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"CRIMTORTS" AS CORPORATE JUST DESERTS†

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Just as Grant Gilmore described "contorts" that lie on the borderline between contract and tort law, the authors coin the term "crimtort" to identify the expanding common ground between criminal and tort law. Although the concept of crimtort can be broadly applied to many areas of the law, this Article focuses on the primary crimtort remedy—punitive damages. The deterrent power of punitive damages lies in the wealth-calibration of the defendant's punishment. For corporations, this means that punitive damages will reflect the firm's net income or net worth. The theoretical danger is that juries will abuse wealth by redistributing corporate assets in disregard of the purposes of civil punishment. To support their argument that wealth is not being widely misused, the authors present an empirical study of a decade of crimtort cases in which federal appeals courts upheld punitive damages of $1 million or more. However, even though punitive damage verdicts are generally proportional to corporate wealth, individual cases such as Exxon Valdez raise troubling due process issues. The authors propose instituting middle-range procedural protection for crimtort defendants in order to accommodate the quasi-criminal objectives of this legal hybrid.

† The phrase "just desert" is taken from the eighteenth-century German philosopher Immanuel Kant, who articulated the retributive theory of justice. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 99–107 (1965 ed.); *see also* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997) (summarizing Immanuel Kant's theory of "just deserts" which held that punishment should be proportionate to "their internal wickedness"). This Article benefited from the excellent research assistance and editorial suggestions of Waino Kangas, Chryss Knowles, Kristin Kraeger, Theresa Mrusick-Meyer, Jessie Nice, and Professor Marie Natoli. Our colleagues Anthony Polito and Eric Blumenson provided valuable materials. Discussions at the National Conference on Punitive Damages held in October 1996 at the University of Wisconsin Law School played an important role in formulating our ideas.

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INTRODUCTION

The late New York Yankees baseball star, Mickey Mantle, once complained to Larry King about the folly of professional baseball in assessing fixed fines against players who make wildly different salaries. He stated, "[y]ou know what really makes me mad—they still fine these guys the same thing they fined us. Me and Billy [Martin] got fined $500. That was a lot of money [to us]. If I was making $5 million I'd say, 'Here, take another.'"[1] This statement regarding the necessity of considering disparities in wealth when calculating the amount of a fine poses one of the central issues in the debate surrounding the future of punitive damages. The fining of Mike Tyson three million dollars for biting Evander Holyfield's ear during a championship boxing match is a salient example of a wealth-calibrated punishment at issue in this debate.[2]

The twenty-five million dollar award of punitive damages assessed against O.J. Simpson illustrates the potency of this type of wealth-based remedy. The punitive damages award was based upon the extremely aggravated circumstances underlying the murders of Nicole Simpson and Ronald Goldman, and was calibrated to have the proper punitive effect given O.J. Simpson's wealth and imputed future earnings.[3] The remedy of punitive damages can both express

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1. Respondent's Brief at 37 n.37, TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) (No. 92-479) (citing *Larry King Live* (CNN television broadcast, Apr. 16, 1991)). In 1956, Mickey Mantle earned a salary of $30,000 which, when combined with endorsements and bonuses, amounted to a total income of approximately $100,000. *See* DICK SCHAAP, MICKEY MANTLE: THE INDISPENSABLE YANKEE 113, 129–30 (1961). In contrast, baseball player Barry Bonds of the San Francisco Giants currently earns an annual salary of $11.45 million. *See Barry Bonds Inks $22.9 Mil. Extension to Become Top-Paid Player in Baseball*, JET MAGAZINE, Mar. 10, 1997, at 48.

2. Criminal fines calibrated to the ability of the defendant to pay are currently utilized in Germany, Scandinavia, and England. *See* George F. Cole, *Making Them Pay: Alternatives to Jail Hit the Pocketbook*, LEGAL TIMES, Nov. 6, 1989, at 28; *Making the Punishment Fit the Income*, SOLIC. J., Apr. 11, 1997, at 319 (describing English fines based on "equality of hardship rather than equality of monetary penalty").

3. *See* B. Drummond Ayres, Jr., *Jury Decides Simpson Must Pay $25 Million in Punitive Award*, N.Y. TIMES, Feb. 11, 1997, at A-1, -12. The O.J. Simpson civil jury voted 11–1 on the question of liability for punitive damages and 10–2 on the actual amount of the award assessed. *See id.* The jury had also awarded $8.5 million in compensatory damages for the wrongful deaths involved in the case. The jury arrived at this multimillion-dollar punitive damage award by using a model of potential or imputed earnings. *See id.* Even so, this award was "very large by any standard." *See id.*

and appease community outrage when criminal prosecution appears to the public insufficient for the conduct involved.

Punitive damage awards can also serve to punish and deter the misuse of official power. In *Zarcone v. Perry*,[4] a night court judge had a coffee vendor arrested and marched into his courtroom in handcuffs for the offense of making coffee that the judge and his deputy considered "putrid-tasting."[5] The punitive damages awarded in *Zarcone* redressed the psychological harm inflicted during the judge's malicious degradation ceremony.[6] These types of awards demonstrate the power of punitive damages to punish quasi-criminal conduct that is in itself beyond the reach of the criminal law.

Courts increasingly employ punitive damages to control the abuse of organizational authority. As corporate power increases, so does the need for effective legal sanctions to protect the public interest.[7] As C.S. Lewis observed:

> The greatest evil is not now done in those sordid "dens of crime" that Dickens loved to paint. It is not done even in concentration camps and labor camps. In those we see its final result. But it is conceived and ordered (moved, seconded, carried and minuted) in clean, carpeted, warmed and well-lighted offices, by quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voice.[8]

Corporate malfeasance costs Americans hundreds of billions of dollars annually and causes an untold number of preventable deaths and injuries.[9] Increasingly, the legal sanctions used to

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4. 581 F.2d 1039 (2d Cir. 1978).

5. *See id.* at 1040.

6. The sociological term "degradation ceremony" has been used to describe the rituals through which low-status individuals are humiliated by the powerful in order to manipulate and reinforce social position or hierarchy. *See* Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420, 420 (1956).

7. *See* Catharine Pierce Wells, *Corrective Justice and Corporate Tort Liability*, 69 S. CAL. L. REV. 1769, 1779 (1996) (discussing the various fairness and justice concerns involved when a tort defendant is a corporation).

8. Paul Greenberg, *Western Leaders, Look, Study and Ignore the New World Disorder*, CHI. TRIB., Jan. 14, 1994, at 17 (quoting a statement made by C.S. Lewis in 1941).

9. The costs of corporate crime are unascertainable, but they are certainly very high:

> It is estimated that corporate crimes in the form of faulty goods, monopolistic practices, and similar law violations annually cost consumers between $174 billion and $231 billion. The loss to taxpayers from reported and unreported

deter and punish corporations employ blend tort and criminal remedies.

Tort law and criminal law traditionally have been thought of as separate subjects with clear lines of demarcation[10] since the latter half of the nineteenth century.[11] However, the two areas of law have always shared a common ground.[12] Richard Posner has described the division between civil and criminal law in legal theory as overly dichotomous:

> The conventional legal thinker draws an extremely sharp line between civil law and criminal law and between torts and contract. This tendency is due in part to failing to take a functional approach. . . . The idea that criminal law is about deterrence and civil law is about compensation is a product of the same kind of conceptual and essentialist thinking that underlies efforts to define the word law.[13]

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violations of federal regulations by corporations is between $10 billion and $20 billion. About $1.2 billion goes unreported in corporate tax returns each year. Price fixing among corporations costs the consumer $60 billion a year.

. . . In addition, it has been estimated that each year 200,000 to 500,000 workers are needlessly exposed to toxic agents such as radioactive materials and poisonous chemicals because of corporate failure to obey safety laws. . . . Many of the 2.5 million temporary and 250,000 permanent worker disabilities from industrial accidents each year are the result of managerial acts that represent culpable failure to adhere to established standards.

STEVEN VAGO, LAW & SOCIETY 163–64 (4th ed. 1994) (citations omitted).

10. A typical, simplistic explanation of the classic distinction made between tort and criminal law is that a tortfeasor breaches a duty to the individual while a criminal breaches a duty to the public. *See* GEORGE E. RUSH, THE DICTIONARY OF CRIMINAL JUSTICE (4th ed. 1994).

11. Torts did not even emerge as a distinct legal field until the 1850s. The first American torts treatise was not written until 1859, and the first torts casebook was not published until 1874. *See* G. Edward White, *The Intellectual Origins of Torts in America*, 86 YALE L.J. 671, 671 (1977); *see also* G. EDWARD WHITE, TORT LAW IN AMERICA 231 (1980) (noting that "[i]n the late nineteenth century Torts became increasingly conceived as a private law subject, not because it was inherently so suited, but because a sharp line between 'private' and 'public' activity was consistent with prevailing social wisdom").

12. The line between criminal and tort law has always been blurred. *See* United States v. Shapleigh, 54 F. 126 (8th Cir. 1893) (noting the criminal aspects of what was theoretically civil punishment).

13. RICHARD A. POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 54 (1996). The essentialist approach focuses on the fit of crimtorts to abstract doctrinal principles while a functional approach examines the social impact of crimtort remedies. *See* Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561, 579 (1988).

Just as there are torts which are subject to criminal sanction, there are tort remedies that punish and deter. The term "crimtort" is principally employed by this Article to describe the expanding middle-ground between criminal and tort law. To a lesser extent, "crimtort" also refers to civil punishment undertaken by state and federal regulators. The doctrine of crimtorts formally recognizes that there are private quasi-criminal prosecutions occurring within civil law. In the fields of antitrust, securities, and environmental litigation, private attorneys frequently initiate this type of civil punishment proceeding. This Article traces the expansion of crimtorts in American law and proposes a set of "middle range" level of procedural protections for crimtort defendants. The contours of this framework are developed by means of an empirical examination of the classic crimtort remedy—punitive damages.

The growing overlap between criminal and tort law is reflected in the expanded use of punitive damages to punish misconduct by the powerful. This approach is controversial because civil sanctions blend the criminal law function of punishment and deterrence with the tort law goal of reparation. The issue of fairness then arises because conduct that is tortious is increasingly punished in quasi-criminal proceedings lacking the protection of the safeguards provided by the criminal justice system. However, the remedy of punitive damages remains a vital doctrine because it "continues to serve the useful purposes of expressing society's disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice."[14]

The explosion of punitive damages awards is part of the much larger breakdown of the great divide between private and public law.[15] One commentator has observed, "the distinction between criminal and civil law seems to be collapsing across a broad front."[16] Criminal and tort laws are blending to form an entirely

14. Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 641 (1980).

15. *See* LAWRENCE M. FRIEDMAN, AMERICAN LAW 152–53 (1984) (noting that the distinction between public and private law can be traced to classical Roman Law).

16. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325 (1991). Another commentator argues that this collapse is due to the fact that "[c]ivil law has taken on some characteristics of criminal law, such as its increased use of punitive damages, but more commonly criminal law has been expanded to include what were traditionally civil violations." Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 210 (1996).

new type of legal control.[17] This hybrid doctrinal development is reflected in the emerging field we have labeled "crimtorts."

Crimtorts are not a new body of law per se or even a new cause of action. Rather, crimtorts are an explicit recognition that the criminal law principles of punishment and deterrence have been assimilated into tort remedies. Crimtorts have a unique capacity simultaneously to fulfill a private function of compensating injured claimants and a public law purpose of controlling socially harmful behavior. The trend towards the absorption of criminal law elements into torts can be seen in many recent high profile cases. A California jury "awarded $5 billion to a woman whose son was sexually tortured and cut to pieces by a serial killer."[18] The Ninth Circuit upheld a $1.2 billion punitive damages award against the estate of the former President of the Phillippines, Ferdinand Marcos, to punish a pattern of human rights violations.[19] Punitive damages were also awarded to the victims of a "campaign of torture, arbitrary imprisonment and summary executions against perceived enemies of the government" at the hands of an Ethiopian dictatorship.[20] The congregation of a black church in South Carolina sought punitive damages against alleged arsonists who burned their house of worship as part of "the Christian Knights' practice of promoting white supremacist goals through violent means."[21]

Each new crimtort remedy is not an anomaly to be dealt with on an ad hoc basis. Rather, we see the growth of crimtorts as an

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17. This discredited division between private and public continues to dominate Anglo-American jurisprudence. This false dichotomy is an example of those legal doctrines that "we have buried, but they still rule us from their graves." FREDERIC W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (1936).

18. *Mother of Serial-Killer Victim Awarded $5 Billion*, SAN DIEGO UNION-TRIB., Jan. 9, 1992, at A-33.

19. *See* Hilao v. Estate of Marcos, 103 F.3d 767, 787 (9th Cir. 1996) (upholding punitive damage award against the estate of Marcos).

20. *See* Abebej-Jira v. Negewo, 72 F.3d 844, 845 (11th Cir. 1996) (upholding $300,000 punitive damages award for each plaintiff). The jurisdiction of the U.S. court system may expand further: a federal judge has ruled that Unocal, a partner in a pipeline project with the state-owned Myanmar Oil and Gas Enterprise, can be held liable "for [human rights] abuses allegedly committed by the government of Myanmar." Evelyn Iritani, *Unocal May Be Liable in Myanmar Case, Judge Rules*, L.A. TIMES, Apr. 17, 1997, at A1.

21. Stephane Clare, *Pro Bono*, AM. LAW., Sept. 1996, at 111 (quoting Tom Turnipseed, the church's attorney). Punitive damages have also been sought in relation to other racially motivated criminal acts. *See* Berhanu v. Metzger, 850 P.2d 373 (Or. Ct. App. 1993) (awarding punitive damages for the act of encouraging a skinhead gang to commit the murder of blacks); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1051 n.107 (1995) (discussing efforts to recover punitive damages against the Ku Klux Klan in Texas).

evolving reconceptualization of law essential in defending against the abuses of organizational power.[22] Crimtorts are seldom successfully criminally prosecuted[23] despite the great societal dangers created by corporate malfeasance.[24] This Article argues that punitive damages should be viewed as the ideal remedy to control crimtorts because it is a civil sanction fulfilling a public purpose.[25]

The false dichotomy between public and private law has prevented legal scholars from recognizing crimtorts as a principled method of dealing with power inequities in legal disputes. The blending of civil and criminal law in punitive damages is attacked on essentialist grounds as threatening to those "norms linked to the rule of law"[26] and because it wrongly applies

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22. Crimtorts can provide a backup to public law enforcement in situations in which government enforcement fails to adequately protect the public. For example, the Consumer Product Safety Commission (CPSC) assessed a mere $5.09 million in fines between 1980–91 against only approximately 50 companies that did not comply with the CPSC's reporting requirements even though thousands of firms actually failed to meet those same reporting requirements. *See* MICHAEL RUSTAD & THOMAS KOENIG, PRODUCT LIABILITY PRACTICE GUIDE § 18.02(4), at 18–21 & n.32 (1993). The total of all CPSC fines in the quarter century of its existence would be the functional equivalent of a parking ticket to a Fortune 500 firm. The $5 billion punitive damages award assessed against Exxon in *In re The Exxon Valdez*, No. A89-09-CV (D. Alaska Sept. 16, 1994), dwarfs the totality of the CPSC's enforcement effort.

23. Corporations are skilled in resisting criminal prosecutions because of their superior resources. *See* John Braithwaite, *Challenging Just Deserts: Punishing White-Collar Criminals*, 73 J. CRIM. L. & CRIMINOLOGY 723, 753–54 (1982) (arguing that the corporate counsel exploit the various legal, accounting, organizational, and jurisdictional complexities to thwart criminal prosecutions for organizational crimes). Large criminal penalties for serious corporate misconduct are so rare that they make headlines. *See* United States v. Archer Daniels Midland Co., No. 96CR640 (N.D. Ill. Oct. 16, 1996) (assessing a $100 million-dollar criminal fine against Archer Daniels Midland for a conspiracy to fix prices). *See generally* Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1563, 1570–74 (1990) (discussing the trend toward increasing employment of corporate criminal sanctions).

24. Crime in the suites poses a greater societal danger than crime in the streets. Mass torts have the potential of endangering thousands of consumers as illustrated by the asbestos product liability litigation. No criminal prosecutions were ever pursued despite the widespread deaths and social dislocation attributed to the asbestos industry's cover-up of the dangers from unprotected exposure. Toxic torts may endanger an entire community's air or water supply. *See generally* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1 (1992).

25. The Supreme Court has recognized that punitive damages play a quasi-criminal role in punishing conduct that may also be subject to criminal penalties. *See* BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1598 n.22 (1996) (comparing the size of punitive damages to civil and criminal penalties as one of the measures of excessiveness).

26. Kenneth S. Abraham & John C. Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 416 (1989); *see also* Rob-

criminal sanctions to "fictional entities."[27] This blurring of the two spheres of law is viewed as a dangerous anomaly by some commentators because it "invites arbitrary and discriminatory enforcement, and violates the separation of powers principle that has traditionally denied federal courts the power to make common law crimes."[28]

Some critics propose to clarify the line between crime and tort by changing punitive damages into a Procrustean remedy which makes punishment the same regardless of the defendants' level of wealth and power.[29] President Clinton vetoed the Common Sense Product Liability Legal Reform Act of 1996,[30] which would have converted the remedy of punitive damages into a national system of capped fines. In just such an effort, the Product Liability Reform Act of 1997 proposes to separate wealth from punitive damages calculations by limiting the remedy to the greater of two times compensatory damages or $250,000.[31]

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ert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1143 (1989) (favoring the adoption of an incentive adequacy burden on plaintiffs seeking punitive damages, thereby largely eliminating net worth calculations from punitive damages awards); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 77–78 (1982) (arguing that punitive damages should only be awarded where the fault is intentional, the fault is gross or repeated, and the damages are not being used to correct imperfections in bringing suits or calculating damage awards); George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 124–25 (1982) (questioning the deterrent effect of punitive damages on conduct which results in a harm); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 152 (1982) (indicating the existence of tensions between modern cost-benefit analysis and the use of punitive damages awards).

27. *See* Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 WASH. U. L.Q. 329, 329 (1993) (noting the theoretical dilemma involved in the criminal prosecution of a fictional corporate entity).

28. John C. Coffee, *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 207 (1991).

29. In ancient Greek mythology, Procrustes waylaid travelers and forced them to lie on an iron bed. His bed was always the right size, as the victims were "stretched or lopped . . . to fit the furniture." Anthony Harris, *An EMU that Makes for Quarrelsome Bedmates*, THE TIMES, Jan. 29, 1997, at 1.

30. Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. *See* PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 28–29 (1997) (noting that federal product liability tort reforms capping damages are excessively one sided); Richard B. Schmitt, *Planned Veto of Liability Bill is Business's Loss*, WALL ST. J., Mar. 18, 1996, at A2.

31. Product Liability Reform Act of 1997, S. 648, 105th Cong. § 108. Similarly, the American Law Institute's *Reporters' Study on Enterprise Responsibility for Personal Injury* (ALI *Reporters' Study*) proposed the elimination of defendants' wealth from the punitive damages equation, in favor of capped fines. *Enterprise Responsibility for Personal Injury*, 2 A.L.I. REP. STUDY 253, 255 (1991). The ALI *Reporters' Study* concluded that "what is relevant is not the defendant's *overall* wealth, but rather the profit it realized from the particular tortious activity in question." *Id.* at 254.

