RETRIBUTIVE DAMAGES

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Not long ago, Professor Cass Sunstein 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.”

Under the retributive damages framework, when people defy legal obligations the state has imposed to protect the rights and interests of others, 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. Retributive damages statutes would empower private parties to act on behalf of the state to seek the imposition of what is in effect a 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 together (to the state, the plaintiff, and the lawyer) constitute the best way to structure punitive damages to advance the goals of retributive justice.

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 Professor 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 strangers 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, our society has, for centuries, deployed not only criminal law but also tort law, among other regulatory devices, to help punish this misconduct.1 Punitive damages, however, can serve a range of purposes beyond imposition of punishment.2 Thus it is more accurate to label them extra-compensatory damages.

Despite the variety of purposes capable of being ascribed to extra-compensatory damages, in recent decades, the Supreme Court has come to see them as fulfilling two particular purposes: to impose retributive justice against wrongdoers and to deter future misconduct by the defendant and others.3 Imposing retribution triggers its own deterrent or preventive effect, of course, but in recent years, much of the scholarship has been largely driven by law and economics scholars seeking to tweak extra-compensatory damages law to advance the goal of optimal deterrence, or cost-internalization.4

Unlike theories that try to calibrate a penalty in part based on the guilty state of mind (mens rea) associated with a defendant’s misconduct, theories embracing cost-

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

2 Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. CAL. L. REV. 1, 3 (1982) (noting “at least seven purposes for imposing punitive damages … (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”).


4 Under an optimal deterrence (or efficient deterrence) framework, defendants internalize the costs of their activities so that they face accurate “marginal cost curves,” which facilitates correct pricing of their activity. Thus punitive damages (qua cost internalization) are best calibrated in reference to a defendant’s likelihood of evading detection from paying compensatory damages: the higher the likelihood of not compensating other similarly situated victims, then the higher the augmented damages should be. See A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 HARV. L. REV. 869, 906 (1998) (“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.”). See also Robert D. Cooter, Punitive Damages for Deterrence: When and How Much?, 40 ALA. L. REV. 1143 (1989). One paper in this genre has extended the cost-internalization paradigm by urging that punitive damages be configured to provide for “societal damages,” that is, to compensate society, through split-recovery schemes, for harms the defendant externalized onto society independent of the harms suffered by particular plaintiffs in the litigation. Catherine M. Sharkey, Punitive Damages as Societal Damages, 113 YALE L.J. 347, 391 (2004). Sharkey views her theory as providing a “‘nonpunitive’ rationale” for punitive damages that focuses on compensation, and implicitly on cost-internalization. See id. at 389-90.
internalization need not inquire into the putative reprehensibility of a defendant’s actions. The underlying goal of cost internalization is simply, albeit crudely, “pay for the mess you made, but you can continue to make that mess, so long as you pay for it.” In its recent decision on punitive damages, Philip Morris USA v. Williams, the Supreme Court imposed impediments to the quest for cost-internalization through extra-compensatory 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 necessitates much more litigation to ensure successful cost-internalization.

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. Though a voluminous literature on punitive damages exists, absent from that literature, as Professor Cass Sunstein and his co-authors lamented ten years ago, is “a full normative account of the relationship between retributive goals and punitive damages.”

5 See Polinsky & Shavell, supra note 4. Professor Sharkey’s account, supra note 4, does in fact require 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. See Thomas C. Galligan, Jr., Augmented Awards: The Efficient Evolution of Punitive Damages, 51 LA. L. REV. 3, 62-63 (1990) (“focus 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.”).

6 See Philip Morris, 127 S.Ct. 1057 (prohibiting factfinders from imposing punitive damage awards based on the amount of harm caused by the defendant to nonparties to the litigation).

7 Cost-internalization is still possible after Philip Morris when a defendant’s misconduct affects only the plaintiffs to the litigation. 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.

8 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.”).


10 Sunstein et al., Assessing Punitive Damages, supra note 9, at 2085. In truth, however, there have been some valuable efforts in this direction. See sources cited infra note 12. But these accounts have shortcomings described in Part I.B and II.D.
In this Article, I try to fill that void by providing a defense of what I call “retributive damages.” While retributive damages constitute just one aspect of extra-compensatory damages that warrant attention, it is the aspect I focus on here. Specifically, my goal is to describe and defend a structure for retributive damages as an intermediate sanction – between compensatory damages and criminal punishment. The retributive damages proposal incentivizes plaintiffs and their lawyers in the tort system to help the state obtain a form of fines and other relevant relief against defendants on account of their having proven, 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 the economist’s goal of cost-internalization, this account focuses on the normative public interest in retributive justice.

While the account here promises to make sense of the Court’s holding in Philip Morris, the goal of this project is not to interpret punitive damages doctrine as it is, but to re-imagine what the law should be. Hence, the regime of retributive damages I endorse is consistent with the constitutional landscape but not a mere reflection of it.

It bears emphasis that retributive theory not only offers a motivation for reconfiguring punitive damages. It also establishes a set of constraints. After all, retributive justice, properly understood, is conceptually tethered to concerns for equality, modesty, accuracy, proportionality, impartiality, and the rule of law—aspects that are largely missing not only from current common law punitive damages practices but also, to varying degrees, from the accounts of those scholars emphasizing punitive damages as vehicles for vindicating a private plaintiff’s interest in “poetic justice” or revenge or a jury’s interest in ventilat-

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11 Thus, as the Appendix shows, juries are encouraged to disaggregate the purposes of extra-compensatory damages and segregate the amounts needed to achieve cost-internalization or victim-vindication from retributive justice.

12 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 (2005), or a plaintiff’s putative right to “state-sanctioned revenge,” see Anthony J. Sebok, Punitive Damages: From Myth to Theory, 92 IOWA L. REV. 957, 961 (2007). 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 55-58 (2002) (arguing that recourse theorists like 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’s focused on the relationship of obligation between the state and the wrongdoer. Another piece worth substantial mention here 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 Parts I.B and II.D.

13 Some accounts stressing victim-vindication may also be viewed as consistent with the Philip Morris holding. See, e.g., Sebok, supra note 12. But compare Galanter and Luban, supra note 12 (viewing victim-vindication as compatible with making defendant pay for harms to non-parties to the litigation).
ing its outrage. 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 goals often ascribed to punitive damages by scholars endorsing victim-vindication, cost-internalization, or retributive justice.

As constitutional interpretation, that minimalism may be a desideratum. But in terms of giving guidance to states on matters of grave importance, it is opaque. Moreover, as a brief survey shows, prior scholarly accounts have not adequately explained both how and why states should pursue retributive justice through punitive damages. This article tries to do just that, and in order to do so, some familiarity with the demands and limits of retributive justice is necessary.

Part II provides that familiarity by sketching what I have elsewhere called the confrontational conception of retributivism (or the CCR). 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 need for reducing two kinds of errors: Type I errors in which people are mistakenly punished or excessively punished relative to comparable offenders, and Type II errors in which offenders escape their punishment altogether or receive too lenient a punishment relative to comparable offenders. Accounts of both retributive justice and retributive damages ought to demonstrate the need for sustained reflection on 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 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. More provocatively, I suggest that non-victims for wrongs that don’t necessarily materialize in harms should be able to bring actions for

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14 See, e.g., Galanter & Luban, supra note 12; Sebok, supra note 12, 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”).

retributive damages under certain conditions. This would look something like contemporary qui tam statutes. 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 fines individual defendants based on a percentage of their net wealth and entities based on a percentage of their net value. The sanction 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. I then explain why and how lawyers and plaintiffs should be rewarded for their efforts by the state and why the state should receive the bulk of retributive damages. These payments together (to the state, the plaintiff, and the lawyer) constitute a sensible way to structure retributive damages in light of the values and limits of retributive justice discussed in Part II.

Drawing upon some of the materials embedded in the social justice accounts of tort law, Part IV clarifies why creating an intermediate retributive sanction under the right safeguards to the tort system is a superior way of punishing and preventing misconduct than strictly relying on compensatory damages, class actions for compensatory damages, extra-compensatory damages for victim-vindication, the criminal justice system as we know it, or even a privately enforced criminal justice system. Part V explains how a retributive damages framework surmounts the constitutional questions raised by punitive damages generally.

This Article lays the foundations for retributive damages. In two subsequent articles, I will grapple with questions regarding the implementation of the retributive damages framework in simple and complex litigation contexts. Thus, by the end of the project, one can discern how retributive damages might co-exist alongside extra-compensatory damages designed to pursue other goals, including cost-internalization. A glimpse of this aspiration to disaggregate and realize the purposes of extra-compensatory damages can be seen with a review of the appendix to this article, which captures most of the main policy ideas as they would affect the development of jury instructions.

I. A QUICK OVERVIEW OF AMERICAN PUNITIVE DAMAGES LAW AND SCHOLARSHIP

A. Legal Patterns and Innovations

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17 See Dan Markel, Implementing Retributive Damages; Dan Markel, Retributive Damages and Complex Litigation. In those works, I address various interesting questions given little to no attention here: e.g., are retributive damages schemes compatible with vicarious liability and the punishment of entities? Which procedural safeguards should defendants and plaintiffs have and why? How should retributive damages be taxed? 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?
Punitive damages have a long history.\(^{18}\) According to the conventional understanding, early Anglo-American courts awarded “exemplary” damages for a range of purposes, in some cases as compensation to a plaintiff for suffering “intangible wrongs” such as insults that caused dignitary harms and in other cases as punishment of “the defendant for his misconduct.”\(^{19}\) As the scope of compensatory damages in recent years expanded to include “mental anguish, wounded feelings, indignity and embarrassment,” however, the need to use punitive damages to compensate such harms may have diminished.\(^{20}\) Indeed, many of the “intangible harms” initially uncompensated are now covered.\(^{21}\)

Consequently, the Supreme Court has cast its doubts on the compensatory rationale of punitive damages, explaining that today punitive damages should be understood as “quasi-criminal” “private fines” designed to punish and deter the misconduct at issue.\(^{22}\) Interestingly, although courts frequently view punitive damages as serving both and primarily retribution and deterrence,\(^{23}\) analysis of these purposes and their implications is often scant. As such, courts rarely instruct juries to consider decoupling these functions by determining the amount of money necessary to serve as the punishment of the defendant and the amount necessary to achieve deterrence.\(^{24}\) 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).

Today, notwithstanding the public nature of the retributive and deterrent values 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 award of punitive damages.\(^{25}\) Consequently, in most states, if extra-compensatory damages are awarded, the plaintiff (and her lawyers) will receive most, if not all, of the amount awarded.\(^{26}\)


\(^{19}\) Redish & Mathews, supra note 9, at 13-16 (discussing early English cases where plaintiff showed dignitary harm that would otherwise remain uncompensated in the absence of exemplary damages).

\(^{20}\) SCHLUETER & REDDEN, supra note 3, at § 1.4(B). But see Sebok, supra note 12, at 204-05 (“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.”).

\(^{21}\) For example, in Philip Morris USA v. Williams, the jury awarded the decedent’s wife $21,000 in economic compensatory damages and $800,000 in non-economic compensatory damages. Additionally, the jury awarded $79.5 million in punitive damages. 127 S.Ct. 1057, 1060-61 (2007). Recently, the Supreme Court of Oregon upheld the jury verdict. See Williams v. Philips Morris Inc., 2008 WL 256614 (Or. Jan. 31, 2008).


\(^{23}\) See, e.g., cases cited supra note 22.

\(^{24}\) SCHLUETER & REDDEN, supra note 3, at § 2.2(A)(1); RESTATEMENT (SECOND) OF TORTS § 908(1) (1979).

\(^{25}\) See Sharkey, supra note 4, at 375-80. Compare IND. CODE. ANN. §34-51-3-6(d) (“The office of the attorney general may negotiate and compromise [its portion of] a punitive damage award”) and GA. CODE ANN. § 51-12-5.1(c)(2) (“Upon issuance of judgment [for punitive damages], the state shall have all rights due a judgment creditor until such judgment is satisfied and shall stand on equal
Despite the variations in who recovers punitive damages, certain practices are well-entrenched. For example, in every jurisdiction where punitive damages are allowed, the fact-finder must make a predicate finding about the defendant’s culpable state of mind, i.e., did the defendant’s action evince something like “wanton, willful, malicious, or reckless conduct that shows an indifference to the rights of others?” Moreover, most American jurisdictions have in recent decades required that punitive damages be awarded only if the plaintiff has proven the defendant’s culpable state of mind with “clear and convincing evidence,” rather than the traditional, “preponderance of the evidence” standard.

Additionally, the Supreme Court has, in the last fifteen years, begun to establish a constitutional framework for regulating punitive damages. These rules are designed to ameliorate “the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion.” The Court’s requirements can be summed up in six rules.

First, when courts review the reasonableness of punitive damages awards, the most important factor they must consider is the degree of reprehensibility of the defendant’s misconduct. 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. More controversially, in State Farm, 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.”

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.” Fourth, reviewing courts, under the Supreme Court’s new Philip Morris decision,
must ensure that the jury is instructed not to punish defendants an amount that figures in the harms to nonparties to the litigation. One might see this as related, though not essential, to the Court’s stated interest in ensuring that one state not try to punish defendants for conduct lawfully performed in another state. Fifth, judicial review of a jury’s award of punitive damages must be available at both the trial and appellate levels. Finally, appellate review of punitive damages must adopt a “de novo” standard of review of the jury’s award, at least when the action is a federal case.

Importantly, although the Court developed these rules to improve fair notice and proportionality to defendants facing these sanctions, the Court has not extended to defendants the protections normally applicable in the criminal law context. Indeed, defendants in punitive damages actions have no right to bifurcated proceedings between liability and punitive damages, no right against vicarious liability, no double jeopardy rights, no right to counsel, no right to standards of proof requiring proof beyond a reasonable doubt, 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 vicarious liability for punitive damages, or multiple awards of punitive damages for the same underlying tortious conduct, such as in a mass torts case. Nor has the Court insisted that the trial court specify its reasons for upholding or remitting the amount of punitive damages.

