
REPLY

PUNITIVE DAMAGES AND PRIVATE ORDERING FETISHISM

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In reply to Michael I. Krauss, Response, “*Retributive Damages*” and the *Death of Private Ordering*, 158 U. PA. L. REV. PENNUMBRA 167 (2010), <http://www.pennumbra.com/responses/02-2010/Krauss.pdf>; David G. Owen, Response, *Aggravating Punitive Damages*, 158 U. PA. L. REV. PENNUMBRA 181 (2010), <http://www.pennumbra.com/responses/02-2010/Owen.pdf>.

Let me begin with some words of warm thanks, first to Professors Michael Krauss and David Owen for engaging my work with attention and interest¹ and, second, to the editors at PENNumbra, for soliciting my reactions. This Reply’s principal goal is to clarify some areas in which I think Professors Krauss and Owen misunderstood some aspects of my proposed framework for restructuring punitive damages, a framework I developed in two articles last year.² Those clarifications

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¹ See Michael I. Krauss, Response, “*Retributive Damages*” and the *Death of Private Ordering*, 158 U. PA. L. REV. PENNUMBRA 167 (2010), <http://www.pennumbra.com/responses/02-2010/Krauss.pdf>; David G. Owen, Response, *Aggravating Punitive Damages*, 158 U. PA. L. REV. PENNUMBRA 181 (2010), <http://www.pennumbra.com/responses/02-2010/Owen.pdf>.

² See Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383 (2009) [hereinafter Markel, *Punitive Damages*] (explaining how retributive damages should work alongside damages meant to achieve cost internalization and victim vindication); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 245-46 (2009) [hereinafter Markel, *Retributive Dam-*

address issues including but not limited to how punitive damages law ought to address the wealth or financial condition of the defendant, the defendant's status as a corporation, settlement dynamics and insurance. Before I answer Professor Krauss's and Professor Owen's challenges in those particular domains, however, I will begin with some more general observations about what role tort law could and should serve. My hope is that these initial remarks will provide some context for the nature and significance of the particular policy disputes we have with respect to punitive damages law.

I. PRIVATE LAW ESSENTIALISM

Both Professor Owen and Professor Krauss tend to see tort law as an institution with a nature, not a history, and thus seem to recoil at the plasticity and possibility of legal change.³ But "essentializing" tort law's familiar practices is not an argument that legislatures must accept, especially in light of the widely known problems of tort under-enforcement.⁴ And my concern is not tort law's past, or even its present, but its future.

In this vein, my work on punitive damages is chiefly prescriptive, not interpretive, and thus asks the following: in light of the best understanding of the constitutional constraints established by the Supreme Court, what kind of extracompensatory damages scheme should a state build? My answer here is a pluralistic one designed to allow juries to make reasoned decisions about which goals to advance. Subject to various safeguards and guidelines, my proposed framework tries to show how courts or juries could award extracompensatory damages designed to advance cost internalization (what I call "deter-

ages] (arguing that states should restructure punitive damages in part to advance the public's interest in retributive justice);

³ See Krauss, *supra* note 1, at 169 ("My own view is that awards of punitive damages almost always violate a key characteristic of tort law by breaching the private ordering/public ordering divide."); Owen, *supra* note 1, at 194 ("I prefer the world we now inhabit . . . where punitive damages are restitutionary in nature.").

⁴ See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1183 (1992) ("One of the most remarkable features of the tort system is how few plaintiffs there are. A great many potential plaintiffs are never heard from by the injurers or their insurers."); see also Richard L. Abel, *The Real Torts Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 447 (1987) ("The tort system does not encourage fraud or display excessive generosity but fails to compensate, needy, deserving victims."); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1159 (1996) (stating that "relatively few" tort claims are brought to court and that, even if more claims were filed, the tort system might not have the capacity to handle them).

rence damages”); victim vindication (with “aggravated damages”); and the public’s interest in retributive justice (with “retributive damages”).

The underlying pluralism of the extracompensatory-damages scheme was not itself new,⁵ although various ways in which I proposed implementing these distinctive purposes were innovations. Professor Owen’s generous remarks recognize these contributions, for which I am grateful. But both responses downplay the fundamentally pluralist worldview that undergirds the scheme described in *How Should Punitive Damages Work?*

So, just to be clear, my proposed framework does literally nothing to impede the private or restitutionary concerns articulated by both professors. The proposed framework accommodates the victim-vindication function easily by the proposed establishment of aggravated damages.⁶ As stated in *How Should Punitive Damages Work?*, “the victim vindication model and what I call aggravated damages are interested in the same thing: giving the plaintiff unfettered control over the choice to seek a remedy, usually in the form of money that would go directly to the plaintiff, designed to repair the injury to her dignity.”⁷ Quite to the contrary of Professor Owen’s assertion that the proposed framework threatens this quasi-compensatory function,⁸ the pluralistic scheme would actually allow both functions to be expressly served as the needs of the case require.⁹ As I explained, “Different cases present different problems; not every case requires pursuit of any of these purposes.”¹⁰

Despite that pluralistic structure, the responses focus their analysis on only one aspect of that framework: retributive damages. That focus is not itself unfair because I emphatically spend more time developing that aspect of the proposed framework, as it has been the least discussed in the scholarship associated with these three potential functions.¹¹ But in the course of directing their critical attention toward that “public retributive” aspect, Professors Krauss and Owen re-

⁵ Markel, *Punitive Damages*, *supra* note 2, at 1403 n.64.