These reforms would limit the ability of relatively powerless individuals to redress social injustices.[32] Punitive damages would no longer be a practical option in many cases where compensatory damages are low, even when the societal harm is great. An illustration of the necessity of punitive damages to correct power imbalances is in nursing home cases in which the victim's nonexistent earnings and low life expectancy reduce potential compensatory recovery to a trivial sum.[33]

The expanding role of crimtorts reflects the trend towards the civilization of the criminal law and the criminalization of the civil law.[34] While an exhaustive survey of all the dimensions of crimtorts is beyond the scope of this Article, our focus here will be on the most striking and controversial aspect of crimtorts: wealth-calibrated civil punishment. The crimtort paradigm can explain the development of hybrid sanctions such as punitive damages, civil fines, and other forms of graduated punishment as a functional response to America's growing social complexity and power inequalities.

This Article recasts the interstices between criminal and tort law as the unfolding field of crimtorts.[35] Part I argues that punitive damages evolved as the most efficient crimtort remedy because of the difficulties of applying sanctions to conduct that

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32. As Jonathan Kagan explains:

> Because absolute caps are not linked to crucial factors such as the wealth of the defendant or the reprehensibility of his conduct, they may over-deter some defendants while under-deterring others. . . . An award within a $250,000 cap might deter a local business, or even force it into bankruptcy, but it is unlikely that this amount would affect the operating procedures of any Fortune 500 company.

Jonathan Kagan, Comment, *Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damage Reform*, 40 UCLA L. REV. 753, 780 (1993). It is important to note, however, that the Product Liability Reform Act of 1997 includes language addressing a defendant's egregious conduct. *See* S. 648 § 108(b)(3). The type of harm caused by the defendant and the defendant's financial condition are factors considered under that section. *See id.* § 108(b)(3)(B).

33. *See* Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Amoral Monsters"*, 47 RUTGERS L. REV. 975, 1038–56 (1995).

34. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 479 (1997) (noting with concern the trends of the criminalization of civil law and civilization of criminal law).

35. Many of the procedural protections as proposed are consistent with the Model Punitive Damages Act proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL). *See* MODEL PUNITIVE DAMAGES ACT (1996). The principal purpose of NCCUSL is to promote uniformity in state laws. One of the best known and successful NCCUSL law reform projects is the Uniform Commercial Code. *See* A. Brooke Overby, *Modeling UCC Drafting*, 29 LOY. L.A. L. REV. 645, 651 (1996).

is harmful, yet not clearly criminal. Part II presents empirical research that suggests that juries are not discriminating against corporations when awarding the standard crimtort remedy, punitive damages. Instead, our study of a decade of federal punitive damage awards of one million dollars or more against corporate defendants demonstrates that punitive damages awards are rare and well-controlled. Part III proposes that crimtort defendants receive intermediate procedural protection halfway between the safeguards currently utilized for criminal and tort defendants.

Determining the amount of punitive damages based on the defendant's ability to pay *appears* inequitable because this Protean remedy is in tension with the dominant legal ideology of formal equality.[36] The debate over wealth-based punishment for crimtorts reflects "the paradox of justice"[37]—the long-standing clash between America's egalitarian ideal of protecting the weak while simultaneously advancing the inevitable inequalities produced by a market economy.

I. THE ORIGINS AND EVOLUTION OF CRIMTORTS

The rigid doctrinal distinction between tort and criminal law is an example of the disease of "hardening of the categories."[38] The separation between criminal law and tort law occurred over centuries. At early common law, tort injuries did not give rise to a distinct cause of action. Tort law was entirely encompassed by

36. Social scientists frequently criticize the law's assumption of formal equality because large corporations have innumerable advantages over an individual in any transaction. *See, e.g.*, JAMES S. COLEMAN, THE ASYMMETRIC SOCIETY 22 (1982) (arguing that "two parties beginning with nominally equal rights in a relation, but coming to it with vastly different resources, end with very different actual rights in the relation").

A recent example of product liability defendants' exercise of asymmetric power is found in the public relations campaign mounted by firms such as Dow Corning and the Keene Corporation in jurisdictions where they faced punitive damages litigation in an attempt to influence public opinion in general and jurors in particular against the plaintiffs' claims. *See* Richard B. Schmitt, *Can Corporate Advertising Sway Juries?*, WALL ST. J., Mar. 3, 1997, at B1, B3.

37. *See* CHARLES HANDY, THE AGE OF PARADOX 40 (1994) (discussing a paradox between incompatible American beliefs that "those who achieve most should get most" and "those who need most should have their needs met").

38. *See* GLANVILLE WILLIAMS & B. A. HIPPLE, FOUNDATIONS OF TORT 28 (1976).

the criminal aspects of the law.[39] At early common law, torts such as trespass "had a basic criminal character."[40] However, tort law was so firmly split off from criminal law that it was viewed as an entirely different branch of the law by the middle of the nineteenth century. The result was that criminal law patrolled conduct inimical to the public order, while tort law was primarily concerned with rectifying the wrongs done to private individuals.

This model had a theoretical symmetry and simplicity that appealed to legal formalists, but was out of touch with the law-in-action. Unlike today, class and wealth differences were openly discussed in nineteenth-century American lawsuits. In order to deter the privileged, wrongdoers could be punished by fines that were based upon wealth.

In 1845, Abraham Lincoln represented a wealthy but brutal defendant who was assessed punitive damages for an aggravated assault. The Illinois Appellate Court rejected Mr. Lincoln's argument that the wealth and power of the defendant should not be considered by the jury, stating:

> It is the policy of the law to protect the persons and property of the poor. The consequences of an assault upon a poor man, who has a family dependent upon his labor for support by which he is maimed for life, are surely more serious than they would be to a man in affluence. There is nothing more abhorrent to the feelings of the citizens of a free government than oppressing the poor and distressed under the forms and color of, but in reality in violation of, the law.[41]

References to the defendant's wealth and the plaintiff's poverty were made routinely as recently as the early decades of the twentieth century.[42] Appellate judges referred repeatedly to the

39. *See* Dan Dobbs & Paul T. Hayden, *Torts and Compensation: Personal Accountability and Social Responsibility for Injury, in* TEACHER'S MANUAL 1 (3d ed. 1997) (citing S.F.C. MILSON, HISTORICAL FOUNDATIONS OF THE COMMON LAW 353 (1969)).

40. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 6, at 28 (5th ed. 1984) (observing that the action of trespass was primarily concerned with punishment of a crime and "damages first came to be awarded incidentally to the injured plaintiff").

41. McNamara v. King, 7 Ill. 432, 434 (App. Ct. 1845) (upholding punitive damages).

42. For example, Clarence Darrow stated: "I speak for the poor, for the weak, for the weary, for that long line of men who in darkness and despair, have borne the labors of the human race." Central of Ga. R.R. Co. v. Cole, 381 S.E.2d 60, 63 (Ga. Ct. App. 1989) (quoting Clarence Darrow). The plaintiff's counsel in another railroad case argued that the millionaire defendant was oppressing the people and should be pun-

social and economic inequality of the parties in lawsuits as a justification for civil punishment.[43] Defendants were always provided with safeguards against the misuse of evidence of their wealth. Plaintiff's counsel who employed references to corporate wealth too freely in order to incite juries often had their verdicts overturned on appeal.[44]

A. Punitive Damages as a Reflection of Changing Social Norms

Punitive damages were prefigured in the English doctrine of exemplary damages.[45] This remedy preserved social peace and punished abuses of power.[46] From its inception, exemplary damages were based upon the enormity of the societal wrong and on

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ished. *See* Louisville & Nashville R.R. Co. v. Crow, 107 S.W. 807, 808 (Ky. 1907). Similarly, a plaintiff's counsel told a jury that he chose to make his living practicing law "'for the naked and sick and blind in the rain and the cold,'" quoting at length from Masefield's *Consecration*. Maryland Casualty Co. v. Abbott, 148 S.W.2d 465, 470 (Tex. Civ. App. 1941, writ dism'd judgm't cor.) (dismissing objection to argument that contrasted defendant's wealth with plaintiff's poverty because the objection had not been raised at trial).

43. As the New Hampshire Supreme Court ruled in 1870: "In regard to the question of exemplary damages . . . it becomes proper to inquire into the condition and circumstances of the defendant, because . . . what would be sufficient damages by way of example and of punishment, for a day laborer, would be nothing by way either of example or as a punishment for . . . a corporation." Belknap v. Boston & Me. R.R., 49 N.H. 358, 374 (1870).

44. *See, e.g.*, Missouri Pac. R.R. Co. v. Foreman, 107 S.W.2d 546, 546 (Ark. 1937) (reversing award where plaintiff's counsel argued that recovery would not result in "a meal missed" by the owners of the defendant railroad); Southern Ry. Co. v. Bulleit, 82 N.E. 474, 475 (Ind. App. 1907) (reversing $2,000 award because of improper statement that "defendant will make that much money in the time you are signing your verdict"); Louisville & Nashville R.R. Co. v. Hull, 68 S.W. 433, 436 (Ky. 1902) (reversing award because of improper comparison of the railroad's wealth to Solomon's Temple); Louisville & Nashville R.R. Co. v. Smith, 84 S.W. 755, 757–58 (Ky. 1905) (describing railroad as a soulless corporation that made millions of dollars every day).

45. The first English exemplary damages cases arose out of the warrantless searches of an oppositional newspaper by government agents in the companion cases of *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763) (stating that the jury could consider the social standing of parties in exemplary damages award), and *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763) (awarding 1000 pounds sterling in exemplary damages to deter government oppression).

46. Exemplary damages were generally awarded to preserve social peace. *See, e.g.*, Merest v. Harvey, 5 Taunt. 442 (1814) (upholding a large exemplary damages award against a drunken aristocrat who hunted game on the plaintiff's land without permission and shot toward the plaintiff when reproached for trespassing); *see also* Forde v. Skinner, 4 C. & P. (1808) (assessing exemplary damages against a poor house administration for shaving the head of a female pauper without justification).

the status differentials between the plaintiff and the defendant, as well as the plaintiff's particular injury.[47]

The first American punitive damages verdict was assessed against a physician in South Carolina in 1784.[48] The Wisconsin Supreme Court in *Luther v. Shaw* noted that punitive damage awards were important because the remedy "vindicates the right of the weak, and encourages recourse to, and confidence in, the courts of law by those wronged or oppressed."[49]

Law evolves as society changes.[50] What is outrageous to the community varies with the changing societal values that accompany historical development.[51] Blood sports such as bull and

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47. The New Hampshire Supreme Court in *Fay v. Parker* noted that Lord Camden articulated the logic of punitive damages in *Beardmore v. Carrington*, 2 Wils. 244 (K.B. 1764), stating:

> As to the damages, I continue of opinion that the jury are not limited to the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty and as a proof of the detestation in which the wrong act is held by the jury.

> There is a historical continuity in the Court's decision in *BMW of North America, Inc., v. Gore*, 116 S. Ct. at 1599, which observed that "infliction of economic injury . . . when the target is financially unbearable, can warrant a substantial penalty."

Fay v. Parker, 53 N.H. 342, 364 (1872); *see also* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1287–97 (1993) (discussing the history of exemplary and punitive damages in England and the United States).

48. The South Carolina Supreme Court in *Genay v. Norris*, 1 S.C.L. (1 Bay) 6 (1784), upheld exemplary damages against a physician who caused the plaintiff "extreme and excruciating pain" by secretly spiking his wine glass with a large dose of cantharides (Spanish fly). *See id.* at 6–7. The professional standing of the physician was mentioned in the jury instruction, which stated that "a very serious injury to the plaintiff . . . entitled him to very exemplary damages, especially from a professional character, who could not plead ignorance of the operation and powerful effects of this medicine." *Id.* at 7.

49. 147 N.W. 18, 20 (Wis. 1914); *see also* Gallagher v. The Yankee, 9 F. Cas. 1091, 1093 (N.D. Cal. 1859) (No. 5196) (holding master of vessel liable for exemplary damages for knowingly transporting seaman to foreign country against his will); Parrish v. Danford, 18 F. Cas. 1231, 1233 (C.C.S.D. Ohio 1860) (No. 10,770) (upholding exemplary damages for oppressive action of sheriff executing writ of attachment). In *Brown v. Evans*, 17 F. 912 (C.C.D. Nev. 1883), the federal court noted that punitive damages could be assessed for "'vindictive actions,' such as assault and battery, slander, libel, seduction, . . . etc., where the elements of fraud, malice, gross negligence, cruelty, oppression, brutality, or wantonness intervene, exemplary or punitive damages may be recovered from the defendant." *Id.* at 913.

50. *See generally* KAI T. ERIKSON, WAYWARD PURITANS (1966) (describing how the social definitions of crime and deviance in Puritan society reflected the values and social structure of that society).

51. *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 81 (George Simpson trans., Free Press of Glencoe 1964) (1893) ("[W]e must not say that an action

bear baiting did not offend the sensibilities of the English during the 1700s. By the first decades of the nineteenth century, the royal cockpit at Westminster was demolished and bull and bear baiters were prosecuted as criminals.[52] The punitive damages mechanism possesses the flexibility to defend against new social threats as they emerge. Punitive damages have been used, for example, to protect individuals with unpopular opinions from the tyranny of the majority during war time.[53]

Moreover, the punitive damages' remedy can accommodate to new moralities such as the changing definitions of the family.[54] Punitive damages in nineteenth-century America protected the sanctity of the family as a social unit from such external threats

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shocks the common conscience because it is criminal, but rather that it is criminal because it shocks the common conscience. We do not reprove it because it is a crime, but it is a crime because we reprove it.").

52. *See* PAUL JOHNSON, THE BIRTH OF THE MODERN WORLD SOCIETY 1815–1830, at 721 (1991).

53. In *Walker v. Kellar*, 218 S.W. 792, 801–02 (Tex. Civ. App. 1920), the plaintiff was awarded punitive damages after being tarred and feathered by an anti-German mob during World War I.

54. The nineteenth century witnessed the transition between the forms of social control appropriate to the local community to the types needed in an impersonal and bureaucratic mass society. In the early part of the nineteenth century, exemplary damages were awarded to punish offenses against the family while later verdicts protected against impersonal corporate wrongdoing. Ferdinand Tonnies, the German sociologist, explained this transition as a movement from *Gemeinschaft* to *Gesellschaft*. FERDINAND TONNIES, COMMUNITY AND SOCIETY 33–34 (Charles P. Loomis trans., Mich. State Univ. Press 1957) (1887); *see also* MICHAEL CROZIER, THE BUREAUCRATIC PHENOMENON 1–9 (1964) (discussing the development of the concept of bureaucracy and its various characterizations).

Fay v. Parker, 53 N.H. 342 (1872), examines a litany of nineteenth-century New Hampshire punitive damage cases which illustrate the change from the local conflicts characteristic of a *Gemeinschaft* society. The early cases centered on insults to the family, rights to individual private property, and threats to the local community. The emergence of railroad negligence cases in New Hampshire illustrates the movement from small scale society to mass society. Nine categories predominated: 1) criminal conversation, *see* Sanborn v. Neilson, 4 N.H. 501 (1828); 2) threat to public safety posed by neglect of bridge, *see* Woodman v. Nottingham, 49 N.H. 387 (1870); Whipple v. Walpole, 10 N.H. 130 (1839); 3) breach of promise of marriage, *see* Greenleaf v. McColley, 14 N.H. 303 (1843); 4) slander, *see* Page v. Parker, 40 N.H. 47 (1860); Knight v. Foster, 39 N.H. 576 (1859); Severance v. Hilton, 32 N.H. 289 (1855); Symonds v. Carter, 32 N.H. 458 (1855); Merrill v. Peaslee, 17 N.H. 540 (1845); 5) seduction of servant or family member, *see* Davidson v. Goodall, 18 N.H. 423 (1846); 6) trespass or unlawful entry upon land, *see* Cram v. Hadley, 48 N.H. 191 (1868); Whitney v. Swett, 22 N.H. 10 (1850); Perkins v. Tawte, 43 N.H. 220 (1861); 7) wrongful attachment of personal property, *see* Moore v. Bowman, 47 N.H. 494 (1867); 8) railroad negligence, *see* Holyoke v. Grand Trunk Ry., 48 N.H. 541 (1869); Taylor v. Grand Trunk Ry. Co., 48 N.H. 304 (1869); Hopkins v. The Atlantic and St. Lawrence R.R., 36 N.H. 9 (1857); and 9) railroads' intentional torts, *see* Belknap v. Boston & Me. R.R., 49 N.H. 358 (1870).

as seduction,[55] loss of services,[56] and criminal conversation.[57] Familial crimtorts in the modern period generally punish oppression within the family, not external threats to the family unit. Today, wives and children receive punitive damages for familial sexual abuse[58] and other torts by family members.[59]

Crimtorts continue to expand to further protect individuals from brutality. However, the most controversial extension of punitive damages lies in their increasing use for the social control of abusive organizations. By the 1850s, punitive damages punished reckless conduct by common carriers.[60] Railroads became habitual defendants in cases involving the negligent maintenance of tracks, reckless operation of trains, and intentional wrongdoing by employees,[61] and, by the 1870s, wealth-based

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55. Many seduction cases punished wealthy males who victimized servants or other subordinates. *See, e.g.*, Drobnich v. Bach, 198 N.W. 669, 670 (Minn. 1924) (upholding a $9,000 award against a rich defendant for breach of promise to marry plaintiff); Goodal v. Thurman, 38 Tenn. (1 Head) 209 (1858) (assessing punitive damages against a wealthy male for seduction of a servant); Owens v. Fanning, 205 S.W. 69, 72 (Mo. Ct. App. 1918) (awarding punitive damages against a wealthy man for seducing a 17-year-old girl).

56. Loss of services was frequently mentioned as the *sine qua non* of torts against the family. *See, e.g.*, Berghammer v. Mayer, 207 N.W. 289 (Wis. 1926) (awarding punitive damages to father of 15-year-old seduction victim); Reutkemeier v. Nolte, 161 N.W. 290 (Iowa 1917) (awarding $6,000 punitive damages to father of impregnated 14-year-old girl).

57. *See, e.g.*, Sanborn v. Neilson, 4 N.H. 501, 504, 511 (1828) (affirming punitive damages verdict for criminal conversation with plaintiff's wife based in part on the type of conduct undertaken by defendant).

58. *See, e.g.*, Parsons v. McRoberts, 463 N.E.2d 1049, 1050 (Ill. App. Ct. 1984) (affirming $12,000 punitive damages award against stepfather for sexually assaulting stepdaughter); Laurie Marie M. v. Jeffrey T.M., 559 N.Y.S.2d 336, 342 (App. Div. 1990) (reducing $275,000 punitive damages award to $100,000 in case where defendant was charged with sexually touching 11-year-old stepdaughter). *See generally* Jocelyn B. Lamm, Note, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189 (1991).

59. In *Caron v. Caron*, 577 A.2d 1178 (Me. 1990), an ex-wife and her son obtained $110,000 in punitive damages from her former husband as the result of physical and psychological abuse.

60. Vicarious punitive liability for the reckless acts of agents was well established by the 1850s. The Iowa Supreme Court upheld a punitive damages award against a stage coach company for employing a known drunkard as a driver in *Frink & Co. v. Coe*, 4 Greene 555, 560 (Iowa 1854). *See also* Peck v. Neil, 19 F. Cas. 79 (D. Ohio 1842) (No. 10,892) (ruling that stage coach company was liable for exemplary damages based upon recklessness of driver).

