Justifying the plaintiff's receipt of punitive damages

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JUSTIFYING THE PLAINTIFF’S RECEIPT
OF PUNITIVE DAMAGES

by

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Bachelor of Arts
University of Guam, Mangilao
1999

A thesis submitted in partial fulfillment
of the requirements for the

Master of Arts in Ethics and Policy Studies
Department of Political Science
Ethics and Policy Studies
College of Liberal Arts

Graduate College
University of Nevada, Las Vegas
August 2005
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Justifying the Plaintiff's Receipt of Punitive Damages

is approved in partial fulfillment of the requirements for the degree of
Master of Arts in Ethics and Policy Studies

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ABSTRACT

Justifying the Plaintiff's Receipt of Punitive Damages

by

Marlisa Moschella

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This thesis addresses the punitive damages reform issue of whether or not the plaintiff should receive the award. Reformers argue the purposes of punitive damages would be better served with other distribution options; and prioritized societal gains, above the gains of the plaintiff. The various purposes of punitive damages show that receipt by the plaintiff is in accordance with original intentions of punitive damages and serves justice. The historical and modern purposes of punitive damages such as vengeance satisfaction, redeeming honor, repairing insult, and supporting ‘private attorneys general,’ are maintained by the plaintiff receiving damages. These purposes provide an important incentive to the plaintiff to pursue litigation. Incentive for this pursuit mitigates the inherent burden placed upon the plaintiff and serves justice since the plaintiff is procedurally the “least advantaged” participant. Therefore, the status quo should be maintained to provide incentive and to ensure justice in civil law.
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PREFACE

It all started on May 16, 2002, I was having lunch with my father. He’s an attorney. As he sat down, he enthusiastically declared that his firm had won a case against Mobil Oil Guam and the jury awarded $50,000 in compensatory damages and $2.8 million in punitive damages. He was so excited. He called to the server for some water and was slapping the table and gesturing his fists in the air as if he had just won a title match. I questioned the amounts awarded; it seemed strange that a civil case spurred reactions similar to that of winning the lottery. My father explained that the compensatory damages equaled the amount stolen from the plaintiff and the punitive damages served to punish Mobil Oil for the fraud they had committed. I questioned the process because someone had become a millionaire from punishing a corporation. How is this at all like criminal punishment? Do criminal victims receive awards when the offender is punished? Last time I checked, murder victims and rape victims receive no such award. If anything, they receive the satisfaction that the offender is behind bars and will suffer the consequences of his or her actions. I suppose that ordering a corporation to pay a large amount of money would serve the same purpose, but why is the money going to the plaintiff? Would it not serve society better if it were donated to the University’s business school to teach future businessmen some ethics? My father’s explanation was, “That’s civil law.”

That day changed my life. About 5 months after that day, I moved to Las Vegas, and applied to UNLV’s Ethics and Policy Studies (EPS) Program. I had a Bachelors degree
in philosophy, but was raised by a lawyer. So the EPS Program was a good match. When I began, I knew absolutely nothing about punitive damages. Now, all my questions about punitive damages have been answered. Thanks to EPS's eclectic program, Dr. Craig Walton, Dr. Alan Zundel, and my Thesis Committee members UNLV Law Professor Robert Correales, and Criminal Justice Department Professor Dr. Hong Lu, I was able to accomplish not only a Master’s Degree, but also the satisfaction of knowing why plaintiffs receive punitive damages.

I humbly thank friend and colleague Cecilia Mun, whose intelligence, analytical skills, humor and alcohol tolerance has assisted me in pursuit of my degree. (Not to mention the argument diagrams in the bar and the discourse in the garage.) All the problems she has helped me solve over a glass of wine were just as beneficial as any graduate seminar; may the wine of friendship never run dry.

I thank my family whose encouragement has helped me achieve this degree. My older sister Christina - attorney turned happy – thank you for constantly building my confidence and for proofreading every paper I have ever written since my undergraduate upper division classes; I could not have done without your prose. And of course my father who has inspired me in all the ways he hoped not to. Although I may not have gone to law school, thank you for the capacity and the motivation to pursue what I love. And I cannot forget my son, Sebastian, who has been the most faithful and patient of all persons. As I typed and studied through the night, sacrificed time with him in order to get this degree, he has always been supportive, thank you.
INTRODUCTION

In BMW of North America, Inc. v. Gore\(^1\) (1996), an Alabama case, the plaintiff was awarded $4000 in compensatory damages. In addition, the jury awarded the plaintiff $4 million in punitive damages.\(^2\) The punitive amount was based upon the total number of automobiles sold nation-wide that had been similarly damaged and fraudulently repaired. The repairs were found fraudulent since BMW had transported the repainted cars to the United States and did not disclose information regarding the repair to Alabama consumers. The entire damages amount was to be awarded to the single plaintiff. In 1997, the punitive award was appealed twice and reduced by the Alabama Supreme Court and the U.S. Supreme Court to $50,000.

This case, and many similar to it, represent why punitive damages have been under scrutiny. Not only are the large amounts criticized, but also the process in which a single plaintiff has the possibility of receiving amounts calculated by assessing the harm to the plaintiff as well as the cumulative potential or actual social harm.

This thesis addresses the punitive damages reform issue of whether or not the plaintiff should receive the award, or if the purposes of punitive damages would be better served with other distribution options. In order to determine whether the policy process should be reformed, I examine the justice served by the different purposes of punitive damages


as described by modern judicial literature as well as historical perspectives. I conclude that the status quo should be maintained.

I argue that certain purposes of punitive damages validate the plaintiff receiving the damages. These purposes include: vengeance satisfaction, honor redemption, insult reparation, and supporting ‘private attorneys general.’ These purposes provide an essential incentive to the plaintiff to bring civil wrong-doings to court. Incentive for this pursuit mitigates the inherent burden placed upon the plaintiff, and serves procedural justice since the plaintiff is the “least advantaged” participant in the proceedings. Thus in order to continue to fulfill these purposes, the status quo should be maintained. The plaintiff should continue to receive the punitive damages award in order to reinforce incentive to the plaintiff and to ensure justice in civil law. These purposes outweigh the counterarguments for reform.

Punitive damage awards and the process that surrounds them is not common knowledge. So I begin with a general description of the arena of civil law.

Civil Law

Civil law has three main branches: tort law, contract law, and property law. When an individual, or a company treated as an individual, has wronged or harmed another, justice calls for a corrective procedure. If the “harm is caused through the fault of another person(s) which calls for compensation or redress (tort law), or because of some

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unfairness or other impropriety due to the processes of exchange or other voluntary agreements in society (contract law), the case is taken to civil court. Civil law procedures deal with socially declared ‘wrongs,’ but they are treated as ‘private wrongs’ since the decision to pursue litigation is left to the party who claims they have been wronged. This ‘private wrong’ aspect is unique to civil law.

Another aspect of civil law that characterizes it within the private law arena is the outcome: the damages are received by the plaintiff, as opposed to the state. Remedies under civil law include restitution, monetary compensation, and punitive damages.

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6 Antony Duff, "Legal Punishment", The Stanford Encyclopedia of Philosophy (Spring 2004 Edition), Edward N. Zalta (ed.), [on-line]; http://plato.stanford.edu/archives/spr2004/entries/legal-punishment/; 4. Accessed on 16 April 2004. “Civil law deals in part with wrongs which are non-private in that they are legally and socially declared as wrongs -- with the wrong constituted by libel, for instance: but they are still treated as ‘private’ wrongs in the sense that it is up to the person who was wronged to seek legal redress.” See also Marc S. Galanter and David Luban, “Poetic Justice: Punitive Damages and Legal Pluralism,” The American University Law Review 42:1393 (Summer 1993) : 2: “A civil wrong is an injury to a private party or to the state in the role of a private party.”

7 Duff, "Theories of Criminal Law", The Stanford Encyclopedia of Philosophy (Spring 2004 Edition), Edward N. Zalta (ed.), [on-line]; http://plato.stanford.edu/archives/spr2004/entries/legal-punishment/; 4. Accessed on 16 April 2004. “Civil wrongs are typically viewed as ‘private’ matters because it is the victim’s burden to weigh what happened, to identify the alleged wrongdoer, and to bring a case against him. The law provides the institutions (such as the courts or arbitration services) through which that case can be brought.” ... All civil law requires “the injured party to decide whether to pursue, or to abandon a case, and whether to insist on extracting the damages the court awarded,” or to do without them.

8 Ibid. 5. If a plaintiff wins a case, “the defendant may have to pay her damages, as compensation for the harm that she suffered, and for which she has sued.”

9 Steven H. Gifts, s.v. “punitive damages,” in Law Dictionary, 3d ed., (1991). Punitive damages, also known as exemplary damages, are defined as “monetary compensation in excess of actual damages; a form of punishment to the wrongdoer and excess enhancement to the injured; nominal or actual damages must exist before
Thus, for further reference in this thesis, it is important to note that punitive damages processes work in a specialized arena of the legal system—civil law. In this arena the transactions are between private parties, the burden to pursue litigation is on the plaintiff, and the result, if the defendant is found guilty, of civil law cases involves a monetary payment to the plaintiff. What is unique and distinguishes civil law from criminal is the private law aspect.

**Summary of Chapters**

The academic and legal discourse regarding punitive damages involves the questions of whether or not the amounts of the award are excessive, and therefore possibly breach Constitutional Rights, whether this form of punishment is justified, and whether the public policies behind punitive damages may best be served by alternate forms of distribution. Chapter One presents the public discourse surrounding punitive damages. Reformers argue that punitive damages have reached proportions that are excessive and that the system provides too few guidelines for their calculation. In this chapter, after reviewing the different views for reform, the significant cases, and current punitive exemplary damages are awarded.” Further specific conditions for the awarding of punitive damages are addressed in Chapter One regarding the discourse as well as in Chapter Three regarding the punishment purposes. Punitive damages in some states specifically require for tort law clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. See Dorsey D. Ellis, Jr., “Symposium: Punitive Damages: Article: Fairness and Efficiency in the Law of Punitive Damages,” *Southern California Law Review*, 56 (November 1982): 9. Malice is defined as “a state of mind; [which has] the desire to harm another that accompanies and provides a reason for intentional act.” Willful misconduct or reckless conduct is defined as “conduct involving a conscious choice of a course of action entailing a disproportionately great risk of harm to another relative to the utility of the conduct, and undertaken with knowledge of the danger or of facts that would disclose the danger to a reasonable person.”
damages policy; I conclude that although certain cases reflect large amounts of punitive
damage awards, these large awards are rare, the amounts are usually reduced, and the
appellate courts have constructively presented guidelines to address justified calculations.

But, however few, large punitive damage amounts have lead the debate further to the
justice behind the distribution of awards. One of the most recent debates involves the
question of whether the plaintiff should receive the award in addition to compensation or
actual damages, or if the purposes of punitive damages would be better served with
alternate forms of distribution such as split recovery awards, where the award is shared
with the state. It is this aspect of the punitive damages discourse I focus on in this thesis.

Chapter Two begins with presenting two theories of justice I chose to apply to civil
law procedures: corrective justice and procedural justice. Civil law seeks to achieve
justice through compensatory damages and punitive damages. Compensatory damages
correct civil law wrongs through restitution and follow corrective justice principles.

Punitive damages are applied to wrongs that deem further punishment. The justice of
punishment is discussed in Chapter Three. Since my focus involves the justice behind
the distribution of the punitive damages award, after it has been determined necessary; in
order to determine if the plaintiff's receipt of the punitive damages award properly serves
justice, I present John Rawls's procedural justice theory of "justice as fairness." I argue
that the plaintiff receiving the award ensures justice because the plaintiff in a civil law
suit is, in a procedural sense, the "least advantaged." According to the second justice
principle for "justice as fairness," inequalities in society should be arranged so that they
benefit the "least advantaged" participant. After determining how the plaintiff is the least
advantaged participant, I conclude that the damages should continue to be received by the
plaintiff. But the theories of justice are not the only justification for this process.

Punitive damages serve many purposes, all of which should be justified. So I examine
the purposes of punitive damages.

The punishment theories of retribution and deterrence are most often referred to for
the justification of awarding punitive damages.\textsuperscript{10} The evaluation of justified punishment
through these theories is presented in Chapter Three. I also review whether or not
punishment for retribution and deterrence justifies the plaintiff receiving the award. I
conclude that retribution and deterrence do not require plaintiff receipt. But retribution
and deterrence are not the only punishment aspects encompassed by punitive damages.
Punitive damages have also historically served the punishment purpose of vengeance
satisfaction. And punitive damages have served a means to punish elite groups or
corporate entities. Although retribution and deterrence do not provide specific reason for
the plaintiff to receive the award, vengeance satisfaction and the punishment of corporate
entities do provide reason. But the purposes of punitive damages do not cease at
punishment.

History also reveals that initial purposes for punitive damages included the restoration
of personal honor and the repair of insult for the plaintiff. Chapter Four investigates

\textsuperscript{10} Duff, "Theories of Criminal Law", 6. Punitive damages are mainly “intended to
punish or burden the defendant.” See also Ellis Jr., “Symposium: Punitive Damages:
Article: Fairness and Efficiency in the Law of Punitive Damages,” 2. There are “at least
seven purposes for imposing punitive damages [that] can be gleaned from judicial
opinions and the writings of commentators: (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 the
victims for otherwise uncompensable losses; and (7) paying the plaintiff’s attorneys’
fees.”

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these purposes to demonstrate how they developed, and how they also justify the plaintiff receiving the award.

Thus, these purposes - vengeance, honor, insult, and punishing corporations - serve to support a further purpose for punitive damages, incentive to private attorneys general. Chapter Five addresses why incentive to the plaintiff is significant to civil law. First, the system is complex, passive, and costly. These characteristics give reason for incentive, since the burden to pursue litigation rests solely on the plaintiff. The plaintiff's duty to take on the burden of litigation is referred to as the "private attorney general" principle and is unique to the civil law system. To support the "good" to society which is produced by the private attorneys general as they bring civil wrongs to justice, the system of civil law provides an incentive, the possibility of receiving punitive damages. Therefore, the plaintiff receiving the punitive damages award maintains the system of civil law by inducing the plaintiff as a private attorney general.

In conclusion, I recommend the status quo. Summing up the reasons presented in this thesis, Chapter Six argues that the plaintiff should continue to receive the punitive damages award. This process supports purposes of incentive and justice. The proposed reforms for distribution addressed in Chapter Six, split-recovery statutes and societal damages, remove or lessen the incentive to the plaintiff and are also premised upon large award amounts. Since plaintiff incentive is significant to justice in civil law, and large award amounts are rare, the purposes of the status quo outweigh the counter-arguments for change.

11 Duff, "Legal Punishment", 3 – 4. The incentive is also important to the civil justice system because it helps to maintain the private attorney general principle, in which "the plaintiff is required to bring the case to court on their own – with no or little assistance from the police."
CHAPTER 1

DISCOURSE ON PUNITIVE DAMAGES

The discourses that pursue the reformation of punitive damages are eclectic, from the legal community to economists, and from the moral philosophy behind the law to issues in the business community. This chapter examines the different perspectives on reform: (1) that punitive damages are excessive and should be limited or capped; (2) that they should be removed from civil law and dealt with through criminal punishments; and (3) that the receipt of punitive damages should be split between the plaintiff and the state, or that they should be societal damages, which are received and distributed by the state.

Although all the above reform issues are worthy of further discussion and analysis, apart from this chapter, the remainder of the thesis will focus on the issue of whom should receive the punitive damages. The arguments that the award should be split between the state and the plaintiff or that they should be deemed societal damages will be introduced in this chapter and addressed further in my final recommendations.

The Discourse on Excessiveness

Development of the Concern

The issue of limiting or regulating punitive damage awards is not recent. The development and intensification of concern for reform of punitive damages manifest in 1967 by Judge Henry Friendly of the Second Circuit in the case of Roginsky v.
Richardson-Merrell, Inc. Judge Friendly anticipated potential dangers in modern mass tort litigation when he denied the awarding of punitive damages due to violations of due process.  

Concerns expressed in this case were that repetitive punitive awards for a single manufactured product, which was viewed as a single course of conduct, could subject a defendant to liability that had never been considered prior to mass tort litigation. Moreover, the cumulation of a nationally calculated punishment was not in proportion to the similar maximum penalties authorized by the criminal law, and exceeded any level of existing civil sanction that could be thought necessary to serve punishment or deterrence.

1 Roginsky v. Richardson-Merrell, Inc. 378 F.2d 832; 1967 U.S. App. LEXIS 6863. Summary “Although other theories of liability for compensatory damages had been advanced in the complaint, plaintiff withdrew all except negligence and fraud upon the Food and Drug Administration (FDA). Defendant moved for a directed verdict on all claims for injury by cataract as unsupported by sufficient proof of causation and on the fraud and punitive damage claims as unsupported by the evidence; the motions were denied. The judge instructed the jury it must first determine the issue of causation; if it found for the plaintiff on that, it should then pass upon the other issues, which he explained in a charge to which defendant took no exception. He helpfully submitted six separate questions: (1) causation, (2) negligence, (3) fraud upon the FDA, (4) amount of compensatory damages, (5) liability for exemplary damages, and (6) the amount thereof. The jury gave affirmative answers to all the questions relating to liability and fixed compensatory damages at $17,500 and punitive damages at $100,000, which the judge later declined to eliminate or reduce, 254 F. Supp. 430 (1966).”

2 Ibid. “On appeal defendant contends that its motions for directed verdicts should have been granted; it argues also that evidence erroneously admitted, much of it in support of what it considers the unsubstantiated fraud count, could have prejudiced the jury's determination of the issues of negligence and of conduct warranting the award of punitive damages. It also raises other objections to the receipt of evidence and complains that the award of punitive damages, "unless restricted to fixed and measurable amounts," violates due process. We affirm the award of compensatory damages but find that the evidence was not sufficient to warrant submission of the punitive damage issue to the jury.” Rehearing Denied May 8, 1967.

3 Repetitive – referring to products liability and other mass tort cases, where punitive damages may be repetitively invoked against a single course of conduct.
Judge Friendly also expressed concern that there seemed no strict guidelines for jury decision-making, nor mechanisms for effective control of aggregate awards.\textsuperscript{4}

This case raised questions regarding the fairness and constitutionality of punitive damages, since the requirements for proportionality to compensatory damages and civil sanctions were not specifically outlined. There were no specific guidelines for juries to follow in determining the amount of punitive damages. With this, national corporations were sent back to the drawing board for calculating the risk of liability for a single product. Mass tort litigation had escalated and a variety of businesses were held nationally responsible for their actions. Areas included asbestos, formaldehyde, DES, Agent Orange, and automobiles.\textsuperscript{5} By the late 1980's large corporations were threatened with the possibilities of bankruptcy from mass tort law suits. For instance, “A.H. Robins, a pharmaceutical company that manufactured the Dalkon Shield, an intrauterine device


\textsuperscript{5} Richard A. Seltzer “Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency, and Control,” \textit{Fordham L. Review} 52:37 (1983). From footnotes, “n5 Approximately 700 lawsuits have been filed against Ford Motor Company arising out of an alleged defect in the transmissions of Ford cars and trucks manufactured between 1966 and 1980. Sylvester, \$ 280M Legal Bill for a ’Better Idea’”, Nat'l L.J., Sept. 27, 1982, at 18, col. 2. The Center for Auto Safety has predicted that Ford may eventually spend \$ 280 million paying claims for damages resulting from this transmission defect.” “n7 A.H. Robins, the manufacturer of the Dalkon Shield IUD, reported that a total of 3,258 lawsuits had been filed against it in connection with the Dalkon Shield; 1,685 of these had been resolved, most by settlement, several by dismissal and only nine by trial, of which seven resulted in judgments for the defendant and two resulted in judgments for the plaintiff. Affidavit of R.P. Wolf, Secretary and Assistant General Counsel of A.H. Robins Co., \textit{In re} Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887 (N.D. Cal. 1981), \textit{vacated}, 693 F.2d 847 (9th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 817 (1983). As of May, 1981, an additional 2,309 claims had been brought against Robins, of which 2,003 had been resolved by settlement or abandonment.”
that caused an immense swath of injuries ... went into bankruptcy in anticipation of a flood of product liability verdicts with an increasing punitive component.\textsuperscript{6}

Reformers continued to argue that punitive damage awards have increased in the last few decades. They argued that unconstrained and unprecedented punitive damage awards continued to overwhelm the court systems, and that “increases in the size and frequency of punitive damages awards brought an associated increase in the amount of harm caused by any constitutional defect that infect[s] punitive damages procedures.”\textsuperscript{7} In other words, they argued that if the punitive damages procedures were unconstitutional, the larger the punitive damages award, the larger the harm caused. The accusation of unconstitutionality was based upon claims that excessive and multiple calculations of awards violated the Eighth Amendment’s protection against cruel and unusual punishment,\textsuperscript{8} as well as the Fifth and Fourteenth amendment’s protection for due process of law.\textsuperscript{9} Excessive awards were seen as ‘unusual punishment’ and multiple calculations of awards for a single course of conduct were accused of violating due process. Claiming these constitutional violations, reformers felt that punitive damages procedures should be

\textsuperscript{6} Galanter and Luban, “Poetic Justice: Punitive Damages and Legal Pluralism,” 9. Also from ENDNOTE117, “11 juries had awarded $24.8 million in punitive damages and more than 5000 Dalkon Shield cases remained unresolved” during their bankruptcy petition.


\textsuperscript{8} Jeffries, 147.

\textsuperscript{9} Ibid. and also see Wheeler, “The Constitutional Case for Reforming Punitive Damages Procedures,” 272. “violates due process primarily because those procedures create an unnecessary and undue risk of an improper verdict on the issue of liability on the measure of compensatory damages, on the issue of whether to award punitive damages, and on the measure of punitive damages.”

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reviewed above the state jurisdictions with heightened federal judicial scrutiny. They argued that plaintiffs, their lawyers, and society in general viewed tort litigation as a profitable opportunity and the scales of justice were tipped with excessive multiple fines. Reformers solicited caps for punitive damage awards as well as specific instructions for juries in calculating awards.\(^\text{10}\)

But mass tort litigation is just one of the many areas of concern for punitive damages reform. Punitive damage awards are awarded in different proportions for various areas of civil law\(^\text{11}\) when the wrong has been declared warranted of punishment.\(^\text{12}\) Several landmark cases are often referred to when discussing the development of the issue of punitive damages. Each one of these cases set precedence for the issue of excessiveness for punitive damages.

\(^{10}\) Wheeler, 272.


\(^{12}\) For example, from BMW of North America, Inc., v. Ira Gore, Jr. 701 So. 2d 507; 1997 Ala. LEXIS 126, under section I. ... “Alabama, by statute, provides notice concerning the conduct that will subject one to punitive damages in this state. Ala. Code 1975, § 6–11–20, expressly set forth defines the acts, as well as the state of mind: ‘(a) Punitive damages may not be awarded in any civil action, except civil actions for wrongful death pursuant to Sections 6–5–391 and 6–5–410, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. …’"
In 1989, the case of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, the Supreme Court addressed the issue of whether or not the Eighth Amendment is violated by punitive damage awards that are grossly out of proportion to the compensatory awards. The Supreme Court held that the excessive fines clause of the Eighth Amendment *does not apply* to civil litigation since it is between private parties. The Supreme Court clarified that with ‘private parties’ litigation, the prosecution is not initiated by the state government nor does the state have any part in the receipt of the damages award. The court reasoned that the Eighth Amendment’s excessive fines clause was designed solely to prevent the government, or the legal authority from excessive punishment or fines.

The justification of legal punishment is discussed in more detail in Chapter Three, but in general, legal punishment needs justification because the community grants the legal

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14 U.S. Constitution, Bill of Rights, Amendment VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. From the Legal Information Institute, [on-line], accessed on 26 April 2005; www.law.cornell.edu/constitution/constitution.billofrights.html#amendmentviii.

15 McKee, “The Implications of BMW v. Gore for Future Punitive Damages Litigation: Observations from a Participant,” 3 of 41. “The 1989 decision in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., disposed of the Eighth Amendment challenge, but left open the due process issues. Browning - Ferris Industries (BFI) claimed a $ 6 million punitive damages verdict was excessive in an antitrust case where the compensatory damages were about $ 50,000. A 7-2 majority held that the Eighth Amendment's Excessive Fines Clause does not apply to civil litigation between private parties "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”
system full responsibility and authority to punish.\textsuperscript{16} Community consented authority, particularly to harm a citizen, needs justification. It is reasonable to assume that the purpose of the Eighth Amendment was to ensure that the authority to punish is not abused. The Supreme Court holding that the Eighth Amendment does not apply to private litigation implies that civil courts have the responsibility to determine excessive or disproportionate fines or punishments and that it is not a federal issue. Since the damage amounts are decided by a jury; and the victim, a member of the community, who receives the damages, not the legal authority. This rationale reinforces the private law aspect of civil litigation, which is an important distinction between civil and criminal law.\textsuperscript{17}

In the early 1990’s, there were two cases that addressed the procedural due process issue of punitive damages. In 1991, the case of Pacific Mutual Life Insurance Co. v. Haslip,\textsuperscript{18} and in 1993, the case of TXO Production Corp. v. Alliance Resources Corp.\textsuperscript{19} Both cases awarded large amounts for punitive damages that were upheld by the Supreme Court. This means that the Court did not find the large damages in violation of due process. Although in each case dissenting opinions expressed concern for the need of

\textsuperscript{16} To punish meaning to cause harm to citizens of the community for said wrongs. Will be discussed further in Chapter Three.

\textsuperscript{17} See Introduction, Civil Law for more on the private law reference to civil law. This importance will also be addressed in detail and its influence on punitive damages procedure in Chapter Five.