⁶ *See id.* at 1414 (proposing aggravated damages as one way of addressing the shortcomings of current noneconomic damages awards).

⁷ *Id.* at 1416.

⁸ *See* Owen, *supra* note 1, at 184 (arguing that the proposed framework “undermines the private justice demands of victims of aggravated misconduct”).

⁹ *See* Markel, *Punitive Damages*, *supra* note 2, at 1416 (“[T]he victim vindication model and what I call aggravated damages are interested in the same thing . . .”).

¹⁰ *Id.* at 1403-04.

¹¹ *See id.* at 1387 n.5 (citing scholars endorsing or explicating cost internalization and victim vindication).

veal hostility toward accepting functions for punitive damages other than the quasi-compensatory one I call victim vindication (advanced by aggravated damages).

Thus, by implication, both critiques endorse a view very popular with business defendants—namely that punitive damages awards are a remedy best understood as limited to serving private law values relating to the historical “tort loophole” which resulted in dignity insults not being remedied under traditional measures of compensatory damages.¹² This view allows large businesses to take advantage of reluctance by “small” litigants to press claims against “large” litigants, thereby creating an enforcement lottery. Moreover, proponents of this quasi-compensatory view can keep the costs of awards down by emphasizing to the jury that one should not address the putative injustice of what the defendant did by extending a “windfall” to a particular plaintiff (and her lawyers).¹³

To his credit, Professor Owen’s response at least concedes the potential value of facilitating cost internalization or the vindication of the *public’s* interest in fair and accurate retribution. Nonetheless, like Professor Krauss, Professor Owen thinks these other functions should not be served by tort law; their shared view, which is left largely unexplained, appears to be that only public agencies should pursue public values.¹⁴ The rest should be left to privately ordered choices between plaintiffs and defendants.

¹² See, e.g., Krauss, *supra* note 1, at 176 (“Retributive use of punitive damages represents, to me, a pollution of tort law by public ordering principles.”).

¹³ Curiously, despite Professor Krauss’s view that punitive damages serve private compensatory goals, he believes “that the most coherent federal-constitutional justification for judicial control of state punitive damages awards is the Eighth Amendment’s ‘excessive fines’ clause.” *Id.* at 168. Similarly, Professor Owen thinks more procedural safeguards are warranted even for what I (among others) call aggravated damages. See Owen, *supra* note 1, at 189 & n.31 (discussing the benefits of increasing the burden of proof for aggravated damages). These constitutional views are also unsurprisingly reflective of the interests of business defendants, even though one might think that if juries are instructed in ways that are consistent with the quasi-compensatory victim vindication model, then there is not much reason to think awards of such damages should be entitled to the same level of procedural safeguards associated with public-minded sanctions (such as criminal fines or retributive damages), which by design should carry with them more stigma and condemnation than compensatory damages.

¹⁴ See, Owen, *supra* note 1, at 188 (“The private law should jealously guard its punitive damages remedy to assure that victims are fully compensated . . .”).

Although I support private ordering in many spheres,¹⁵ I find this inflexible view of tort law to be somewhat, well, odd. To be sure, I can see how respect for private ordering might be very important in certain domains such as contract law, although even there we have an array of appropriate limits.¹⁶ But in tort law, as in criminal law, one party has already abused the other party or its property in some way.

Accordingly, our society has (rightfully) never validated the view that disputes arising from involuntary usurpations of rights create private property rights belonging solely to the plaintiff.¹⁷ For if that were true, it would require the state to abandon the public prosecutor and the concern for reducing Type I (false positive) and Type II (false negative) errors in the criminal justice system, as well as the role of courts and legislatures in effectuating public policy through tort law.

More to the point here, and contrary to the historical arguments made in the responses, courts have long articulated the public interest in the preventive and punitive functions of punitive damages.¹⁸ This view was recently noted in *Exxon Shipping Co. v. Baker*, in which the Supreme Court cited various cases from yore where punitive damages were provided “for example’s sake,”¹⁹ “to deter from any such proceeding for the future,”²⁰ and “to give damages for *example’s* sake, to prevent such offences in [the] future.”²¹ That complicated history was also defended and elaborated more recently by Professors Akhil Amar and Arthur McEvoy in their amicus brief before the Supreme Court in *Philip Morris USA v. Williams*.²² To that extent, the historical narrative of the quasi-compensatory role of punitive damages tells only part of the story, albeit a substantial part.

And the complications go in both directions. Restitution is also a familiar part of criminal sanctions, and not long ago, private parties

¹⁵ See, e.g., DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 96-97 (2009) (urging the state to repeal bigamy, adultery, and incest laws against consenting adults).

¹⁶ See generally MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 34-42 (1993) (exploring areas in which limitations on private ordering seem necessary or attractive).