61. *See, e.g.*, Maysville & Lexington R.R. Co. v. Herrick, 76 Ky. 122, 127 (1877) (assessing punitive damage for railroad's gross negligence); *see also* Texas Trunk Ry. Co. v. Johnson, 12 S.W. 482 (Tex. 1889) (upholding exemplary damages award arising out of train derailment caused by excessive speed on rotten tracks); McFee v. Vicksburg, 7 So. 720 (La. 1890) (assessing punitive damages for "running its trains over an unsafe and dangerous track, the necessary repairs to which were delayed, although

punitive damages against corporations for threats to the public safety was well established by the 1870s.[62]

B. The Contemporary Debate over Wealth and Punishment

The contemporary critics of wealth-calibrated punishment argue that since the "wealthy defendant derives no greater benefit than a poor defendant, then both will be equally deterred (or equally undeterred) by the threat of [compensatory] tort liability."[63] Another critic asserts that: "The 'wealth of the defendant' bears no obvious relationship to deterrence goals: If the diminishing utility of money reduces the rich defendant's 'real' liability costs, it equally reduces the risk-prevention costs the defendant would need to incur."[64] Although such assertions are theoretically elegant, they defy common sense.

Fixed fines reduce a defendant's calculus to a question of long-term profit balanced against the cost of doing business. Trucks of a major package delivery service casually ignore the parking regulations of Boston's Beacon Hill, treating the resulting tickets as a cost of doing business. Punitive damages against this firm would not be appropriate because no significant social harm results from their lackadaisical parking practices. However, if these delivery vans created a real risk to the public by blocking access for ambulances and fire trucks, punitive damages might be employed to optimally raise the price of wrongdoing.

Wealth is a necessary ingredient in the punitive damages equation because of the enormous power of America's giant corporations.[65] As Justice Louis Brandeis warned:

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the dangerous condition and consequent peril to the safety and lives of its employees and the public were well known to the managers of the company").

62. *See, e.g.*, Goddard v. Grand Trunk Ry., 57 Me. 222 (1869) (noting that "every candid-minded person must admit that [punitive damages] against a corporation is no new doctrine").

63. Abraham & Jeffries, *supra* note 26, at 417

64. Schwartz, *supra* note 26, at 140.

65. Berle and Means described the growing societal power of America's largest corporations in their classic 1932 study of management control:

> [A] society in which production is governed by blind economic forces is being replaced by one in which production is carried on under the ultimate control of a handful of individuals. The economic power in the hands of the few persons who control a giant corporation is a tremendous force which can harm or benefit a multitude of individuals, affect whole districts, skirt the currents of trade,

> Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State.[66]

Organizational deviance by private corporations is an increasing danger to our collective welfare in the information age.

II. TOWARD A CRIMTORT PARADIGM

A. A Crimtort Paradigm

The deep divisions over the propriety of punitive damages are the teething pains of the emergent paradigm of crimtorts. The development of a new paradigm is "regularly marked by frequent and deep debates over legitimate methods, problems, and standards of solution."[67] Criminal law is "drowning in a sea of torts,"[68] as illustrated by such statutes as the Racketeer Influenced and Corrupt Organization Act (RICO),[69] the Resource Conservation and Recovery Act (RCRA),[70] anti-insider trader statutes,[71] and the False Claims Act.[72] Wealth-based civil punishment is also employed in section 1983 constitutional tort

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> bring ruin to one community and prosperity to another. The organizations which they control have passed far beyond the realm of private enterprise—they have become more nearly social institutions.

ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 46 (rev. ed. 1968).

66. Louis K. Liggett Co. v. Lee, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting).

67. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 47–48 (3rd ed. 1996) (developing the theory of scientific progress through paradigm shifts).

68. GRANT GILMORE, THE DEATH OF CONTRACTS 87 (1994) (coining expression).

69. RICO permits private lawsuits against corrupt organizations. Claimants may receive treble damages for exposing wrongdoing detrimental to the public interest. *See* 18 U.S.C. § 1964(c) (1997).

70. RCRA authorizes private citizens to file lawsuits to protect the environment. Courts may award attorney fees and the costs of expert witnesses to encourage the exposure of wrongdoing. *See* 42 U.S.C. §§ 6901–92 (1997).

71. *See* Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989).

72. 31 U.S.C. § 3729 (1997).

actions,[73] civil forfeiture litigation,[74] antitrust enforcement,[75] sexual harassment remedies,[76] and whistleblower *qui tam* actions.[77]

The rapid expansion of graduated punishment to deter organizational malfeasance is emblematic of the increasingly indistinct boundaries between public and private law.[78] As Justice Sandra Day O'Connor observed in her dissent in *Pacific Mutual Life Insurance Co. v. Haslip*, "the civil/criminal distinction is blurry. Unlike compensatory damages, which are purely civil in character, punitive damages are by definition punishment. They operate as 'private fines levied by civil juries' to advance governmental objectives."[79]

The cutting edge of crimtorts is the expanded use of progressive punitive sanctions against corporations.[80] The use of

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73. *See* Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 841 n.2 (1996) (stating that punitive damages are available for citizen suits seeking redress for "constitutional violations committed by state officers and other persons acting 'under color of' state law").

74. *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1326 n.4 (1991) (noting that there are "[o]ver 100 federal forfeiture statutes . . . currently in effect, covering the seizure of goods and property and encompassing a wide range of activities"). *See generally* Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79 (1996); Michael J. Munn, *The Aftermath of* Austin v. United States*: When is Civil Forfeiture an Excessive Fine?*, 1994 UTAH L. REV. 1255.

75. Dual governmental and private enforcement is provided for in the Sherman Act, 15 U.S.C. §§ 1–2 (1997), the Clayton Act, 15 U.S.C. § 18 (1997), and the Robinson-Patman Act, 15 U.S.C. § 13–13b (1997).

76. *See, e.g.*, Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at* Meritor Savings Bank, FSB v. Vinson, 44 VAND. L. REV. 1229, 1232 n.11 (1991) (referring to congressional moves to allow punitive damages for Title VII actions).

77. A *qui tam* action is a "civil action that requires the underlying conduct to be considered criminal. . . . In a *qui tam* action, the plaintiff pays the litigation costs and shares in any penalties that are awarded." Michael W. Carroll, *When Congress Just Says No: Deterrence Theory and the Inadequate Enforcement of the Federal Election Campaign Act*, 84 GEO. L.J. 551, 585 (1996). *See generally* William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799 (1996) (describing the use of financial incentives to encourage civil lawsuits initiated by whistleblowers).

78. Many scholars have commented on the merging of criminal and civil law. *See, e.g.*, Coffee, *supra* note 28, at 193; John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875 (1992); Abraham S. Goldstein, *White-Collar Crime and Civil Sanctions*, 101 YALE L.J. 1895 (1992); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992); Robinson & Darley, *supra* note 34, at 479–82.

79. 499 U.S. 1, 47–48 (1991) (O'Connor, J., dissenting) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

80. *See* Mann, *supra* note 78, at 1795. *See generally* Coffee, *supra* note 28, at 193.

wealth in setting punishment is the most controversial feature of modern civil punishment.[81] The bitter struggle over punitive damages pits plaintiffs' lawyers against the defense bar and consumer advocates against corporatists. We propose a cease-fire and a cooperative effort to clarify the remedy without destroying its deterrent power. The moral credibility of crimtorts depends upon recognizing procedural and institutional reforms which reflect its doctrinal status halfway between criminal and civil law.[82] Table One below depicts our preliminary thoughts on the major dimensions of this emergent paradigm.

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81. One plaintiff's lawyer argues that the elimination of facts about net worth would "[c]hange the nature of punitive damages . . . more into the nature of insignificant fines." Mike McKee, *Concealing the Company Assets*, LEGAL TIMES, Apr. 3, 1995, at 5 (quoting Dan Bolton, San Francisco plaintiff's attorney).

A former American Trial Lawyers of America President defends the present system, arguing that if the "jurors in the Exxon Valdez oil-spill case had hit the Exxon Corp. with $1 million in punitive damages instead of $5 billion, as they did, the multi-national company would have 'laughed at it.'" McKee, *supra* at 5 (quoting Larry Stewart, plaintiff's attorney with Miami law firm of Stewart, Tilghman, Fox & Bianchi).

Numerous business interests have combined in every state to limit the remedy of punitive damages. This issue remains a top legislative priority for much of the corporate community. *See* Sally Roberts, *Tort Reform Issues Top Risk Managers' Concerns: Survey*, BUS. INS., Apr. 15, 1996, at 29 (reporting that for the eighth year in a row, caps on noneconomic and punitive damages are the most important of several tort reform issues to corporate risk managers).

The Contract with America advocated capping punitive damages in product liability:

> It is news to no one that juries have been out of control over the past decade in awarding punitive damages far in excess of what is required to make a plaintiff whole. Part of the blame is to rest on the system, because it gives juries very little guidance with which to make such awards.

CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 147 (Ed Gillespie & Bob Schellhas eds., 1994) (advocating the Common Sense Legal Reforms Act which would limit punitive damages to the greater of three times the economic damages or $250,000).

82. *See* Robinson & Darley, *supra* note 34, at 478 (arguing that "the law's moral credibility also may depend upon procedural and institutional reforms").

TABLE ONE:
KEY DIMENSIONS OF CRIMTORTS, CRIMES, AND TORTS

PREDOMINANT FEATURE	CRIMTORT	CRIME	TORT
Social Functions	Private & Public—Exemplary	Public—Order Control	Private—Restitution
Culpability Standard	Middle Range: i.e., Reckless Disregard	States of Mind: From Malice to Strict Liability	Intentional, Negligence, and Strict Liability
Examples of Procedural Protection	Proof by Clear and Convincing Evidence	Proof Beyond a Reasonable Doubt	Proof by Preponderance of the Evidence
Use of Wealth	Wealth-Calibrated	Wealth is Inadmissible	Wealth is Inadmissible

B. Contorts as a Subcategory of Crimtorts

The disintegration of the boundary between crime and tort parallels the merging of the laws of contract and tort. Many "contorts" are actually crimtorts in disguise, controlling conduct inimical to the general welfare through wealth-calibrated civil punishment.[83] Punitive damages are assessed for "contorts" when there is an independent tort flowing from an egregious breach of contract.[84] The extension of tort law into contract law[85]

83. *See* GILMORE, *supra* note 68, at 90 (proposing that the first-year law school curriculum merge the subjects of contracts and torts into "contorts").

84. "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable." RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981). Only California permitted punitive damages in purely commercial contracts not involving a special relationship between the contracting parties. *See* Seaman's Direct Buying Serv. v. Standard Oil Co., 686 P.2d 1158 (Cal. 1984). Recently, California has reversed course and rejected the expansion of punitive contort liability in the purely commercial context. *See* Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 679–80 (Cal. 1995) (overruling *Seaman's Direct Buying Service*).

85. Punitive damages are not available in a purely contractual case. However, courts employ the legal fiction of an independent tort to permit the claimant to receive punitive damages. *See* RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981). The independent torts of fraud, interference with contractual relations, and intentional

arises chiefly where there is a significant imbalance of power and information in the contractual relationship.[86]

Contorts are typically used as counterweapons against stronger contractual parties who abuse some special duty owed to the weaker party. An insurer's refusal to pay a valid claim is a breach of contract but it may also constitute an independent tort warranting punitive damages.[87] When a firm "chisels" small amounts from each member of a large group, it is unlikely that any individual will go to court.[88] Table Two depicts the four most common punitive contorts.

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infliction of emotional distress are frequently employed to obtain punitive damages in a contracts case.

86. Churning of a customer's accounts is a typical example of the misuse of asymmetrical knowledge which can lead to punitive damages. *See* Deborah Travis, Comment, *Broker Churning: Who Is Punished? Vicariously Assessed Punitive Damages in the Context of Brokerage Houses and Their Agents*, 30 HOUS. L. REV. 1775 (1993).

87. The classic example of asymmetric information is the relationship of insurer and insured. Courts frequently note that insurers owe a higher duty to the insured because of their superior bargaining power. *See* Grand Sheet Metal Prod. Co. v. Protection Mut. Ins. Co., 375 A.2d 428, 430 (Conn. Super. Ct. 1977); White v. Unigard Mut. Ins. Co., 730 P.2d 1014, 1019 (Idaho 1986). The court in *Egan v. Mutual of Omaha Insurance Co.*, 620 P.2d 141 (Cal. 1979), upheld punitive damages against a disability insurer who failed to properly investigate a policyholder's claim by having him examined by the physician. The court stated that "the relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position. The availability of punitive damages is thus compatible with recognition of insurers' underlying public obligations and reflects an attempt to restore balance in the contractual relationship." *Id.* at 146.

88. Punitive damages were assessed against an insurance company that taught its adjusters to chisel payments on claims because policyholders were unlikely to discover or strenuously object to such petty losses. *See* Hawkins v. Allstate Ins. Co., 733 P.2d 1073 (Ariz. 1987); *see also* Moore v. American United Life Ins. Co., 197 Cal. Rptr. 878 (Ct. App. 1984) (upholding punitive damages against company engaged in a bad faith failure-to-investigate-claims scheme); Eckenrode v. Life of Am. Ins. Co., 470 F.2d 1 (7th Cir. 1972) (upholding award against life insurer for its practice of using "economic coercion" to "compromise" valid claims); Delos v. Farmers Ins. Group, Inc., 155 Cal. Rptr. 843, 857 (Ct. App. 1979) (affirming award against insurer for "nefarious scheme to mislead and defraud thousands of policyholders").

In energy producing states, such as Texas or Oklahoma, there is a great potential for abuse because royalty owners are often uneducated and unfamiliar with the legalese in complex oil and gas contracts. Chiseling may take the form of a producer systematically underpaying royalties or concealing excessive charges. The typical royalty owner will defer to the producer's "expertise" as to what constitutes a valid payout because of a disparity in information.

Farmers selling to large scale wholesalers are another group that is particularly vulnerable to chiseling by powerful corporations. In *Braswell v. ConAgra, Inc.*, 936 F.2d 1169 (11th Cir. 1991), 268 Alabama chicken raisers received a $9.1 million punitive damages award against a firm which systematically underweighed chickens, causing small losses to numerous farmers. In the absence of punitive damages, no single farmer would find it worthwhile to prosecute his small claim. *See also* Hultein v. Meilman Food Indus., Inc., 293 N.W.2d 889 (S.D. 1980) (upholding $50,000 punitive

TABLE TWO: CONTORTS AS CIVIL PUNISHMENT

SPECIFIC CONTRACTS	CONTRACTUAL RELATIONSHIP	TYPES OF WRONGDOING
Insurance Bad Faith	Quasi-Fiduciary Relationship; Unequal Bargaining	Failure to Settle Claims; Inadequate Investigation
Lender Liability	Duty to Disclose Information; Fiduciary Duty	Common Law Fraud; Lender Liability; Bad Faith Torts; Breach of Loan Contract
Business Contracts	No Special Relationship	Bad Faith Breach of Contract
Employment Relationships	Decline of At-Will Rule; No Special Relationship	Bad Faith Terminations

Two insurance punitive contorts were upheld by the Supreme Court during the past decade.[89] In *Pacific Mutual Life Insurance Co. v. Haslip*,[90] an insurance company refused to pay the hospital bills of a poor woman because an agent had absconded with her premium payments. The Supreme Court upheld a punitive damages award against the insurance company, finding the firm liable for the intentional fraud of its agent.

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damages award against a meat packing plant that systematically cheated ranchers by misgrading meat). It is rare for this type of wrongdoing to be uncovered by public regulators. *But see* Scott Kilman, *ConAgra Pleads Guilty to Fraud in Grain Case*, WALL ST. J., March 20, 1997, at B12 (reporting that ConAgra recently agreed to pay $8.3 million in criminal penalties to settle fraud charges for systematically cheating Indiana farmers by spraying water on grain to make it heavier); Boise Dodge v. Clark, 453 P.2d 551, 558 (Idaho 1969) (upholding punitive award of 36 times compensatory award in odometer rollback case on grounds that few purchasers would discover the illegal conduct); FDIC v. W.R. Grace & Co., 877 F.2d 614, 623 (7th Cir. 1989) ("The most straightforward rationale for punitive damages . . . is that they are necessary to deter torts or crimes that are concealable."). *See generally* Walker v. Sheldon, 179 N.E.2d 497, 499–500 (N.Y. 1961) (upholding punitive damages award for fraud).

89. *See* Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71 (1988) (affirming punitive damages award arising out of bad-faith denial of insurance claim); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (same).

90. 499 U.S. 1, 6–7 (1991) (upholding an award which included compensatory damages and punitive damages of more than $1 million).

Another rapidly growing punitive contort is lender liability, a field which gave rise to many multi-million dollar punitive damage awards during the 1980s.[91] A number of large punitive damage awards have also been assessed for toxic spills.[92] Business contract awards are currently the fastest growing punitive contort.[93] Predatory and unfair business tactics have resulted in a number of the largest punitive damages awards.[94] Terminated or disgruntled employees have employed punitive damages to redress wrongful terminations, sexual harassment, and other employment torts. An eighty million dollar punitive damages award was assessed against Triton Energy Corporation for terminating an employee who refused to participate in preparing a fraudulent 10-K filing for his employer.[95]

The rise of contorts is another example of the disintegrating boundaries between private and public law. The debate over punitive damages has been deeply confused and misdirected by the failure to develop a general theory of contorts. The rise of this new body of crimtort law shows that Prosser was right; the interests of society are increasingly involved in private tort litigation.[96]

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91. *See, e.g.*, K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985) (upholding $7.5 million punitive damages award in lender liability action); Penthouse Int'l, Ltd. v. Dominion Fed. Sav. & Loan Ass'n, 665 F. Supp. 301 (S.D.N.Y. 1987), *modified*, 885 F.2d 963 (2d Cir. 1988) (awarding $130,000,000 damages in lender liability action).

92. *See* Pamela Coyle, *Tort Reform Advocates See $3.4 Bilion Award as Evidence of Sick Systems*, 83 A.B.A. J. 38 (Nov. 1997) (reporting a $2.5 billion punitive damage jury award against five companies for neighborhood evacuations due to New Orleans chemical fire).

93. RAND's Institute of Civil Justice found punitive damages in business contract cases to have increased greatly between 1960 and 1984. *See* MARK PETERSON ET AL., INSTITUTE FOR CIVIL JUSTICE, RAND, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 22–25 (1987).

94. *See, e.g.*, Texaco, Inc. v. Penzoil Co., 784 F.2d 1133 (2d Cir. 1986), *rev'd in part*, 481 U.S. 1 (1987) (upholding three billion dollars in punitive damages and seven and a half billion dollars in compensatory damages in business torts case); Dominquez Energy L.P. v. Shell Oil Co., No. C736 891 (L.A. Cen. Civ. W., Cal., Jan. 11, 1994) (awarding $173 million in real estate fraud case involving environmental contamination); *$137 Million Fraud Verdict*, NAT'L L.J., Apr. 20, 1992, at 19 (reporting $134 million punitive award in fraudulent brokerage case *ContiCommodity Servs. Inc. v. Prescott, Ball & Turben*, NAT'L L.J., Jan. 25, 1993, at S-14 (N.J. Super. Ct. App. Div., Apr. 6, 1992)); Zachariades v. Smith & Nephew Richards, No. 336,999 (San Mateo, Cal., 1993) (reported in California Jury Verdicts & Settlement Reports, LEXIS) (awarding $19 million in business torts and misappropriation of trade secrets case).

95. *See* Janacek v. Triton Energy Corp., No. 90-7220 (Dallas, Tex., Dist. Ct., May 1992).

96. *See* KEETON ET AL., *supra* note 40, § 3, at 15.