\textsuperscript{19} TXO Production Corp. v. Alliance Resources Corp 509 U.S. 443 (1993).
more detailed and strict jury instructions and limitations on determining punitive damages amounts.\textsuperscript{20}

Following these cases, advocates for reform of punitive damages lobbied for guidelines and limits on punitive damages in order to ensure due process.\textsuperscript{21} Advocates emphasized predictability as a requirement for punitive damage procedure in order to concur with due process,\textsuperscript{22} or seen as the right to fair notice. In other words, they felt the courts should advise some way to measure or predict the amounts of damages that the

\textsuperscript{20} McKee, "The Implications of BMW v. Gore for Future Punitive Damages Litigation: Observations from a Participant," 3. "In 1991, the Court finally reached the due process issue, at least procedural due process, in the Alabama case of Pacific Mutual Life Insurance Co. v. Haslip... The jury awarded a general verdict of $1.04 million to Haslip. The appellate courts, based primarily on plaintiffs' counsel's closing argument, were willing to assume that about $200,000 represented compensatory damages (albeit, mostly mental anguish rather than out-of-pocket economic loss). The majority held that the Due Process Clause does apply to punitive damages procedures but that the Alabama general jury charge and Alabama's system of post-trial judicial review met at least the minimum requirements of procedural due process. ...Lastly, the majority opinion intimated that a 4:1 ratio of punitive to compensatory damages was "close to the line.""

"In 1993, the West Virginia case of TXO Production Corp. v. Alliance Resources Corp. came before the Court. In that case, a "slander of title" suit, the jury awarded $19,000 in compensatory damages (for having to defend a frivolous declaratory judgment action initiated by TXO) and $10 million in punitive damages. ...The Supreme Court plurality affirmed the West Virginia Supreme Court of Appeals' holding that the award of punitive damages was reasonable. The plurality also explained away the 526:1 ratio by comparing the $10 million verdict to TXO's potential profit of $5-8 million, had the fraudulent scheme succeeded."

\textsuperscript{21} Law.com Dictionary, http://dictionary.law.com/ s.v. 'due process of law' a fundamental principle of fairness in all legal matters, both civil and criminal, especially in the courts. All legal procedures set by statute and court practice, including notice of rights, must be followed for each individual so that no prejudicial or unequal treatment will result. The universal guarantee of due process is in the Fifth Amendment to the U.S. Constitution, which provides "No person shall... be deprived of life, liberty, or property, without due process of law," and is applied to all states by the 14th Amendment. From this basic principle flows many legal decisions determining both procedural and substantive rights

defendants could face – other than previous cases as examples. Just as criminal defendant punishments were pre-set depending upon the convicted charge, punitive damages needed predictability, but had no set scale to follow. The court usually would only advise the jury to impose the minimum amount of punitive damages necessary to deter the defendant. One prominent proponent of reform is Washington, D.C. lawyer Theodore Olson declared in congressional testimony in 1995:

> Over ... three decades in the legal profession, I have seen how changes in the civil justice system affect the decisions of those who are sued or who are exposed to lawsuits. I have seen the civil justice system become more expensive, anomalous, inefficient, arbitrary and unpredictable [due to punitive damages]... the frequency and magnitude of punitive damage awards are exploding out of control [like] ... an unchecked virus.

Shortly after this declaration came a case which set important guidelines for civil litigation and punitive damages, and perhaps the most notable case regarding the excessiveness of punitive damages. In *BMW v. Gore* (1997), a single plaintiff was

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26 BMW of North America, Inc., v. Ira Gore, Jr. 701 So. 2d 507; 1997 Ala. LEXIS 126. Summary “The facts are set out in their entirety in BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994), and we note them here only briefly: Dr. Ira Gore, the purchaser of a BMW automobile, sued BMW of North America, Inc. ("BMW"), alleging, among other things, that BMW and Bayerische Motoren Werke, A.G., the foreign manufacturer of the automobile, had fraudulently failed to disclose to him that the automobile he was purchasing had been repainted after being damaged by acid rain during its shipment from Germany. At trial, BMW admitted that the car had been
initially awarded by the jury $4,000 in compensatory damages and $4 million in punitive
damages. The U.S. Supreme Court decided that the punitive damages amount was
grossly excessive and violated due process; as a result the award was reduced to $50,000.
This was the first time the United States Supreme Court had reversed a punitive damages
judgment on the basis of due process.\textsuperscript{27} Punitive damages reform issues addressed by
this ruling included not only the violation of due process, but also guidelines for
determining the award amount to ensure the awards were not excessive.

The primary support for the violation of due process was reasoned in two parts. First,
the state could not legitimately impose the interest of the nation or neighboring states on
the defendant, since the original punitive damages amount was calculated upon nation
wide instances of the disclosure violation. The implications of this affected not only
punitive damages and civil litigation,\textsuperscript{28} but also how companies do business at each end
of the nation. State regulations for businesses vary. When the initial punitive damages
judgment against BMW was made ($4 million), BMW adjusted their national policy to
accommodate the minimum regulation for one state, regardless of what the other states
required. BMW's policy adjustment can be interpreted as punishment deterring further
similar harm. But the Court struck down the award, and its rationale protects businesses
damaged and that BMW had a nationwide policy not to advise its dealers of predelivery
damage to new cars when the cost of repair did not exceed three percent (3\%) of the car's
suggested retail price.”

\textsuperscript{27} McKee, 4.

\textsuperscript{28} McKee, From the Introduction: “The publicity this case received has revived
public debate about whether Alabama's juries are "out of control." However, this opinion
has far more than a mere parochial impact on Alabama's judicial system. The May 20,
1996, decision marks the first time a majority of the Supreme Court has found a verdict
amount to be too high. Thus, the BMW decision is of great national importance to all
civil litigators and their clients.”
who have varying policies for varying states. As much as the states have the right to
different regulations, they are not in-turn allowed to punish a company for the ‘good’ of
the nation, based upon their particular regulation.

The second primary support for the violation of due process was that the defendant
did not receive adequate notice of the magnitude of the possible sanction of its failure to
disclose.29

The public policy behind the court’s due process analysis was as follows: (a) that
there were no aggravating factors associated with reprehensible conduct, for if there were
then the defendant could refer to the reprehensible conduct sanctions for fair notice; (b)
that no consumers, nor competitors were threatened with potential harm that threatened
the health or safety of others, the only harm found was economic; and (c) that the
punitive damages award was substantially greater than the possible statutory fine of the
state for similar misconduct, the maximum civil penalty authorized by the Alabama
Legislature for violation of its Deceptive Trade Practices Act is $2,000.30

The U.S. Supreme Court implied that punitive damages law was analogous to
criminal law. Just as criminal sanctions are required to be known, or can be known if the
public so chooses to find out – for instance the penalty for murder, theft, or rape – so too
must punitive damages be known with the above three distinctions. The knowledge of
penalty is an important factor in the justification of legal punishment. In order to justly
punish a member of the community that has committed a crime, it is assumed that the

29 BMW of North America, Inc., v. Ira Gore, Jr. 517 U.S. 559; 116 S. Ct. 1589; 134

30 Ibid. See p. 25 of 45, under the section Sanctions for Comparable Misconduct, Ala.
guilty criminal is a rational (mature and participating) member of the community that is aware of its laws as well as its penalties.\textsuperscript{31}

So, for the sake of fairness and due process, civil litigation was given guidelines to follow for punitive damages procedure; that the state can only punish for what is in the interest of the particular state and its constituents, and that adequate and fair notice should follow those three guidelines.

Most importantly addressed in the \textit{BMV v. Gore} case was the dollar amount of the punitive damages award, and how the U.S. Supreme Court came to determine its excessiveness. The Court outlined three indicators of excessiveness. First, the award was deemed excessive because there were no aggravating factors that evidenced a high degree of reprehensibility on the part of the defendant.\textsuperscript{32} Secondly, the ratio between compensatory and punitive damages was clearly outside of the acceptable range.\textsuperscript{33} And thirdly, the punitive damages award amount was also largely disproportionate to the

\begin{itemize}
\item \textsuperscript{31} Further detail of this justification is discussed in Chapter Three in regards to the justification of punishment in general. But for this point, it is important to note the implications of this decision.
\item \textsuperscript{32} BMW of North America, Inc., v. Ira Gore, Jr. 517 U.S. 559; 116 S. Ct. 1589; 134 L. Ed. 2d 809. (1996) U.S. LEXIS 3390. page 9 of 45 point (c). Indicates the harm was purely economic, there was no indifference to, or reckless disregard for the health and safety of others, there was no pattern of tortuous conduct, no evidence of bad faith, no unlawful conduct, no false statements, affirmative misconduct, or concealment of evidence of improper motive.
\item \textsuperscript{33} Ibid. point (d). $2 million dollars was 500 times the amount of the plaintiff's actual harm. The Court does express that there are no set mathematical multipliers that should apply to the ratio between compensatory and punitive damages; but that in this case, the ratio was clearly too high.
\end{itemize}
comparable civil or criminal sanctions for similar conduct. Furthermore, there was no indication of why a more modest amount would not have been sufficient.\textsuperscript{34}

The second and third indicators of excessiveness clarified by the Court regulates punitive damages awards by requiring that it be in proportion to the compensatory damages as well as the comparable state civil and criminal sanctions. Although there are no specific ratios for proportion, the above three factors (amount of harm, amount of compensatory damages, and the amount of existing similar sanctions), when taken into consideration together, govern calculation of a reasonable and proportionate punitive damages award.

The first indicator of excessiveness requires the presence of aggravating factors in the harm. More importantly, it also requires the jury take these factors into account when determining the award amount. This means that analogous to criminal law, that there are gradients to punishment that fit the crime – meaning a murder punishment will receive longer incarceration or a more severe penalty than theft – so too must punitive damages amounts be proportionate to the weight of the harm.\textsuperscript{35} The calculation dollar amounts that are appropriate to noneconomic harm or loss is a difficult task. In BMW’s case, since there was no evidence of grossly aggravated reprehensibility, the award of $4 million dollars was excessive. Juries have been criticized to take only into account the

\textsuperscript{34} Ibid. point (e).

\textsuperscript{35} BMW of North America, Inc., v. Ira Gore, Jr. 517 U.S. 559; 116 S. Ct. 1589; 134 L. Ed. 2d 809. (1996) U.S. LEXIS 3390. page 6 of 45. See LEDHN15, “The principle that exemplary, or punitive, damages imposed on a defendant should reflect the enormity of the defendant’s offense reflects the accepted view that some wrongs are more blameworthy than others.” That damages must be proportionate implies that there is a recognized gradient of harm: violent being more than non-violent, trickery or deceit being more than negligence, torts being more than economic injury, repeat misconduct being more than individual instance malfeasance. See LEDHN 16, 17, 18, 19.
economic prosperity of the defendants, and calculate based upon what would deter the defendant from repeating their action. So that if the defendant was a large profitable international company, the damages award would be justified to be larger than for a smaller company. Although the profits and deterring the defendants do need to be taken into account, the degree of harm is just as important. So, in determining the amount worthy to punish, the amount of harm as well as the amount to deter must be taken into account.

Even after *BMW v. Gore* in 1996, reformers continued to argue that juries are not capable of calculating a justified dollar amount for punishment, and this creates erratic awards. Reformers argue that the arbitrariness of putting a price on punishment is a result of subjective moral judgments. And because people have difficulty translating moral wrongs into dollars, this results in punitive awards that are unpredictable and arbitrary. Reformers argue that the arbitrariness of putting a price on punishment is a result of subjective moral judgments. And because people have difficulty translating moral wrongs into dollars, this results in punitive awards that are unpredictable and arbitrary. Reformers argue that arbitrariness of putting a price on punishment is a result of subjective moral judgments. And because people have difficulty translating moral wrongs into dollars, this results in punitive awards that are unpredictable and arbitrary. Reformers argue that arbitrariness of putting a price on punishment is a result of subjective moral judgments. And because people have difficulty translating moral wrongs into dollars, this results in punitive awards that are unpredictable and arbitrary. Reformers argue that arbitrariness of putting a price on punishment is a result of subjective moral judgments. And because people have difficulty translating moral wrongs into dollars, this results in punitive awards that are unpredictable and arbitrary.

Jury instructions continued to consist only of factors that measured the gravity of the wrong and the need to deter similar wrongful conduct, reinforcing that the purposes of punitive damages are to punish and deter. So, advocates continued to argue for more judicial review of punitive damages awards.


37 Samuel David Bowden v. Caldor, INC. et. Al., 350 Md. 4; 710 A.2d 267; 1998 Md. LEXIS 407, June 2, 1998. Opinion by Eldridge, J., III. A. “We have stated that the 'purpose of punitive damages is ...to punish the defendant for egregiously bad conduct toward the plaintiff, [and] also to deter the defendant and others contemplating similar behaviour.'” Owens-Corning v. Garrett, 343 Md. 500, 537-538, 682 A.2d 1143, 1161 (1996). B. “n9 [referring to] Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 15, 111 S. Ct. 1032, 1042, 113 L. Ed. 2d, 18 (1991), the Supreme Court observed: ‘Under the traditional common-law approach, the amount of the punitive awards is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter
At the state level, further judicial review of the jury awards was addressed in the 1998 Maryland case of Bowden v. Caldor, Inc. The Maryland Court of Appeals issued nine guidelines to be followed by the trial judge, if a judgment is sent back for review, in order to determine if a punitive award is excessive. Although these guidelines did not specifically apply to jury instruction, they did expand the judicial review of the award amount upon appeal.

These nine guidelines included the three indicators of excessiveness explicated in BMW v. Gore: (1) that the award must be proportionate to the harm; (2) that the award must be proportionate to civil and criminal sanctions; as well as (3) comparable to the compensatory award; and added: (4) that the award should not be disproportionate to the defendant’s ability to pay, in that the award must not bankrupt or impoverish a defendant; (5) that the deterrence value of the amount awarded by the jury is relevant; (6) that the award can be compared with other final punitive damages awards for similar harms in the jurisdiction; (7) that the defendant’s past punitive damages awards can be considered in mitigation of post-verdict proceedings; (8) if the harm was a result of a single occurrence or episode, then the punitive damages award cannot be multiplied or compounded, if the compensatory damages were based upon separate torts; and (9) that reasonable plaintiff costs and expenses resulting from the defendant’s malicious and tortious conduct, including expenses of litigation not covered by the compensatory award can be considered in the judicial review of an award of punitive damages.
Although these guidelines are not rigid rules, they offer examples of how states can propose principles that can be followed to ensure justice. These guidelines encompass the main purposes of punitive damages, to punish and deter. The principles emphasize the consideration of proportionality to harm as well as a moderate amount to deter. The principles also clarify aspects that should be considered in regards to the defendant’s wealth, similar past awards paid by the defendant, whether it was a single or multiple episode(s) of the harm, and plaintiff’s costs. At this juncture in the discourse, these guidelines encompass most concerns of reformers (due process, excessiveness, and guidelines for award amount) and consider both the defendant and the plaintiff. But, case law precedence is not the only influence in the reform of punitive damages.

Although BMW v. Gore can be seen as a great stepping stone for punitive damages reform, special interest groups continue to lobby. Special interest groups have played a large role ensuring state and federal political policy agendas continue to include punitive damages reform. The progression of the punitive damages excessiveness issue continues today.

For instance, the 2004 Keep Our Doctors in Nevada (KODIN) initiative argued that physicians were leaving Nevada due to the increase of medical malpractice insurance

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40 Such as: American Tort Reform Association (www.atra.org, argue for limits on punitive damages), Civil Justice Reform Group, Health Coalition on Liability and Access (HCLA) (www.hcla.org, argue that “damages should be limited to $250,000, or twice the compensatory damages (the total of economic plus noneconomic losses), whichever is greater.” See HCLA’s Issue Briefing 2003, accessed via on-line on April 18, 2005; The National Chamber Litigation Center, and also see Jean Stefancic & Richard Delgado, No Mercy: How Conservative Think Tanks and Foundations Changed America’s Social Agenda, (Philadelphia: Temple University Press, 1996), 96-108.

rates. KODIN felt the current legislation did not provide enough protection for doctors and their insurers from large jury verdicts, and thus the cost of liability insurance was double that of doctors in other large cities. Since this was forcing doctors to leave the state, in turn the patients would suffer with a limited availability of doctors to choose from. The proposal was passed and limited the amount of recoverable noneconomic damages to $350,000 per action, with no exceptions. This is just one of several instances in which interest groups have been effective in reforming punitive damages procedures. Once proposal was passed, advocates from the opposition to the issue attributed the passing of the bill to the large advertising budget for the campaign.

Although the success or failure of political campaigns based upon the advertising budget is an issue all in itself, this example shows that punitive damages continue to be a political hot item that is not left to the courts. “Interest groups wanting fundamental changes in the civil justice system have been successful in strategically representing

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42 Ibid. From explanation of Ballot Question #3 “If passed, the proposal would limit the fees an attorney could charge a person seeking damages against a negligent provider of health care in a medical malpractice action. ... The law currently provides that a person seeking damages in a medical malpractice action is limited to recovering $350,000 in noneconomic damages from each defendant, with two exceptions. Noneconomic damages is money paid to the injured person to compensate for pain, suffering, inconvenience, physical impairment, and disfigurement, while economic damages is money paid to compensate for the injured person's medical treatment, care or custody, loss of earning and loss of earning capacity. The two current exceptions to the $350,000 cap on noneconomic damages allow an injured person to receive more than $350,000 if: (1) the wrongdoer committed gross malpractice, or (2) exceptional circumstances justify an award in excess of the cap. The proposal, if passed, would remove the two statutory exceptions to the existing $350,000 cap, and limit the recovery of noneconomic damages to $350,000 per action.”

43 Paul Harasim, “Ballot Initiatives: Doctors outspend lawyers,” Las Vegas Review Journal, 29 October 2004. “Trial lawyer Jim Corckett said the poll results show ‘how powerful a message can be if it’s advertised enough.’ ... Campaign contribution and expense reports filed ... with the secretary of state’s office show that from Jan. 1 through October 21, Keep Our Doctors in Nevada spend $3.3 million to influence voters.”

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Punitive damages as a compelling policy problem requiring governmental action."\textsuperscript{44}

Punitive damages reforms, whether initiated by interest groups, or from other sources have been and continue to be implemented.

Data from general jurisdiction courts in 16 States for which information was available indicate that tort filings rose 43% between 1975 and 1998. Most of this increase occurred between 1975 and 1986. To deal with this increase, most States enacted some sort of tort reform to discourage litigation.\textsuperscript{45}

Reforms that were enacted included “placing caps on the amount of punitive damages that can be awarded, requiring clear and convincing evidence to establish punitive damage liability, and making punitive damages proportional to the type of offense alleged.”\textsuperscript{46}

Caps, or limitations on punitive damages, were a strongly supported reform in the 1980’s to combat excessiveness.\textsuperscript{47} Caps on damages may have limited amounts, but they

\textsuperscript{44} Daniels, and Martin, in Conclusion of “The Incidence, Scope, and Purpose of Punitive Damages:...,” 14 of 24.


\textsuperscript{46} Ibid. According to the Tort Reform Record taken in 1999, 30 states had made some type of punitive damages reform from 1986 – 1999.

\textsuperscript{47} States that enacted legislation that limited punitive damages in the 1980’s include: Colorado: Punitive award may not exceed compensatory damages. (1986); Georgia: $250,000, limit does not apply to product liability cases. (1987); Kansas: Limits punitive award at lesser of defendant’s annual gross income or $5,000,000. (1988); Nevada: Limits punitive damages to $300,000 in cases in which compensatory damages are less than $100,000 and to three times compensatory damages in cases of $100,000 or more Note: product liability, insurance bad faith, discrimination, toxic torts, and defamation cases are excluded.) (1989); Virginia: $350,000 limit on punitive damages. (1987). From © 2002, The American Tort Reform Association, [on-line] accessed on 26 April 2005;
did not lower the amount of lawsuits. One empirical study investigated the patterns of financial jury verdicts and the effects, if any, that caps\textsuperscript{48} have on punitive damages. Studies found that the presence or absence of caps has no statistically significant effect on whether or not the suits went to trial or were settled,\textsuperscript{49} yet they still affected the amounts of punitive awards.

I do not agree that the perceived problem of excessive awards should be addressed with caps or multiplying standards. This would suggest that the courts had the ability to limit the price of the harm. This is opposed to the BMW v. Gore guidelines that advise the award should be proportionate to the harm. If particular harms are deemed extremely malicious with grave aggravated intent to harm, then a proportionate large amount of damages is applicably fair. Caps and multiplying standards that are placed prior to specific knowledge of harm and calculated prior to trial, limit the possibility of an unprecedented or unimaginable harm. Since juries must now take into account the three guidelines provided by BMW v. Gore, the reprehensibility to the harm, the proportionality to the compensatory damages, and the proportionality to the existing state statutes; excessive caps should be proportionate to the harm and do not require limits. Caps, like

\begin{itemize}
\item \textsuperscript{48} A set limit on the amount of punitive damages that can be awarded, a maximum amount that can be charged.
\item \textsuperscript{49} Thomas A.Eaton, D. B. Mustard, and S. M. Talarico. "The Effect of Seeking Punitive Damages on the Processing of Tort Claims." \textit{University of Georgia.} (Aug. 2004). [on-line] www.terry.uga.edu/~dmustard/torts.pdf; accessed Fall 2004. 23. “Tort suits with uncapped punitive damage claims were more likely to be disposed by trial as compared to suits with capped punitive damage claims. Furthermore, tort suits with uncapped punitive damage claims were less likely to be disposed by settlement than suits with capped punitive damage claims.”
\end{itemize}
those enacted in the recent Nevada election, limit the amount of recoverable noneconomic loss to the plaintiff, with no exceptions.

Furthermore, with the predictability of caps, businesses have, and will continue to calculate harm as a business loss. For example, in Grimshaw v. Ford Motor Co., the jury awarded $125 million in punitive damages to the injured in the Ford Pinto explosion. The figure was calculated after the jury learned “that Ford relied on a study that showed that the costs of recalling the Pinto for modification would outweigh the benefits, which were estimated at $200,000 per burn death avoided and $67,000 per injury avoided, by $100 million.” With limited awards, “offenders will be temped to treat the law not as a norm demanding compliance but merely as a type of tax on activity such as predatory pricing.” The difference is fundamental. ‘Don’t do X’ or ‘Either don’t do X or else pay’... Only by imposing punitive damages of a different order from compensatory damages can a jury convey the message that a norm is categorical, that it demands compliance and not cost-benefit analysis.”

The possibility of businesses, professionals, or any member of society calculating the cost of noneconomic harms into their annual budget spreadsheets is and should be of greater concern to the nation than the possibility of large punitive damages awards. If

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juries calculate unjust awards, they can be, and have been, appealed and remanded if necessary.

The pursuit of reform for punitive damages has not ceased. Law review journals continue to be filled with articles debating the reform of punitive damages. Interest groups continue to lobby for reform on the state and federal level. The National Chamber Litigation Center is just one example of the special interest groups that continue to pursue reform; they have filed approximately 20 amicus briefs regarding punitive damages decisions in the last few years.

As there are two sides to every issue, the next section takes a look at the views that argue that punitive damages are not excessive, despite above developments.

Criticisms to the Excessive View

The excessiveness of punitive damages is often attributed to the 'litigation explosion,' a development from about the 1970's in which the nation has experienced significant increases in the number of lawsuits.

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54 See www.uschamber.com, “The National Chamber Litigation Center (NCLC) is a membership organization that advocates fair treatment of business in the courts and regulatory agencies. NCLC provides litigation support and advocates on legal and regulatory issues on behalf of the U.S. Chamber and other organizations to challenge anti-business laws.” Viewed website on 4 December 2004. See also the American Tort Reform Association (ATRA) at http://www.atra.org/. “ATRA’s mission is to bring greater fairness, predictability, and efficiency to the civil justice system through public education and legislative reform, and to put an end to lawsuit abuse.” Viewed website on 26 April 2005. Other organizations listed on the ATRA website include the American Justice Partnership, American Tort Reform Foundation, Citizens for a Sound Economy, Health Care Liability Alliance (HCLA), Overlawyered.com, The Federalist Society, The Rand Institute for Civil Justice, etc...specific State Tort Reform Coalition website links are also available.

55 Gifis, Law Dictionary, s.v., “Amicus Curiae: one who gives information to the court on some matter of law which is in doubt. See 264 F. 276, 279.”

an enormous increase in the number of lawsuits due to plaintiffs seeking profit, not justice. But in actuality, tort legislation which allowed for punitive damages provisions may have been the cause of the increase in litigation, which is a result of changing social values. In the past three decades, important legislation has been passed that involved punitive damages. One example is the Equal Credit Opportunity Act which was passed by Congress in 1974 and went into effect one year later. The Act included in the main provisions of the awarding of "punitive damages in individual suits of up to $10,000 and $100,000 or one percent of net worth – whichever is less – in class action suits." This Act was a success for several national women’s groups that addressed the issue of credit discrimination against women because of gender and marital status. With acts such as these, it is not surprising that the number of punitive damages awards, and cases that were able to award them, began to increase.

Despite the emphasis on the increase in the number of punitive damage awards in reform literature, empirical studies have shown that punitive damages awards in cases are rare. "Fewer than 5% of civil cases filed result in trials; plaintiffs prevail in approximately half of the tort cases that go to trial; and punitive damages are awarded in only 2-5% of the tort cases in which the plaintiff prevails. Thus, for every 1000 tort claims filed, typically only 50 are resolved by trial, only 25 produce trial outcomes favorable to the plaintiff, and only 1.25 impose a punitive damage award." According


58 Eaton, Mustard, and Talarico, “The Effect of Seeking Punitive Damages on the Processing of Tort Claims;” 2-3. Referring to (Eaton et al., 2000; Smith et al. 1995), (DeFrances and Litras, 1999; Eaton et al., 2000; Moller, 1996) “In all tort cases the plaintiff prevails 50% of the time. There are significant differences in win rates for
to the most recent study of "Civil Trial Cases and Verdicts in Large Counties, [in] 2001," from the Bureau of Justice Statistics Bulletin the total amount of "punitive damages, [for the year] estimated at $1.2 billion, were awarded to 6% of plaintiff winners in trials. The median punitive damage award was $50,000."\(^59\)

It is also important to note that most punitive damages awards, if at all large, are dependent upon the type of case. Studies show that the majority of punitive damages awards as well as the largest amounts are awarded in cases that are not personal. In 2001, according to the above study, the largest total amount of punitive damages awards was awarded in business to business cases.\(^60\) Of all the tort trial cases (356) in 2001, 138 were business cases. And the total amount of punitive damages awarded for the year for business cases alone was $854,658,000 out of the total of $1,221,877,000. The median for the contract cases was $83,000. Compared to the total awarded for the 217 tort cases being $367,149,000 with a median of $25,000. The business case awards are more than double that of the entire tort cases put together – which include automobile, product liability, medical malpractice, slander/libel, etc... That punitive damages are most often in business contract or securities cases is not a recent development.