¹⁷ Cf. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 1 (1977) (arguing for a system that “restores the participants’ rights to their own conflicts”).

¹⁸ See, e.g., *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2620 (2008) (tracing the deterrence history of punitive damages).

¹⁹ *Id.* (quoting *Tullidge v. Wade*, (1769) 95 Eng. Rep. 909, 910 (K.B.)).

²⁰ *Id.* (quoting *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489, 498-99 (K.B.)).

²¹ *Id.* (quoting *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791)).

²² Brief of Akhil Reed Amar and Arthur McEvoy as *Amici Curiae* in Support of Respondent, *Philip Morris USA v. Williams*, 548 U.S. 346 (2007) (No. 05-1256).

prosecuted criminal actions and collected criminal fines. So the lines differentiating tort, public regulation, and criminal law are and have, in fact, been blurry. And while punitive damages have served a useful compensatory vehicle for injuries otherwise unaddressed, it has now been decades since that view predominated. Indeed, the Supreme Court has emphasized the public values of retribution and deterrence in punitive damages for four decades.²³

This pluralism about purposes is not inherently bad, I argue, if the right safeguards are in place. Thus, if the responses are to carry the day, they must do more than simply asseverate a preference for keeping tort law free from public law values. They must actually explain why it is wrong or inefficient or regressive to use tort law in some cases as one of the policy instruments in the social policy toolkit available to advance the public's interests. In this crucial respect, I think the responses are largely silent. And it is too bad because one role tort law (and punitive damages in particular) can play is to facilitate justice in areas where the state, for any number of reasons, fails.²⁴

II. PROFESSOR KRAUSS

In what follows, I turn my attention to the more specific concerns raised by each of the responses. I begin with Professor Krauss, who takes my proposed framework to task on a number of issues.

²³ See, e.g., *Exxon*, 128 S. Ct. at 2621 (2008) (“[T]he consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.”); *Philip Morris*, 549 U.S. at 352 (“This Court has long made clear that ‘[p]unitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.’” (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996))); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (describing punitive damages as “private fines” designed to punish and deter “reprehensible conduct”).

²⁴ See Markel, *Retributive Damages*, *supra* note 2, at 323 (tbl.). Indeed, if we are truly interested in a system of justice as fairness and not just a system that is driven by relative power and wealth (such as that which might be manifested by a disproportionate enforcement of street crime), then we might need to allocate more resources to investigating and prosecuting white collar crime and corporate malfeasance. As explained in *Retributive Damages*, these efforts would not only cost a great deal of public tax dollars, but they might also be susceptible to various regulatory failures; in light of these concerns, tort law can step in and, in a way, help ensure fairness. To be sure, there are costs and consequences when privately initiated suits serve this role. Sometimes, they serve as an end run around our regulatory apparatus and so some limits are also needed to protect the integrity of that public process.

A. *The Role of the Defendant's Wealth*

Professor Krauss makes several objections to the consideration of the defendant's wealth in the calculation of retributive damages.²⁵ In so doing, there are several instances where Professor Krauss misinterprets the arguments I advanced in the proposed framework and the relevant law.

First, and simply as a prefatory matter, the proposed framework is not designed to be limited to defendants who are wealthy and powerful.²⁶ Rather, I argued that the proposed structure is likely to be especially effective against the wealthy and powerful for reasons not similarly applicable when using other public enforcement or private litigation strategies.²⁷ Accordingly, the proposed framework is not categorically limited only to wealthy or powerful defendants, but rather litigation would likely tend to focus on those defendants, similar to the way that most tort cases currently focus on those with deep pockets.

Second, Professor Krauss worries that a wealth-adjusted retributive damages sanction would be unconstitutional. Specifically, he states that the "notion that punitive damages should represent a percentage (between 0.5% and 10%) of a defendant's net worth—i.e., that wealthier defendants should pay higher punitive awards *ceteris paribus*—is in my opinion subject to severe Due Process problems."²⁸ For support, Professor Krauss cites Justice Breyer's concurring opinion in *BMW of North America, Inc. v. Gore*, which announced a concern that wealth might be "an open-ended basis for inflating awards when the defendant is wealthy."²⁹ However, it is interesting that Professor Krauss chose to cite to that specific language, because the concerns for an "open-ended basis" for inflating awards are entirely foreclosed by the proposed cap on retributive damages set at 10% of the defendant's net wealth.³⁰

Moreover, Professor Krauss's opinion that wealth-informed penalties violate the Due Process Clause is unfounded speculation. Justice

²⁵ See Krauss, *supra* note 1, at 177 (raising due process, proportionality, and incentive concerns with punitive damages, particularly with respect to corporate defendants).

²⁶ See *id.* at 176 n.51 (arguing that *Retributive Damages* sought to "limit punitive damages to suits against the rich").

²⁷ See Markel, *Retributive Damages*, *supra* note 2, at 323 (tbl.).

²⁸ Krauss, *supra* note 1, at 177.

²⁹ *Id.* at n. 59 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 591 (1996) (Breyer, J., concurring)).

