty, rather than pride, and upon assurances that those risks of error and abuse are tolerably minimal.<sup>97</sup> While invoking a principle of modesty may seem theoretically vague, it actually has substantial practical implications. Because the state must demonstrate its awareness for error and abuse, it should forbear from those punishment strategies that evidence a preening sense of superiority; modesty in punishment, I have argued, entails limits on the state's ability to adopt a punishment like the death penalty because it prevents the state from exhibiting contrition to the wrongly punished offender.<sup>98</sup>

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<sup>95</sup> Cf. Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 861–69 (2008) (extending, in part, my work in the area of consequentialist retributivism).

<sup>96</sup> See, e.g., Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (presenting a study of two hundred DNA exonerations).

<sup>97</sup> However, as Professors Ronald Allen and Larry Laudan demonstrate, an “innocentistic” social concern for eliminating only Type I errors cannot be justified. Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 3–4 (June 24, 2008), available at <http://ssrn.com/abstract=1150931>. But cf. Daniel Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549 (defending innocentistic social movements).

<sup>98</sup> Markel, *Be Not Proud*, *supra* note 19, at 462–65. Of course, the Type II errors are also a concern: if a wrongly released offender kills an innocent person, the state is also deprived of the opportunity to exhibit contrition to the victim for its indirect role in creating the threat to the victim. However, if the state acted upon reasonable information, it should not be blamed for its indirect role in the harm caused by the released offender.

## 2. *Confrontational Retributivism and Prevention*

Second, viewing retributive justice as an institutional practice raises a related point about prevention of offenses. As a practical matter, establishing institutions advancing retributive justice will assuredly have some concomitant effect on preventing wrongdoing in the future.<sup>99</sup> This preventative effect in no way taints the moral worthiness of the practice of retribution. (Indeed, for some non-retributivists, the preventative effects are the evidence of the practice's morality.) We should not rest on incidental deterrence alone, however. The genuine possibility of achieving a greater deterrent effect compels mindfulness of the way in which the state responds to proscribed misconduct; after all, that response may directly affect the incidence of the proscribed misconduct. If, as some have suggested, punishing persons is a way for government to respect them,<sup>100</sup> then so too is governmental attention to preventing harm to them (and their rights).<sup>101</sup> Thus, if we were better able to prevent offenses by spending more on detection and less on the intensity of punishment, we would be remiss in our responsibilities to each other if our institutions did not reflect that factor at all. Conversely, if we could determine, based on reasonable evidence, that punishing an offense more severely would reduce the number of offenses (or in an error-prone system, reduce the number of innocent persons mistakenly swept up in the enforcement dragnet), then that too would constitute a reasonable consideration from a retributivist perspective that considers its *ex ante* function properly.<sup>102</sup>

Of course, these questions of marginal deterrence are largely contingent and speculative, at least in situations of street offenders, for whom rational calculation is somewhat less likely than it is for organizations.<sup>103</sup> I mention these issues about deterrence solely to ex-

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<sup>99</sup> See Hampton, *Righting Wrongs*, *supra* note 86, at 1666–71 (identifying prevention-oriented measures as sharing retributivist concern for the value of persons); cf. Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 629–40 (2002) (arguing that deterrence has a place within corrective justice institutions).

<sup>100</sup> See Morris, *supra* note 85, at 76.

<sup>101</sup> See Hampton, *The Retributive Idea*, *supra* note 86, at 138–42 (discussing retribution as “vindicating value through protection”); see also Hampton, *Righting Wrongs*, *supra* note 86, at 1687–89 (arguing, through example, that large punitive damage awards serve an important retributive purpose by communicating to the wrongdoer that the avoidance of harm to others must be superior to profits). On expressing commitments through state action, see Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 66 & n.228 (1995).

<sup>102</sup> I develop this point more in Dan Markel, *Ex Ante Retributivism* (unpublished manuscript, on file with author).

<sup>103</sup> See Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 178–82 (2004). That said, it is also a mistake to assume that all organizations are scrupulously sensitive to the signals the law emits.

plain that deterrence, or better, “prevention,” is not a concern inherently hostile or antithetical to the project of retributive justice. Indeed, prevention of offenses is entwined conceptually in important respects with retributivism’s *ex ante* function because of the underlying mission of preserving and protecting persons and their rights within a polity committed to obtaining the conditions of freedom and security necessary for human flourishing. For that reason, it should come as no surprise that this pluralistic account of retributive justice is able, in the context of extra-compensatory damages, to recognize the distinctive worth of the values underlying other approaches emphasizing cost internalization or victim vindication.

### 3. *Transformative Intent and Confrontational Retributivism*

Third, and for now, finally, embedded in the account of the CCR is an intent requirement on the part of the state’s punishing agents. Insisting only on the public’s perception of the offender’s defeat, to the exclusion of the offender’s *potential* internalization of correct values that the confrontation encourages, undermines the (CCR’s first) interest in affirming our recognition of each other as autonomous moral agents capable of responsible decision making. To achieve this vision in the concrete practice of punishment, it is crucial that the punishment is carried out in a way that is conducive to the internalization of the values the retributive encounter is meant to uphold. The retributive encounter *need not guarantee the internalization of those values*, but it ought not proceed without the desire for that result and an opportunity to evidence that internalization; in other words, the state ought not take measures that, in the course of punishment, would directly preclude internalization. At bottom, the state must hope to impose punishment that not only denies the offender’s claim of superiority, but also augurs his transformation.<sup>104</sup> To borrow the philosopher Robert Nozick’s phrase, “The hope is that delivering the message will change the person so that he will realize he did wrong, then start doing things because they are right.”<sup>105</sup>

#### C. Confrontational Retributivism as Distinct from Revenge

If we agree that these principles provide a dignified image of retributive justice, then we can see how, *contra* various courts and com-

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<sup>104</sup> See Markel, *Shaming Punishments*, *supra* note 19, at 2209–10; cf. R.A. Duff, *Penance, Punishment and the Limits of Community*, 5 PUNISHMENT & SOC’Y 295, 302 (2003); cf. also *Ezekiel* 33:11 (“I have no pleasure in the death of the wicked; but that the wicked turn from his way and live . . .”).

<sup>105</sup> See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 377 (1981). See generally Markel, *Executing Retributivism*, *supra* note 19 (discussing implications of communicative retributivism for Eighth Amendment review of capital and noncapital punishments).



mentators,<sup>106</sup> we might usefully contrast retributive justice, especially in its institutional form, with revenge—at least as ideal types.<sup>107</sup> To begin with, what induces retributive punishment is the offense against the legal order. Where the law runs out, so must retribution. By contrast, revenge may address slights, injuries, insults, or nonlegal wrongs. Nozick identified five other characteristics that tend to distinguish retribution from revenge: (a) retribution ends cycles of violence, whereas revenge fosters them; (b) retribution limits punishment to that which is in proportion to the wrongdoing, whereas revenge is not properly limited by principle; (c) retribution is impartially administered by the state, whereas revenge is often personal; (d) retributivists seek the equal application of the law, whereas no generality attaches to the avenger's interest; and (e) retribution is cool and unemotional, whereas revenge has a particular emotional tone of taking pleasure in the suffering of another.<sup>108</sup>

Per the CCR, a few other important distinctions can be added to Nozick's list: (f) retributivism always seeks to attach the punishment directly to the offender because it is the offender who makes claims the state seeks to reject, not the offender's children or parents, whereas revenge may target an offender's relatives or allies;<sup>109</sup> (g) retributivism is uninterested in making the offender experience generic suffering, but instead seeks to use the state's power to coerce the offender so that certain ideas can be communicated through that coercion;<sup>110</sup> (h) retributivism is interested in, and speaks to, the moral autonomy and dignity of the offender, whereas revenge may be indifferent to those qualities—an important point because such indifference crucially affects whether and what kind of defenses (justifications and excuses) might limit retribution; (i) and finally, retributivism's intent requirement, discussed above, requires that the punishment permit the offender an opportunity to internalize the "sense of justice" that would let an offender demonstrate his respect for the norms

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<sup>106</sup> Markel, *Be Not Proud*, *supra* note 19, at 410 n.13 (providing citations).

<sup>107</sup> I qualify this discussion by reference to ideal types because there have often been cultural or social norms involving revenge that fall somewhere in between. *See generally* WILLIAM IAN MILLER, *EYE FOR AN EYE* (2006) (presenting a detailed discussion of the cultural history of revenge).

<sup>108</sup> *See* NOZICK, *supra* note 105, at 366–68.

<sup>109</sup> This is not to deny that retributive punishment may result in third-party harms, nor is it to suggest that revenge is *always* targeted at third parties close to the offender. My point is narrow: retributive justice does not aim to punish third parties, and in some cases, the kind of retribution imposed should take into account innocent third-party harms. *Cf.*, e.g., Dan Markel, Jennifer M. Collins & Ethan J. Leib., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1220–24 (urging greater use of time-deferred sentencing to mitigate third party harms).

<sup>110</sup> An avenger who sees his antagonist experience suffering from some other source, such as disease, may decline to follow through on the revenge, whereas the state's retributive interest would not be satisfied merely by having an offender suffer.

of moral responsibility, equal liberty under law, and democratic self-defense, whereas revenge has no such requirement.<sup>111</sup>

The value of retributivism, on this account, is realized when the state communicates its commitment to these three norms through the use of its coercive power against the offender. Notwithstanding those who might be tempted to view retributivism as merely an “expressive theory” that can be reduced to the success of its norm-projection to society, the CCR reveals retributivism’s intelligibility even if we focus strictly on the relationship between the state and the offender.<sup>112</sup>

Having explained the internal intelligibility of the public interest in retributive justice, I now turn to how these principles apply to the justification and design of “retributive damages.” To be clear, I am not arguing that confrontational retributivism is the only permissible justification for extra-compensatory damages; rather, my claim is that adherence to this conception of retributive justice both permits and guides the construction of a retributive damages scheme that can be faithful to values including accuracy, modesty, even-handedness, and proportionality. Moreover, such a scheme can coexist peacefully with other purposes including, but not limited to, cost internalization and victim vindication.

#### D. Some Implications for Retributive Damages

In this Section, I merely foreshadow how certain values emanating from the preceding account are relevant to the design of retributive damages. I will say a bit more about this in Part III.D. The values have to do principally with legality, equality, and modesty.

First, this is a *legal* account of retributive punishment, meaning that what triggers any kind of state-backed sanction must be a violation of a clearly delineated legal norm that spells out with granularity the kind of misconduct that warrants even an intermediate civil sanction.

Second, it is an account of punishment animated by concerns for respecting our right to be regarded as *equal* under the law. The concern for equality has several noteworthy implications. To begin with, a system that arbitrarily punished some people’s illegal conduct while systematically—or haphazardly—leaving others’ misconduct untouched would be one that participated (perhaps unwittingly) in the making of false assessments of whose interests count how much in a liberal democracy. Consequently, when people defy their equal obligation to obey the rules the state has imposed to protect the rights of others, the state may seek to punish them through traditional criminal

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<sup>111</sup> See Markel, *Shaming Punishments*, *supra* note 19, at 2216–17.

<sup>112</sup> This notion might resonate more for some through the thought experiment of the “secret but fair punishment.” See *id.* at 2211–12.

law. But if the state doesn't know of the misconduct or cannot reasonably put its prosecution at the top of its priority list, then it should at least empower private parties to gather and disseminate information that might yield an intermediate sanction such as retributive damages. Because these retributive damages are in fact state-imposed sanctions—that is, coerced condemnatory deprivations—these damages should be credited against any further criminal punishments for the same misconduct to avoid duplicative and disproportionate punishments.

A concern for equality also means curtailing the lottery effects of most punitive damages structures. Plaintiffs shouldn't receive windfalls because they have the good fortune of a wealthy injurer and defendants shouldn't receive discounts based on the good fortune of having a low-earning victim. In other words, rewards or penalties should not be contingent upon morally arbitrary features of the victim or the defendant.

The CCR also stressed modesty, which entails both a high regard for accuracy-enhancing features of adjudication (i.e., the state shouldn't leap to conclusions without solid indicia of reliability) and a disdain for measures of punishment that preclude the defendant's internalization of the retributive message.<sup>113</sup> In the context of retributive damages, defendants should enjoy procedural safeguards that elevate our confidence levels above what's necessary for compensatory damages but below what's expected for criminal fines.<sup>114</sup> Moreover, a concern for modesty would entail limiting and structuring retributive damages payments so they operate as an *intermediate* sanction and would not jeopardize the defendant's ability to continue his life or his business in compliance with the law's dictates. Additionally, modesty requires procedural fairness. Specifically, defendants have a right to present defenses showing that their conduct is excused or justified. This has important implications for doctrine. We cannot *assume* that because a defendant wronged one party that the same conduct would necessarily be culpable misconduct to another person in the same jurisdiction or another. That's the gravamen of the Court's holding in *Philip Morris*: defendants should be able to present defenses they might have against persons who are nonparties to the litigation and they should not be punished based on the harm they may have lawfully caused another.<sup>115</sup>

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<sup>113</sup> See *supra* Part II.B.1.

<sup>114</sup> See Markel, *How Should Punitive Damages Work?*, *supra* note 20, Part III; cf. also Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 133–51 (2008) (proposing a model that tracks standard of proof to the balance of power between the parties and the severity of the remedy/sanction).

<sup>115</sup> See *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

### E. Why It All Matters

Although the vast majority of civil litigants never receive an award of punitive damages,<sup>116</sup> the times that juries do award punitive damages often make the news. The effect of this publicity is not lost on potential defendants: punitive damages influence the way potential parties view or settle an array of torts cases.<sup>117</sup> Indeed, if punitive damages did not raise much concern, it would be hard to understand why, in recent years, various entities have underwritten the activities of think tanks and academics interested in tort reform.<sup>118</sup>

In the context of retributive damages, those potential costs may be especially significant if there are inadequate measures to ensure accurate and fair adjudication. Furthermore, the fear of retributive damages and possible errors in adjudication might cause some defendants to litigate with greater tenacity. Potential defendants might also refrain from engaging in certain activities based on fears that some might consider the particular activity illegal. The risks associated with retributive damages are not trivial. When courts and juries award retributive damages, even as intermediate sanctions, they serve to condemn the defendant. Moreover, if erratically assigned, awards of retributive damages will imperil defendants' planning and structuring activities. Hence, to the extent that juries or courts mistakenly and erratically deploy retributive damages, there are real consequences that should trigger caution prior to their distribution.<sup>119</sup>

For these and other reasons, various scholars, judges, and politicians have laced into the typical common law punitive damages regime, calling it unpredictable, undesirable, and far worse.<sup>120</sup>

<sup>116</sup> See Vidmar Amicus Brief, *supra* note 13, at 4–8 (discussing, with extensive citations to empirical studies, how rarely juries award punitive damages).

<sup>117</sup> See Tom Baker, *Transforming Punishment into Compensation: In the Shadow of Punitive Damages*, 1998 Wis. L. REV. 211, 230–31. But see generally Thomas A. Eaton et al., *The Effects of Seeking Punitive Damages on the Processing of Tort Claims*, 34 J. LEGAL STUD. 343 (2005) (presenting an empirical study of punitive damages claims, which concludes that punitive damages have no statistically significant effect on most phases of the tort process).

<sup>118</sup> See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626 n.17 (2008) (noting that the defendant had funded academic research on punitive damages); Kenneth J. Cheesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637, 1707–15 (1993).

<sup>119</sup> The chief significance of a retributive damages award is that the defendant loses money, and, in some cases, suffers reputational harm. The same is true, but to a smaller extent, when a defendant loses, for example, a generic negligence tort case.

<sup>120</sup> See, e.g., *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 472 (1993) (O'Connor, J., dissenting); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting); *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part); 143 CONG. REC. 26,236 (1997) (statement of Sen. Hatch) ("Excessive, unpredictable, and often arbitrary punitive damage awards jeopardize the financial well-being of many individuals and companies, particularly the Nation's small businesses."); A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. LEGAL STUD. 663, 671–77 (1997); Viscusi, *supra* note 13, at 384–87.

Although critics have exaggerated the dangers of the size and frequency of punitive damages,<sup>121</sup> the presence of these risks is not trivial and commands a simple precept: if courts are to award retributive damages in the future, they should distribute them in a way that ultimately benefits society and is consistent with the values a just and attractive society should embrace.

This perspective of caution, however, is not regularly voiced from the cheerleaders for punitive damages in the academy or in the bar.<sup>122</sup> For that reason, having a structure that carefully harnesses the energy of retributive justice while minimizing its risks is important. Indeed, I want to alert the reader to the sensitivity I have for both respecting and constraining retributive energy; I hope that what follows will ensure that I am not, as it were, writing a check on insufficient funds.

### III

#### DESIGNING RETRIBUTIVE DAMAGES

It bears mention that at no point in the discussion of the CCR in Part II is the word “crime” or “criminal” used to describe the underlying values of, or limits upon, retributive justice. This omission is suggestive, indicating that the values of retributive justice—which include commitments to accuracy, responsibility, modesty, equality, and impartiality—can be served through a civil system’s use of extra-compensatory damages under conditions described here coupled with the intermediate level of procedural safeguards described and defended in the second and third installments of this series of articles.<sup>123</sup>

This Part shows how the design of a retributive damages scheme can be made more sensitive to the concerns of critics and proponents of punitive damages alike. Section A discusses what kind of conduct should trigger retributive damages and how concern for Type I and Type II error reduction affects who should be able to bring those actions. Section B explains how retributive theory’s concern with reducing both Type I and Type II errors informs the structure for thinking

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<sup>121</sup> See Vidmar Amicus Brief, *supra* note 13, at 2; Eisenberg, *supra* note 13, at 744–45; Sebok, *supra* note 13, at 962–63; see also *Exxon Shipping*, 128 S. Ct. at 1624–25 (stating that punitive damage awards are not as excessive or out of control as many critics have argued).

<sup>122</sup> See, e.g., KOENIG & RUSTAD, *supra* note 61, at 213–19; Galanter & Luban, *supra* note 16, at 1428; see also, e.g., John C.P. Goldberg, *Twentieth Century Tort Theory*, 91 GEO. L.J. 513, 560–63 (2003) (describing some scholars’ enthusiasm for current punitive damages practice).

<sup>123</sup> The safeguards I call for include (but are not limited to): guidelines that both inform and limit the penalties defendants face on account of their misconduct; a heightened standard of proof such as “clear and convincing evidence”; de novo appellate review of defendants’ reprehensibility scores with deferential review to their factual predicates; increased protection against duplicative punishment from the criminal justice system; and the procedural bifurcation of evidence of wealth from evidence of liability. See Markel, *How Should Punitive Damages Work?*, *supra* note 20; Markel, *Punitive Damages and Complex Litigation*, *supra* note 20.

about the *amount* of retributive damages in a given case and across cases. Section C suggests some principles for the sensible allocation of the retributive damages sanction among the state, the plaintiffs, and plaintiffs' counsel. Section D illuminates how these reforms create a viable structure notably distinct from both the criminal justice system and victim vindication accounts of punitive damages.

#### A. Which Conduct Should Retributive Damages Punish? Who Should Bring Retributive Damages?

If a state adopted retributive damages, it would have to decide what conduct to punish through retributive damages and who could bring these actions. These two questions seem distinct but, as the discussion below suggests, the rationale for retributive damages suggests a need to view them together.

##### 1. *Should Retributive Damages Reach Beyond Criminality? If So, How?*

To assess which conduct ought to be subject to retributive damages as an intermediate sanction, there are at least two possible conventional sources for answers with at least four possible outcomes. First, we could use the extant standards for punitive damages in tort law in a given jurisdiction. Second, we could look instead to the criminal law in that jurisdiction for guidance. Third, we could look to both tort and criminal law and incorporate both spheres of law to announce the standards of wrongdoing. Fourth, we could choose to select only discrete areas of misconduct from both tort and criminal law.

This Section does not offer a comprehensive theory of retributive damages legislation, but it suggests a few possible guiding principles and some of the advantages and drawbacks to these various choices. One legislative option is to pass a statute that simply prohibits all conduct that demonstrates malice or reckless disregard for the legal rights and legitimate interests of fellow citizens or institutions.<sup>124</sup> In order

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<sup>124</sup> On this view, malicious conduct exhibits "circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2 (5th ed. 1984). A defendant has engaged in reckless conduct when circumstances show that he was aware from his "knowledge of existing conditions that it is probable that injury would result from his . . . acts and omissions, and nevertheless proceeded with reckless indifference as to the consequences and without care for the rights of others." *Id.*; see also MODEL PENAL CODE § 2.02 (1985); RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (1965) ("Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of . . . harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so."). These formulae each have pros

to reduce the scope of conduct associated with such a statute, jurisdictions might wish to add, per Professor David Owen, a requirement that the misconduct in question constitutes “an extreme departure from lawful conduct.”<sup>125</sup> This puts prospective defendants on notice that reckless or malicious misconduct would no longer simply be “priced” in the tort system according to the harms caused, as some economists claim the current system allows. Instead, the proposed statute would tell potential defendants that their conduct is prohibited—and the sanction for violating such a rule could include the award of retributive damages.<sup>126</sup> This hybrid choice would cover conduct that is normally actionable under both tort law and criminal legislation, but it would not include all tort law or all criminal law.

One concern with this legislative standard is that by prohibiting misconduct undertaken with malice or recklessness through the threat of retributive damages, it provides insufficient notice to defendants and fails to ensure even-handed application by juries and judges. Nonetheless, in defense of the current conventions, which look awfully like that proposed legislative standard, the following can be said: courts routinely and often intelligently apply purportedly vague standards in criminal law—“good faith” in mistake of fact, “reasonableness” in sentencing, and “beyond a reasonable doubt” in criminal trials.<sup>127</sup> Indeed tort law’s dominant norm is negligence,<sup>128</sup> and that typically requires a jury determination of whether the defendant’s

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and cons, but they have the virtue of being used in a variety of jurisdictions over a significant period of time, and have withstood various forms of critical scrutiny.

<sup>125</sup> David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 730 (1989) (emphasis omitted).