\(^{59}\) Cohen and Smith, "Civil Trial Cases and Verdicts in Large Counties, 2001," 1. Under Highlights. Also see page 6, "Punitive damages were awarded in 6% of the 6,487 trial cases in which the plaintiff won damages. Punitive damages totaled over $1.2 billion and accounted for about 28% of the $4.4 billion awarded to plaintiffs overall."

\(^{60}\) Ibid. See page 6, Table 7. Punitive damage awards in civil trial cases for plaintiff award winners in State courts in the Nation's 75 largest counties, 2001.
In 1997, the RAND Corporation released a study on Punitive Damages in Financial Injury Verdicts, finding that "almost half of all punitive awards were made in cases in which the damages were financial, rather than personal in nature. These verdicts, which we call financial injury verdicts to distinguish them from personal injury verdicts, comprise disputes arising from contractual or commercial relationships including, for example, disputes arising from insurance or employment contracts or from unfair business practices." According to the study, between 1985 and 1994, the types of punitive damages awards were mostly in contract disputes (258 of 647), and the largest award amounts were found in securities disputes ($30,269,389 as the mean, which is very high, in comparison to all the other category means which were below $7,033,676). So, from this study, although the mean punitive damages award was overall, $5,344,876; a large portion of that mean was weighted from one type of case.

Who are the participants in these cases with such large amounts? Contract cases often involve business disputes; businesses comprised a substantial percentage (44%) of all contract plaintiffs, businesses suing businesses. The question then is, does the average consumer need to be overly concerned about the large punitive damages awards? Perhaps, since these large awards will have a third party effect on the economy. But

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62 Thomas H. Cohen and S. K. Smith, “Civil Trial Cases and Verdicts in Large Counties, 2001.” Bureau of Justice Statistics Bulletin. 3. See also to page 4, “For contract trials the estimated win rate surpassed 70% in seller plaintiff (77%) and mortgage foreclosure (73%) cases and exceeded 60% in buyer plaintiff (62%), rental lease (65%), and subrogation (67%) cases. Conversely, plaintiffs prevailed in 44% of employment discrimination cases and 46% of partnership disputes.”

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realistically, it is not an explosion of any kind. In fact, with the few exceptions that were mentioned in the previous section, punitive damages have not at all been running the country ragged with law suits. Realistically, punitive damages frequency and amount has been steady for the past 20 years.

The RAND study also showed that the actual number of punitive damages awards in financial injury verdicts has decreased, contrary to what reformers have claimed.

[In] the entire population of financial injury verdicts ... for each of the five-year periods 1985-1989 and 1990-1994. ... The number of punitive awards has decreased between these periods, both in absolute numbers and as a percentage of the overall number of verdicts. Punitive damages were awarded in about 16 percent of all financial injury verdicts in the 1985-1989 period and in about 13 percent of all financial injury verdicts in the 1990-1994 period. This change reflects the facts that plaintiffs are winning at a slightly lower rate, and given that they have won the case, plaintiffs are also being awarded punitive damages at a slightly lower rate as well.63

The study also showed that the mean for the amount of the awards in these cases did increase between the two periods.

However, the mean award amount increased from $3.4 million to $7.6 million between these two periods. In addition, punitive damages represent a larger portion of all damages awarded, rising from about 44 percent of all damages awarded in the 1985-1989 period to slightly less than 60 percent of all damages awarded in the 1990-1994 period.64

The increase in the amount of the awards over the ten year period could be attributed to social factors like inflation. Over a short period of time, businesses have become larger, affecting more persons nation wide, are worth more money, and invest more. It is also important to mention that the 1991 Civil Rights Act “dramatically changed the

63 Moller, Pace, and Carroll, background to Punitive Damages in Financial Injury Verdicts, in Variation in Punitive Damage Awards Over Time, 21.

64 Ibid., 22.
recovery system by granting a statutory right of compensatory and punitive damages to employees who are victims of intentional sexual discrimination."65 It does follow that once a statute is passed allowing for persons to file for punitive damages, which was not allowed previously, there will be a coinciding increase in the number of suits and damage awards.

In this sense, "we are not faced with an inexorable exponential explosion of cases, but rather with a series of local changes, some sudden but most incremental, as particular kinds of disputes move in and out of the ambit of courts."66 Therefore the increase in cases and awards can simply be evidence of social change. The court system is not a stagnant non-participatory institution. The court system is an active participant in social change and policy making, just as are the legislative and executive branches of government. "Litigation implies accountability to public standards," a way for society to "correct the [private] market."67 When seen in this view, the upsurge of litigation is a positive indication of a desired democratic decentralized government working on behalf of society in order to express the normative views that often change with generations. Litigation is a part of political and social change, and therefore should not be carelessly viewed as adverse to society.

65 Christy Lynn McQuality, in Introduction of "No Harm, No Foul?: An Argument for the Allowance of Punitive Damages Without Compensatory Damages Under 42 U.S.C. § 1981a," *Washington & Lee Law Review* 59:643 (2002) : [*644]. Also in n1 "In addition to making punitive and compensatory damages available to victims of Title VII sex discrimination, the 1991 amendments also provided a jury trial to these victims."


67 Ibid.
Arguments to Reform the Distribution

Large punitive damage awards have led to arguments stating that the plaintiffs sue not to seek justice, but for hopes of a ‘windfall’ gain. The argument against the plaintiff receiving the punitive award is that it is an inappropriate way to compensate plaintiffs for taking the trouble to sue. Groups seeking reform argue that allowing plaintiffs to keep the awards motivates frivolous or unjust lawsuits, since plaintiffs may seek damages in hopes of never going to court, but threaten defendants to pay settlement damages. Furthermore, they contend that plaintiffs bringing civil suits to court should be seeking justice, not windfall gains. When there is the potential for receiving the punitive awards in addition to compensatory awards, in some cases in significant amounts, the motive for trial becomes morally questionable, for punishment in any form should only be pursued if it is deserved.68

Arguments that support plaintiffs receiving punitive damages insist that punitive damages assist the plaintiff with legal fees required to pursue litigation, which are not covered under compensation. They also argue that contingent fees69 do not encourage frivolous litigation.

68 Referring to the punishment theory of retribution, discussed in detail in Chapter Three.

69 Gifis, Law Dictionary, s.v. “Attorney’s Fees,” “A contingent fee is a charge made by an attorney dependent upon a successful outcome in the case and is often agreed to be a percentage of the party’s recovery... often used in negligence cases and other civil actions but it is unethical for an attorney to charge a criminal defendant a fee substantially contingent upon the result. ABA DR 2-106(C).”
In a contingent fee arrangement, a lawyer who takes a case must pay the costs of the litigation up front, for the chance of a percentage return of an ultimate recovery. It simply makes no economic sense for a contingent fee lawyer to bring frivolous litigation because there is only cost and no benefit. Besides logic, the evidence shows that contingent fee lawyers provide an important function in screening out cases of dubious merit.\(^{70}\)

In response to this, it is argued that:

\[O\]ffsetting a plaintiff's litigation expenses is not an appropriate function of civil litigation. ... If the law doesn't allow plaintiffs to recover certain damages (for instance, attorneys' fees, or as-yet-unthought-of forms of pain and suffering), [then] they shouldn't be able to recover for those damages through the catch-all proxy of punitive damages.\(^{71}\)

Those opposed to plaintiffs receiving punitive awards are not in favor of doing away with punitive damages. They agree that punitive damages have their justification as punishment to the defendant. But, they do feel that the punitive damage awards should instead be paid partially or entirely to the state.

It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should receive anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public on whose behalf he is punished.\(^{72}\)

In this view, “the public on whose behalf he is punished” refers to the theory that “the justice of particular actions [is dependent upon punishment] being authorized by a stable,  


effective, and to the extent possible, democratic legal institution that represent society and punish on behalf of society. This means that a just punishment, to which the definition of punitive damages refers, should be assigned to the responsibility of the government. Since punitive damages are said to fulfill the punishment goals of retribution and deterrence, and society supports punishment only if it is legally authorized, it is argued that legal authorization of punishment was developed by society not for the sake of morality, but for the sake of politics to maintain social order and preserve the peace. Moreover it is argued, despite the moral obligations of punishment, legal procedures were established for political purposes, to maintain social order, not to maintain morality. For anyone in society to punish another, and avoid punishment in return, legitimacy of this act in the community needed to be established. Thus society developed the legal punishment system to take responsibility for legitimizing punishment, developing rules and procedures, and deciding what is punishable and how. According to this legal punishment theory, in order for legal punishment by an institution

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75 Binder, “Punishment Theory: …” 328. “... vigilante justice is not morally wrong, and that legally authorized punishment of the guilty is not morally right. The wrong of vigilante justice is a political wrong and the right to punish conferred by law is a political right.”

76 Ibid., 322. “The legitimacy of punishment is bound up with the legitimacy of the norm it enforces and of the institutions promulgating the norm, imposing the punishment, and inflicting it.”
to be justified, the crime must not only be an offense against the individual, but also against society at large. Since punitive damages are only applicable in instances where malice and willful misconduct are present, it is argued that the act is found offensive enough for justified legal punishment, it is declared a wrong against the plaintiff and as well as against society. Since the wrong is also deemed a social harm, reformers argue that punitive damage awards should go to the state – the institution that is responsible for the punishment.

This conclusion leads to the argument that there is a “philosophical void between the reasons we award punitive damages and how the damages are distributed.” According to the legal justification of punishment (for the sake of society as a whole), it is philosophically correct that the damages assessed for the purpose of punishment should go to the state, not the plaintiff. Reforms arguing damages should be received by the state are split-recovery statutes, which are currently practiced in eight states, and the most recently proposed introduction of societal damages.

77 Binder, “Punishment Theory: ...,” 333. “While Kant required that just actions had to conform to moral standards, he required more: he also held that the justice of particular actions depends on their being authorized by stable, effective, and, to the extent possible, democratic legal institutions.”

78 Ibid., 328. The question of justifying institutionalized punishment is not a question of morality “but of legitimacy.” Since punishment is for the society, not just for the individual, it is legitimized through the institution.

79 Sharkey, “Punitive Damages as Societal Damages,” 12, *381. [Cited at note 53] Quoting the court in regards to Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121 (Ohio 2002) see her endnote 108.

80 Sharkey, 11, *374.

81 Ibid.
These reforms use a "central concept . . . that societal, as opposed to individual, interests may be vindicated by punitive damages."\textsuperscript{82} Split-recovery procedure varies from state to state. The basic process has a portion of the punitive damages award distributed to a state general fund, or some type of state managed compensation fund for specific victims. The proportions vary between states.\textsuperscript{83} The goals of split-recovery statutes are (1) "to discourage plaintiffs from bringing [frivolous] punitive damages claims by decreasing the amount of their recovery,\textsuperscript{84} (2) to eliminate the "windfall gains" to the plaintiff,\textsuperscript{85} and (3) as a revenue raising measure for the state.\textsuperscript{86}

Compensatory Societal Damages\textsuperscript{87} proposes that in "pattern or practice"\textsuperscript{88} torts,\textsuperscript{89} since a "defendant’s conduct toward the plaintiff is part of a pattern of similar repeated

\begin{itemize}
\item \textsuperscript{82} Ibid., [endnote72]*373 From endnote72: “Current law recognizes that punitive damages may serve the societal objective of deterring similar conduct by the defendant . . . to ‘punish . . . and deter . . .’, [dual purpose] focus solely on vindicating society’s interests”.
\item \textsuperscript{83} Volokh, see Table 5: States that divert part of punitive damages awards to public purposes, 41-42.
\item \textsuperscript{84} Sharkey, 11. “The Illinois split-recovery statute [ ] was enacted specifically to discourage punitive damages,”
\item \textsuperscript{85} Ibid. “a plaintiff is a fortuitous beneficiary of a punitive damages award simply because there is no one else to receive it. [endnote 85].”
\item \textsuperscript{86} Ibid. also see endnote86, endnote87, endnote88.
\item \textsuperscript{87} Ibid., 15. Part III A New Category of Compensatory Societal Damages.
\item \textsuperscript{88} Ibid. Repeated conduct that likewise affects multiple parties, as opposed to single tortuous acts by defendants that harm multiple victims.
\item \textsuperscript{89} Gifis, \textit{Law Dictionary}, s.v. "tort": a wrong; a private or civil wrong or injury resulting from a breach of a legal duty that exists by virtue of society’s expectations regarding interpersonal conduct, rather than by contract or other private relationship. 26 N.E. 2d 254, 259.
\end{itemize}
conduct, a higher punitive damages award is permissible.\textsuperscript{90} The punitive damages – since calculated based upon the repeated conduct – should be held by the state in order for the other harmed plaintiffs, who did not directly participate in the specific legal case, to collect after judgment.

Those against the plaintiff receiving the award view the main purpose of punitive damages as punishment which is provided by the state in order to balance societal harm. Those who support the plaintiffs receiving the award view punitive damages' main purpose as assisting in the civil litigation process by enforcing the motive and means for plaintiffs to bring cases to court. In order to determine the most appropriate distribution purpose of punitive damages, this thesis reviews first, the justice theories that should be applied to punitive damages procedure; second, the legal punishment theories that punitive damages fulfill; and thirdly, the historical and immanent\textsuperscript{91} purposes of punitive damages.

\textsuperscript{90} Sharkey, 15. refer also to her endnote149.

\textsuperscript{91} inherent
CHAPTER 2

SERVING JUSTICE

Justice first assumes that equality is inherent in basic human worth,\(^1\) for in order to conclude that there should be fairness, you must assume that equality is inherent or agreed upon. The laws that govern society aim to ensure equality and thus uphold justice. The aims of these laws and whether they actually achieve justice are two distinct discourses. The former is often referred to as ‘formal justice’ and the latter as ‘material justice.’\(^2\) So when discussing the justice of procedures and rules, it is referred to as the formal justice aspect. Justice in law is positive or an action-requiring virtue – “righting wrongs through punishment, ensuring compensation for victims, or in some other way

\(^1\) Campbell, Justice, 246. “...the distinctive discourse of justice presupposes the ideal of basic human equality, what I call the ‘prior equality’ of equal human worth, complemented by the practical recognition of differential deserts on the part of responsible agents, so that justified inequalities are based on unequal worthiness.”

\(^2\) Ibid., 26. [First to consider is] “...the principle of formal justice, since it involves the application of whatever criteria of distribution are being used in a consistent manner, irrespective of the content or substantive merits of the criteria in question. The justification of the criteria, as distinct from their accurate implementation, is then regarded as a matter of substantive or material justice to be determined by the exercise of further moral judgment.” See also John Rawls, Theory of Justice: Revised Edition, (Cambridge: The Belknap Press of Harvard University Press, 1999), §38 Rule of Law p. 206. “I have already noted that the conception of formal justice, the regular and impartial administration of public rules, becomes the rule of law when applied to the legal system.” See also Whitney North Seymour Jr., “The American Legal System,” Why Justice Fails, (New York: William Morrow & Company, Inc., 1973), 6. Seymour points out the distinction between procedure and substance. “If there is any flaw in our implementation of these key concepts [referring to trial by jury and cross examination processes], it is our tendency to rely more on procedure than on substance.”
responding appropriately to the perpetration of injustice.” As discussed in the Introduction, Civil Law responds or addresses wrongs through compensatory and punitive damages policies. In this chapter, I will focus on the formal justice aspects of compensatory and punitive damages. The theories I chose to discuss these aspects are corrective justice and procedural justice.

First, I will discuss corrective justice, according to Aristotle, and how it applies to compensatory damages. Compensatory damages and corrective justice principles focus on restoring balance to the assumed equilibrium that existed between both parties prior to the private transactions. An unequal or wrongful transaction is one that requires correction through compensatory damages. If the wrongful transaction is deemed worthy of punishment by the courts, then punitive damages are applied. The justice of punitive damages as ‘punishment’ will be discussed in the next chapter. In order to determine justification for the policy of whether or not the plaintiff should receive the damages, or if the damages should go to the state, I will discuss procedural justice, according to John Rawls. Procedural justice focuses on determining correct procedures that would ensure justice in society. And as I will show, according to Rawls’s procedural justice principles, the plaintiff should continue to receive the punitive damages award in order to ensure justice.

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3 Ibid., 3.
Correction

Victims to any crime carry the burden of loss until the legal system can shift that burden. In the case of civil law, the burden is shifted from the victim to the wrong-doer through monetary payment. The 'shift' is based upon the principles of corrective justice.

Aristotle recognized justice as the regulating factor in good human relations. When relations or transactions are not equal, they are deemed unjust. With different types of relations and transactions, different types of injustice are entailed. Aristotle distinguishes the justice or injustice of human relations that deal with honor, possessions, safety, and success; and those justices or injustices that are caused by a man's desire for profit. This type of justice or injustice has two parts, one ensuring equal distribution of citizenship in the community and the other rectifying private transactions; the second type of justice or injustice falls under the discourse of civil law.

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4 Martin Ostwald, (transl), Aristotle: Nicomachean Ethics, (Prentice Hall, Upper Saddle River, New Jersey, 1999). Book V.1130a. "...justice alone of all the virtues is thought to be the good of another, because it is a relation to our fellow men in that it does what is of advantage to others, either to a ruler or to a fellow member of society." Future references as NE 1130a.

5 NE 1130a.20 - 25. "...unjust in the wider sense of 'contrary to the law.'"

6 NE 1130b.1-5. In Book V. 2. Partial justice: just action as distribution and as rectification "The capacity of both is revealed in our relations with others, while the sphere of the former is everything that is the concern of a morally good man, the latter deals with honor, material goods, security, or whatever single term we can find to express all these collectively, and its motive is the pleasure that comes from profit."

7 NE 1130b.30. "One form of partial justice and of what is just in this sense is found in the distribution of honors, of material goods, or of anything else that can be divided among those who have a share in the political system. For in these matters it is possible for a man to have a share equal or unequal to that of his neighbor. A second kind of just action in the partial sense has a rectifying function in private transactions, and it is divided into two parts: ..." (continued below)
Aristotle further recognized two aspects to private transactions, those that are voluntary and those that are involuntary.\(^8\) In civil cases of voluntary transactions, like contracts, property agreements, or employment, the parties are assumed to enter into the original transaction willingly, each with their personal expectations of desired outcome to the agreement. Civil law also has forms of involuntary transactions — accidental harms — known as torts.

When a transaction has been determined to be unjust, rectification (correction) is based upon the principles of corrective justice. Correction first views the participants of these actions as equal. But just transactions can be based upon proportional equality. That is, even if the participants are not actually (physically or socially) on equal standing prior to the transaction, given the voluntary nature, in the transaction they are treated as equals. Thus the transaction itself is in proportion.\(^9\) The transaction is deemed unjust when it violates the proportion.

Since the intent of the voluntary transaction between private parties assumes that they both agree to the transaction, rectification or corrective justice, is concerned only with the

\(^8\) *NE* 1131a.2 – 8. (continued from above) "... (a) voluntary and (b) involuntary transactions. (a) Voluntary transactions are, for example, sale, purchase, lending at interest, giving security, lending without interest, depositing in trust, and letting for hire. They are called voluntary because the initiative in these transactions is voluntary. (b) Some involuntary transactions are clandestine, e.g., theft, adultery, poisoning, procuring, enticement of slaves, assassination, and bearing false witness; ..."

\(^9\) *NE* 1131b.32 - 1132a.1-2. "Now the just in transactions is also something equal (and the unjust something unequal), but <it is something equal> which corresponds not to a geometrical but to an arithmetical proportion." See footnote 24 on Ostwald page 120 – 121. "An ‘arithmetical proportion’ is for us not a proportion at all but a series in an arithmetical progression. In it the first term is larger than the second by the same amount by which the third term is larger than the fourth: \(a - b = c - d\). It is ‘something equal’ because in such proportions the sum of the means is equal to the sum of the extremes: \(a + d = b + c\)."
injustice or violation of proportion in the transaction. It is this ill-proportion which corrective justice aims to restore. “The only difference the law considers is that [which] brought about the damage”10 in the transaction, and not the moral implications of the wrong or the character of the participants (such as the malice and intent on which punitive damages are based). It is for this reason that corrective justice is applicable to civil law and compensatory damages.11

Corrective justice rules are concerned with ensuring or restoring the appropriate terms and conditions for persons to conduct fair private transactions. Corrective justice rules are less concerned with offering guidance regarding “the actual [moral] duties [we have as citizens] to avoid or prevent harm ... to one another.”12 The injustice focused on in the rules of corrective justice is that which was created by the transaction, and it is for the judge to restore equilibrium. The correction is made by imposing the loss or burden on the guilty by taking away any gain made by the defendant from the transaction and transferring this gain back to the plaintiff. This is achieved with the payment of

10 NE 1132a.3-4.

11 See Ostwald footnote 24, p. 121, quoting Ross, Ethica Nicomachea (Oxford, 1925) “The problem of ‘rectificatory justice’ has nothing to do with punishment proper but is only that of rectifying a wrong that has been done, by awarding damages; i.e., rectificatory justice is that of the civil, not that of the criminal courts. The parties are treated as equal (since a law court is not a court of morals), and the wrongful act is reckoned as having brought equal gain to the wrongdoer and loss of his victim; it brings A to the position A + C, and B to the position B − C. The judge’s task is to find the arithmetical mean between these, and this he does by transferring C from A to B ....”

12 Coleman, “Theories of Tort Law”, 14. Corrective justice is concerned with the appropriate “…conditions under which it is fair to impose duties to avoid or prevent untoward consequences, [and it] offers little guidance regarding the actual duties to avoid or prevent harm that we owe to one another.”
compensatory damages which include pecuniary damages, non-pecuniary damages, and hedonic losses,\textsuperscript{13} to balance the wrong.

In this sense, corrective justice simply focuses on restoring balance once a wrong has already been done. But, when taking into account what should have been or should not have been done, or what could have been done to prevent the wrong, these are considerations the civil legal system assesses to justify punishment, or the application of punitive damages, not for compensation. This is what separates compensatory and corrective justice from punitive damages and punishment in civil law.

\textit{Procedural Justice}

Punitive damages are added when the wrong is deserving of punishment, and takes obligations to society into account.\textsuperscript{14} After a guilty judgment, if punitive damages are determined necessary, then the question (for this thesis) is, who shall receive this award in order to serve justice properly? This question is not a matter of rectification, as explicated above. Nor is it strictly a matter of punishment, for once the award is ordered, punishment is served (either way – to the plaintiff or to the state). Therefore, receipt of the damages requires a process, a procedure, a policy. So, in order to determine whether the plaintiff should receive the punitive damages award or if the award should go to the state, I now investigate the theory of procedural justice.

\textsuperscript{13} Volokh, 8. "compensatory damages include pecuniary damages - which is out-of-pocket expenses, or loss of wages; non-pecuniary damages - nonmonetary losses like pain and suffering; and hedonic losses - for the lost pleasure of life."

\textsuperscript{14} Justifications of the Punishment aspect further discussed in Chapter Three.
Procedural justice theories, specifically in regards to legal system, attempt to determine the just process for criticizing, reforming, and creating the rules of law so they would properly serve justice. The emphasis in procedural justice is the fair and accurate method for devising rules of law. For procedural justice, fair and accurate application of correct rules should ensure just results. John Rawls's theory of 'justice as fairness,' is "a theory of just procedures, so that whatever results from these processes is itself just."

According to Rawls, the main purpose of a legal system is to coerce rational persons in the community to maintain order through public rules. The legal system and its rules "regulate ... conduct and provide the framework for social cooperation." In order to maintain order, Rawls emphasizes that the rules of law must have the citizen's liberty as a priority and a sense of regularity. Thus, the maxims that the rules of law are derived from include the priorities of liberty and regularity in order to ensure social cooperation.

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15 John Rawls, *Theory of Justice: Revised Edition*, §10 Institutions and Formal Justice, 47-48, "Now by an institution I shall understand a public system of rules which defines offices and positions with their rights and duties, powers and immunities and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for certain penalties and defenses, and so on, when violations occur. As examples of institutions, or more generally social practices, we may think of games and rituals, trials and parliaments, markets and systems of property." See also 51, "Formal justice in the case of legal institutions is simply an aspect of the rule of law which supports and secures legitimate expectations."

16 Ibid., 207-210.

17 Ibid., §38 Rule of Law p. 206-207. "One kind of unjust action is the failure of judges and others in authority to apply the appropriate rule or to interpret it correctly. ... The regular and impartial, and in this sense fair, administration of law we may call ‘justice as regularity.’ This is a more suggestive phrase than ‘formal justice.’"


These maxims include (1) that "ought implies can."20 This means that every rule of law inherently includes the ability to be achieved by rational persons.21 (2) That "similar cases [are] treated similarly."22 This ensures that society can be assured that arbitrary changes will not be made given similar circumstances - this adds to predictability in rules; (3) that "there is no offense without the law."23 This implies that the rules be known and have been "expressly promulgated, meanings clearly defined, that statutes be general both in statement and intent and not be used as a way of harming particular individuals ...."24 And (4) that rules of law define the notion of natural justice. This means that the rules of law "intend to preserve the integrity of the judicial process. ... The precepts of natural justice are to insure that the legal order will be impartially and regularly maintained."25 Impartiality is mandatory in order to determine whether any decision or rule would be considered just, or if any action would serve justice.26

20 Ibid., 208.

21 Campbell, 120-121. Defining a rational participant. "... in the original position, where the parties are confined to those with the capacity to take part in society and who must, therefore, have the minimum requirements of moral agency: that is, they must inter alia, have the capacity to have, and effectively pursue a conception of their own good."


23 Ibid., 209

24 Ibid.


26 Ibid., 51. "For it is supposed that institutions are reasonably just, then it is of great importance that the authorities should be impartial and not influenced by personal, monetary, or other irrelevant considerations in their handling of particular cases."
Procedural justice embraces and hopes to achieve impartiality through emphasis on correct procedure.