³⁰ See Markel, *Punitive Damages*, *supra* note 2, at 1462 (noting further that procedural safeguards make such a system more likely to comply with due process concerns).

Breyer's concurring opinion certainly established no law prohibiting consideration of wealth or financial condition when setting penalties. Indeed, the legality of that practice has long been recognized by the Supreme Court as "well-settled law,"³¹ and Professor Krauss's view here has simply not been vindicated by the Supreme Court. Needless to say, Professor Krauss's concern has been addressed by other sophisticated jurists, including Judge Easterbrook³² and Judge Posner,³³ and while they have raised some concerns, there is no square holding that punitive damages informed by wealth or financial condition violate due process as such.

Professor Krauss also challenges considerations of the defendant's wealth from the standpoint of equality, stating that "[i]f a person is to be punished, it should be for what she has done, not for who she is, even if she is a large corporation."³⁴ There is widespread disagreement about what it might mean to punish different defendants equally through financial penalties. Some, like Professor Krauss, think fines are equal when they are assigned using invariant dollar amounts (e.g., \$100) for all violators of the same legal rule. Others, including me, think fines (and retributive damages) should register against individuals based on legislatively predetermined percentages of net wealth (or income in some cases). Still others might prefer for people across various wealth levels to *experience* the same amount of financial sting

³¹ See, e.g., *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993) (describing as "well-settled law" the notion that evidence related to financial condition of defendant is "typically considered in assessing punitive damages"). For specific citations to each state's practices regarding the admission of evidence related to the wealth or financial position of the defendant, see Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1316 n.108 (2005); 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 5.3(F) (5th ed. 2009).

³² Professor Krauss cites Judge Easterbrook's opinion in *Zazú Designs v. L'Oréal, S.A.* See 979 F.2d 499, 509 (7th Cir. 1992) ("Corporate size is a reason to magnify damages only when the wrongs of larger firms are less likely to be punished; yet judges rarely have any reason to suppose this, and the court in this case had none."). Importantly, those are also arguments I addressed in *Retributive Damages*. Markel, *Retributive Damages*, *supra* note 2, at 294-96. Judge Easterbrook's opinion in that case examines the punitive damages award primarily through the lens of cost internalization, not retribution (because the panel did not find the defendant's conduct to be antisocial), and focuses on the award against a corporation, which may raise different issues, a point I made in the proposed framework on several occasions.

³³ See *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (noting that a wealthy defendant can "mount an extremely aggressive defense . . . and by doing so . . . make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33-40 percent contingent fee").

³⁴ Krauss, *supra* note 1, at 177.

and thus either use a progressively scaled fine system to account for the diminishing utility of money or brain scans and other technologies to determine what amount of punishment would cause the right (and equal) number of disutils.³⁵ In other words, there are different benchmarks to which one can appeal in trying to achieve equality in this regard: flat dollar amounts, percentages of equal wealth, or disutils. Many jurisdictions around the world and within the United States use income or wealth-adjusted fines.³⁶ This dispute is simply about how to punish in an equal manner. The reasonable disagreement over this issue might be why there has been no constitutional prohibition under due process or equal protection for using wealth as a consideration. Moreover, the method that I endorsed was already defended against claims that it would raise constitutional and policy concerns at length earlier in the companion article, and these arguments do not warrant repetition here.³⁷

That said, it should be clarified that the purpose of incorporating the defendant's wealth or financial condition into the calculation of retributive damages is not because it is thought that wealthier defendants should have to take *greater* care than everyone else in society.³⁸ Rather, wealthier tortfeasors should be punished, like all people, in a manner that *adequately* communicates to them that their risk-imposing, wrongful behavior is not subject to a price but rather a sanction. A wealth-adjusted sanction helps achieve that adequate communication. Less abstractly, we do not want the wealthy to think that they can wrongfully injure poor persons simply because the compensation needed to remedy those injuries is lower than would be the case were the same conduct targeted at wealthier people.³⁹

³⁵ See generally Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 186 (2009) (arguing for a system of punishment that considers, and is calibrated to, the subjective experiences of offenders).

³⁶ See Markel, *Retributive Damages*, *supra* note 2, at 289 ("Currently more than half a dozen American jurisdictions use . . . a program of day fines, which are prevalent in Europe, where a judge follows an established scale and assigns an offense a number based on its severity, and that number is multiplied by the defendant's daily income.").

³⁷ *Id.* at 290-96, 327-35.

³⁸ But see Krauss, *supra* note 1, at 177 ("[S]ome have argued that the rich need greater deterrents than do the poor." (citing Jennifer H. Arlen, *Should Defendants' Wealth Matter?*, 21 J. LEGAL STUD. 413, 422-23 (1992))).

³⁹ As explained in *Retributive Damages*, however, some types of misconduct (e.g., those aimed only at financial injury, such as fraud) might plausibly be subjected to a different kind of sanction strategy (such as a multiplier of the compensatory damages) as long as the retributive sanction put the defendant in an objectively worse position than when he began his misconduct, even after accounting for restitution and legal costs. Markel, *Retributive Damages*, *supra* note 2, at 290 & n.181.