C. Social Functions of Crimtort Remedies

During the past quarter century, civil punishment of corporations has been institutionalized in the form of statutory multiple damages and punitive damages. Punitive crimtort remedies deter reprehensible conduct that, although arguably rational from the economic standpoint of the particular tortfeasor, has devastating social costs for consumers and for society. Crimtort penalties are useful in punishing impermissible cost-benefit calculations which trade consumer safety for profits.[97]

In *Grimshaw v. Ford Motor Co.*,[98] the cost of fixing the dangerously defective fuel system in Pinto automobiles would have been $137 million.[99] Ford estimated that the 180 burn deaths, 180 serious burn injuries, and 2,100 destroyed vehicles that would result from the failure to recall the Pintos would cost the company only $49.5 million.[100] The jury awarded punitive damages, finding that Ford sacrificed consumer interests in favor of

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97. The practical difficulties in prosecuting crimtorts on the criminal side of the law include the complex issues of cause-in-fact, the stringent procedural and evidentiary standard of beyond a reasonable doubt, and the more demanding procedural and evidentiary rules required under criminal law. *See* Jordan H. Leibman, *Fatal Subtraction: The Inside Story of* Buchwald v. Paramount, 31 BUS. L.J. 535, 535 (1993) (noting that the Pinto litigation illustrated the difficulties of using criminal law against corporations); *see also* Francis T. Cullen et al., *The Ford Pinto Case and Beyond: Moral Boundaries and the Criminal Sanction, in* WHITE-COLLAR CRIME: CLASSIC AND CONTEMPORARY VIEWS 280, 287–94 (Gilbert Geis et al. eds., 1995) (discussing the difficulties in prosecuting Ford).

98. 174 Cal. Rptr. 348 (Ct. App. 1981). The decision to expose consumers to such a risk was based on an unethical "cost-benefit analysis" that balanced egregiously undervalued "human lives and limbs against corporate profit." *Id.* at 384. Profit maximizers must know that the worst case scenario is more serious than merely paying only what was owed in the first place plus legal expenses. In the calculation of the defendant's expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously. The firm will be perfectly content to bear the additional cost of litigation as the price for continuing its illicit business conduct. *See also* William Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018, 1026 (examining the economics of corporate deterrence); *cf.* David Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 17 n.83 (1982) (arguing that cost-benefit analysis is a necessary corporate practice that juries misunderstand which leads to unjust punitive damage awards).

99. *See* Dennis A. Gioia, *Why I Didn't Recognize Pinto Fire Hazards: How Organizational Scripts Channel Managers' Thoughts and Actions, in* CORPORATE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY 139, 142–43 (M. David Ermann & Richard J. Lundman eds., 5th ed. 1996) (presenting an account of Ford's decision not to recall the Pinto by Ford's recall coordinator).

100. *See id.*

its own bottom line. Punitive damages punished Ford. The criminal law did not.[101] The *Grimshaw* jury awarded $125 million in punitive damages, reduced by the trial judge to $3.5 million.[102] The punitive damages stung, but did not bankrupt, Ford Motor Company.

The Ford Pinto litigation produced the only case in American history in which a corporation was criminally prosecuted for knowingly marketing a dangerously defective product.[103] In August of 1978, three teenage girls died from burns when their 1973 Pinto was struck from behind and burst into flames. An Indiana prosecutor charged Ford with three counts of reckless homicide,[104] but Ford's acquittal on these criminal charges has discouraged other prosecutors from using the criminal law to punish reckless manufacturers.[105]

The criminal law also proved inadequate to protect the public interest in punishing the massive fraud that led to the collapse of the savings and loan industry in the 1980s. One in six savings and loan firms became insolvent because of unbridled greed coupled with risky investment decisions.[106] Although the

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101. Under California law, the maximum criminal penalty for marketing a defective vehicle would have been $1,000, an amount dwarfed by Ford's net worth of $7.7 billion and its after-tax income after taxes of $983 million. *See Grimshaw*, 174 Cal. Rptr. at 396.

102. *See id.* at 358.

103. *See* David T. Friendly, *Ford's Pinto: Not Guilty*, NEWSWEEK, Mar. 24, 1980, at 74.

104. *See* Cullen et al., *supra* note 97, at 280, 284 (noting that the State's Attorney General Michael Consentino brought charges under section 35-42-1-5 of the Indiana Code, which states that "[a] person who recklessly kills another human being commits reckless homicide").

105. In a post-verdict interview, Ford's attorney stated that he hoped "Ford's acquittal would deter other prosecutors from bringing similar criminal charges against corporations." Karen Clem Fritz, *Pinto Jury Votes Acquittal*, WASH. POST, Mar. 14, 1980, at A-1. His hope has been realized. One of the reasons that criminal law is so ineffectual in prosecuting crimtorts is that corporate defendants hire teams of former white collar prosecutors to defend against these actions. Most elite defense firms are staffed with former prosecutors who are knowledgeable about the internal workings of federal and state law enforcement agencies. For example, the home page of the Chicago law firm of McDermott, Will and Emery is one of many that advertises that the partnership has "extensive experience handling white-collar criminal matters. . . . Many of the attorneys in the Litigation Department have served as federal prosecutors, an experience which provides them with a unique perspective to counsel and advise clients." *McDermott, Will & Emery Home Page* (visited Nov. 21, 1997) <http://www.mwe.com/area/lit-whit.html> (on file with the *University of Michigan Journal of Law Reform*). *See generally* KENNETH MANN, DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 21 (1985) (discussing trend of federal prosecutors joining white collar crime defense bar).

106. *See* ROBERT F. HARTLEY, MANAGEMENT MISTAKES AND SUCCESSES 213 (4th ed. 1994).

"financial losses incurred in the savings and loan crisis [were] due in no small part to deliberate criminal activity,"[107] few individual or corporate defendants were prosecuted.[108]

Punitive damages uncovered and punished a pattern of fraud that was previously undetected by weak public regulators.[109] When it was shown that thousands of customers of Lincoln Savings and Loan Association were steered toward high-yielding junk bonds with the false promise that the bonds were guaranteed against default, a $410 million punitive damage award was assessed for this systematic defrauding.[110]

1. Punishment and Specific Deterrence—Wealth-sensitive crimtort remedies such as punitive damages, civil fines, statutory multiple damages, and, to a lesser extent, criminal fines, can teach even the most influential organizations that "tort does not pay."[111] Corporate wrongdoing too often goes unpunished because of the limited resources and expertise of public prosecutors

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107. Henry N. Pontell & Kitty Calavita, *The Savings and Loan Industry, in* BEYOND THE LAW: CRIME IN COMPLEX ORGANIZATIONS 203, 240 (Michael Tonry & Albert J. Reiss, Jr. eds., 1993) (reporting that "fraud in savings and loan (S&L) institutions may constitute the most costly set of white-collar crimes in history").

108. *See* Kitty Calavita & Henry T. Pontell, *Heads I Win, Tails You Lose: Deregulation, Crime, and Crisis in the Savings and Loan Industry, in* WHITE-COLLAR CRIME: CLASSIC AND CONTEMPORARY VIEWS, *supra* note 97, at 200 (discussing causes of government's failure to use the criminal law against savings and loan executives).

109. *See* DAVID O. FRIEDRICHS, TRUSTED CRIMINALS: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY 164 (1996) (stating that, even when the government prosecuted, "[b]y the Justice Department's own guidelines, the appropriate jail time for these crimes was less than that imposed for conventional bank robbery, and the fines imposed were less than the total amount stolen") (citation omitted).

110. *See* Shields v. Keating (In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.), No. 93–15131, 1994 U.S. App. LEXIS 13184 (9th Cir. May 23, 1994) (upholding $410 million punitive damages award for violations of federal securities laws, RICO, and fraud). The prosecution of this staggering crime resulted in one of the few criminal convictions. In 1990, Charles Keating was sentenced to ten years in prison for defrauding these customers. In 1993, he was convicted on another 73 criminal counts. *See* FRIEDRICHS, *supra* note 109, at 162–64 (noting that "[m]ost of those convicted in S & L cases were minor players, and in many of the cases involving losses of millions in the dollars, only probation and relatively modest fines were imposed") (citation omitted).

The criminal law did not provide any redress to the tens of thousands of victims of savings and loan fraud. Big Eight accounting firms and several of America's most prestigious law firms agreed to pay punitive damages for their participation in this scandal. The accounting firm of Arthur Andersen settled the claims against it for $30 million. The New York law firm of Kaye, Scholer, Fierman, Hays & Handler paid $20 million. The Chicago law firm of Sidley & Austin settled its punitive liability for $35 million. Drexel Burnham Lambert and Michael E. Milliken agreed to pay $80 million. *See In re* American Continental Corp./Lincoln Sav. & Loan Sec. Litig., MDL Docket No. 834 (D. Ariz. 1992).

111. *See* Rookes v. Bernard, 1 All E.R. 367 (H.L. 1964).

and the great power of large companies.[112] However, crimtorts send a message to even the wealthiest organizations that they may not abuse the public trust.[113] Civil punishment is especially appropriate when a firm demonstrates its unwillingness to obey social norms and is undeterred by fixed criminal fines or penalties.[114] Crimtorts are optimally used to punish and deter wrongdoers where the probability of detection is very low and the probability of harm is very high.[115] The price of wrongdoing must significantly exceed the gain in order not to provide the wrongdoer with a competitive advantage.[116]

2. The Social Message of General Deterrence—Punitive sanctions signal to the entire community that certain socially harmful behaviors will not be tolerated.[117] Deterrence depends upon certain and severe punishment following violations of the social order. Civil punishment expresses societal disapproval by ratcheting up the price of wrongdoing[118] and has been described as "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine."[119] The message of punitive damages is "teaching the defendant not to do it again, and of deterring others from following the defendant's example."[120]

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112. *See* Peter Cleary Yeager, *Industrial Water Pollution, in* BEYOND THE LAW: CRIME IN COMPLEX ORGANIZATIONS, *supra* note 107, at 97, 130 (arguing that enforcement efforts are rarely directed at large corporations because officials are afraid of the resistance of large corporations).

113. *See* FRIEDRICHS, *supra* note 109, at 12.

114. *See generally* BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 86 (1993) (arguing that wide range of sanctions is necessary to maintain corporate accountability).

115. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 160–63 (1987).

116. *See* POSNER *supra* note 13, at 54 (arguing that when costs of prosecution and the difficulty of detection are high, punitive damages are particularly efficient).

117. In *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), a national waste disposal firm attempted to gain a competitive edge over a smaller rival by "[s]quish[ing] him like a bug." *Id.* at 260. The jury's $6 million dollar punitive damages award is designed to deter the business community from employing such tactics.

The $10 million punitive damages award affirmed by the Supreme Court in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), was based upon the actual and potential harm of the defendant's course of conduct, the degree of bad faith displayed by the defendant, and whether the conduct was part of a "larger pattern of fraud, trickery and deceit." *Id.* at 462. The $10 million punitive award was a message not only to TXO, but to the entire oil and gas industry, not to engage in predatory business practices.

118. The Supreme Court of Indiana stated that the "sole issues [in awarding punitive damages] are whether or not the Defendant's conduct was so obdurate that he should be punished for the benefit of the general public." Orkin Exterminating Co. v. Traina, 486 N.E.2d 1019, 1022 (Ind. 1986).

119. Cabakov v. Thatcher, 37 N.J. Super. 540, 544 (1980).

120. KEETON ET AL., *supra* note 40, § 62, at 433.

3. Stigmatizing the Wayward Corporation—Corporations often fear the adverse publicity that accompanies punitive damages and other forms of civil punishment far more than the monetary costs.[121] Being publicly labeled as an endangerer of the public welfare is the functional equivalent of a shaming ceremony for individuals. This blow to the firm's public image may act as a "scarlet letter" for corporations.[122] As Justice O'Connor notes, "there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake."[123] Scholars of the New Chicago School point out that compliance is a complex relationship between legal, social and behavioral norms.[124]

The plutonium contamination case in *Silkwood v. Kerr-McGee Corp.*[125] became the subject of an Academy Award winning movie. Goodyear suffered damaging publicity when CBS' "60 Minutes" broadcast an exposé of the dangers of exploding rimless tires entitled, "Killer Wheels."[126] The trend towards secret settlements is motivated in part by a desire to avoid this type of public exposure.[127]

Adverse publicity can severely damage a company by shattering public confidence.[128] Ford's Pinto was America's best selling car in the early 1970s, but had to be withdrawn from the

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121. *See* Rustad, *supra* note 24, at 77–78 ("Defense attorneys and corporate officials viewed adverse publicity as the ultimate sanction posed by punitive damages. . . . It is not the payment of punitive damages that is so greatly feared; it is the publicity and the stigma.").

122. *See* Andrew Cowan, *Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387, 2388 (1992) (noting that "the bulk of corporate crime reporting generally appears in the back pages of newspapers or in the financial section" and is therefore not noticed by the general public); *see also* Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 343 (1996) (proposing the adoption of a mandatory publicity component to punitive damage awards, since businesses dread negative publicity).

123. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting).

124. *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (arguing importance of individual social norms in compliance); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 348–49 (1996) (arguing that non-legal sanctions play a key role in social control).

125. 769 F.2d 1451 (10th Cir. 1985).

126. *See* Lola Butcher, *Courting a Chosen 12*, 8 KAN. CITY BUS. J. 21 (1990).

127. *See* Rustad, *supra* note 24, at 61–62 (reporting trend toward confidential post-verdict settlements of punitive damages).

128. *See* MARSHALL B. CLINARD & PETER C. YEAGER, CORPORATE CRIME 318 (1980) (finding that firms feared bad publicity more than formal sanctions).

market when consumers began to associate the vehicle with flaming death. Few consumers would purchase the automobile even after the integrity of the fuel system was corrected.

D. Corporate Crimtort Culpability

1. Corporate Punitive Liability—Chief Justice John Marshall noted that a corporation is "an artificial being, invisible, intangible and existing only in contemplation of law,"[129] but the proper method of imputing an agent's wrongdoing to the corporation is a subject of continuing controversy.[130] Agency theory makes a corporation potentially liable for an "employee's outrageous conduct since a jury could award punitive damages for that employee's actions."[131] And while oversight of decentralized agents becomes increasingly difficult, it has become increasingly necessary as American society grows more complex.[132] Vicarious liability and the complicity rule are the two competing theories for imputing punitive liability to organizations. Vicarious tort liability, or imputed negligence, is a form of strict liability in that a firm may be assessed punitive damages even though it

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129. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

130. *See* Robert J. Stern & D. Jackson Loughhead, *Vicarious Liability for Punitive Damages: The Worst Side of a Questionable Doctrine*, 54 DEF. COUNS. J. 29, 32–33 (1987) (arguing that vicarious punitive damages are unfair); *cf.* Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 84 (1990) (arguing for imposing vicarious punitive damages to advance the goal of efficiency). Corporations may be able to insure for vicarious liability. *See, e.g.*, Dayton Hudson Corp. v. American Mut. Liab. Ins. Co., 621 P.2d 1155, 1160 (Okla. 1980) (stating that recovery of indemnity from an insurer by an employer who is liable for the willful or grossly negligent conduct of his employee is not against public policy).

131. Clement L. Hyland, *Labor and Employment Law: 1994 Survey of Florida Law—A Confluence of Streams*, 19 NOVA L. REV. 161, 182 (1994).

132. Technological and organization change increases the importance of vicarious punitive liability. For example, strong corporate incentives are necessary to prevent illegal insider trading in the financial services industry:

> Organizational adaptions to the changing informational needs enabled abuse, as investment banks, in particular, developed flexible organizational structures to respond quickly to changing product needs. In these self-designing organizations coordination and control were constant problems not easily solved through hierarchies of rules and procedures. Normative controls where they existed were often extra-organizational.

Nancy Reichman, *Insider Trading, in* BEYOND THE LAW: CRIME IN COMPLEX ORGANIZATIONS, *supra* note 107, at 55, 90 (arguing for the need to develop structurally based dynamic models of corporate crime).

had no knowledge of its agent's misbehavior.[133] Vicarious liability creates incentives for firms "to screen or train employees more carefully."[134] The complicity rule, on the other hand, requires corporate authorization or ratification before imposing indirect punitive liability.[135] The Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip*[136] found no due process problem in assessing punitive damages against a corporation based upon the actions of a rogue agent who absconded with the plaintiff's insurance premiums. Imputing an agent's wrongdoing to a corporation is justified if "the cost of the resulting increase in employer vigilance is less than the harm that it averts."[137]

2. Corporate Family Liability—The culpability of corporate families poses particular problems in the field of crimtorts. It is well-established that a successor corporation may be liable for the punitive damages of its predecessor.[138] However, a parent corporation may isolate those risky activities in separate sub-

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133. William Prosser notes that imputed negligence is also called "vicarious liability, or the principle is given the Latin name of *respondeat superior*." KEETON ET. AL., *supra* note 40, § 69, at 499. The exception to vicarious liability is if the employee's wrongdoing is committed on a "frolic or detour" from his normal duties. *See* Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444 (1923); Comment, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296, 1300 n.34 (1961).

Section six of NCCUSL's Model Punitive Damages Act provides that one defendant is vicariously liable for the wrongdoing of another, provided the misconduct occurred "in the course and within the scope of the employment or agency and the employer or principal, with knowledge of its wrongful nature, directed, authorized, participated in, consented to, acquiesced in or ratified the conduct of an employee or agent." MODEL PUNITIVE DAMAGES ACT, § 6 rep. note (1996) (citing RESTATEMENT (SECOND) OF AGENCY § 217C (1958); RESTATEMENT (SECOND) OF TORTS § 909B (1979)).

134. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 3.9, at 214–15 (1973).

135. The term "complicity rule" was coined in an article by Clarence Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 221 (1960). Professor Morris' complicity rule requires that the plaintiff prove some deliberate corporate participation before corporate punitive liability may be imposed. Generally, a high-level officer of the corporation must have ordered, participated in, or ratified the egregious conduct of the employee for the firm to be assessed punitive damages. *See* RESTATEMENT (SECOND) OF AGENCY, § 217C (1958); RESTATEMENT (SECOND) OF TORTS § 909 (1979).

136. 499 U.S. 1 (1991).

137. Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 96 (1982).

138. *See* Celotex Corp. v. Pickett, 490 So.2d 35 (Fla. 1986) (holding a successor corporation may be liable for punitive damages for the reckless conduct of a predecessor). In *Pickett*, an insulator was exposed to asbestos for three years. Celotex, the corporate successor to Philip Carey, was held to also succeed to punitive damages liability. *See id.* at 38; *see also* Wussow v. Commercial Mechanisms, Inc., 293 N.W.2d 897, 907 (Wis. 1980) (holding that successor to defunct corporation is liable for predecessor's conduct).

sidiary corporations in the absence of joint and several liability.[139] Courts are reluctant to pierce the corporate veil, respecting the legal fiction that each member of a corporate family has a separate legal persona.[140] Corporate punishment frequently involves the liability of several defendants who act in concert.[141] The common law permits evidence of culpability and wealth to be admissible against all defendants where joint tortfeasors are implicated in wrongdoing.[142] A minority of jurisdictions permit, and even require, joint and several punitive damages.[143]

The critics of joint and several liability argue that this doctrine encourages plaintiffs to seek out the deep pocket through a "shotgun" style of pleading,[144] but the possible injustice of joint and several punitive liability is mitigated by apportioning the

139. *See* Richard A. Westin & Sanford E. Gaines, *The Relationship of Federal Income Taxes to Toxic Wastes: A Selective Study*, 16 B.C. ENVTL. AFF. L. REV. 753, 786, 790 (1989) (contending that parent firm and subsidiaries considered to be members of the same economic family will isolate environmentally risky activities in a weakly capitalized subsidiary to avoid punitive liability). For example, if a foreign company uses a closely held but undercapitalized American subsidiary to export goods, it may be difficult to unravel, much less apportion, the wrongdoing. The wrongdoing leading to punitive damages in product liability is frequently indivisible and, therefore, incapable of apportionment.