**Correct Procedure**

Rawls's political theory of justice uses a hypothetical contractual procedure to understand the role of justice in society. The initial analysis of a hypothetical state of society allows political philosophy to depict what the social and political rules and the system of government *ought* to be and how these rules could then sustain particular policies.²⁷

Rawls's approach crucially depends on the characterization of the imagined state of nature, which includes the qualities of the participants. His imagined state of nature begins with participants hypothetically entering into a contract²⁸ which establishes the foundations of a legal system. Entering into this contract would assist persons to achieve personal goals²⁹ in community life, as opposed to living without the benefits of political

²⁷ Campbell, 94. "Imagining and thinking through the implications of a hypothetical state of nature is a way of getting to know the content of the social and political rules and the system of government that ought to be created and sustained in the here and now."

²⁸ Rawls, *Theory of Justice: Revised Edition*, 10 – 11, "...we are not to think of the original contract as one to enter a particular society or to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are principles that free rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association." See also Rawls, “A Liberal Theory of Justice,” 577 – 578. Rawls’s Social contract theory "corresponds to the state of nature in the traditional theory of social contract. The original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice."

²⁹ It is assumed that persons would desire assistance from the community and a system to achieve desires and life goals. See also Campbell, 92. The Social Contract is an agreement between potential citizens about the terms on which they are to enter into either social or political relationships. It posits a situation — "state of nature" — in which
arrangements. By entering into a contract, citizens consent to and allow the operation of social and/or political organizations which enforce social order. Since the entrance into the contract is considered a fair\textsuperscript{30} situation for all rational persons, Rawls argues that it is “possible to base political obligation on ... the premise that citizens have an obligation to obey just laws,”\textsuperscript{31} since they agreed to enter into the contractual agreement with others in order to receive the benefits of a politically organized society.

Once this mutual obligation is established, next Rawls explicates a process which produces a hypothetical deliberative state in which the rules of law can be judged, reformed, or established. This begins with “the original position.”

The Original Position

This hypothetical contractarian method begins with a hypothetical state for decision-making, the “original position.” The strategy of using the original position hopes to ensure impartiality by insisting that “all causes of bias and partiality are excluded from [deliberation], thus achieving an impartial and fair outcome.”\textsuperscript{32} This hypothetical state requires three things: (1) that the participant has the capacity to take part in society – meaning they can contribute to the free market, and have the minimum requirements of persons who have no existing political (and perhaps social) rights or obligations reach (usually unanimous) agreement about the basis on which to establish a social and/or political system in which they do have recognized rights and obligations.

\textsuperscript{30} Campbell, 95. ‘Fair’ because one can choose not to enter into the contract. “...freedom is a matter of autonomy (uncoerced and informed choice) and equality has to do with equal capacity to bargain on the basis of equal procedural rights and equal claims on the outcome.

\textsuperscript{31} Ibid.

\textsuperscript{32} Ibid., 98
moral agency, in order to deliberate in regards to principles of justice; (2) the participant must be (hypothetically) free and equal, in order to achieve fairness; and (3) the participants deliberate under a “veil of ignorance.”

Free, means un-coerced and not under any prior obligations or constraints. No hidden agendas, no party affiliations, no causes to pursue, purely free for decision making and deliberation in the hypothetical contract. This freedom is not only from oneself, but also from other participants. During deliberation, participants are viewed as independent and autonomous sources.

Rawls argues that this freedom will ensure that participants will deliberate with “mutual disinterest” in regards to the claims for the benefits of social cooperation. So, in pursuit of their disinterested claims, “the parties are free to propose and argue for the principles of justice that they believe would be of greatest benefit to themselves; and it is assumed that they, as rational persons, will agree only to the best bargain they can obtain in return for the benefits of social cooperation.” This is what Rawls calls possessing “rational autonomy” – “the rationality of the intelligent and prudent person, the capacity

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33 Campbell, 120-121. Defining a rational participant. “… in the original position, where the parties are confined to those with the capacity to take part in society and who must, therefore, have the minimum requirements of moral agency: that is, they must inter alia, have the capacity to have, and effectively pursue a conception of their own good.”

34 Ibid., 101. “Rawls defines that the parties are egoists since they do not seek to harm anyone else, but says they are mutually disinterested in that they care only about their own welfare, taken in isolation. They have normal human desires although they feel no envy, and are not interested in benefiting or harming others for its own sake.”

35 Ibid.
to discover and follow the most effective means to a chosen end." So the rationally autonomous participants in the hypothetical contract will ensure that decisions, rules, and laws are fair and just, not only for their "mutually disinterested" selves, but for all persons in society. The "mutual disinterest," since it is coercion-free, forces one to apply to the self what in a disinterested, unbiased, and impartial way is applicable to the whole.

In addition to freedom, there must be equality. Since the basis of any discourse in justice begins with the assumption of equality, the hypothetical contract ensures equality is prefaced when deciding the rules of law. In order to debate just rules of law in the original position, persons must have equality in procedural rights, equal access to important sources of valid claims on societal resources in relation to basic social institutions, and equal worth which is "symmetrical with respect to one another."

The achievement of hypothetical equality for deliberation is possible because we are rational agents: we have the ability to imagine, understand, and apply hypothetical

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36 Campbell, 101. "People in the original position possess what Rawls calls 'rational autonomy', a property he equates with the notion of rationality found in Kant's hypothetical imperative or in neoclassical economics, ...” For reference to Kant, see James W. Ellington, (transl.), Immanuel Kant: Grounding for the Metaphysics of Morals with On a Supposed Right to Lie Because of Philanthropic Concerns, 3rd ed. (Hackett Publishing Company, Inc., Indianapolis/Cambridge, 1981). Third Section: Transition From a Metaphysics of Morals to a Critique of Pure Practical Reason, The Concept of Freedom Is the Key for an Explanation of the Autonomy of the Will, 447 (marginal number), page 49. “What else then can freedom of the will be but autonomy, i.e., the property that the will has of being a law to itself? The proposition that the will is in every action a law to itself expresses, however, nothing but the principle of acting according to no other maxim than that which can at the same time have itself as a universal law for its object. Now this is precisely the formula of the categorical imperative and is the principle of morality. Thus free will and a will subject to moral laws are one and the same.”

37 Supra footnote 1.

38 Campbell, 101.
equality. Thus the nature of respect for and understanding of equality is rooted in the equality of persons as moral agents.\textsuperscript{39}

Now that the conditions of the particular participants in the original position are determined, justice as fairness further clarifies the process with the ‘veil of ignorance.’ In order for the original position to determine just procedures leading to fair decisions, or rules of law, the persons in the original position (free and equal) must imagine themselves under a ‘veil of ignorance.’ The veil ensures theoretical impartiality in the original position. This veil is a hypothetical state in which one does not know one’s status in society in regards to material possessions, occupation, or status. The veil also makes deliberation void of gender, age, intelligence, strength, or talent. Rawls argues that the original position, with a veil of ignorance, would “ensure that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances.”\textsuperscript{40}

For example, in everyday personal or social conversation, when asking whether or not an individual approves or disapproves of, for instance, the increase or decrease of taxes, their response is usually supported by their personal position in society, how the rise or lowering of taxes would affect them personally. It is not unjust to prefer to support a political law, a political party, or choose a side of a political issue based upon the benefits and burdens of your person. But when placed in the position of reforming, creating, or

\textsuperscript{39} Campbell, 102. Referring to Kantian constructivism. Constructivists contend the “principles of justice are generated from the ideal of the moral person through the model of the original position.” Persons in the original position create/construct principles of justice, and “the constructing parties are equal.”

\textsuperscript{40} Rawls, “A Liberal Theory of Justice,” 578. The contingencies of social circumstances are detailed in regards to determining the least advantaged group.
criticizing the rules of law in order for them to be determined for society – everyone would prefer that the persons in deliberation are not only considering themselves, but the justice that is to be served to society as a whole or what is right in itself, with no bias or personal preference. This is why Rawls argues that the veil of ignorance "remove[s] all the possibilities of unfairness in the decision to be made, by rendering each [person] entirely ignorant of any particular fact about themselves which might lead them … to favor themselves at the expense of those with different qualities."\(^{41}\)

Furthermore, parties under the veil of ignorance are "*ex hypothesi*, ignorant of the content of their [personal] sense of justice."\(^{42}\) This means that they have no bias or preference to determining what is just in society (such as religious beliefs or ethical theories). This ignorance is essential for the logical independence of the contract method since "the motivation of the parties is the furtherance of their own [independent ignorant] interests, [and] all that they know is that they are creatures who will have a sense of justice in actual society."\(^{43}\) So the sense of justice that they do possess, and will refer to, is that of the basic human equal worth. Thus, the veil of ignorance will result in a "procedural fairness based on the strategy of ensuring that all causes of bias and partiality are excluded from the original position, thus achieving an impartial and fair outcome."\(^{44}\)

These characteristics of the original position – free, equal, and ignorant to their own social positions, or status – are monumental to procedural justice in establishing

\(^{41}\) Campbell, 102.

\(^{42}\) Ibid.

\(^{43}\) Ibid., 102 – 103.

\(^{44}\) Ibid., 98.
impartiality in order to deliberate upon which principles should guide the criticism of the rules of law. Thus the principles chosen to guide the rules of law would be the result of a purely just procedure since persons determining them are free, equal, and ignorant; and in turn the principles would guide deliberation to justice.

Rawls hoped that "the principles [of justice] would be chosen [in the original position and] match our considered convictions of justice or extend them in an acceptable way." Furthermore, since the original position would ensure impartiality, it would also determine "limitations on argument[s]" during deliberation. Disagreements regarding justice could be limited, accepted, rejected, and directed by the fairly chosen principles of justice.

Determined Principles of Justice

For Rawls, the original position procedure results in two principles of justice. The principles of justice are broad in the sense that they could be applied with specific deliberation to all rules of law, or questionable situations that require regulation – they assist us in deciding what the rules ought to specify. These principles should be used to regulate, reform, or criticize the basic institutions of society, which in turn will determine the distribution of the benefits and burdens of social cooperation.

The first principle states that: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty

\[\text{Campbell, 98.}\]

\[\text{Ibid.}\]

\[\text{Rawls, "A Liberal Theory of Justice," 578. These principles are to be used to guide and "regulate all subsequent criticism and reform of institutions."}\]
for all." It implies that rational participants in society will value, and therefore desire, equality of basic liberties. These basic liberties are "primary goods," as defined by Rawls; "rights and liberties, powers and opportunities, income and wealth,...[as well as] self respect." These "primary goods" can be governed by institutions, and are required by any person in order to pursue any conception of the good in their life. Once the primary goods are constituted, in the original position, the next question is "how these goods are to be distributed;" in other words what are justified distributive procedures?

Although the first principle requires equality in liberties, Rawls recognizes that there are inherent inequalities in basic liberties which develop within society. For, although everyone should be equal, not everyone is in fact equal. Advantages and disadvantages in society occur for reasons that include natural abilities or talents, or privileges, honor,

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49 Ibid., 588-589. "The argument for the two principles of justice does not assume that the parties have particular ends, but only that they desire certain primary goods. ... The preference for primary goods is derived, then, from only the most general assumptions about rationality and the conditions of human life."

50 Rawls, *A Theory of Justice: Revised Edition*, 54. "...For simplicity, assume that the chief primary goods at the disposition of society are rights, liberties, and opportunities, and income and wealth. (Later on in Part Three the primary good of self-respect has a central place.)" See also Rawls, "A Liberal Theory of Justice," 583. Also see Campbell, 104, "the social bases of self-respect, ... conditions necessary for individuals to maintain a feeling of their worth as moral agents."

51 Ibid., 54. "...primary goods, that is, things that every rational man is presumed to want. These goods normally have a use whatever a person’s rational plan of life.” See also Campbell, 104. “conception of the good in a well ordered society which respects the individual’s moral powers to follow out in his life a conception of the good and an ideal of justice.”

52 Campbell, 105.


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and wealth that are inherited from birth or gained through certain advantaged circumstances. There are leaders and there are followers. Some choose to lead, and some choose to follow. Not everyone can be the president at the same time, and not everyone wants to be president, and so forth. In recognizing the inherent inequalities that develop in society, the second principle entails the necessity to turn attention from assuming that ‘all persons are created equal’ to inherent social goods that one may try to exploit as a result of circumstance. So, the second principle of justice must address what to do in the event that there are inequalities, in order to ensure that liberty and equality are maintained.

Thus, the second principle states: “Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings [or the difference] principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.”

The Least Advantaged and the Difference Principle

Rawls defines the “least advantaged” group as those “whose family and class origins are more disadvantaged than others, whose natural endowments (as realized) permit them to fare less well, and whose fortune and luck in the course of life turn out to be less happy, all within the normal range … and with the relevant measures based on social primary goods.” In the event of unequal distributions of primary goods, (which refers

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55 Ibid., 83 - 84. “I shall assume that everyone has physical needs and psychological capacities within the normal range, so that the questions of health care and mental capacity do not arise. … The first problem of justice concerns the relations among those who in the everyday course of things are full and active participants in society and directly or indirectly associated together over the whole span of their life. Thus, the
to the excess of basic liberties which have already been maximized to the highest point of equal distribution, or to the fact that some persons or group of persons have some advantage over the other in terms of access to these goods) the second principle states that these excess goods should be distributed so that they have the effect of maximizing the lot of the least advantaged group.\(^{56}\) If in a situation, certain individuals have superior talents, and gain higher benefits than others, Rawls feels they do not have any intrinsic sole right to these benefits arising from personal merit.\(^{57}\) Thus if they receive an excess of goods, they are obligated to distribute these goods, unless as the “difference principle” states, their receiving or keeping these goods would benefit the least advantaged.

According to the “difference principle”, also referred to as the “just savings principle”:

> Assuming the framework of institutions required by equal liberty and fair equality of opportunity, the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society. The intuitive idea is that the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate. ... The difference principle is a strongly egalitarian conception in the sense that unless there is a distribution that makes both persons better off (limiting ourselves to the two-person case for simplicity), an equal distribution is to be preferred.\(^{58}\)

\(^{56}\) Campbell, 106.

\(^{57}\) Ibid., 107.

For example, if a student has shown to be talented in the medical field, the government may offer that person a scholarship for school. This advantage is not to ‘secure the prospects of the better off.’ But, if the loan required the student to give back to society in partial compensation for his loan, by practicing medicine upon graduation for a certain period at a free clinic, or as lawyers are required to provide a certain amount of *pro bono* cases, the federal scholarship becomes an advantage that benefits the least advantaged as well. The difference principle assumes that rational persons would not permit inequalities in positions where they might not be able to compete on equal terms, so the second principle of justice ensures that inequalities should be arranged to the greatest benefit of the least advantaged.

Another illustration of the second principle of justice and the difference principle given by Rawls is a hypothetical situation of limiting free trade.

For example, persons engaged in a particular industry often find that free trade is contrary to their interests. Perhaps the industry cannot remain prosperous without tariffs or other restrictions. But if free trade is desirable from the point of view of equal citizens or of the least advantaged, it is justified even though more specific interests temporarily suffer. For we are to agree in advance to the principles of justice and their consistent application from the standpoint of certain positions.

Thus when faced with inequalities inherent in society, and for the purpose of distribution and justice, the priority of benefit is that of the least advantaged, not the majority of participants or specific interests.

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59 Campbell, 107.

Application of the Principles – Reflective Equilibrium

The process for “justice as fairness” – the original position, the veil of ignorance, and the two principles of justice – can be used to analyze present day justice issues, whether it be the criticism, reform, or creation of political policies. The advantage of the hypothetical procedure is that it can be used at any time by rational persons in pursuit of justice. The original position is a state of deliberation, and a part of the process of decision making that establishes guidelines and principles to follow in order to maintain justice. Rawls stated:

At any time we can enter into the original position,... simply by following a certain procedure, by arguing for principles of justice in accordance with these restrictions.

The use of the original position when in deliberation as to whether or not a policy serves justice as fairness, Rawls refers to “reflective equilibrium.” Once the principles of justice are decided, we can apply them to our particular policies and convictions of justice to see if they match or extend them in an acceptable way. Using the principles of justice as a guide to goodness and right, we can determine whether or not reforms are necessary. Procedural justice asserts that with correct deliberation guided by the principles of justice and the original position, justice as fairness can be achieved.


62 Ibid. [The reflective equilibrium is used] “...to see if the principles which would be chosen match our considered convictions of justice or extend them in an acceptable way. We can note whether applying these principles would lead us to make the same judgments about the basic structure of society which we now make intuitively and in which we have the greatest confidence; or whether, in cases where our present judgments are in doubt and given with hesitation, these principles offer a resolution which we can affirm on reflection.”

63 Ibid. 18. “We can either modify the account of the initial situation or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are
For in the deliberation of a policy, even if we can only determine what we ought to do, or how the process or procedure should be, we are closer to achieving justice than not carefully reflecting upon the policies at all, or waiting for some end result to justify or not justify its existence. So despite the hypothetical nature of 'justice as fairness,' this theory appeals to normative views because it focuses on the procedure for establishing standards for determining justice in society.

So, for the sake of this thesis, we will use a reflective equilibrium and apply it to the distribution policy of punitive damages. Reformers argue that since punitive damages are calculated for multiple harms, the punitive damages award should not be given solely to the plaintiff. Reformers argue that this is process does not serve justice and provides a 'windfall' gain to the plaintiff. Reformers feel that the punitive damages should go to the state, in order to beheld for and benefit, those for whom the award was calculated, not just the plaintiff who took the time, effort, and opportunity to sue. In order to apply 'justice as fairness' to the policy in question — whether or not punitive damages should continue to be received by the plaintiff, or if the purposes of justice and punitive damages would be better off served if received by the state, or split between the plaintiff and the

liable to revision. By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted. This state of affairs I refer to as reflective equilibrium."

64 Sharkey, 15. Section III A New Category of Compensatory Societal Damages, “The concept of societal damages is particularly relevant to widespread harm torts. These torts comprise two categories: (1) single tortuous acts by defendants that harm multiple victims; and (2) ‘pattern or practice’ torts, which consist of repeated conduct that likewise affects multiple parties. If a defendant’s conduct toward the plaintiff is part of a pattern of similar repeated conduct, a higher punitive damages award may be permissible.”
state – one must first ask: How do compensatory and punitive damages fulfill the two principles of justice?

Given the first principle of justice, that of equal distribution of liberties or primary goods, the purpose of the processes of the civil court system is to correct the imbalance of liberties that may result from private transactions. Although compensatory and punitive damages are liberties or primary goods, they are not ‘public goods,’ for primary goods in private transactions are private goods. The primary responsibility and concern of societal institutions is the distribution of public goods; Societal institutions become concerned with private goods only when private entities seek the assistance of the institution to settle injustices or imbalances of private transactions.

Although the actual goods distributed as compensatory damages or punitive damages are not public goods, the assistance provided by societal institutions in correcting injustices in private transactions is a public good. Thus, access to the civil law system should be equal and fair to all citizens. Assuming that access to the civil law system is equal, the policies that regulate distribution, policies for compensatory and punitive damages, should aim to ensure equality to the participants in the civil law arena.

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65 Rawls, *A Theory of Justice: Revised Edition*, 235. "...public good has two characteristic features, indivisibility and publicness. That is there are many individuals, a public so to speak, who want more or less if this is good, but if they are to enjoy it at all must each enjoy the same amount. The quantity produced cannot be divided up as private goods can and purchased by individuals according to their preferences for more and less. There are various kinds of public goods depending upon their degree of indivisibility and the size of relevant public. ... A standard example is the defense of the nation against (unjustified) foreign attack."

66 Ibid., 236. "It follows that arranging for and financing public goods must be taken over by the state and some binding rule requiring payment must be enforced."
That punitive damages go to the plaintiff is supported by the second principle of justice; the principle that inequalities are to be arranged to the greatest benefit of the least advantaged or in accordance with the difference principle. The inequalities in private transactions are the goods that are being sued for by the plaintiff as punitive damages. If we contemplate pure compensation (compensatory damages only), if a guilty verdict is decided, the goods are distributed to the plaintiff. But compensatory damages, unlike punitive damages, are not inequalities. The civil law system and compensatory damages are merely correcting the inequalities created during private transactions. Thus, compensatory damages are not concerned with ‘inequality’ as it is referred to in the second principle; for the second principle addresses inequalities that are a result of an excess of advantages for some person or group, which is produced from a just situation. Thus, in terms of the second principle of justice, an unjust transaction occurs only when an inequality of excess, not rightly deserved, is created; but correction and compensatory damages re-distribute and settle inequality for the sake of restoration.

Punitive damages, on the contrary, serve as punishment – further damages for further harm caused. It can be argued that this may be just a problem of semantics. For the harm weighed for punitive damages, although not nominal, is also an inequality resulting from an unjust action, so they are no different or not ‘in excess’ (just as compensatory damages are not.) For punitive damages punish or correct for harm that is not monetary. The only difference is the term and application, but in theory, they seem similar. But since the civil law and the public discourse clearly make the distinction between the two, as discussed in Chapter One, we will proceed on the premise that punitive damages do not represent in any way simple compensation or correction.
If we view punitive damages as an inequality which is an ‘excess liberty’ or in this case ‘further damages’ which are to be distributed, then according to the second principle the inequality – which I will define as the defendant having to pay further damages and the plaintiff receiving additional damages beyond compensation – should be distributed and is allowed as long as it is to the benefit of the least advantaged group. Since the plaintiff, in the situation of the civil law suit is “the least advantaged group,” distribution of punitive damages should be to the plaintiff.

To explain: if we refer back to the definition of “the least advantaged” group: those “whose family and class origins are more disadvantaged than others, whose natural endowments (as realized) permit them to fare less well, and whose fortune and luck in the course of life turn out to be less happy, all within the normal range ... and with the relevant measures based on social primary goods,”^6^ how is the plaintiff the least advantaged? The three contingencies which we can weigh to determine the least advantaged are family and class origins, natural endowments, and fortune and luck in the course of life. Given the plaintiff and the defendant, it is entirely possible that the family and class origin and natural endowments of each could be equal or weigh more to the plaintiff. But since the civil law arena, as stated earlier, does not take into account family

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^6^ Rawls, *A Theory of Justice: Revised Edition*, 83 - 84. “I shall assume that everyone has physical needs and psychological capacities within the normal range, so that the questions of health care and mental capacity do not arise. ... The first problem of justice concerns the relations among those who in the everyday course of things are full and active participants in society and directly or indirectly associated together over the whole span of their life. Thus, the difference principle is to apply to citizens engaged in social cooperation; if the principle fails for this case, it would seem to fail in general.” Rawls also notes that there are three main kinds of contingencies, possibilities, or unforeseen unequal situations that will affect persons in society in which the least advantaged status is based upon: family and class origins, natural endowments, and fortune and luck in the course of life.
and class, or natural endowments when deciding compensatory damages, they should not be weighed into the distribution for punitive damages. In civil law, the personal positions of the participants do not and should not weigh into the decision of guilt in private transactions. In this way, the civil law arena applies its veil of ignorance, thus so will I. But, I do argue that the last contingency can apply – one’s fortune and luck in the course of life. For given the situation – the private transaction – we can conclude that the plaintiff did not fair luckily in this private transaction in the course of his/her life, since we are assuming a guilty verdict has been established. If any of the three contingencies of the least advantaged are to apply at this point, given that the defendant is guilty, the plaintiff is the least advantaged in the situation since the plaintiff is judged a victim of a wrong that has been deemed worthy for punitive damages. Thus, the punitive damages should be received by the plaintiff according to the second principle of justice.

Arguments against distribution to the plaintiff would argue that the least advantaged in this situation would be society, especially if the harm was one that required mass litigation or caused the defendant to change policies that applied to the whole of the nation or state in which the wrong was committed. And so the damages should go to the state, which would in turn serve society as a whole.

The problem with this view is that it is conditioned on the premise that the harm was a mass litigation and punishment did (as an end result) affect society, this is a special circumstance. But reform of punitive damages policy should not be changed for specific occasional conditions. Even if societal damages are desirable from the point of view which requires attention to certain situations, the proposed reform is based upon specific conditions and interests. But, keeping in tune with the original position and the veil of
ignorance, policies and rules of law, in order to sustain justice, policies and rules should not be made on the premise of specific interests. Given the possibility that I could be one of the least advantaged, the plaintiff in a law suit, my mutual disinterest\textsuperscript{68} in the benefits to society as a whole or to specific groups would lead me to conclude that I should receive the punitive damages, and that they should not be held for others who did not pursue legal suit. Since I was judged the victim in a wrong-doing and went through the long process of civil court, the benefit, if any that initially would come from the judgment, such as punitive damages, should be awarded to me, the plaintiff. This is not a purely selfish decision, but it is mutually disinterested.\textsuperscript{69} For as addressed in the next chapter, purposes of punitive damages that include punishment do benefit society through deterrence, both specific and general.

Thus I will briefly conclude that through my deliberation, for the punitive damages policy, the plaintiff is the least advantaged and should continue to receive the award. The following chapters discuss further the purposes of punitive damages – punishment, honor, insult, and plaintiff incentive – and how these purposes contribute to why the plaintiff should receive the damages. For, although procedural justice can direct us in the further deliberation of this issue, it is not the sole guide to correct policy.

\textsuperscript{68} Campbell, 101. [Mutually disinterested refers to those in the original position, where in pursuit of their disinterested claims,] “the parties are free to propose and argue for the principles of justice that they believe would be of greatest benefit to themselves; and it is assumed that they, as rational persons, will agree only to the best bargain they can obtain in return for the benefits of social cooperation.”

\textsuperscript{69} Independent, not coerced by special interests, be the special interest of society or any group, but only the interest of a participant in the pursuit of justice, as one in the original position.
Criticisms to Rawls

Critics argue that the circumstances to sustain the original position – free, equal, and ignorant – are not possible. Although our minds can be creative enough to imagine hypothetical situations, it is not likely that persons could communicate, let alone deliberate without personal convictions influencing decisions. Criticism that the hypothetical situation is not easy to achieve, is not surprising, since it is an ideal situation. But it is that very superlative situation that hopes to create ideal principles. It may be difficult, but I would not say that it is impossible. If idyllic justice principles are what we are striving for, then a perfect process is the best way to achieve this.