<sup>126</sup> It is worth noting that certain liberal conceptions of tort law don’t view a simple negligence claim as simply “pricing” conduct in an economic sense; instead, these tort standards, as articulated to juries, perform a sanctioning function by communicating to the defendant that his conduct in question is prohibited because he undertook unjustifiable risks without sufficient regard for others. See, e.g., Kenneth W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as well as Efficiency Values*, 54 VAND. L. REV. 901, 905 (2001) [hereinafter Simons, *The Hand Formula*]; Kenneth W. Simons, *Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation*, 15 HARV. J.L. & PUB. POL’Y 849, 868–69 (1992). One thing worth asking about accounts like these is whether a defendant’s violation of his primary duty to act non-negligently toward others warrants a condemnation such that all tort actions for negligence ought to trigger a retributive sanction.

<sup>127</sup> See, e.g., *Rita v. United States*, 127 S. Ct. 2456, 2459 (2007) (“The federal courts of appeals review federal sentences and set aside those they find ‘unreasonable.’”); *Patterson v. New York*, 432 U.S. 197, 210 (1977) (“[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.”); *People v. Navarro*, 99 Cal. App. 3d Supp. 1, 10–11 (Cal. App. Dept. Super. 1979) (holding that the trial court erred in instructing the jury that the defendant was guilty even though his misconduct constituted a good faith mistake).

<sup>128</sup> See generally G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 12–19 (expanded ed. 2003) (discussing close identification between torts as an independent branch of law and negligence theory).

conduct was “reasonable,” a standard which is likely more nebulous than whether someone acted maliciously or recklessly. The accretion of precedent, which provides greater predictability to prospective litigants regarding what counts as reprehensible, typically reduces anxiety about such vagueness, even in the criminal law context.<sup>129</sup> Moreover, such anxiety might be further allayed by recent studies of communal intuitions of justice that show striking agreement among people about the nature and severity of wrongdoing.<sup>130</sup>

Still, while the standard Professor Owen articulates is useful for further limiting the cases in which the fact finder determines liability for retributive damages, more granular guidance can be found by looking at the various factors that currently inform courts’ analyses of *the amount* of punitive damages. For example, in its *State Farm* decision, the Supreme Court told courts to consider whether the misconduct caused harm that “was physical as opposed to economic”; whether “the target of the conduct had financial vulnerability”; whether the “conduct evinced an indifference to or a reckless disregard of the health or safety of others”; and whether the harm resulted from “intentional malice, trickery, or deceit, or mere accident.”<sup>131</sup> Other courts have offered various other factors to assist the fact finder, including, for example: the extent of hazard posed to the plaintiff and the public; the degree of defendant’s awareness of the hazard and its excessiveness; the cost of correcting or reducing the risk; the duration of both the improper marketing behavior and its cover up; the attitude and conduct of the defendant upon discovery of the misconduct; and the defendant’s reasons for failing to act appropriately.<sup>132</sup> The legislature may also wish to require juries or judges to consider factors often deemed relevant to filing charges against a corporate defendant, such as: “the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management”; the defendant’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it; the defendant’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents; the existence and adequacy of the defendant’s preexisting compliance measures; and the defendant’s remedial actions, including any efforts to implement an effective compliance program or to improve an existing one, to replace respon-

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<sup>129</sup> Cf. *Wainwright v. Stone*, 414 U.S. 21, 22–23 (1973) (upholding convictions under a Florida statute previously voided for vagueness because defendants had sufficient notice of the criminal nature of their conduct).

<sup>130</sup> See PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 139–40 (2008).

<sup>131</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

<sup>132</sup> See, e.g., *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223–24 (Ala. 1989).



sible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies.<sup>133</sup>

A simpler way to reduce vagueness is by imposing retributive damages liability only when the victim suffers physical injury or mental distress, as opposed to economic harms alone. But from a retributivist perspective, such a restriction undermines the goal of ensuring that more offenders receive at least some coercive condemnatory deprivation. The better strategy, then, is to deploy all the preceding factors within the statute as considerations for determining the amount of retributive damages to award in a given case (as I explain shortly). Of course, as these various considerations demonstrate, the culpable misconduct that triggers retributive damages is, unlike a cost internalization approach, not simply a matter of what harm the defendant caused. Rather, the award of retributive damages should focus on the magnitude of the harm threatened and the nature of that threat.<sup>134</sup> As Galanter and Luban observe,

A retributivist scales punishment to the heinousness of the offense, and that is not measured by the magnitude of harm. A moment's negligence behind the wheel, of the sort that every driver has been guilty of many times, may result in horrible consequences, while cold-bloodedly throwing a child out of a skyscraper window may result in very little harm because the child's suspenders miraculously catch on a flagpole.<sup>135</sup>

What matters to virtually all retributivists is the culpable conduct of the offender,<sup>136</sup> and that entails examination of the harm as well as the defendant's imposition of unreasonable *risk* of harm and any relevant defenses. In other words, the amount of harm *threatened* by the defendant might be a relevant consideration when assessing the defendant's reprehensibility; accordingly, the purposeful theft of \$100 is not worse than a reckless homicide simply because purpose is a more culpable *mens rea* than recklessness.

A legislature that wants to impose retributive damages on conduct that is not already criminalized could do so using the general

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<sup>133</sup> Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice to the Heads of Dep't Components, U.S. Att'y Office 4 (Dec. 12, 2006), available at [http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf).

<sup>134</sup> Legislatures or courts will have to consider whether to assess that threat's magnitude from the defendant's perspective or an objective perspective.

<sup>135</sup> Galanter & Luban, *supra* note 16, at 1432.

<sup>136</sup> See, e.g., Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad But Instructive Arguments Against It*, 37 ARIZ. L. REV. 117, 119 (1995); Stephen J. Morse, *Reason, Results and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 409; Stephen Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1600-03 (1974). While most retributivists focus on culpability and not harm, at least one prominent retributivist believes that there is additional moral significance to wrongs that cause harm. See Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 267-71 (1994).

statute described in this section. Nonetheless, in service to principles of legality,<sup>137</sup> legislatures would do well to be as specific as possible in the context of defining which misconduct triggers retributive damages. Indeed it is the ancient principle of *nullum crimen, nulla poena sine praevia lege poenali*—no crime, no punishment without a previous penal law—that should inform an aversion to having state courts use their common law powers to devise retributive sanctions that punish conduct not previously condemned by statute. Moreover, operating this structure by statute will also help overcome standing issues and prevent arbitrary enforcement practices.

2. *Should Retributive Damages Reach “Harmless” Misconduct? If So, Who Sues?*

A more interesting and complex issue to consider is whether *all* conduct already prohibited by criminal law in a given jurisdiction should be subject to retributive damages actions. I can imagine why some legislatures might wish to exempt various offenses from retributive damages. However, it is not entirely clear that such exemptions would be justified on retributivist grounds.

Two areas seem particularly pertinent here: first, “harmless crimes” where certain conduct is prohibited irrespective of harmful result, such as illegal drug possession or driving under the influence of alcohol; and second, inchoate crimes, such as solicitation, attempt, and conspiracy. In these two areas of criminal law, criminal penalties are available to punish misconduct even where harms to others do not actually materialize. These two kinds of conduct are somewhat confounding in the context of retributive damages because tort law conventionally requires a finding of harm to a victim.<sup>138</sup> In both these areas of criminal law, no victim is necessarily available to bring a suit for retributive damages even though there is conduct deemed (by legislators) worthy of condemnation.

The relevant question is whether standing to sue for retributive damages should be available broadly.<sup>139</sup> One might restrict the pool

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<sup>137</sup> See generally John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985) (explaining the requirement that a court cannot impose punishment on a defendant unless a previous penal statute authorizes such punishment for the conduct in question).

<sup>138</sup> To be sure, courts sometimes circumvent the requirement of causation of harm by vindicating the plaintiff’s rights even when the harm was trivial or nominal. See *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 158–62 (Wis. 1997) (imposing \$1 in nominal compensatory damages and \$100,000 in punitive damages for trespass on land).

<sup>139</sup> I am, for now, assuming that state legislatures have the power to confer such standing on private attorneys general. I recognize that, in the federal context, the standing question is considerably more complex, although as a general matter, “Congress may enact statutes creating legal rights, the invasion of which creates [constitutional] standing, even

of plaintiffs here only to *likely* victims of the defendant's actions.<sup>140</sup> Another strategy, which I believe is more consistent with the retributivist goal of reducing Type II errors, is for legislatures to empower private attorneys general (PAGs) who discover proscribed misconduct to sue for retributive damages. This would look similar but not identical to the *qui tam* structure in which the federal government encourages whistle-blowers to report fraud on the government.<sup>141</sup> But this would raise questions about the scope of misconduct we actually want to have enforced by PAGs. Thus legislatures should limit the reach of the PAGs, as described below.

Though controversial, PAGs are entrenched and pervasively influential actors across spheres of law ranging from consumer protection to environmental enforcement.<sup>142</sup> In this context, they would be individuals empowered to bring claims against defendants for actions that did not harm them personally, and would supplement the government's enforcement work for a range of legislatively specified misconduct. While this may seem odd today, private parties, including non-victims, were historically empowered to prosecute crime for the government. In fact, PAGs who initiated actions often captured the entirety of the criminal fine, even if they were not victims.<sup>143</sup> To be clear, I am not suggesting we use PAGs and retributive damages to serve as a complete substitute for the public enforcement of criminal law. As I explain in Part IV.D, there are good reasons for having a professional prosecutorial force at the government's employ. But empowering PAGs to seek an intermediate sanction against defendants is a cost-effective and politically independent mechanism to bring justice to those who perpetrate legislatively proscribed actions.<sup>144</sup>

Two potential problems with PAG suits require examination. First is the possibility of vexatious suits, increasing the likelihood of harassment and Type I errors. Second is the concern that having PAGs (rather than public prosecutors) enforce certain laws might jeopardize our commitments to other values (such as free speech).<sup>145</sup> But neither of these problems is insurmountable.

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though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).

<sup>140</sup> Cf. RESTATEMENT (SECOND) OF TORTS §§ 313(2), 436(3) (1965) (allowing a plaintiff to seek redress for relational emotional harm caused by the defendant's actions injuring a third party only if the plaintiff was physically endangered by the defendant's misconduct).

<sup>141</sup> See William B. Rubenstein, *On What a "Private Attorney General" Is—and Why it Matters*, 57 VAND. L. REV. 2129, 2144 (2004).

<sup>142</sup> See *id.* at 2146–54.

<sup>143</sup> See Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 598–602 (2005).

<sup>144</sup> See *id.* at 608–10.

<sup>145</sup> But see *id.* at 631–46 (arguing that the Solicitor General's concern to this effect in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), was misplaced).

With respect to the first challenge, the rules of legal ethics and civil procedure forbid lawyers from bringing frivolous or bad faith litigation claims.<sup>146</sup> And the economic structure of litigation encourages plaintiffs' lawyers only to take on suits with some good prospect of recovery. Moreover, the retributive damages scheme would impose heightened procedural safeguards—such as the clear and convincing standard of proof—that would reduce the incidence of Type I errors.

With respect to the second problem, a legislature may limit the extent to which PAG enforcement jeopardizes other values by clearly delineating which rights are subject to PAG enforcement.<sup>147</sup>

A preferable measure to reduce Type I errors, while still remaining true to the retributive energy that seeks the reduction of Type II errors (the wrongdoers who escape punishment), would be to adopt a segmented litigation strategy. That is, courts would allow plaintiffs actually harmed by the defendant's conduct to pursue retributive damages as a remedy in the traditional tort structure. But for those cases where there was no actual harm or where a PAG wanted to bring a claim that the victim did not want to bring, the state would have to create a cause of action (as opposed to a simple remedy) that allowed a PAG to bring an action only for retributive damages under certain conditions. In such cases, the PAG would be required to notify a government agency, perhaps a section of the state attorney general's office that deals with tort litigation, of the defendant's misconduct. The PAG would lodge the complaint and provide the evidence against the defendant to the government; the government would then decide whether to bring a case.<sup>148</sup> If the government brought and won a retributive damages action, a portion would go to the PAG as a reward for bringing this misconduct to public attention, much like those jurisdictions that reward citizens who call in crime-stopping tips.

If the government chose not to sue by a certain time, it would have to set out its reasons in a statement.<sup>149</sup> This would facilitate both democratic accountability and judicial or executive review of the declination. The government's declination would permit the claim to go back to the PAG, who could decide to sue for retributive damages if

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<sup>146</sup> See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258–59 (1975); Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C. L. REV. 613, 614–15, 631–53 (1983).

<sup>147</sup> See Morrison, *supra* note 143, at 614–17 (arguing for legislative choice in these trade-offs).

<sup>148</sup> An alternative regime would leave these actions in private hands but subject to government approval, much like an EEOC right-to-sue letter in the employment discrimination context.

<sup>149</sup> Cf., e.g., MICH. COMP. LAWS ANN. § 767.41 (West 2008) (requiring prosecutors to file an explanatory statement when declining to file charges against a defendant); NEB. REV. STAT. ANN. § 29-1606 (LexisNexis 2003) (same).

she secured counsel.<sup>150</sup> Legislatures could require lawyers who take on PAG claims of this sort to filter out bad claims by requiring lawyers to bear some risk of paying the opposing parties' lawyers' fees if the opposing party wins.<sup>151</sup> This kind of case might also be attractive to nonprofit organizations or firms that are willing and able to bankroll important impact litigation and acquire a diversified risk portfolio of cases.

By the same logic, this public-private scheme would apply to a more controversial realm: those cases where the defendant caused harm to a victim, but where the victim chose not to seek retributive damages. It is more controversial because allowing third parties to seek retributive damages here supervenes upon the victims' choice to seek or not seek redress against the wrongdoers who injured them. From some perspectives, punitive damages serve to vindicate the wrongs against actual victims.<sup>152</sup> By such lights, the PAG scheme would be problematic where victims choose to extend mercy to their wrongdoer by not seeking compensation or retribution. Indeed, some might think the tort system's essential feature is to empower, but not require, victims to seek recourse against their wrongdoers.<sup>153</sup> Thus, from this perspective, allowing a PAG to seek retribution against the wrongdoer for another person's suffering would be seen as disempowering to the victim, especially if the victim had to testify involuntarily.

From the perspective of the public's interest in retributive justice, however, a victim's refusal to pursue retributive damages for reasons not associated with the merits of the claim is a source of Type II error. Think of a student injured by his friend's drunk driving or a clergyman's sexual misconduct. In both cases, we might still want a PAG to inform society of this misconduct, even if the victim declined to do so.

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<sup>150</sup> Those concerned about the courts being flooded with weak non-harm-based claims can take some comfort in the fact that the scrutiny of plaintiff's counsel, when deciding whether to take on a case that the government has already declined, will probably filter out many weak cases. Another feedback effect is that (potential) juries may think that the claims are weak if the government declined to pursue them.

<sup>151</sup> The legislature might also decide to disallow suits by pro se plaintiffs who are not attorneys if it is worried that there will be too many frivolous claims. Additionally or alternatively, the state can place a burden on the PAG pro se plaintiff to incur the risk of paying the defendant's legal fees or some portion thereof if the defendant wins or if the court deems the plaintiff's case unmeritorious.

<sup>152</sup> See Colby, *supra* note 11, (manuscript at 2) (developing constitutional claim that punitive damages are best understood as vindicating private wrongs to individuals, not public wrongs); Galanter & Luban, *supra* note 16, at 1436-37 (justifying punitive damages as punishment for defendant's treatment of the plaintiff as having "merely a price, not a dignity"); Sebok, *supra* note 13, at 1015-22 (arguing that awarding punitive damages in tort cases is appropriate to redress an invasion of a private right); Zipursky, *supra* note 16, at 105 (arguing that some punitive damages cases implicate the plaintiff's "right to be punitive" in response to the wrong suffered).

<sup>153</sup> See, e.g., Zipursky, *supra* note 63, at 738-39.

The victim's failure to seek retributive damages or report the incident to law enforcement not only risks leaving the state unaware of the defendant's misconduct (when the defendant's claims to license could otherwise be humbled through coercion), but it leaves the defendant a risk to others and possibly again to the victim. Together, these admittedly disparate areas of misconduct—inchoate crimes, conduct crimes with no resulting harm, and misconduct causing harm to victims who don't wish to seek recourse for the wrong—may all be seen, at least in some contexts, as situations where moral luck operates. The storeowner whose fraudulent scheme fails because an honest employee tips off the customer, the drunk who luckily drove home without injuring anyone, and the molested altar boy who forgives his parish priest—all present situations where a defendant's culpable misconduct is worthy of sanction, and nonetheless, under a traditional torts scheme, the wrongdoer escapes legal responsibility. To be sure, these cases could be left for the criminal justice system exclusively. But, in light of the government's scarce investigative and prosecutorial resources, that would likely leave this category of cases under-enforced.<sup>154</sup> Moreover, since many retributive theorists take the position that culpable wrongdoing, rather than actual harm, ought to trigger sanction, it makes sense to have retributive damages indifferent to these various kinds of eruptions of moral luck.<sup>155</sup>

Punishing these spheres of misconduct through retributive damages might be controversial to some because it involves a paradigm shift for the tort system. Indeed, when states like California tried uncoupling victimhood from standing to sue as a civil plaintiff, they encountered resistance because law firms abused the system.<sup>156</sup> Thus, a jurisdiction might find a retributive damages scheme more acceptable if it used the hybrid regime mentioned earlier to empower PAGs to bring retributive damages actions following a government declination.<sup>157</sup> States could also restrict retributive damages to cases where

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<sup>154</sup> See *infra* Part IV.C.

<sup>155</sup> Cf. ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 77 (1999) (arguing that the moral point of view requires hostility to outcome disparity driven purely by moral luck). But cf. John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 *CORNELL L. REV.* 1123, 1131–32 (2007) (explaining the rationale for allowing luck to affect outcomes in typical tort actions involving civil recourse for compensation).

<sup>156</sup> A few years ago, voters passed an initiative to curtail California's private attorney general regime for ferreting out unfair business conduct; that law did not restrict standing to those injured by the conduct. See Jordan Rau, *Key Ballot Measures Go Governor's Way*, *L.A. TIMES*, Nov. 3, 2004, at A1.

<sup>157</sup> Might a PAG violate the terms of *Philip Morris*? Technically speaking, a PAG-enforcement system contemplates punishing a defendant for harms to nonparties to the litigation. See *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007). Nonetheless, my sense is this would be an incorrect inference to draw. The PAG is not suing to recover for the harm to the victim, but rather to initiate an intermediate sanction for the defendant's wrongful conduct, and is doing so as an informally deputized agent of the state. Moreover,

the misconduct involved or risked physical harm or where the financial misconduct involved losses above a certain threshold. Additionally, as alluded to earlier, they could further ensure that persons who bring these cases bear a risk that they will have to pay for some part of the defense's legal fees if the PAG case loses. To be sure, such measures would sap retributive energy and increase Type II errors, but that energy needs to be balanced against other important social projects and moral obligations, including the reduction of Type I errors.

What would be the implication of retributive damages liability for subsequent criminal liability? I address this question further in the subsequent companion article to this one,<sup>158</sup> but briefly, such criminal liability would only attach when the underlying conduct is itself subject to criminal sanction. Although some torts might not trigger any subsequent criminal liability, others could. For example, the state could prosecute a defendant already found civilly liable for, say, fraud, but as mentioned earlier, any retributive damages penalties the defendant paid would be credited against any subsequent criminal penalties for the same misconduct. Conversely, PAGs would generally not be entitled to bring actions for retributive damages after the government signaled its intent to prosecute the defendant criminally for the same misconduct. Allowing such actions would only encourage free riding on the government's prosecutorial efforts.

Notice that this approach to figuring out what retributive damages can punish does not posit that there is an intermediate category of wrongdoing between so-called private and so-called public wrongs. No intermediate category of wrongdoing (in the sense that it is less severe than criminal wrongs but more severe than private torts) is necessary to justify having an intermediate sanction of retributive damages. But it is important to note that this account does not view retributive damages as justified only because they serve as a means for increasing the enforcement of criminal laws.<sup>159</sup> Rather, the legislature delineates the wrongs triggering retributive damages; hence, the legislature decides what kind of misconduct is subject to retributive damages, criminal sanction, or both. (And my own view is that both these sets of decisions should be subjected to a kind of liberal mini-

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reading *Philip Morris* to suggest that it precludes a PAG scheme could suggest that the decision also precludes the state from punishing a defendant if the *state* is not a direct victim. Since that conclusion is inconsistent with a settled convention that the state could properly initiate punishment proceedings, it suggests a misreading of *Philip Morris*. The real goals of *Philip Morris* are to ensure that defendants can avoid duplicative punishments for the same wrong to the same victim and that defendants have an opportunity to present defenses to the wrong being adjudicated. The PAG scheme I have described is consistent with those goals.

<sup>158</sup> Markel, *How Should Punitive Damages Work?*, *supra* note 20.

<sup>159</sup> See Chapman & Trebilcock, *supra* note 59, at 744.

malist approach under which potential criminal laws are subjected to heightened scrutiny by the legislature.<sup>160</sup>)

As one can see, the question regarding the proper scope of wrongs subject to retributive damages is complicated, with at least two approaches presented here. A familiar and more restrictive approach endorses retributive damages actions only against defendants whose misconduct leaves actual victims behind. These victims would be permitted, but not required, to bring conventional tort suits seeking retributive damages. A major disadvantage of such an approach is that it leaves the criminal justice system alone to deal with a vast array of wrongful acts warranting retribution not covered by this restrictive approach. Alternatively, in a world where, as I describe in the next Part, detecting complex wrongdoing occurring in private is difficult and where people may not even know they have been victimized (culpably as opposed to accidentally), we might want a broader approach that increases the incentives for reporting misconduct to the system. The broader approach would have retributive damages legislation track not only familiar bases for punitive damages in tort law but also (a large segment of) a society's criminal laws.