140. "Piercing the corporate veil" is generally permitted only when the two corporations can be shown to be so closely intertwined that they should be considered one and the same. *See* Joel R. Burcat & Craig P. Wilson, *Post-dissolution Liability of Corporations and Their Shareholders Under CERCLA*, 50 BUS. LAW. 1273 (1995) (citing Joslyn Manufacturing Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990)).

141. One of the frequent issues is whether the parent corporation's wealth is admissible when the subsidiary is charged with wrongdoing. Joint and several liability problems will frequently arise when a parent and subsidiary firm are in a product distribution chain. *See generally* 1 JAMES GHIARDI & JOHN KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 9.09, at 27 (1988); DOBBS, *supra* note 134, § 3.9, at 215.

142. Punitive damages have been assessed jointly and severally since the English case of *Merryweather v. Nixon*, 101 Eng. Rep. 1337 (K.B. 1799).

143. The Wisconsin Court of Appeals affirmed a joint and several liability punitive damages award against several joint tortfeasors in the distribution chain involved in the sale of a used boat in *Radford v. J.J.B. Enterprises, Ltd.*, 472 N.W.2d 790 (Wis. Ct. App. 1991). The Tennessee Supreme Court permitted joint and several punitive damages in *Odom v. Gray*, 508 S.W.2d 526 (Tenn. 1974); and in *Huckleby v. Spangler*, 563 S.W.2d 555, 558 (Tenn. 1978), the court found it unobjectionable to base a joint and several punitive damages award upon the net worth or assets of only one of several punitive damage defendants. The Alabama Supreme Court held that punitive damages in wrongful death actions may not be apportioned among joint tortfeasors in *Tatum v. Schering Corp.*, 523 So. 2d 1042 (Ala. 1988) and affirmed the assessment of joint and several unapportioned punitive damage awards against three defendants in an estate action for conversion in *Lyons v. Williams*, 567 So. 2d 1280 (Ala. 1990).

144. *See* Thomas A. Eaton & Susette M. Talarico, *A Profile of Tort Litigation in Georgia and Reflections on Tort Reform*, 30 GA. L. REV. 627, 683 (1996).

award based upon each defendant's culpability.[145] Where the wrong cannot be apportioned, joint and several liability allocates the burden of an uncollected damages award upon the solvent codefendant, rather than the injured plaintiff.[146]

III. POLICY ALTERNATIVES TO CRIMTORTS

A variety of policy options are available to punish and deter corporate endangerment of the public interest.[147] States are

145. *See generally* D.E. Ytreberg, Annotation, *Apportionment of Punitive or Exemplary Damages as Between Joint Tortfeasors*, 20 A.L.R.3d 666 (1968) (discussing whether punitive damages may be apportioned among joint tortfeasors).

146. A number of jurisdictions permit joint and several punitive damages. *See* Blue v. Rose, 786 F.2d 349, 352–53 (8th Cir. 1986) (holding partners jointly and severally liable for punitive damages based on actions of one or more partners); Pease v. Alford Photo Indus., Inc., 667 F. Supp. 1188, 1203 (W.D. Tenn. 1987) (awarding punitive damages jointly and severally); Elwell v. Stone, 799 S.W.2d 46, 47 (Ky. Ct. App. 1990) (affirming judgment awarding punitive damages jointly and severally on the basis of appelants' failure to preserve error); Mervis v. Wolverton, 211 So. 2d 847, 847 (Miss. 1968) (reversing punitive damages portion of joint and several judgment against estate of deceased defendant); Caple v. Raynel Campers, Inc., 526 P.2d 334, 335–36 (Nev. 1974) (affirming joint and several punitive damages award). Jurisdictions vary in allowing the jury to take wealth into account in making different punitive awards against joint tortfeasors. Linda Schlueter and Kenneth Redden note that a "majority have refused to admit evidence of the financial resources of any of the defendants so as to avoid prejudice to the less financially sound defendants." 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 4.4(B)(2)(b)(3) (2d ed. 1990).

147. As Reiss and Tonrey note:

> A central problem of modern societies is to control the behavior of organizations in the public interest. There are several principal ways of doing so.
>
> One is to rely on governments to make laws and rules governing the behavior of organizations and to establish techniques for their enforcement or compliance with them. Our civil, criminal, and administrative law systems are the foundation of legal control of organizational behavior. Public prosecution, civil litigation, and regulatory actions are their hallmarks.
>
> Another is to trust that market mechanisms can control organizational behavior. . . .
>
> Market mechanisms of control are more or less indifferent to the legality of commodities or services, however, and competition may be restricted by illegal means such as coercive violence, as well as by legal means. . . .
>
> A third way to control the behavior of organizations in the public interest is to depend on aggrieved parties—typically private organizations or individuals—to exercise control over organizations through civil suits for compensatory or punitive damages.

laboratories of public policy that vary in their approach to controlling corporate abuses of power. Some states favor strong regulatory bodies, while others place more emphasis on private attorneys general.[148] A few states have devised new corporate criminal sanctions.[149] If wealth-based punitive damages are to be stricken from the legal landscape, alternative methods of controlling corporate misbehavior must be developed.

A. Criminalization of Crimtorts

Criminal penalties against corporations offer possible alternatives to crimtorts.[150] Court-ordered corporate reorganization has occasionally been used to punish wayward corporations.[151]

Albert J. Reiss, Jr. & Michael Tonry, *Organizational Crime*, *in* BEYOND THE LAW: CRIME IN COMPLEX ORGANIZATIONS, *supra* note 107, at 1, 8–9.

148. States rely upon different methods for the public regulation of corporate crime. For example, Massachusetts does not recognize the doctrine of punitive damages in common law, but the Massachusetts Attorney General has active oversight in the fields of consumer protection, civil rights and financial services. Alabama, in contrast, has extremely weak public oversight, providing little control over abuses by insurers. Punitive damages plays a key role in protecting Alabama consumers from the worst excesses of insurance companies. *See* Phillip Rawls, *Abundance of Lawsuits Earn Alabama Title: "Jackpot Justice,"* CHI. TRIB., Feb. 28, 1996, at 2 (quoting former Lt. Gov. Jake Beasley).

149. California uses fines and imprisonment to punish an employer's willful violation of any occupational safety or health standard or order which causes death or serious illness to an employee. *See* CAL. LAB. CODE § 6425 (West 1996). The remedy is very rarely used. Recently the California Assembly passed a bill limiting corporate criminal liability. "Under current law, prosecutors must prove only that the manager or corporation 'should have known' about a hidden or 'seriously concealed danger'" before imposing criminal liability. The new bill requires the corporation to have actual knowledge of a "serious concealed danger." Littler, et al., *California Assembly Passes Bill Limiting Corporate Criminal Liability*, 5 CALIF. EMPL. L. MONITOR 6 (Feb. 26, 1996). While California is considering retrenchment, Washington State is debating a bill that would make it a crime for a director of a corporation to approve an act that endangers public health or safety. *See* H.B. 1744, 55th Leg., 1997 Reg. Sess. (Wash. 1997).

150. In Japan, firms can be punished with the functional equivalent of imprisonment: "In 1982 the Japanese Health Ministry, responding to drug marketing violations, shut down Nippon Chemiphar for 80 days, sealing its plants and warehouses. The company, which prior to this action boasted $100 million in annual sales, suffered a precipitous decline on the stock market." Christopher Kennedy, Comment, *Criminal Sentences for Corporations: Alternative Fining Mechanisms*, 73 CAL. L. REV. 443, 446 n.10 (1985).

151. *See* Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions*, 56 S. CAL. L. REV. 1141 (1983) (citing examples of courts ordering corporate death through *quo warranto* proceedings); Kennedy, *supra* note 150, at 445–46 n.10 (noting that *quo warranto* is too rigid to be a practical means of corporate punishment).

However, if the criminal penalty is too high or the standard too vague, there will be a chilling effect on legitimate business activities. A corporate death penalty is another possible social sanction, but the loss of a corporate franchise is too severe a punishment for most crimtorts.[152]

Jailing corporate executives both deters and punishes, but this penalty carries significant social costs.[153] As Richard Posner notes, it may be more efficient to award substantial punitive damages "on top of compensatory damages, rather than . . . locking the defendant up."[154] Moreover, due to the immense legal, political, and social resources possessed by corporations,

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152. Despite the social dangers posed by corporate abuse of power, the large firm is an invaluable wealth producing institution. *See* PETER DRUCKER, CONCEPT OF THE CORPORATION 5 (1972) (arguing that "[t]he central problem of all modern society is not whether we want Big Business but what we want of it, and what organization of Big Business and of the society it serves is best equipped to realize our wishes and demands").

153. David O. Friedrichs presents an excellent summary of the case for and against imprisoning white collar offenders:

> Some arguments in favor of incarceration include the following: (1) Because white collar offenses typically involve a high level of intent, calculation, and rationality and are typically committed over an extended period of time, the purely punitive dimension of prison is especially deserved; (2) the prospect of prison, perhaps more than any other sanction, is feared by white collar offenders, and thus it has a powerful deterrent effect on both convicted and prospective offenders alike; (3) the scope of harm caused by white collar offenders is often great enough to merit so serious a punishment as incarceration; (4) it is simply unfair (and an inspiration for cynicism) to send conventional offenders to prison in large numbers without imposing the same sanction on white collar offenders who have caused equivalent or greater harm, typically with less excuse for doing so; and (5) the victims of white collar crimes, especially those who have suffered direct losses and injuries, may expect or demand imprisonment for convicted offenders.
>
> Conversely, the various arguments advanced against the use of imprisonment in white collar cases include the following: (1) the "rehabilitation" dimension of imprisonment, which is one rationale for its existence, simply does not apply to white collar offenders, who are not in need of rehabilitative training; (2) the humiliation and loss of status and position suffered by white collar offenders are on the average substantially greater than those sustained by conventional offenders, and imprisonment is a gratuitous, additional punishment; (3) it is wasteful to put people in prison, especially highly competent business executives, professionals, and other skilled and well-educated people who could be making constructive contributions in the larger society; (4) white collar offenders are not "dangerous" in the direct, predatory sense, and accordingly they need not be incarcerated; and, (5) it is more beneficial to victims of white collar crimes to require offenders to earn money legally outside prison and make restitution, which also saves taxpayers the costs of incarceration.

FRIEDRICHS, *supra* note 109, at 351–52.

154. POSNER, *supra* note 13, at 54.

imprisonment of American executives for even the most egregious corporate misbehavior is extremely rare.[155] If public prosecutors or regulators replace private attorneys general in these suits, there will be even greater fiscal costs. More ominous is the specter of excessive governmental intrusion into corporate management.[156]

B. Corporate Probation

Corporate probation is constrained by the inherent incapacity of courts to monitor complex organizations[157] but John Coffee proposes a form of corporate probation which includes a mechanism for sanctioning the company through adverse publicity. Probation would consist of a firm being required to publish the details of both its wrongdoing and its implementation of court

155. James W. Coleman notes:

> That the white-collar defendant's ability to pay for a first-rate defense—the best lawyers, numerous appeals, and if necessary, private investigators and expert witnesses—is probably of even greater importance [in protecting them from severe punishment]. Many former defendants have openly admitted that their ability to "hire the best" was the decisive factor in their case. . . .

JAMES W. COLEMAN, THE CRIMINAL ELITE: THE SOCIOLOGY OF WHITE-COLLAR CRIME 178 (3d ed. 1994).

156. David Simon summarizes some alternative means of curbing organizational or corporate deviance that have been advocated by social scientists:

> Declare occupational disqualification for corporate offenders; Use fines, imprisonment, and rehabilitation more extensively in punishing convicted corporate executives; Appoint certain members of boards of directors of convicted companies to represent the public interest by a Federal Corporation Commission. Their task would be to assure that laws are being complied with, to oversee the environmental impact of future actions by convicted corporations, to oversee mandated reforms, and to implement judgments against the corporation; Deny insurance coverage to companies lacking adequate systems of information concerning internal wrongdoing; Designate a specific corporate official to be charged with the preparation of all raw data concerning violations and disclosure thereof; Provide inspectors to oversee enforcement of federal regulations; Offer protection and rewards to so-called whistle blowers; and establishing an exchange program between officials in both business and government.

DAVID R. SIMON, ELITE DEVIANCE 334 (5th ed. 1996).

157. *See* Kennedy, *supra* note 150, at 445 n.10.

ordered reforms.[158] Such formal publicity sends a message of zero tolerance to corporate wrongdoers.[159]

C. Capping Punitive Damages

A number of states have stricken wealth from the punitive damages equation by capping this remedy, generally at the greater of a fixed sum or some multiple of the compensatory damages.[160] However, such caps "artificially and arbitrarily deflate punitive damages, no matter how egregious the defendant's disregard of health and safety."[161] The arbitrary limitation of punitive damages to the harm suffered by the

158. *See* John C. Coffee, Jr., *No Soul to Damn No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 431–34 (1981); *see also* Brent Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, 8 MELB. U. L. REV. 107 (1971) (evaluating the usefulness of limited formal publicity sanctions).

159. *See Book Review: The Impact of Publicity on Corporate Offenders*, DUKE L.J. 158, 158 (1984) (reviewing BRENT FISSE AND JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS (1983)) (noting that Fisse and Braithwaite view informal publicity as "creating an atmosphere in which corporate crime is not tolerated, and formal publicity is employed as a sanction, either as a punishment in a criminal proceeding or as a civil remedy").

160. States adopting the fixed ratio approach limit punitive damages to a specified amount of compensatory damages. A fixed-ratio ceiling sets punitive damages at a predetermined maximum ratio to the amount of compensatory damages. Five states employ fixed-ratio caps: Colorado, *see* COLO. REV. STAT. § 13-21-102(3) (1987) (limiting recovery to three times the amount of actual damages); Florida, *see* FLA. STAT. ANN. ch. 768.72 (Harrison 1994); Nevada, *see* tit. 23 NEV. REV. STAT. § 42.005 (1995); Oklahoma, *see* OKLA. STAT. ANN., § 9.1 (West Supp. 1998); and Texas, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (West 1997). Virginia caps punitive damages at $350,000. *See* VA. CODE ANN. § 8.01-38.1 (Michie 1992). No state employing a fixed amount cap employs inflation adjustments. As the value of money decreases, so does the level of punishment. A few jurisdictions employ a combination of fixed amounts and ratios to set punitive damages. A few states have adopted hybrid approaches. Kansas, for example, limits punitive damages to the lesser of five million dollars or the "defendant's highest gross annual income earned for any one of the five years immediately before the act for which such damages are awarded." KAN. STAT. ANN. § 60-3701(e) (1991). The plaintiff can circumvent the Kansas cap by proving that a defendant expected to make profit exceeding the maximum damage award. *See id.* § 60-3701(f) (providing for exception if expected profits exceed limitation). If the plaintiff qualifies for the exception, damages may be set at one and one-half times the defendant's expected profit as a result of the misconduct. *See id.* North Dakota limits punitive damages to no more than twice compensatory damages or $250,000, whichever is greater. *See* N.D. CENT. CODE § 3203.2-1(4) (1995).

161. *Hearings on the Prod. Liab. Reform Act of 1997 Before the Senate Comm. on Commerce, Science, and Trans.*, 105th Cong. (1997) (statement of Lucinda M. Finley, Professor of Law, SUNY Buffalo Law School).

plaintiff undermines deterrence because the sanction is then limited to a predictable amount of money.[162]

Capped punitive damages are particularly ineffective when the level of compensatory damages is low. A nursing home's decision to short-staff its facility is unlikely to be prosecuted by private attorneys general because the elderly residents have such low imputed economic value.[163] The Supreme Court has validated the use of potential harm to justify high ratio punitive damages where the actual damages are small. In *TXO Production Corp. v. Alliance Resources Corp.*,[164] the Supreme Court upheld a punitive damages award of $10 million, which was 526 times greater than the actual damages. The Court found the award justifiable because of the potential economic harm, considering both TXO's wealth and that the "scheme . . . was part of a larger pattern of fraud, trickery and deceit."[165]

IV. EMPIRICAL STUDIES OF WEALTH IN CIVIL PUNISHMENT

The radical expansion of crimtort penalties in the form of punitive damages, civil fines, and statutorily permitted multiple damages reflects a new wealth-based model for civil punishment.

The federal government has enacted a wide range of wealth-based civil and criminal fines.[166] Thousands of statutes

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162. Some commentators argue that capping punitive damages will lessen the deterrent value of the remedy by permitting firms to conduct cost-benefit analyses in order to determine the potential profitability of trading public safety for profits. *See, e.g.*, Sylvia M. Demarest & David E. Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L.J. 797, 825 & n.156 (1987) (criticizing punitive damages caps as arbitrarily imposed, thereby creating disproportionate results); Jimmie O. Clements, Jr., Comment, *Limiting Punitive Damages: A Placebo for America's Ailing Competitiveness*, 24 ST. MARY'S L.J. 197, 218–19 (1992) (asserting that punitive damages cap would cause malicious conduct to go undeterred and unpunished); Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 335 (1991) (stating that statutory punitive damages caps, by allowing potential tortfeasors to calculate maximum expected costs, sacrifice goals of punitive damages).

163. The typical elderly resident has no economic value under traditional compensatory damages formulas. Compensatory damages typically are calibrated to the expected future earnings of the claimant. *See* Rustad & Koenig, *supra* note 33, at 1053–65 (providing examples of punitive damages for nursing home neglect).

164. 509 U.S. 443 (1993).

165. *Id.* at 462.

166. Franklin E. Zimring has detailed this trend: "The federal criminal code of 1984 greatly expanded the range of criminal fines, and both federal and state criminal sanctions now include options like restitution, the payment of some enforcement

providing graduated civil punishment or multiple damages have been enacted at the state and federal level.[167] The recommended federal organizational sentencing guidelines implicitly recognize that large civil fines are necessary to deter corporate misconduct.[168] These guidelines include consideration of

> various factors, including the amount of loss the offense caused (sometimes diffuse and difficult to calculate); the offense "multiple" (difficulty of detecting and prosecuting, to ensure that the fine is both a deterrent and a just punishment); and the enforcement costs involved. These factors are added together to produce a total monetary sanction (which may be broken down into restitution, forfeitures and fines).[169]

These guidelines provide for organizational fines as high as $290 million.[170]

Federal statutes increasingly permit claimants to collect punitive damages in order to encourage private attorneys general to augment public prosecution. The Agricultural Adjustment Act of 1938,[171] Bank Holding Company Act,[172] Consumer Credit Protection Act,[173] Fair Housing Act,[174] Federal National Mortgage

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costs, and reparative remedies such as community service." Franklin E. Zimring, *The Multiple Middlegrounds Between Civil and Criminal Law*, 101 YALE L.J. 1901, 1904 (1992). *See generally* Mann, *supra* note 78, at 1848–49 (describing how courts have encouraged civil fines in cases where plaintiffs could also have pursued criminal sanctions).

167. John C. Coffee notes that "[criminal defense practitioner Stanley Arkin's] estimate places the number of federal regulations currently punishable by criminal penalties at over 300,000." Coffee, *supra* note 78, at 1881 (footnotes omitted). There are an equal number of state statutes blending civil and criminal penalties.

168. The drafters of the federal sentencing guidelines for corporations had difficulty finding any examples of successful criminal prosecutions. *See* Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 214–15 (1993). Critics argue that the Guidelines' vagueness places "on corporations another burden: ascertaining what the Guidelines mean and how to comply with them." Note, *Growing the Carrot: Encouraging Effective Corporate Compliance*, 109 HARV. L. REV. 1783 (1996). *See generally* Richard S. Gruner, *Just Punishment and Adequate Deterrence for Organizational Misconduct: Scaling Economic Penalties Under the New Corporate Sentencing Guidelines*, 66 S. CAL. L. REV. 225 (1992) (advocating cost based fines as a corporate criminal sanction).