"The principal weakness of Rawls's [hypothetical contractual] approach is the uncertainty which surrounds the original position and its outcome."^70 Since average utility offers everyone the best chance of the best life, it is assumed that persons in the original position would rationally choose average utility. Critics argue that it "seems desperately ad hoc for Rawls to rule this out by insisting on the unrealistic proviso that rational individuals would not be prepared to take the risks involved in such a strategy and [yet] to not know the probabilities involved."^71 But it is this very choice which Rawls relies upon in order to accept his hypothetical contractarianism over a principle of universal beneficence as the basis for social choice. Since it cannot be certain that these rational agents would make this choice, then his justification is weak.

The uncertainty is also evident in "that the basic liberties must be given priority by purely self-regarding individuals with a sound knowledge of human nature, for actual

^70 Campbell, 109.

^71 Ibid.
people are prepared to forgo political rights for economic gains well beyond the point of
economic subsistence." In response to this criticism I argue that it is important to re-
emphasize that it is not an actual situation, but an ideal situation. It is true that actual
people may not make these choices. But under the veil of ignorance, Rawls argues, they
would. Again, Rawls's goal in developing his theory "was to gain general acceptance for
this as a method of political reflection in a liberal society." It may also be argued that
depending upon the nature of the culture and society, be it not a liberal one, the principles
may be different, even under the veil of ignorance. But Rawls's theory is attractive for it
"promises to provide a means whereby citizens of liberal societies, with their emphasis
on individual autonomy and commitment to toleration of individual and group
differences, can reach working agreements as to the basic normative structure of
society." Thus it is this type of society in which Rawls premises the conclusion that
basic liberties will be given priority by purely self-regarding individuals. As noted,
earlier, participants are mutually disinterested, independent and autonomous sources of
claims on the benefits of social cooperation.

"Controversy has also attached to the exclusive emphasis which the difference
principle puts on the situation of the worst-off-group. It is argued more weight would
attach, for instance, to those whose position is only marginally better than this one class
of persons." If a society's main objective was economic efficiency, this criticism could

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72 Ibid.
73 Ibid.
74 Ibid., 109.
75 Ibid., 110.
be warranted. For the worst-off-group would most often be the least economically efficient.

Economic efficiency in criminal or civil law is best described by Richard A. Posner.\(^{76}\) Posner's theory justifies legal punishment, in criminal and civil law, in that it promotes efficiency. He argues that the main reason for law in a capitalist society is to prevent people from "bypassing the system of voluntary, compensated exchange – the ‘market,’ explicit or implicit – in situations where, because transaction costs are low, the market is a more efficient method for allocating resources than forced exchange."\(^{77}\) Since a punishment (criminal or civil), according to Posner, deters persons from bypassing fair exchange through the market, punishment is therefore justified in that it promotes efficiency. Posner also argues that due to economic deterrence, it is also efficient to punish according to an offender's wealth. Also in this sense, imprisonment is designed primarily for the non-affluent, who would not be deterred by economic sanctions, since they have little economically to lose, whereas the affluent, in contrast, may be deterred by monetary fines, compensatory and punitive damages.\(^{78}\) With this view, the worst-off group would be considered to be the non-affluent, and since monetary threats are not effective on them, neither would it make sense, in criticism to Rawls's principles, to

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ensure that in distribution of basic liberties, they are distributed to the worst-off’s benefit, for they are the most inefficient in society.

Posner’s economic efficiency of the law can most efficiently be applied when determining fines, amounts of damages, and lengths of incarcerations. Posner may be most effective in addressing the excessiveness issue of punitive damages. His view of the end for punishment is efficiency and general deterrence. But, when determining whether or not a procedure serves justice, namely, whether or not the plaintiff should receive the punitive damages, regardless of the amount, I argue that procedural justice is most appropriate to measure justice.

So in the liberal society to which Rawls refers, he is assuming that individualism would outweigh economic efficiency. And as addressed earlier, the second principle assumes that there are divisions in society. The second principle addresses the distribution of social and economic advantages in order to distinguish “among primary social goods that one should try to exploit. It suggests, [and recognizes, an inherent and] important division in the social system.”

The choice of the difference principle is a reaction to the assumption that individualism would lead to exploitation at times, and it is a reflection of the view that economic efficiency is the more important consideration.

Although the idealistic nature of Rawls’s argument is the biggest criticism, I argue it is that which makes it suitable to criticize existing laws. “It is hard to reject the view that there is some objectivity and universality in the [hypothetical contractarian] method in so far as it incorporates and institutionalizes the role of impartiality in the moral debate and

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political decision-making. Impartiality is key to any decision that would be considered just and any action that would serve justice. Since procedural justice embraces impartiality, it is suitable in measuring the procedures of justice.

\[80\] Ibid.
CHAPTER 3

PUNISHMENT IN PUNITIVE DAMAGES

As stated in Chapter One, the major purpose of punitive damages is to serve punishment, specifically for retribution and deterrence. The first section of this chapter will address how punitive damages are defined as punishment in civil law. The next section describes legal punishment and its justification. The following sections will first define the punishment theories of retribution, deterrence, and a punishment goal which is not commonly referred to in the justification of punitive damages - vengeance satisfaction. Each section of the punishment theories will examine their benefits and

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2 Vengeance satisfaction is referred to as a Utilitarian aim of punishment. Vengeance satisfaction is seen as a good or increase of happiness as a result of punishment. This is
detriments to the justification of legal punishment and in conclusion, I evaluate how these theories justify punitive damages as punishment and more specifically, if they in any way reinforce whether or not the plaintiff should receive the award.

**Civil Remedies**

In our legal system, there are different types of legal punishment, – criminal, civil, economic, administrative, etc. In the civil law arena, wrongs are brought to justice through compensatory damages.\(^3\) It is important to distinguish that compensatory damages are not seen as analogous to punishment,\(^4\) for they are measured as direct equal compensation for losses. Punitive damages are “civil style”\(^5\) punishment which is different from retribution. Retribution argues that vengeance represents equality and punishment is deserved, not because it has any positive results. Thus vengeance satisfaction will be addressed as separately from retribution.

\(^{3}\) See pages ix, supra, in the Introduction, *Civil Law* section.


\(^{5}\) Galanter and Luban, “Poetic Justice: ...,” 2.
imposed in addition to compensation. Unlike criminal fines or incapacitation, punitive damages are an infliction of further harm on the wrongdoing party, in addition to compensatory damages, in the form of monetary payment. Punishment in the form of monetary payment is distinct from a civil fine, which has a set amount for a particular violation. The amount of punitive damages is determined by a jury or judge, on a case by case basis. As explained in Chapter One, punitive damages should by common law be proportionate to the additional harm that is not covered by compensatory damages, as well as serve as punishment and with intent to deter.

If punitive damages are defined as punishment served with the defendant paying goods or money to the plaintiff to serve purposes other than direct compensation, the development of the doctrine of punitive damages can be traced back to Babylonian and ancient Hindu traditions, the Bible, and Roman Law. In England, punitive damages originated in a dispute between the Secretary of State's agents and a publisher named Wilkes. The dispute was due to an unlawful search and seizure in the case of Wilkes v. Wood. The plaintiff demanded that the jury award more than trivial fines to ensure that

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6 Further, because it is in addition to compensatory damages.

7 Any general guidelines that exist for determining this amount were discussed in Chapter One.


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unlawful search and seizures would not be taken lightly by officials and never happen again. The Chief Justice agreed and upheld that a jury had it in their power to give damages for more than the injury received and that "damages are designed not only to satisfy the injured person, but also to punish the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." Thus the purposes of victim vindictive satisfaction, retribution (to punish), deterrence, and social expression of norms were established for punitive damages. This case set precedence for the punishment purposes of punitive damages. It also infers "that the punitive and deterrent purposes of damage awards could be separated from their compensatory function."^11

Punitive damages as punishment serves two unique purposes for civil law. First, punitive damages provide moral evaluation of civil wrongs. Specific conditions for the levy of punitive damages vary from state to state. Most state laws require that in order for punitive damages to be awarded, their "imposition ... [must be] based upon reckless

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10 Ellis, "Symposium: Punitive Damages: Article: Fairness and Efficiency in the Law of Punitive Damages," 6. "In Wilkes v. Wood, Lord Chief Justice Pratt announced his view that: [A] jury have it in their power to give damages for more than the injury received." Also see Michael Rustad and Thomas Koenig, "Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers," n96. "In Wilkes, the publisher of The North Briton asked for "large and exemplary damages" in his suit because actual damages would not punish or deter this type of misconduct. Wilkes, 98 Eng. Rep. at 490. The jury awarded him 1000 pounds."

or grossly negligent conduct; ... the requirement of ‘public harm’; ... and [damages are subject to] federal appellate ‘reprehensibility’ review.”¹² So, even if a defendant is found guilty of harm which deems compensation, further harm must be evident in order for punitive damages to be awarded. Because of this, punitive damages takes civil law compensation further – this is why it is deemed punishment. Punitive damages, since they are additional to compensation, introduce into the civil law wrong the evaluation of intangible losses of victim as well as the intent of the defendant when assessing the damages,¹³ compensatory damages do not take these into account.

¹² Galanter and Luban, “Poetic Justice: ...,” 7. “Federal appellate ‘reprehensibility’ review considers, as factors relevant to determining the constitutionality of the size of punitive damages in a given case, whether the defendant’s conduct ‘evinces’ an indifference to or a reckless disregard of the health or safety of others’ or ‘involved repeated actions.’” See also Kolstad v. American Dental Association, (98-208) 527 U.S. 526 (1999) 139 F. 3d 958. In Syllabus section 1. “... An employer’s conduct need not be independently ‘egregious’ to satisfy §1981a’s requirements for a punitive damages award, although evidence of egregious behavior may provide a valuable means by which an employee can show the ‘malice’ or ‘reckless indifference’ needed to qualify for such an award.” See also For example, from BMW of North America, Inc., v. Ira Gore, Jr. 701 So. 2d 507; 1997 Ala. LEXIS 126, under section I. “...Alabama, by statute, provides notice concerning the conduct that will subject one to punitive damages in this state. Ala. Code 1975, § 6-11-20, expressly set forth defines the acts, as well as the state of mind: ‘(a) Punitive damages may not be awarded in any civil action, except civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. ...”

¹³ Ibid., 6. See also Kolstad v. American Dental Association, “Section 1981a’s two-tiered structure–it limits compensatory and punitive awards to cases of “intentional discrimination,” §1981a(a)(1), and further qualifies the availability of punitive awards to instances of “malice” or “reckless indifference”—suggests a congressional intent to impose two standards of liability, one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award. The terms ‘malice’ and ‘reckless indifference’ ultimately focus on the actor’s state of mind, ... Intent determines which remedies are open to a plaintiff here as well. This focus on the employer’s state of mind does give effect to the statute’s two-tiered structure. The terms “malice” and “reckless indifference” pertain not to the employer’s awareness that it is engaging in discrimination, but to its knowledge that it may be acting in violation of
Second, to this moral evaluation of wrong-doings, punitive damages provide society with a particular method to serve punishment to groups, corporations, and otherwise nonindividual entities through hindrance of economic activity. “[P]unitive damages serve a vital function for which neither criminal punishment nor administrative controls can substitute;”¹⁴ the ability to threaten private groups, corporations, and organizations “control over their subjects – be they members, customers, clients, or employees. The ability to sanction flourishing economic actors is the major strength of punitive damages.”¹⁵ Thus punitive damages subsist as unique type of legal punishment, not only because of the restitution characteristics, or punishment through monetary payment, but also as a method to punish groups, corporations, and organizations in order to hold them accountable for their contracts, transactions, products, and policies.

**Punishing Corporations**

Since Wilkes v. Woods in 1763, similar cases in England continued to set precedence and expand the purposes of awarding punitive (at that time also called compensatory, exemplary, or vindictive) damages. Each case substantiated and expanded the purposes of punitive damages. In addition to the purposes of punishment, deterrence, and the...

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¹⁴ Galanter and Luban, 13.

¹⁵ Ibid. Detail discussion of the unique characteristic of punitive damages to punish corporations and the like will be addressed in following chapters.
demonstration of social detestation, judges and juries awarded punitive damages in order to penalize the powerful elites who were usually above the law.\textsuperscript{16} Courts commonly awarded punitive damages against those who oppressed the physically weak and socially powerless.\textsuperscript{17} In some cases, the awarding of punitive damages forewarned that acts of oppression would not be overlooked, that the common people deserved protection by the law, and that individual rights against the mighty would be preserved.\textsuperscript{18}

By the end of the 1800's, "punitive damages cases against corporations, courts typically held that the corporation was liable only if it either ordered the misconduct or condoned it by a refusal to take remedial steps. The standard for corporate punitive liability, therefore, was functionally equivalent to that of individuals."\textsuperscript{19} The powerful elites of the 1700's became the corporate entities of our time.

A corporation is "an association of shareholders (or even a single shareholder) created under law and regarded as an 'artificial person' by courts."\textsuperscript{20} The advantages that came with corporations were that a person or persons could have an entity that was "entirely separate and distinct from the individuals who compose it."\textsuperscript{21} This entity could not die, so its assets could be passed down to generations. And the entity had "the capacity as

\begin{itemize}
\item[16] Rustad and Koenig. 5.
\item[17] Ibid., 6.
\item[18] Ibid.
\item[20] Gifis, s.v. 'corporation.'
\item[21] Ibid. quoting 200 N.W. 76, 87. See 17 U.S. 518, 657.
\end{itemize}
such legal entity, of taking, holding and conveying property, suing and being sued, and exercising such other powers as may be conferred on it by law, just as a natural person may.\footnote{Ibid.} What is advantageous to corporations is the limit of liability. "A corporation’s liability is normally limited to its assets and the stockholders [and their deemed personal assets] are thus protected … in connection with the affairs of the corporation."\footnote{Ibid. referring to Henn & Alexander, Law of Corporations 694 (3rd ed. 1983).} So with the new ways of doing business, also came some new ways to commit crimes. White-collar crimes like fraud, embezzlement, bribes and kickbacks, income tax evasion, and business violations evolved.

As businesses and corporations grew, so did the legal regulations that applied to them. The law was "a way to control and hold accountable remote and overwhelming actors."\footnote{Galanter, “The Day After the Litigation Explosion,” 5.} For instance, "a special income tax was imposed on personal holding companies in 1937 in order to prevent taxpayers from avoiding taxes by placing their assets in corporations. Previously, taxpayers would avoid income taxes by placing their assets in one or more corporations, thereby splitting their income among several taxpayers and taking advantage of the lower marginal tax brackets."\footnote{Gifts, s.v. personal holding company, I.R.C. §§541 et seq.} Since corporate liability was multifaceted in shareholders, managers, employees, acquired corporations, brother-sister corporations, controlled, de facto, private, professional, member, and public corporations, etc…. and their influence on society and the market grew; punitive damages became an important tool to guard against these powerful interests, since responsibility
could not always be traced back to an individual. Juries saw punitive damages as the only way to punish a corporate entity, not only because "[c]orporate entities cannot be sent to jail in any realistic sense," but also because affecting their profits appeared to be the most effective way to influence their behavior.

[T]he use of punitive damages can be viewed as a partial offset to weak administrative controls. For example, in Wisconsin a truck driver injured in an accident caused by smoke from a forest fire ignited by a railroad received a $500,000 punitive award. Because fines were minimal [prior to this,] railroads had ignored the state Department of Natural Resources (DNR) rules requiring them to fix faulty exhaust systems and clear brush from tracks. After the punitive award, the 'railroads got the message … and railroad caused fires dropped from 339 in 1980 to 102 in 1986.' A DNR fire specialist said, 'The punitive damage award showed the railroads that there was a need to do what we had been trying to get them to do - clean up portions of their right-of-way and begin a locomotive exhaust maintenance program.'

Punitive damage awards facilitated the individual consumer, families, the smaller business owner, and even other corporations, in protecting their rights against conglomerates. In 2001, "in 83% of all [civil] trial cases, the plaintiff was an individual. Businesses were plaintiffs in 16% of all trials, government agencies, 1% and hospitals, 0.3%. …Defendants in all trials were primarily divided between individuals (47%) and businesses (42%)."


Questionable business practices caused many of the nation's most serious economic, political, and social evils:^{29} fraud and embezzlement, bribes and kickbacks, income tax evasions, antitrust violations.^{30} Modernity gave birth to the culture of business ethics: questioning and regulating decisions in business transactions. Academic, political, and social discussions regarding corporate social responsibility, truth telling, employee rights and responsibilities, attracted public attention, possibly because of the amount of money that was often involved in these crimes.^{31} Furthermore, when publicized, "the poor man sees the white-collar criminal able to obtain the aid of experienced lawyers who can prolong the proceedings, take advantage of every technicality and obtain favored treatment from the courts, then the impact of white-collar crime is compounded."^{32} The majority of the lay public do not comprehend the complexities of corporate white-collar crime, which adds to the fact that they could easily go unnoticed. Punitive damages uphold an avenue to justice for victims of corporate crimes. Punitive damages "are

^{29} Rustad and Koenig, 6. "By century’s end, most courts generally agreed that exemplary damages could be assessed against corporations.” Referring to Seymour D. Thompson, Liability of Corporations for Exemplary Damages, 41 Cent. L.J. 308, 308 (1895).


^{31} Civil Justice Survey of State Courts 2001, Bureau of Justice Statistics Bulletin, April 2004 NCJ 202803, 4. During 2001 plaintiff winners in civil trials were awarded an estimated $4.4 billion in compensatory and punitive damages in the Nation’s 75 largest counties. Contract cases [Subrogation, Partnership disputes, Tortious interference, Rental/lease, Employment disputes, Mortgage foreclosures, Buyer/Seller plaintiff, Fraud] garnered higher median awards ($45,000) compared to tort ($27,000) cases.

^{32} Seymour Jr., 74.
perhaps the most important instrument in the legal repertoire for pronouncing moral disapproval of economically formidable offenders.”

**General Justification of Legal Punishment**

Punishment requires justification. Why? A thorough examination of the definition of punishment will illustrate. Punishment in general is defined as the deliberate infliction of harm upon someone, or the withdrawal of some good from them, in response to a committed offense. According to this definition, punishment is an act which is dependent upon, since it is a reaction to, a first act. This first act is specifically an offense, which is a violation of moral, social, or other accepted standards. So, the committer of the first act, which we also refer to as a crime, is the punished. From this, the definition of punishment assumes the punished is guilty. Thus, for the purposes of this paper, when referring to punishment and the punished, the establishment of guilt will be assumed.

Who then is responsible for inflicting the second act, the punishment? Our society

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33 Galanter and Luban, 14.


36 Ibid. s.v. “guilt,” “awareness of wrongdoing: an awareness of having done wrong or committed a crime, accompanied by feelings of shame and regret, feelings of guilt; fact of wrongdoing: the fact of having committed a crime or done wrong an admission of guilt; responsibility for wrongdoing: the responsibility for committing a crime or doing wrong; legal culpability: the responsibility, as determined by a court or other legal authority, for committing an offense that carries a legal penalty.”

37 Thus punishment of the innocent will not be specifically addressed.
has placed the responsibility of punishment on the legal system. Society developed the legal punishment system to take responsibility for legitimizing punishment, developing rules and procedures, and deciding what is punishable and how. Thus we can assume that each member of society has consented to and understands this authority. This assumption of consent is based upon the view that membership in society is voluntary and that members are rational, or are able to decide upon this consent.

"A rational being is someone who is capable of reasoning about his conduct and who freely decides what he will do, on the basis of his own conception of what is best. Because he has the capacity he has the responsibility for his actions."\(^38\) Due to this rational ability, every member of the community that has this ability agrees to be governed by the community's social contract, since they have rationally chosen to live in the community. This is demonstrated in Thomas Hobbes' idea of a social contract:

To escape the state of nature, then, people must agree to the establishment of rules to govern their relations with one another, and they must agree to the establishment of an agency - the state - with the power necessary to enforce those rules. According to Hobbes, such an agreement actually exists, and it makes social living possible. This agreement, to which every citizen is a party, is called the social contract.\(^39\)

But consent alone is not justification of an authoritative practice. Since punishment involves the infliction of harm or the deprivation of good, legal punishment requires ethical justification.\(^40\) In order for anyone in society to punish another, and avoid


\(^40\) Blackburn, s.v. "punishment". Ethical referring to that it need to be justified as a good thing. See also Igor Primoratz, *Justifying Legal Punishment*, (New Jersey:
punishment in return, legitimacy and justification of this act in the community needs to be established in order to ensure that it is good – has utility which is beneficial to citizens. It is this justification that ethical theories of punishment address. The different theories of punishment\(^\text{41}\) which address the moral justification of legal punishment can be classified into two main groups: "utilitarian or retributive theories."\(^\text{42}\) These theories attempt to morally justify punishment by resolving the problem of how harm to a citizen can be socially approved.

What set these two theories apart are their particular views of the rational member of society.\(^\text{43}\) Retributivists argue that since individuals are rational, their best choices are made through rational deliberation. Assuming that persons do deliberate rationally when making choices, criminals choose to commit an offense, and thus can be held responsible for its consequences. So for retributivists, punishment is justified because it is deserved. The Utilitarians argue that since individuals are rational, they can choose to commit or not commit an offense. But from the utilitarian perspective, these rational choices are ruled by a person's preference for pleasure over pain. The choices that one makes are

\(^{41}\) Different theories include: Retribution, Reparation, Reformation, Deterrence, Incapacitation or Prevention, (from Blackburn, s.v. "punishment").

\(^{42}\) Primoratz, Justifying Legal Punishment, 9. See also page 11: Utilitarian theories: Deterrence, Reformation or Rehabilitation, Educative. Also page 19 which classifies Disablement or Incapacitation, Material Compensation or Restitution, and Vindictive Satisfaction under Utilitarian theories. Retribution does not specify sub-categories of punishment theories. Thus, if it is not retribution, it is some type of utilitarian theory, or neither. But the most popularly discussed, are listed under utilitarian, or as retribution.

\(^{43}\) Although presenting a general overview here, detail on the view of rational persons for each theory will be reiterated in the sections following.
those which bring the most pleasure and the least amount of pain. Thus the justification of punishment should be based upon influencing this choice.

In order to understand and criticize these theories, I first identify their purpose or aim, and the application of this purpose or aim for punishment in general. I classify the purposes of legal punishment by asking two questions: why we punish, and then how we punish? I do not argue that any one theory of punishment is better than or more just than the other, but that each plays a part in morally justifying punishment by determining particular criteria for moral justification. The two objectives (retribution and social utility) are important to the justification of punishment, and they are both needed to completely justify punishment. I argue that these theories alone do not completely answer both questions, but they can be used together to morally justify punishment. I argue that these theories, although seemingly philosophically competitive, should be viewed as complementary.

44 Only after answering the question of why we punish can the questions of how we should punish and what is just punishment be analyzed or discussed. In other words, we must first define and justify the purpose of legal punishment before we can justify its aim or consequences. This is a distinction that I concluded when studying the differences between retribution and the utilitarian theories of punishment.

45 I found support for this view of punishment theories also in H.L.A. Hart, *Punishment and Responsibility*, (Oxford: Clarendon Press, 1992) : 3. “…what is needed is not a simple admission that instead of a single value or aim (Deterrence, Retribution, Reform or an other) a plurality of different values and aims should be given as a conjunctive answer to some single (emphasis in text) questions concerning the justification of punishment. What is needed is the realization that different principles (each of which may in a sense be called a ‘justification’) are relevant at different points in any morally acceptable account of punishment.”
The Retributive Theory of Punishment

The punishment theory of retribution asserts that legal punishment serves justice because it is deserved. "This means that it is justified because it is retribution – it is an evil the offender has deserved by his offense, an evil by which the state or society, ... pays him back for what he has done." The basic principles of retribution which support this justification are as follows: (1) that a person may be punished if and only if he has voluntarily done something wrong; (2) that the punishment must be proportionate to the wickedness or heinousness of the offense; and (3) that the justification for punishing persons is desert, the return of suffering for moral injury voluntarily committed, thus it is itself just or morally good.

Voluntary Principle

The first principle of retribution requires that the wrong-doing was voluntary or out of one’s free will. This voluntary principle is derived from the premises that the rational member of society is (1) free and equal, (2) has knowledge of the act’s consequences, and thus chose to commit the offense.

Retributivists see the individual as ‘truly’ free when he subjects his urges, desires, and interests to the rule of ethical principles that were established by the community. With reason, he knows what he ‘ought’ to do, or what ‘ought’ to be done if he was guilty. He would conclude that he should be punished for the harm against others. And

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46 Primoratz, 12.


48 Primoratz, 68.
retribution embraces equity in society for each individual, and thus one is equally deserving of harm as one is deserving of good, depending upon one’s acts.

Retributivists also assume that wrongdoers are aware of the laws and the consequences for breaking them. Since the general will of the community is expressed in laws,\textsuperscript{49} to break these laws is to go against the general will of the community of which you are a member. “It is obvious, for example, that we could not live together very well if we did not accept rules prohibiting murder, assault, theft, lying, breaking a promise, and the like. These rules are justified simply by showing that they are necessary if we are to cooperate for our mutual benefit.”\textsuperscript{50} Every member of society implicitly agrees to obey the law – obey and live freely. When one disobeys the law, one agrees to punishment. So breaking the laws of which one is aware is performed out of free will – free from influence or coercion, and so one is willing to accept the deserving consequences of one’s actions.

[Rational beings are responsible for their behavior and so they are accountable for what they do. We may feel gratitude when they behave well and resentment when they behave badly. Reward and punishment – . . . are the natural expressions of this gratitude and resentment. Thus in punishing people, we are holding them responsible for their actions in a way in which we can not hold mere animals responsible. . . . We are responding to them . . . as people who have freely chosen their evil deeds.\textsuperscript{51}]

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\textsuperscript{49} Rachels, in Chapter 11, “The Idea of a Social Contract,” 150. “The Social Contract Theory of Morals is . . . the ideal that \textit{morality consists in the set of rules governing how people are to treat one another that rational people will agree to accept, for their mutual benefit, on the condition that others follow those rules as well.} . . . The key idea is that morally binding rules are the ones that are necessary for social living.”
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\textsuperscript{51} Rachels, in Chapter 10, “Kant and Respect for Persons,” sect. 10.3 Kant’s Retributivism, 139. [The Kantian view is only one, others do not presuppose ‘free will,’ such as Aristotle and Hume.]
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Since the responsibility to obey laws comes with freedom, blameworthiness and desert – as a result of knowledge of these laws – are seen as morally justified reasons for punishment.