The Court’s efforts to regulate punitive damages coincide with, and are responsive to, corporate-funded tort reform movements pushing states to place caps that limit a defen-

34 Philip Morris USA v. Williams, 127 S.Ct. 1057, 1063 (2007). Members of the Court have in the past also expressed some thoughts that if punitive damages were captured in part by the state, that structure might trigger review under the Eighth Amendment’s Excessive Fines Clause. See Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257 (1989). However, the statutes in Utah and Oregon under consideration in State Farm and Philip Morris respectively involved a split-recovery scheme and the Court did not address that issue in either case.
35 State Farm, 538 U.S. at 421.
38 See State Farm, 538 U.S. at 416-17.
40 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).
41 Haslip, 499 U.S. at 13-14.
42 Some federal courts have rejected the “overkill” argument that fundamental fairness precludes allowing a defendant to face 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). Nothing in the Court’s Philip Morris decision changes this outcome. Thus a tobacco company could easily face punitive damages in separate actions for the same misrepresentations it made about its product’s health effects.
43 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).
dant’s exposure to punitive damages payments.\(^4^4\) Looking at the landscape as a whole, one might be tempted to view the Court’s jurisprudence here as arcing in the direction of retributive justice’s requirements for procedurally fair, proportionate, and even-handed punishment.

But its jurisprudence is decidedly not yet there. 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 measure. Nor is there much justification for the ongoing common law practice of denying defendants the safeguards necessary for the just imposition of even an intermediate sanction.\(^4^5\) Moreover, to the extent the Court’s jurisprudence can be said to avoid gross disproportionality and unfair surprise, then those are values that Benthamite utilitarians might embrace too—for reasons separate from any retributive leanings to try to reduce Type II errors as well.\(^4^6\)

As a matter of interpreting the Constitution, the Court should refrain from embracing a particular theory of punitive damages as it goes about delineating the rights of defendants in tort actions. That under-theorized position will permit experimentation among the states. Indeed, that strategy leaves a range of constitutionally available policy options: a state could decide, in furtherance of retributive justice goals, to provide more substantive and procedural protections to punitive damages defendants (and plaintiffs) than it does currently. Alternatively, 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.\(^4^7\) More radically, a state could abolish all extra-compensatory damages. The array of punitive damages laws we have now, however, fails to evince much awareness of which goal(s) it is pursuing let alone the goals it ought to be pursuing.

**B. Recent Normative Scholarship**

Unsurprisingly, the complexity, significance, and rapidly evolving nature of punitive damages law has attracted the attention of many scholars. Some legal economists, like

\(^4^4\) The variety of reforms can be sensed by glancing at BMW of N. Am. Inc. v. Gore, 517 U.S. 559, 614 (1996) (Ginsburg, J. dissenting) (appendix listing various state reforms).

\(^4^5\) *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.”).

\(^4^6\) JEREMY BENHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 86-88 (John Bowring ed., 1843) (“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.”).

\(^4^7\) Justice Breyer’s opinion in *Philip Morris* suggests that augmenting damages based on optimal deterrence would only be permissible if the penalty were based on potential harm to the particular plaintiff, rather than other potential victims who are nonparties to the litigation. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (in discussing appropriateness to consider the potential harm by defendant, “we have made clear that the potential harm at issue was harm potentially caused the plaintiff”) (emphasis in original). *See also supra* note 7.
Professors Polinsky and Shavell, think extra-compensatory damages should focus on advancing the goal of cost-internalization. As I explained earlier, under this economic framework, a defendant’s culpability or state of mind is immaterial to her obligation to pay for the harms that she causes.48 Instead, what matters is whether there was any likelihood the defendant would evade paying compensation for the harms she caused. If there is such a possibility, then the amount of punitive damages should be calibrated to the likelihood of her evading compensation.49 This particular economic approach, however, is clearly at odds with the existing doctrine, which, as we saw in the previous Section, generally requires there to be some finding of malice or recklessness before punitive damages can be awarded.

As a matter of policy prescription, the economic approach’s inconsistency with extant doctrine is obviously not a knock against it. Generally speaking, individuals and entities should have to pay for the mess they make; if they can exploit enforcement gaps by private and public parties, there will be an incentive to take insufficient care, which will also run the risk of under-deterrence.50 But the cost-internalization approach, which is conceptually unconcerned with mens rea or culpability, is better thought of as pursuing “augmented” damages, rather than “punitive” damages.51 This allows us to contrast augmented 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 a victim’s dignity and autonomy interests, which have been injured by the defendant’s misconduct.52 In some common law jurisdictions, these extra-compensatory damages are more precisely labeled as “aggravated” damages—and they would go to plaintiffs for the injury to their dignity.53 Some supporters of these non-economic accounts have defended large parts of extant common law punitive damages law on the grounds that these practices serve 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.54 Indeed, for some social justice tort theorists, common law

48 See supra note 4.
49 Id.
50 See Thomas C. Galligan, Jr., The Risks of and Reactions to Underdeterrence in Torts, 70 Mo. L. Rev. 691 (2005).
52 See, e.g., Sebok, supra note 12; Zipursky, supra note 12.
54 At times, the work of Marc Galanter and David Luban, as well as David Hoffman and Kaimipono Wenger, speak in this register. See sources supra note 12 and 14. 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, e.g., Galanter & Luban, supra note 12, 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. The view I take circumscribes jury decision-making considerably more.
jury-driven punitive damages practice serves as a way for an ordinary person to fight malfeasant entities and their lobbyists seeking business-friendly “tort reform.”\(^{55}\) Some scholars, such as Galanter and Luban, drawing on the work of Jean Hampton’s victim-vindication justification for punishment, even view themselves as committed to the goals or values of retributive justice.

But as shown in the insightful interpretive accounts of tort law and punitive damages by Benjamin Zipursky and Anthony Sebok,\(^{56}\) the tort system conventionally empowers victims to either pursue punitive damages or forbear from pursuing such damages. That’s 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 said for allowing victims to have almost unfettered control over settlements with the defendants.

These two practices reveal some space between victim-vindication accounts and the interests underlying a retributivist account. Retributivists, as I will explain shortly, give more weight to the reduction of both Type I false positive errors — in which people are mistakenly punished (or excessively punished relative to comparable offenders) — and Type II false negative errors — in which wrongdoers escape their punishment altogether (or receive too lenient a punishment compared to other similar offenders in the jurisdiction). 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 accounts, this silence is a real weakness.\(^{57}\) After all, failing to defend 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.

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,\(^{58}\) and thus, in this paper, I don’t spend much time analyzing them here. But what’s really missing is a better understanding of what a public retributive justice


\(^{56}\) See sources supra note 12.

\(^{57}\) To its credit, Professor 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 injured the plaintiff. See Sebok, *supra* note 12. But he doesn’t address the state’s interest in reducing Type II errors of either sort, or the procedural safeguards necessary to prevent Type I errors of the mistaken punishment sort.

\(^{58}\) See sources cited *supra* note 4 (scholars urging punitive damages to pursue cost internalization) and note 12 (scholars urging punitive damages to allow for victim-vindication).
theory entails for punitive damages. And in the Parts that follow in this Article, I shall focus on the achievement of retributive justice through the context of “retributive 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 retributive justice, in particular upon something I call the “confrontational conception of retributivism” (or “CCR” or “confrontational retributivism”). 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 pursuit of that social project of retributive justice. As the notes below 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’s 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.

The late John Rawls once defined retributive justice as a view of punishment based on the idea that “wrongdoing merits punishment. 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 wrong-doer 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.” As Professor Michael Moore summarized, retributivism is the “view that punishment is justified by the moral culpability of those who receive it.” Underlying this description is a sense that imposing punishment for wrongdoing is a self-evidently attractive obligation.

The problem with this intuitive view is that many people think the nature of this obligation still needs more explication. Imagine Jack. He has spitefully run over his

59 See sources supra note 15.
60 These differences and departures 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. So far as I can tell, the other retributivist whose work has been relevant to working out an understanding of what’s punitive about punitive damages is Jean Hampton. See, e.g., Galanter & Luban, supra note 12; Sebok, supra note 12; David Owen, The Moral Foundations of Punitive Damages, 40 ALA. L. REV. 705 (1989). Hampton’s work has had a profound influence on my own work, but there are places where I depart from it 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 15, at n.109.
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 Jack undergo some form of “treatment,” where we can cure Jack’s anti-social condition or disease? Skeptics might ask why one should embrace the pursuit of retributive justice qua coercive condemnatory deprivation.

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 automatically follow that the state has a right or a duty to punish Jack. Why is the state involved -- 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, 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, 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, greedy, and indolent, but one’s viciousness is generally not understood to be a compelling reason for the state to condemn a person through punishment. So a person’s moral desert, whether negative or positive, is generally and alone insufficient to motivate state action in a liberal democracy.

The CCR, by contrast, explains the attraction 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, and subject to

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the constraints of culpability and context, retributive punishment effectuates these ideals that are widely understood and that can be embraced ex ante by citizens of complex liberal democracies such as ours. 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 their sense of justice in the absence of particular knowledge about their 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, fostering a sense of impunity and contributing to the conditions that erode our belief in the free and equal nature of persons.

Thus, what’s important to see is that the good achieved by punishment is bound up in the practice of punishment itself, so that the practice of punishment has an intrinsic value, and its achievement 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 Unlawful Behavior

Retributive punishment for legal wrongdoing is justified in part because it communicates to the offender that we are respecting him by holding him as a responsible moral agent, capable of choosing and acting unlawfully and therefore in a blameworthy manner. When we credibly attempt to punish an offender who steals, rapes or murders, we are trying to tell him that his actions matter to this community constituted by shared laws, and that he will be held responsible for his unlawful actions. Imagine Jack’s attack on the dog and that such attacks are illegal. If the state, in its ordinary course of business, knowingly did nothing in the face of Jack’s attack, its inaction could be read to express 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 my actions will not be taken seriously by the state. When the state makes a credible effort to punish Jack for his action, he’s told he will be held responsible for his unlawful actions. In this way, the attempt at punishment communicates the view that we are autonomous agents capable of responsibly choosing between lawful and unlawful actions.

Communication to the offender is of fundamental importance here. Indeed, the practice of retribution would itself 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

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67 Culpability is 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.

68 By “ex ante” I refer here to a situation of decision-making where a person internalizes all available information about possible outcomes except the identity of what position she will occupy after the decision is made. Balancing should be done through the ex ante perspective to ensure that the rules and institutions we choose are not the product of bias that typically arises when we make choices ex post, that is, aware of our specific position or wealth in society.

the evidence to the contrary, but if he cannot understand on what grounds he is being punished, then the punishment is not retributive punishment, but merely a coercive deprivation visited upon the offender whose condemnatory character is lost to the offender. This argument may seem similar to moral desert, but it’s not exactly the same. Think of Jack. Imagine at T1, Jack crushes his neighbor’s dog but then at T2 he bangs his head accidentally and subsequently no longer remembers who he is or what his actions were at T1. Arguably, nothing has happened to change his moral desert; but the point of punishment would be lost — not because he’s suffered a trauma — but because the punishment would lose its communicative significance.

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, that threat suffices to signal the norm that our actions and our interests matter to the state and those around us. But the point of the practice 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. Its value is intelligible independent of those consequences. On the other hand, punishment itself may not be necessary 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 may justifiably be used 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. (By situating this account within liberal democracies, I am assuming that the laws in question are both reasonable, and 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

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70 Without that understanding, the punishment might still serve contingent goals such as incapacitation.
71 It’s important that the memory loss be outside Jack’s control here.
72 Notice the distinction here: with communication, the speaker has an interest in communicating a specific message to someone in particular. With expression, one has a larger audience in mind, and conceivably is indifferent to whether the expression reaches a particular person. When I call you at home to tell you “Dad is not coming home tonight,” that is a communication. When I write a column in the newspaper, I am expressing my opinion.
73 Moore, supra note 62, at 180-81.
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 social order for the purpose of imposing a new order by 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 giving its best reasonable efforts to reduce the plausibility of individuals’ false claims of superiority, over their victims, if there are any, or against the state. The state’s coercive measures serve as measures communicating our 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 our laws. This account reveals in part, then, the intrinsic 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. All that matters is that the offender can be seen, ex ante, 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. If the state establishes no institutions to credibly threaten his punishment, the offender’s implicit or explicit claim to superiority over others commands greater plausibility than it would be if the state had created such an institution. This rationale helps explains 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’s 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? After all, it is only a modern phenomenon that the state has assumed such a function.

Our answer lies in the notion of democratic self-defense. Recall from the subsection above how an offender’s misconduct implicitly or explicitly serves to substantiate a claim of superiority made by an offender’s unlawful action. That claim of superiority is not merely a claim against his 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. In doing so,

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75 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, Misguidedly Merciful? A Reply To Professor Meyer (manuscript on file with author).
77 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).
the offender revolts against the determinations of what those rules are and the constitution-
al rules determining who gets to adjust these rules. Perhaps unwittingly, the offender can be viewed as usurping the sovereign will of the people by challenging their decision-
making structure.78

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 the protection of the decision-making authority of the regime itself. It’s interesting that the principle of democratic self-defense is embodied in the oath taken by federal officers,79 the substance of which obligates officials 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 a greater or lesser degree, forms of rebellion.

To be sure, if we asked the typical offender who commits a “smash and grab,” he would deny that he is making any “implicit” or “explicit” “claim” against the victim, 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 is just violating the law and hoping to get away with it because he needs or wants the money. Consequently, there might be something unreal about viewing proscribed conduct as a rebellion. But it only looks unreal if I’m supposed to explain why punishment is justified to an offender who already knows he’s an offender. To my mind, that objective seems misplaced. As alluded to 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, before he knows whether he’s going to be rich or poor, an offender or a victim, and knowing that he will be able to control his conduct and be punished only for misconduct proscribed by law and subject to his control. Speaking to that person, the attempt to read such misconduct as rebellious seems a lot less unreal.80

What’s more, to see the offense as a rebellion is not to say that all rebellions need be quashed with maximal use of resources. Quite to 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 state pursues and punishes only those acts that are necessary to limit, in order to secure the conditions conducive to human flourishing.81

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, almost invariably, as a social union of social unions within a heterogeneous socie-

80 I am grateful to Brian Tamanaha for pushing me on this point.
81 See Hugo Adam Bedau, An Abolitionist’s Survey of the Death Penalty in America Today, in Debating the Death Penalty 15, 34 (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).
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 both impartial in resolving disputes among its citizens and acceptable to them as the decisor of the disputes among these diverse citizens and the enforcer of sanctions against the wrongdoer. So we now have a reason to respect the state’s involvement in both 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. This division of labor may be facilitated by the use of juries, especially when there is doubt about the state’s capacity to restrain from tyranny or 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 individuals should be punished and not others. 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. After all, only an actual offender who has been convicted 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 punished to contest their false claims. To not punish when we reasonably could is to signal that we don’t 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. Additionally, to under-punish or over-punish relative to comparable offenders is to make (rebuttable) claims that some people are granted favors at the hands of the state, violating a basic liberal commitment to equality under the law. By contrast, the innocent should not be punished 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. Second, the internal intelligibility achieved by punishment of a guilty offender in turn explains the conceptual linkage between legal guilt and retributive punishment. That does not mean that other theories that are more self-consciously utilitarian 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

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82 JOHN RAWLS, POLITICAL LIBERALISM (1993).
83 See Markel, Be Not Proud, supra note 15 (collecting sources that locate desire to punish in these “hot” emotions).
I still need to articulate the limits of retributive justice. 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.