B. *Concerns Regarding the Defendant's Net Value When the Defendant Is an Entity*

Professor Krauss creates the false impression that I have neither addressed nor “thought through” the issue that if net wealth were used as a benchmark for setting financial penalties against corporations, it would spur “corporations to favor debt over equity at the margin and to dole out more in dividends than otherwise would be the case, so as to lower their expected outlays of punitive damages.”⁴⁰ However, this issue is discussed in my articles, and I say precisely the same thing (and cite the very same passage from Judge Posner’s opinion in *Mathias v. Accor Economy Lodging, Inc.*) that Professor Krauss does about why using net worth or wealth for corporate entities would not be the appropriate benchmark.⁴¹ Accordingly, while Professor Krauss’s critique of that position may have merit in this regard, it is the very critique I make against a position I do not adopt.

Only later in the paragraph does Professor Krauss advert to what was actually said: that the measure of punishment should track net value of a corporation. But this term is described by Professor Krauss in his text as “undefined.”⁴² To the contrary, as he recognized in a footnote, I propose that net value of a corporation could be assessed based on “valuation models used on Wall Street.”⁴³ Banks and accountants use various measures to assess the value of corporate entities whenever they are advising on mergers and acquisitions. I would leave it to expert witnesses to provide this kind of information to the court (or the jury, if the jurisdiction preferred) to make that fine-grained assessment. A standard is not “undefined” simply because it is not a rule.

Finally, we get to Professor Krauss’s main objection, which clearly understands that net value is not undefined but rather reflects the kind of valuation models used for assessing transactions on Wall Street. Professor Krauss asks: “Why should a corporation that wastes social resources while committing evil deeds pay less in punitive damages than a corporation whose tremendous contributions to consumer surplus have positively affected its takeover price?”⁴⁴

⁴⁰ Krauss, *supra* note 1, at 177.

⁴¹ Markel, *Retributive Damages*, *supra* note 2, at 289 n.178 and accompanying text.

⁴² Krauss, *supra* note 1, at 177.

⁴³ *Id.* at 178 n.64.

⁴⁴ *Id.* at 178.

This is an interesting question. But it is really no different conceptually from asking why a wealthy person should be punished more in dollar terms than a poor person. After all, a person who is wealthy and later becomes poor—perhaps because of a penchant for wasting social resources—would still end up paying less money in retributive damages if he is sanctioned than someone who began wealthy and stayed wealthy. As mentioned earlier, I have already addressed the question of wealth at some length in the individual context in *Retributive Damages*,⁴⁵ and, as noted in that article, I plan on explaining at greater length why that argument applies in the corporate context. I do not intend to foreshadow that argument in this reply, but needless to say, I am not the only person who believes that corporations can reasonably be thought to be fit subjects for punishment on a variety of rationales⁴⁶ and that the financial condition of such entities may be a relevant consideration.⁴⁷ As some indication of the plausibility of such a view, it is worth noting that American law has allowed corporations to be punished through both criminal and civil penalties for over a hundred years.⁴⁸ Thus, while I may be wrong on the merits of whether it makes sense to punish corporations, I am, at least, not alone.

⁴⁵ Markel, *Retributive Damages*, *supra* note 2, at 289-96, 309-16.

⁴⁶ Cf. BRENT FISSE & JOHN BRATHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 15 (1993) (“[T]he law should hold an axe over the head of a corporation that has committed the *actus reus* of a criminal offence. . . . The private justice system of the firm is then put to work under the shadow of the axe.”); PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY, at ix (1984) (“Corporations are far from being social fictions. A moral theory that must treat them as such is sadly impoverished.”); Amy J. Sepinwall, Shared Responsibility for Corporate Crime (2009) (unpublished manuscript, on file with author) (explaining how corporate criminal liability can be justified in terms of retributive theory). The literature providing justifications for corporate criminal liability would likely also permit corporate liability for intermediate civil sanctions, such as retributive damages.

⁴⁷ See, e.g., Keith N. Hylton, *A Theory of Wealth and Punitive Damages*, 17 WIDENER L. J. 927, 946 (2008) (arguing, on economic-deterrence grounds, that business entities ought to face punitive damages based on financial condition in some contexts).

⁴⁸ See *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494-95 (1909) (“[T]here are some crimes, which in their nature cannot be committed by corporations. But there is a large class of offenses [for which corporations may be held responsible].”); see also *Regina v. St. Lawrence Corp.*, [1969] 5 D.L.R. 263 (Can.) (“Modern law has taken us to a position far removed from the primitive notion that a corporation, being but an abstraction having no mind or body of its own, was not capable of committing a crime”); see generally Melissa Ku & Lee Pepper, *Corporate Criminal Liability*, 45 AM. CRIM. L. REV. 275 (2008) (explaining the principles guiding corporate criminal liability).