**Proportion Principle**

According to the second retribution principle, the guilty should not be punished more or less than he/she deserves, but only to the extent that he/she deserves. This implies that punishment must be proportional to the harm caused.

Punishment is an action of taking away from the wrongdoer, be it in the form of monetary possessions or harming in the form of incapacitation. This is serving harm with equal harm. This perspective of punishment is criticized because if causing harm is seen as ‘bad,’ then the infliction of more harm or the increase in the amount of harm being caused in society through punishment is ‘worse.’ This criticism follows the sayings ‘turn the other cheek’ and embraces the values of forgiveness and beneficence.

But to retributivists, serving punishment is seen as a second and different type of harm than the first. For sanctioned punishment is a harm that is a consequence of, or a reaction to, the first harm – the wrong. As a reaction to the first harm, a harm against harm, even if it increases the overall amount of harm being caused, is just because it is deserved (the third principle) and it is necessary because it treats the criminal as a free and equal member of society.\(^52\)

\(^52\) Primoratz, 69.
Desert Principle

The retributivist view opposes the common convictions\(^{53}\) that we ought to ‘turn the other cheek,’ or ‘not render evil for evil.’ Retributivists argue that “man ought to be bad towards badness, to take ill the evil done to him, to harm those that harm him. As a man has done, so it should be requited to him; he has deserved it by his act.”\(^ {54}\) Retribution is in this way an act of reciprocity, punishment is something that the person on whom it is inflicted has deserved; therefore it is morally justified, and legitimate.\(^ {55}\)

Since the wrong-doer, according to the first principle, is rational, free, and equal; when one harms another in a community, one is infringing on the rights and respect of the harmed as an equally free person. Wrongdoers are violating the victim’s entitlements by diminishing her value as an equally free member of society.\(^ {56}\) Therefore, desert is a result of the “moral injury as damage to the realization of a victim’s value, or damage to acknowledgement of the victim’s value, accomplished through behavior whose meaning is such that the victim is diminished in value.”\(^ {57}\) So to ensure equality and respect for all rationally choosing persons, not only must we punish to restore respect to the harmed, but

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\(^{53}\) Primoratz, 70. Primoratz notes that “This standpoint is opposed to Socrates’ convictions that ‘we ought not to retaliate or render evil for evil to any one, whatever evil we may have suffered from him’, [Plato, *Crito*, 49c (Jowett).] as well as to Plato’s view that ‘it is never right to harm anyone at any time,’ [Plato, *The Republic*, 335e (D. Lee).]”


\(^{55}\) Ibid.


\(^{57}\) Hampton, “Correcting Harms Versus Righting Wrongs:...,” 11 – 12.
we must also punish to ensure respect for the harmer. We respect their choice to commit a crime as a choice they willingly made, and thus respect and respond to that choice with punishment.

Retribution is a justification for punishment that views the punished as ‘ends in themselves.’ And the reason and justification for punishment is that of desert, based on the premise that the person has broken the law or social contract, thus one is deserving of punishment. One is not being punished for a consequentialist reason – for the restoration or betterment of the self (the perpetrator) or the betterment of society. Instead, one is being punished based upon what one has done and what one deserves. In a sense, the theory is backward-looking, in that it looks back on one’s obligations to society as a member of society and judgment is based upon what has been done, not what can be done in the future.

Since wrongs are voluntary and punishment is proportionate to the wrong, it follows that “penal desert constitutes not just a necessary, but a sufficient reason for punishment.” This means that punishment is justified because it is a deserved response – the return of suffering for moral injury. “Punishment in the form of retribution thus

58 Rachels, 138. Referring to Kant “we could describe punishing someone as “respecting him as a person” or as “treating him as an end-in-himself.” “for Kant, treating someone as an “end-in-himself” means treating him as a rational being.”

59 Rachels, 144. Referring to Thomas Hobbes’ idea of a social contract.


61 Duff, "Legal Punishment", 8. If we punish, then it is deserved. If it is deserved, then we punish.
implies desert, which in turn requires that the person being punished must, by a fair procedure, be found to have chosen to commit an act that has been authoritatively declared wrongful.\textsuperscript{62}

**Benefits and Detriments of Retribution**

Retribution morally justifies (1) how the individual as well as the community as a whole is the harmed party, such that when a wrong occurs the value of the victim and the community is diminished; (2) why punishment is due only to those who freely choose to perform unjust acts, since everyone is a rational, free, and equal member of the community; and (3) why imposing degrading through punishment does not demean them, but respects them as a person and the harm imposed equals the moral injury they have caused to others.\textsuperscript{63} It is consistent with maintaining and treating all members in society who meet the qualifications as rational, free, and equal persons, and in turn justifies the existence of the system of punishment.

The theory of retribution focuses on answering the question of why we punish. It ethically justifies the act of punishing by deeming it deserved. But justifying punishment goes further. How do we determine what type of punishment is just? It is here that the theory of retribution falls short.

Retribution calls for punishment proportionate to the harm caused; this is not a normatively applied answer. Measuring harm, from stealing $5 to a loss of a life, is not that simple. Retribution, particularly in the case of punitive damages, fails to specifically


guide us in how severely to punish. Although retribution boasts the principle of proportionality, this is easier said than done. For instance, how is society to measure noneconomic and heinous wrongs for punitive damages, for “heinousness cannot be assigned a straightforward dollar value.” How are we to determine the amount of unfair advantage gained by a civil wrong if nominal damages have already been calculated through compensatory damages?

The theory of retribution alone gives no guidelines for such determinations. It also misrepresents what it is about crime that makes it deserving of punishment: what makes murder, or rape, or theft, or assault a criminal wrong, deserving of punishment, is surely the wrongful harm that it does to the individual victim – not the supposed unfair advantage that the criminal takes over all those who obey the law. The wrongful harms can at least be compared to the existing state statutes, but the unfair advantage is vague and hard to detail. Advantages the defendant may possess may include their economic worth, status in society, etc. – possessions that existed prior to the wrong. How are those to factor or not factor into the weight of the harm?

The problem of measuring harm was recently addressed by the U.S. Supreme Court

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64 Galant and Luban, 17.

65 Ibid.

66 Chapter One discusses the nine judicial guidelines that were established by Bowden v. Caldor, Inc., 350 Md. 4; 710 A.2d 267; 1998 Md. LEXIS 407. These guidelines were established to be used upon appeal of a large punitive damages award, to evaluate if an award was excessive. Included in these guidelines were the any of the punitive damages awards the defendant had already paid in regards to the harm, and the defendant’s economic standing – to ensure the award would not cause bankruptcy,
in the case of *BMW v. Gore*. The guidelines by the Court advise that punitive damages amounts must be in proportion to the compensatory damages and the existing similar state statutes. The Court does not give a set ratio, but does say it must be in proportion and not out of proportion. The Court also states that the aggravating factors of the wrong must be taken into consideration and recognizes a gradient of wrongs, but there is no specific dollar amount assigned to these wrongs, except for what is already set forth in the state statutes.

Despite this detriment, the theory of retribution fulfills the primary aim of punishment, for society must first justify the means before the ends, why to punish before it can punish. When the courts advise, “Punitive damages serve retribution and deterrence” – retribution is synonymous to punishment and deterrence refers to prevention. Retribution represents the act of disapproval society expresses to wrongs committed in the community and its principles justify the act and remain apart from the consequences of the act. “When a punishment is deserved, when it is a retribution and execution of justice, it is thereby morally justified; it is irrelevant whether, at the same time, it does or does not have those consequences in which utilitarians claim to have found its moral justification;” such as deterrence. But the secondary purpose or end goal of punishment, determining how or the amount of punishment, is better served by other theories of punishment such as deterrence, a Utilitarian view of punishment.

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67 See Chapter One referring to BMW of North America, Inc., v. Ira Gore, Jr. 517 U.S. 559; 116 S. Ct. 1589; 134 L. Ed. 2d 809 (1996). The U.S. Supreme Court guidelines advised that punitive damages must be proportionate to compensatory damages and similar state statutes.

68 Primoratz, 12.
The Utilitarian Theory of Punishment

Utility represents "that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness ... or ... to prevent the happening of mischief, pain, evil or unhappiness to the party whose interest is considered." Utilitarian theories (moral, legal, and political) are based on the principle of utility, "that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question ... to promote or to oppose that happiness." The principle of utility relies upon the human rational choice, and argues that this choice is subject to governance by pain and pleasure.

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do and in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. ... The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law.

Since our choices are governed by subjection to pleasure and pain, utilitarian theories conclude that the measure of pleasure and pain is the determinate for what is right or wrong, just or unjust. The Utilitarian view holds the basic tenet that an action is morally good if it brings the greatest amount of good or happiness to the most persons affected by

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Ibid.


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that action and its consequences.

Utilitarian views in general attempt to justify how the state should punish, with aims of deterrence, rehabilitation, or education.\textsuperscript{72} To Utilitarians, crime is viewed as a social problem that disrupts the peace and harmony in the community. Therefore a governmental system is established to deal with any harm to social harmony. If crime is a problem, then punishment is a means to resolve that problem. The need to deal with crime, or any type of behavior that is detrimental to the good of society, is resolved by establishing an institution that serves punishment to and for the community. Punishment is a means for handling the problem of crime and controlling behaviors that may harm the community or its individual members.

The utilitarian view ethically justifies punishment by requiring the imposition of harm to result in the greatest amount of happiness or good for the person being punished, the victim, and/or society. In this sense, the Utilitarian justification for punishment is based upon the consequences or outcomes of the punishment. "The evil inflicted on the person punished is morally justified because punishment has consequences which are good and to such a degree [the consequences] outweigh both [the evil inflicted] and the good consequences of any alternative reaction to law-breaking behavior."\textsuperscript{73}

The main positive consequences of the Utilitarian view of punishment include (1) the prevention of harm, through deterrence and rehabilitation, and (2) the satisfaction to the harmed or victim, through compensation or vindictive satisfaction.\textsuperscript{74} Since deterrence is

\textsuperscript{72} Primoratz, 11. Distinguishes three varieties of the utilitarian view of punishment, "deterrence, reformation, educative."

\textsuperscript{73} Ibid., 10.

\textsuperscript{74} Ibid., 19.
referred to in the legal system as a justification of punitive damages,\textsuperscript{75} I will first address the Utilitarian theory of deterrence.

\textbf{Deterrence}

According to the Utilitarian theory, punishment is morally justified by deterrence in two ways: specific deterrence and general deterrence. Specific or particular deterrence refers to prevention of the wrong by “influencing the behavior of the actual offender, so as to get her to desist from repeating her misdeed.”\textsuperscript{76} General deterrence as punishment serves to prevent others in the community from committing the same offense by setting an example of unwanted punishment (displeasure) as a result. Therefore, punishment for deterrence serves two good consequences – to discourage, or attempt to prevent future wrongs, by the initial wrongdoer as well as by others in the community.

\textbf{Benefits and Detriments of Deterrence}

Unlike the retributive theory, the Utilitarian view is forward looking. If the justification of the act of punishment is dependent upon its consequences, then it is only after punishment, that one can then see if it was justified by its result. This can be seen as using the punishment as a “means to an end.”\textsuperscript{77}

\textsuperscript{75} Supra, \textit{Civil Remedies}. See also Sharkey, 6. Punitive damages in legal doctrine has been stated to serve retribution and deterrence. Other utilitarian theories of punishment such as rehabilitation or restorative justice are not specifically cited as purposes for punitive damages.

\textsuperscript{76} Primoratz, 19.

\textsuperscript{77} Rachels, 136. Since the purpose of punishing the criminal is in pursuit of a particular end, it is separate or different from the criminal’s current state.
Therefore, the Utilitarian justification of the purpose of punishment does not first justify the act prior to the action, regardless of whether or not the punishment actually deters. Since the Utilitarian view focuses on the end or consequence to justify punishment, and if the main purpose of punishment is the intent to deter, deterrence can be achieved regardless of whether or not the accused is guilty. Oddly enough, therefore, under the Utilitarian theory, the punishment of even an innocent person could be justified with the intent only to deter.⁷⁸

Retributivists argue that deterrence as a sole purpose removes punishment from the sphere of justice. They argue that whether or not a punishment is deserved is the only question that concerns justice. Whether or not it deters, may be a question asked, but it is not one of justice, but rather one of social fact.

The Humanitarian theory [Utilitarian] removes from Punishment the concept of Desert. But the concept of desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust [serving justice as opposed to morally justified]. I do not here contend that the question ‘Is it deserved?’ is the only one we can reasonably ask about punishment. We may very properly ask whether it is likely to deter others and to reform the criminal. But neither of these two last questions is a question about justice. . . . Thus when we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a “case.” ⁷⁹

The deterrence theory is challenged in two aspects: (1) whether punishment is morally and legally justified if it deters, and (2) whether punishment is still justified if it does not deter. Deterrence predicates that all crime is “pathological,” or what can be

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⁷⁹ Lewis; 448.
interpreted as a bad decision, and that this bad decision can be modified by weighing the consequences. In order for a deterrent to affect human actions, the person must consider or reflect upon his act before performing it. There is a wide range of thought that is possible prior to actions being performed, from little planning, such as a spontaneous offense, or with systematic planning, such as a premeditated offense. It can be argued that many wrongs are committed in the ‘heat of passion’ or with very little rational consideration for the consequences. Wrongs without thought cannot be deterred by punishment, for there is no opportunity to consider the consequences. Wrongs committed with thought are not necessarily deterred by punishment because the risks have been considered and the appropriate adjustments have been made to account for them. Therefore, it can be argued that punishment does not always deter.

Despite the criticisms, the existence of an institution of punishment must exert some control over wrongs to society as opposed to its nonexistence. For instance in the case of BMW v. Gore, after the initial judgment for the punitive damages award of $4 million, BMW immediately changed its nationwide policy to include full disclosure of all repairs made to its cars prior to sale. So in this case, the large punitive damages award succeeded in instilling immediate deterrence for the defendant. Of course this situation raises the question of whether or not a smaller initial award would have had the same result. But previous cases show that it did not:

80 BMW v. Gore, 517 U.S. 559; 116 S. Ct. 1589; 134 L. Ed. 2d 809; 1996 U.S. LEXIS 3390. From Summary, “The distributor promptly amended its nationwide policy so as to require full disclosure of all repairs. Following the trial court’s denial of the distributor’s motion to set aside the punitive damages award, the distributor appealed.”

81 See Chapter One for case details.
Just months before Dr. Gore’s case went to trial, the jury in a similar lawsuit filed by another Alabama BMW purchaser found that BMW’s failure to disclose paint repair constituted fraud. *Yates v. BMW of North America, Inc.* [This case resulted in an awarding of comparable compensatory damages, but the jury for the *Yates* trial awarded no punitive damages.] Before the judgment in this case, BMW changed its policy by taking steps to avoid the sale of any refinished vehicles in Alabama and two other States. When the $4 million verdict was returned in this case, BMW promptly instituted a nationwide policy of full disclosure of all repairs, no matter how minor.  

Further, there is more to deterrence than the simple attempt at prevention through intimidation. Although prevention is fundamental, punishment through deterrence helps structure the moral education and habits of society. Punishment not only deters through the fear or avoidance of a result, it also deters because it strengthens the public moral code. Justifying punishment through deterrence sends a message to all members of society that society is willing and able to do what it must to establish social order according to the agreed upon laws. “The idea that punishment is a concrete expression of society’s disapproval of an act helps to form and strengthen the public’s moral code and thereby creates conscious and unconscious inhibitions against committing a crime.”

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82 BMW of North America, Inc., v. Ira Gore, Jr. No. 94-896. 517 U.S. 559; 116 S. Ct. 1589; 134 L. Ed. 2d 809; 1996 U.S. LEXIS 3390. See Opinion by Judge J. Stevens, I., text above Footnote 8. As well as see Footnote 8 describing the judgment of *Yates v. BMW of North America, Inc.*, 642 So. 2d 937 (Ala. 1993). “In *Yates*, the plaintiff also relied on the 1983 nondisclosure policy, but instead of offering evidence of 983 repairs costing more than $300 each, he introduced a bulk exhibit containing 5,856 repair bills to show that petitioner had sold over 5,800 new BMW vehicles without disclosing that they had been repaired.”


this case, deterrence as a goal or aim for punishment not only tries to prevent but also socializes citizens through social control. For example:

The Madison Parks Commission, ... asked the City Council to remove asphalt under playground equipment in city parks. The asphalt, would be replaced by softer materials, ... Mark Peterson, parks operations analyst [said,] 'It's a good idea, since (liability lawsuit) settlements are going through the roof.'

In this sense, punishment as a deterrent gives opportunity to and prevents further wrongs, and provides a system to support moral codes in society. Referring back to the principle of utility, these are considered good results. Whether or not punishment actually does deter, and whether or not punishment does educate and contribute to social control, regardless of its hypothetical consequences, Utilitarians argue it is practical and justified because it generates good (as opposed to bad) goals or aims for legal punishment.

Although the Utilitarian view alone fails to justify legal punishment, retribution fulfills the initial justification for punishment – desert, while the Utilitarian view justifies how much to punish – enough to deter. Deterrence alone is not enough to justify why we punish, in place of retribution. Therefore, although deterrence may aim for good results, it alone cannot be used to create a system of legal punishment that serves justice in society. It may be a benefiting factor, an aim, and a guide to how we punish, but it alone should not be used to formulate, structure, regulate, or support the legal system of punishment. Nor can Retribution alone govern how we punish. This shows that when


86 This is consistent with the purpose of punitive damages as stated in the Introduction, preserving the peace.
criticizing punishment theory and policy, it is important to clarify the two aspects of punishment – why and how – and to morally justify the why before the how. Retribution tells us that if someone wrongs another, punishment is justified since it is deserved. Deterrence tells us to punish with the intent to deter. Both endorse punishment in order to uphold the law, enforce social control, and convey social expectations. So these theories complement each other in the moral justification of punishment.

Applying Punishment to Plaintiff’s Receipts

Since punitive damages’ main purpose is to punish justified by the concepts of retribution and deterrence, how does punishment apply to the plaintiff receiving the award?

Deterrence, alone, does not particularly enforce who should receive punitive damages, for the recipient of the award does not necessarily support nor does it undermine deterrence. The act of paying the award is the punishment and the deterrent to the defendant. And the defendant and society as a whole would be deterred regardless of who receives the punitive damages. The defendant is deterred because the punishment itself, not because the payment is given to the plaintiff. Society and others in turn are deterred by knowledge of punishment for harm, and social deterrence is not changed by who the recipient of the damages may be. Although this view may be used to support either distribution of the award, the plaintiff or the state, it requires neither in particular. There is no distinction. Therefore, I argue that the justification of punitive damages specifically being awarded to the plaintiff is not fully supported by deterrence.

The justifications for punishment – retribution and deterrence – work together to support punitive damages policy, which is the awarding of additional damages other than

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compensation – but they alone do not require that the punitive damages award be received by the plaintiff, for retribution justifies punishment by a legal institution based on just deserts, and deterrence determines to what extent, and to what aim punishment should be levied. However, both retribution and deterrence justifications for punishment can be fulfilled by the state receiving the award.

The function of retribution is to justify the act of punishment, because it is deserved. Guilt is established prior to punishment. The victim is relevant to the punishment in order to weigh the amount of harm. According to retribution, the amount of punishment should equal the harm. The outcome of the punishment, whether it does affect or how it affects the victim, is not a factor for justification.

Deterrence principles, on the other hand, assert that the effect justifies punishment, and that the aim of deterrence to the punished and the others in society are both essential. But deterrence to the punished and society can be achieved with the state receiving the punitive damages, therefore it does not require that the award go to the plaintiff.

Therefore, the existence and application of punitive damages policy can be justified by the punishment principles of retribution and deterrence. But the procedure of punitive damages going to the plaintiff is not justified by punishment theories since the goals of retribution and deterrence can be fulfilled by the state receiving the award.

So, are there punishment theories other than retribution and deterrence that can help explain who should get the award? Although it is not commonly referred to, vindictive satisfaction is a Utilitarian punishment goal, and does contribute to the support of the plaintiff receiving the award.
Vindictive Satisfaction

If we all appealed to altruism when we have been harmed, perhaps the satisfaction of vengeance would not be a justification for punishment. The support for satisfying vengeance may not be at the top of the list for moral values, but it is a historically supported requirement for governing institutions – just as there is a need to punish for reasons to enforce laws and social control, so there is a need to satisfy vindictiveness for those who are victims of those wrongs. Punishment is justified since it contributes to the satisfaction of vengeance for the victim. The utilitarian views of punishment justify bringing more good than harm, and the satisfaction of vengeance through punishment is viewed as a resulting good to the victim and society.®

This satisfaction is a useful motivator to the individual victim as well as, “to the public; indeed, it is necessary. It amplifies social control, which in-turn supports the legal punishment system. It is this vindictive satisfaction which sets the tongues of witnesses in motion; it is this which animates the accuser and engages him in the public service, in spite of the embarrassments, the expenses, the enmities to which it exposes him.”® Vindication of honor is prevalent to “a status-oriented society that typified England”® and has carried over to the United States. One of the main reasons the legal system is given the authority to punish is to ensure individuals do not take justice and

® Primoratz, 21 - 22. The type “of satisfaction attainable by punishment [if any.] is vindictive.” Punishment of an offender not only satisfies the victim, but also “all those who, for whatever reason, feel indignation at the offense committed and want its perpetrator punished.”


® Ellis, 6.
punishment in their own hands—to avoid a chaotic society, and to maintain order and self-control. The courts were obligated to assist in deterring personal dueling or feuding which could lead to persons taking punishment into their own hands.\textsuperscript{90}

The desire for revenge or satisfaction leads to disorder if the victim resorts to self-help rather than to the judicial process. Avoidance of the social disorder caused by duels, feuds, and the more extreme forms of self-help that historians denominated ‘bastard feudalism,’ was a major influence in the establishment and maintenance of an effective judicial mechanism.\textsuperscript{91}

The establishment of a legal system to serve punishment legitimizes the act of punishment\textsuperscript{92} and maintains social order by ceasing the need for vigilante justice.

Moreover, vengeance satisfaction to the plaintiff is a fitting justification for punishment in civil law. As explained in the \textit{Introduction} of this thesis, civil law is viewed as the private law arena. Viewing vengeance satisfaction as a justification for punitive damages, in application and distribution to the plaintiff, affirms the private law aspect of civil law. The purpose of satisfying private vengeance for the plaintiff\textsuperscript{93} was a “characteristic of insult cases that makes exemplary [or punitive] damages seem appropriate … [since] they evoke a compelling desire for redress or satisfaction on the

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\textsuperscript{90} Rustad and Koenig, 5., And also see Ellis, 7. Both refer to 2 W. Holdsworth, \textit{History of English Law} 416-18 (3d ed. 1923).

\textsuperscript{91} Ellis, 7.

\textsuperscript{92} Binder, 328.

\textsuperscript{93} Rustad and Koenig, 5. “Clarence Morris believed that the remedy [punitive damages] functioned as an ‘orderly, legal retaliation …to be preferred to …private vengeance which will disturb the peace of the community.” Quoting Simon Greenleaf, A Treatise on the Law of Evidence 240 (16th ed. 1899) (asserting that punitive damages remedy abandons principle of compensation, which is purpose of tort action). 253, at 240 (arguing that exemplary damages should only be awarded in cases where traditional methods of damage assessment are inapplicable).
Awarding punitive damages to the plaintiff satisfied the desire for vengeance and in turn assisted in the maintenance of social order. Vengeance satisfaction through monetary gain provides an incentive for the plaintiff to bring the crime to legal suit instead of dealing with the injustice on their own; since “[c]ompensatory damages do not always provide sufficient incentive” for the average person to bring wrong-doings to court.

The American tradition of punitive damages is modeled after English law. In Genay v. Norris, in 1784, instead of settling a quarrel with a duel of pistols, the defendant offered the plaintiff a poisoned drink which caused extreme and excruciating pain. Vindictive damages were awarded against the defendant, who was a physician and could not plead ignorance from the operation and powerful effects of the poison. Considering the plaintiff was initially ready to settle the dispute with a duel, and the added insult of trickery by a professional, convinced the jury that the plaintiff was “entitled to very exemplary damages." Early American punitive damages cases continued to award punitive damages for conduct that reflected willful and wanton indignities, and to protect social order. Thus, although not commonly referred to in the modern doctrine of

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94 Ellis, 7.
95 Rustad and Koenig, 9.
97 Ibid.
98 Ibid.
justification of punitive damages, vindictive satisfaction is historically supported by civil law and one of the original purposes of punitive damages.

Punishment of any type, be it incarceration or monetary fines, can be argued to help satisfy the victim and society’s need for vindication, as long as the punishment fits the crime. Ideally, the appeal to altruism and the greatest good for the greatest number would argue that for the satisfaction of vengeance, punitive damages should be received by the state. The victim should be satisfied with the very act of punishing the wrongdoer, regardless of who receives damages. But appeasement of the victim should be specifically addressed by civil law, since civil wrongs are defined as personal wrongs100—personal to the victim who brings the case to court. So, the payment of punitive damages specifically to the victim, instead of the state, for the satisfaction vengeance is fitting for civil law procedure.

100 As explained supra, page ix, Introduction, section Civil Law.
CHAPTER 4

HONOR AND INSULT

When justifying any act, we most often refer to its purpose or utility. As noted in the previous chapter, punitive damages' first and foremost purpose is punishment. Punitive damages punishment goals include deterrence, vindictive satisfaction, and punishment for corporate entities. But the goals of punishment do not completely justify why the plaintiff should receive the damages. So we turn to the purposes of punitive damages that are not a direct result of punishment. This chapter reviews the historical development of the purposes of punitive damages, to unveil that the policy also served to restore honor and repair insult to the plaintiffs.