1. Modesty with Power: One Institutional Duty Among Many

First, as I adverted to earlier, the practice of retribution is only one attractive social practice among many. Every person interested in social planning must realize that, on 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 justifies institutions of punishment in liberal democracies does not mean that punishment ought to be imposed under all circumstances such that the ceaseless or careless pursuit of retributive justice consumes our every and last unit of social resources. This need for moral balancing is consistent with retributivism’s animating moral 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.84

Relatedly, the practice of retribution poses significant risks of error and abuse by authorities. When errors or abuses occur, they stand at odds with the animating principles of retributive justice. Consequently, retributive punishment can only be commended when sufficient measures are taken to substantially 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. While invoking a principle of modesty may seem theoretically vague, it actually has substantial policy 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’ve argued, entails limits on the state’s ability to adopt punishments like the death penalty that prevent the state from exhibiting contrition to the offender wrongly punished.85

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, the establishment of institutions advancing retributive justice will assuredly have some concomitant effect on preventing wrongdoing in the future.86 This preventive effect in no way taints the moral worthiness of the practice of retribution. (Indeed, for some non-retributivists, the preventive effects are the evidence of the practice’s morality.) We should not rest on incidental deterrence alone,

however. The genuine possibility of achieving 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 punishing persons is a way for government to respect persons, as some have suggested, then so too is governmental attention to the prevention of harm to them (and their rights). Thus, if hypothetically we were better able to prevent instances of the offense by spending more on the probability of 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 that punishing an offense more severely would, with reasonable evidence as our basis, reduce the amount 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.

Of course, for the most part, these questions of deterrence are contingent and speculative, at least in situations of street offenders, for whom the attribution of rational calculations is somewhat more problematic than it is for organizations. I mention these issues about deterrence solely to explain that deterrence, or better, “prevention,” is not a concern inherently hostile or antithetical to the project of retributive justice. Indeed, prevention of offenses is conceptually entwined 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. To insist only on the offender’s perception of his defeat, to the exclusion of the potential internalization of correct values that the confrontation encourages, would undermine the (CCR’s first) interest we have in affirming our recognition of each other as autonomous moral agents capable of responsible decision making. In order to achieve this vision in the concrete practice of punishment, it is crucial that the denial of the offender's message is explained and carried out in a way that is conducive to the internalization of the values that the retributive encounter is meant to uphold. The encounter need not guarantee the internalization of those values, but it cannot

89 I develop this point more in Dan Markel, Ex Ante Retributivism (manuscript on file).
proceed without the desire for that result, and the state ought not take measures that, in the course of punishment, would directly preclude it. At bottom, the state must hope its punishment not only works to deny the offender’s claim of superiority, but also his transformation.91

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 commentators, retributive justice might usefully be contrasted with revenge.92 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. The philosopher Robert 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.93

A few other important distinctions can be drawn: (f) retributivism always seeks to attach the punishment to the offender directly because it is the offender who makes the claims the state seeks to reject, not the offender’s children or parents, whereas revenge may target an offender’s relatives or allies;94 (g) retributivism is uninterested in making the offender experience generic suffering; rather, and quite distinct from revenge, retribution seeks to use the state’s power to coerce the offender in particular ways, such that certain ideas can be communicated through that coercion;95 (h) retributivism is interested in, and speaks to, the moral autonomy and dignity of the offender, whereas revenge may be indifferent to those qualities; such indifference crucially affects whether and what kind of defenses might limit retribution; (i) and finally, retributivism’s intent requirement, discussed above, requires that the punishment not preclude the internalization of the “sense of justice” that would allow for an offender to demonstrate his respect for the norms of moral re-

91 Markel, Shaming Punishments, supra note 15, at 2209-10. Cf. Ezekiel 33:11 (“I have no pleasure in the death of the wicked; but that the wicked turn from his way and live.”).
92 Markel, Be Not Proud, supra note 15, at 410 n.13 (providing citations).
94 This is not to deny that retributive punishment may impose third-party harms, nor to suggest that revenge is always targeted at third parties close to the offender. My point is narrow: retribution does not aim to harm 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 (urging greater use of time-deferred sentencing to mitigate third party harms).
95 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.
sponsibility, equal liberty under law, and democratic self-defense, whereas revenge has no such requirement.\footnote{See Markel, *Shaming Punishments*, supra note 15, at 2216-17.}

The value of retributivism, on this account, is realized when the state makes the attempt to communicate its commitment to these three norms through the use of its coercive power against him. In contrast to 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 state and offender.\footnote{This notion might be enhanced for some through the thought experiment of the “secret but fair punishment.” See Markel, *Shaming Punishments*, supra note 15, at 2211.}

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’m 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, proportionality, and equality. Moreover, such a scheme can co-exist peacefully with other purposes sometimes ascribed to punitive damages including but not limited to cost-internalization and vindication of a plaintiff’s autonomy or dignity.

**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 \textit{legal} account of retributive punishment, meaning that what triggers any kind of state-backed sanction must be a violation of a clearly delineated statute that spells out with granularity the kind of misconduct that warrants an intermediate sanction.

Second, it is an account of punishment animated by concerns for respecting our right to be regarded as \textit{equal} under the law. The concern for equality has several noteworthy implications. To begin with, a system that arbitrarily selected for punishment some people’s illegal misconduct while systematically — or haphazardly — leaving untouched the illegal misconduct of others 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 law; but if the state doesn’t know of the misconduct or can’t reasonably put its prosecution at the top of its priority list, then it should at least empower private parties to pursue an intermediate sanction like retributive damages. But because these retributive damages are in fact a state-imposed sanction—that is a coerced condemnatory deprivation—these damages should be credited against any further criminal punishments for the same misconduct for the sake of avoiding duplicative and disproportionate punishment.
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 instead of a high-earning one. 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 a high regard for accuracy-enhancing features of adjudication (i.e., the state shouldn’t leap to conclusions quickly and without solid indicia of reliability) and a disdain for measures of punishment that preclude the defendant’s internalization of the retributive message. Applied to 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 full-blown criminal sanctions.98 Moreover, a concern for modesty would entail limiting and structuring retributive damages payments so they operate as an intermediate sanction, and hence, won’t jeopardize the ability of the defendant to continue his life or business in compliance with the law’s dictates. Additionally, modesty requires procedural fairness. Specifically, defendants have a right to present defenses that show the conduct to be 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: a defendant should be able to present defenses they might have against persons who are strangers to the litigation and they shouldn’t be punished based on the harm they may have lawfully caused another. A defendant’s rights to a fair adjudication can’t be eliminated simply because it would make the case a better vehicle for cost-internalization.

E. Why It All Matters

Although the vast majority of civil litigants never receive an award of punitive damages,99 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.100 Indeed, if punitive damages did not raise much concern, it would be hard to understand why various entities have in re-

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99 See Vidmar Amici Brief, supra note 9, at 4-8, (discussing how rarely juries award punitive damages with extensive citations to demonstrative empirical studies).
cent years underwritten the activities of think tanks and academics interested in tort reform.101

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 may cause some defendants to litigate with greater tenacity or they might refrain from the activity under scrutiny because the activity is close to the line of unlawful but still inside the safe zone. The risks associated with retributive damages are not trivial. When courts and juries award punitive damages, they stigmatize and condemn the defendant.102 Moreover, if erratically assigned, awards of punitive damages imperil the planning and structuring activities of defendants. Hence, to the extent punitive damages are mistakenly and erratically deployed by juries or courts, there are real consequences that should trigger caution prior to their distribution.

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.103 Although the dangers regarding the size, unpredictability, and frequency of punitive damages have been exaggerated,104 the presence of these risks is not trivial and commands a simple precept: if punitive damages are awarded, they should be awarded and distributed in a way that is ultimately beneficial for society and at the same time consonant 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.105 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 and I hope that what follows will ensure that I’m not, as it were, writing a check on insufficient funds.

III. DESIGNING RETRIBUTIVE DAMAGES

102 See Baker, supra note 104 at 226-27.
104 See Sebok, Vidmar and Eisenberg sources cited supra note 9.
It bears mention that at no point in the discussion of the CCR in Part II was the word crime or criminal used in the course of describing the underlying values of, or limits upon, retributive justice. This omission should be suggestive, indicating that perhaps in some situations, 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 punitive damages under conditions described here coupled with some intermediate level procedural safeguards such as a standard of proof that required clear and convincing evidence of the reprehensibility of the defendant’s conduct and state of mind.

This Part tries to show 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 who should be able to bring those actions. Section B explains how retributive theory’s concerns for reducing both Type I and Type II errors informs the structure for thinking about the amount of retributive damages in a given case and across cases. Finally, Section C suggests some principles for how the retributive damages sanction would best be allocated among the state, the plaintiff and her counsel.

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 these together.

1. Should Retributive Damages Reach Beyond Criminality, and 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 conduct from both tort and criminal law.

This Section doesn’t offer a comprehensive theory of retributive damages legislation, but it will suggest a few possible guiding principles and some of the advantages and drawbacks to these various choices.

One option a legislature might take is deciding to pass a statute that simply prohibits all conduct that demonstrates reckless or malicious disregard for the legal rights and legitimate interests of fellow individuals or institutions. In order to reduce the scope of

106 Malicious conduct shows “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 his conduct may be called willful or wanton.” DEAN PROSSER, LAW OF TORTS 9-10 (4th ed. 1971). Reckless conduct is behavior where the defendant acted under circumst-
conduct associated with such a statute, jurisdictions might wish to add, per Professor David Owen, that the misconduct in question constitutes “an extreme departure from lawful conduct.” Prospective defendants would then be on notice that reckless or malicious misconduct would no longer simply be “priced” in the tort system according to the harms caused, but instead would be prohibited—and the sanction for violating such a rule could include the award of retributive damages. This hybrid choice would cover conduct normally covered both by tort law principles as well as criminal legislation, but not all tort law and not all criminal law.

One concern with this approach is that this legislative standard—prohibiting, by threat of retributive damages, misconduct undertaken with malice or recklessness—provides insufficient guidance to those concerned with affording fair notice to defendants and ensuring even-handed application by juries and judges. In defense of the current conventions, however, the following can be said: courts routinely apply purportedly vague standards in criminal law—“good faith” in mistake of fact, “reasonableness” in sentencing, “beyond a reasonable doubt”—though not necessarily to their credit. Indeed tort law’s dominant norm is negligence, and that typically requires a jury determination of whether the defendant’s conduct was “reasonable,” which is likely more nebulous than whether someone acted maliciously or recklessly. Anxiety about such vagueness, even in the criminal law context, is typically reduced through the accretion of precedent, which provides greater predictability to prospective litigants regarding what counts as reprehensible. Moreover, such anxiety might be further allayed by the recent studies of communal intuitions of justice that show striking agreement among people about the nature and severity of wrongdoing.

The standard Professor Owen articulates is useful for further limiting the cases in which the fact-finder determines liability for retributive damages. But 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 rather than 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.” This inquiry into reprehensibility can be made even more sensitive. Courts have offered various other factors to assist the fact-finder: e.g., the extent of

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109 G. EDWARD WHITE, TORT LAW IN AMERICA (2d ed. 2005).
111 See PAUL ROBINSON, DISTRIBUTIVE PRINCIPLES FOR CRIMINAL LIABILITY AND PUNISHMENT (manuscript on file).
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 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.\textsuperscript{113}

The legislature may also wish to require consideration of other factors often deemed relevant to filing charges against a corporate defendant: for example, “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 corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents; the existence and adequacy of the corporation’s pre-existing compliance program; the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies.\textsuperscript{114}

A simpler way to reduce vagueness is by restricting retributive damages liability to situations where the harm was only physical as opposed to economic. But such a restriction would, from a retributivist perspective, undermine 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 was caused by the defendant. Indeed, on a retributivist rationale, the award of punitive damages has comparatively little to do with the actual amount of harm caused. What matters to virtually all retributivists is the culpable conduct of the offender,\textsuperscript{115} and that will entail examination of harm alongside a defendant’s imposition of unreasonable risk of harm and any relevant defenses.

A legislature that wanted to reach conduct that wasn’t already criminalized could do so using the general statute described in this section. Nonetheless, in service to principles of legality,\textsuperscript{116} legislatures would do well to be as specific as possible in the context of prohibiting that misconduct which should trigger retributive damages.

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

A more interesting and complex issue to consider is whether all conduct in a jurisdiction already prohibited by criminal law should be subject to retributive damages actions.

\textsuperscript{113}See, e.g., Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989).


\textsuperscript{115}While most retributivists focus on culpability and not harm, see infra sources note 131, at least one prominent retributivist, Michael Moore, believes that there is additional moral significance to wrongs that materialize in harm. See Michael S. Moore, The Independent Moral Significance of Wrongdoing, 5 J. CONTEMP. LEGAL ISSUES 237, 267-71 (1994).

I can imagine why some legislatures might wish to exempt various offenses such that their violations would not be eligible for retributive damages. However, it’s not entirely clear that such exemptions would be justified on retributivist grounds. Let me explain.

Two areas seem particularly pertinent here: first, “harmless crimes” where certain conduct irrespective of harmful result is prohibited, such as driving under the influence of alcohol; and second, inchoate crimes: e.g., solicitation, attempt, and conspiracy.117 In those two areas of criminal law, criminal penalties are available to punish misconduct even where harms to others did not actually materialize. These two kinds of conduct are somewhat confounding in the context of retributive damages because in the domain of tort law, a finding of harm to a victim is conventionally required.118 But with both these areas of criminal law, there is no victim available to bring a suit for retributive damages even though we have conduct deemed worthy of substantial condemnation.