In doing so, the broader approach would have the advantage of achieving more instances of retributive justice; and because of the prevention likely instigated by the PAG scheme, it would entail fewer encroachments upon the rights of persons to their bodies and property.<sup>161</sup> The social costs of administration and enforcement would probably increase initially; but over time, we might see that fewer wrongdoers require punishment because there is a greater disincentive to commit wrongdoing because they know that any observer (and not just direct victims or police or prosecutors) can initiate claims. A wider scope of liability, however, could leave more people worried about erroneous accusations and punishments, and could affect people's preferences regarding how much time they spend in observable spaces.

My own sense is that retributive damages statutes should come close to tracking much of what we already criminalize—though I also believe we have too many crimes on the books with penalties that are too harsh. Ideally, we would have a narrower criminal law and a re-

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<sup>160</sup> See Jennifer M. Collins, Ethan J. Leib, & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. 1327, 1368 (2008) (discussing a liberal minimalism approach to scrutinize criminal law legislation); Ethan J. Leib, Dan Markel, & Jennifer M. Collins, *Voluntarism, Vulnerability, and Criminal Law: A Response to Professors Hills and O'Hear*, 88 B.U. L. REV. 1449, 1459 (2008) (elaborating liberal minimalism approach).

<sup>161</sup> See generally Larry Laudan, *The Social Contract and the Rules of Trial Procedure* (Feb. 25, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1075403> (arguing that an increased emphasis on convicting the guilty, as opposed to the current emphasis on protecting the innocent from false convictions, could have huge crime reduction effects without unduly increasing the number of false convictions).



tributive damages regime that would match much of it, with specific assurances that any conduct punishable through retributive damages would have a *mens rea* requirement of recklessness or higher along with appropriate procedural safeguards to reduce Type I and II errors. But I don't view an all-encompassing retributive damages scheme as necessary. As with much of criminal law, it *should* be the product of careful legislative deliberation and subject to heightened scrutiny.<sup>162</sup>

## B. Implementing Fair Notice for Amounts of Retributive Damages

This Section lays out the key factors affecting the amount of retributive damages. Several elements must be considered in determining the amount of retributive damages in a given case.

For reasons mentioned in Part II, a concern for achieving evenhandedness among similar cases is important from a variety of retributivist and rule of law perspectives.<sup>163</sup> From these perspectives, a defendant should not face an award of retributive damages that varies substantially from another defendant's punishment by the same sovereign, in the same jurisdiction, for the same conduct.<sup>164</sup> Consistent with the retributivist commitment to rule of law values, people should have some reasonable sense of not only what *kind of conduct* is prohibited by pain of retributive damages liability, but also what *kind of penalty* and *how much of a penalty* they might predictably face as well, a point the Supreme Court has recently emphasized.<sup>165</sup> This Section tries to provide a scheme that can help implement fair notice and horizontal equality regarding the scope of damages.

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<sup>162</sup> Although criminal laws not targeting "fundamental rights" are only subjected to rational basis scrutiny under the Constitution, there are good reasons to think that a coercive condemnatory deprivation should trigger heightened scrutiny. See Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 211 (2004).

<sup>163</sup> See Markel, *Against Mercy*, *supra* note 19, at 1453–64 (explaining the retributivist and liberal case against clemency systems encouraging or permitting unwarranted sentencing outcome disparity); Dan Markel, *Luck or Law? The Constitutional Case Against Indeterminate Sentencing* (unpublished manuscript, on file with author) (developing constitutional argument for same position as above); see also ROBINSON, *supra* note 130, at 62–66 (explaining why there might be crime-control benefits accruing from such evenhandedness across defendants).

<sup>164</sup> *Cf. Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 46–48 (1991) (O'Connor, J., dissenting) (arguing that the Court should have held that the Alabama punitive damages scheme, which allows juries virtually unfettered discretion to impose penalties on defendants, violates Due Process).

<sup>165</sup> *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2627 (2008) ("Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another. And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage.") (citation omitted).

1. *Reprehensibility-Based Damages Based on Scaled Guidelines*

- a. *The Basic Structure*

The main feature of the retributive damages award I favor is a reprehensibility-based civil fine.<sup>166</sup> This fine's amount requires two kinds of measurements. The first measurement is a score on a reprehensibility scale. The second measurement translates that reprehensibility score to an amount of damages informed by the defendant's financial position.

Thus, as a preliminary matter, state legislatures or a sentencing commission should devise a set of guidelines to help juries (or judges in bench trials) assess the reprehensibility of the defendant's misconduct. These guidelines would calibrate reprehensibility, perhaps on a scale of one to twenty where twenty is the worst, using the factors that courts currently use to evaluate the defendant's reprehensibility, as discussed earlier.<sup>167</sup> Some factors might increase reprehensibility, such as a defendant's history of previously adjudicated misconduct,<sup>168</sup> and other factors might mitigate reprehensibility, such as preexisting compliance programs or remedial actions and restitution measures the defendant implemented upon discovery of the misconduct. In addition, the guidelines would provide commentaries with hypothetical examples of misconduct that fall on various places on the scale.

This kind of scaling approach would enhance not only fair notice and horizontal equality, but also rational decision making by jurors. It would do so by reducing the risk of isolationism, which is a cognitive bias that arises when individuals are required to make judgments in isolation of other factors that provide a richer context.<sup>169</sup> The scheme suggested here enables jurors to contextualize the conduct they are assessing in comparison to other types of conduct.<sup>170</sup> For example, a jury might rank a given financial harm as a six and a given physical

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<sup>166</sup> Professor Mark Geistfeld has recently articulated a different strategy worth considering in cases involving fatal risks. See Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263 (2008) (advocating use of government regulatory data and methodologies for monetizing fatal risks). I also acknowledge that a multiplier of compensatory damages may permissibly be used for wrongs involving purely financial harms. See *infra* note 181. Taken together, these would be plausible alternative measures to achieve some of the goals of the proposed fines based on reprehensibility and wealth.

<sup>167</sup> See *supra* text accompanying notes 131–32.

<sup>168</sup> Retributivists, however, might differ on whether enhancements for past misconduct should apply. My own view is that enhancements are justified for previously adjudicated misconduct. See Dan Markel, *Connectedness and Its Discontents: The Difficulties of Federalism and Criminal Law*, 4 OHIO ST. J. CRIM. L. 573, 575–76 (2007) (presenting the virtues of a system in which a state applies sentence enhancements for recidivism based on prior out-of-state convictions); Dan Markel, *Retribution and Recidivism passim* (unpublished manuscript, on file with author).

<sup>169</sup> See Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1172–73 (2002).

<sup>170</sup> *Id.* at 1173–78.

harm as a seven if permitted to view those harms separately. But if the two scenarios are viewed together, the jury may rank the financial harm as a five and the physical harm as a nine. The results may be different when juries rank conduct alone because “judgments are spontaneously normalized to the frame of reference implied by the category.”<sup>171</sup> Sunstein and his co-authors provide another example that may be easier to understand. When viewed separately, the answers to both the following questions may be “yes”: “is an eagle large?” and “is a cabin small?”<sup>172</sup> But when viewed together, one’s answers may change because the frame of reference is wider than one particular implied category. Hence, the examples of conduct provided to juries should feature conduct from a wide spectrum of categories so that they can calibrate retributive damages coherently across a broad array of misconduct.<sup>173</sup>

Fixing reprehensibility along a scale is only part of the task. We must also determine how the reprehensibility translates to the amount of the penalty. According to Sunstein and his co-authors, jurors in psychological experiments demonstrate great difficulty in translating their condemnation of defendants’ behavior into predictable dollar amounts.<sup>174</sup> (For what it is worth, some scholars, looking at real life data, contest that juries dispense unpredictable amounts of punitive damages.)<sup>175</sup>

To reduce the difficulties juries or judges might encounter when called to translate outrage into dollars,<sup>176</sup> the number on the reprehensibility scale would track some portion of the individual defendant’s net wealth. A legislature or a state sentencing commission would decide the precise linkage between reprehensibility and financial position *ex ante*. The court would not need to communicate that linkage to the jury. The jury would instead focus on determining what happened and evaluating the reprehensibility of the defendant’s conduct in light of the state-provided guidelines and commentary.

With a corporation, we could look at the worth of the enterprise as measured by valuation models used on Wall Street. Admittedly, valuing and punishing entities is conceptually and practically more difficult, and I explore those difficulties in detail in a later installment of this series.<sup>177</sup> Indeed, because of some of those difficulties, the net

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<sup>171</sup> *Id.* at 1171.

<sup>172</sup> *Id.*

<sup>173</sup> *See id.* at 1179.

<sup>174</sup> *See* Sunstein et al., *supra* note 13, at 2074.

<sup>175</sup> *See, e.g.,* Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error, and Overreaching in Sunstein et al.’s Punitive Damages*, 53 EMORY L.J. 1359, 1366 (2004).

<sup>176</sup> *See* Cass R. Sunstein, *On the Psychology of Punishment*, 11 SUP. CT. ECON. REV. 171, 178 (2004).

<sup>177</sup> Markel, *Punitive Damages and Complex Litigation*, *supra* note 20.

wealth of entities should not be used because it can be a misleading figure; it would simply encourage corporations to use debt, instead of equity, to finance themselves.<sup>178</sup>

Putting aside for now the issues of how best to value and punish entities, let's look at how this system might work in a more straightforward situation involving an individual defendant sued for retributive damages. To illustrate, a finding of two on the scale could lead to a retributive damages award of 1 percent of defendant's net wealth, and a finding of twenty could lead to a penalty of 10 percent of the defendant's net wealth. (The numbers could be played with; I am not suggesting anything magical about this scale.)

Scaling the amount of the penalty to a percentage of wealth is a bit unorthodox in this country, but it is not without precedent. Currently more than half a dozen American jurisdictions use a similar program of day fines, which are prevalent in Europe, where a judge follows an established scale and assigns an offense a number based on its severity, and that number is multiplied by the defendant's daily income.<sup>179</sup> This kind of scaling to financial position is important for several reasons.

b. *The Rationale for Scaling Fines to the Defendant's Financial Condition*

First, unlike using compensatory damages to assess retributive damages, scaling fines to the defendant's financial position avoids sending the wrong signals to the public about the worth of poor people in cases involving risk of physical injury. Second, the point of retributive punishment is to effectuate the communication of certain ideals; defendants must be punished in a way that adequately communicates the severity of the wrongdoing to them. The proposal sketched above takes into account those facts necessary to adequately and effectively communicate condemnation. Third, the proposal here thwarts defendants' ability to use wealth to prevent or obstruct litigation claims brought against them. Fourth, it counteracts the way defendants use wealth to convince people that wealth and size can be a proxy for a reputation that serves as a bond for performance. Fifth,

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<sup>178</sup> *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677–78 (7th Cir. 2003) (Posner, J.) (“[N]et worth’ is not the correct measure of a corporation’s resources. It is an accounting artifact that reflects the allocation of ownership between equity and debt claimants. A firm financed largely by equity investors has a large ‘net worth’ (= the value of the equity claims), while the identical firm financed largely by debt may have only a small net worth because accountants treat debt as a liability.”).

<sup>179</sup> See BUREAU OF JUSTICE ASSISTANCE, HOW TO USE STRUCTURED FINES (DAY FINES) AS AN INTERMEDIATE SANCTION 1 (1996), available at <http://www.ncjrs.gov/pdffiles/156242.pdf>; NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 598–99 (2d ed. 2007). Another way we use wealth in the criminal justice system is to scale the amount of bail required to the value of the defendant's assets.

it facilitates rational jury decision making. Sixth, it helps reduce, but does not eliminate, the diminishing utility of money. And seventh, depending on the configuration of compensation for plaintiffs' lawyers, it provides incentives for plaintiffs' lawyers to take cases even after *Philip Morris*. Let me elaborate each reason, with the caveat that not each reason applies in all cases.

The first major advantage of a reprehensibility-scaled guidelines approach is that it ensures that the degree of the defendant's punishment is not based on morally irrelevant facts about the underlying tort, such as whether the victim was poor or wealthy. As explained in Part I.A, various jurisdictions have insisted on tethering the amount of punitive damages to the amount of compensatory damages awarded.<sup>180</sup> From the retributivist perspective, this tethering is unreasonable in cases involving or risking physical injury because doing so is inconsistent with the equal worth of human life under the law.<sup>181</sup> If punitive damages are based on compensatory damages, then when a defendant's misconduct kills or injures a poor person—i.e., someone whose death or injury triggers smaller compensatory damages under conventional valuation models—the punitive damages award will be lower than an award for the same misconduct committed against a wealthy person. Because such valuation models encourage defendants to undertake unjustifiably risky conduct in a manner that will disproportionately affect the poor and disenfranchised, it is inconsistent with retributivism's extension of equal concern and respect for all persons under the law.<sup>182</sup>

Second, and relatedly, the proposal sketched above takes into account, *ex ante* and in a fair and even-handed way, those facts necessary to help achieve adequate and effective communication of condemnation. If legislatures impose caps on punitive damages by fixing a multiple of compensatory damages or a flat dollar ceiling, then the wealthy defendant is more likely to view punitive damages awards as

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<sup>180</sup> See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 615 (1996) (Ginsburg, J., dissenting) (listing sixteen states that cap punitive damages in general as a function of compensatory damages).

<sup>181</sup> This issue is admittedly less of a concern when defendants' misconduct only threatens financial injury. In that context, a structure of retributive damages tethered to compensatory damages does not encourage defendants to seek out the poor as their victims except to the extent that the poor are also less likely to seek and gain redress through the tort system.

<sup>182</sup> Of course, this might raise questions about whether compensatory damages are also sending these false signals of unequal worth. But using Geistfeld's approach in the realm of compensatory damages might ameliorate that problem in at least some cases. See Geistfeld, *supra* note 166, at 284–95 (advocating the use of government regulatory data and methodologies to quantify social costs).

just a luxury tax or a cost of doing business, especially if the underlying conduct is especially important or profitable.<sup>183</sup>

Another concern arises because many states allow lawyers and their clients to share compensatory damages and defendants know that such a split is common. In such states, when juries award compensatory damages intended to compensate the plaintiff's injury, but not pay for the lawyers' fees, the award will always under-compensate. Jurors are not repeat players and thus may not know the particularities of how plaintiffs and their lawyers are compensated. So to the extent retributive damages usefully foil the pricing calculation by the defendant (who might be a repeat player) in the *ex ante* planning stage, assessing retributive damages as a percentage of wealth would help disrupt such distorted senses of supremacy and license. Fixed or capped multiples or dollar caps are more likely to speak to defendants in a language of pricing rather than prohibition.

Third, the proposal here counteracts defendants' misuse of their financial position to prevent or obstruct claims brought against them.<sup>184</sup> Using wealth-sensitive punishments will help ensure that defendants are less tempted to use their financial position to "invest" in creating a reputation that deters appropriate litigation. In other words, wealth-sensitive penalties help the public overcome the advantages that accrue from wealth both before and during litigation—the sorts of advantages that help defendants avoid being held responsible for their culpable misconduct.<sup>185</sup> Such penalties say to the class of defendants, both *ex ante* and *ex post*, that their financial position cannot buy them an escape route from justice.

Fourth, a distinct but related reason to have wealth-sensitive retributive damages is to counteract the temptation wealthy defendants might have to use the reputation resulting from their size, financial position, and power as a "bond for future performance." That is, to the extent defendants try to lure people into relationships with them based on the reputational gains associated with their size, wealth, and stability, there is no fairness-based reason to occlude from considera-

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<sup>183</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES \*378 ("[The] quantum, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and at all events, what is ruin to one man's fortune, may be a matter of indifference to another's."); Perry, *supra* note 14, at 188 n.57 ("Imposing a \$1,000 fine on a hard working proletarian may be enough as punishment for accidentally injuring the property of another, but it will not be enough if the injurer is a very wealthy man who will not feel the loss of \$1,000.").

<sup>184</sup> See *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003).

<sup>185</sup> See *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 192 (3d Cir. 2007) ("Wealth is also relevant because '[a] rich defendant may act oppressively and force or prolong litigation simply because it can afford to do so and a plaintiff may not be able to bear the costs and the delay.'") (quoting *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 642 (10th Cir. 1996) (alteration in original)).

tion the way in which they try to exploit that size and financial position to their advantage.<sup>186</sup>

A fifth reason for supporting the proposal here, as opposed to the conventional practice of admitting evidence of the defendant's financial position prior to the determination of the amount of punitive damages, is that this proposal facilitates rational jury decision making. Having percentages of net wealth or net value track the reprehensibility scores on a chart means that the plaintiff cannot use a defendant's financial position to unduly pollute or alter the jury's decision making. This approach protects defendants by preventing trials from devolving into "a field day in which the financial standing of the defendant would become a major issue."<sup>187</sup> The plan here does not allow the plaintiff to introduce evidence regarding the defendant's financial position during the liability phase of the trial because such information might poison the jury's decision; instead, the jury should simply assess the reprehensibility, if any, of the misconduct.<sup>188</sup> Under this proposal, the jury would hear such evidence of financial condition only after scoring the reprehensibility of the defendant's conduct on the chart. Defendants concerned that their financial position might prejudice the jury can waive a jury determination as to either financial position or reprehensibility.

A sixth advantage to wealth-sensitive damage awards is that they help ensure that the state is calibrating damages to an objective measure of condemnation associated with punishment rather than trying to determine the idiosyncratic utility functions of each defendant. This helps ensure, in other words, that the punishment will be more consistent across persons and that similarly situated defendants who commit similar types of misconduct within a given jurisdiction will be punished in a roughly similar way—that is, based on expectations of average "disutility" associated with equal percentages of wealth or value. Under the retributive damages scheme, the worse the conduct, the higher the percentage of net wealth that the defendant will forfeit.

Of course, given the diminishing marginal utility of money, one might prefer progressively staggered percentages that increase as a function of both the defendant's reprehensibility and wealth (or value). It's admittedly quite difficult, however, for legislatures or sentencing commissions to assess different people's marginal utility functions. But it need not be part of the retributive project to calibrate

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<sup>186</sup> *But cf.* Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 421–24 (1989).

<sup>187</sup> *Gombos v. Ashe*, 322 P.2d 933, 940 (Cal. App. 1958).

<sup>188</sup> In this respect, the plan ameliorates the primary arbitrariness concerns raised by scholars about having evidence of the defendant's financial condition admitted into trial. *See generally* Abraham & Jeffries, *supra* note 186, at 421–24.

punishment based on *ex post* preferences of defendants.<sup>189</sup> Indeed a legislative scheme that progressively increases the percentage of the defendant's net wealth subject to civil forfeiture could work in a way similar to the progressive income taxation system.

One might object to "progressively" increasing retributive damages based on grounds intrinsic to retributive theory. According to this argument, there is a principle of equality that encourages us to treat similar offenders who commit similar misconduct in similar manners. A progressively increasing punishment structure would likely undermine the ideal of equality because the variability of marginal utility rates would be idiosyncratic across persons (or entities). At least with flat dollar amounts or flat percentages of wealth, the equality principle can be plausibly invoked and made sensible to most people as an expression of social condemnation. But "progressively" scaling retributive damages may imply that society is punishing the rich more severely only because they are rich, or alternatively, punishing the poor less severely only because they are poor. Obviously, this is not an issue that can be decided through retributive theory with unwavering firmness. However, my best sense is that calculating retributive damages against individuals using a fixed percentage of wealth that increases with reprehensibility, rather than a capped dollar amount or capped multiple based on a compensatory damages award, would itself be a substantial improvement and would not require calibrations that "soak the rich" by punishing them more than we punish others for the same misconduct.

Last, depending on the structure of lawyers' fees, the proposed retributive damages scheme may provide incentives to plaintiffs' lawyers to take complex cases against powerful and wealthy people and entities that they would not otherwise take, especially after *Philip Morris*. As mentioned earlier, the Supreme Court ruled that a jury may not award punitive damages based on the amount of harm caused to nonparties to the litigation.<sup>190</sup> The reason for this holding makes good, and underappreciated, sense from a retributivist perspective—a defendant ought not be punished for injuries unless the plaintiff has clearly proven that defendant's culpable misconduct caused those injuries, especially if the defendant has various defenses that could be raised against particular claimants. But the new holding poses a substantial risk of reducing incentives to plaintiffs and their counsel because they cannot pursue a jackpot based on all the harms the

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<sup>189</sup> *But cf.* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. (forthcoming 2009) (manuscript at 40–41, on file with author) (arguing for a system of punishment that takes into account the subjective experience of the particular offender). Chad Flanders and I are writing a paper responsive to this line of inquiry, tentatively entitled *Must Retributivism Care About the Subjective Experience of Punishment?*

<sup>190</sup> See *supra* notes 10–11 and accompanying text.



defendant has caused to other parties and to society. If a jurisdiction decides—against the advice I offer below<sup>191</sup>—to allocate the retributive damages awards entirely to the plaintiff and her counsel, then the reprehensibility-based approach reduces the problem of diminished incentives in the aftermath of *Philip Morris*.

The preceding discussion gives several reasons for considering the defendant's financial position. Although many jurisdictions permit the jury to consider evidence of a defendant's wealth or value, some critics think this approach punishes wealthy defendants for the mere sin of being wealthy.<sup>192</sup> But this claim—that wealth-sensitive punitive damages awards are unconstitutional, arbitrary, discriminatory, or irrational<sup>193</sup>—is wrong. First, it is simply too quick to argue that defendants are punished for being wealthy. They are punished because they did something *unlawful* and the punishment is designed to communicate to them that what they did was unlawful and to be avoided, rather than viewed, both *ex ante* and *ex post*, as mere luxury taxes for those who can afford such wrongdoing.

Moreover, critics of wealth-sensitive punitive damages cannot explain their own deep inconsistencies. Recall that because retributive damages are wealth-sensitive they necessarily take into account a defendant's putative ability to pay. The wealth sensitivity runs in both directions—perforce, poorer defendants will pay less in retributive damages and richer ones will pay more. This helps avoid arbitrary determinations of the correct baseline. Oddly, some of the critics of using financial position to help establish the penalty imposed against a defendant offer no explanation for their belief that evidence of financial position “might be appropriate for purposes of mitigation, as in cases where a defendant would be unable to pay a substantial award.”<sup>194</sup> These critics owe us an argument as to why it is inappropriate to think of this issue as a scalar one, rather than a binary one, especially when payment can be finessed by taking money out of future earnings.<sup>195</sup>

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<sup>191</sup> See *infra* Part III.B.3.