The personal nature of civil lawsuits results in specific attention to the personal insult of the victim. Since the correction of personal effacement by civil wrongs was not included in compensatory damages. So punitive damages were awarded to encompass

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1 See Introduction and other chapters where civil law is referred to private law arena since the plaintiff is responsible, with the assistance of his/her lawyers, for the pursuit of justice in a civil case, as opposed to criminal law where the police and other law enforcement agencies are obligated to assist in enforcing the law.

2 This does not mean that compensatory damages cannot be awarded for noneconomic damages, pain and suffering, and the like... but compensatory damages are most often distinct from punitive damages for this reason. The specific application of compensatory damages can, and does, vary from state to state; and is dependent upon the type of case, the type of harm, and the varying opinions of the state's or case's judge and jury. Thus for the purposes of this thesis, I will maintain the general definition of compensatory damages, which focuses on concrete, economic, nominal harms. In contrast, punitive damages are always only awarded when 'further' harm is established,
the satisfaction of insult and vengeance to the plaintiff, and in order to restore his honor and self-respect. Previous to punitive damages awards, insult and honor were uncompensable losses.

**Insult**

Awarding of punitive damages in order to recognize insult as a compensable injury developed in the early 1700's. The earliest case cited came from England, *Huckle v. Money* in 1763. Exemplary damages were awarded for the defendant causing the plaintiff “feelings of wounded pride and dignity.” But considering insult as a reason for malice, willful intent, or in certain cases of strict liability. But the specific scope of this is beyond this thesis. This thesis will focus on procedures after punitive damages awards have been deemed necessary, which implies desert and guilt. The main concern of this thesis is: after punitive damages have been deemed applicable by judge and jury, regardless of the amount (excessiveness issue discussed in Chapter One), who should receive the damages?

3 John Rawls, “A Liberal Theory of Justice,” in the introduction by Pojman, L.(ed), *Ethical Theory Classical and Contemporary Readings*, 583. “... the chief primary goods at the disposition of society are rights and liberties, powers and opportunities, income and wealth. (Later on ... the primary good of self respect has a central place.)”

4 Ellis, 6-7.


6 See also Rookes Appellant; and Barnard and Others Respondents, [House Of Lords.], [1964] AC 1129, 21 January 1964, (c)2001 The Incorporated Council of Law Reporting for England & Wales. Referring to historical cases to set precedence for the purposes of punitive damages... “But there are also cases in the books where the awards given cannot be explained as compensatory, and I propose therefore to begin by examining the authorities in order to see how far and in what sort of cases the exemplary principle has been recognised. The history of exemplary damages is briefly and clearly stated by Professor Street in Principles of the Law of Damages (1962) at p. 28. They originated just 200 years ago... In Huckle v. Money the plaintiff was a journeyman printer who had been taken into custody in the course of the raid on the North Briton. The issue of liability having already been decided the only question was as to damages and the jury gave him £300. A new trial was asked for on the ground that this figure was "most
damages did not merely repair the plaintiff's hurt feelings. In cases involving intangible losses, establishing insult explains the importance given to the consideration of intent and motive. Intent to insult increases the aggravation of the harm, and thus gives reason for further or increased punitive damages. In Sears v. Lyons \(^7\) "the jury was instructed that it 'might consider not only the mere pecuniary damage sustained by the plaintiff, but also the intention with which the fact had been done, whether for insult or injury.' "\(^8\) The consideration of insult adding to injury is also evident in Forde v. Skinner\(^9\), where the jury was instructed to note that according to the evidence, the harm included "malicious intent imputed of 'taking down their pride,' ... [and should be considered] an aggravation and ought to increase the damages."\(^10\) So in this case, the intent to insult gave the jury reason to increase the amount of punitive damages.

Insult in addition to malice, willfulness, and other aggravating factors in the awarding of punitive damages continues to be considered today, although not always mentioned in


\(^8\) Ellis, 7. Referring to Sears v. Lyons.


\(^10\) Ellis, 7. Referring to Forde v. Skinner.
the forefront of reasons for punitive damages. Insult, like vengeance, to the altruistic ideal should not be a valued. But the reparation of insult is important, because personal insult bruises a person's honor. And honor was a historically significant personal value, and honor continues to be an important personal and social value in our community.

**Honor**

The importance of personal honor in society is evident in professional, social, and family structures. "Honour is the value of a person in his own eyes,' as well as 'in the eyes of his society." To the individual, honor "is his estimation of his own worth, his claim to pride, but it is also the acknowledgement of that claim, his excellence recognized

11 See for example Industrial Technologies, Inc., and Richard Hill v. Jacobs Bank; Jacobs Bank v. Industrial Technologies, Inc., and Richard Hill 1011966, 1012064 Supreme Court of Alabama 872 So. 2d 819; 2003 Ala. LEXIS 130 (April 25, 2003). Opinion by Justice Woodall, Section II. Industrial's Appeal "Indeed, "punitive damages are recoverable in a conversion case when the evidence shows legal malice, willfulness, insult, or other aggravating circumstances." Schwertfeger v. Moorehouse, 569 So. 2d 322, 324 (Ala. 1990) [*20] (emphasis added). "Punitive damages [in an action for conversion] are justified when the evidence discloses the conversion to have been committed in known violation of law and of owner's rights, with circumstances of insult, or contumely, or malice." Roberson v. Ammons, 477 So. 2d 957, 961 (Ala. 1985) (quoting Carolina Cas. Ins. Co. v. Tisdale, 46 Ala. App. 50, 57, 237 So. 2d 855, 859-60 (1970)). "The conversion committed in known violation of the law and of plaintiffs' rights is itself legal insult, contumely, or malice sufficient to justify an award of punitive damages." 477 So. 2d at 961 (emphasis added). Consistent with Ala. Code 1975, § 6-11-20(a), a punitive-damages award will not be vacated where the evidence supporting the award is "of such quality and weight that a jury of reasonable and fair-minded persons could find by clear and convincing evidence," Ex parte Norwood [*827] Hodges Motor Co., 680 So. 2d 245, 249 (Ala. 1996), that the conversion was associated with "malice, willfulness, insult, or other aggravating circumstances."

by society, his *right* to pride."¹³ In this sense, honor is not simply an individual emotion, but it is also produced by social recognition to acts. If an employee does a good job, they are honored with verbal praise, a raise in pay, a certificate, or an award at the annual employee party.¹⁴ Employee of the month plaques and reserved parking spots are present at most places of employment. The world of academia teaches our children about social honor with simple lists like the ‘honor roll.’ Ceremonies and celebrations honoring graduates, employees of the month, or the bride to be – by her maid of honor – surround our everyday lives. Honor is not limited to the personal or emotional sphere, but is given and taken within society. “[Honor] implies not merely a habitual preference for a given mode of conduct, but the entitlement to a certain treatment from society in return.”¹⁵

These examples of honor are those that are due to the praise of an action. Thus an important aspect to honor is the deserved receipt of this recognition. Desert is an important aspect of honor. “Deserts is a relative term that refers to external goods; and as the greatest external good, …”¹⁶ we define honor. The degree of desert affects the degree of honor. And honor is only of its greatest when it is most deserved.¹⁷

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¹⁴ Praise of an employee is not only done out of good faith, but can be found in company policies and taught in management courses. Praise and honor are important to business and correct treatment of employees. This is a reflection of the importance of honor and praise in our society.

¹⁵ Pitt-Rivers, 22.

¹⁶ NE 1123b.15-20.

¹⁷ NE 1123b.24-26. “A small-minded man falls short both in view of his own deserts and in relation to the claims of a high-minded person [who is deserving of honor], while a vain man exceeds his own deserts but does not exceed the high-minded.”
Given the importance and value of honor in our society, it is not surprising that our legal institution, which is responsible for punishment (the taking of honor) should also have responsibility to take part in maintaining honor in our society. The honoring of citizens in the community is not limited to the ceremonial 'keys to the city' or awards for community service. Praise and honor from the government should, and does, come from all branches – executive, legislative, and judicial.

Government institutions bear the responsibility of sustaining socially agreed rights and wrongs. When the government punishes, it reflects the social scorn of the wrongdoing, and takes honor from the guilty and at the same time restores social honor to society and the victim. This is why it is important for the government to participate in the recognition and distribution of social honor to citizens. Honor is not left to the private sector, government participation in recognition of honorable acts is as necessary as the government punishing – it maintains justice.

According to Rawls's justice as fairness, in order to ensure justice, moral considerations such as ensuring equal distribution of social values are incorporated into the government policies. Honor is considered a good that is desired, a good social value. That is why for situations in which one’s honor is bruised, resolution can be gained through “some tribunal, the ‘fount of honour’: public opinion, the monarch, or the ordeal of the judicial combat.” Another reason the legal system takes into account

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18 For instance the law enforcement agencies enforce the laws that are made to ensure equality and prevent crime, legislative bodies make laws to ensure equal treatment in the workplace, enforce the minimum wage, prevent discrimination, etc.

19 See Chapter Two, Serving Justice, Procedural Justice.

20 Pitt-Rivers, 23.
affronts to honor is to discourage citizens to take matters into their own hands which would, and did, result in private dueling and feuds, and social unrest. In general, promoting social control is a goal of legal punishment. Incorporating insult and honor into punishment supports this goal.

Therefore it is historically and communally justified for the legal system to incorporate in its policy some type of restoration that represents honor. Punitive damages awarded for the purpose of repairing insult are an example of political policy restoring honor.

The compensation for non-monetary injuries, unrelated to tangible losses, developed “from roughly the first quarter of the seventeenth century through the first quarter of the nineteenth century.” These injuries included “cases of slander, seduction, assault and battery in humiliating circumstances, criminal conversation, malicious prosecution, illegal intrusion into private dwellings and seizure of private papers, trespass onto private land in an offensive manner, and false imprisonment.” Prior to punitive damages these claims had no legal monetary value. And these cases entire show one common factor,

21 Ellis, 6.

"they involved acts that resulted in affronts to the honor of the victims."® Therefore the legal system incorporated satisfaction of honor into the civil law system; punitive damages provides for this purpose.

Moreover, as stated earlier, the satisfaction of honor is greatest when it is most deserved, and in a civil law suit, it is most deserved by the plaintiff, if it is at all deserved. Also, due to the restoration of honor, punitive damages are, and should continue to be awarded to whom rightly deserves them – the plaintiff. In the instance of offending honor, the victim “requires satisfaction if [he] is to return to [his] normal condition.”®

The plaintiff is most deserving firstly, because the damages serve as a return of his honor after being victimized; and secondly, the plaintiff’s endeavor to bring the wrongdoing to court and the guilty to punishment, not only for him, but also for the good of society. These are honorable acts. Often when pursuing a suit, “it is an extremely painful process, exposing the claimant to social discreditation and self-doubt.”® Thus, not only is the wrong-doing an injury of honor to the plaintiff, but so is the pursuit of seeking justice. These insults are vindicated with a guilty punishment, and the plaintiff is honored with praise for a good job, or perhaps if the judge or jury find worthy, with punitive damages. Therefore, the purpose of honor justifies the awarding of punitive

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23 Ellis, 6. Also see Rustad and Koenig, 6, n119. “damages ...for mental anguish, or personal indignity and disgrace." The Rule of Damages in Actions Ex Delicto, 9 Law Rep. 529, 535 (1847).


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damages specifically to the plaintiff because after the usually long pursuit, the award is deserved.²⁶

_Serving Justice_

The purposes of repairing insult and restoring honor enforce that punitive damages should be awarded to the plaintiff because it also ensures procedural justice. Procedural justice is served in two ways. First, awarding the punitive damages to the plaintiff restores self-respect, which is a principle of procedural justice. Self-respect is a basic social value which includes honor and respect from society. Since the government agencies are responsible for maintaining social values amongst the community, government agencies should actively participate in governing self-respect.²⁷ One way that the government can do this is through acknowledging the importance of self-respect in its policies and procedures. Since civil law is the private law arena,²⁸ its concern for the restoration of the plaintiff’s personal self-respect should be maintained in its policies. Private wrongs harm self-respect through insult. Punitive damages awarded to the plaintiff, instead of the state, restore this personal harm.

Second, procedural justice also states that in the government distribution of benefits or burdens, the excess should be distributed to the benefit of least advantaged. Civil law,

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²⁶ It must be noted that the award must be in proportion to what is deserved, just as in punishment for retribution. Punitive damages in excess of desert are not rightly deserved, which is why they are usually and justly appealed and struck down. See Chapter 1, briefly addressing the excessiveness issue of punitive damages.


²⁸ Disputes amongst private parties: Contracts, torts, etc...
as described in corrective justice, weighs its participants as equals\(^\text{29}\) when calculating compensation and the amount of harm caused. So civil law does not first consider the plaintiff's or the defendant's actual economic or social status prior to judgment of guilt. So, if a guilty verdict finds that further punitive damages should be awarded, the plaintiff is, in the civil law arena, the least advantaged for two reasons. First, the burden pursuing justice is on the plaintiff and places them as the disadvantaged, since the passive system requires the plaintiff to take on the full initiative to pursue justice. Second, the burden of prosecution alone bruises the plaintiff's self-respect in the eyes of society. Add this insulting burden to the original injury or harm, and the plaintiff is again the least advantaged, regardless of their actual social and economic status.\(^\text{30}\)

So, since procedural justice principles advise that if there are burdens or benefits that are to be distributed, then they should benefit the least advantaged. And since punitive damages are an additional burden to the defendant as well as an additional benefit to who receives them, they should be received by the plaintiff, because the plaintiff is the least advantaged in the civil law procedures. The plaintiff is the least advantaged because of

\(^{29}\) See Chapter Two, Serving Justice, *Correction*. The status of the plaintiff and the defendant are not considered when calculating the amount of harm for compensation, only the harm itself. Participants in civil law are rendered equal before the eyes of the law, the only difference is the harm that was caused.

\(^{30}\) Noted, that it is possible that the plaintiff may be of great wealth and status, and the defendant quite the opposite. It cannot be assumed that the plaintiff is always of lower status economically and socially. But, for evaluative purposes, and since the civil law arena first judges correction as though the plaintiff and defendant are equal, when I refer to the least advantaged, in formal procedural terms, the plaintiff in the civil law system is the least advantaged or of lesser advantage than the defendant due the claim that they have been wronged (a victim) and due to the fact that the burden of proof is on the plaintiff. If the system should allow a plaintiff with more power and money to unlawfully persecute a defendant only because they have less power or money, that is an issue of judicial process prior to the awarding of punitive damages that is not in the scope of this paper.
their injury, their insult to honor, and their burden of proof. All of which also make the
plaintiff most deserving of the punitive damages award.
CHAPTER 5

PLAINTIFF INCENTIVE

Reminisce to the early 1900's Old West and think about those 'Wanted' posters they used to post for criminals. According to the Library of Congress\(^1\) one of the earliest 'Wanted' posters that displayed a photograph was for John Wilkes Booth by the War Department in Washington, D.C. dated April 20, 1865, offering a $100,000 reward. At the bottom of the poster it stated:

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\text{LIBERAL REWARDS will be paid for any information that shall conduce to the arrest of either of the above named criminals, or their accomplices. ...Let the stain of innocent blood be removed from the land by the arrest and punishment of the murderers. All good citizens are exhorted to aid public justice on this occasion. Every man should consider his own conscience charged with this solemn duty, and rest neither night nor day until it be accomplished.}^2
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Turning to private citizens to assist in law enforcement is historically supported. As stated above, the government requested that every man make it his duty to assist in the persecution of wrongs. Today, we may assume that incentives to persecute wrongs in society are not warranted, but indeed they are. Even with modern technology and the vast law enforcement departments, there are wrongs that are sometimes only witnessed by the victims or by-standards. In the Old West, towns were far apart and criminals


\(^2\) Ibid. Poster can be viewed on-line as part of the Library of Congress American Treasures Exhibition.
dependent upon plaintiffs bringing wrongs to suit in order for any justice to be sought, hence the private law aspect.

In addition to this, in this chapter, I argue that the complex and costly civil law system gives further reason that plaintiffs should be offered incentive to persecute. Ideally we would ask that the only incentive for justice, be justice. But realistically, the civil law system is complex and costly; and the pursuit for justice can be discouraging. The incentive to the plaintiff provided by civil law is also known as promoting ‘private attorneys general.’ This incentive, in addition to the other purposes discussed earlier, is an important purpose for the awarding of punitive damages. Most importantly, this purpose requires that the damages be awarded to the plaintiff, and not to the state.

Awarding punitive damages to the plaintiff not only completes procedural justice, satisfies vindictiveness, heals insult, and restores honor; it also advocates ‘private law enforcement.’ Also in this chapter I discuss why ‘private law enforcement’ not only serves the plaintiff’s needs for justice, but also society’s.

3 The only reasons that concerned members of society should pursue a case is to right wrongs, to punish wrong-doers, for the good of society.

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could hide in the vast empty plains. Today, although we are closer together, criminals can still find some remote places to hide. And, specifically addressing the wrongs of civil law, wrong-doers can hide in plain site, since it is only the ‘duty’ or decision of the plaintiff which will uncover any injustice.

Plaintiff incentive is necessary in the arena of civil law, more so than with criminal law, since civil persecution is reliant upon the plaintiff’s decision to litigate. Civil law is
The rules and procedures of the legal system are complex. One reason lawyers are regarded as professionals, along with doctors and teachers, is that these fields require specialized knowledge through specialized education. This specialized knowledge is required to participate in the legal system since there are also different laws for different states, different resources (other than lawyers) and different ways to access these resources. The policies and procedures of the legal system are not common knowledge, and the basic architecture creates and limits equal use of the system. It follows, similar to any complex system or process, the more experienced or more familiar one is with the puzzle, the more advantaged. The limited equal use of the system usually places one party at a disadvantage.

This gap of advantage between participants in litigation has been explicated by Marc Galanter, in his article "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." Galanter states that participants vary but can be generally classified in a gradient that has the "one-shotters" (those who have only occasional recourse to the courts) at one end and the "repeat players" (those who are engaged in many similar litigations over time) at the other.

The repeat-players at one side of the gradient are anticipatory, prepared, and more resourced than the others. In addition, since repeat players frequent the system, they are

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5 Ibid.


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able to buy professional legal services more steadily, in larger quantities, in bulk (by retainer) and at higher rates, in order to get services of better quality.7

Most one-shotter participant claims are either "too large or too small to be managed routinely and rationally."8 They usually have limited resources and must stop to initially research the system before they can familiarize themselves with what they require to pursue a case.

The differences between the experienced and the inexperienced, along with the advantages and disadvantages, can be pointed out with almost every legal system (criminal or civil); any governmental transaction (paying taxes, obtaining licenses, registering your car), or any private transaction (applying for a loan for a major asset purchase, applying to college, arrangements for a wedding). Our society values, seeks, and pays for experience. 'Leave it to the professionals,' is the common phrase when one is faced with a complex system. But, in the pursuit for justice these differences and advantages do not result in perhaps a higher tax return or a smooth run wedding reception, these differences have the potential to be the key between justice served or withheld.

The differences in these participants are not solely based upon actual social power, wealth, or status; but the differences "define a position of advantage in the configuration of contending parties and indicates how those with other advantages tend to occupy this position of advantage."9

7 Ibid., 114.
8 Ibid., 98.
9 Ibid., 103.
How can these differences be resolved, or at least maintained to ensure equal access to justice for all participants? Well, the simple answer would be that everyone needs to be aggressive in their education of social processes. Before you go to register your car, call the Department of Motor Vehicles to find out what documents are required. Before you decide to buy a house, get some consultation, ask someone you know who has gone through that experience, be informed. And before you enter into a legal transaction, make sure you know your rights, the limits, and the laws. Read your contracts carefully, and consult a lawyer. As a professor at the local community college, I often advise my students to be aggressive in their education – ask questions! Granted everyone in society should be an active participant in transactions that involve their person. But for the purpose of analyzing legal procedures, we must ask for more. The difference in position of advantage to the participants in civil litigation is an inequality in which the legal system could, and should, neutralize through use of the process. But more often than not, the legal system has institutional features that increase the advantageous gap between participants.

The civil litigation system is passive in that it must be mobilized by the claimant. As we have noted earlier, the burden of pursuit for litigation is on the plaintiff. If the plaintiff chose to dismiss the wrong, leave it for someone else, or the next victim to pursue, the claim is dropped. The government and law enforcement officials offer no assistance to the victim in pursuit of a civil suit.

The institution is also passive in that it does not regularly solicit for civil suits. The system is present and available, but does not go out to the world of private transactions

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10 Ibid, 119. As stated earlier, the burden of litigation is on the plaintiff.
looking for, soliciting for, or encouraging victims of wrongs to pursue suit. This passivity of the institution also gives advantage to the participant with more information, with the greater ability to overcome cost barriers, and procedural requirements.\textsuperscript{11}

Probably one of the main reasons why the institution itself is not adamantly encouraging suits, like businesses soliciting customers, is because the system is busy. Reported tort cases filed in California and New York for 2002 was over 80,000 for each state; Nevada reported over 7,000; and New Jersey over 70,000.\textsuperscript{12} According to the National Center for State Courts *Caseload Highlights\textsuperscript{13}* in a study of appellate cases resolved in 1996 and 1997 from five state supreme courts (Florida, Georgia, Minnesota, Ohio, and Virginia), the number of days it took for 90 percent of mandatory appeals cases to be resolved ranged from 363 - 818. The American Bar Association (ABA), Appellate Court Performance Standards Commission recommends that state supreme courts should resolve 50 percent of mandatory appeals from the dates of their filings within 290 days or fewer.\textsuperscript{14} And the ABA recommends that 90 percent of mandatory appeals for review

\textsuperscript{11} Ibid.


should be resolved within 365 days or fewer. According to the National Center for State Courts study for cases resolved in 1996 and 1997 in the above mentioned five states, the number of days from date of filing to resolution for mandatory appeals cases in the 90th percentile (excluding the death penalty) ranged from 318 (Minnesota), to 624 (Ohio). Although these numbers may seem large, the study concludes that the numbers do vary from state to state, and that some courts are more expeditious than others. The "popular images of supreme courts taking painfully long periods of time to resolve their cases are not supported by the data." Note this study encompassed appeals cases. So this does not include the actual time from the initial filing of the case. What this does tell us is that courts cases are not resolved immediately. According to the Las Vegas Justice Court for Clark County, Nevada; a small claim filing tentative court date is approximately 90 to 120 days after the claim is filed. In summary, when filing a claim in civil court, patience is a virtue. The civil system is passive, not aggressive in assisting the plaintiff in pursuing justice.

Now, if the claim is lucky enough to make it through the system (overcoming delays, raising costs with delays, restrictive rules, and temptations of settlement), the passivity of the institution continues. The burden to proceed – the development of the case, collection of evidence, presentation of proof – are left to the parties, this further defines the passivity of the system.

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15 Ibid.

16 Ibid. See section 'Summing Up and Looking Ahead.'

Furthermore, in the civil law system, the “parties are treated as if they were equally endowed with economic resources, investigative opportunities and legal skills.”\textsuperscript{18} Even if the participants were of equal resource, the burden of litigation is still on the plaintiff, and the burden is not a light one. So for the participant who is the least advantaged (in terms of resources, information, funding, and motivation), which is most often the plaintiff, one must have more than just a strong will to pursue justice.

Due to arbitration or mediation, out of court negotiations, the lack of ability or knowledge as to how to even consult a lawyer, most civil disputes do not even get to court.\textsuperscript{19} Suitors, lawyers, and the court system are not the only players in litigation. “Organizational actors such as large manufacturing corporations, financial institutions, [insurance companies], educational and cultural institutions, political parties, etc.,”\textsuperscript{20} are in contact with the potential plaintiff before the thought of a legal suit. It has been found:

[There is an] absence of sizable numbers of legal actions in which individuals or firms of substantial or large means appear on both sides of lawsuits. Such potential suitors can afford, and are likely to make extensive use of skilled professional help to channel their affairs so as to prevent trouble. … [T]hey are likely to be equipped to make sophisticated choices of alternatives to litigation to resolve difficulties through bargaining, mediation or arbitration.\textsuperscript{21}

\textsuperscript{18} Galanter, “Why the ‘Haves’ Come Out Ahead: …,” 120.

\textsuperscript{19} Marc S. Galanter, “Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society,” \textit{UCLA Law Review}, 31:4 (October 1983): 8. “Miller and Sarat report that about 11% of disputants [ . . . ] took their middle range disputes [between $1,000 and $10,000] to court.” Miller & Sarat, 15 LAW & SOC’Y REV. 525, 527 (1980 – 81).


The process of litigation is a deterrent not only to single plaintiffs, but also to large companies. "For plaintiffs and defendants alike, litigation proves a miserable, disruptive, painful experience." Therefore, if even large corporations are deterred from civil court complexities, the single citizen must also be deterred. Incentive and the award of punitive damages is necessary to compensate the plaintiff for 'taking the extreme trouble' to sue, as well as to support the private law aspect of civil law.

The complex and passivity of the civil legal system is another reason, in addition to insult, harm, and bruised honor, that the plaintiff is the least advantaged as compared to the defendant. This supports why, incentive is necessary.

The Costly System

For criminal law, the government carries the burden of costs for prosecution. But for civil law, the costs of persecution fall entirely upon the plaintiff. The possibility of a punitive damages award provides additional incentive for the plaintiff to pursue litigation, since additional monetary compensation aids in attorney fees and other costs that may accompany a legal suit.

The actual cost of litigation is highly dependent upon the type of injury, whether a death is involved, and whether or not the case actually goes to court or is settled.