The relevant question is whether standing to sue for retributive damages should be available broadly. One might restrict the pool of plaintiffs here only to those who were likely victims of the defendant’s actions.119 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 bring suit for retributive damages. This would look similar to the qui-tam structure in which the federal government encourages whistle-blowers to report fraud on the government.

Private attorneys general are entrenched and pervasively influential actors across spheres of law ranging from consumer protection to environmental enforcement.120 Conceived here as those who bring claims without a particular interest as an aggrieved party to the defendant’s misconduct, PAGs would supplement the government’s enforcement work for a range of misconduct that the legislature specifically denominates. While this may seem odd, historically, private parties, including non-victims, were also empowered to prosecute crime for the government. In fact, those PAGs who initiated actions often garnered the entirety of the criminal fine that may have been awarded, even if they weren’t victims.121 To be clear, I’m 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 professionalized prosecutorial force at the government’s employ. But having PAGs empowered to bring an intermediate sanction against

117 E.g., ALA. CODE § 13A-4-2 (2004) (“(a) A person is guilty of an attempt to commit a crime if, with the intent to commit a specific offense, he does any overt act towards the commission of such offense.”).
118 To be sure, courts sometimes circumvent the causation of harm requirement by vindicating the plaintiff’s rights even when harm was trivial or nominal, which is another way of saying nonexistent. See Jacque v. Steenberg Homes, 563 N.W.2d 154 (Wis. 1997) (trespass on land resulting in $1 nominal award and $100,000 punitive damages).
119 Cf. RESTATAMENT (SECOND) OF TORTS §§ 313(2), 436(3) (1965) (allowing plaintiff to seek re-redress for relational emotional harm if and only if plaintiff was physically endangered by defendant’s misconduct when such misconduct caused injury to a third party).
defendants is a cost-effective and politically independent mechanism to bring justice to those who perpetrate legislatively proscribed actions.122

Two problems with PAG suits exist: first is the fear that they will be brought vexatiously against the defendant, increasing the likelihood of 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).123 But these threats have responses: the rules of legal ethics and civil procedure instruct and forbid lawyers from bringing frivolous or bad faith litigation claims; and the economics of litigation encourage plaintiffs’ lawyers only to take on suits that have some good prospect of recovery.124 Moreover, under the retributive damages scheme, heightened procedural burdens would be imposed — such as clear and convincing evidence — that would reduce the incidence of false positives. Additionally, to the extent that other values are jeopardized by PAG enforcement, that decision is one a legislature can make by delineating which rights are subject to PAG enforcement and which ones are not.125

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 who were actually harmed by the defendant’s conduct to pursue retributive damages in the traditional tort structure. But for those cases involving a PAG, where there was no actual harm, the PAG would be required to notify a governmental 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 its evidence against the defendant with the government office, and the government would decide whether to bring a case.126 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 many jurisdictions reward those 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.127 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 she secured counsel.128

122 Id. at 608-10.
123 But see Morrison, supra note 122, at 631-46 (arguing that the Solicitor General’s concern to this effect in Nike v. Kasky was misplaced).
125 See Morrison, supra note 121 (arguing for legislative choice in these trade-offs).
126 An alternative regime would leave the actions in private hands but subject to government approval, much like an EEOC right-to-sue letter in the employment discrimination context.
128 Environmental law enforcement and EEOC discrimination suits are not much different than suits of this sort. Those concerned with the courts being flooded with weak non-harm based claims can take some comfort in that the willingness of plaintiff’s counsel 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 the case.
This public-private scheme would apply by the same logic to a more controversial realm: those cases where the defendant caused harm to a victim but the victim chose not to seek retributive damages. It is more controversial because allowing third parties to seek retributive damages here supervenes upon the choice of a victim to seek or not seek redress against the wrongdoer. From some perspectives, punitive damages serve to vindicate the wrongs against the actual interests of actual victims. 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 structure is to empower but not require victims to seek recourse against their wrongdoers. Thus to allow for 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 against his or her will.

From the CCR’s perspective, however, a victim’s declination not only risks leaving the state unaware of the defendant’s misconduct (when the defendant could be humbled through coercion otherwise) but it leaves the defendant a risk to other people’s rights, including, possibly the victim’s. Think here of a victim of a teacher or clergyman’s sexual abuse; if there was independent evidence of the abuse -- say a PAG’s testimony and camera-phone pictures -- we might still want a PAG to share awareness of this to punish and prevent this abuse.

Together, these admittedly disparate areas of misconduct—inchoate crimes, conduct crimes with no resulting harm, and misconduct with resulting 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 store owner whose fraudulent scheme fails because an honest employee tips off the customer; the drunk who luckily drove home without injuring anyone; the molested altar boy who forgives his parish priest—these each involve situations where a defendant’s culpable misconduct is worthy of sanction, and nonetheless, under a traditional torts scheme, the wrongdoer might escape being held legally responsible. To be sure, these cases could be left for the criminal justice system exclusively. But that would likely leave this category of cases under-enforced in light of the government’s scarce investigative resources and scarce prosecutorial resources (discussed next in Part IV). Moreover, since many retributive theorists take the position that culpable wrongdoing is what generally ought to trigger sanction, not the instantiation of actual harm, it makes sense to have a retributive damages scheme that would endeavor to be indifferent to these eruptions of moral luck.

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129 See sources cited supra note 12.
Punishing these spheres of misconduct through retributive damages might be controversial because it involves a paradigm shift for the tort system. States like California that have tried uncoupling victimhood from standing to sue as a civil plaintiff have encountered resistance. Thus a jurisdiction might find more acceptability by using the hybrid regime mentioned earlier to empower PAGs to bring retributive damages actions following a government declination; the government may also decide to restrict these cases to alleged misconduct involving or risking physical harm or for financial misconduct involving losses greater than (say) $100,000.

Subsequent criminal liability of course only attaches if the underlying conduct is subject to criminal sanction. Thus, depending on the jurisdiction, a defendant facing retributive damages for defamation might not trigger any subsequent criminal liability. But a defendant sanctioned for fraud in tort might subsequently be prosecuted under the criminal law. As mentioned earlier, any retributive damages penalties a defendant pays would be credited against subsequent criminal penalties assuming the prosecution was for the same misconduct the defendant was accused of in the retributive damages proceeding. Conversely, PAGs would not be entitled to bring actions for retributive damages after the government has already signaled its intent to criminally prosecute the defendant for the same misconduct. (That would only encourage free-riding on the government’s prosecutorial efforts.)

Notice that this approach to figuring out what can be punished through retributive damages doesn’t 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’s important to note that this account also doesn’t view retributive damages as justified only because it serves as a means for enforcing criminal liability. Rather, the wrongs, for purposes of retributive damages, are delineated by the legislation authorizing retributive damages, and the scope of that conduct is up to the legislature.

As one can see, the question regarding the proper scope of retributive damages is complicated. 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’d have a narrower criminal law and a retributive 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 errors of false positives. But I don’t view an all-encompassing retributive damages

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133 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. See Jordan Rau, *Key Ballot Measures Go Governor’s Way*, L.A. TIMES, Nov. 3, 2004, at A1.

134 Legislatures adopting retributive damages would have to adjust their criminal legislation on fines to ensure that criminal fines are permitted to be at least as much as retributive damages.

scheme to be required. As with much of criminal law, it should be the product of careful legislative deliberation and subject to heightened scrutiny.\textsuperscript{136}

In sum, we can see two approaches here. A familiar and more restrictive approach endorses retributive damages actions only against certain misconduct that actually left victims in its wake, victims who are permitted but not required to bring conventional tort suits including retributive damages. A major disadvantage is that such an approach leaves the criminal justice system alone to deal with the whole array of wrongdoing that warrants retribution.

In a world where detecting complex wrongdoing occurring in private is difficult, as I describe in the next Part, and people may not even know they have been victimized, 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 society’s criminal laws.

The broad strategy follows a basic logic. If the underlying misconduct is sufficiently noxious to allow criminal sanctions, then the intermediate sanction of retributive damages is also permissible if a defendant’s interests in a fair and impartial adjudication are protected. 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. The social costs of administration and enforcement would probably increase initially but over time we might see that fewer wrongdoers require punishment because there’s less temptation to commit wrongdoing if they know that any observer (and not just police or prosecutors) can initiate claims. A wider scope of liability, however, would leave more people worried about erroneous accusations and punishments, and could affect people’s preferences regarding how much time they spend in observable spaces.

B. Implementing Fair Notice for Amounts of Retributive Damages

This section’s discussion lays out the key factors affecting the amount of retributive damages. There are several elements that must be considered in determining the amount of retributive damages in a given case.

A concern for achieving even-handedness among similar cases is important from a variety of retributivist and rule of law perspectives.\textsuperscript{137} From this vantage point, a defendant should not face an award of retributive damages that varies substantially from another defendant’s punishment when both committed the same misconduct and are being punished by the same sovereign in the same jurisdiction.\textsuperscript{138} Consistent with the retributivist com-

\textsuperscript{136} Although criminal laws not targeting “fundamental rights” are only given rational basis scrutiny under the Constitution, there are good reasons to think that being subject to a coercive condemnation deprivation should trigger heightened scrutiny. See \textit{generally} Douglas Husak, \textit{Overcriminalization} (2008).

\textsuperscript{137} See Markel, \textit{Against Mercy}, supra note 15 (explaining the retributivist and liberal case against clemency systems encouraging or permitting unwarranted sentencing disparity); Dan Markel, \textit{Luck or Law? The Constitutional Case Against Indeterminate Sentencing} (manuscript 2008); cf. also Robinson, \textit{supra} note 111 (explaining why there might be crime-control benefits accruing from such even-handedness across defendants).

mitment to rule of law values, individuals 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. This section tries to provide a scheme that can help implement fair notice and horizontal equality regarding the scope of damages. It also addresses some of the difficult questions arising in the context of settlement.

1. Reprehensibility-Based Damages Based on Scaled Guidelines

The main feature of a retributive damages award is a reprehensibility-based fine. This fine’s amount requires two kinds of measurements. The first is a number on a reprehensibility scale. The second measurement translates that reprehensibility score to an amount of damages.

Thus, as a preliminary matter, state legislatures or a sentencing commission should devise a set of guidelines for juries (or judges in bench trials) to help them assess how reprehensible the misconduct is. The guidelines would calibrate reprehensibility, perhaps on a scale of 1-20, with 20 being the worst, using the factors, discussed earlier, that courts currently use to evaluate the defendant’s reprehensibility. Some factors might increase reprehensibility, such as a defendant’s history of past adjudicated misconduct, and other factors might mitigate, such as pre-existing compliance programs or remedial actions and restitution measures taken by the defendant upon discovery of the misconduct. In addition, the guidelines would provide hypothetical examples of misconduct that fell 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. The scheme suggested here enables jurors to deliberate over and contextualize the conduct they are assessing in comparison to other types of conduct. For example, if viewed separately a jury may rank a given financial harm as a 6 and a given physical harm as a 7. But if the two scenarios are viewed together, the jury may rank the financial harm as a 5 and the physical harm as a 9. The rankings may be different when conduct is ranked alone because “judgments are spontaneously normalized to the frame of reference implied by the category.” Sunstein et al. 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?” But when viewed together, one’s answers may change because the frame of ref-

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139 See text accompanying footnotes 112-113.
140 Retributivists, however, might differ on whether enhancements for past misconduct should apply. My own view is that enhancements are justified for past adjudicated misconduct. See Dan Markel, Connectedness and Its Discontents: The Difficulties of Federalism and Criminal Law, 4 OHIO ST. J. CRIM. L. 573 (2007).
142 Id. at 1171.
143 Id.
ference 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 retributive damages can be calibrated to be coherent across a broad array of conduct, instead of simply one separate category of conduct.144

Bear in mind that determining 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 Professors Sunstein et al., jurors in psychology experiments demonstrate great difficulty in translating their condemnation of defendants’ behavior into predictable scales of dollar amounts.145 (Some scholars, looking at real life data, contest that juries dispense unpredictable amounts of punitive damages.146)

To reduce the difficulties juries or judges might encounter when called to translate “outrage into dollars,”147 the number on the reprehensibility scale would track some portion of the individual defendant’s net wealth.148 The precise tracking between reprehensibility and wealth would be decided ex ante by a legislature or a state sentencing commission, but that linkage need not be communicated to the jury. The jury’s focus instead would be on what happened and the moral evaluation of the defendant’s reprehensibility in light of the guidelines and commentary. With a corporation, we would look at the worth of the enterprise as measured by valuation models used on Wall Street. Reliance on net wealth of entities can be misleading because it would simply encourage corporations to use debt to finance themselves instead of equity.149

To illustrate, a finding of 2 on the scale could lead to a retributive damages award of 1% of defendant’s net wealth, and a finding of 20 could lead to 10% of the defendant’s value being assessed. 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 a dozen jurisdictions use a similar program of day fines that are prevalent in Europe, by which a judge determines the severity of the offense with reference to a number, and that number is multiplied by the income a defendant has on a daily basis.150

144 See id. at 1179.
145 See Sunstein et al., Assessing Punitive Damages, supra note 9.
147 See Sunstein et al., Assessing Punitive Damages, supra note 9.
148 Professor Mark Geistfeld has recently articulated a different strategy worth consideration in cases involving fatal risks. See Mark Geistfeld, Punitive Damages, Retribution, and Due Process, 81 S. CAL. L. REV. (2008) (advocating use of government regulatory data and methodologies for monetizing fatal risks).
149 Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 677-78 (7th Cir. 2003) (Posner, J.) (term “‘net 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.”).
150 See BUREAU OF JUSTICE ASSISTANCE, HOW TO USE STRUCTURED FINES (DAY FINES) AS AN INTERMEDIATE SANCTION, NO. NCJ 156242 (1996); NORA DEMLEITNER, DOUGLAS BERMAN, MARC MILLER & RONALD F. WRIGHT, SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 598-599 (2d ed. 2007). In this context, consider how wealth of individuals affect bail or pre-trial release determinations.
This kind of scaling to wealth or value is important for four reasons: it avoids emitting the wrong signals to the public about the worth of poor people in cases involving physical injury; it facilitates rational jury decision making; it helps reduce, but does not eliminate, the problem of the diminishing utility of money; and last, it provides reasonable incentives for plaintiffs’ lawyers to take cases even after Philip Morris. Let me elaborate each reason.