C. Concerns Regarding Criminal Prosecution and Civil Litigation

Professor Krauss also expresses concern that the coexistence of retributive damages and criminal prosecution will result in practical and political problems.⁴⁹ For instance, he worries that politics may result in criminal prosecution being delayed “so that the ‘prize’ for misbehavior can accrue to a politically favored private party and not to the state.”⁵⁰ This scenario is entirely unlikely, however. The only “prize” to be enjoyed by a private party under the retributive damages structure is the finder’s fee that the legislature decides to award. My recommendation was that such a fee should be relatively modest and in a flat amount across a range of cases—something like \$10,000.⁵¹ How often would a government attorney be willing to delay prosecution (and risk disbarment or worse based on breaches of professional ethics) so that a private plaintiff could collect \$10,000?

Professor Krauss also worries that “innocent corporations” would, under the proposed retributive damages framework, begin to plead guilty to crimes in order “to avoid confiscatory punitive damages.”⁵² This concern is misplaced for a number of reasons. Implicit in this concern is the notion that retributive damages would constitute significantly higher award amounts than comparable fines or penalties associated with admitting to illegal activities in criminal court. However, the retributive damages scheme would not be established in a vacuum isolated from the rest of public policy. The regime would involve, among other tasks, state legislative action to carefully craft and construct a reprehensibility scale by which to measure the conduct of a defendant.⁵³ As such, the legislature could and should determine whether the underlying values of its other laws would be usurped or undermined and then utilize its authority to make sure that the system achieves the right balance of its pertinent policy goals. The legislature, under the proposed framework, would be encouraged to make sure that criminal penalties exceed retributive damages,⁵⁴ although

⁴⁹ See Krauss, *supra* note 1, at 178 (arguing that offsets may lead to “sweetheart deals” for politically favored private parties).

⁵⁰ *Id.*

⁵¹ Markel, *Punitive Damages*, *supra* note 2, at 1402.

⁵² Krauss, *supra* note 1, at 178.

⁵³ See Markel, *Punitive Damages*, *supra* note 2, at 1400-01 (explaining that the reprehensibility score would then be matched to a schedule for retributive damages adjusted by financial condition).

⁵⁴ See *id.* at 1431 n.156 (“If retributive damages are truly going to be intermediate in nature, then jurisdictions . . . may also have to adjust fines in the criminal context to

they would not be required to ensure that the only currency of punishment here is financial in nature.

Second, and related to that last point, there are many different costs that a corporation pleading guilty may incur aside from monetary penalties. For instance, corporations could lose valuable permits or suffer negative public relations consequences as a result of admitting to crimes.

Third, a corporation is only eligible for retributive damages sanctions if it commits reckless or malicious conduct. In situations where the entity did in fact commit certain reckless or malicious conduct warranting retributive damages, there would not be a problem of a corporation ostensibly “innocent” of any wrongdoing finding itself pleading guilty to a crime. Moreover, the proposed framework calls for enhanced procedural safeguards that would not be otherwise available in tort cases. Accordingly, one has to wonder whether a corporation’s officers would fear a Type I error in adjudication of retributive damages so much that it would agree to plead guilty to a crime it did not commit. This scenario seems especially implausible because defendants pleading guilty to a crime have to convince a prosecutor and then a judge that in fact a crime has been committed. Typically, judges are required to go through a plea colloquy with a defendant to ensure that any plea of guilty to a crime has a basis before it is accepted by the court. If the officers of a corporation say the corporation committed a crime that it did not commit simply to buy itself repose against retributive damages, they have committed perjury. The officers would be on the hook to the state and to their shareholders in derivative litigation.

The real concern seems to be focused on what defendants might do in fear of mistaken adjudications in retributive damages trials. This more plausible concern arises in situations in which recklessness might be ascribed to a corporation that engages in cost-benefit analysis regarding the safety of its products. In that situation, an entity that weighs profits against safety improvements could be adjudged “reckless” for not taking the safety precautions because they viewed the costs of doing so (by estimating likely liability, profits and elasticity of demand) as insufficient to justify the safety improvement. The concern here focuses on a Type I error in which a corporate defendant is

always be some amount greater than the amount awarded in retributive damages for similar misconduct.”).

wrongly determined to have been reckless (as opposed to one in which the innocent defendant pleads guilty).

The answer to this concern is complicated, but in short, there are several responses. First, the standard of recklessness to which I have been advertent tracks the one used in the Model Penal Code, and in that context, a defendant must have consciously disregarded a “substantial and *unjustifiable* risk” and the disregard of that risk has to be one that involves “a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”⁵⁵ That is a difficult standard to satisfy actually, and it is not clear why—as applied to entities who might be tempted to externalize risks to others—it is unfair. Second, as mentioned before, cases involving retributive damages also entail heightened procedural safeguards. Third, if we do not think that the standard of conduct and the procedural safeguards are sufficient to allay concerns of Type I false positives, then that concern provides another reason to bolster my support for insurance for retributive damages arising from reckless conduct on the part of the defendant. Indeed, this was one of the justifications for insurance to which Professor Owen rightly alluded in his response.⁵⁶ States disallowing insurance in these contexts should revise their policies.