<sup>192</sup> See Abraham & Jeffries, *supra* note 186, at 423; see also *Zazú Designs v. L'Oréal, S.A.*, 979 F.2d 499, 508–09 (7th Cir. 1992) (Easterbrook, J.).

<sup>193</sup> See, e.g., Brief Amicus Curiae of the Business Roundtable in Support of Appellant Urging Reversal, *White v. Ford Motor Co.*, 500 F.3d 963 (9th Cir. 2005) (No. 05-15655) (arguing that use of shareholder equity in determining punitive damages violates defendant's Due Process rights).

<sup>194</sup> *Id.* at 7 n.1 (citing *Bell v. Clackamas County*, 341 F.3d 858, 868 (9th Cir. 2003)); see also *Bell*, 341 F.3d at 868 (noting that it may be “appropriate to reduce the punitive damages awards as so ‘grossly excessive’ in violation of due process on the basis of the individual defendants’ ability to pay”).

<sup>195</sup> If a defendant committed grave misconduct and then restructured its finances to make it appear that it cannot pay its tab, the courts might adjust the retributive damages based on the defendant's wealth or value at the time the misconduct occurred.

To be sure, calibrating a penalty's stiffness based on offender-specific features can pose a challenge to rule of law values such as consistency and predictability when these adjustments occur ad hoc, the way they do across cases now. But a democracy that calibrates the amount of retributive damages the way I have described avoids the inconsistency decried by critics like Professors Kenneth Abraham and John Jeffries.<sup>196</sup>

Yes, wealth-sensitive retributive damages awards make assumptions about the interpersonal comparisons of the utility of wealth. But so do flat dollar caps or fixed multiples—and those assumptions are more questionable, not less. To the extent these assumptions do not reflect widespread and legitimately instantiated views about expected average individual utility, they then only appear in the context of penalties for reckless or malicious misconduct that defendants could have avoided. Defendants thus stand in relation to wealth-based adjustments the same way they stand in relation to adjustments based on recidivism. The financial position of a defendant, like his criminal history, can serve as a democratically authorized consideration that permissibly and predictably informs the typical amount of monetary punishment.

To be sure, punishing corporations requires a more complex analysis because their value at the time of punishment may simply reflect their managers' past decisions to pay dividends to shareholders.<sup>197</sup> But there will be market responses to companies that pay dividends imprudently—insufficiently capitalized companies will have to pay higher interest rates to borrow and will pay more to suppliers concerned about their capacity to perform their obligations, for example. These checks will operate to restrain some of the strategic behavior that seem triggered by the design of retributive damages payments.<sup>198</sup>

Moreover, caution about the use of financial position is warranted for reasons having to do with federalism, and in particular the concern that states may rely on juries to extract lucre from out-of-state defendants.<sup>199</sup> But the retributive damages scheme, because of the constraints emerging from the guidelines and commentaries, as well as the procedural safeguards (including de novo review of the repre-

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<sup>196</sup> See Abraham & Jeffries, *supra* note 186, at 423.

<sup>197</sup> Cf. *Zazú Designs*, 979 F.2d at 508–09 (excoriating uncritical use of defendant's wealth to assess punitive damages).

<sup>198</sup> I address the punishment of entities at further length in the third installment of this series: Markel, Punitive Damages and Complex Litigation, *supra* note 20.

<sup>199</sup> E.g., *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (“[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.”).

hensibility score), will reduce the possibility of punishing out-of-state defendants based primarily on their residency or financial position.

The scheme described above furnishes potential defendants little basis for complaint that the amount or award of retributive damages is a surprise, since it uses standards that are no different than the now-familiar guidelines many jurisdictions use to assess criminal liability and sentencing issues. Of course, criminal defendants have more procedural protections. Thus, if we deputize plaintiffs as PAGs to facilitate punishing defendants with an intermediate civil sanction, we must enhance at least some of the procedural safeguards in place in retributive damages cases, an aspect of this proposal I have previously alluded to and will further develop in the subsequent installments of this project.<sup>200</sup>

## 2. *Penalties for Gain-Stripping*

In addition to the reprehensibility-based fine, courts should determine the net profitability of the defendant's misconduct, if any, toward the plaintiff involved.<sup>201</sup> This determination is necessary because retributive damages awards signal two commitments: first, that misconduct of this sort should not occur; and second, if such misconduct does occur, the defendant should not profit from it (akin to complete deterrence). Indeed, the defendant should experience a retributive setback to his interests for having undertaken the misconduct.

The gain-stripping penalty should be treated distinctly from the reprehensibility-based fine. Gain-stripping alone returns the defendant to the *status quo ante*, which does not adequately communicate the wrongness of the action; adding the reprehensibility-based fine makes the defendant worse off for his culpable conduct, as he should be from a retributive perspective. Thus, if the defendant were to pay a hypothetical reprehensibility-based fine of \$200 and had gained from the misconduct \$200, then the defendant should pay (at least) \$400. That said, the defendant's gain needs to be considered in light of the harms the defendant has been forced to compensate. Thus, if the defendant gained \$200 but is required to pay \$100 to the plaintiff in compensatory damages, then the defendant netted only \$100. In such a case, the defendant should be forced to pay the compensatory damages to the plaintiff (\$100), the extra profits (\$100), and a retributive damages award that puts the defendant in a worse position than

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<sup>200</sup> See *supra* note 123; see also sources cited *supra* note 20.

<sup>201</sup> See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21–22 (1991) (finding that juries may consider the wrongful conduct's profitability to the defendant in determining punitive damage awards).

before the misconduct, the size of which depends in large measure on how reprehensible the conduct was.

One caveat is necessary. If I am correct about how to read *Philip Morris*,<sup>202</sup> any gain-stripping penalty against the defendant will be limited to the gain the defendant made at the expense of the plaintiffs in the litigation, rather than gains made at the expense of nonparties to the litigation. After all, the defendant may have adequate defenses against others and be entitled to keep gains resulting from conduct with them. This also reduces the amount of potential reward to contingency-fee-based plaintiffs' lawyers, so states may need to enact provisions allowing for reasonable fees for plaintiffs' lawyers in cases that warrant retributive damages. I address this next.

### 3. *Providing Litigation Fees and Expenses*

In addition to gain-stripping and reprehensibility-based fines, the state must also consider the significance of litigation fees and expenses when determining retributive damages because the way the state provides incentives for plaintiffs and their lawyers will influence the number and kind of retributive damages actions brought.

Given its primary focus on the criminal justice system, contemporary retributive theory quite naturally does not have a lot to say about the institutional design for solving this particular problem. Extrapolating from the account in Part II, the retributivist's interest here is in encouraging high quality lawyers to invest in cases that ventilate the wrongs perpetrated against society (reduction of Type II errors); concomitantly, we want lawyers to screen cases so that they don't bring vexatious strike suits (reduction of Type I errors).<sup>203</sup> Various structures might be able to achieve these goals, but whichever structure we choose, it will involve tradeoffs. My limited goal here is to point out some of the options and the difficult tradeoffs.

Because the retributive damages should go largely to the state for reasons I adumbrate below in Section C, I preclude from consideration using retributive damages awards to create the defined pot of money that will be shared exclusively by the plaintiff and his lawyers. Of course, plaintiffs and their lawyers can still share in the compensatory and aggravated damages.<sup>204</sup> But with retributive damages, the fact that the money goes largely to the state does not mean that the state cannot use a portion of those specific funds or funds drawn from the public fisc to reimburse lawyers for the risk, time, and expense associated with the lawyer's efforts. But which efforts need reimbursement here?

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<sup>202</sup> See *supra* note 11 and accompanying text.

<sup>203</sup> See *supra* Part I.B.

<sup>204</sup> See Markel, *How Should Punitive Damages Work?*, *supra* note 20, Part II.

If we assume *ex hypothesi* that the state will take the lion's share of the retributive damages, we marginally increase the likelihood that the plaintiff will have a difficult time in finding a lawyer to take the case absent compensation for fees and expenses. That is, compensatory damages may not sufficiently motivate lawyers where the damages are insubstantial or uncertain. Making lawyers' fees available in cases proving retributive damages liability will thereby motivate, at least on the margins, lawyers who might not take cases brought solely for other forms of damages. Additionally, lawyers' fees adjusted upward for risk, time, and expense will incentivize lawyers to find and publicize evidence of a defendant's *mens rea* that they might not otherwise pursue if they were looking strictly to settle or litigate for non-retributive damages.<sup>205</sup> The question is: should the fees reimburse only that part of the litigation focused on evidence for retributive damages? If we only promise fees for the retributive damages aspect of the litigation, then we might be losing out on the information associated with cases that would not be brought at all because of low compensatory damages that provide insufficient motivation on their own.

One thing we can say is that full recompense for successful plaintiffs' lawyers is likely to be necessary in the case of the successful PAG since private lawyers in those cases would not generally bother to take the case otherwise. After all, they are not relying on any prospect of compensatory damages to motivate the claims and they will not, by design, enjoy any more of the retributive damages penalties than is necessary to incentivize them to bring suit and do a competent job.

Especially in the context of the PAG, but also more generally, a few other concerns are worth consideration. As alluded to earlier, we first need to consider the problem of incentivizing too many dubious lawsuits for retributive damages. One good option for reducing Type I errors associated with vexatious PAG strike suits is to make the plaintiffs' lawyers perform more of the filtering by having them bear some risk. Specifically, if the lawsuit fails to secure a determination of retributive damages liability, then the plaintiffs' lawyers will have to compensate the defense lawyers for a part of their time and expenses. In suits involving claims by victims for compensatory damages, the plain-

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<sup>205</sup> See Thomas H. Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 Wis. L. Rev. 169, 172 ("The empirical evidence suggests that the business community's fear of runaway punitive damages is exaggerated. However, what litigators 'define as real, becomes real in their consequences.' A belief that punitive damages are 'out of control' and randomly assessed may create a self-fulfilling prophesy as parties negotiate claims according to their perceptions of the populist behavior of juries."); see also Baker, *supra* note 117, *passim* (finding that the possibility of punitive damage affects how lawyers approach their cases).

tiffs' lawyers who lose will have to pay some portion of the legal fees associated with defending against the retributive damages liability.<sup>206</sup>

We should consider risk-adjustments for fees. On the one hand, compensating all lawyers who win retributive damages actions with an amount that covers fees and expenses may not be enough to induce lawyers to enter this field of practice unless they can find a way to hedge their risks or work for an organization whose members help bankroll these kinds of cases. So the compensation they receive needs to be sufficient to achieve the security associated with a diversified portfolio of cases involving allegations of retributive damages—otherwise we increase the risk of Type II errors. On the other hand, if we give too much of a risk-adjusted multiplier of reasonable fees to lawyers, they will aggressively try to push the law to cover cases not in the heartland of what is meant to be punishable by retributive damages. This raises the likelihood of Type I errors.

Last, we also need to consider how the fee structure might affect meritorious suits with very little money or values at stake. Indeed, the allocation of lawyers' fees will say a lot about how much society wants to reduce Type II errors. If, for example, John maliciously stomps on exactly one of Neighbor Nancy's prized roses in her presence, should Nancy have a retributive damages action against John? If so, should John pay for Nancy's lawyer and court costs too? Paula, the lawyer for Nancy, will bring suit here only if she thinks she will get paid if she prevails, unless she works for an entity (perhaps governmental or non-profit) that subsidizes these actions. But if lawyers are not available and willing to litigate, it may mean that John can stomp on Nancy's roses with impunity, especially if he does it on the installment plan. There's always the threat of criminal sanctions to prevent John's actions, but prosecutors are also sometimes reluctant to charge perpetrators whose crimes are lower priorities.

One thing is clear: jurisdictions perennially face competing moral obligations for scarce resources; thus, consideration of administrative costs of various regimes is necessary. Choices impinging on the plaintiff lawyers' interests will almost certainly serve as a drag on retributive energy to reduce Type II errors. But giving plaintiffs' lawyers everything they want will also risk deleterious effects.<sup>207</sup> As I stated in Part

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<sup>206</sup> The PAG plaintiffs who represent themselves pro se would have to do the same and face the same exposure if they lost; but if they won, the PAG pro se plaintiffs would collect comparable reasonable fees and expenses as well as a flat finder's award, as discussed in the next sub-section.

<sup>207</sup> For example, if a state gives either all or most of the retributive damages award to plaintiffs and their lawyers, it should recognize that these schemes tend to reward plaintiffs and their lawyers based on the wealth of the injurer. This exacerbates the distortionary effect on which cases are brought against whom. Moreover, most split-recovery schemes do not do much to curtail the collusion risks associated with settlement.

II, we cannot expect to spend every last unit of social resources on retributive justice. Tradeoffs have to be made somewhere.

#### 4. *Rewards for Plaintiffs and the Risks of Collusive Settlements*

Considering the interests of potential plaintiffs' lawyers in this scheme is not enough. It would only create an incentive for enterprising lawyers to find plaintiffs. It would not do the job of channeling plaintiffs to lawyers, especially if the aggravation of a lawsuit coupled with the chance of not winning were otherwise sufficient to dissuade a plaintiff from bringing suit. The availability of retributive damages with some portion of it going to the plaintiff creates the conditions for more enforcement of the public values at stake. From the public's perspective then, the amount awarded to the plaintiffs and their lawyers should be no more than is necessary to induce (a) plaintiffs to bring their suits to lawyers and (b) the lawyers to successfully bring the suits to fruition and public attention. Thus, in addition to the fee structures discussed immediately above, jurisdictions should provide victorious plaintiffs in retributive damages suits a flat finder's fee, in addition to compensatory damages if applicable.

The flat fee reward, which I will posit here somewhat arbitrarily as \$10,000, encourages all citizens to bring cases warranting retributive justice without making the windfall to the plaintiff contingent on morally arbitrary features such as the defendant's financial position.<sup>208</sup> The benefit of such a finder's fee is it makes the project of retributive justice more likely to succeed while being less susceptible to lottery effects that undermine retributivism's commitment to fairness and equality across persons.

In the absence of countervailing safeguards, the flat fee award creates a risk of collusion such that defendants would try to "bribe" plaintiffs to settle for \$10,001 above their compensatory damages. (The same settlement motivation could also exist in the PAG context.) This would have other bad effects: it might encourage defendants to pay for wrongs they did not commit just to make suits go away. Meanwhile, secret settlements of this sort embolden the original wrongdoers who are never held liable—and are never confronted—for wrongs that they actually *did* commit.

While I address settlement issues in greater detail in *How Should Punitive Damages Work?*,<sup>209</sup> let me foreshadow that discussion briefly. To avoid these problems, the litigation process should require three

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<sup>208</sup> Notice, however, that while this proposal introduces an apparent asymmetry between fines based on percentages of defendant's wealth and flat fee awards to plaintiffs, the goal behind both these techniques is to reduce the relevance of the financial position of the offender from the perspective of retributive justice.

<sup>209</sup> See Markel, *supra* note 20, Part IV.

steps. First, plaintiffs must signal in their *initial* complaint that they are seeking retributive damages<sup>210</sup> and they must also lodge a copy of the initial complaint with a state attorney general's representative. Second, courts must scrutinize and make transparent all settlements of suits where plaintiffs lodge retributive damages claims in the initial complaint. Third, the state attorney general's representative either has to agree to the settlement or buy the plaintiffs' retributive damages claims (for the finder's fee) so that the state can prosecute the retributive damages aspect of the litigation. These rules would prevent private parties from settling in a way that deprives the public of potentially critical information involving public misconduct and conveys to the court (and the state) a basis for scrutinizing any settlements that arise regarding the nature of the misconduct.

Thus if plaintiffs decided to go ahead and allege retributive damages in the initial complaint, they would not be prohibited from settling. But this scenario would require plaintiffs to secure governmental approval to settle and it would force defendants to either admit responsibility and pay some acceptable amount of retributive damages to the state or to deny responsibility. If the defendant denied responsibility, he would have to convince the state's representative that this particular claim lacked merit. Otherwise, the state—or conceivably another PAG if the state declined—could decide to risk litigating against the defendant. Clearly, the settlement dynamics would change because defendants would have little incentive to settle without admitting liability. Knowing these diminished incentives, plaintiffs will be unlikely to bring suits merely for the purposes of harassment.

One last point: collusive settlements might also seem tempting *prior* to the filing of a complaint, but because of the PAG structure, the incentives for collusion between plaintiffs and defendants against the state are substantially reduced if not eliminated. Under the scheme here, a defendant can certainly settle any non-retributive damages alleged by a plaintiff, but unless the defendant owns up to the misconduct—by having the state ratify the settlement and ensure that the defendant pays the state also—the defendant will derive no certain repose against retributive damages liability sought by a PAG subsequent to the pre-filing settlement.<sup>211</sup>

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<sup>210</sup> This would be in contrast to those jurisdictions that permit claims for punitive damages only after a hearing. See Rustad, *supra* note 31, at 1313.

<sup>211</sup> When the state settles with defendants, they will have to make a formal record of that settlement and its scope to prevent PAGs from needlessly filing suit. PAGs will have to check these records before they can proceed with their suit. By including in the Class Action Fairness Act (CAFA) a provision that requires defendants to notify the state attorneys general of settlements affecting citizens of their state, Congress has created an example from which we can emulate or depart for the retributive damages structure. 28 U.S.C.



In sum, where retributive damages are warranted, a defendant should pay reprehensibility-based civil fines, attorneys' fees (informed by risk, time, expertise, and expenses), a state-determined flat award going directly to the plaintiff, and an amount sufficient to eliminate any net gains the defendant made from his misconduct toward the plaintiff that was not part of the compensatory damages to the plaintiff. This structure creates a *quid pro quo*. The finder's fee helps channel cases to lawyers; the lawyers who invest in these cases are paid for the risk and effort they take. Meanwhile, defendants are made worse off as a result of their culpable misconduct. But before that happens, they enjoy a set of procedural safeguards and advance legislative notice of what conduct instigates retributive damages in ways that are more restrained and predictable than the extant regimes in most jurisdictions around the nation.<sup>212</sup> Moreover, the retributive civil sanction is not a criminal fine; there is no "conviction" and no proposed imposition of collateral consequences.

### C. Allocating Retributive Damages Chiefly to the State

By virtue of their punitive, educative, and preventive effects, retributive damages serve a number of public purposes in effectuating the CCR's values described earlier in Part II. These public purposes explain why the defendant should pay retributive damages, but they do not yet fully explain who should receive the retributive damages. Indeed, extracting damages (or other relevant remedies) from the defendant largely satisfies both the retributive and the cost internalization functions. But neither function seems at first blush to require the plaintiff to be the exclusive beneficiary of that penalty. Let me try to elaborate why, at least with respect to retributive damages, the state should capture the bulk of the retributive damages award.

To be sure, there are good arguments that tort victims should have an avenue of redress for their losses,<sup>213</sup> though of course compensation could alternatively be achieved through social insurance schemes.<sup>214</sup> Perhaps tort victims should also be compensated through "aggravated damages" for the dignitary harm they have personally endured. However, if extra-compensatory damages are inflicted to achieve the public's interest in retributive justice, then we must see

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§ 1715 (2006). For a trenchant analysis of this CAFA provision, see Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971 (2008).

<sup>212</sup> See *supra* note 123.

<sup>213</sup> See, e.g., John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 590–626 (2006) (arguing for recognition of a right to a body of law that empowers people to seek redress against those who have wronged them).

<sup>214</sup> See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 642–64 (1985). Professor Sugarman's preference for abolishing the tort system is consistent with retention of an improved punitive damages scheme. See *id.* at 660.

the recovery by private plaintiffs of any “retributive damages” as merely a *contingent* result, not one that is necessary or necessarily desirable.

Indeed, it is very likely wrong-headed to award plaintiffs the bulk of retributive damages. The quintessentially *socio-legal* interest underlying the CCR counsels in favor of awarding only that incentive to the plaintiff and her lawyer necessary to bring the suit to the public’s attention, and to dedicate the balance of the retributive damages award to other pressing social obligations, including but not limited to remedial services for crime victims or other law enforcement budgets.<sup>215</sup>

Before *Philip Morris*, the risk of giving the plaintiff—who might only be one of many victims of the defendant’s conduct—the entire punitive damages award was that it would undermine the state’s interest in ensuring a fair distribution of both compensatory and retributive damages for others. After *Philip Morris*, this reasoning is admittedly weaker as a justification for the state to take the lion’s share of retributive damages. But even in the post-*Philip Morris* context, giving more than a reasonable award (say, of \$10,000) in addition to compensatory damages and litigation expenses would make the system vulnerable to lottery effects that are incompatible with a scheme of retributive justice committed to condemning misconduct in the public’s name, rather than the victim’s. As I explained in greater detail in Part III.B.4, why should plaintiffs benefit from retributive damages because they had the “good fortune” of having a wealthy injurer?

There are two additional reasons—not intrinsic to retributive theory per se but related to the fairness considerations that animate retributive justice nonetheless—to ensure that plaintiffs do not enjoy windfalls through awards of retributive damages. First, as long as lawyers’ fees are sufficient to induce counsel to take worthy cases, the state should treat retributive damages as a vehicle to efficiently and fairly raise revenue. That efficiency is enhanced when the retributive damages awards go largely to the state because plaintiffs do not plan on being victims of conduct leading to retributive damages liability and they, for the most part, have other incentives to pursue compensatory damages and take precautions against being injured or wronged. In other words, the state can collect revenue for valuable social projects without deterring plaintiffs and their lawyers “from bringing suits and deterring difficult-to-detect or intentional torts.”<sup>216</sup>

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<sup>215</sup> In principle, I have no objection to using retributive damages funds for other socially valuable purposes, but the legitimacy of the practice is likely enhanced if the funds go to law enforcement (broadly understood) rather than, say, legislative pay raises. But this is one area where the CCR underdetermines the policy outcome and other considerations are properly raised.

<sup>216</sup> Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1564 (1999).