The first major advantage of a reprehensibility-scaled guidelines approach is that it ensures that the reprehensibility of the defendant’s misconduct is what is being measured and punished, rather than say, morally irrelevant facts about the underlying tort. As explained in Part I.A., various jurisdictions have insisted that the amount of punitive damages be tethered tightly to the amount of compensatory damages awarded.151 This tethering is unreasonable from a perspective of retributive punishment, especially in cases involving or risking physical injury because doing so is inconsistent with the belief in the equal worth of human life under the law. When a defendant’s misconduct kills or injures a poor person—i.e., someone whose death or injury triggers smaller payouts in compensatory damages under conventional valuation models—such misconduct will yield a lower punitive damages award where there is a requirement that punitive damages be based on compensatory damages than if the defendant killed or injured a wealthy person.152 Not only is this outcome objectionable from a perspective that values equal respect for all persons before the law, it will encourage defendants to undertake unjustifiably risky conduct in a manner that will disproportionately affect the poor and disenfranchised. If legislatures have imposed caps on punitive damages through using a certain multiple of the compensatory damages or a certain flat dollar amount, then the wealthy defendant will simply view the punitive damages award as just a tax or a cost of doing business.153 By contrast, the assessment of a percentage of wealth would help rupture that sense.154

The second benefit of using percentages of net wealth or net value is that a defendant’s wealth won’t be used to affect the jury’s decision-making.155 This approach protects defendants by preventing trial courts devolving into “a field day in which the financial

151 See BMW of N. Am. Inc. v. Gore, 517 U.S. 559, 615 (1996) (Ginsburg, J., dissenting) (appendix listing sixteen states capping punitive damages in general as a function of compensatory damages). 152 This problem is also not likely to emerge under Professor Geistfeld’s approach. See supra note 148.

153 See Ronen Perry, The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory, 73 TENN. L. REV. 177, 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.”).

154 Admittedly, this issue is less of a concern when defendants’ misconduct only threatens financial injury; in that context, a structure of punitive damages tethered to compensatory damages does not encourage defendants to seek out the poor as their victims unless there is a sense that the poor are also less likely to seek redress through the tort system. Absent context-specific reason to believe that’s the case, when misconduct threatens only financial harms, punitive damages tracking compensatory damages are less offensive to notions of human worth and equality.

155 See 4 W. BLACKSTONE, COMMENTARIES *371 (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.”).
standing of the defendant would become a major issue.\footnote{Gombos v. Ashe, 158 Cal. App. 2d 517, 528 (1958).} In other words, the plan here does not allow for the introduction of evidence regarding the financial condition of the defendant because such information might poison the jury’s decision; instead the jury is tasked simply with assessing the reprehensibility of the misconduct.

A third advantage to assessing retributive damages this way is it helps ensure that the sting of 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. Under the retributive damages scheme, the worse the conduct, the higher the percentage of net wealth that will be forfeited. Of course, given that the marginal utility of money diminishes, one might think there is a need for progressively staggered percentages that increase as a function of both reprehensibility and wealth (or value). It’s quite difficult, however, for legislatures or sentencing commissions to assess different marginal utility functions for different persons.

Moreover, there is a principled reason to treat similar offenders who commit similar misconduct in similar manners, and thus the principle of equality under which retributive punishment serves would likely be undermined by a progressively increasing punishment structure because the variability of marginal utility rates would be idiosyncratic across persons (or entities).\footnote{But cf. Adam J. Kolber, The Subjective Experience of Punishment 40-41 (Feb. 5, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090337.} At least with flat fines (dollar amounts) or flat percentages of wealth, the equality principle can be plausibly invoked to most people. Thus, because scaling retributive damages “progressively” is an issue whose outcome I don’t think retributive theory can resolve with firmness, I would counsel caution. Moving from fixed dollar amounts or multiples based on compensatory damages to fixed percentages of wealth regardless of the wealth of the defendant would itself be a substantial improvement.

Last, there might be some additional benefit to the approach described here, one that is especially salient after the Court’s \textit{Philip Morris} decision. As mentioned earlier, the Court ruled that a jury may not award punitive damages based on the amount of harm caused to nonparties to the litigation. Although the reason for this holding makes good and under-appreciated sense from a retributivist perspective – a person ought not be punished for conduct that has not been clearly proven to be the defendant’s culpable misconduct, especially if the defendant has various defenses that could be raised as against particular claimants – the new holding poses a substantial risk of reducing incentives to plaintiffs and their counsel because they cannot pursue a jackpot of punitive damages based on “total harm.” If a jurisdiction decided (against my advice offered below) to allocate the retributive damages awards to the plaintiff and her counsel, then the reprehensibility-based guidelines approach reduces the problem of diminished incentives in the aftermath of \textit{Philip Morris}. (But to my mind a better solution is for the state to take the award and to simply provide that the defendant pay lawyer’s fees based on risk, time and expense.)

Some additional points warrant attention. Consistent with the virtue of retributive modesty, mentioned in Part II, in situations where a defendant has reason to doubt its viability if required to pay one lump sum, legislatures may authorize courts to order defendants to pay the amount as a percentage of profits in coming years. Additionally, if one is concerned that a defendant committed grave misconduct and then undertook to restructure

\begin{thebibliography}{10}
\item Gombos v. Ashe, 158 Cal. App. 2d 517, 528 (1958).
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its finances to make it appear that it cannot pay its tab, the courts might adjust the retributive damages based on the wealth or value of the defendant at the time the misconduct last occurred.

The scheme described above furnishes potential defendants little basis for complaint that the amount or award of retributive damages is a surprise, since the standards that would be applied to them are no different than the guidelines that have now become familiar in many jurisdictions when assessing criminal liability and sentencing issues. Of course, the defendants in criminal cases have more procedures in place, and thus, if we are deputizing plaintiffs to facilitate punishment of the defendant through an intermediate sanction, this requires enhancing at least some of the procedural safeguards in place in retributive damages cases, an aspect of the argument I develop in greater detail in the next installment of this project.

2. Penalties for Gain-Stripping

In addition to the reprehensibility-based fine, courts should assess the net profitability of the misconduct, if any, toward the plaintiff involved. 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. So, in addition to the reprehensibility-based fines, the amount of retributive damages should also include the retrieval of whatever profits can be tied to the misconduct toward the plaintiff.

The gain-stripping penalty should be treated distinctly from the reprehensibility-based fine. Gain stripping alone puts the defendant at the status quo ante, which doesn’t 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 fine of 200 and had gained from the misconduct 200, then the defendant should pay (at least) 400. That said, the gain of the defendant needs to be considered in light of the harms the defendant has been forced to compensate also. Thus, if the defendant gained 200 but is required to pay 100 to the plaintiff in compensatory damages, then the defendant really gained only 100, and so should be forced to pay the compensatory damages to the plaintiff (100), the extra profits (100), and then also pay a retributive damages award that puts the defendant in a worse position than earlier, based on how reprehensible the conduct was.

One caveat is necessary. Any gain-stripping penalty against the defendant will, in the aftermath of the Philip Morris decision, have to be limited to the gain the defendant made against the plaintiffs in the litigation rather than gains made against others who are strangers to the litigation. 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 where retributive damages are warranted. 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 having the defendant pay for litigation fees and expenses when determining retributive damages.

Though the state ought to receive the bulk of the retributive damages (for reasons I explain in the next Section), it needs to provide incentive for plaintiffs and their lawyers to bring retributive damages actions to the attention of the state. We need to determine how that general allocation strategy affects incentives for lawyers to bring retributive damages actions. If we assume that the state takes the lion’s share of the retributive damages penalties for the reprehensibility-based fine and the gain-stripping (in light of the public interest in retributive damages), we 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’s because compensatory damages may not sufficiently motivate lawyers where the damages are insubstantial or uncertain. For cases where compensatory damages are uncertain or small, provision of lawyers’ fees provide motivation to tort lawyers who might not take these cases otherwise. Additionally, it incentivizes plaintiffs’ lawyers to find and promulgate evidence of a defendant’s mens rea that they might not otherwise pursue if they were looking strictly for compensatory damages. Moreover, these issues cast a significant shadow over settlement discussions. So if we want to make sure high quality lawyers are marginally more attracted to this area of law than they would be under conditions that lead to compensatory damages only, we have to ensure fees are provided for to motivate private lawyers to invest in these cases.

If reasonable fees and expenses are awarded – and adjusted for risk, time, and expertise – for all victorious plaintiffs in retributive damages claims, then that would create incentives for lawyers to bring good cases. It’s a good general rule, and reflects the same commitments to human values as when we make losing defendants in civil rights cases pay for the costs of litigation.

But it might also encourage suits with very little money at stake. Thus, the allocation of lawyers’ fees will say a lot about how much should be spent on reducing 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 for the sentimental and market value of the rose? If so, should John pay Nancy’s lawyer and the court costs too? A lawyer 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 aren’t available, 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 low-value perpetrators.

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158 See Thomas 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 prophecy as parties negotiate claims according to their perceptions of the populist behavior of juries.”); see also Baker, supra note 102.
159 Cf. 42 U.S.C. § 1988 (awarding attorney’s fees to victorious parties in civil rights cases).
Given its primary focus on the criminal justice system, retributive theory quite naturally doesn’t have a lot to say about the architectural design for solving this particular problem. The retributive interest is in encouraging high quality lawyers to invest in strong cases that vindicate the wrongs perpetrated against society. But various structures might be able to achieve this aside from a blanket rule awarding lawyers’ fees in successful retributive damages awards. For instance, some jurisdictions might decide that the state prosecutor will seek retributive damages when the fear is that the defendant can’t afford to pay the lawyers’ fees. Alternatively, the state may decide to subsidize private lawyer’s fees out of the public fisc especially in cases susceptible to class treatment. One thing is clear. Jurisdictions facing competing moral obligations for scarce resources may decide that a concession to administrative cost is necessary. Those that do make that choice will force a drag on the goal of using retributive damages to reduce Type II errors, but as stated in Part II, we can’t expect to spend every last unit of social resources on retributive justice. Trade-offs have to be made somewhere.

4. Rewards for Plaintiffs and the Risks of Collusion

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 of retributive damages awarded to the plaintiff should be the amount necessary to reward the plaintiff for bringing the suit to the lawyer and the lawyer for bringing the suit to public attention. Thus, in addition to the fee structures discussed immediately above, jurisdictions could provide that plaintiffs in victorious retributive damages suits will receive, say, a $10,000 finder’s fee, in addition to compensatory damages if applicable.

The flat fee reward 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 wealth.\textsuperscript{160} The benefit of such a finder’s fee is it makes the project of retributive justice likely while being less susceptible to lottery effects that undermine retributivism’s commitment to fairness and equality across persons.

The flat fee award might create a risk of collusion such that defendants would try to “bribe” plaintiffs to settle for, per our example, $10,001 above their compensatory damages. If we adopted the flat fee award under our current system, we would encourage de-

\textsuperscript{160} 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 show the moral irrelevance of the wealth of the offender from the perspective of retributive justice.
fendants to pay for wrongs they might never have been committed to make suits go away. Meanwhile, secret settlements of this sort embolden the original wrongdoers who are never held liable – are never confronted with their wrongdoing – for wrongs that they actually did commit.

To avoid these problems, the litigation process should take three steps. First, plaintiffs must signal in their initial complaint that they are seeking retributive damages; 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 all suits where retributive damages claims are lodged in the initial complaint. Third, the state attorney general’s representative has to either agree to the settlement or buy the retributive damages claims of plaintiffs (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 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. Moreover, it also encourages defendants to contest liability for retributive damages unless they actually did something wrong.

Thus if a plaintiff decided to go ahead and allege retributive damages in the initial complaint, he would not be prohibited from settling subsequently. But this scenario would require plaintiffs to secure governmental approval to settle and it would force defendants to either admit responsibility and pay some 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 was not worth pursuing because of lack of merit. Otherwise, the state — or conceivably another PAG if the state declined — could decide to risk litigating against the defendant. Clearly, the dynamics of settlement 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.

In sum, where retributive damages are warranted, a defendant should pay repressibility-based fines, attorneys’ fees (informed by risk, time, expertise, and expenses), a state-determined flat award going directly to the plaintiff, and the elimination of any net gains made by the defendant 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 finders’ 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 safe-

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161 If government attorneys force the alienation of the retributive damages claim from the plaintiff prior to settlement, then the defendant will offer a settlement of retributive damages to the government, along with open acknowledgement of the wrongdoing in the settlement. If the defendant settled with the government just to make the suit go away without acknowledging responsibility, he might still be on the hook for subsequent criminal prosecution.

162 States tempted to employ split-recovery retributive damages schemes, however, should recognize that these tend to reward plaintiffs and their counsel based on the wealth of the injurer, creating an untoward lottery effect, rather than the risk-adjusted work of the counsel. Moreover, some split recovery schemes don’t do much to curtail the collusion risks detailed in the text. That said, there may be other options I haven’t thought of that avoid these risks, especially if states took some of the precautions advocated in the text.
guards 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.

C. Allocating Retributive Damages Chiefly to the State

By virtue of their punitive, educative, and preventive effects, retributive damages serve a public purpose in effectuating the CCR’s values described earlier in Part II. This public nature indicates why the defendant should pay retributive damages, but it does not yet explain who should receive the retributive damages awarded. Indeed, both the retributive and the cost-internalization functions are largely satisfied by extracting damages (or other relevant remedies) from the defendant. 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 compensation for their losses, though of course compensation could alternatively be achieved through social insurance schemes. Perhaps tort victims should additionally be compensated through “aggravated damages” for the dignity harm they have personally endured, if, for some reason, their compensatory damages did not properly encompass those harms. But if extra-compensatory damages are inflicted to achieve the public’s interest in retributive justice, then we must see 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 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 public 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.

In the world before the Supreme Court’s recent Philip Morris decision, 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 more likely undermine the state’s interest in ensuring a fair distribution of both compensatory and retributive damages for others, since a crippling retributive damages award might impair the availability of adequate compensation funds (or punitive damages) for future claimants. In light of the Court’s pro-

164 See Stephen D. Sugarman, Doing Away With Tort Law, 73 CAL. L. REV. 555 (1985). Sugarman’s preference for abolishing the tort system is consistent with retention of an improved punitive damages scheme. See id. at 660.
165 In principle, I have no objection to using the 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.
nouncement that punitive damages may not be calibrated based on the amounts of harm inflicted on other victims who are non-parties to the litigation, this reason is admittedly weaker as a justification for the state to take the lion’s share of retributive damages, especially in simple litigation where the defendant’s misconduct only hurts one party.