D. *Concerns Regarding Settlement, Sweetheart Deals, and Insurance*

Professor Krauss also challenges the proposed framework on the ground that the “courts are utterly ill-equipped to deal effectively with the settlement process,” claiming that close supervision would be required to prevent sweetheart deals between plaintiffs and defendants that would cheat the state out of collecting its bounty of retributive damages.⁵⁷ This issue was addressed in the proposed framework, which calls for concurrent implementation of changes to the requirements that plaintiffs must meet should they wish to seek retributive damages.⁵⁸ Plaintiffs who have failed to plead the type of misconduct that would give rise to a retributive damages claim would be prevented from altering their claims later to include such conduct.⁵⁹

⁵⁵ MODEL PENAL CODE § 2.02(2)(c) (1981).

⁵⁶ Owen, *supra* note 1, at 190.

⁵⁷ Krauss, *supra* note 1, at 178.

⁵⁸ See Markel, *Punitive Damages*, *supra* note 2, at 1473-74 (outlining the restrictions to be placed on plaintiffs who seek retributive damages so as to prevent sandbagging defendants).

⁵⁹ See *id.* at 1473 (proposing that “compelling circumstances” should be required to allow complaint amendments).

Once this conduct is included in complaints, the state, and not just the courts, would be alerted to the need to supervise the settlement process.⁶⁰

Following this alert, the state would then review and authorize settlements, with the ability to object to potential sweetheart deals and purchase the claim for the aforementioned “finder’s fee” of a certain amount, such as ten thousand dollars.⁶¹ The procedural pleading requirements combined with the ability to purchase the retributive damages claim would go far toward modifying the current system to prevent sweetheart-deal collusion. The presence of the threat of a private attorney general (PAG) who is empowered to follow up on a suit that the government declines to bring is a further incentive for defendants to resist any attempts by plaintiffs to shake them down *prior* to filing; if defendants wanted repose against PAGs, they would have to acquire it through state supervision of the settlement.

Finally, Professor Krauss wonders whether such collusion concerns would require retributive damages insurance to be mandatory.⁶² This is a puzzling question. There is no necessary link between the proposed framework’s attempt to address sweetheart deals, which, absent the safeguards, would likely occur with or without insurance, and the availability of insurance for certain conduct that might trigger retributive damages. That said, there is no requirement upon anyone to buy insurance for retributive damages. The private ordering that Professor Krauss venerates so much would be allowed under the proposed framework such that if insurance companies want to offer insurance for retributive damages, they would be permitted to do so, and they would be allowed to charge what they thought they needed in order to make it worth their while.⁶³

⁶⁰ *Id.* at 1473-74.

⁶¹ *Id.* at 1474.

⁶² See Krauss, *supra* note 1, at 178 (questioning whether such insurance, if not mandated by statute, would lead to adverse selection problems).

⁶³ For what it is worth, I would have no problem with legislation that forbade the issuance of insurance contracts that covered intentional harms, though as described further *infra*, there is not much need to do so because insurance companies are in the business of insuring for “insurable risks” and intentional harms are not included in that category. Indeed standard insurance agreements include phrases excluding coverage for intended or expected losses. The question of who should benefit from insurance availability is different when the insured did not intend to cause the harm but a nonmanagerial employee of the insured did cause the harm intentionally. In that situation, and assuming the insured did not somehow encourage or ratify the misconduct of the employee, companies should be able to buy insurance and seek insurance companies’ expertise in loss prevention.

III. PROFESSOR OWEN

Professor Owen offers a subtle read of the articles forming the proposed framework for extracompensatory damages. In light of his own distinguished scholarship,⁶⁴ which has long been a source of inspiration to me, among others, this is not surprising. Nonetheless, I think there are some misunderstandings in his response, and I will use this Part to clarify them as well as to address some of the substantive concerns he had about insurance and related aspects of the proposed framework.

A. *Clarifying Some Misunderstandings*

First, I do not argue that aggravated or deterrence damages “might well escape constitutional limitation altogether.”⁶⁵ Rather, for those kinds of damages, federalism concerns—at the very least—would arise and thus would likely require some, if not all, of the same constraints on punitive damages that the Supreme Court has already established.⁶⁶ (Retributive damages would warrant additional safeguards at least as a policy matter, if not as a constitutional one.)

Second, and this is a point to which I alluded near the outset, although Professor Owen agrees that there is a theoretical attractiveness to reducing both Type I and Type II errors, he disagrees with me about the extent to which the law of torts should care about and pursue the reduction of Type II false negatives.⁶⁷ He views the concern for reducing Type II errors through a PAG scheme as especially troubling: “While Professor Markel avoids enlisting the police and public prosecutors in his effort to catch malefactors, his enlistment of every member of society is reminiscent of the ruthless use of collaborators by police states in the past.”⁶⁸

This remark, unfortunately, is wrong and wrong again. First, nothing about my proposed framework suggests anything like displacing or eliminating police and public prosecutors from catching malefactors. Second, the proposed framework contains nothing like any kind of forced conscription or coercion upon persons to serve as secret informants for the police state, and the suggestion itself is odious. While there is a modest financial incentive for private persons to

⁶⁴ See, e.g., David G. Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103 (1983); David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705 (1989).

⁶⁵ Owen, *supra* note 1, at 189.