A second consideration is that, if allocated *ex post* to plaintiffs, awards of retributive damages are windfalls to plaintiffs that work a form of lottery, which a risk-averse population would reject *ex ante* in favor of lower taxes (or more services).<sup>217</sup>

#### D. Retributive Damages: Prosaic Justice, not Poetic Justice

Looking backward now, I want to highlight how this structure for retributive damages reflects the CCR's values and not simply revenge or victim vindication. First, decisions about the pursuit of retributive damages claims and their settlement are not left solely in the hands of the victim. The state basically has a veto on settlements in cases involving potential retributive damages liability. Moreover, either through a PAG alone, or in the segmented strategy I endorsed earlier, a defendant's misconduct is vulnerable to retributive damages even if the victim doesn't pursue retributive damages. These rules work to reduce Type II errors resulting from too much victim control. And by tempering victim control, the CCR also makes retributive damages less like revenge because, as I conceive them, retributive damages are constrained by a variety of safeguards; impartially administered by the state; attached directly to the offender; and serve as an expression of the state's power to coerce the offender in order to communicate certain ideals through that coercion.

To be sure, the plaintiff seeking retributive damages might feel vengeful, and might take pleasure in the defendant's suffering, but, per the regime I have described, the state would not punish the defendant without its customary—or aspirational—concern for the offender's free and equal nature. Thus, unlike revenge, retributive damages would not be available if typical excuses and justifications apply to the defendant's actions. Moreover, nothing about retributive damages is inconsistent with retributivism's intent requirement, discussed earlier, which requires that the punishment permit the potential internalization of the "sense of justice" that would allow for an offender to demonstrate his respect for the norms of moral responsibility, equal liberty under law, and democratic self-defense. Retributive damages, properly constrained as an intermediate sanction, do not prevent the defendant from ongoing activity nor do they aim at the defendant's destruction or social isolation.

And while the private plaintiff may have no interest in the general application of the law, the state, which extracts the retributive damages, does. Specifically, a retributive damages action brought by one plaintiff still permits (and may facilitate) punishing other defendants for similar wrongs by exposing modus operandi or industry practice.

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<sup>217</sup> *Id.*

It permits and facilitates punishing the same defendant for other wrongs against other victims. And it permits and facilitates the subsequent pursuit of *criminal* sanctions against the same defendant for the wrong against the plaintiff-victim. So retributive damages, at least when properly constrained and conceived, might actually increase the likelihood of fair and general applications of the law.

This concern for fair and general applications of the law manifests itself in efforts to ensure the defendant is not over-punished (generally and relative to similar offenders). Unlike most states' current punitive damages regimes, the retributive damages structure would permit a defendant to credit any retributive damages paid against any fines imposed in subsequent criminal actions brought by the state for the same misconduct.<sup>218</sup> Conversely, defendants would not face retributive damages awards for certain misconduct if they have already been criminally convicted in that jurisdiction for that particular misconduct. In that situation, the state has already done the hard work of ferreting out the misconduct and proving it beyond a reasonable doubt. Thus, there would be no reason to give lawyers or plaintiffs a reward for pursuing retributive damages against an already-convicted defendant.

Additionally, this structure reflects the CCR's concern for equality, proportionality, and even-handedness. Across the realm of cases, state-drafted guidelines and commentary will be used to inform deliberations about the appropriate level of the defendant's reprehensibility. The goal behind this regime is to reduce Type I over-punishment and Type II under-punishment problems because the guidelines will give juries a far more effective way to avoid the ad hoc determinations that afflict the common law method of apportioning punitive damages.<sup>219</sup> Indeed, because the correct interpretation of the guidelines would effectively be a legal question susceptible to much less deference from reviewing courts, the jury's role would be more circumscribed. Moreover, restricting a plaintiff's share of the punitive damages award to a flat "finder's fee" avoids creating lottery effects or windfalls to plaintiffs lucky enough to have a wealthy injurer. The sanctions imposed under a retributive damages scheme communicate that the misconduct is prohibited and not simply priced based on morally arbitrary features of the victim, such as his earning power. In other words, plaintiffs will not receive windfalls because they have the good fortune of having a wealthy injurer and defendants will not re-

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<sup>218</sup> See Markel, *How Should Punitive Damages Work?*, *supra* note 20, Part III.

<sup>219</sup> Those concerned about federalism and reducing Type I errors of over-punishment in complex cases will find some comfort in the subsequent installments of this project. See sources cited *supra* note 20.

ceive penalty discounts based on the good fortune of having a poor victim.

Last, the CCR's concerns for accuracy and modesty are reflected in the safeguards to which defendants would be entitled under a retributive damages scheme.<sup>220</sup> Defendants should enjoy certain procedural safeguards that elevate our confidence levels above what is necessary for compensatory damages but below what is expected for criminal fines, which trigger both the stigma of "conviction" and collateral consequences. Moreover, a concern for modesty would entail limiting and structuring retributive damages payments so they operate as an intermediate sanction, and hence, would not jeopardize the defendant's ability to continue his life or business in compliance with the law's dictates.

Taken together, these notions readily separate the retributive damages scheme from prior accounts of punitive damages emphasizing revenge, "poetic justice," or victim vindication through civil recourse, theories propounded with different emphases by Professors Zipursky, Sebok, Galanter and Luban, Colby, and Goldberg.<sup>221</sup> For instance, although Galanter and Luban's poetic justice account effectively explains part of the rationale for punitive damages, it is unconvincing in defending the lack of procedural safeguards for defendants,<sup>222</sup> the imposition of punishment for harms occurring to nonparties to the litigation, and the extension of great deference to a jury's ad hoc determination of punitive damages.<sup>223</sup> Moreover, like Colby and Sebok, Galanter and Luban propose little in the way of trying to ensure any degree of proportionality or even-handedness in the sanctions imposed on comparable defendants. What we really need is prosaic justice, not poetic justice; we need the kind of justice that is readily assimilated into rule of law values that provide even-handedness and fair notice. The preceding discussion explains how the structure of retributive damages differs from victim vindication accounts. Insofar as it successfully delineates prosaic justice, the retributive damages structure might still upset criminal law "purists" who think that conferring upon private plaintiffs the opportunity to bring claims seeking retributive damages is a basic affront to retributive justice. What can be said to quell these qualms?

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<sup>220</sup> See *supra* note 123.

<sup>221</sup> See Colby, *supra* note 11, (manuscript at 25-66) (arguing that punitive damages are a legal form of private revenge); Galanter & Luban, *supra* note 16, at 1432-38; Sebok, *supra* note 13, at 1006-29 (arguing that punitive damages law is best explained by concepts of victim vindication and legalized revenge); Zipursky, *supra* note 16, at 733-40 (arguing that punitive damages law makes sense based in part on the notion that victims are entitled to seek recourse against their injurers); Goldberg, *supra* note 16.

<sup>222</sup> See Markel, *How Should Punitive Damages Work?*, *supra* note 20, Part III.

<sup>223</sup> See Galanter & Luban, *supra* note 16, at 1436-40.

First, under my proposed scheme, the government could still *sua sponte* bring a retributive damages claim against a defendant even without the victim's cooperation. And the government retains its own criminal law apparatus. So the main concern is that a supplementary force of "prosecutors" among victims and PAGs is somehow contrary to the norms of retributive justice. To my mind, it is mistaken to think that a retributive damages regime would violate the CCR because it is a private party, rather than the state, that might detect and instigate the legal action. Per the CCR, two things matter here. First, the state performs the function of adjudicating offenses—both to ensure impartiality and to reflect the legitimacy of the state's role in proscribing certain misconduct. Under the retributive damages structure, a state's judge presides over the trial and rules on matters of law or, in some cases, fact and the final award of retributive damages is subject to *de novo* review by the regular channels of appeals. Second, the state ensures that offenders who are convicted (or in the context of retributive damages, found liable) are actually punished in a manner consistent with rule of law values in a liberal democracy. In the end, it is the *state* that enforces the judgment against the losing party. Thus, the fact that private parties instigate the retributive damages proceeding is largely immaterial if the adjudication and punishment comport with accuracy, modesty, and fairness.

Criminal law purists should also recognize that the increased role private parties would play in proceedings leading to retributive damages is not radically different from the role they currently play in cases leading to criminal punishment by the state.<sup>224</sup> This is especially so as more and more states embrace aspects of the agenda behind victims'

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<sup>224</sup> Consider the following: crimes are often prosecuted because private parties have come forward and reported their status as victims, survivors, allies of a victim, or witnesses to a crime. In this respect, a private party seeking retributive damages against another person is not differently situated from the private party seeking state punishment of another person for his unlawful action. They are both complainants. Not only may private parties serve as complainants in the criminal law, they also may serve as facilitators for enforcing public laws. The government often encourages "private law enforcement" by providing bounties or rewards for information leading to the capture or conviction of offenders. Under the scheme here, the civil system would do something similar by making a bounty available for plaintiffs as part of the retributive damages structure. *Cf. e.g.*, *Hambarian v. Superior Court*, 44 P.3d 102, 104 (Cal. 2002) (victim paid for an accountant to be used by the prosecutor's office); *Commonwealth v. Ellis*, 708 N.E. 2d 644, 649 (Mass. 1999) (upholding a statutory regime requiring funding by the insurance industry to root out insurance fraud); *see also, e.g.*, WIS. STAT. ANN. § 968.02 (West 2007) (providing for privately initiated criminal complaint); W. VA. CODE ANN. §§ 48-27-902, 62-3-39a (Lexis-Nexis 2004) (same); *State v. Culbreath*, 30 S.W.3d 309, 314 (Tenn. 2000) (noting that "many jurisdictions still allow a private attorney to be retained or appointed to assist in the prosecution of a criminal case").

rights.<sup>225</sup> And historically, private parties played a dominant role in prosecuting criminal actions.<sup>226</sup>

Because the role private parties play in criminal cases today is largely uncontroversial, there is less reason to be suspicious of what role they might play when seeking retributive damages in civil cases—again, assuming there are sufficient checks and safeguards to ensure the accurate and fair disposition of the suits. Moreover, the Supreme Court has long recognized the overlapping nature of criminal law and punitive damages, remarking that punitive damages are “private fines levied by civil juries,”<sup>227</sup> which “advance governmental objectives.”<sup>228</sup> This point of view found expression again in the Supreme Court’s recent decisions in *Exxon Shipping Co. v. Baker* and *Philip Morris*.<sup>229</sup>

To be sure, merely demonstrating the rich variety of ways in which even the criminal justice system relies on or seeks out participation by private parties is not itself an argument on behalf of that participation. But it does reveal that criminal law purists’ concerns are less compelling and urgent than they might seem at first blush. Additionally, what this discussion shows is that the attempt to draw very sharp distinctions between the criminal law and existing punitive damages law (and my proposed retributive damages scheme) is impaired. Retributive damages fall on a continuum between compensatory damages and criminal fines. Criminal convictions convey a different, more severe social message of condemnation than findings of liability for retributive damages in the civil context. Additionally, criminal convictions portend a range of legal disabilities and collateral consequences that do not attach under the retributive damages scheme proposed here. Retributive damages nonetheless involve a public rebuke and require some safeguards appropriate to an intermediate civil sanction. But there’s no reason to think, with the advent of retributive damages, that the civil system could not be used to advance certain goals that are shared by the two systems, such as the preservation and protection of legally recognized rights and interests and the defense of equal liberty under law.

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<sup>225</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-4408 (West 2001). See generally DOUGLAS E. BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE (2d ed. 2006).

<sup>226</sup> MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION 165 (3d ed. 2007) (“Throughout much of the eighteenth and nineteenth centuries, it was common for private citizens to bring complaints to a grand jury or a magistrate, and to hire private attorneys to assist the public prosecutor or to prosecute the criminal case alone. Only at the turn of the twentieth century did the public prosecutor become the primary method for initiating criminal charges.”); Morrison, *supra* note 143, at 601–02 (noting that “privately initiated criminal prosecutions” have long been practiced in this country).

<sup>227</sup> Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

<sup>228</sup> Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 47 (1991) (O’Connor, J., dissenting).

<sup>229</sup> Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2633 n.27 (2008); Philip Morris USA v. Williams, 127 S. Ct. 1057, 1062 (2007).

## IV

## MOTIVATING RETRIBUTIVE DAMAGES

The goal of this Part is to explain why we would want retributive damages when we already have the tort system to provide some compensation and deterrence and the criminal justice system to inflict some retribution against criminals. Section A examines the particular strengths of retributive damages against powerful and wealthy entities and individuals in particular. Section B explains what a retributive damages scheme in general can achieve. Section C summarizes these benefits and articulates the comparative advantages of retributive damages vis-à-vis compensatory damages, class actions, criminal sanctions, and extra-compensatory damages awarded for victim vindication or cost internalization. Lastly, in Section D, I explain why retributive damages should remain a supplement to, rather than a substitute for, traditional or privatized criminal punishment.

## A. Retributive Damages Against the Wealthy or Powerful

Perhaps the most important reason for making retributive damages available is to facilitate a modest form of punishment that is otherwise especially difficult to obtain against wealthy and powerful persons and entities. In other words, even when the criminal justice system would normally seek to punish offenders for serious wrongs, it might be particularly difficult to do so when the offender is a wealthy or powerful person or entity.<sup>230</sup> In such situations, retributive damages proceedings might generate otherwise-unavailable relevant information (related to a defendant's *mens rea*) for a subsequent state prosecution of the defendant or related parties. Additionally, it ensures that there is a punishment against the wealthy and powerful that might not be available if we had to rely on the criminal justice system alone to detect and prosecute this misconduct.

1. *Obstacles to Investigating Misconduct*

Retributive damages schemes are attractive because they help overcome the difficulties associated with the historically scant investigation of wrongdoing by powerful and wealthy individuals and entities. As Professor Darryl Brown points out, many kinds of white-collar misconduct<sup>231</sup> are harder to investigate because, compared to street

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<sup>230</sup> See generally JEFFREY REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CRIME, AND CRIMINAL JUSTICE* (8th ed. 2007) (discussing the obstacles to securing punishment against the wealthy and powerful).

<sup>231</sup> For now, I am using the term "white-collar" misconduct here somewhat loosely for reasons Professor Stuart Green correctly adumbrates. See STUART P. GREEN, *LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME* 14–20 (2006).



crime, they are both more private (in the sense of obscured from view) and more complex.<sup>232</sup>

In terms of *privacy*, the misconduct perpetrated by the wealthy and powerful occurs largely indoors, and as some scholars have noted, various criminal procedure doctrines protect privacy.<sup>233</sup> Coupled with the fact that inculpatory documents might be shielded by privilege available to those who can afford counsel before arrest, it is no surprise that the misconduct of wealthy and powerful persons and entities is more likely to be obscured than the misconduct of those who lack substantial resources and operate in plain view of others.

Additionally, investigation of misconduct by wealthy and powerful persons and entities is impeded by the *complexity* of the activity. As one former prosecutor put it, "The history of punishment in corporate cases is not very good," because often "[t]hese are complex schemes, and it is sometimes difficult to unwind them from an investigative standpoint and ultimately explain them to a jury."<sup>234</sup> Moreover, as Galanter and Luban have cogently explained, reliance upon state-initiated investigations is often inadequate to the task of ferreting out the type of malfeasance that passes the reprehensibility threshold associated with punitive damages.<sup>235</sup>

To see how this pattern unfolds, consider the difficulty of detecting malfeasance in the context of manufacturing activity.<sup>236</sup> Imagine a defendant manufactures a product and during its design makes various calculations not to disclose substantial hazards that might be associated with its design.<sup>237</sup> Consequently, various users are injured across the country. At least initially, the local and state police are unlikely to detect problems with the product outside their locality. Moreover, the law enforcement authorities will have no reason to suspect that there were culpable decisions made at the company headquarters, which is often located in another state and outside their jurisdiction. Galanter and Luban describe the problem:

<sup>232</sup> See Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 526–28 (2004).

<sup>233</sup> See, e.g., William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1267 (1999) ("Different crimes are committed by different classes of criminals. As it happens, the kinds of crimes wealthier people tend to commit require greater invasions of privacy by the police to catch perpetrators. By raising the cost of the tactics that most intrude on privacy, Fourth Amendment law lowers the cost of other tactics, and those are the tactics that are most useful in uncovering the crimes of the poor.").

<sup>234</sup> Brown, *supra* note 232, at 528 n.16 (quoting Kurt Eichenwald, *White-Collar Defense Stance: The Criminal-less Crime*, N.Y. TIMES, Mar. 3, 2002, § 4, at 3).

<sup>235</sup> See Galanter & Luban, *supra* note 16, at 1440–45.

<sup>236</sup> David G. Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103, 103 & n.4 (1982) (stating that criminal law coverage is "spotty, to say the least" in some areas and "[m]anufacturing decisions" are "largely beyond the reach of the criminal law").

<sup>237</sup> For examples of this, see KOENIG & RUSTAD, *supra* note 61, at 82–101; Owen, *supra* note 1, at 1325–61.

Even federal authorities will have no reason to believe that anything other than a typical series of . . . accidents has occurred unless they perform a statistical analysis of the pattern. Suppose, then, that punitive damages were replaced by criminal sanctions in morally culpable product liability cases. Law enforcement would require statistical analyses of all patterns of automobile accidents, and appliance accidents, and pharmaceutical accidents, and heavy equipment accidents, and on and on, around the country, which is utterly impossible. Even if it were possible, the analysis would overlook those culpable injuries that do not leave a statistical fingerprint behind them. Finally, once an investigatory agency becomes convinced that an offense has occurred, it would have to investigate the offending company to establish culpable negligence. No federal agency has or could have the resources to carry out so many investigations. . . .<sup>238</sup>

As Galanter and Luban observed about Ford's failure to recall the Pinto,<sup>239</sup> "The repeated pattern of [car crashes and subsequent burnings] . . . indicating a defective design emerges only after we consider evidence from many different states and jurisdictions. Thus, the entire pattern will not typically be investigated by state authorities."<sup>240</sup>

Similar difficulties in detection occurred in the aftermath of the sex abuse scandals involving Roman Catholic clergymen, where Church officials suppressed vital information about the misconduct of its priests.<sup>241</sup> In various jurisdictions where the Catholic Church had close relationships with local prosecutors and police officials, public investigation into the Church's role was largely anemic because of affinities between law enforcement officials and the Church.<sup>242</sup> As described by Professor Timothy Lytton, only after dogged use of discovery and other private litigation tactics were plaintiffs' attorneys

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<sup>238</sup> Galanter & Luban, *supra* note 16, at 1441.

<sup>239</sup> See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 382–83 (Cal. Ct. App. 1981) ("Governmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so which can be considerable and not otherwise recoverable.") (citations omitted). For an overview of *Grimshaw*, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 206–13 (1988). *But see* Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 *RUTGERS L. REV.* 1013, 1020–26 (1991) (addressing misconceptions about the Ford documents in the Pinto case).

<sup>240</sup> Galanter & Luban, *supra* note 16, at 1441. Of course, even assuming Schwartz's debunking of the specifics of the Pinto case is accurate, *see supra* note 239, at 1020–35, the point Galanter & Luban are making might still apply in other contexts.

<sup>241</sup> See TIMOTHY D. LYTTON, *HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE* 42–54 (2008).

<sup>242</sup> See PHILIP JENKINS, *PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS* 14 (1996) ("Before 1984, there was a conspicuous lack of public agencies with the desire or ability to intervene officially in cases, and police and prosecutors were usually reluctant to offend so powerful a constituent as the local Catholic church.").

able to reveal the extent of the complicity by higher officials within the Church. In many situations, private litigants shared their information with the media; only then did law enforcement and state legislatures grapple with the misconduct they were otherwise ignoring or downplaying.<sup>243</sup> In some cases, juries awarded multimillion dollar punitive damages awards against dioceses whose officials were complicit in the cover-up.<sup>244</sup>

These examples illustrate how complex and private misconduct by wealthy or powerful individuals or entities can be quite hard to detect. Moreover, relying only on public agencies to detect this misconduct is an inadequate strategy in a world governed by nonideal conditions of democratic deliberation and scarce social resources. Indeed, in a regulatory environment often affected by agency capture,<sup>245</sup> we should probably expect spotty government inspections.<sup>246</sup> As one agency official noted recently: "Private enforcement is a necessary supplement to the work that the [agency] does. It is also a safety valve against the potential capture of the agency by industry."<sup>247</sup> Indeed, even when government forces desire investigations, access to vital information may be impeded or blocked altogether by competent white-collar criminal defense lawyering.<sup>248</sup> Needless to say, the threats of agency capture and obstructionist lawyering might also serve as obstacles to governmental *prosecution* of wrongdoing by powerful and wealthy persons or entities. Because of these impediments, it is un-

<sup>243</sup> See LYTTON, *supra* note 241, at 49–54 (demonstrating that the publicity surrounding certain sexual abuse cases correlates to increases in new case files).

<sup>244</sup> *Id.*

<sup>245</sup> See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971); see also THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 77–78, 90–91 (2d ed. 1979) ("The Departments of Commerce and Labor. . . are organized around an identifiable sector of the economy and are legally obliged to develop and maintain an orientation toward the interests that comprise this sector."); cf. Abel, *supra* note 61, at 535–46 (explaining that disorganized individuals lose to organized special interests in the making of tort law).

<sup>246</sup> See KOENIG & RUSTAD, *supra* note 61, at 175–76 (criticizing the decades-long legacy of lax oversight by Consumer Product Safety Commission and other safety-regulating agencies such as OSHA and the FDA); STEPHANIE MENCIMER, *BLOCKING THE COURTHOUSE DOOR: HOW THE REPUBLICAN PARTY AND ITS CORPORATE ALLIES ARE TAKING AWAY YOUR RIGHT TO SUE passim* (2006) (describing the role of the OCC in blocking state-level consumer protection activity); Gardiner Harris, *Advisers Say F.D.A.'s Flaws Put Lives at Risk*, N.Y. TIMES, Dec. 1, 2007, at A12 (discussing a report blasting the inadequacy of the FDA's resources to ensure public health regulation); see also David Barstow, *U.S. Rarely Seeks Charges for Deaths in Workplace*, N.Y. TIMES, Dec. 22, 2003, at A1 (reporting the failure of OSHA to prosecute employers and others responsible for workplace deaths).