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 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 don’t 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 by which revenue may be raised efficiently and fairly. That efficiency is enhanced when most of the retributive damages awards go to the state because plaintiffs don’t plan on being victims of punitive damages awards and they, for the most part, have other incentives to pursue compensatory damages. 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.”

A second consideration is that 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).

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 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 alleging retributive damage. Moreover, either through a PAG alone or in the segmented strategy I endorsed earlier, a defendant’s misconduct is subject to retributive damages even if the victim doesn’t pursue retributive damages. These rules work to reduce Type II errors resulting from too much control the victims might have. And by tempering the power of the victim, the CCR also makes retributive damages less like revenge.

Indeed, if we recourse back to the previously mentioned differences between retribution and revenge, and apply those conceptual differences to retributive damages, we see that retributive damages, properly implemented, look quite like the kinds of conventional criminal fines used around the world. As I conceive them, retributive damages are subjected to proportionality 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 particular ways, such that certain ideas can be communicated through that coercion.

167 *Id.* at 1564.
168 *See supra* Part II.C.
Where appropriate, retributive damages might also be accompanied by other measures short of criminal sanctions such as injunctive relief.

To be sure, the plaintiff seeking retributive damages might feel vengeful, and might take pleasure in the suffering of the defendant, but, per the regime I have described, the state won’t punish the defendant by extracting the fine without its customary — or aspirational — concern for the free and equal nature of the offender. 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 not preclude the 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 fine, does. Specifically, a retributive damages action brought by one plaintiff does nothing to preclude the punishment of other defendants for similar wrongs; does nothing to preclude punishing the same defendant for other wrongs against other victims; and — through its information-generating effects about a defendant’s mens rea — actually facilitates the pursuit of criminal sanctions against the same defendant within the criminal justice system for the same wrongdoing to the plaintiff-victim as well as for other wrongs the defendant may have perpetrated against others. 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 is manifested also by seeking to ensure the defendant is not over-punished (generally and relative to similar offenders). Unlike the current regime, 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. 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. (Whether indictments should suffice is a harder issue.)

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169 The state should still be able to go after a defendant for criminal liability so it can extract additional fines or impose other punishments and have a more severe stigma attach as a result of a criminal conviction.

170 My sense is that arraignments, where defendants are told of the charges and enter a plea of guilty or not guilty, would be an appropriate time because at that point the state is taking a substantial step toward prosecution. Since defendants shouldn’t have to fight a two-front battle at the same time, the government should have the opportunity to speak first with respect to retributive punishment. Compare John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 440 (1981) (arguing that punitive damag-
Additionally, this structure reflects the CCR’s concern for equality, proportionality and even-handedness. Across the realm of cases, state-drafted guidelines and commentary are used to inform judicial or juries’ deliberations about the appropriate level of the defendant’s reprehensibility. The goal behind this is to reduce Type I over-punishment and Type II under-punishment problems (compared to others) because the guidelines will give juries a far more effective way to avoid the ad hoc determinations that afflict the common law method of portioning punitive damages. 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, by restricting plaintiff’s share of the punitive damages award to a flat “finder’s fee,” we avoid creating lottery effects or windfalls to plaintiffs lucky enough to have a wealthy injurer. Last, the sanctions imposed under a retributive damages scheme communicates 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 won’t receive windfalls because they have the good fortune of a wealthy injurer and defendants shouldn’t receive penalty discounts based on the good fortune of having a low-earning victim instead of a high-earning one.

Last, the CCR’s concerns for accuracy and modesty are reflected in the procedural and substantive safeguards defendants would be entitled to under a retributive damages scheme: a right to counsel, judicial review, and a higher burden of proof (clear and convincing evidence), and a right to credit retributive damages amounts against subsequent criminal sanctions would protect defendants from risks of duplicative or inaccurate punishment (Type I errors). Defendants should enjoy certain procedural safeguards that elevate our confidence levels above what’s necessary for compensatory damages but below what’s expected for full-blown criminal sanctions. Moreover, a concern for modesty would entail limiting and structuring retributive damages payments so they operate as an intermediate sanction, and hence, won’t jeopardize the ability of the defendant 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. For instance, notwithstanding its effectiveness in explaining part of the rationale for punitive damages, Galanter and Luban’s poetic justice account is unpersuasive in defending the lack of procedural safeguards for defendants, the imposition of punishment for harms occurring to non-parties to the litigation, and the extension of great deference to a jury’s ad hoc determination of punitive damages. What we really need is prosaic justice, not poetic justice.

Moreover, like Professors Zipursky 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. Last, Professors Sebok and Galanter and Luban exhibit hostility to punitive damages used to pursue cost-internalization, even though there is no principled reason that extra-compensatory damages could not be struc-

\[171\] I say more in the subsequent article which addresses procedural safeguards.

\[172\] See Galanter & Luban, supra note 12; Sebok, supra note 12.
tured to allow a state to pursue retributive damages alongside remedies designed to pursue other purposes, including both cost-internalization and compensating victims for uncompensated harms to their dignity.

It goes without saying that the entire design of a retributive damages scheme needs some explanation for why it would be useful beyond mere reliance on the tort system to provide compensation for victims and the criminal justice system to infict retribution against criminals. The next Part tries to explain what makes retributive damages, as I’ve described them in this Part, attractive as an intermediate sanction falling between compensatory damages and criminal penalties.

IV. MOTIVATING RETRIBUTIVE DAMAGES

Knowing what they look like, we can now try to explain the affirmative rationale for retributive damages awards. 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. Last, in Section D, I explain why retributive damages should remain a supplement to, rather than a substitute for, traditional 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. In such situations, retributive damages proceedings might generate relevant information (specifically information related to a defendant’s mens rea) for possible subsequent prosecution efforts against the defendant or related parties by the state that would not be made available by relying on compensatory damages suits alone.

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 or corporate misconduct are harder to investigate because, compared to

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street crime, they are both more private (in the sense of obscured from view) and more complex.\textsuperscript{174}

In terms of \textit{privacy}, the misconduct perpetrated by the wealthy and powerful occurs largely indoors, and as Professor Bill Stuntz, among others, noted various criminal procedure doctrines protect privacy.\textsuperscript{175} 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 entities and persons will more likely be obscured relative to the misconduct of those lacking substantial resources and operating in plain view of others.

Additionally, investigation of misconduct by wealthy and powerful persons and entities is impeded by the \textit{complexity} of the criminal 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's sometimes difficult to unwind them from an investigative standpoint and ultimately explain them to a jury.”\textsuperscript{176} And as Professors Galanter and Luban have cogently explained, there are many times when reliance upon state-initiated investigations is inadequate to the task of ferreting out the type of malfeasance that passes the reprehensibility threshold associated with punitive damages.\textsuperscript{177}

To see how this pattern unfolds, consider the difficulty of detecting malfeasance in the context of manufacturing activity.\textsuperscript{178} Imagine a defendant manufactures a product and in the course of its design makes various calculations not to disclose substantial hazards that might be associated with its design.\textsuperscript{179} Consequently, various users are injured across the country. The local and state police are unlikely to detect problems with the product outside their locality, at least initially. Moreover, the law enforcement authorities will have no reason to suspect that there were culpable decisions made at the company headquarters, often in another state and outside their jurisdiction. As Professors Galanter and Luban describe the problem,

Even federal authorities will have no reason to believe that anything other than a typical series of \textit{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 re-


\textsuperscript{175} See William J. Stuntz, \textit{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.”).

\textsuperscript{176} Quoted in Brown, \textit{supra} note 174, at n.16.

\textsuperscript{177} Galanter & Luban, \textit{supra} note 12, at 1441.

\textsuperscript{178} David G. Owen, \textit{Civil Punishment and the Public Good}, 56 S. CAL. L. REV. 103, 104 n.4 (1982) (criminal law coverage is “spotty, to say the least” in some areas and “manufacturing decisions” are “largely beyond the reach of the criminal law”).

\textsuperscript{179} For examples of this, see KOENIG & RUSTAD, \textit{supra} note 16, at 82-101; see also David G. Owen, \textit{Punitive Damages in Products Liability Litigation}, 74 MICH. L. REV. 1257 (1976).
quire 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, nor would we be likely to welcome a federal agency that is such a nosy intruder.\textsuperscript{180}

As Galanter and Luban observed about Ford’s failure to recall the Pinto,\textsuperscript{181} “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.”\textsuperscript{182}

Similar difficulties occurred in the aftermath of the Catholic clergy sex abuse scandals, where Church officials suppressed vital information about the misconduct of its priests.\textsuperscript{183} In various jurisdictions where the Catholic Church had close relationships with local prosecutors and police officials, public investigation into the Church’s role was stymied because of affinities between officials and the Church.\textsuperscript{184} As described by Professor Lytton, only after dogged use of discovery and other private litigation tactics were plaintiffs’ attorneys able to reveal the extent of the complicity by higher officials within the Church. In many situations, only once private litigants shared their information to the media did law enforcement and state legislatures grapple with the misconduct they were otherwise ignoring or downplaying.\textsuperscript{185}

These examples illustrate how complex and private misconduct by wealthy or powerful individuals or entities can be quite hard to detect in the course of activity both with-

\textsuperscript{180} Galanter & Luban, supra note 12, at 1441.

\textsuperscript{181} See Grimshaw v. Ford, 174 Cal. Rptr. 348, 383-84 (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, 1020-22 (1991) (addressing misconceptions about Ford documents in the Pinto case).

\textsuperscript{182} Galanter & Luban, supra note 12 at 1441.

\textsuperscript{183} See Timothy Lytton, Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law, 39 CONN. L. REV. 809, 867-879 (2007).

\textsuperscript{184} PHILIP JENKINS, PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS 14 (2001) (“Before 1984, there was a conspicuous lack of public agencies with a 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.”).

\textsuperscript{185} See Lytton, supra note 183, at 867-879.
in and across jurisdictions. Moreover, relying exclusively on public agencies to detect this misconduct is an inadequate strategy in a world governed by non-ideal conditions of democratic deliberation and scarce social resources. Indeed, in a regulatory environment often affected by agency capture, we should probably expect spotty government inspections. 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.” Indeed, even when government forces desire investigations, access to vital information may be impeded or blocked altogether by competent white-collar criminal defense lawyering. Needless to say, the threat 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 unlikely, though not impossible, that a cadre of state investigators will effectively undertake national research—and then file suit at each of the state levels.

Although such coordination efforts can happen through the promise of compensatory damages alone or in a class action, there are two reasons to think retributive damages as I’ve described them are be an important supplemental tactic to achieve adequate detection and punishment of private or complex misconduct. First, with compensatory damages alone, the lawyers are not incentivized to inquire into the aspects of the defendants’

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186 Consider the extraordinary resources needed to prosecute those involved with the Enron, Tyco, or WorldCom frauds in the criminal context. Much of the government’s case emerged only after private actors pored through reams of financial statements to see where the misconduct might have occurred.

187 Cf. Abel, supra note 55, at 536-46 (disorganized individuals lose to organized interests in making of tort law). See generally 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.”); George Stigler, The Economic Theory of Regulation, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) (“A central thesis of this paper is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.”).


190 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).

191 Galanter & Luban, supra note 12, at 1441. Consider the involvement of states in tobacco litigation, which largely followed the investigative efforts of private litigation.

192 KOENIG & RUSTAD, supra note 16, at 176 (the “tort system ensures that Americans need not depend solely upon the government to enforce product safety”).
misconduct that reveals a reprehensible state of mind or mens rea. Satisfying the elements of a case that require mens rea is, on average, more expensive to pursue than satisfying the elements of a case that need only show negligence or strict liability. Without fees for retributive damages available, lawyers may decide to settle cases that involve culpable misconduct too cheaply. 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 malevolent defendant separately. The bill for the lawyers should not be conflated with the harms to the plaintiffs.

Because inducing public investigation of wrongdoing against financially formidable persons or entities within society is sometimes difficult to achieve, \footnote{See Brown, supra note 174, at 524. But cf. Edward Glaeser et al., What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes, 2 Am. L. & Econ. Rev. 259, 288 (2000) (evidence that federal prosecutors single out high-status defendants in drug cases for reputational purposes).} the prospect of obtaining (fees and rewards for) retributive damages motivates plaintiffs and lawyers willing and financially able to ferret out whether harms or risks were \textit{culpably} undertaken. In short, retributive damages may work as an effective supplemental strategy of law enforcement, a form of \textit{sousveillance} against the rich and powerful who might otherwise evade the \textit{surveillance} undertaken by public law enforcement agencies.

2. Obstacles to Prosecuting Misconduct

Beyond simple investigation, we must also consider the comparative difficulty of \textit{prosecuting} crimes (or claims generally) against wealthy persons or entities. \footnote{Cf. Mathias v. Accor Economy Lodging Inc., 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.) (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...”).} Such “white-collar” defendants often have excellent counsel, and, conventional wisdom to the contrary, are often able to overwhelm the relatively scarce resources of the prosecution, especially at the state level where the bulk of wrongdoing is prosecuted and punished. \footnote{See supra note 190.} 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. \footnote{See \textit{Green}, supra note 173, at 28-29.} As Galanter and Luban have noted, a variety of factors help make prosecuting white-collar conduct 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 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.\textsuperscript{197}

To be sure, the odds for federal prosecutors have substantially improved against corporations and executives, particularly in recent years with respect to securities fraud.\textsuperscript{198} Prosecutors now routinely use threats of conspiracy prosecutions against low-level executives to secure cooperating witnesses, and through those witnesses, they can generate copious amounts of information about the more senior officials and the misconduct within the corporate bureaucracy.\textsuperscript{199} 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.\textsuperscript{200} Taken together, these constitute increasingly powerful incentives for persons or entities to share information about potential culpability.