23 Legal Information Institute, Cornell Law School, s.v. 'Criminal law – an overview' viewed [on-line] at http://www.law.cornell.edu on 9 May 2005. "Criminal law involves prosecution by the government of a person for an act that has been classified as a crime. Civil cases, on the other hand, involve individuals and organizations seeking to resolve legal disputes. In a criminal case the state, through a prosecutor, initiates the suit, while in a civil case the victim brings the suit. Persons convicted of a crime may be incarcerated, fined, or both. However, persons found liable in a civil case may only have to give up property or pay money, but are not incarcerated."
"Empirical research from the Wisconsin Civil Litigation Research Project, reveals that
...the cost to litigate an average or "typical" civil suit rarely exceeds $10,000."^24

Specifically, only eight percent of the cases studied reported legal fees
of more than $10,000. Another eight percent reported legal fees ranging
between $5,001 to $10,000. In thirty eight percent of the cases, the legal
fees ranged between $1,001 to $5,000. Most surprisingly, forty six
percent of the cases studied reported legal fees of only $1,000 or less.25

So the majority of case costs were less than $5,000. Although it is important to note
that the cost of litigation varies with the type of harm. The Rand Institute for Civil
Justice in 1988 found that legal fees for asbestos and air accident cases where the cases
involved the death of a plaintiff and the stakes are much higher, “the average litigation
expenditure amounted to $72,000 and the defendant’s average costs amounted to
$49,000.”26

The question is: how important is the cost of litigation? Is the decision to pursue
litigation heavily weighed upon the cost? Or will plaintiffs do whatever they can,
whatever it takes, to pursue justice? The answer to this question is dependent upon the
type of harm. The more severe the harm, the more one would be motivated to pursue
justice. But at the same time, the more severe the harm, the more costly the pursuit
becomes.

24 David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel

25 Than N. Luu, Reducing the Costs of Civil Litigation, Public Law Research Institute,
[on-line] http://w3.uchastings.edu/plri/fal95tex/cstslit.html; (UC Hastings College of the

26 Ibid. referring to James S. Kakalik, Elizabeth M. King, Michael Traynor, Patricia
A. Ebener, & Larry Picus, Costs and Compensation Paid in Aviation Accident Litigation,
R-3421-ICJ (Rand Institute for Civil Justice) 1988.
Since punitive damages can compensate for attorney's fees, it has the possibility\textsuperscript{27} of softening the burden of incurring the costs up front for the plaintiff. Furthermore, even if the plaintiff does not come out successfully, the fact that the possible outcome is there, eases the mental pursuit of litigation. Fairness of the procedure gives the participants a sense of justice, even if the outcome is not in their favor. This implies that "process is important because our notion of fairness includes not only the end result but the sense of fair process by which the result occurred."\textsuperscript{28} According to Robert E. Lane, in "Procedural Goods in Democracy: How One is Treated Versus What One Gets,"\textsuperscript{29} people often care more about how they are treated than what they get. Because of this, the essential moral ingredients in procedural justice are just as important as justice principles concerned with outcomes such as distributive and retribution principles.\textsuperscript{30} In order to determine fair procedure, moral ingredients need to be applied. Of these moral ingredients, one is self-respect. Lane also refers to Rawls's view of self-respect as an important primary good, and thus should be used as a "prime criterion for assessing justice procedures."\textsuperscript{31} Self-respect can be gained through self-esteem from small groups,

\textsuperscript{27} I emphasize possibility since the punitive damages award is not guaranteed. Only after a defendant is found guilty and compensatory awards are determined, are punitive damages considered. So it is possible for one to pursue litigation with no possibility of receiving punitive damages, even if they win the case. Also refer to Chapter One regarding the discourse of punitive damages, they are rare and only awarded in a small percentage of civil cases.


\textsuperscript{30} Ibid., 177-178.

\textsuperscript{31} Ibid., 179.
personal achievements, and "reflected appraisal," judging yourself as you imagine others judge you. This means that being treated with respect affects self-respect." This judgment includes treatment by authorities such as policemen, employers, or legal institutions.

Lane explains that once a person is treated with respect, they are more likely to exercise personal control over actions and motives. It is this control that allows them to consider the price of justice (whether or not to bring a case to court) and dignity in the midst of procedures in "which distributive justice and dignity are compensations," such as in civil law. After the unpleasantness of justice procedures, which Lane concludes actually result in more pain, the level of overall satisfaction is factored by adding the intrinsic pleasure of procedure: having one's problems solved, receiving benefits, or avoiding burdens, the sense of having been dealt with fairly. These pleasures represent "a kind of achievement, validating one's self-respect," and at the end are more of a relief from the pains of litigation than actual pleasures. Therefore, procedural goods, such as punitive damages awarded to the plaintiff, serve justice. Not only because the

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32 Ibid.

33 Ibid. When treated with respect one has the "opportunity to know what one can do, opportunity to control by one's own acts one's own economic destiny."

34 Ibid., 182.

35 Ibid., 183-4, in the section "Relief From Procedural Pain," where he refers to court proceedings being taxing, full of painful conflict, time costs and information costs.

36 Ibid.

37 Ibid., 183-4,
plaintiff is at the least advantaged, but also because the existence of the procedure itself, provides a sense of fairness, regardless of the outcome.

Reformers who favor split recovery awards, criminal punishment, or societal distribution disagree. The arguments against plaintiffs receiving the punitive damages beg that the award is an inappropriate way of compensating plaintiffs for taking the trouble to sue. Reformers who propose alternatives to punitive damages distribution argue that allowing plaintiffs to keep punitive damages, motivates frivolous or unjust lawsuits, and that plaintiffs bringing civil suits to court should be seeking justice, not monetary “windfall gains.” Reformers for punitive damages distribution believe that the potential for receiving the punitive awards in addition to compensatory awards, in some cases significant amounts, promote inappropriate civil litigation.

But as I have shown, the ‘trouble’ to sue is immense and can be overwhelming to plaintiffs. And the purpose of a punitive damages award is not solely to compensate for attorney’s fees. Its foremost purpose is to punish and deter, it repairs insult and honor to the plaintiff, it satisfies vengeance, it provides incentive to the plaintiff for carrying the burden of pursuing justice, and lastly, it assists with attorney’s fees and the cost of litigation.

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38 See Chapter One, Arguments to Reform the Distribution.

39 Where the punitive damages amount is shared with the state.

40 Volokh, 1.

41 See Sharkey.

42 supra. See Chapter One. The reform proposals for Societal Damages and Split Recovery.

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The claim that punitive damages encourage frivolous litigation is a discounted claim through the oversimplification of the issue. Again, punitive damages are rare, as stated in Chapter One, only occur in about 2–5 percent of all tort cases. If attorneys or plaintiffs are pursuing frivolous cases assuming that punitive damages will be easily awarded, they are mistaken. Also, contingency fee lawyers must cover the costs of litigation upfront. Thus it simply makes no economic sense for them to bring frivolous litigation because there is only cost and no guaranteed benefit. Another problem with the claim that frivolous litigation applies to punitive damages is that it assumes that monetary gain is the dominant motivation to pursue justice. Lawyers and plaintiffs many not only be seeking monetary gains with frivolous lawsuits, but also social attention or possible career moves. So, if one wanted to pursue a frivolous lawsuit, then they would, regardless of the possibility of the punitive damages award. The reformation of distribution to the plaintiff based solely on prevention of frivolous lawsuits is impetuous. Calling attention to frivolous lawsuits is the interest groups’ way of distracting policy makers from the real purposes of punitive damages, namely, to punish, to provide incentive for, and repair further harm to the plaintiff.

For, even if monetary gain was a dominant factor in litigation pursuit, punitive damages going to the plaintiff serve purposes that rise above ethical maintenance of greedy lawyers and false plaintiffs. Adjusting the distribution of punitive damages is not the solution to preventing frivolous lawsuits, because the risk of losing legitimate

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43 Capra, “An Accident and a Dream...,” 35. Although there are statutes such as the Americans with Disabilities Act of 1990, 42 U.S.C. Chapter 126, SubChapter IV §12205 that states “the court or agency, in its discretion may allow the prevailing party, ...a reasonable attorney’s fee, including litigation expenses and costs...”

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lawsuits is too great. Punitive damages awarded to the plaintiff plays too important of a part in ensuring legitimate lawsuits make it through the system.

**The Private Attorney General Principle**

The purpose of inducing private law enforcement is instituted by the system of civil law. Civil law is distinct in that the plaintiff is required to bring the case to court on their own – with no or little assistance from the police. Whether or not to bring a case to court is the sole decision of the plaintiff. This is why it is referred to as private law. The civil legal system operates only when the process is triggered by parties. "The punitive damage system . . . is driven exclusively by private litigants and their lawyers." Civil law "is a matter of private law in the sense that its goal is to provide compensation and satisfaction for the offended, [only] if she chooses to pursue the case." So it can be concluded that civil law is distinct from criminal law since the burden of bringing the wrong-doing to court is on the plaintiff. Given that civil law procedures begin with this distinction, it can be concluded that the 'private law' aspect is inherent in the purpose of civil law, and therefore an important purpose that procedures

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44 Duff, "Legal Punishment," 4. "Civil law deals in part with wrongs which are non-private in that they are legally and socially declared as wrongs – with the wrong constituted by libel, for instance: but they are still treated as 'private' wrongs in the sense that it is up to the person who was wronged to seek legal redress. She must decide to bring, or not to bring, a civil case against the person who wronged her; and although she can appeal to the law to protect her rights, the case is still between her and the defendant."

45 Galanter, "Why the ‘Haves’ Come Out Ahead…," 103.

46 Volokh, 22. Quoting Theodore Olson of the Civil Justice Reform Group.

In order for plaintiffs to succeed in extensive civil court cases, the damages, compensatory and punitive must go to the plaintiff. If it did not, then the private law aspect of civil law would be lost with this procedure, and it is possible that some private wrong-doings would not make it to court and the responsible entity or individual would be free to repeat harm. The alternatives to not pursuing a case are not attractive: inaction is often a response by “claimants who lack information or access, or who decide the gain is too low, cost too high;” withdrawal from the situation by relocation is a common expedient to trouble; resorting to some unofficial control system such as insurance agency settlements, mediation or arbitration, ombudsmen, tribunals, etc.; and private oppositional remedies that may include gangs and the mafia. Most of these alternative resolutions to justice are temporary or do not reach justice at all.

The legal system has its barriers. But once overcome, the system offers the best opportunity to justice through adversarialism. Litigation benefits not only the participants by ensuring a fair and just trial, a fair and just punishment, but it also benefits the community in several ways.

General social deterrence results when wrongs are publicly exposed and punished. Citizens or groups in society may change their policies and procedures to comply with the result of the trial in order for them to avoid similar repercussions. Also, court trials in general influence change in society in a variety of ways. As an agenda-setting forum for

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political policies, civil court cases have set precedent regarding influence on product safety efforts, and sexual discrimination policies. Court decisions provide social communication of social moral evaluations of specific actions or conduct. Knowledge of court proceedings and decisions invite society to evaluate and possibly adjust their views of these actions. The result is that “the law may maintain or intensify existing evaluations of conduct.” Therefore, litigation is important to society in regards to change and communicating social norms as they do change.

Litigation and private attorneys general should be encouraged. The greatest barrier to the legal system is the initiation of suit and the motivation to continue, which makes incentive through punitive damages vital. The private attorneys general pursue and prosecute actors who have committed egregious acts beyond the practical reach of criminal law. It is believed appropriate for this reason, to reward these private prosecutors for their public service in bringing the wrongdoers to account.

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50 Galanter, “The Day After the Litigation Explosion,” 18. Listing the beneficial effects of litigation.

51 Ibid. 19.

Punitive awards are a common law remedy in which citizens serve as prosecutors, bringing wrongdoers to justice. The possibility of being awarded punitive damages encourages plaintiffs to act as ‘private attorneys general’ and provides incentive for plaintiffs to sue in instances where conduct has caused widespread harm. Punitive damages permit the litigation of claims that might otherwise be too expensive for an individual plaintiff to prosecute, and they serve as ‘bounty’ for the plaintiff. Without exemplary damages, a corporation would run the risk if it harmed a large number of people, each in a relatively minor way. Punitive damages are particularly necessary where there are ‘gaps’ in the criminal law. Private attorneys general provide a ‘backup’ remedy in situations where government enforcement agencies fail to adequately protect the public.  

Therefore, the plaintiff receiving the award is more than just “windfall gains” or a winning of a lottery – it serves to support the main functions of civil law, viz. private law enforcement. Private law enforcement is an important social benefit as well as the initial step for all civil law, and therefore should be supported. Punitive damages awarded to the plaintiff specifically support private law enforcement by providing incentive. This purpose outweighs other concerns to reform distribution of punitive damages awards, and so the procedure should remain.

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53 Rustad and Koenig, 14 of 64.
CHAPTER 6

RECOMMENDATIONS

My initial question regarding punitive damages was not of amount, but of the award distribution. However, the excessiveness issue, as discussed in Chapter One, could not be ignored. With careful research I found that the excessiveness claims derived mostly from special interest groups and the media. This is common. Like most political policies, the legal court system is utilized as an agenda-setting arena. Special interest groups employ the court system, just like the legislatures, to change political policy. After reviewing the case history of ‘excessive’ punitive damages awards, I also learned that the court system has taken measures, through appellate guidelines, to address the claims that awards are excessive or violate Constitutional rights. And, since most of the larger awards are remitted, appealed, and struck down; I became assured that excessiveness was not an issue.

But regardless of the amount, what justified the plaintiff receipt? Whether the amount is small or large, how are punitive damages justified to be received by the plaintiff, if they represent punishment? The punishment theories of retribution and deterrence are classic justifications for meting out punishment in order to correct harms in society. Punitive damages are appropriately awarded as a method for civil punishment. Since civil law through compensatory damages does not always take into account further (non-nominal) harms, punitive damages policy allows civil law to punish,
especially corporations, without having to merge with criminal law. But retribution and deterrence as punishment justifications do not require punitive damages to be received by the plaintiff. Nor do they rule out punishment justifications for the plaintiff’s receipt of the damages. As I have discovered, the punishment justification of vengeance satisfaction does require the punitive damages be awarded to the plaintiff. Vengeance at first glance may not seem to be a virtuous justification for punishment, but it is historically supported as a purpose for punitive damages. Although purposes for punitive damages have expanded and been updated with time, it is important to validate damages through the original purposes or see if the original purposes still apply today; for although times change and new generations cause us to shift focus from the original purposes, we must remember to first learn from the past, before we can adjust for the future. So, since it is the particular plaintiff’s vengeance that punitive damages seek to satisfy, given private law; vengeance satisfaction supports the punitive damages be received by the plaintiff. For it is through this individual exchange that personal vengeance is satisfied.

Along with the satisfaction of vengeance, the original purposes of repairing insult and restoring honor to the plaintiff are historically supported purposes for punitive damages. Given the personal nature of all three, they all support that punitive damages should be received by the plaintiff. It could be argued that vengeance, insult, and honor could be served by the plaintiff not receiving the punitive damages – for punishment of the wrong-

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1 This does not discount that some punitive damages are calculated for harm that occurred in the state or predicted harm. In this sense, the excessiveness issue comes into play. This view will be addressed in this section regarding societal damages claims. Most punitive damages are initially calculated according to the further harm caused to the plaintiff. And as discussed in Chapter One, calculations that include national or state (as opposed to individual) harm, cause concerns for due process violations and excessiveness.
doer alone should satisfy all three, just as they suffice for criminal law. But, I argue that since civil law is labeled 'private law' and deals with personal and private transactions, the damages should remain so, personal and private to the plaintiff. And since the private law arena deals with private wrongs, unlike criminal law, then the punishments are serving *first* the plaintiff, and *second* the community. The private law aspect of civil law is inherent and important to the distinction of the system, so that it is equally important as a determinant for the policies.

Also inherent in the private law aspect is the justification of the plaintiff receipts policy. The main reason why civil law is referred to as private law is because the decision and burden to pursue litigation, to accuse of a wrong, and to follow through for justice is the sole responsibility of the plaintiff. Plaintiff responsibility for litigation is the major characteristic of civil law. And since the plaintiff is procedurally responsible for the burden of litigation, the plaintiff becomes procedurally the least advantaged in the process. According to the procedural justice principles of John Rawls, as discussed in Chapter Two, excess liberties such as punitive damages, should be distributed to benefit the least advantaged. Thus the punitive damages should be awarded to the plaintiff because they are the least advantaged and to provide an incentive for their seeking relief for this burden.

Support for plaintiff incentive or a private attorney general is not only needed due to plaintiff’s responsibility. For moral obligations, parental for example, do not always require incentive. But since the obligation to pursue justice requires that the plaintiff take on the civil legal system, it requires incentive because the system is inherently passive, complex, costly, and usually requires expert assistance. In order for the legal system to
ensure justice, it can either make the pursuit of justice more accessible for the private attorneys general, or it can provide some kind of assistance and incentive.

Is providing incentive just in itself? Or should we require moral obligation alone to manage civil suits? As I have shown in earlier chapters, incentive to pursue justice is nothing new. The legal system has offered awards and incentives to citizens for many years. Until society is ready to rely on moral obligation alone, incentive is necessary for achieving justice in society. Punitive damages being received by the plaintiff serve this purpose in civil law.

Referring back to my original question, what justified plaintiff receipt? Initially when I began research, I assumed that there were no reasons for this justification. I have discovered the justifications exist: vengeance, insult, honor, incentive, and benefiting the least advantaged. But are these justifications enough? Shouldn't the traditional justifications (retribution and deterrence) for punishment alone be enough to determine distribution of punitive damages just as they do for criminal punishment? And for with criminal punishment, the emphasis of justification lies in community benefits, not the plaintiff's. The community benefits since criminals are incapacitated, rehabilitation of the criminal is important, and fines, if any, go to the institution that is responsible for serving the punishment. Shouldn't institutional punishment of any kind benefit first societal concerns? These are the arguments against the plaintiff receiving the award.

Reforms to amend distribution include split-recovery statutes and societal damages proposals, as introduced in Chapter One. Both of these reforms utilize a "central concept . . . that societal, as opposed to individual, interests may be vindicated by punitive
damages. But societal interests continue to be served with the punitive damages award received by the plaintiff: the maintenance of social order and deterrence. Regardless of who receives the award, the wrong-doer is being punished and societal benefits are being served. But just as this is not a reason for the plaintiff to receive the award, it is also not a reason for the plaintiff to not receive the award. Purposes served when the plaintiff does receive the award, as listed above, should receive precedence in civil law. Since civil law leaves the burden to seek justice solely to the plaintiff, so for the distribution procedures of punitive damages, the individual interests outweigh societal interests of split-recovery and societal damages.

Although split-recovery procedure varies from state to state, the basic process requires a portion of the punitive damages award distributed to a state general fund, or some type of state managed compensation fund for specific victims, and the proportions vary between states. Listed goals of split-recovery statutes are (1) “to discourage plaintiffs from bringing [frivolous] punitive damages claims by decreasing the amount of their recovery,” (2) to eliminate the “windfall gains” to the plaintiff, and (3) as a revenue

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2 Sharkey, [endnote72]*373  From endnote72: “Current law recognizes that punitive damages may serve the societal objective of deterring similar conduct by the defendant... to ‘punish [] and deter[ ],’ [dual purpose] focus solely on vindicating society’s interests”.


4 Sharkey, 11. “The Illinois split-recovery statute [] was enacted specifically to discourage punitive damages,”
raising measure for the state.⁶

I have argued in Chapter One and in Chapter Five that frivolous lawsuits are not a result of punitive damages' receipt by the plaintiff. The fact that punitive damages assist the plaintiff with lawyers’ fees does not necessarily entice frivolous law suits. Lawyers still take the risk of losing as well as the burden of costs up front with contingency fees, so logic follows that they would be discouraged to take on frivolous suits. Punitive damages receipt by the plaintiff provides an incentive that encourages the private attorneys general aspect of civil law. Reformers do exaggerate and distort this claim by rephrasing it as ‘encouraging frivolous law suits.’ The ‘frivolous law suit’ claim also assumes that suits that involve punitive damages are frequent, thus plaintiffs can be enticed with them. But as statistics have shown, the awarding of punitive damages is rare.⁷ Taking on the burden of a law suit for the sole hopes of being awarded punitive damages is a big risk.

The last two purposes for split-recovery statutes, preventing windfall gains and raising revenue for the state, assume that the punitive damages awards are large enough to be considered “windfalls” and would be substantial revenue for the state. According to the U.S. Department of Justice Bureau of Justice Statistics summary findings for state

⁵ Ibid. “a plaintiff is a fortuitous beneficiary of a punitive damages award simply because there is no one else to receive it. [endnote85].”

⁶ Ibid. also see endnote 86, endnote 87, endnote 88.

⁷ See Chapter One as well as U. S. Department of Justice, Bureau of Justice Statistics, Civil Justice Statistics, “Summary Findings,” http://www.ojp.usdoj.gov/bjs/civil.htm, accessed 12 November 2004. Surveying the 75 largest counties in the United States, from a total of 11,908 tort, contract and real property trial cases, of the 8,859 Jury trial cases, plaintiffs won in only 4,715 of the cases and of those, 260 cases were awarded punitive damages. Of the 2,828 Bench trial cases, plaintiff winners were in 1,849 cases and of those, 79 were awarded punitive damages.
courts civil justice statistics, in 2001 for jury trials, the median total award for the plaintiff winner was $37,000. The median punitive damages award for the plaintiff was $50,000. Juries awarded punitive damages in only 6% of civil cases with a plaintiff winner.

Now the revenue raising concerns of reformers would like to assume that most punitive damages awards are in the millions of dollars. But in reality they are not. And as established in Chapter Five, the average case costs approximately $10,000; thus the gains provided by punitive damages are hardly windfall to the plaintiff. Since the states have many other options for raising revenue, this reason for reform is moot. Therefore, the purposes that punitive damages being received by the plaintiff fulfill deserve precedence over split-recovery concerns.

Compensatory Societal Damages specifically apply to “pattern or practice” torts. It is argued that since a “defendant’s conduct toward the plaintiff is part of a pattern of similar repeated conduct, [and] a higher punitive damages award is permissible.”

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8 Ibid.

9 Ibid. For judge decisions, the median total award was $28,000 and the median punitive damages award was $46,000.

10 Ibid. Judges awarded punitive damages in only 4% of the civil cases with a plaintiff winner.

11 Sharkey, 15. Part III A New Category of Compensatory Societal Damages.

12 Ibid. Repeated conduct that likewise affects multiple parties, as opposed to single tortuous acts by defendants that harm multiple victims.

13 Gifis, Law Dictionary, s.v. “tort”: a wrong; a private or civil wrong or injury resulting from a breach of a legal duty that exists by virtue of society’s expectations regarding interpersonal conduct, rather than by contract or other private relationship. 26 N.E. 2d 254, 259.
also argued that the punitive damages – since calculated based upon the repeated conduct – should be held by the state for the other harmed plaintiffs to collect after judgment, even though they did not directly participate in the specific legal case.

These assertions are made on the premise that instead of taking advantage of the class action lawsuit, in which a lawsuit is brought by a representative member of a large group of persons on behalf of all members of the group, and since punitive damages is permissible to be calculated based on a pattern of repeat conduct (meaning that others have been harmed in the same way), the policy should ease the pursuit of litigation for those who do not take the “trouble to sue.”

The legal system is complex and costly, and as I have established, awarding the plaintiff for taking the time and effort to sue is a justifiable purpose. Filing and following through with a civil suit is not as easy as applying for your driver’s license. Even the filing of a small claims case consists of forms, copies, fees, time lines, serving of papers, etc... So, if the other plaintiffs wanted to take the time to pursue justice, they should, and the statutes of the law need not be changed for this purpose.

Does this mean that justice is only served to those who take the time and have the resources to pursue litigation, even though the award may be calculated on other’s harm? Due to the passiveness of the system, it does mean this. But, in order justify a change in policy, I argue that there must be some consistency in what can be viewed as the problem. Multiple calculations of harm is not the standard and varies from state to state, case to case, jury to jury. Again, these societal damage reforms are based upon the

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14 Sharkey, 15. refer also to her endnote 149.


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premise that awards are calculated on multiple harms and that the award includes not only compensation, but also punitive damages. But since these conditions are not the standard nor are they consistent throughout the nation, I see little justification for entertaining reform.

If class action lawsuit statutes need to be reformed in order to better accommodate groups filings, then perhaps they are in need of examination. But the policy of punitive damages should not be adjusted to suit class action proceedings. The calculation of repeat conduct into the amount of punitive damages has been accused of being unjust according to Due Process Laws as well as violating Fair and Just Punishment Laws. But, as addressed in Chapter One, these concerns have been addressed with judiciary review guidelines. And we must remember that for most of these cases, the large awards have been appealed and struck down. Lastly, societal damages reform is also asserted on the premise that the awards are large and excessive, and as has been noted, they are neither.

In conclusion, punitive damages should be awarded to the plaintiff in order to: (1) serve as an incentive in order to maintain private attorneys general, since they directly repair insult, satisfy vengeance, and repair honor; and (2) since they mitigate the burden of litigation that is solely on the plaintiff. The ease of this burden is necessary because the civil law system is inherently passive, complex, and costly. And due to the inherent burden in the system, along with the private law aspect, (3) the plaintiff becomes the least advantaged in the procedure and awarding punitive damages to the plaintiff serve

16 Due to the limited scope of this paper, I will not delve too deeply into this issue.

17 Jeffries, “A Comment on the Constitutionality of Punitive Damages,” 147. See also details in Chapter One.
procedural justice principles. These purposes for the plaintiff to receive the award are justified, supported by history, and serve society, the individual, and justice.

Reformation considerations to any policy process require a structurally concise review of the original purposes of the policy in order to determine which “implicit principles ... on the whole make sense of the practice.”18 Once these are determined, they are used to validate, or invalidate, the procedure. Since our repeated actions, practices, or political policies are explained with their established rules, purposes, and intentions, “[i]n order to justify – to make good an argument or show a person or action to be just or right, or defend as right or proper, or give adequate grounds for action – we need to appeal to some standard of what is right, proper or just. When we justify an action that is part of a practice, to make our case we can often point to rules of the practice.”19

Thus for the policy in which punitive damages should be received by the plaintiff, I have presented these standards. The purposes I have used to justify plaintiff receipt complete the practice of civil law and make sense of the practice itself, since it’s purposes are inherent in and support the private law arena. Plaintiff receipt validates civil law procedure and serves procedural justice. Reforms for punitive damages should not conflict with the purposes that serve the system and society, and the awarding of punitive damages to the plaintiff does both.

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19 Ibid., 8.
APPENDIX

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