<sup>247</sup> See Stephen Labaton, *Businesses Seek New Protection on Legal Front*, N.Y. TIMES, Oct. 29, 2006, at A1 (quoting former SEC Chairman Harvey Goldschmid); see also *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

<sup>248</sup> See KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 4, 8–13, 22–23, 200, 204, 218, 231 (1985) (describing advantages that white-collar defense lawyers have over street-crime defense lawyers).

likely, though not impossible, that a cadre of state investigators will effectively undertake national research—and then file suit at each of the state levels.<sup>249</sup>

Although such coordination can happen through the promise of compensatory damages alone or in a class action, there are three reasons to think retributive damages (as I have described them) are an important supplemental tactic to achieve adequate detection and punishment of private or complex misconduct.<sup>250</sup> First, compensatory damages alone rarely provide lawyers with sufficient incentive to inquire into the aspects of the defendants' misconduct that reveal a reprehensible state of mind or *mens rea*. Satisfying the elements of a case that requires evidence of culpability is, on average, more expensive to pursue than satisfying the elements of a case through a theory based on negligence or strict liability. Without fees or incentives for retributive damages available, lawyers may decide to settle cases involving culpable misconduct too cheaply.<sup>251</sup> Second, if compensatory damages are really designed to compensate plaintiffs for actual harms to them, it hardly seems right that their lawyers should take a share of that compensation rather than be paid by the malfeasant defendant separately. The bill for the lawyers should not be conflated with the harms to the plaintiffs. This point, of course, generalizes beyond suits involving retributive damages.

Third, the PAG scheme described in Part III is especially important here. In conventional tort schemes, plaintiffs control whether to pursue claims at all and how much to settle them for; thus, they are particularly vulnerable to being bought or intimidated into silence while the defendants walk away without admitting their wrongdoing or experiencing any public rebuke for their misconduct. The retributive damages scheme here makes it much harder for defendants to perpetrate misconduct that goes unaddressed by the state because if they settle with the plaintiff in a case that ought to have included a retributive damages component, the defendants will not have acquired the repose they would want; there is always the prospect that a PAG will sue them for retributive damages based on the misconduct that was not disclosed to the government during the settlement negotiations. It would be much more advantageous for defendants to settle by paying compensatory damages, and at the same time acknowledge their wrongdoing to the government, by registering that

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<sup>249</sup> See Galanter & Luban, *supra* note 16, at 1441.

<sup>250</sup> See KOENIG & RUSTAD, *supra* note 61, at 176 (“The tort system ensures that Americans need not depend solely upon the government to enforce product safety.”).

<sup>251</sup> Cf. Tom Baker, *Blood Money, New Money and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 314 (2001) (showing that plaintiffs' lawyers are already prone to settling quickly for whatever coverage liability insurance provides).

misconduct in a government registry in order to avoid threats of liability from subsequent PAG suits for that particular misconduct.

Given the difficulty of inducing public investigation of wrongdoing against financially formidable persons or entities,<sup>252</sup> the prospect of obtaining (fees and rewards for) retributive damages would likely motivate plaintiffs and lawyers willing and financially able to ferret out whether harms or risks were *culpably* undertaken. In short, retributive damages may work as an effective supplemental strategy of law enforcement—a form of “*sousveillance*”—against the rich and powerful who might otherwise evade the *surveillance* undertaken by public law enforcement agencies.<sup>253</sup>

## 2. *Obstacles to Prosecuting Misconduct*

Beyond simple *investigation*, we must also consider the comparative difficulty of *prosecuting* crimes (or claims generally) against wealthy persons or entities.<sup>254</sup> Such “white-collar” defendants often have excellent counsel, and, conventional wisdom to the contrary, are often able to overwhelm the prosecution’s relatively scarce resources, especially against the state- or local-level prosecutors who are responsible for prosecuting the bulk of wrongdoing.<sup>255</sup> Put more modestly, skilled defense counsel will be effective, at least on the margins, at making the unreasonable seem reasonable, which is particularly helpful for defendants trying to establish reasonable doubt about the ambiguous areas of moral wrongdoing sometimes associated with white-collar misconduct.<sup>256</sup> As Galanter and Luban have noted, a variety of factors help make prosecuting white-collar misconduct more difficult:

White-collar criminals have more influence over sources of damaging information; the evidence of white-collar crimes may be more dispersed and less exposed; the definition of the crimes is typically more ambiguous, so that defendant behavior is more likely to look marginally legal and get the benefit of the doubt from prosecutors and judges; white-collar criminal defendants have more resources

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<sup>252</sup> See Brown, *supra* note 232, at 524 (“White-collar wrongdoing poses far greater barriers to government investigation and information gathering efforts.”).

<sup>253</sup> This structure will admittedly not work as well in practice against the non-wealthy and relatively powerless for reasons illuminated by Professor Tom Baker’s research: plaintiffs’ lawyers are reluctant to take cases where there is no liability insurance or deep pocket to pay the damages. See Baker, *supra* note 117, at 219–20, 222; see also Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 4–6 (2005) (“Liability by itself is not enough. The defendant must have the ability to pay.”).

<sup>254</sup> Cf. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (noting that a defendant’s wealth permits it “to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly”).

<sup>255</sup> See MANN, *supra* note 248, *passim*.

<sup>256</sup> See GREEN, *supra* note 231, at 28–29 (explaining that white-collar defense teams are particularly skilled at “exploiting the moral ambiguity of white-collar crime”).

and are more sophisticated; agencies investigating white-collar crimes are more likely to allow precharge adversary hearings in which the defendant's lawyer can argue against indictment; the government is less likely to make arrests or physical searches in white-collar cases; white-collar indictments are more delayed, allowing better preparation for defense; and the defense lawyer in white-collar criminal cases is usually better qualified.<sup>257</sup>

To be sure, the odds for federal prosecutors have substantially improved against corporations and executives, particularly in recent years with respect to securities fraud.<sup>258</sup> Prosecutors now routinely threaten to charge low-level executives with conspiracy to secure them as cooperating witnesses, through whom they can generate copious amounts of information about more senior executives and misconduct within the corporate bureaucracy.<sup>259</sup> Additionally, in some jurisdictions, prosecutors offer leniency for the "fruits of employer coercion of employees to waive their rights to silence," waiver of the entity's attorney-client privilege, or the termination of indemnification of attorney fees to the entity's agents.<sup>260</sup> Taken together, powerful incentives exist for persons or entities to share information about potential culpability.

Unfortunately, the impediments to effective redress in the civil system persist.<sup>261</sup> The result, according to Professor Christine Hurt, is a criminal system that creates too much risk of severely punishing conduct that is not particularly egregious while at the same time failing to ensure adequate redress against those whose actions warrant, at the

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<sup>257</sup> Galanter & Luban, *supra* note 16, at 1443 (summarizing findings in MANN, *supra* note 248, at 3–18, 231–40); *see also* John Braithwaite & Gilbert Geis, *On Theory and Action for Corporate Crime Control*, in ON WHITE-COLLAR CRIME 189, 189–94 (Gilbert Geis ed., 1982) (discussing difficulties of prosecuting white collar crime); Brown, *supra* note 232, at 526–27 (same).

<sup>258</sup> *See* Kathleen F. Brickey, *In Enron's Wake: Corporate Executives on Trial*, 96 J. CRIM. L. & CRIMINOLOGY 397, 419 (2006) (concluding that in recent years, the government has prosecuted many corporate fraud cases and has "enjoy[ed] a respectable, if not spectacular, conviction rate"). Since 2002, the federal government has established the Corporate Fraud Task Force; additionally, the Sarbanes-Oxley Act both enhanced penalties under federal sentencing laws for existing crimes of corporate misconduct and created new criminal offenses. *See* Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 361, 373–75, 378–79 (2008).

<sup>259</sup> *See* Hurt, *supra* note 258, at 404 (noting that the value to government of charging conspiracy "cannot be overstated").

<sup>260</sup> *See* Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1616 (2007). *But see* Press Release, Dep't of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html> (announcing revision of federal guidelines for prosecuting corporate misconduct that alter practices discussed in Buell's article).

<sup>261</sup> Hurt, *supra* note 258, at 364–65 ("Due to incremental changes in both federal and state law, victims of corporate misconduct, former and current shareholders, face substantial obstacles in obtaining relief based on investor losses, which are increasingly seen as foreseeable costs of investing in a risky environment.").

very least, some form of intermediate sanction.<sup>262</sup> In other words, the system involves too great a risk of Type I errors in the criminal context and too great a risk of Type II errors in the civil context.<sup>263</sup>

### 3. *The Low/High Problem with Criminal Penalties As Applied*

The apparent imbalance espied by Hurt suggests that retributive damages, if properly designed, might also provide a way around what might be thought of as the “low/high” problem as it applies especially to white-collar misconduct. As various scholars have argued, non-custodial criminal penalties against persons and entities have in the past tended to be extremely low flat fines, often rendering them mere “costs of doing business” rather than signals that the conduct in question should be categorically prohibited.<sup>264</sup> Additionally, people within corporations themselves may feel somewhat insensitive to the stigma associated with criminal convictions because responsibility for particular misconduct is dispersed across many people, different places, and a span of time. The consequences are predictable in such situations: defendants might view fines as prices, not sanctions. For example, where state fines were set too low, Wisconsin railroads repeatedly ignored their lack of compliance with rules requiring them to repair exhaust systems and remove brush from the area around the tracks, resulting in numerous fires.<sup>265</sup> Only after a substantial punitive damages award was levied against the railroad did the company strengthen efforts to ensure compliance with the rules governing maintenance and brush-clearance issued by the state’s Department of Natural Resources.<sup>266</sup> Similar examples abound.<sup>267</sup> As alluded to earlier, legislatures have responded selectively to the problem of low penalties in recent years.<sup>268</sup> In the federal context, where Congress has

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<sup>262</sup> See *id.* at 371–73.

<sup>263</sup> *Id.*

<sup>264</sup> See Galanter & Luban, *supra* note 16, at 1443 (citing a study by Amitai Etzioni of Fortune 500 companies).

<sup>265</sup> See Cary Segall, *Bill Would Ease Punitive Damages*, Wis. ST. J., Nov. 29, 1987, at 12 (referenced in Galanter & Luban, *supra* note 16, at 1426–27).

<sup>266</sup> See *id.*

<sup>267</sup> See KOENIG & RUSTAD, *supra* note 61, at 69–101 (relating several cases that demonstrate the ubiquity of the low/high problem).

<sup>268</sup> For instance, the federal government only introduced sentencing guidelines for organizations in 1991. Before the sentencing guidelines were introduced, most federal statutes did not distinguish the amount of fine based on whether a defendant was a poor individual or a wealthy entity. See Timothy A. Johnson, Note, *Sentencing Organizations After Booker*, 116 YALE L.J. 632, 641 n.47 (2006) (citing a report of the Senate Judiciary Committee that notes the existence of “low and inconsistent fines”). The majority of states, however, retain indeterminate sentencing schemes and/or antiquated criminal codes that do not address differences across entities or between individuals and entities.

imposed new and higher penalties, its focus has been on preventing and punishing securities fraud.<sup>269</sup>

But with these relatively newer and higher criminal penalties is an additional problem related to concerns of proportionality: overkill in the form of disproportionate punishment. Indeed, some scholars have concluded that corporate criminal liability might, under certain conditions, actually lead to more perilous risk-taking, rather than less.<sup>270</sup> Critics of corporate criminal liability have raised concerns about the danger that indictments against corporations pose: in particular, they might destroy an entire company and the jobs of innocent persons instead of focusing on the malfeasance of the bad actors or the failure of the managers and owners to control adequately the bad actors.<sup>271</sup> Professors Assaf Hamdani and Alon Klement point out that corporate criminal liability “can subject firms to dire collateral consequences, including exclusion from bidding on government contracts, de-licensing, and irreparable damage to reputation.”<sup>272</sup> Moreover, the doctrines governing corporate criminal liability are often quite permissive. In federal criminal trials, for example, corporations can face criminal liability based simply on a respondeat superior theory under which “the acts and intent of agents at any level of an entity’s hierarchy—including those at the lower end of the organizational ladder—are imputable to the firm.”<sup>273</sup> Consequently, critics have sounded alarms over the sweeping effects of such apparent over-criminalization and over-enforcement,<sup>274</sup> suggesting instead

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<sup>269</sup> See Hurt, *supra* note 258, at 373–77 (discussing, for example, criminal provisions of the Sarbanes-Oxley Act and amendments to federal sentencing guidelines aimed at securities fraud).

<sup>270</sup> See Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. (forthcoming 2009) (manuscript at 3, on file with author).

<sup>271</sup> See Joseph A. Grundfest, *Over Before It Started*, N.Y. TIMES, June 14, 2005, at A23 (noting that corporate indictments are very dangerous because “[t]he prosecutor’s decision to indict is largely immune from judicial review. The prosecutor acts as judge and jury. . . . The innocent can therefore be punished as though they are guilty, and penalties imposed in settlements need not bear a rational relationship to penalties that would result at a trial that will never happen.”); see also Hamdani & Klement, *supra* note 270 (manuscript at 18) (noting that because firms can rarely eliminate all wrongdoing, “[a] firm may . . . go out of business even for a single violation that took place despite its monitoring effort”). Arthur Andersen’s demise is a good example. See generally Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 107 (2006) (describing how the conviction of the firm at trial led to the termination of 28,000 jobs). The indictment of the firm for its role in the Enron debacle precipitated the collapse of the company even though its legal claims were eventually vindicated at the Supreme Court. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) (finding erroneous jury instructions and reversing conviction).

<sup>272</sup> See Hamdani & Klement, *supra* note 270 (manuscript at 2).

<sup>273</sup> Kathleen F. Brickley, *Andersen’s Fall from Grace*, 81 WASH. U. L.Q. 917, 929 (2003) (citations omitted).

<sup>274</sup> INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION xii (2006), available at <http://www.capmktreg.org/research.html> (“[C]riminal enforcement against



that much of this misconduct is better left addressed through the civil, not the criminal, system.<sup>275</sup>

In sum, companies might be both too weak (against the perils associated with corporate criminal prosecution) and too strong (against regulatory powers where the investigative functions are stymied or corrupted through capture or rent-seeking). As a result, the prospect of a retributive damages scheme as an intermediate sanction expands the arsenal of tools to facilitate compliance and the detection and punishment of misconduct by wealthy and well-organized persons or organizations.<sup>276</sup>

## B. What Might Retributive Damages Achieve Generally?

This section explains why, broadly speaking, retributive damages might be a socially beneficial policy prescription. While we might readily understand why a system of criminal law makes sense, it is a bit harder to see why we might additionally use a civil system to impose retributive damages to punish offenders. Why not simply invest more social resources in the criminal justice system if we are concerned that the project of retributive justice is being given short shrift? While retributive damages are not necessarily a more efficient sanction,<sup>277</sup> they may be appealing for reasons described below.

### 1. *Retributive Justice in the Real World*<sup>278</sup>

Making retributive damages available provides the state some flexibility it might not otherwise have regarding allocation of public resources. To see why, we must first appreciate the major differences between a retributive damages action and a criminal penalty: (a) criminal penalties are usually prosecuted exclusively by a state attorney,<sup>279</sup>

companies, in light of the experience of Arthur Andersen, should truly be a last resort reserved solely for companies that have become criminal enterprises from top to bottom.”).

<sup>275</sup> See, e.g., Larry E. Ribstein, *Perils of Criminalizing Agency Costs* 2 (U. Ill. L. & Econ. Working Paper No. LE06-021, 2006), available at <http://ssrn.com/abstract=920140> (discussing the “problems with criminalizing agency costs”). Cf. Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035 (2008) (contending that insurance markets can serve as a way to regulate and reduce corporate misconduct).

<sup>276</sup> See Galanter & Luban, *supra* note 16, at 1444 (“[T]he punitive damages system . . . stands out as the best hope for protection from wealthy and formidable wrongdoers.”); see also Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1331 (2001) (indicating that some prosecutors are less zealous against white-collar offenders on the assumption that civil sanctions are available and sufficient).

<sup>277</sup> Cf. David M. Cutler & Lawrence H. Summers, *The Costs of Conflict Resolution and Financial Distress: Evidence from the Texaco-Pennzoil Litigation*, 19 RAND J. ECON. 157, 158 (1988) (exploring the economic inefficiency of the Texaco-Pennzoil litigation).

<sup>278</sup> With apologies to Michael Cahill. See *supra* note 95.

<sup>279</sup> But see *supra* note 224.

(b) defendants in American criminal actions are entitled to a richer panoply of procedural safeguards, (c) criminal penalties frequently lead to a host of collateral consequences and sanctions,<sup>280</sup> and (d) criminal penalties may include prison time for individual defendants. The combination of these factors works to create a stronger social stigma or condemnation of the defendant than there would be otherwise. Of course, retributive damages are still a coercive condemnatory sanction designed to place defendants in a worse position than they were prior to their misconduct; thus, they serve to effectuate retributive justice. But those differences help render retributive damages an intermediate civil sanction, lying between compensatory damages and criminal fines.

A society that did not want to spend scarce prosecutorial resources investigating and prosecuting minor wrongs could nonetheless make available a legal forum where persons can bring actions against malefactors whose misdeeds have failed to trigger criminal prosecution because of more urgent priorities in prosecutors' offices.<sup>281</sup> The bare reality is that prosecutors don't have the resources to investigate and prosecute all the criminal conduct that arises.<sup>282</sup> Thus, the tort system serves to correct state inaction in some cases, allowing private parties to vindicate the kinds of wrongs the criminal system might, in a fully funded world, pursue. Insofar as the CCR not only *permits* reasonable punishment but also *encourages* the punishment of legal offenses to reduce Type II errors, a retributive damages structure is a way of allocating scarce public resource among a variety of compelling and competing moral priorities. Of course, if this is the rationale, we need to ensure that defendants receive procedural protections necessary for imposing an intermediate sanction on them.<sup>283</sup>

## 2. *Proportionality*

A second rationale for a retributive damages scheme is that it might better facilitate the promotion of proportional sanctioning between misconduct and penalties. Retributivists, among others, might want a softer sanction for misconduct that is not worthy of being condemned in the strongest terms as "criminal." Allowing for retributive

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<sup>280</sup> See Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 255 (2003).

<sup>281</sup> See Charles T. McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C. L. REV. 129, 130 (1929) (explaining that punitive damages allow for punishment of "minor oppressions and cruelties, which [are] theoretically criminally punishable, but which in actual practice go[ ] unnoticed by prosecutors occupied with more serious crimes").

<sup>282</sup> See *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003) (Posner, J.) ("[O]ne function of punitive-damages awards is to relieve the pressures on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes.").

<sup>283</sup> See *supra* note 123.

damages facilitates that goal, in particular because incarceration and collateral consequences (e.g., disenfranchisement, de-licensing, residency restrictions) would not attach to the award of retributive damages under my proposal. Indeed, because of the collateral consequences ensuing from a criminal conviction, along with the added stigma of being “convicted” as a criminal, even a criminal fine might be too onerous a penalty for certain misconduct. Thus, in some cases, retributive damages might be a penalty that seems suitable to the comparatively less severe wrongdoing at hand. And prosecutors could look at successful retributive damages actions and determine whether additional prosecution is appropriate.

One might respond by simply asking to expand the range of criminal sanctions so that some criminal penalties do not carry collateral consequences in less severe cases. That’s not a bad idea, as far as it goes. But if we think there is something distinctive and worth preserving about the higher level of condemnation communicated through a criminal sanction compared to the intentionally lower level of condemnation communicated through a civil sanction, then keeping some of the relevant and reasonable collateral consequences of conviction might better facilitate the realization of that gradation. And inasmuch as expanding the range of criminal sanctions would serve, *arguendo*, to impede the availability of retributive damages in the tort system, it would likely impede the realization of retributive justice in situations of scarce public prosecutorial resources, such as those discussed immediately above.

### 3. *Encouraging Market Transactions*

Awards of retributive damages can also encourage market transactions between parties. Imagine X Corp wants to develop a product for consumers. Y Corp makes a similar product using proprietary information. X Corp decides to steal Y Corp’s information and manufactures the new product at a lower price than Y Corp. By ensuring that X Corp will be in a worse position if it is caught for its theft, the availability of retributive damages encourages parties to use market transactions instead of misconduct that violates property rules—that is, those rules that require parties to negotiate over the transfer of legal entitlements prior to their exchange.<sup>284</sup> But when a defendant

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<sup>284</sup> See Polinsky & Shavell, *supra* note 8, at 945–47 (explaining how punitive damages serve to encourage market transactions with respect to misconduct). By recognizing the virtue of encouraging market transactions, Polinsky and Shavell are actually straying from the cost internalization paradigm. They recognize that to encourage market transactions, punitive damages must be set substantially higher than the value of the property taken. See *id.* at 947. But by conceding that, the rationale of encouraging market transactions requires that property rules be viewed with respect, rather than the indifference permitting someone to violate the law so long as he agrees to pay if the victim chooses to sue.

knows he has to pay at least his gain, a defendant in X Corp's position should prefer to bargain.<sup>285</sup> Unsurprisingly, this is part of the economic logic behind many criminal penalties.<sup>286</sup> Of course, the same could be said for a penalty that simply sets the penalty at a gain-stripping amount. But what gain-stripping alone loses is the condemnatory aspect of the sanction and thus fails to actually punish the defendant for his past misconduct; it simply gives the defendant a reason to be chary about undertaking the conduct again in the future.

This bargain-inducing structure is beneficial for two reasons. First, the transaction costs associated with *ex ante* bargaining in the marketplace are likely to be lower than those associated with *ex post* litigation in the courts.<sup>287</sup> Second, to the extent that fewer potential defendants violate rights (and possibly pay for these violations *ex post* through the tort system), this structure helps eliminate the wasteful precautions associated with trying to prevent mistreatment of one's rights.<sup>288</sup> At the same time, retributive damages might perform this task more efficiently than criminal sanctions, since there are fewer deleterious consequences to the defendant (and related third parties) and fewer costs associated with enforcing the rights of criminal defendants.<sup>289</sup> If we want to encourage market transactions at a cheaper social cost than criminal penalties, which often have socially burdensome collateral sanctions associated with them, retributive damages

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<sup>285</sup> See David D. Haddock, Fred S. McChesney, & Menahem Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1, 20 (1990). If damages were set simply at the level necessary for cost internalization, then that amount would not discourage violations of property rights and the "opportunistic" use of courts. But if the gain is stripped and the condemnation is made through a retributive sanction, the property rights are likelier to be respected by defendants capable of understanding these messages emitted by law. See *id.* at 20–21.