In response, critics have sounded alarms over the sweeping effects of such apparent over-criminalization and over-enforcement, suggesting instead that much of this misconduct is better left addressed through the civil, not the criminal, system.\textsuperscript{201} Unfortunately, the impediments to effective redress in the civil system are difficult to surmount,\textsuperscript{202} especially in a world without ready access to remedies like retributive damages. The result, according to Professor Christine Hurt, is a criminal system that creates too much risk of severely punishing conduct that is not all that egregious while at the same time failing to ensure adequate redress against those whose actions warrant, at the very least, some form of intermediate sanction.\textsuperscript{203} In other words, it’s a system with too great a


\textsuperscript{198} Since 2002, the federal government has established the Corporate Fraud Task Force; additionally, the Sarbanes-Oxley legislation both enhanced penalties under federal sentencing law for existing crimes of corporate misconduct as well as created new criminal legislation. \textit{See} Kathleen F. Brickey, \textit{In Enron’s Wake: Corporate Executives on Trial}, 96 J. CRIM. L. & CRIMINOLOGY 397, 419 (2006); \textit{see also} Christine Hurt, \textit{The Undercivilization of Corporate Law} at 2, available at http://ssrn.com/abstract=965871.

\textsuperscript{199} Hurt, \textit{supra} note 198, at 54 (value to government of charging conspiracy “cannot be overstated”).


\textsuperscript{202} Hurt, \textit{supra} note 198 at 2 (“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.”).

\textsuperscript{203} \textit{Id.} at 4.}
risk of Type I errors in the criminal context and too great a risk of Type II errors in the civil system.\textsuperscript{204}

3. The Low/High Problem With Criminal Penalties As Applied

The apparent imbalance espied by Professor Hurt suggests that retributive damages, if properly designed, might also provide a way around what might be thought of the “low/high” problem as it applies especially to corporate criminal activity. As various scholars have demonstrated, non-custodial criminal penalties against persons and entities have in the past tended to be extremely low, often rendering them mere “costs of doing business” rather than signals that the conduct in question should be categorically prohibited.\textsuperscript{205} Additionally, notwithstanding the social stigma typically attaching to criminal convictions, individuals within corporations themselves may feel somewhat insensitive to that stigma because responsibility for particular misconduct is dispersed across persons, place and 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, railroads in Wisconsin repeatedly ignored their lack of compliance with rules necessitating repairs that could cause fires to brush that had not been removed from the area around the tracks. 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.\textsuperscript{206} Similar examples abound.\textsuperscript{207} As alluded to earlier, legislatures have responded selectively to the problem of low penalties in recent years.\textsuperscript{208} In the federal context, the focus of these high penalties has been on preventing and punishing securities fraud.

But with these high criminal penalties lies an additional problem, related to concerns of proportionality: overkill in the form of disproportionate punishment.\textsuperscript{209} Critics of corporate criminal liability have raised concerns about the danger that indictments against the corporation pose: in particular, they might destroy the entire company and the jobs of innocent persons instead of focusing on the malfeasance of the bad actors or the failure of

\textsuperscript{204} Id.

\textsuperscript{205} Galanter & Luban, supra note 12, at 1443 (citing Etzioni’s study).


\textsuperscript{208} For instance, the federal government only introduced sentencing guidelines for organizations in 1991. Before the sentencing guidelines were introduced, most federal statutes didn’t 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). The majority of jurisdictions, however, still retain indeterminate sentencing schemes and/or antiquated criminal codes that don’t address differences across entities or between individuals and entities.

\textsuperscript{209} Indeed, some scholars have concluded that the corporate death penalty might, under certain conditions, actually lead to more perilous risk-taking, rather than less. See Assaf Hamdani & Alon Klement, Does the Corporate Death Penalty Deter? (draft on file with author).
the managers and owners to adequately control the bad actors. Consequently, 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.

B. What Might Retributive Damages Achieve Generally?

This section explains why retributive damages might be a socially beneficial policy prescription broadly speaking. In light of the account in Part II, it’s not especially hard to see why we might establish a system of criminal law and punishment to serve these purposes. It is a bit harder to see why we might additionally use a civil system to impose retributive damages. 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? Retributive damages are not necessarily a more efficient sanction, but they may be appealing for reasons described below.

1. Retributive Justice in the Real World

Making retributive damages available provides society 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)

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210 Joseph Grundfest, Over Before It Started, N.Y. TIMES, June 14, 2005, at A23 (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.”). 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) (conviction of the firm at trial led to 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. Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) (finding erroneous jury instructions and reversing conviction).

211 Galanter & Luban, supra note 102, at 1443-44; see 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).


213 With apologies to Michael Cahill. See supra note 85.
criminal penalties are usually prosecuted exclusively by a state attorney, defendants in American criminal actions are entitled to a richer panoply of procedural safeguards, criminal penalties often lead to a host of collateral sanctions, and 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 in the absence of these factors. Of course, retributive damages are still a coercive condemnatory sanction that sets defendants back in a position worse than where they were prior to the misconduct; thus, they do serve to effectuate retributive justice. But those differences render retributive damages an intermediate sanction, lying between compensatory damages and criminal penalties.

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 seek bring actions against malefactors whose misdeeds have failed to trigger criminal prosecution because of more urgent priorities in prosecutors’ offices. The bare reality is that prosecutors typically don’t have the resources to investigate and prosecute all the criminal conduct that arises. Thus the tort system serves as a corrective to public 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 and avoid the sense of impunidad that would be communicated to offenders and expressed to the public), a retributive damages structure is a way of dealing with scarce public resources that must be allocated among a variety of compelling 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: access to counsel, an intermediate standard of proof (i.e., clear and convincing evidence), protections against duplicative punishment for the same misconduct toward the same victim; and guidelines that both inform and limit the amount of penalties a defendant faces on account of its misconduct.

2. Proportionality

A second general rationale for a retributive damages scheme is that it might better facilitate the promotion of proportional sanctioning between misconduct and penalties. Re-
tributivists and others might want a softer sanction for misconduct that is not worthy of being deemed or condemned in the strongest terms as “criminal.” Allowing for retributive damages facilitates that goal, in particular because incarceration and collateral sanctions (e.g., disenfranchisement, residency restrictions) would not attach to the award of retributive damages under this proposal. Thus, in some cases, retributive damages might be a penalty that seems suitable to the comparatively less severe wrongdoing at hand. Because of the collateral consequences ensuing from a criminal conviction, even a criminal fine might be viewed as too onerous a penalty for certain misconduct. 218 Thus, 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 presumably lower level of condemnation communicated with 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 resources, such as those discussed immediately above.

3. Encouraging Market Transactions

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 market transactions with respect to misconduct that violates property rules, that is, those rules which require parties to negotiate over the transfer of legal entitlements prior to their exchange. 219 When a defendant knows he has to pay more in excess of its gain or the harm caused – and retributive damages will always exceed more than the greater of

218 See Christine Hurt, supra note 198, at 96.
219 See Polinsky & Shavell, supra note 4, at 945. 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. But by doing so, the rationale of encouraging market transactions requires that property rules be viewed with respect rather than the indifference permitting someone to violate now so long as he agrees to pay later if the victim chooses to sue. Damages that force only cost-internalization do little to encourage market transactions because defendants would be relatively indifferent to when those costs are internalized, assuming relatively low transaction costs.
these two figures – a defendant in X Corp’s position should prefer to bargain. Unsurprisingly, this is part of the logic behind some criminal penalties too.

This 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. Second, to the extent that fewer potential defendants take rights (and possibly pay for them ex post through the tort system), it helps eliminate the wasteful precautions associated with trying to prevent mistreatment of one’s rights. At the same time, retributive damages might perform this task more cheaply or effectively than use of criminal sanctions, since there are fewer deleterious consequences to the defendant and fewer costs associated with enforcing the rights of criminal defendants. If we want to encourage market transactions at a cheaper social cost than criminal penalties, which often have socially burdensome and problematic collateral sanctions associated with them, retributive damages might provide a superior tool to do so, at least in contexts involving violation of property rules.

C. The Comparative Benefits of Retributive Damages

As Nietzsche pointed out, punishment’s utilities are overdetermined. I take the central benefit of retributive damages to be the fact 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 hypothesis, otherwise be on the agenda of the prosecutor’s office but, because of difficulties in detecting the private and complex wrongdoing, escape such condign punishment. Retributive damages schemes also: facilitate legal condemnation for wrongdoing that is not on a prose-

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220 If damages were set simply at the level necessary for cost internalization, then that amount would not convey any condemnation of the malicious or reckless wrongdoing and would not discourage violations of property rights.


222 See generally Posner, supra note 223.

223 Keith N. Hylton, Punitive Damages and the Economic Theory of Penalties, 87 GEO. L.J. 421 (1998) (advancing gain-stripping theory of punitive damages when defendant’s activity is illicit); Polinsky & Shavell, supra note 4, 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.”).


225 This rationale has its limits. It does not apply to inalienability rules or to situations where extra-compensatory damages are for harms which are hidden or covered up.

cutor’s office agenda because of pressing budget constraints and political responsibilities (or improper external pressures); afford more granular proportionality between misconduct and penalty and thus avoid overkill by use of criminal indictments against corporate entities; and encourage market transactions and concomitantly reduce socially wasteful expenditures on preventions 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.
### Comparing Retributive Damages to Other Remedies

<table>
<thead>
<tr>
<th>Purpose -</th>
<th>Type I error -</th>
<th>Type II error -</th>
<th>Incentive to private party to detect and reveal culpable misconduct By Wealthy and Power-</th>
<th>Facilitates Subsequent Prosecution</th>
<th>Incentive for Righting Small Wrongs</th>
<th>Proportionality</th>
<th>Encourage Market Transactions for Violations of Property Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>Traditional Criminal Sanction Facilitated Through Private Initiative</td>
<td>Yes (all procedural protections apply)</td>
<td>Yes, because full sanction is extended (unless victims influence prosecutorial discretion)</td>
<td>No.</td>
<td>Not applicable</td>
<td>Not likely (b/c of resource constraints)</td>
<td>In theory, yes, but possibly too low or too high; problems of unknown and onerous collateral sanctions</td>
<td>Yes</td>
</tr>
<tr>
<td>Retributive Damages</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Possibly alone or through class actions depending on structure for</td>
<td>Yes.</td>
<td>Yes</td>
</tr>
<tr>
<td>Compensatory Damages (single case)</td>
<td>No, because no inquiry into mens rea; no procedural safeguards</td>
<td>No, b/c no judgment on mens rea; under-punishment possible because no jury</td>
<td>No b/c no mens rea</td>
<td>No b/c no mens rea</td>
<td>Not really, because no lawyers will take case absent fee shifting</td>
<td>Focus is on harm only, not wrong, so proportionality is not a material concern</td>
<td>No</td>
</tr>
<tr>
<td>Cost Internalization (via evasion reciprocal formula)</td>
<td>No because no procedural safeguards; no inquiry into mens rea</td>
<td>No, because no mens rea inquiry is necessary</td>
<td>No b/c no mens rea inquiry is necessary</td>
<td>No b/c no need for proof of mens rea</td>
<td>Yes, through class actions, but no heightened penalties for mens</td>
<td>Proportional only to harms, not wrongs</td>
<td>No</td>
</tr>
<tr>
<td>Extra-compensatory damages for Victim-Vindication (Compensating Dignity Harms)</td>
<td>No, because no procedural safeguards</td>
<td>Arguably yes to condemnation. But money goes to plaintiff, not state; no equality in punishment measures; no public responsibility b/c defendants can secretly</td>
<td>Not necessarily since plaintiffs can be &quot;bribed&quot;; plaintiffs can choose not to pursue misconduct too</td>
<td>Yes</td>
<td>Perhaps</td>
<td>Proportionality is basically immaterial</td>
<td>Yes, though b/c plaintiffs can settle, they might settle too low</td>
</tr>
</tbody>
</table>

As one can see, 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. That de-
prives the state of knowledge possibly relevant to imposing retribution on wrongdoers and issues no judgment of condemnation. From an economic perspective, compensatory damages simply price behavior rather than punish it, allowing defendants to undertake all sorts of misconduct if they are willing to pay damages. If extra-compensatory damages were awarded on the grounds of cost-internalization alone, they would suffer from the same problem. They would leave the defendant 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, on a retributivist rationale, when the defendant’s misconduct evinces grossly insufficient care for the interests and well-being of others.

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 dignity 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 seek or not seek such damages; Type II errors are more likely, since the victim-vindication model doesn’t purport to restrict the plaintiff from either forbearing from seeking punitive damages or to settle at an amount lower than what is necessary to signal to the defendant to forbear from such misconduct in the future. Moreover, proponents of victim-vindication models haven’t embraced any real constraints on jury discretion, which gives awards of punitive damages a very ad hoc veneer.227

Importantly, while retributive damages have some distinctive advantages, there is no good reason to doubt that they can interact well with cost-internalization strategies (like class actions for compensatory damages) to avoid working at cross-purposes or duplication. While I leave that proposition to defend in the next article, 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.

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 the project of 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. Some of the benefits described above might arise if we had statutes that permitted private citizens to serve as prosecutors under the criminal law, or if we had mechanisms that allowed private citizens to compel prosecutions in the criminal justice system, or at least forced prosecutors to give reasons for declining to prosecute certain actions.228

227 But see supra note 57.
Without arguing that retributive damages would be a superior strategy to all 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 expertise and the disciplinary opportunities to keep the prosecutor in check, facts that occur as a result of the government serving as a repeat player in the criminal justice system. There would also be a risk that the criminal justice system’s moral credibility would be undermined (further?) since only those with time and resources would serve to prosecute claims and that would systematically disadvantage the poor.

If we allowed a private right of action under the criminal law to supplement rather than supplant the government’s work, other problems unfold: there might be races to the courthouse between public and private representatives to avoid double jeopardy concerns; government prosecutors would have less incentive to do its job if the private sector could wholly displace it; and, most importantly, we might have a higher error rate of both Type I and Type II kinds if private citizens’ or their hired agents couldn’t be counted on to do their work competently, diligently, and fairly in large part because they were not repeat players and because they could reasonably be viewed as more biased (whether consciously or unconsciously) against possible defendants. It would also be hard to imagine how one privatizes prosecutions without privatizing the investigative function of police too.