169. FRIEDRICHS, *supra* note 109, at 348 (citation omitted).

170. *See* Christopher A. Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017, 2027 (1992).

171. 7 U.S.C. §§ 1314(a), 1339(a)(1), 1346(a), 1359(a) (1994).

172. 12 U.S.C. § 1975 (1994).

173. 15 U.S.C. § 1692k(a)(2) (1994).

174. 42 U.S.C. § 3613(c)(1) (1994).

Association Charter Act,[175] Federal Property and Administrative Services Act of 1949,[176] Organized Crime Control Act of 1970 (RICO),[177] Patent Act,[178] Prevention of Unfair Methods of Competition in Import Trade,[179] Regional Rail Reorganization Act of 1973,[180] Trademark Act of 1946,[181] Petroleum Marketing Practices Act,[182] and the Commodity Futures Trading Commission Act of 1973[183] are all statutory examples of civil punishment.[184] These provisions for civil punishment are the functional equivalent of crimtorts.

Some legal scholars argue that normative principles require that the prosperous and the poor be assessed the same level of punitive damages and that due process is violated by larger awards against corporations.[185] Criminal and tort law both treat defendants with a formal equality.[186] As the *Laidlaw v. Sage*[187] court stated, a "cardinal principle" of American law is that the "rich and the poor stand alike in courts of justice, and that neither the wealth of the one nor the poverty of the other shall be permitted to affect the administration of the law."[188] In fact, the

175. 12 U.S.C. § 1723a(e) (1994).
176. 40 U.S.C. § 489(b)(1) (1994).
177. 18 U.S.C. § 1964(c) (1994).
178. 35 U.S.C. § 284 (1994).
179. 15 U.S.C. § 72 (1994).
180. 45 U.S.C. § 711(j) (1994).
181. 15 U.S.C. § 1117(a) (1994).
182. 15 U.S.C. § 2805(d)(1)(8) (1994).
183. 7 U.S.C. § 9 (1994).
184. *See* 1 LINDA SCHLUETTER & KENNETH REDDEN, PUNITIVE DAMAGES (3rd ed. 1995). (citing examples of multiple damages).
185. *See* Paul J. Zwier, *Due Process and Punitive Damages*, 1991 UTAH L. REV. 407 (citing examples of multiple damages).
186. Anatole France satirized formal legal equality by stating that the poor "must labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." ANATOLE FRANCE, THE RED LILY 75 (1917 ed.) (1894).

In reality, wealth and power shape life chances in a variety of ways. A graphic illustration is the 1912 sinking of the Titanic, where class strongly affected who lived and who perished. "Among the women, . . . 3 percent of the first-class passengers drowned, compared to 16 percent of the second-class and 45 percent of the third-class passengers." DENNIS GILBERT & JOSEPH A. KAHL, THE AMERICAN CLASS STRUCTURE: A NEW SYNTHESIS 2 (4th ed. 1993).
187. 52 N.E. 679 (N.Y. 1899).
188. *Id.* at 690.

rich are rarely criminally prosecuted, while the poor, having "shallow pockets,"[189] are very rarely sued for crimtorts.[190]

Distinctions based upon wealth are not considered to be remarkable in American law. The United States, for example, has a progressive income tax which assesses the prosperous at a different rate than the poor. Wealthy families are excluded from need-based governmentally funded student aid programs. The recipients of Social Security benefits are taxed if their income exceeds a certain threshold. The Sherman Act exacts fines up to $10 million for corporations, but caps fines for individuals at $350,000.[191] Taxes are frequently skewed so that owners of commercial property or expensive homes pay a larger percentage of the property's value.

The use of wealth in crimtorts may appear anomalous but the remedy of punitive damages "is not an innovation of common law, it is the common law."[192] Nearly every American jurisdiction that recognizes punitive damages permits evidence of financial standing to be considered in order to ensure that the award is large enough to deter the wrongdoer.[193] The flexibility of punitive damages makes it an effective sanction against wealthy actors, given the requisite level of risk averseness.[194]

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189. "Shallow pockets," the lack of wealth of the defendant, may be admitted as a mitigating factor in a punitive damages trial. *See* Dag E. Ytreberg, Annotation, *Admissibility on Defendant's Behalf, as Matter in Mitigation of Punitive Damages, of Evidence as to His Lack of Financial Resources*, 79 A.L.R.3d 1138 (1997). In *Rupert v. Sellers*, 368 N.Y.S.2d 904 (1975), the court held that the defendant had a right to show his lack of wealth to diminish the size of punitive damages. *See also* Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996) (holding that a policeman's lack of financial assets should be considered in assessing punitive damages against him).

190. *See* Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1204–05 (1985) (arguing that "the criminal law is designed primarily for the non-affluent; the affluent are kept in line, for the most part, by tort law").

191. 15 U.S.C. § 1 (1996).

192. Edwards v. Leavitt, 46 Vt. 126, 135 (1873); *see also* Brown v. Evans, 17 F. 912, 914 (C.C.D. Nev. 1883) (explaining that "if exemplary damages may be given by way of punishment for an outrageous act, the jury must know something, at least, of the defendant's ability to respond in damages, since what would be a severe verdict to one with limited means might be but a trifle to one of large means, and the rule utterly fail").

193. Evidence of the defendant's wealth is currently admissible in 36 of the 45 states permitting punitive damages to be assessed under common law. *See* 1 GHIARDI & KIRCHER, supra note 141, § 5.36. The *Restatement (Second) of Torts* recognizes the validity of wealth in assessing punitive damages. RESTATEMENT (SECOND) OF TORTS § 908(2) cmt. e (1977); *see also* TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 462 n.28 (1993) (stating that the admissibility of wealth in determining the size of punitive damages is "well-settled law"); Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996) (explaining that the majority of jurisdictions permit, but do not require, wealth to be considered in assessing damages).

194. Paul Zweier argues that:

The dispute over wealth in crimtort remedies is too often dominated by theoretical concerns about overdeterrence, anecdotes, and tort horror stories rather than empirical research.[195] Abstract models of corporate deterrence are necessarily premised on the idea that all corporations respond similarly to punitive sanctions.[196] By examining the largest punitive damage

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> The wealth of the defendant is central because money damages are the only workable means of deterrence. Because of their financial status, the wealthy in effect are able to buy the right to intentionally injure others. Thus, wealth can have the impact of encouraging otherwise impermissible behavior. For equal deterrence, therefore, different punitive damage amounts should be awarded on the basis of the wealth of the actor. This approach is entirely rational under a due process analysis.

Jennifer H. Arlen, *Should Defendant's Wealth Matter?*, 21 J. LEGAL STUD. 413, 414 (1992) (quoting Paul Zweier).

Edward Dauer holds a similar position:

> If we're attempting to change corporate behavior, then it makes sense to think about a wealth-related measure of punitive damages. A risk-neutral person is one who is indifferent to damages of one dollar or a one percent chance of one hundred dollars. A risk-averse person is one who, due to wealth constraints or other factors, and not just due to psychological disposition, doesn't want to take the chance of losing the one hundred dollars. It may be the larger the corporation, the closer it is to being risk-neutral . . . . [Thus] it takes a greater amount to move a larger entity from risk-neutrality to risk-aversiveness.

Edward Dauer, *Punitive Damages: Comment: Symposium Discussion*, 56 S. CAL. L. REV. 155, 187–88 (1982).

195. A full-page advertisement in the *Washington Post* and *Washington Times* urged Congress to cap noneconomic damages at $250,000. "The ad pictures a doctor holding a baby and says, 'Maureen O'Regan put her name down in support of liability reform . . . Dr. Maureen O'Regan wants to be able to deliver babies . . . but the [legal] risk is too great." *Liability Reform: Groups Run Ads to Support Their Views*, HEALTH LINE, Apr. 26, 1995. Former Vice President Dan Quayle regaled audiences with a story:

> [A] psychic who was awarded nearly $1 million because a CAT scan allegedly robbed her of her psychic powers, but he didn't mention that the judge dismissed the awards. Ronald Reagan recounted how a cat burglar sued a homeowner for injuries incurred while falling through a skylight. When the real case was identified, the plaintiff turned out to be high school student sent to retrieve athletic equipment stored on the roof of a school and had fallen through a skylight.

Carl Bogus, *Tort "Reform" Should be Kept Out of Contract*, PALM BEACH POST, July 16, 1995, at 1F.

196. As John Coffee notes, models are designed to deal with typical organizations, not the occasional amoral firm:

> [I]f in real life, there is a dispersion of potential offenders (some optimistic; some pessimistic; some more skilled at crime than others; some more risk averse than others), a pricing system that focuses only on the average offender will by defini-

award in history, we gain insight into the role that wealth plays in civil punishment.

A. The Exxon Valdez Oil Spill as a Case Study

Real world crimtorts often do not live up to the paradigmatic ideal. The sanctions applied after the Exxon Valdez spilled 11.1 million gallons of oil into Alaska's Prince William Sound illustrate the unresolved problems with the crimtort paradigm. Exxon, America's largest energy producer, caused one of the world's greatest ecological disasters. The Exxon Valdez was "the world's largest drunk-driving case." Exxon's conduct was found to be reckless because Captain Hazelwood drank, left the bridge, and failed to supervise inexperienced underlings.[197] The federal district judge instructed the jury "that it could consider company policies on the issue of whether Hazelwood's conduct should be imputed to Exxon."[198] Exxon argued that Hazelwood left the bridge of the Exxon Valdez in direct violation of company policy and that his conduct should not be attributed to the firm.[199] The district court judge rejected this argument, ruling that there was ample basis for a jury finding of Exxon's recklessness.[200] The jury heard evidence that "Hazelwood drank with

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tion under-deter the above-average offender. The point is that, even within the four corners of deterrence theory, there is a need to employ substantial penalties that exceed the expected level necessary to deter the average potential offender.

Hearing Before U.S. Sentencing Comm'n, at 11 (New York, Oct. 1988) (statement of John C. Coffee).

197. *See* Paul Reidinger, *Black Gold*, A.B.A. J., Feb. 1998, at 79 (previewing DAVID LEBEDOFF, CLEANING UP: THE STORY BEHIND THE BIGGEST LEGAL BONANZA OF OUR TIME (1998) (stating that Lebedoff "describes the Exxon Valdez matter as the 'world's largest drunk-driving case'").

198. In re The Exxon Valdez, 1995 U.S. Dist. LEXIS 12953, at *6 (D. Alaska Jan. 27, 1995).

199. *See id.*

200. The judge stated:

> Exxon argues that Captain Hazelwood's decision to leave the bridge at 11:52 p.m. on the night of the grounding was the only act committed by Hazelwood which could be the legal cause of the accident. The jury heard evidence that Hazelwood, upon electing to leave the bridge, gave Gregory Cousins certain navigation instructions . . . . The court has reviewed all of the evidence on this issue [and found] that . . . . [t]he jury could reasonably have found that it was reckless for Hazelwood to leave the bridge of a supertanker headed directly at a known reef only minutes away.

In re The Exxon Valdez, 1995 U.S. Dist. LEXIS 12949, at *9.

Exxon officers and that Exxon management received reports of Hazelwood's relapse."[201]

The Exxon Valdez disaster was not only the largest environmental crime in U.S. history—it was also America's largest tort.[202] The criminal fines and settlements amounted to three and one-half years of profits from all of Exxon's American oil and gas operations.[203] The federal court remitted a $150 million criminal fine to $25 million,[204] because Exxon had mitigated its environmental offenses through an expensive cleanup.[205] Exxon was later assessed $5 billion dollars in punitive damages in a mandatory punitive damages class action for environmental degradation.[206] The punitive damages award is atypical because of the unprecedented civil and criminal sanctions previously imposed on Exxon. Exxon expended $2.1 billion in cleanup costs and hundreds of millions of dollars in criminal and civil penalties. The jury's award of $5 billion in a case of reckless conduct dwarfs the largest punitive damage awards upheld in cases where a firm acted intentionally or maliciously.[207] Exxon cited our previous research as evidence that a punitive damage verdict in the wake of a stiff criminal fine is extremely unusual.[208]

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201. *Id.* at *14.

202. Exxon was assessed a $25 million criminal fine, which had been remitted from $150 million. Exxon paid $100 million in restitution to the state and federal governments. Exxon settled natural resources claims with Alaska for $900 million. In addition, Exxon spent $2.1 billion for cleanup expenditures. Another $304 million was paid to settle private damage claims. Other claims included $20 million for native subsistence claims, $287 million to fishermen, $9.7 million to a Native American corporation, $46 million in casualty losses, and hundreds of millions of dollars for costs and interest. *See* Exxon's Brief in Support of Motion for Judgment on Plaintiffs' Punitive Damages Claims at 21 (Phase III Issues), *In re* The Exxon Valdez, No. A89-095 (HRH) (D. Alaska Sept. 30, 1994) [hereinafter Exxon's Brief].

203. *See id.* at 23.

204. The remittance of the criminal fines has a parallel in the federal organizational sentencing guidelines. Under the guidelines, corporations may introduce evidence of "good corporate citizenship" to mitigate punishment. *See* Bucy, *supra* note 27, at 329 (noting that companies can mitigate but not obviate punishment for proof of good corporate citizenry, internal compliance programs to detect and correct wrongdoing, and full cooperation with prosecutors).

205. *See* Transcript of Change of Plea at 71, United States v. Exxon Corp., No. A90-015-CR (D. Alaska Oct. 8, 1991), *cited in* Exxon's Brief, *supra* note 202.

206. *See* In re The Exxon Valdez, 1996 U.S. Dist. LEXIS 8173 (D. Alaska June 11, 1996).

207. *See supra* Part III (showing that the typical multi-million dollar punitive damage award stems from purposeful and excessive profit-seeking).

208. *See* Exxon's Brief, *supra* note 202, at 15–16 (quoting Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1314 (1993)).

One might question the multi-billion dollar punitive damages award given Exxon's prompt cleanup efforts.[209] Exxon's penalty was based upon vicarious liability for the reckless activities of its employees. Exxon made no attempt to cover up or deny responsibility for the disaster, unlike the typical defendant in a business tort or products liability case.[210] The company undertook a policy review to examine the structural factors that led to the Exxon Valdez spill.[211] In this case, the private attorneys general played an insignificant role in uncovering corporate wrongdoing or in changing Exxon's behavior.

The Exxon Valdez case illustrates the difficulty of providing corporate defendants with safeguards against the misuse of wealth in setting punishment. Exxon argues that the verdict is "a textbook example of how to appeal to a jury's prejudices"[212] and is appealing the punitive damages award on the grounds that:

> [T]here can be no doubt that the massive verdict in this case is solely attributable to the huge financial figures plaintiffs paraded before the jury: no other evidence in the

209. The U.S. Environmental Protection Agency proposed to eliminate punitive civil penalties for firms that voluntarily identify, disclose, and correct violations by self-audits of their compliance with federal and state environmental requirements. The EPA will also not recommend criminal prosecution for environmental crimes where the firm was acting in good faith to identify, disclose and correct violations. *See* Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16,875 (1995) (proposed Apr. 3, 1995).

210. In the "Dalkon Shield" litigation, high level A.H. Robins Co. executives failed to take prompt remedial measures after learning of the dangerously defective nature of their IUDs. Thousands of women suffered preventable life-threatening or even fatal illnesses. The Kansas Supreme Court noted that the company deliberately and actively concealed the potential dangers of the product, thereby violating its duty to protect the consuming public. *See* Tetuan v. A.H. Robins Co., 738 P.2d 1210 (Kan. 1987). The asbestos punitive damages awards were based upon an entire industry's cover-up of the then-known dangers of unprotected exposure. *See, e.g.*, Rustad, *supra* note 24, at 64–77 (documenting the systematic patterns of various corporate wrongdoing that led to punitive damages in products liability).

211. Exxon undertook several mitigatory measures *prior* to the punitive damages award. Exxon instituted alcohol abuse programs at all levels of the company, strengthened its policy against the use of alcohol on its vessels, expanded mandatory rest periods for its vessel officers, improved its navigation policies, reduced dangerous routes, and developed new navigation technologies and training programs. *See* Exxon's Brief, *supra* note 202, at 25–28.

212. *Id.* at 62 (noting that "[p]laintiffs continually emphasized Exxon's wealth describing the multibillion-dollar criminal and remediation expenses as a 'hiccup,' and asserting that $1 billion was 'not worth [chairman's] time.'").

record could conceivably explain, much less justify, the unprecedented $5 billion sanction.[213]

There are three policy arguments commonly used to justify subjecting a giant firm like Exxon to such a large punitive damage award. First, fixed fines have a lesser impact on large organizations because of the diminishing utility of money.[214] Without wealth-based punitive damages, it may be cheaper to pay cleanup costs, than to prevent future oil spills through vigilant oversight. Second, corporate size is correlated with corporate deviance.[215] The larger the company, the greater the difficulty it has in monitoring its agents.[216] Exxon is a worldwide firm with divisions on several continents, making effective oversight extremely costly. Finally, multinational corporations such as Exxon are less susceptible to government regulation because of their complex organization as well as their capacity to influence public policy.[217]

The five billion dollar punitive damages award served a social purpose by sending a message not only to Exxon, but to the entire industry, that environmental protection must be a top priority.[218] Exxon was certainly not crippled by the punitive

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213. *Id.*

214. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 227–28, 232 & n.3 (4th ed. 1992).

215. *See* CLINARD & YEAGER, *supra* note 121, at 130 (suggesting that "the greater numbers of violations of the larger firms may result on the whole from their greater productive activity and the consequent increase in legal exposure").

216. Exxon invested substantial resources in fortifying its alcohol and drug policy and other means of overseeing its employees once it faced significant potential exposure to punitive damages. Large firms, in general, have many incentives not to strictly monitor and discipline their employees. As Fisse and Braithwaite note:

> A high degree of trust has been reposed in corporations to maintain internal discipline. It is readily apparent, however, that companies have strong incentives not to undertake extensive disciplinary action. In particular, a disciplinary program may be disruptive, embarrassing for those exercising managerial control, encouraging for whistle-blowers, or hazardous in the event of civil litigation against the company or its officers. Sometimes these incentives may be veiled by the claim that the problem has been sufficiently investigated and resolved by public enforcement action.

FISSE & BRAITHWAITE, *supra* note 114, at 9.

217. *See generally* DAN CLAWSON ET AL., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE (1992) (presenting results of survey of corporate executives on the political role of large corporations); EDWIN M. EPSTEIN, THE CORPORATION IN AMERICAN POLITICS (1969) (surveying the resources that corporations can use to influence public policy and the limitations of business power).

218. Exxon argues that "other oil companies, such as ARCO, have adopted similar measures [of oversight]. As anyone would expect, in the face of both multi-billion dol-

damages verdict. In 1996, Exxon was America's most profitable corporation.[219] If potential wrongdoers know that their total exposure is limited to a fixed amount, there is only a limited deterrent effect.[220]

Hard cases such as the Exxon Valdez litigation make bad law. We need to examine the overall underlying patterns, not predicate law reform on a single, exceptional award. We do not abandon the criminal law because innocent defendants are occasionally wrongfully convicted. The interesting empirical question is not the aberrant case, but the typical one. The claim that juries discriminate against the wealthy does not withstand empirical investigation.

B. Do Juries Prefer Robin Hood or the Sheriff?

Members of the Supreme Court have expressed reservations about the use of corporate wealth because of the possibility that juries will vent their "raw, redistributist impulses" against wealthy out-of-state corporations.[221] Justice Sandra Day

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lar criminal and civil exposure and incalculable loss of reputation, not only Exxon, but the entire industry, has 'gotten the message.'" Exxon's Brief, *supra* note 202, at 28.