<sup>286</sup> See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195, 1204 (1985) (explaining that the threat of criminal punishment "makes the completed crime more costly . . . and therefore less likely to be committed").

<sup>287</sup> See *id.* at 1195 (noting that "because transaction costs are low, the market is a more efficient method of allocating resources than forced exchange").

<sup>288</sup> See Hylton, *supra* note 4, at 423 (advancing a gain-stripping theory of punitive damages when defendant's activity is illicit); Polinsky & Shavell, *supra* note 8, at 946 ("Copyright violators, for example, will devote resources to copying others' protected material, and copyright owners will take steps to stop such illicit copying. Such efforts are socially wasteful.").

<sup>289</sup> See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1485–86 (1996) (citation omitted) ("[P]ublic enforcement was necessary to ensure that the corporation and its actors properly internalized the cost of their activities to society."); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798 (1992) ("[S]ince [punitive civil sanctions] are not constrained by criminal procedure, imposing them is cheaper and more efficient than imposing criminal sanctions.").

might provide a superior tool to do so, at least in contexts involving violation of property rules.<sup>290</sup>

### C. The Comparative Benefits of Retributive Damages

While punishment's utilities are said to be over-determined,<sup>291</sup> I take the central benefit of retributive damages to be that their availability helps effectuate the good of retributive justice by reducing the incidence of Type I and Type II errors. By imposing an intermediate sanction only on reckless or malicious wrongdoing, a retributive damages scheme will facilitate conventional criminal law punishment against those pockets of society that have traditionally been able to resist punishment by virtue of the relatively private and complex nature of their misconduct. This misconduct would, *ex hypothesi*, be on the prosecutor's office agenda, but because of difficulties in detecting private and complex wrongdoing, it would escape condign punishment. Retributive damages schemes also facilitate legal condemnation for wrongdoing that is *not* on a prosecutor's agenda because of pressing budget constraints and political responsibilities (or improper external pressures); afford greater proportionality between misconduct and penalty and thus avoid overkill caused by using criminal indictments against corporate entities; and encourage market transactions and concomitantly reduce socially wasteful expenditures on precautions against unauthorized takings or violations of rights. To the extent retributive damages can aid in achieving these purposes, one can see what public benefits might accrue from the availability of awarding retributive damages to the state and private plaintiffs.

One might wonder whether some of these benefits arise when extra-compensatory or compensatory damages are available on non-retributive grounds and in class actions. Below is a chart in which I summarize how retributive damages would stack up against reliance upon other remedies and mechanisms.

To be sure, class actions seeking only compensatory damages might address the incentives problem for lawyers to bring cases of misconduct. But so long as they were seeking compensation for the plaintiff or cost internalization for the class of plaintiffs, they would not need to inquire into evidence that indicated malice or recklessness—though admittedly, sometimes evidence of concealment or deceit will be relevant to determining the probability of evading

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<sup>290</sup> This rationale has its limits. For example, it does not apply to violations of inalienability rules. Nor does it apply to justify more damages for harms that defendants have hidden or covered up.

<sup>291</sup> FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 80–81 (Walter Kaufmann & R.J. Hollingdale trans., 1989) (1887).

Comparing Retributive Damages to Other Remedial and Penal Regimes

Purpose or Benefit ↑ Possible Remedy ↓	Type I Error Reduction (Mistaken Punishment or Over-Punishment Compared to Similar Offenders)	Type II Error Reduction (Escaping Punishment or Under-Punishment Compared to Similar Offenders)	Incentive to Private Party to Detect and Reveal Culpable Misconduct by Wealthy and Powerful	Facilitates Subsequent Criminal Prosecution	Provides Incentive for Fighting Small Wrongs	Proportionality	Encourages Market Transactions for Violations of Property Rules
Traditional Criminal Sanction Facilitated Through Private Initiative	Yes (many procedural protections apply)	Yes, because full sanction is extended (unless victims influence prosecutorial discretion)	No, although "crime-stoppers" might be helpful in some contexts though not necessarily against the wealthy and powerful	Not applicable	Not likely because of scarce prosecutorial resources	Theoretically, yes, but practical result depends on many factors of the sentencing regime; problems of unknown and onerous collateral sanctions	Yes
Retributive Damages	Yes because intermediate level of safeguards tracks intermediate sanction	Yes because guidelines promote consistency; victims and PACs can initiate suits	Yes	Yes	Possibly alone or through class actions depending on structure for fees	Yes	Yes
Compensatory Damages (CD) (Single Case)	No, because no inquiry into <i>mens rea</i> ; without <i>mens rea</i> there is no <i>condemnation</i>	No, because no judgment of <i>mens rea</i> ; under-punishment especially likely if plaintiff only seeks CD or settles low	Partial, because no evidence of <i>mens rea</i> is required there is less incentive to find wrongdoing in absence of harm	No, because CD claims do not always require evidence of <i>mens rea</i>	Not really, because no lawyers will take case absent fee shifting	Focus is on harm only, not wrong, so proportionality is not a material concern	No
Cost Internalization (Via Evasion Reciprocal Formula)	No necessary inquiry into <i>mens rea</i> means no punishment	No, because no <i>mens rea</i> inquiry is necessary, though evidence of concealment is relevant and might be helpful	No, because no <i>mens rea</i> inquiry is necessary though sometimes it is incidental	Not really, because no need for proof of <i>mens rea</i> , though evidence of concealment might be relevant	Yes, through class actions, but no heightened penalties for <i>mens rea</i>	Proportional only to harms, not wrongs	No
Extra-Compensatory Damages for Victim-Vindication (VV) (Compensating Dignity Harms)	Without procedural safeguards, there's a risk of uncanalized revenge against defendant; no constraints on jury to ensure even-handed treatment of defendants	Arguably yes to some condemnation. But victims control whether to seek VV damages or to settle, so there's a risk of no punishment or under-punishment of defendant. Also, no measures to achieve even-handedness in amount of aggravated damages.	Not necessarily since plaintiffs can be "bribed" into silence; plaintiffs can choose not to pursue misconduct too	Yes	Perhaps, though it depends on structure for fees for lawyers	Proportionality is basically immaterial	Yes, though because plaintiffs can settle, they might settle too low

compensation. As a general matter, however, that remedial strategy deprives the state of knowledge potentially relevant to imposing retribution on wrongdoers and issues no judgment of public condemnation. From an economic perspective, compensatory damages allow defendants to undertake misconduct if they are willing to pay compensatory damages. If extra-compensatory damages were awarded on the grounds of cost internalization alone, they would suffer from the same problem. They would leave defendants no worse off than a position in which they simply price their conduct according to its harms. Damages designed to achieve cost internalization might be appropriate when the defendant acts with adequate regard for the security and well being of others, but they are inadequate, under a retributivist rationale, when the defendant's misconduct evinces grossly insufficient care for the interests and well being of others.<sup>292</sup>

Extra-compensatory damages might also be contemplated solely for the purpose of victim vindication (what I have called "aggravated damages"). These aggravated damages would go to the plaintiff as compensation for uncompensated dignitary harms, separate and apart from pain and suffering. While aggravated damages might encourage lawyers to ferret out evidence of a defendant's state of mind, they would fail to do much for the public's interest in retributive justice. That's because with aggravated damages, the victim is empowered to choose whether to seek such damages; Type II errors are more likely, since the victim vindication model doesn't restrict the plaintiff from forgoing punitive damages altogether or settling at an amount lower than what is necessary to signal to the defendant that he is being punished. Moreover, most proponents of victim vindication models haven't articulated any real strategies for constraining jury discretion, which gives awards of aggravated damages a very ad hoc structure.

Importantly, while retributive damages have some comparative advantages, there is no reason to think that they cannot interact well with cost internalization strategies (like class actions for compensatory damages or aggravated damages). While I leave that proposition to defend in the sequel to this article,<sup>293</sup> for now, I hope I have brought into better focus the intelligibility and advantages of retributive damages as compared to compensatory damages, criminal sanctions, or damages designed to achieve cost internalization and victim vindication.

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<sup>292</sup> Indeed, even when courts apply a negligence standard, they may not always credit the defendant's personal valuation of the burden associated with taking a given precaution. See Simons, *The Hand Formula*, *supra* note 126, at 905.

<sup>293</sup> Markel, *How Should Punitive Damages Work?*, *supra* note 20.

#### D. Why Not Private Criminal Punishment?

Thus far, I have explained why the state would be interested in outsourcing part of its investigative and prosecuting functions to private parties and why such outsourcing would not be inherently disruptive to retributive justice. What I also need to explain is the attractiveness of retributive damages vis-à-vis the private enforcement of the criminal justice system. In other words, we might gain some of the benefits described above if we had: statutes that permitted or encouraged private citizens to prosecute criminal law violations; mechanisms that allowed private citizens to compel criminal prosecution; or mechanisms that force prosecutors to give reasons for declining to prosecute certain actions.<sup>294</sup>

Without arguing that retributive damages are superior to all of these other mechanisms, let me raise a few cautionary points. If we allowed *only* private actions brought under the criminal law, we would lose both the prosecutor's expertise and the disciplinary opportunities to keep the prosecutor in check—both of which are a result of the government being a repeat player. There would also be a risk that the criminal justice system's moral credibility would be (further) undermined since, on the margins, those with more time and resources are more likely to bring claims, which would unduly disadvantage the poor even more.

If we allowed a private right of action under the criminal law to *supplement* rather than supplant the government's work, other problems unfold. For example, to avoid double jeopardy concerns, private and public prosecutors might race to the courthouse in a way that undermines deliberate investigations of the underlying misconduct; this race seems especially problematic when we use our most severe sanction of the criminal law. Additionally, government prosecutors would have less incentive to do their job if the private sector could displace them. Most importantly, we might have a higher rate of both Type I and Type II errors—if private citizens' or their hired agents could not be counted on to do their work competently, diligently, and fairly. This would be more likely because they would not be repeat players and because they could reasonably be viewed as more biased (whether consciously or unconsciously) against possible defendants.

A more modest proposal would be to allow private citizens to lodge complaints or request explanations for prosecutorial inactivity, but that is something that already exists in a few jurisdictions and fits compatibly with our current regime, as well as the proposed scheme

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<sup>294</sup> See MILLER & WRIGHT, *supra* note 226, at 165–74.



of retributive damages.<sup>295</sup> Another alternative would be a public regulatory system with fines and sanctions, and rewards and lawyers' fees for whistle-blowers who call attention to unsafe products or conditions, the detection efforts of which can be delegated to private attorneys general who might not be actual victims. Assuming this model introduced intermediate sanctions and had the procedural safeguards defendants would need, this model could plausibly achieve many of the benefits of retributive damages actions. However, it is unclear whether an adjudication and penalty through an administrative agency would suffice in actually conveying the condemnation through communal judgment that a judgment of retributive damages would through a full-blown adjudication ultimately supervised by a judge. Moreover, there might be some efficiency gains by having retributive damages actions ride piggyback to the tort system. If we instead relied exclusively on a regulatory system to do the work done by punitive damages now, it might require us to develop a whole new governmental apparatus, while either retaining our torts system or instead developing a large social insurance scheme to replace tort law. My sense is that these alternatives are not meant to render retributive judgments but simply to ensure compensation and deterrence more efficiently.

By contrast, if a state wanted to be serious about retributive damages as a fair scheme for imposing an intermediate sanction, there are only a handful of critical and relatively straightforward steps it must take. First, the state must pass a statute that says retributive damages will be available for specified kinds of misconduct. Second, the state must declare which, if any, of those kinds of misconduct are enforceable by private attorneys general after the government has declined to sue. Third, the state must indicate that all suits must initially allege retributive damages in the complaint and all settlements will have to be approved by the court and the attorney general's relevant office. Settlements between parties involving conduct warranting retributive damages will have to get government approval or the defendant will face the possibility of subsequent PAG enforcement. Fourth, the state must devise guidelines and commentary to measure reprehensibility and assess the percentages of wealth or net value that will correspond to given levels of reprehensibility. Fifth, the state must draft instructions for juries on retributive damages inspired by the instructions appended to this article.<sup>296</sup> Last, the state must allow defendants to credit retributive damages against any subsequent criminal penalties,

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<sup>295</sup> See *id.* Such a proposal would be not be constitutionally required, see *Heckler v. Chaney*, 470 U.S. 821, 837 (1985), but a state could constitutionally or legislatively require prosecutorial staff to provide reasons for declining cases.

<sup>296</sup> See *infra* Appendix.

and must offer a few other procedural safeguards, including a heightened standard of proof.

## V

### SOME CONSTITUTIONAL IMPLICATIONS

There are a variety of constitutional questions that might arise in response to a retributive damages scheme. Some of these questions I answer in the next installment of this project, where I address in greater detail the procedural safeguards for defendants.<sup>297</sup> That said, I will now address constitutional issues that may arise regarding the *structure* of the retributive damages scheme described in Part III.

#### A. Preliminary Thoughts

If a state chose to adopt a retributive damages scheme like the one proposed here, that scheme and the awards of retributive damages arising under it would likely be entitled to more deference from the Supreme Court than is normally extended to awards of punitive damages in common law jurisdictions. For one thing, the retributive damages scheme is legislatively generated. More importantly, it focuses more attention on the concerns of even-handedness, predictability, impartiality, accuracy, and proportionality than does the common law method used in many jurisdictions. In so doing, the retributive damages scheme is more solicitous of these values, which inform the interpretation of both procedural and substantive due process.

Even if the Court refused to show deference to a careful legislative scheme of retributive damages, this scheme is consistent with the Court's procedural due process cases. And the scheme's outcomes are very likely to be compatible with the Supreme Court's excessiveness review under substantive due process or under the Eighth Amendment's Excessive Fines Clause.<sup>298</sup> Let me explain.

With respect to procedural due process, the structure of retributive damages is fully compatible with judicial and appellate review (per *Honda*), de novo review of retributive damages in federal courts (per *Cooper Industries*), and a prohibition on punishing a defendant based on harms to nonparties to the litigation (per *Philip Morris*).<sup>299</sup> And because the scope of one's reprehensibility entails consideration of how deliberate and pervasive the wrongdoing is, the reprehensibil-

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<sup>297</sup> Markel, *How Should Punitive Damages Work?*, *supra* note 20.

<sup>298</sup> See *supra* note 39.

<sup>299</sup> See *supra* Part I.A.

ity guidelines should be able to police the distinction that seemed to elude Justice Stevens in *Philip Morris*.<sup>300</sup>

As to excessiveness review, the Supreme Court places primary importance on the degree of reprehensibility of the defendant's misconduct.<sup>301</sup> As I described in Part III.B, reprehensibility is also the driving force behind the determination of retributive damages. But, after *State Farm*, the Court has also required courts to consider the "disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award."<sup>302</sup> The Court further presumes that double-digit ratios between punitive damages and compensatory damages are incompatible with due process, and courts must consider "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."<sup>303</sup>

This proposal's most salient problem with regard to the Court's excessiveness review is the potential for the retributive damages scheme to result in very high retributive damages awards against very wealthy persons or entities who commit reprehensible conduct of the sort that might trigger a penalty at the high end of the reprehensibility scale. An award of retributive damages against Bill Gates, for instance, raises the possibility of multibillion-dollar retributive damages. In a case where compensatory damages to the plaintiff are relatively low, such a result might be viewed as constitutionally suspect because of the supposed "disparity" between the "actual or potential harm suffered by the plaintiff and the punitive damages award."<sup>304</sup> In other words, the multibillion-dollar award, when framed as a dollar amount, rather than as a percentage of net wealth, could raise the proverbial judicial eyebrow.

One response to this problem is simply to note that those situations will not frequently occur,<sup>305</sup> and when they do, these results

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<sup>300</sup> Justice Stevens expressed befuddlement at the line drawn by the majority in *Philip Morris* between punishing a defendant based on harms to nonparties to the litigation (impermissible) and considering the scope of the defendant's wrongdoing in determining the reprehensibility (permissible). See *id.* at 1066–67 (Stevens, J., dissenting). The basic idea, however, is evidentiary. Evidence of harm to others could be relevant to determining the defendant's reprehensibility under a Federal Rule of Evidence 404(b)–type analysis; that is, when such evidence establishes "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b).

<sup>301</sup> *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 ("[T]he *most important indicium* of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.") (emphasis added).

<sup>302</sup> *Id.* at 418.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> The empirical data shows that punitive damages awards are rarely awarded and upheld. See, e.g., Vidmar Amicus Brief, *supra* note 13, at 4–8. Of course, this data is only a moderately useful predictor of the future frequency of retributive damages since the retributive damages scheme significantly reworks current practice.

should not be viewed as controversial compared to the various cases in which courts have upheld punitive damages awards that constitute a far higher percentage of the defendant's net wealth or value than what has been proposed here.<sup>306</sup> Moreover, because this retributive damages regime has been devised and authorized by the legislature, appellate courts should be more inclined to defer to it than the ad hoc judgments currently made by juries or trial courts. Another, less palatable, option is to acquiesce to judicial application of the *State Farm* disparity test and accept reduced retributive damages awards in those unusual cases. A reduction of retributive damages in a given case on "disparity" grounds does not call into question the entire structure itself—even if one could reasonably complain that such reductions undermine commitments to equality since wealthy persons would benefit from unjustified downward adjustments.

### B. What's Wrong with Disparity?

A more intellectually serious response, however, would take issue with the Court's "disparity" criterion altogether. Recall that a majority of the *State Farm* Court declared an affinity for the presumptive use of single-digit multipliers of compensatory damages.<sup>307</sup> This presumption, as applied to retributive damages, is highly problematic. Since the reprehensibility analysis drives both retributive damages and constitutional substantive due process review, the real lingering constitutional problem for the retributive damages regime is the disparity criterion. This inquiry asks whether there is a reasonable relationship between the amount of harm or potential harm and the penalty imposed.<sup>308</sup> Stated at that level of generality, and in conjunction with the Court's emphasis on reprehensibility, there is likely to be little friction between the Court's punitive damages jurisprudence and the retributive damages scheme defended here.

But two problems come to mind. First, courts sometimes uncritically conflate the harm or potential harm to the plaintiff with the compensatory damages actually paid.<sup>309</sup> Second, after *State Farm*, a "reasonable relationship" has morphed into a judicial presumption *against* punitive damages awards that are ten times or higher than the compensatory damages award. In what follows, I explain why both

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<sup>306</sup> See *Nat'l Bank of Monticello v. Doss*, 491 N.E.2d 106, 111–12 (Ill. App. 1986) (affirming punitive award that was "more than twice defendant's net worth"); *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 388 (La. App. 2001) (upholding punitive damages award of \$850 million or 18 percent of defendant's net worth).

<sup>307</sup> *State Farm*, 538 U.S. at 425.

<sup>308</sup> *Id.* at 418.

<sup>309</sup> See Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 86 (2007) (discussing unvalued harms in various punitive damages cases that look only at compensatory damages).

compensatory damages anchors and the presumptive single-digit multiplier are often misguided.

Using compensatory damages as an anchor for the disparity inquiry lacks sufficient justification, at least in cases involving or risking physical injury or mental distress. In those cases, as explained in Part III.B.4, using compensatory damages as a benchmark for measuring retributive damages would signal that some people are worth more than others since compensatory damages are often keyed to one's economic status in life. It is possible that compensatory damages are a useful baseline in cases involving only financial losses by plaintiffs who were not targeted on account of their lack of resources, but that is a position that needs argumentation, not conclusion by assumption.

The principal justifications for anchoring disparity inquiries off the shoals of compensatory damages are its administrability and the sense of finitude it provides. But both these factors under-determine the doctrine because it would be equally administrable to always award a billion dollars or zero dollars in extra-compensatory damages regardless of the tort or to impose a flat limit of \$500 for punitive damages. Once we are in the business of reasoning out extra-compensatory damages to reach a sensible result, we should be able to offer relevant reasons for our decisions. The current doctrine is substantially lacking one, especially because cost internalization proponents also criticize the use of compensatory damages anchors.<sup>310</sup> Notwithstanding the fact that there is little justification for insisting on a relationship between compensatory damages and retribution or optimal deterrence, some courts have uncritically fastened to it.<sup>311</sup>

On top of the problematic use of compensatory damages, the Court's preference for a presumption of a single-digit multiplier undermines the value of the disparity analysis. Use of a presumptive multiplier will likely lead courts to apply the single-digit multiplier even in cases where the rationales for retribution, victim vindication, or cost internalization require more, either separately or in combination. Indeed, some preliminary evidence supports this concern,<sup>312</sup>

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<sup>310</sup> From a cost internalization perspective, what matters is whether there is a probability of defendants avoiding compensating victims for the harms they caused, not the amount of compensatory damages they might pay. See Polinsky & Shavell, *supra* note 8, at 887–96; see also Hylton, *supra* note 4, at 454 (explaining that, in light of economic gain-stripping theory, the “presumption that the punitive award must stand in some reasonable numerical ratio to the compensatory award . . . has been harmful”).

<sup>311</sup> *E.g.*, *Motorola Credit Corp. v. Uzan*, 509 F.3d 74, 85–87 (2d Cir. 2007) (providing a cursory examination of disparity in actions for fraud where ratio was less than 1:1); *L-3 Commc'ns Corp. v. OSI Sys., Inc.*, 2007 U.S. Dist. LEXIS 12701, at \*10–13 (S.D.N.Y. Feb. 23, 2007) (giving an analysis of a 2.8:1 ratio that was essentially limited to whether the punitive award “shock[ed] the conscience of the Court”).