A more modest proposal would be to allow private citizens to lodge complaints or request explanations for prosecutorial inactivity, but that’s something that already exists in a few jurisdictions, and fits compatibly with our current regime and a scheme of retributive damages. Another alternative, which some have suggested, 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 retributive damages actions seek to achieve. 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 the use of a jury trial and/or judge. Moreover, there might be some efficiency gains by having retributive damages actions ride piggyback to the tort system. If we relied on a public regulatory system to do some of the work done by punitive damages now, it might require the development of a whole new governmental apparatus. Indeed, a public regulatory system, at least as some of its advocates would have it, also requires the introduction of large social insurance schemes 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, the basic structure for retributive damages already exists within our extant tort law system and would require just a few modifications. Indeed, if a state

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229 Such a proposal would be not be constitutionally required, see *Heckler v. Chaney*, 470 U.S. 821 (1985), but there would be nothing unconstitutional if a state required reason-giving of its prosecutorial staff for its declinations.

230 E.g., Sugarman, *supra* note 164.
wanted to be serious about retributive damages as a fair scheme of imposing an interme-
diate sanction, there are only a handful of critical and relatively straightforward steps it
must take. First, pass a statute that says retributive damages will be available for X, Y and
Z kinds of misconduct. Second, declare which, if any, of these wrongs (just X and Y?) are
enforceable by private attorneys general after the government has declined to sue. Next,
indicate that all suits must initially allege retributive damages in the complaint and that all
settlements will have to be approved by the court and the attorney general’s relevant office.
Then, devise guidelines and commentary to track reprehensibility and assess what percen-
tages of wealth or net value will correspond.231 Fifth, draft instructions for juries on retri-
butive damages inspired by the instructions appended to this article. Last, allow defendants to
credit retributive damages against any subsequent criminal penalties.

V. SOME CONSTITUTIONAL IMPLICATIONS

There are a variety of constitutional questions that might arise in response to retri-
butive damages. Some of these questions I answer in the next installment of this project,
where I address in greater detail the procedural safeguards for defendants. That said, I want
to address constitutional issues that may arise regarding the structure of retributive damag-
es scheme described in Part III.

First, if a state chose to adopt a structure of retributive damages like the one de-
fended here, that structure and the awards of retributive damages arising under it would be
entitled, I believe, to far more deference from the Supreme Court than is normally extended
to awards of punitive damages in common law jurisdictions. After all, the retributive dam-
ages structure extends far more granular attention to the concerns of even-handedness, pre-
dictability, 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 the values informing interpretation of both procedural and substantive due process. Even
if the Court refused to credit a careful legislative scheme of retributive damages with sub-
stantial deference, in most cases, the outcomes from the retributive damages scheme I’ve
described are sure to be compatible with the Court’s procedural due process cases and are
very likely to be compatible with the Supreme Court’s excessiveness review under subs-
stantive due process or even under the Eighth Amendment’s Excessive Fines Clause.

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 defen-
dant based on harms to strangers to the litigation (per Philip Morris).232

As to excessiveness review,233 the Court places primary importance on the degree
of reprehensibility of the defendant’s misconduct. As described in Part III.B, reprehensibil-

231 See supra note 134.
232 See Part I.A. Based on the Court’s acceptance of sentencing enhancements for recidivism generally, see Ewing v. California, 538 U. S. 11 (2003), it is unlikely that a modest enhancement based on past adjudicated conduct would run afoul of Philip Morris, where the Court raised concerns that the defendant may have defenses against other potential claimants.
233 Because retributive damages are effectively fines, courts may think excessiveness re-
view for retributive damages is better done under the Excessive Fines Clause of the Eighth
Amendment. But see supra note 34.
ity is the driving force behind the amount of retributive damages also. But the Court, after *State Farm*, also requires consideration of the “disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award”; presumes that double digit ratios between punitive damages and compensatory damages are incompatible with due process; and states that the courts consider “the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.”

The most salient problem that comes to mind regards the potential for the retributive damages scheme to result in very high amounts of retributive damages awarded against very wealthy persons or entities who commit reprehensible conduct of the sort that might trigger a ten percent penalty. 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.” In other words, the multi-billion dollar award, when framed as a dollar amount, rather than as a percentage of net wealth, could, after *BMW v. Gore*, raise the proverbial judicial eyebrow.

One response to this problem is to note that those situations simply won’t occur too often, and if they do, these results 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 net wealth or value than what I’ve suggested under retributive damages. Moreover, because the legislature has passed a retributive damages scheme, substantial deference should be extended to outcomes like these. Another and 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.

A more intellectually serious response however would take issue with the Court’s “disparity” criterion altogether. In *State Farm*, a majority of the Court declared an affinity for the presumptive use of single-digit multipliers of compensatory damages. This presumption, as applied to retributive damages, is highly problematic. Since the reprehensibility analysis drives retributive damages and constitutional due process review, the real constitutional problem for the retributive damages regime is the disparity criterion, which asks whether there’s a reasonable relationship between the amount of harm or potential harm and the penalty imposed. Stated at that level of generality, and in conjunction with the Court’s emphasis on reprehensibility, there is likely to be


235 The empirical data shows that punitive damages awards are rarely awarded and upheld, which, of course, is only a partially useful predictor of their future frequency if the retributive damages scheme is adopted. See, e.g., Vidmar Amici Brief, *supra* note 9, at 4-8.

little friction between the Court’s punitive damages jurisprudence and the retributive damages scheme defended here.

But two problems come to mind: first, courts often uncritically conflate the harm or potential harm to the plaintiff with the compensatory damages actually paid.237 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 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. In those situations, as explained in Part III.B.4, using compensatory damages as a benchmark for measuring retributive damages would create a signal of inequality of human worth since compensatory damages are often keyed to one’s economic status in life, not one’s political status wherein one bears the privileges and burdens of equal citizenship.238 It’s 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’s 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 underdetermine 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’re in the business of reasoning out extra-compensatory damages to reach a non-absurd result, we should be able to offer relevant reasons for our decisions. The current doctrine is substantially lacking one, especially because the cost-internalization proponents also criticize the use of compensatory damages anchors.239 Notwithstanding the fact that there is little justification for insisting on a relationship between compensatory damages and retribution or deterrence, some courts have uncritically fastened to it.240

On top of the problematic use of compensatory damages, the disparity analysis is undermined by the Court’s preference for a presumption of a single digit multiplier, which may 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, the preliminary evidence supports this concern.241

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238 Moreover, from a cost-internalization perspective, what matters is whether there’s a probability of evading compensating victims for the harms caused, not the amount of compensatory damages. See Polinsky & Shavell, supra note 3. See also Hylton, supra note 6, at 454 (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.”).

239 See, e.g., Polinsky and Shavell, supra note 4; Galligan, supra note 50.

240 E.g., Motorola Credit Corp. v. Uzan, 509 F.3d 74 (2d Cir. 2007) (cursory examination of disparity in action for fraud where ratio was less than 1-1); L-3 Commc’ns Corp. v. OSI Systems, Inc., 2007 U.S. Dist. LEXIS 12701 (S.D.N.Y. 2007) (analysis of a 2.8-1 ratio essentially limited to whether the punitive award “shock[ed] the conscience of the Court”).

241 See, e.g., Morris v. Flaig, 511 F. Supp. 2d 282 (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 defen-
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. Indeed one might wonder just how much notice is afforded when juries can basically choose virtually any multiplier less than 10.

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 apply than the determination currently made by juries, which judges subsequently review in an ad hoc manner. More importantly, the retributive damages structure provides far more particular notice to defendants about their potential liability than is provided for by the current regime of punitive damages regulation, wherein most assessments of punitive damages will receive a pass on scrutiny as long as it is nine times or less than the amount of compensatory damages.

Thus, especially in light of the Court’s stated aversion to regulating extraordinary criminal punishments against defendants, there would be little basis for objecting to civil penalties that would ensure the defendant did not profit from his action and that removed no more than (say) 10% of his wealth and would do so only in a manner where the defendant enjoyed the benefit of various procedural safeguards. Recall that retributive damages also abide by an intent requirement by which a defendant should be given the opportuni-
ty to internalize the values of retributive justice. Thus, if retributive damages were set so high as to economically destroy or bankrupt a defendant, that would go too far – at least from the perspective that views retributive damages’ purpose as an intermediate sanction, rather than one that results from a full-fledged criminal prosecution.

In sum, it is doubtful that the retributive damages structure is constitutionally infirm. At worst, and assuming the Court extended no special deference to this intricate scheme of intermediate sanctions, it may mean that in certain cases, the jury’s award of an amount of punitive damages is deemed excessive, a determination that applies now in jurisdictions that apply a whole range of structures and procedures, but which offer far less in the way of notice and even-handedness than the structure I’ve advocated. And, as I intimated earlier, a jurisdiction that took pains to structure the distribution of punitive damages in the careful manner advocated here would have, by my lights, done at least what is necessary to survive constitutional scrutiny under the Due Process Clause.

Indeed, in light of the fact that the Court has in the past allowed horrifically long sentences to be imposed on those whose misconduct is far less egregious than, say, Philip Morris’ conduct was, the structure of retributive damages—which would involve steep but relatively difficult to obtain awards of retributive damages—is a decent way of addressing the perverse approach the Court has adopted when portioning punishment over the last fifteen years: i.e., with substantial excessiveness review of punitive damages and very limited review of excessiveness in the imposition of prison incarceration.246

The last point about constitutional law worth mentioning here focuses on the defendant’s wealth. 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 wealth in trying to figure an amount of punitive damages that will adequately punish and deter the defendant.247 The Supreme Court has not held that a defendant’s wealth cannot be factored into the amount of punitive damages. Rather, what the Court has said is that wealthy defendants are just as entitled to fair notice as “impecunious individuals.”248 The structure of retributive damages discussed in Part III provides constitutionally adequate notice designed to communicate that sanctions for reckless or malicious wrongdoing won’t be mere luxury taxes on the rich.249

CONCLUSION

246 See id.
247 JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS § 3940 (2007) (court may instruct a jury in a non-bifurcated trial that it can consider the defendant’s financial condition in figuring the amount of punitive damages.); FLORIDA STANDARD JURY INSTRUCTIONS (CIVIL) § 2.d.2 (2007) (“You should consider the following: . . . defendant’s financial resources.”); NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 2:278 (“You may also consider the [defendant’s] financial condition and the impact your punitive damages award will have on [him/her].”)
249 CGB Occupational Therapy, Inc. v. RHA Health Srvs., 499 F.3d 184, 192 (3d Cir. 2007) (“Wealth is 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.”); Mathias, 347 F.3d at 677.
Structured properly, retributive damages awards are a pragmatic form of redress against anti-social misconduct, especially when undertaken by wealthy and powerful entities. In this respect, there’s a real synergy between retributive damages and the work of “social justice” tort theorists. On the other hand, a dose of retributive damages is strong medicine, and it needs to be distributed far more sensitively to the values of equality, predictability, and modesty than the careless way punitive damages are currently awarded and reviewed by courts.

This Article, the first of a trilogy, 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, the 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 relevant proportions. 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. In the companion articles to this one, I take up that challenge.

250 See supra note 17.
APPENDIX: INSTRUCTIONS FOR ASSESSING EXTRA-COMPENSATORY DAMAGES

What follows is a distillation of the principal conclusions of this punitive damages project, which could be used to craft jury instructions. These instructions are designed to take into account the Supreme Court’s recent decision in *Philip Morris*.251

* * *

In considering the amount of extra-compensatory damages on the defendant, you should determine whether three separate dollar 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 compensation for the plaintiff’s personal dignity 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 its conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’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 actor’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.

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 that should help you determine where on a scale of 1 to 20, with 20 being the most reprehensible and 1 being the least, the defendant’s misconduct lies. The chart tells you whether to add points to the scale

251 These instructions are a substantially modified version of the kind found in Professor Polinsky and Shavell’s article, *supra* note 4. In some places, having mostly to do with cost internalization, I expressly borrow the language from their proposed jury instructions.
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 may also be your job to determine the wealth of the defendant, or its net value if the defendant is an entity.] It is not your job to assess how much harm the defendant’s misconduct has caused to society or other non-parties to this litigation. This finding should also be accompanied by an explanation of what 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 provide services necessary for victims and offender re-entry into society.] Second, the purpose of retributive damages is to make the defendant worse off than it would have been had it not undertaken its malicious or reckless misconduct. Thus, when determining the level of reprehensibility, do not consider the amount of other damages (whether compensatory, aggravated, or augmented, 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 taken 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 other 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).
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 other non-economic damages endured by 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 compensate the plaintiff for the injury to the plaintiff’s personal dignity. Injuries to personal dignity, as understood here, are injuries where the defendant specifically targeted its misconduct toward this particular plaintiff. If the defendant is a corporation, consider whether the injury to the plaintiff was part of a larger course of conduct or whether it was 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. Augmented Damages for Cost Internalization

In some cases, extra-compensatory damages are desirable to serve the function of making sure that defendants do not impose costs on others that the defendants do not pay for. 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 who are not parties to this litigation. You may only consider what harm or potential harm the defendant’s conduct caused to the plaintiff(s) in this case. Other possible victims of the defendant’s misconduct may bring their own suits.

Augmented damages fulfill the objective of making sure the defendant pays for the injuries it causes to the plaintiffs in the litigation. But augmented damages will undermine the cost internalization objective if they cause defendants to take wasteful steps to prevent harm, if they cause the prices of products and services to rise excessively, or if they cause firms to withdraw socially valuable products or services from the market.

Thus, ask yourself whether the defendant might have escaped having to pay for the
harm for which he or she should be responsible to this plaintiff. For example, if the harm was substantial and 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 his or her harmful conduct, your estimate of the likelihood of escaping liability would be relatively high. You should use the table below to determine the augmented 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 compensating personal dignity harms] by your augmented damages multiplier. The resulting number is the base amount for augmented damages.

The base augmented 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.

<table>
<thead>
<tr>
<th>Probability of Escaping Liability</th>
<th>Augmented Damages Multiplier</th>
</tr>
</thead>
<tbody>
<tr>
<td>0%</td>
<td>0</td>
</tr>
<tr>
<td>10%</td>
<td>.11</td>
</tr>
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<td>20%</td>
<td>.25</td>
</tr>
<tr>
<td>30%</td>
<td>.43</td>
</tr>
<tr>
<td>40%</td>
<td>.67</td>
</tr>
<tr>
<td>50%</td>
<td>1.00</td>
</tr>
<tr>
<td>60%</td>
<td>1.50</td>
</tr>
</tbody>
</table>
70%       2.33
80%       4.00
90%       9.00

***

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 1 to 20. Second, you should also determine an amount of aggravated damages necessary, if any, to compensate the plaintiff for personal dignity 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 augmented damages for cost internalization of the harm and potential 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 non-parties.