219. *See* Richard Teitelbaum, *Exxon: Pumping Up Profits*, FORTUNE, Apr. 28, 1997, at 134.

220. Steven Vago notes that if fines are capped at a low level "the penalty imposed for violating the law amounts to little more than a reasonable licensing fee for engaging in illegal activity. Essentially, it is worthwhile for a large corporation to violate the laws regulating business. Typically, the fines are microscopic." VAGO, *supra* note 9, at 164.

221. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 468 (1992) (Kennedy, J., concurring). The Court has articulated its concern over the misuse of wealth in several recent corporate punitive damages cases. In her dissent in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting), Justice Sandra Day O'Connor warned that punitive damages permit juries "to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth." In an earlier case, the Court noted the danger of juries unjustly punishing unpopular defendants: "[Since] juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. . . . they remain free to use their discretion selectively to punish expressions of unpopular views." International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 51 n.14 (1979) (quoting Gertz v. Robert Welch Inc., 418 U.S. 323, 350 (1974) (awarding punitive damages against founder of right-wing John Birch Society)) (alteration in original).

In *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), the Court held that defendants were entitled to a meaningful post-trial judicial review of the size of a punitive damage award. *See id.* at 2341. The plurality discussed the need for greater safeguards against the misuse of wealth in setting the level of corporate punishment: "[T]he rise of large, interstate and multinational corporations has aggravated the problem of

O'Connor noted the unfairness that might result from the introduction of corporate wealth into the punitive damages equation:

> Courts have long recognized that juries may view large corporations with great disfavor. Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources; jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.[222]

Tort reformers argue that the consideration of the defendant's wealth discriminates against corporate defendants.[223] They charge that wealth-sensitive remedies create class hostility by

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arbitrary awards and potentially biased juries. Punitive damages pose an acute danger of arbitrary deprivation of property." *Id.* at 2340.

In another recent punitive damage case, the Supreme Court set aside a $2 million punitive damages verdict as so grossly excessive as to violate the Due Process Clause of the Fourteenth Amendment. *See* BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1604 (1996). The *BMW* Court reasoned, in part, that the ratio of punitive damages to compensatory damages is a relevant factor in determining whether a given award is so excessive as to violate a defendant's constitutional rights. *See id.* at 1601–03. However, the Court refused to draw a "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable." *Id.* at 1602 (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1990)); *see also infra* notes 267–69.

Earlier decisions also expressed the Court's concern over standardless punitive damages against corporations. *See, e.g.*, Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (Brennan, J., concurring) (noting that juries are given little guidance in awarding punitive damages).

222. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 490–91 (1993) (O'Connor, J., dissenting) (citations omitted).

223. "According to this view, everything else being equal, injured parties are more likely to blame and sue deep-pocket targets; attorneys are more likely to accept cases against deep-pocket targets; and juries are more likely to find liability, and award more money, when cases involve deep-pocket defendants." Amicus Curiae Brief for The American Automobile Manufacturers Association et al. in Support of Respondent, BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589 (1996) (No. 94-896). Neil K. Komesar summarizes the attack on the consideration of wealth: "Critics argue that juries grant awards to plaintiffs against 'deep pockets,' merely because 'deep pockets' are wealthy. This is said to epitomize the jury's disregard for legal rules, irrational sympathy for injured plaintiffs, and antipathy to large enterprises and other wealthy defendants." NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY 187 n.62 (1994). *But see* Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the Deep Pockets Hypothesis*, 30 LAW & SOC'Y REV. 148, 150 (1996) (concluding that there is little evidence of a defendant wealth effect on juror judgments).

bringing a "politics of resentment into the courtroom."[224] In response to these concerns, the vast majority of states have recently enacted one or more restrictions on the use of wealth in calibrating civil punishment.[225]

Gary Schwartz argues that "the 'wealth of the defendant' bears no obvious relationship to deterrence goals . . . . If the diminishing utility of money reduces the rich defendant's 'real' liability costs, it equally reduces the risk-prevention costs the defendant would need to incur."[226] In contrast, Richard Posner counters that punitive damages are necessary "to make sure that people channel transactions through the market when the costs of voluntary transactions are low. We do not want a person to be able to take his neighbor's car and when the neighbor complains tell him to go sue for its value."[227]

No empirical research exists to resolve the dispute over the deterrent power of punitive damages. However, as Dan Dobbs notes, "[i]t is indeed true that deterrence has not been proven to be effective in the case of punitive damages, but neither has it been proven effective in the case of orthodox criminal penalties."[228] Most empirical research of punitive damages verdicts has centered on whether juries unfairly exercise their power with the result that they destroy corporations.[229] The existing

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224. Abraham & Jeffries, *supra* note 26, at 424 (arguing that "[r]etribution is the only plausible justification for considering the defendant's wealth in awarding punitive damages"); *see also* Michael McKee, *Concealing the Company Assets*, LEGAL TIMES, Apr. 3, 1995, at 5 (quoting Shirley Hufstedler, former federal appeals court judge and now counsel to Dow Corning, that "the size of the [company's] purse does not measure how badly damaged the plaintiff was").

225. *See* Thomas Koenig & Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability*, 16 JUST. SYS. J. 21, 23 (1993).

226. Schwartz, *supra* note 26, at 140.

227. Kemezy v. Peters, 79 F.3d 33, 34 (7th Cir. 1996). Further, Richard Posner argues: "[I]f the shareholders bear no responsibility for a manager's crime they will have every incentive to hire managers willing to commit crimes on the corporation's behalf." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 398 (3rd ed. 1986).

228. DOBBS, *supra* note 134, § 3.9, at 220.

229. In *Berry v. Loiseau*, 614 A.2d 414, 427 (Conn. 1992), the Connecticut Supreme Court noted that a large punitive damage award is not necessarily discriminatory:

> The size of the verdict alone does not determine whether it is excessive. The only practical test to apply . . . is whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption. . . . Every reasonable presumption in favor of the correctness of the court's refusal to set aside the verdict as excessive should be indulged . . . and its ruling will not be disturbed unless there is a clear abuse of discretion.

Id. at 427 (omissions in original).

scientific studies suggest that the remedy of punitive damages is not being systematically misused.[230] Further research is needed, but there is little empirical evidence showing a need to remove wealth from the civil punishment equation.

Some critics complain "that juries harbor a consistent bias against wealthy and insured defendants and that a difference in the parties' financial status creates a 'Robin Hood like state of mind in the jury room.'"[231] Recent social psychological research finds no evidence that juries are unfavorably disposed toward corporations.[232] For example, one study concluded:

> [J]urors were suspicious of the legitimacy of plaintiffs' claims and concerned about the personal and social costs

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230. Ermann and Lundman argue that firms are being underdeterred by corporate fines:

> For the most part, these financial penalties fail to exceed or even equal the gains from corporate violations of the law. Thus, the Sentencing Commission found that federal courts fined only two corporations in its sample more than $500,000. The average fine was $141,000.
>
> This is a lot of money for most individuals, but it is insignificant for most corporations. To get a sense of the impact of an average fine for a corporation, we calculated the equivalent fine for a person earning $35,000. If a "small" corporation with annual sales of $500 million—a firm approximately one-tenth the size of Apple Computer—were fined $141,000, it would be the equivalent of $10 for a person earning $35,000.

M. David Ermann & Richard J. Lundman, *Corporate and Governmental Deviance*, *in* CORPORATE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY, *supra* note 99, at 3, 40.

231. Alan Howard Scheiner, *Judicial Assessment of Punitive Damages: The Seventh Amendment and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 164 (1991) (citing [FIRST NAME] Dubois, *Punitive Damages in Personal Injury, Products Liability and Professional Cases: Bonanza or Disaster*, 43 INS. COUNS. J. 344, 351 (1976)). Professor David Owen argues that considering corporate wealth results in unjustly large awards:

> "[W]ealth" no longer serves as a clearly limiting factor on the range of jury discretion. Instead, a jury instructed to use the "wealth" of a multi-million or multi-billion corporation as a yardstick in assessing punitive damages is almost forced to think in terms of seven figures . . . or eight figures . . . or nine figures. . . .

Owen, *supra* note 98, at 45–46; *see also* Abraham & Jeffries, *supra* note 26, at 416–20 (arguing a tendency for juries to discriminate against large corporations to ensure ad hoc redistributions of wealth).

232. *See* Edith Greene et al., *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805, 814–15 (1991); Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217 (1993).

> of large jury awards. Despite insistence on product safety and high expectations of business, jurors were generally favorable toward business, skeptical more about the profit motives of individual plaintiffs than of business defendants, and committed to holding down awards.[233]

RAND investigated the "widely held view that juries are biased against wealthy 'deep-pocket' defendants" with jury simulations.[234] Its study, which is consistent with all other empirical research,[235] in casting doubt on the deep-pocket hypothesis.[236]

C. Awards Are Correlated With Plaintiff's Injury

RAND's Institute for Civil Justice discovered that corporations are more likely than individuals or public agencies to be assessed the largest punitive damages awards.[237] Theodore Eisenberg and his Cornell University colleagues reported a similar finding "that mean punitive damages awards are in fact higher in cases involving business defendants than in cases involving individual defendants, a result confirmed by RAND's findings."[238]

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233. Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 L. & SOC'Y REV. 85, 93 (1992) (concluding that "tort jurors had strong negative views about the frequency and legitimacy of civil lawsuits," and finding little evidence of tough standards and punitiveness by jurors toward corporations). Hans and Lofquist report public opposition to the use of wealth in punitive damages. Jurors believe that an "organization's assets should not be and were not relevant to the liability and award decisions." *Id.* at 106.

234. *See generally* MacCoun, *supra* note 223.

235. *See generally* Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 LAW & CONTEMP. PROBS. 177 (1989); Vidmar, *supra* note 232.

236. *See generally* MacCoun, *supra* note 223.

237. *See* PETERSON ET AL., *supra* note 93, at 49–50. RAND concluded that "[p]unitive [damages] awards against businesses were far larger than those against individuals in both personal injury and business/contract cases . . . . " *Id.* at 50. *See generally* AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS? (1985).

238. Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 640 (1997). The mean punitive damages award when an individual sued another individual was $279,415 (67 cases). The mean verdict was $817,230 when an individual was awarded punitive damages against a corporation. The mean punitive damages award was $515,666 in business versus business lawsuits. *See* PETERSON ET AL., *supra* note 93, at 14.

But higher awards assessed against business organizations provide no evidence that juries are anti-corporate since:

> The punishment/deterrent rationale, when implemented through monetary sanctions, suggests fine-tuning to reflect the defendant's financial circumstances. A police officer who unlawfully beats a victim may be severely punished, and other police officers deterred, by a punitive award of $5,000. A multi-billion dollar corporation may not even notice such an award. We thus expect the level of the award to reflect the defendant's financial situation. Increased award levels against wealthier defendants, therefore, do not necessarily show bias against them.[239]

The size of punitive damage awards against firms is more closely correlated with the damages inflicted than with the wealth of the corporate defendant.[240] The larger awards against business defendants appear to result principally from the greater injuries inflicted by corporations.[241]

D. A Secondary Analysis of Million Dollar Awards

To learn more about the relationship between wealth and civil punishment, we conducted a secondary analysis of punitive damages awards of $1 million or more upheld in federal courts between 1984 and 1994.[242] The rarity of multimillion-dollar punitive damage awards upheld in federal courts is in itself a striking finding. The federal courts of the fifty states upheld only thirty-four punitive damage awards of $1 million or more

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239. PETERSON ET AL., *supra* note 93 at 5.

240. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1439 (1993) (citing study by Joan T. Schmit et al., *Punitive Damages: Punishment or Further Compensation?*, 55 J. RISK & INS. 453, 463 (1988)).

241. *See* Rustad, *supra* note 24, at 63 tbl. 20 (finding that median punitive damages award in products liability litigation was directly related to severity of the plaintiff's injury).

242. The Exxon study was devised to buttress the firm's argument that the $5 billion punitive damages awarded in the Exxon Valdez case was excessive and out of proportion with past decided federal cases. The only cases Exxon excluded were awards where the net worth and net income figures were unavailable. For insurance companies, net worth amount represents "policyholders surplus" and net income represents "net operating income." For other companies, net worth represents "stockholders' equity." Otherwise, "figures were obtained from judicial opinion." Exxon's Brief, *supra* note 202, at app. (Table of Punitive Damage Awards).

over the decade—fewer than four of these verdicts per year.[243] Nine other recent empirical studies have also found that large punitive damage awards against corporations are quite infrequent.[244]

Our examination of the factual foundations underlying these large punitive damage awards reveals that most grew out of business disputes. Intentional torts or fraud in a business context accounted for the great majority of multimillion-dollar punitive verdicts.[245] Twenty-six of the awards grew out of economic loss litigation which involved business torts, contract breaches, or libel. Only eight of the upheld million dollar awards arose out of personal injury, a finding which undermines the argument that juries are redistributing corporate wealth to injured local residents.[246] If there is a punitive damages problem, it comes not from David suing Goliath, but Goliath suing Goliath.[247]

We analyzed the size, frequency, and underlying factual foundations of the thirty-four upheld cases to determine the relationship between wealth and punishment. While a few cases resulted in corporate defendants becoming virtually bankrupt, most corporate defendants were punished only slightly in view

243. Our analysis discovered that the largest awards upheld by the federal courts of appeals were punitive damages arising out of business disputes, commercial contracts, and intentional torts. Punitive damages in products liability, medical malpractice, and personal injury—the areas targeted by tort reformers—are underrepresented in Exxon's sample of million dollar plus awards.

244. *See* Michael Rustad, *Nationalizing Tort Law: The Republicans' War Against Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 689–704 (1996). In the most recent of the nine studies, the Justice Department found punitive damages to be rare in its survey of 762,000 cases in the 75 most populous counties of the United States. *See* CAROL DEFRANCES ET AL., U.S. DEP'T OF JUSTICE, CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 1–6 (1995). Plaintiffs were awarded punitive damages in only six percent of the cases they won. *See id.* at 6. Plaintiffs received over $50,000 in merely half of the successful verdicts. *See id.* at 5. Punitive damages accounted for only about one tenth of all money awarded to plaintiffs. *See id.* at 6.

245. *See* Exxon's Brief, *supra* note 202, at 15.

246. The belief that the introduction of evidence of a defendant's wealth will lead to biased awards is long-standing. *See* Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1191 (1931) (arguing that "[i]t is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare"). Contemporary critics assert that the use of wealth encourages juries to unfairly redistribute power from corporations to plaintiffs and their attorneys. See Abraham & Jeffries, *supra* note 26, at 424, for an argument that punitive damages unfairly tempt the jury "to ad hoc redistribution of wealth."

247. *See generally* Michael Rustad, Unraveling Punitive Damages: Current Data and Further Inquiry (paper presented at the National Conference on the Future of Punitive Damages, University of Wisconsin-Madison Law School, Oct. 25, 1996).

of their size and the gravity of their offense.[248] These punitive damage awards were typically well within the defendant's ability to pay as presented in Table Three below. Only five of the awards in the sample exceeded one percent of the defendant's net worth.[249]

TABLE THREE:
ANALYSIS OF PAST FEDERAL CASES OF PUNITIVE DAMAGES OF $1 MILLION OR MORE UPHELD IN FEDERAL COURTS, 1984–1994

MEDIAN PERCENTAGE OF NET WORTH	MEAN PERCENTAGE OF NET WORTH	MEDIAN OF NET INCOME	MEAN OF NET INCOME
.3 of one percent	1.915 percent	3 percent	7.43 percent

Table Three shows that the median punitive damages award upheld was 0.3% of the firm's net worth.[250] A fraction of one percent of a firm's net worth may be a substantial amount of money but does not threaten a firm's solvency. This database of upheld awards includes large awards that were reversed or remitted by trial and appellate judges.[251]

248. The upheld punitive damage awards ranged from 0.19% to 74% of the net income of defendants. This is a wide variation, but most awards were commensurate with the defendant's wealth. Judicial review is warranted where punitive damages constitute 74% of a firm's net income or are otherwise disproportionate to a firm's ability to pay.

249. None of these were personal injury cases. Four of these verdicts arose out of business disputes and the remaining one from nuisance litigation.

250. There is no evidence in this data to suggest that juries discriminate against deep pocket corporations in favor of injured plaintiffs. Personal injury cases tended to be smaller, with a median of less than 0.2% of corporate net worth. This finding shows that the tort reform debate may be misdirected. Business contracts or torts appear to be the major source of large punitive damage awards.

251. Our earlier study of punitive damages in product liability found that half of all awards were remitted or reversed in the post-verdict period. *See* Rustad, *supra* note 24, at 51–58. Even some of the upheld million dollar awards had been reduced by reviewing courts. Eight of these 34 million dollar awards were remitted or reduced by the trial or appellate court. This pattern is evidence of the strict scrutiny that courts apply to large punitive damage awards.

In sharp contrast to the nineteenth century, when reversals for misuse of evidence of corporate wealth were quite common, improper references to the wealth of the defendant were not an issue in these cases. In fact, in the full decade examined, no federal appeals court has reduced an award because of a plaintiff's improper references to the defendant's wealth.[252]

Our empirical research suggests that wealth-calibrated punitive damages are not out of control. Our findings corroborate the results of previous research which shows that corporations are not being bankrupted by misuses of civil punishment.[253] Further empirical research on the "crimtorts in action" is needed to discover the functions and dysfunctions of this emergent third paradigm of civil punishment.

All of the empirical evidence leads to one firm conclusion. The emergent crimtort remedy of punitive damages is functioning well. However, the fact that the great majority of verdicts are reasonably based is of little solace to a crimtort defendant such as Exxon. This section proposes a procedural framework for the fair prosecution of offenses lying in the borderland. Rather than eliminating punitive damages or imposing unworkable criminal procedural standards, we propose developing intermediate protection that is tailored to the nature of this hybrid.

V. PROPOSALS FOR REFORM OF CRIMTORTS IN THE COURTS

A. Enforcement by Private Attorneys General

One of the distinctive features of crimtorts is enforcement by private attorneys general.[254] Public authorities played little or no

252. *Cf.* Dunn v. Hovic, 1 F.3d 1371 (3d Cir. 1993) (rejecting the asbestos manufacturer's contention that the closing argument by plaintiff's counsel used wealth in a prejudicial manner); Emery-Waterhouse Co. v. Rhode Island Hosp. Trust Nat'l Bank, 757 F.2d 399 (1st Cir. 1985) (rejecting defense argument that improper appeal to wealth led to large punitive damages award).

253. *See* Rustad, *supra* note 247, at 3–23 (summarizing nine empirical research studies confirming that punitive damages are rare and closely supervised by judicial review).

254. The use of wealth is the key to creating optimal incentives for the "private attorneys general." The private attorney general is a trial lawyer who brings an action on behalf of the larger society as well as her client. In products liability litigation, the private attorney general role was key in uncovering a variety of dangerously defective products including the Ford Pinto, the CJ-7 Jeep, Copper-Seven intrauterine devices, and asbestos. *See generally* Rustad, *supra* note 24. In the field of medical malpractice, private attorneys general uncovered deplorable conditions in several corporate nursing home chains. *See, e.g.*, Harmon v. Gilsan Care Center, Inc., No. 8111-07085

role in uncovering the misconduct that led to hundreds of punitive damage awards in products liability[255] and medical malpractice lawsuits.[256] The punitive damages settlement against the chemical companies who polluted Love Canal[257] and the verdict against Kerr-McGee in the famous Silkwood case provide dramatic examples of the public interest being served by the work of private attorneys general.[258]

B. Intermediate Procedural Protection for Crimtorts

Crimtort penalties are typically imposed for aggravated misconduct far beyond negligence, but less than the intentional misconduct characteristic of criminal punishment. Here, the difficult policy choice is whether to adopt civil or criminal procedures for a crimtort trial. In this Section, we propose procedural protection midway between criminal and civil safeguards.[259]

(Multnomah County Cir. Ct., Or. Aug. 6, 1982) (assessing punitive damages for nursing home neglect of 90-year-old resident). Florida passed a statute providing for punitive damages explicitly to create incentives for lawyers to represent elderly nursing home residents. *See* Rustad & Koenig, *supra* note 33, at 1034 n.198 (1995).