<sup>312</sup> See, *e.g.*, *Bennett v. Am. Med. Response, Inc.*, 226 Fed. App'x. 725, 728–29 (9th Cir. 2007) (striking down punitive award in an emotional distress case that had a 6.49:1 ratio and remanding for an award “not [to] exceed a 4:1 ratio”); *Bach v. First Union Nat'l Bank*,

though one commentator thinks the feebleness and malleability of the disparity criterion are now becoming apparent to the courts, which could explain why the Supreme Court did not address the disparity criterion in *Philip Morris*.<sup>313</sup>

Like the compensatory damages anchor, a presumptive single-digit multiplier is reputed to help achieve administrability and some degree of notice about the bounds of one's liability. But even after *State Farm*, the pretense to such predictability is overstated.<sup>314</sup> Indeed, one might wonder just how much notice is afforded when juries can choose virtually any amount that works out to being less than ten times the compensatory damages, and when courts will reconstruct what the "compensatory damages" are when it suits them.<sup>315</sup>

Importantly, administrability and notice are at least as well satisfied by the retributive damages scheme. A guidelines-based reprehensibility scale is not substantially more difficult to administer than the determination currently made by juries, which judges subsequently re-

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486 F.3d 150, 156 (6th Cir. 2007) (recognizing that although the defendant deserved to be punished for repeated statutory violations, intentionally inflicting emotional distress, and defaming the plaintiff, a 6.6:1 ratio of punitive to compensatory damages should still be reduced to a 1:1 ratio on grounds that plaintiff's compensatory damages award was large); *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 487-90 (6th Cir. 2007) (striking down punitive damages award on grounds that 9.5:1 ratio was excessive in light of the large compensatory award, even though defendant acted with malice and deceit); *Morris v. Flaig*, 511 F. Supp. 2d 282, 309-13 (E.D.N.Y. 2007) (striking down jury award of 20.8:1 in action where, among other things, defendant did not fix lead paint problem despite defendant's representations to the contrary); *Jet Source Charter, Inc. v. Doherty*, 55 Cal. Rptr. 3d 176, 178 (Cal. Ct. App. 2007) (reducing a \$26 million punitive damages award for repeated fraud and breach of fiduciary duty to \$6.5 million—a 1:1 ratio—because plaintiff's compensatory award was "substantial"); *Walker v. Farmers Ins. Exch.*, 63 Cal. Rptr.3d 507, 513 (Cal. Ct. App. 2007) (holding that a 1:1 ratio was the constitutional maximum where plaintiff received substantial emotional compensation and award of attorneys' fees, which were compensatory but had a "punitive" effect).

<sup>313</sup> See Anthony J. Sebok, *After Philip Morris v. Williams: What Is Left of the "Single-Digit" Ratio?*, 2 CHARLESTON L. REV. 287, 296 (2008).

<sup>314</sup> See, e.g., *Alexander v. City of Milwaukee*, 474 F.3d 437, 454-55 (7th Cir. 2007) (affirming double-digit ratio because "[p]unitive damages should be proportional to the wrongfulness of each defendant's actions"); *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 675-78 (7th Cir. 2003) (affirming ratio of 37.2:1); *Peake v. Patterson*, No. 05-CV-1687, 2007 WL 2903209, at \*4-5 (M.D. Pa. Sept. 28, 2007) (permitting a 60:1 ratio in civil rights context); *Berberena v. Pesquino*, No. 03-557-CJP, 2007 WL 2778636, at \*3 (S.D. Ill. Sept. 19, 2007) (affirming 5000:1 ratio); *Superior Fed. Bank v. Jones & Mackey Constr. Co.*, 219 S.W.3d 643, 651-54 (Ark. App. 2005) (upholding 17.6:1 ratio because the award was not "breathhtaking"); *Atkinson v. Nat'l Boston Video Ctr., Inc.*, No. 06-P-189, 2007 WL 1704088, at \*6 (Mass. App. June 13, 2007) (affirming 20:1 ratio); *Mission Res., Inc. v. Garza Energy Trust*, 166 S.W.3d 301, 319 (Tex. App. 2005) (upholding 20:1 ratio because trespass was "highly unlawful").

<sup>315</sup> See Sebok, *supra* note 313, at 293 (citing cases where court included lawyers' fees as actual damages in calculating ratio); see also *Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 235 (3d Cir. 2005).

view in an ad hoc manner.<sup>316</sup> Moreover, the retributive damages structure provides far greater particular notice to defendants about their potential liability than the current regime of punitive damages regulation provides, where most punitive damages assessments pass scrutiny as long as they are less than ten times the compensatory damages award.

Especially in light of the Court's stated aversion to regulating extraordinary *criminal* punishments against defendants,<sup>317</sup> there is little basis for the Court's objection to civil penalties that would ensure defendants did not profit from their actions and that would remove no more than, for example, 10 percent of their wealth. Furthermore, this removal of wealth would occur only after proceedings in which the defendant enjoyed a cluster of important procedural safeguards. Recall that retributive damages also abide by an intent requirement by which a defendant should be given the opportunity to internalize the values of retributive justice. Thus, retributive damages set so high as to economically destroy or bankrupt a defendant would go too far—at least from the perspective that views retributive damages' purpose as an intermediate sanction, rather than one resulting from a full-fledged criminal prosecution.

### C. Lingering Thoughts: Financial Position, Procedural Safeguards, and Federalism

Three last points about possible constitutional objections to this scheme are worth mentioning here. The first focuses on the relevance of the defendant's financial position. Recall from Part III that the reprehensibility of the defendant's misconduct will in turn track a percentage of the defendant's wealth (or net value, in the case of entities). Various jurisdictions around the country currently inform juries that they may consider the defendant's financial position in trying to figure an amount of punitive damages that will adequately punish and deter the defendant.<sup>318</sup> The Supreme Court has never held that the jury may not factor a defendant's financial position into the amount

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<sup>316</sup> See Sebok, *supra* note 313, at 296.

<sup>317</sup> See Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1051 (2004); Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damage Awards*, 86 VA. L. REV. 1249, 1252–53 (2000).

<sup>318</sup> See, e.g., JUDICIAL COUNCIL OF CAL., CIVIL JURY INSTRUCTIONS § 3940 (June 2008) (court may instruct a jury in a non-bifurcated trial that it can consider the defendant's financial position in figuring the amount of punitive damages.); FLA. STANDARD JURY INSTRUCTIONS (CIVIL) § 2.d.2 (2007) ("You should consider the . . . defendant's financial resources."); N.Y. PATTERN JURY INSTRUCTIONS—CIVIL § 2:278 (2008) ("You may also consider the [defendant's] financial position and the impact your punitive damages award will have on [him/her].").

of punitive damages it awards.<sup>319</sup> Rather, the Court has said that wealthy defendants are just as entitled to fair notice as “impecunious individuals.”<sup>320</sup> The structure defended in Part III provides precisely that fair notice.

Second, some scholars have advanced the view that when punitive damages are performing overtly public functions, a constitutional problem arises either because the prosecutor of such a claim is not the state, or because the defendants do not receive the full panoply of criminal procedural safeguards.<sup>321</sup> Other scholars have agreed with this second claim, but have denied the public interest in punitive damages and have instead defended a conception of punitive damages that operates to vindicate only the *private* party’s interest in revenge, or what I have been calling victim vindication.<sup>322</sup> On this view, there is no need to afford criminal procedural safeguards because only private interests are at work.

This view is misconceived.<sup>323</sup> I will say more about this issue in the immediate sequel to this Article;<sup>324</sup> but briefly stated, the better

<sup>319</sup> Indeed, the Court acknowledged that consideration of wealth was permissible in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 22 (1991).

<sup>320</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996).

<sup>321</sup> See Redish & Mathews, *supra* note 13, at 5–6; Grass, *supra* note 48, at 241–43; Wheeler, *supra* note 48, at 276–77. To my mind, because the state reserves the adjudication and punishment functions for itself, the scheme of retributive damages as an intermediate sanction sidesteps the basic challenge advanced by Redish and Mathews. Redish and Mathews might insist that public prosecutors have a disinterestedness that private parties do not. See *id.* at 6. However, for over a hundred years our national legal experience accepted that private parties could initiate and collect criminal fines. See, e.g., *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 127–28 (1998) (Stevens, J., concurring) (explaining the historical role of private parties in the criminal justice system); *supra* note 226 and accompanying text. Thus, it is hard to understand what makes Redish and Mathews’s claim about the requirement of “adversarial neutrality” in the context of punishment a compelling constitutional claim as opposed to a normative claim about the proper allocation of authority to pursue intermediate sanctions on the public’s behalf. It will not do to argue that all the safeguards that apply to incarceration also apply to fines. See Redish & Mathews, *supra* note 13, at 20 (claiming that “the same special constitutional protections apply in criminal cases seeking only the imposition of financial penalties as apply in cases in which imprisonment is at issue”). For one thing, there is no right to counsel for criminal fines, nor is there a right to a jury trial in that context. See generally *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that counsel is only required where actual imprisonment is imposed); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding that a jury trial is not constitutionally required for cases where penalty is incarceration less than six months). Zipursky provides further reasons for skepticism toward their argument. See Zipursky, *supra* note 16, at 137–40.

<sup>322</sup> See Colby, *supra* note 11, (manuscript Part IV.A).

<sup>323</sup> See Zipursky, *supra* note 16, at 141–45 (critiquing Colby, *supra* note 13, regarding the nature of “private wrong”). Colby’s more recent efforts are an attempt to overcome some of the criticisms lodged by Professors Sebok, Zipursky, Akhil Amar, Arthur McEvoy, and others. See Brief of Akhil Reed Amar and Arthur McEvoy as Amici Curiae in Support of Respondent at 9 n.10, *Philip Morris v. Williams*, 127 S. Ct. 1057 (2007) (No. 05-1256). I offer my critical assessment of Colby’s latest effort in Markel, *How Should Punitive Damages Work?*, *supra* note 20, at Part III.

<sup>324</sup> Markel, *How Should Punitive Damages Work?*, *supra* note 20.



way to overcome the “is it private or is it public?” debate of punitive damages is to say that it is an intermediate civil sanction permissibly instigated by private or public parties and accompanied by an appropriate level of safeguards that matches its status as an intermediate civil sanction. Retributive damages awards won’t carry the social stigma or collateral consequences associated with criminal sanctions and they won’t need to have the same apparatus that attaches to criminal adjudications. The states will provide an intermediate level of procedural safeguards that should be more than sufficient to survive constitutional scrutiny of a middle-ground sanction.

Finally, I want to say a quick word about federalism. It is possible to read the Supreme Court’s cases from *BMW* to *State Farm* and *Philip Morris* as primarily concerned with the possibility of one state using its laws to punish conduct that harms other persons in other states, in violation of the constitutional principle that limits the extra-territorial reach of a state’s powers. Though I think this federalism emphasis can explain much of what the Court decided in *BMW* and *State Farm*, it would be a mistake to think that the Court’s strategy for dealing with federalism concerns is the only strategy available and therefore all punitive damages cases must use it. Indeed, because the federalism explanations only make sense in the context of complex litigation involving a wrong (or series of wrongs from one course of conduct) with many victims across many jurisdictions, it would be a mistake to think the same structure of review must apply even in cases involving one simple wrong with only one victim (or perhaps no victims). Moreover, as I explain in the successor articles to this one, there are various ways to harmonize the Court’s federalism concerns with retributive and non-retributive damages.<sup>325</sup>

In sum, it is doubtful that a well-crafted retributive damages structure would be constitutionally infirm. At worst, assuming the Court extended no special deference to this scheme of intermediate sanctions, in certain rare cases, the jury’s award of retributive damages will be struck down as grossly excessive. That’s a determination courts already make in any number of jurisdictions that provide far less notice and even-handedness than the structure I’ve advocated. And far more likely, a jurisdiction that takes pains to structure the distribution of extra-compensatory damages in the careful manner defended in this project would have done far more than what is necessary to survive constitutional scrutiny.

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<sup>325</sup> See sources cited *supra* note 20.

## CONCLUSION

Structured properly, retributive damages awards are a pragmatic form of redress against anti-social misconduct, especially when considering the difficulties of punishing wealthy and powerful individuals and entities who undertake such misconduct. In some respects, there is a real synergy between retributive damages and the work of “social justice” tort theorists.<sup>326</sup> Nonetheless, a dose of retributive damages is strong medicine, and courts need to distribute it with far more sensitivity to the values of equality, predictability, and modesty than they currently exhibit when awarding and reviewing punitive damages.

This Article, the first in a series, has tried to extend substantial consideration to these and other relevant concerns. Providing a framework to translate the values and limits of retributive justice into a practical scheme of retributive damages, this Article has identified what sorts of conduct should warrant this intermediate sanction, what factors should inform the amount of retributive damages, and who should receive retributive damages and in what proportions. Although I believe these recommendations make the most sense in light of the retributivist theory I have provided in Part II, readers may think other approaches support some or all of the policy suggestions made subsequently, such as the guidelines for reprehensibility-based punitive damages. I have no quarrel with these recommendations having the appearance of over-determination. At the same time, while this Article provides the *foundations* of retributive damages, in truth, more needs to be said about their *contours*: specifically, about how to implement retributive damages in simple and complex litigation contexts and how to reconcile retributive damages with extra-compensatory damages designed to advance cost internalization and victim vindication. In the companion articles to this one,<sup>327</sup> I take up that challenge, and the Appendix provides a glimpse of how I propose to do so.

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<sup>326</sup> See sources cited *supra* note 61.

<sup>327</sup> Markel, *How Should Punitive Damages Work?*, *supra* note 20; Markel, *Punitive Damages and Complex Litigation*, *supra* note 20.

APPENDIX:  
INSTRUCTIONS FOR ASSESSING EXTRA-  
COMPENSATORY DAMAGES

What follows is a distillation of this punitive damages project's principal conclusions, which can be used to craft jury instructions. These instructions are designed to take into account the Supreme Court's recent decision in *Philip Morris*.<sup>328</sup>

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In considering the amount of extra-compensatory damages the defendant is responsible for, you should determine whether three separate amounts are necessary: (A) an amount to accomplish retributive justice against the defendant; (B) an amount to accomplish cost internalization; (C) and an amount to accomplish the vindication of the plaintiff's personal dignitary harms.

A. Retributive Damages

Retributive damages fulfill the punishment objective of extra-compensatory damages. These instructions apply only to defendants who have committed misconduct that you have found to be malicious or reckless in nature. If you do not think, based on clear and convincing evidence, that the conduct in question was malicious or reckless in nature, *do not award* retributive damages.

Malicious conduct is that conduct which was done with a purpose or knowledge of causing harm, and no other legally recognized excuse or justification for the conduct is available as a defense.

A defendant acts recklessly when he consciously disregards a substantial and unjustifiable risk that harm will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the defendant's conduct and the circumstances known to the defendant, his disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the defendant's situation. If there are multiple defendants, you must undertake this analysis separately for each of the defendants based on each defendant's misconduct. A defendant corporation will not be held legally responsible for all the misconduct of each of its employees. You must ask whether each defendant's action was malicious or reckless.

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<sup>328</sup> See generally *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (holding that punitive damage awards may not include amounts of harms caused to nonparties). These instructions are a substantially modified version of the kind found in Polinsky & Shavell, *supra* note 8, at 957–62. In some places, having mostly to do with cost internalization, I expressly borrow the language from their proposed jury instructions. In other places, I borrow language from the Supreme Court.

If, and only if, you have determined that a particular defendant's misconduct was undertaken with malice or recklessness, then the next step requires consultation of the chart prepared by the state legislature. The chart should help you determine where, on a scale of one to twenty, the defendant's misconduct lies, with twenty being the most reprehensible and one being the least reprehensible. The chart tells you whether to add points to the scale based on various factors and whether to subtract points based on other factors. Your job is to assess the wrongfulness of the defendant's misconduct based on the reprehensibility chart. It is not your job to assess how much harm the defendant's misconduct has caused to society or other nonparties to this litigation. This finding of reprehensibility should also be accompanied by an explanation of which facts you considered relevant to your determination. Once you have determined the level of reprehensibility, the court will use a different chart to determine the amount of retributive damages that the defendant will pay based on your assessment of reprehensibility.

In determining the reprehensibility of the defendant's misconduct, you may, but are not required, to consider "evidence of actual harm to nonparties" because that can help show "that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." Similarly, you may also consider the harm or potential harm the defendant's conduct caused to others in determining whether the defendant's misconduct was accidental or deliberate or part of a policy or pattern and practice. However, it is important that you not consider the mere fact that others were harmed as a basis for assessing retributive damages. Those others who are not plaintiff(s) in this case can bring their own suits for compensatory and other damages.

Two facts are relevant to your task—though they should not inform your actual assessment of the reprehensibility of the defendant's misconduct. First, the plaintiff will personally receive no more than [\$10,000] of the retributive damages award. The balance will go to the state [to advance law enforcement objectives, including but not limited to providing services necessary for victims and for offender re-entry into society]. Second, the purpose of retributive damages is to make the defendant worse off than he would have been had the defendant not undertaken his malicious or reckless misconduct. Thus, when determining the level of reprehensibility, do not consider the amount of other damages (whether compensatory, "aggravated," or "deterrence," described below). [If the defendant has made such payments or has been otherwise punished through the criminal justice system of this jurisdiction, then you ought to forego making any reprehensibility assessment.] [Note to judges: civil penalties already paid for by the defendant for this misconduct against this plaintiff should

be credited against retributive damages. No retributive damages are available if the government has already criminally prosecuted the defendant for the wrong to the particular plaintiff in this case.]

After you make your assessment of reprehensibility, the court [or you, the jury] will determine whether any gains or profits by the defendant need to be forfeited in addition to the reprehensibility-based retributive damages award. The court may also make subsequent determinations regarding reasonable attorneys' fees and costs (to be determined in light of the risk, time, expense and expertise related to this litigation). [It may also be your job to determine the financial position of the defendant, or its net value if the defendant is an entity.]

### B. Aggravated Damages for Repairing Personal Dignity Harms

In deciding the remedy for personal dignity harms, please first make sure that you have not already figured this amount into your assessment of compensatory damages, perhaps based on what you attributed under pain and suffering, or emotional distress, or loss of enjoyment of life, or other non-economic damages awarded to the plaintiff. Once you are certain that the amount of compensatory damages has not mistakenly included an amount for insult to the plaintiff's dignity, consider what action or amount of money is appropriate to vindicate the insult or injury to the plaintiff's personal dignity. Injuries to personal dignity, as understood here, are injuries where the defendant specifically targeted his misconduct toward this particular plaintiff with an aim of diminishing the plaintiff's dignity. If the defendant is a corporation, consider whether the injury to the plaintiff was part of a larger course of commercial conduct or whether the defendant specifically aimed at denigrating the dignity of this particular plaintiff.

[To facilitate review of your verdict and ensure even-handed consistency across similar cases, you are required to explain the basis for your reasoning in a few sentences or more.] The remedy you choose here may be an amount of money that you determine is appropriate to alleviate this particular injury to personal dignity. Bear in mind that the plaintiff (and, depending on the circumstances, his/her counsel) will receive the entirety of the amount you decide under this heading.

Additionally, or alternatively, you may require the defendant to apologize to the plaintiff for the injury to the plaintiff's dignity in person or via written communication. You may also suggest other possible actions that might repair the injury to the plaintiff's dignity.

### C. Deterrence Damages for Cost Internalization

In some cases, extra-compensatory damages are desirable to make sure that defendants do not impose costs on others that the defendants should properly bear (cost internalization). In making your assessment for promoting cost internalization, bear in mind that you are not able to extract money from the defendant for harms that happened to persons or entities that are not parties to this litigation. You may only consider what the likelihood is that the defendant would escape compensating the victim(s) in this lawsuit for the(ir) injury. Other possible victims of the defendant's misconduct may bring their own suits.

Thus, ask yourself whether the defendant might have escaped having to pay for the harm for which the defendant should be responsible to this plaintiff. For example, if the harm was substantial, noticeable, and likely to lead to a lawsuit, your estimate of the likelihood of escaping liability would be relatively low. But if the harm might not have been attributed to the defendant, or if the defendant tried to conceal the harmful conduct, your estimate of the defendant's likelihood of escaping liability to this plaintiff would be relatively high. You should use the table below to determine the deterrence damages multiplier that corresponds to your estimated probability of escaping liability to this particular plaintiff. Then multiply the compensatory damages amount [plus an amount, if any, for aggravated damages] by your deterrence damages multiplier. The resulting number is the base amount for deterrence damages for cost internalization.

Keep in mind that the deterrence damages amount should **not** be adjusted upward or downward because of any of the following considerations:

- (a) reprehensibility of the defendant's conduct;
- (b) net worth or income of the defendant or net profits;
- (c) gain or profit that the defendant might have obtained from his or her harmful conduct;
- (d) litigation costs borne by the plaintiff;
- (e) whether the harm included physical injury.

*Cost Internalization Multipliers Chart*

Probability of Escaping Liability	Deterrence Damages Multiplier
0%	0
10%	0.11
20%	0.25
30%	0.43
40%	0.67
50%	1.00
60%	1.50
70%	2.33
80%	4.00
90%	9.00

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In sum, if you find the conduct at issue was undertaken with malice or recklessness, you should make a finding of reprehensibility (using the chart and its commentary and guidelines provided by the state) based on a scale of one to twenty. Second, you should also determine an amount of aggravated damages necessary, if any, to compensate the plaintiff for personal dignitary harms that were not already covered by the compensatory damages. This finding should be accompanied by an explanation of what facts you considered relevant to your determination. Finally, you should make, if necessary, a recommendation of the amount needed to pursue deterrence damages for cost internalization of the tortious harm to this plaintiff. Recall that other victims of the defendant’s conduct might bring their own suits and you do not need to punish the defendant or extract compensation from the defendant based on harms that happened to these nonparties. Finally, you should also consider what the court instructs you regarding the tax treatment of these damages awards.<sup>329</sup>

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<sup>329</sup> See Markel, *How Should Punitive Damages Work?*, *supra* note 20, Part IV; Dan Markel & Gregg Polsky, *Taxing Punitive Damages* (manuscript in progress, on file with the authors).