255. *See generally* Rustad, *supra* note 24.

256. *See generally* Rustad & Koenig, *supra* note 33, at 1081–82.

257. *See generally* Robert Emmet Hernan, *A State's Right to Recover Punitive Damages in a Public Nuisance Action: The Love Canal Case Study*, 1 TOURO ENVTL. L.J. 45 (1994). The settlement which included punitive damages in the Love Canal litigation sent a clear message to the entire chemical industry that the indiscriminate dumping of toxic waste was a violation of the public trust that could result in severe punishment. The state of New York, one of the plaintiffs, was found to be entitled to seek punitive damages through a public nuisance action. The case settled before it could be determined whether the state could collect punitive damages on behalf of citizens harmed by the antisocial conduct of the chemical companies.

258. The typical toxic torts case involves a private plaintiff functioning as a private attorney general, as in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). Before her death, Karen Silkwood uncovered a pattern of unsafe workplace practices in a Kerr-McGee plutonium plant in Cimarron, Oklahoma. The attorneys for her estate proved that Kerr-McGee's safety policies were so lackadaisical that the firm could not account for several pounds of missing plutonium. An Oklahoma jury awarded the estate $10 million in punitive damages to punish and deter Kerr-McGee's reckless indifference to the public safety. *See* Silkwood v. Kerr-McGee Corp., 769 F.2d 1451, 1455 (10th Cir. 1985) (describing defendant's operations as manifesting a lackadaisical attitude toward health and safety).

259. *See* Lyndon F. Biddle, Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CAL. L. REV. 1433, 1458 (1987) ("The defendant's wealth is relevant only to the harshness side of the proportion, not to the wrongfulness side, and the danger of jury prejudice arises when this distinction gets blurred.").

Common law tort remedies afford the defendant too few safeguards, while criminal law is too blunt of an instrument.[260] A corporation has no right to privacy[261] or any Fifth Amendment privilege against self-incrimination,[262] but it is entitled to due process.[263] The Supreme Court in *United States v. Hudson* recently decided an issue relevant to crimtort jurisprudence: whether people fined by federal agencies for wrongdoing can also be criminally prosecuted for the same misdeeds.[264] The Court held that the double jeopardy clause is not a bar to a later criminal prosecution because the governmental fine was civil not criminal. This difficult double jeopardy issue often arises where conduct lies on the borderline between crime and tort.

The culpability standard for punitive damages varies from jurisdiction to jurisdiction.[265] Although civil defendants have no constitutional right to notice of whether their behavior will result in civil punishment, notice is "[o]ne of the most important

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260. *See* Susan W. Brenner, *Civil Complicity: Using the Pinkerton Doctrine to Impose Vicarious Liability in Civil RICO Actions*, 81 KY. L.J. 369, 405 (1993) (arguing that tort analogies are inappropriate due to different policy considerations underlying criminal and civil penalties).

261. *See* United States v. Morton Salt Co., 338 U.S. 632 (1950).

262. *See* Wilson v. United States, 221 U.S. 361, 384–85 (1911).

263. *See* Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2332 (1994) (holding that corporate defendant was entitled to post-verdict review for excessiveness of punitive damage award as a matter of procedural due process); BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1591, 1598 (1996) (holding that punitive damages award against corporate defendant violated substantive due process).

264. 118 S. Ct. 1488 (1997).

265. David Owen observes that "vagueness is an inherent and necessary aspect of punitive damage standards." David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 384 (1994).

The American Bar Association's Litigation Section has divided punitive damage liability standards into four general clusters:

> (1). The intent or scienter nucleus: intentional, willful, deliberate, knowing, conscious design, plan or purpose or consequences; (2). The bad motive or state of mind nucleus: malice (real), hatred, ill will, spite, anger, revenge, evil intent, moral turpitude, fraud, oppression, vexatious annoyance, and insulting behavior; (3). A test based upon conduct seen objectively as warranting punitive damages: outrageous misconduct or conduct beyond the bounds of decency, flagrant misconduct; and (4). The nucleus of more than negligence but less than intent: wanton, reckless (indifference) to consequences, implied malice, gross negligence, heedless and an entire want of care (or used no care).

AMERICAN BAR ASS'N SECTION OF LITIG., PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 34 tbl. 1 (1986).

requirements of a legal system . . . that the law be clear and certain."[266]

The Supreme Court has begun to articulate intermediate procedural protection for corporate defendants reviewing the excessiveness of punitive damage awards in four recent cases.[267] In *BMW of North America, Inc. v. Gore*,[268] the Court established "three guideposts" which, in effect, give defendants fair notice that they may be subject to punitive damages.[269] The model proposed by this Article is consistent with the Court's continuing concern for due process guarantees for punitive damage defendants. Accordingly, this Article recommends adoption of the defendant's right to bifurcated proceedings, of the heightened burden of proof of clear and convincing evidence, of a crimtort liability standard of "reckless indifference to the rights of others," and of protection against overkill from repeated punishment for the same acts. The intermediate regime of crimtorts should apply to the trial of all civil punishments, which include punitive damages, multiple statutory damages and quasi-criminal fines.

1. Bifurcation—Many states require that punitive damages proceedings be divided into two phases, the determination of liability and the punitive damages phase—a procedure that resembles criminal sentencing. In criminal cases, judges consider a broad range of aggravating and mitigating factors to determine the proper sentence, but only after the jury has rendered its verdict of guilt. The first stage of a bifurcated crimtort trial determines all of the compensatory damages issues and estab-

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266. SPECIAL COMM. ON THE TORT LIAB. SYS., TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 2–23 (1984).

267. The Court in *Pacific Mutual Insurance Co. v. Haslip*, 499 U.S. 1, 34 (1991), observed that Alabama's exclusion of wealth from consideration in determining the amount of punitive damages was a key variable in the "constitutional calculus" that was upheld in that case. In *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993), Justice Stevens noted that the "emphasis on the wealth of the wrongdoer increase[s] the risk . . . that [punitive damage] award[s] may . . . [be] influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident." The Court held that defendants were entitled to a post-verdict excessiveness review in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994). Most recently, in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), the U.S. Supreme Court found a high ratio punitive damages award excessive as a matter of substantive due process.

268. 116 S. Ct. 1589 (1996).

269. The three guideposts are the degree of reprehensibility of the conduct, the ratio between the actual or potential harm suffered and the punitive damages award, and the difference between civil penalties authorized or imposed and the punitive damages award. *See* 116 S. Ct. at 1598–99.

lishes whether punitive damages are to be assessed.[270] The second phase of the trial is limited to the single issue of the amount of punitive damages necessary to punish the defendant appropriately.[271] In the absence of bifurcation, factors such as the defendant's prior bad acts and the wealth of the defendant—which are relevant only to punitive damages—might contaminate the compensatory stage.[272] Compulsory bifurcation should be ordered at the request of the defendant or at the discretion of the trial judge in all civil punishment litigation.[273]

2. "Clear and Convincing Evidence"—While the ordinary burden of proof in civil litigation is "preponderance of the evidence," the criminal standard requires "beyond a reasonable doubt." The crimtort paradigm should follow the *de facto* standard of "clear and convincing evidence" that has evolved in

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270. The purpose of the bifurcated proceeding is to prevent prejudice against the defendant. In Stage I of a bifurcated trial, all evidence of aggravated misconduct and of the defendant's finances are excluded. Stage I determines the defendant's liability and whether punishment should be imposed. In Stage II, the level of punitive damages is set based upon wealth of the defendant, aggravating circumstances, and mitigating circumstances.

Section 11 of NCCUSL's Model Punitive Damages Act provides for the bifurcated trial of punitive damage claims. The Act creates separate proceedings for the adjudication of the amount of punitive damages. *See* MODEL PUNITIVE DAMAGES ACT § 11 (1996).

271. For example, in California, the court "shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud"; evidence of profit and financial condition "shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud." Such evidence "shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud." CAL. CIV. CODE § 3295(d) (West 1997); *see also* CONN. GEN. STAT. ANN. § 52-240b (West 1991) (stating that "[i]f the trier of fact determines that punitive damages should be awarded [in a products liability action], the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff"); GA. CODE ANN. § 51-12-5.1(d)(1)–(2) (Supp. 1997) ("In any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made . . . . If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case. It shall then be the duty of the trier of fact to set the amount to be awarded.").

272. *See* Koenig & Rustad, *supra* note 225, at 28 (reporting that twelve states require bifurcated punitive damages trials).

273. *See* Foreword to *Symposium on Civil Justice Reform*, 42 AM. U. L. REV. 1245, 1250 (1993) (noting that "reformers argue that punitive damages punish defendants without employing the procedural safeguards of criminal law, thereby blurring the distinction between public and private law").

many states.[274] This heightened standard of proof for civil punishment is formal recognition that all remedies for crimtorts involve potentially stigmatizing punishment.

3. Clarifying Jury Instructions—Crimtort defendants complain that juries are given inadequate instructions as to the conduct which constitutes punishable behavior. Criminal law, in contrast, contains clear descriptions of the elements of each offense and provides advance notice of the consequences. Crimtort defendants may not be entitled to the kind of notice accorded criminal defendants. It is neither possible nor desirable to enumerate all of the quasi-criminal misconduct that is potentially subject to civil punishment but crimtort defendants are entitled to notice of the general state of mind warranting punishment.

Judicial recognition of the crimtort paradigm will result in improved jury instructions. An explicit explanation of the hybrid nature of crimtort remedies would clarify the rationale for civil punishment. A review of the social functions of crimtorts would aid the jury in determining when civil punishment should be imposed. Juries should be instructed as to both the aggravating and mitigating circumstances, as well as the defendant's wealth, as guides to settling the appropriate level of punishment. Examples of aggravating circumstances would include concealment and the cover-up of similar incidents. Mitigating factors would include prompt remedial action and the adoption of oversight procedures to guard against the repetition of the bad behavior.

One of the key policy decisions is to determine which mental state is appropriate for civil punishment. Punitive damages standards vary widely from gross negligence to intentional misconduct.[275] Civil punishment requires that a defendant have a mental state that goes beyond mere negligence.[276] The punitive

274. *See* Koenig & Rustad, *supra* note 225, at 27 (reporting that 26 jurisdictions now require a plaintiff to prove punitive damages by at least clear and convincing evidence).

275. *See* RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 8.2, at 114–15 (1991) (documenting that the punitive damages liability standard varies by state from gross negligence to malice).

276. Prosser notes the intermediate nature of punitive damages:

> Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton.

KEETON ET AL., *supra* note 40, § 2, at 9–10.

liability standard lies "between intent to do harm . . . and the mere unreasonable risk of harm to another involved in ordinary negligence."[277] The Supreme Court in *BMW of America, Inc. v. Gore*[278] noted that punitive damages is reserved for conduct "more reprehensible than negligence."[279]

The malice standard employed by some jurisdictions is inappropriate as a measure of corporate misconduct.[280] Product manufacturers bear no ill-will toward their customers; they harm them through reckless indifference.[281] The standard of reckless indifference lies below intentional conduct that is not measured by the defendant's unreasonableness but by the higher standard of systematic indifference to the public welfare. The reckless indifference standard harmonizes with the punitive liability standard many states are already adopting.[282]

4. Safeguarding Against Overkill—Punitive damages are an appropriate reward for the attorneys who uncover the smoking guns that lead to the first awards, but this is not a compelling justification for the fiftieth or hundredth case using these same documents. Tobacco, asbestos, and silicone breast implants are recent examples of mass torts possessing the potential to bankrupt companies. While corporations need protection against being subject to repeated civil punishment arising out of the same conduct or act,[283] in mass tort cases, late coming plaintiffs need some assurance that the cupboard will not be left bare by earlier multimillion-dollar claimants.[284]

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277. WILLIAM PROSSER, THE LAW OF TORTS § 34, at 184–85 (4th ed. 1971).

278. 116 S. Ct. 1589, 1599 (1996).

279. *Id.* at 1598–99.

280. *See* Rawlings v. Apodaca, 726 P.2d 565, 578 (Ariz. 1986) (stating that malice warranting punitive damages occurs when the "defendant's evil hand was guided by an evil mind").

281. *See* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1279 n.64 (1993).

282. *See* BLATT ET AL., *supra* note 275, § 3.2, at 58 (citing 23 states where conduct is "more culpable than gross negligence").

283. The overkill problem predicted by Judge Friendly in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839, 841 (2d Cir. 1967) has not materialized. In the case of MER-29, there were only three punitive damages awards out of thousands of claims. There were only eleven punitive damage awards in the Dalkon Shield litigation, even though the victims numbered over 200,000. Similarly, there have been fewer than 25 punitive damages awards in a decade of breast implant cases. We base these findings on a computer run of the authors' nationwide database of punitive damages in product liability. For a description of this database, see Rustad, *supra* note 24, at 32–36.

284. *See* Findley v. Blinken (*In re* Joint E. & S. Dist. Asbestos Litig.), 129 B.R. 710, 751 (E. & S.D.N.Y. 1991) (concluding that one failure of the system is that future claims may lead to the insolvency of many companies).

The overkill problem requires a solution in harmony with the intermediate nature of crimtorts. Criminal defendants have protection against double jeopardy. Tort law imposes no limitations on multiple lawsuits arising out of the same act. The intermediate approach would be to treat every mass crimtort as a limited pool rather than to create an arbitrary civil double jeopardy rule.[285] Proof of prior punitive damages should be admissible to show that a corporate defendant has been punished sufficiently.[286] Another policy alternative to the overkill problem is to place some arbitrary limit on the percentage of net income or net worth that can be assessed in repeated cases of civil punishment for the same act. Punitive damage class action lawsuits are a possible solution to the problem of overkill.

5. Post-Verdict Reviews for Excessiveness—Heightened judicial review of crimtort verdicts will minimize any possible prejudice against corporate defendants. The Supreme Court in *Honda Motor Co. v. Oberg*,[287] held that punitive damages defendants are entitled to a post-verdict judicial review for excessiveness. The *Oberg* Court stated:

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. Judicial review of the amount awarded

285. *See* Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 290 ("Our view is that from the beginning, mass torts should be treated similarly to a bankruptcy proceeding. No matter how financially healthy the defendants in these huge cases, the sheer number of present and future victims means that we are ultimately dealing with a limited compensation fund.").

286. NCCUSL's Model Punitive Damages Act goes further than any state tort reform by permitting the trial judge to give credit for awards assessed in *other* jurisdictions. In section 10(b) the defendant is given an opportunity to produce evidence of the prior awards to prevent duplicative punishment. Section 10(c) provides factors for the trial judge to consider in determining whether punitive damages should be reduced in a multiple punishment scenario. NCCUSL's guidelines include the purposes of punitive damages, how the awards were calculated, and whether defendant has already disgorged economic gain. Finally, there is a provision for the stay of a judgment to determine whether credit should be given for prior punitive damage awards in section 10(d). While too much credit for past punitive damages assessments may lead to under-deterrence, this reform makes sense where a firm may be bankrupted by repeated punitive damage awards.

287. 114 S. Ct. 2331 (1994).

was one of the few procedural safeguards which the common law provided against that danger.[288]

The compulsory post-verdict test should be extended to all civil punishment whether prosecuted by public or private attorneys general. The most common tests for assessing whether a given award is excessive are whether it shocks the conscience of the court and whether it is so large that it suggests that the jury has succumbed to passion or prejudice.[289] Sending a legitimate message of community outrage through a large award comes perilously close to violating these traditional standards. The current standard is too vague to provide proper guidance to the judiciary.

Present day courts are not reluctant to overrule jury punitive damage awards.[290] Downward post-verdict adjustments or outright reversals are ordered in about half of all punitive damage verdicts in product liability cases.[291] In medical malpractice cases, appellate courts apply strict scrutiny, vacating, remitting or reversing punitive damages on a routine basis.[292] Compulsory post-verdict review of all crimtorts offer defendants protection against runaway juries or overzealous prosecutors. Factors that may be considered in assessing the size of the punitive damage award should, at a minimum include: wealth of the defendant, actual harm to the plaintiff, and potential harm to the society.

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288. *Id.* at 2340–41.

289. Many states review punitive damage awards by asking whether a given verdict is a product of "passion or prejudice." Ghiardi and Kircher state: "A widely used test to determine if the jury's punitive damage award is subject to judicial intervention is whether such award indicates that the jury was guided by passion or prejudice or some other improper considerations outside the evidence." 2 GHIARDI & KIRCHER, *supra* note 141, § 18.02, at 6. California courts determine whether the award is excessive as a matter of law or raises a presumption that it is a product of passion or prejudice. *See* Cates Constr., Inc. v. Talbort Partners, 53 Cal. App. 4th 1420 (1997).

290. Post-trial motions for remittitur, directed verdict, and judgments notwithstanding the verdict are other checks on the misuse of wealth in awarding punitive damages. Post-verdict motions test the sufficiency of the evidence as well as the amount of punitive damages. A trial judge presents the plaintiff with Hobson's choice when a remittitur is entered. A plaintiff must accept the trial judge's reduction or submit to a new trial. In remitting punitive damages, the court may only reduce the verdict to the highest amount which a jury could properly have awarded.

291. *See* Rustad, *supra* note 24, at 54–59.

292. *See* Rustad & Koenig, *supra* note 33, at 1012.

CONCLUSION

Crimtort remedies will increasingly be utilized to control socially harmful conduct that escapes prosecution on the criminal side of the law. Legal scholars and practitioners alike must adjust their thinking to accommodate the development of this legal hybrid of crimtorts. Judges and policymakers have been forced to smuggle crimtort protection into the common law on a patchwork basis rather than develop it as a coherent body of law. Instead of being troubled by the overlap of criminal and tort law, the American legal system needs to develop procedural protection that will balance the interests of both the public and crimtort defendants.

Civil punishment that is calibrated by wealth has the unique ability to adapt to social change and emergent abuses of power. As American society transformed from an agrarian-based economy to the modern industrialized state, crimtort remedies such as punitive damages evolved to control the excesses of industrial capitalism. Punitive damages have increasingly been employed to punish and deter toxic pollution, defective products, and dangerous medical practices. As the United States enters the information age, new abuses of power will emerge that the government is ill-equipped to control. Wealth-based civil penalties and punitive damages will play a crucial role in punishing and deterring these new forms of social deviance.

This Article has presented the first empirical study of the impact of wealth in high stakes punitive damages adjudication. This data demonstrates that punitive damage awards are generally rationally related to corporate wealth. Still, some aberrant punitive damage awards occur. Orderly and principled intermediate procedural rules must be instituted in order to properly deal with such outliers. Criminal standards such as sentencing guidelines or proof beyond a reasonable doubt are too stringent for civil punishment, while ordinary civil standards are too lax to adequately protect crimtort defendants.

The reforms proposed here—compulsory bifurcation, a standard of clear and convincing evidence, clarification of jury instructions, prevention of overkill, and the institution of rigorous post-verdict reviews of civil punishment verdicts—are already emerging on an ad hoc basis. Explicit recognition of the crimtort paradigm will accelerate the adoption of an appropriate level of procedural protection. These reforms will rein in the ex-

treme verdicts without crippling a vitally important remedy for punishing and deterring quasi-criminal conduct.