⁶⁶ Markel, *Punitive Damages*, *supra* note 2, at 1425-26.

⁶⁷ Owen, *supra* note 1, at 184.

⁶⁸ *Id.* at 185 n.15.

channel cases successfully into the retributive damages system, the contemplated structure would allow a private party to bring such a case only after the government exercised a right of first refusal.⁶⁹ This basically contemplates using the same hybrid enforcement scheme currently used in the United States today in the context of environmental law.⁷⁰ And, unlike in a police state, where there are secret informants, the defendant facing a PAG would be entitled to heightened procedural safeguards described in detail in *Punitive Damages*⁷¹—safeguards essentially endorsed by Professor Owen as desirable mechanisms to reduce the risk of Type I errors involving false accusations or determinations of liability in open court.

Finally, there is an irony (not quite a misunderstanding) worth exposing in Professor Owen's justification for punitive damages. The justification proposed by Professor Owen itself requires greater institutionalized respect for the reduction of Type II errors involving false negatives where tortfeasors escape liability. To see why, notice that in Professor Owen's normative account of punitive damages, he emphasizes how such damages

restore the equality of the victim in relation to the thief by diminishing the extra worth and freedom held illicitly by the thief who stole these fundamental goods of personhood from the victim. By vindicating a person's right to remain free from flagrantly inflicted harm through compensation for the aggravated nature of the person's damages attributable to the aggravated nature of the wrong, the law restores and reaffirms the equal worth and freedom of the person victimized by the flagrant wrong.⁷²

Note that it is the *law* that "reaffirms the equal worth and freedom" of the victim, not the agency of the victim.⁷³ And yet, if the law were to

⁶⁹ See Markel, *Retributive Damages*, *supra* note 2, at 281-84 (describing the possible dangers of and safeguards against vexatious actions brought by nonvictims).

⁷⁰ See William B. Rubenstein, *On What a "Private Attorney General" Is—and Why it Matters*, 57 VAND. L. REV. 2129, 2146 n.67 (2004) (citing to various studies of citizen-suit provisions in the environmental law context).

⁷¹ Markel, *Punitive Damages*, *supra* note 2, at 1436-62.

⁷² Owen, *supra* note 1, at 187.

⁷³ Indeed, some of Professor Owen's prior scholarship notes the value to society, and not just the private interest, of punitive damages. *E.g.*, David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 376 (1994) ("Punitive damages also serve an important retributive, restitutionary interest for society." (emphasis added)); *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 7-8 (1982) ("Punitive (or 'exemplary') damages are assessed in addition to compensatory damages to punish a defendant who commits an aggravated or outrageous act of misconduct against the plaintiff and to deter the defendant and others from similar misbehavior in the future." (emphasis added)).

confer a monopoly regarding the choice to settle or forbear from suit upon the victim, who may be unduly lazy or merciful, the insult to the victim and to the public by the “theft” still occurs by the possibly unrepentant offender. That wrong is left to rest without rebuke or sanction. Why should that action stand unchecked when there is potentially another way to counter the defendant’s interference with a person’s freedom and equality, either through the agency of the state or a PAG and either through intermediate sanctions with some safeguards or more severe criminal sanctions with a larger panoply of procedural safeguards? Professor Owen does not answer this question, but his own justification for punitive damages permits, if not demands, a flexible instrument for reducing and sanctioning flagrant misconduct by tortfeasors.

B. *Concerns about Insurance*

Professor Owen expressed some concerns about the clarity of the discussion of insurance for retributive damages in the proposed framework.⁷⁴ First, he is uncertain why a straightforwardly retributive account of punitive damages would permit insurance for retributive damages actions that are reckless.⁷⁵ He argues that this conclusion is problematic, worrying first that it would create the risk that a defendant would not have to lose “ill-gotten gains” and second that such insurance permits a wrongdoer to “shift” punishment to “innocent third parties.”⁷⁶ These concerns are misplaced.

First, *Punitive Damages* provides an extended discussion regarding the claim that insurance would blunt the retributive force of the penalty.⁷⁷ Without repeating it, let me highlight a few key points and explain why those are relevant to answering Professor Owen’s queries. In so doing, I will make one point that ought to have been highlighted more in the proposed framework if its implication was not clear from that discussion.

Under the proposed framework, a defendant facing penalties of retributive damages must (a) always disgorge any ill-gotten gains associated with conduct related to the victim and also endure a sanction that requires paying (b) a finder’s fee to the plaintiff or PAG, (c) attorney’s fees for the relevant part of the labor, and (d) the additional

⁷⁴ Owen, *supra* note 1, at 189-90.

⁷⁵ *Id.* at 189.

⁷⁶ *Id.*

⁷⁷ Markel, *Punitive Damages*, *supra* note 2, at 1469-71.

monetary sanction informed by the reprehensibility and the wealth of the defendant (assuming that the defendant is an individual). So there are actually four parts to the retributive damages sanction, but not each assignment of retributive damages requires all four parts. After all, some cases might not have any ill-gotten gains that arise after full compensation to the victim has been paid. Under the retributive damages scheme in the proposed framework, only these aspects would be insurable. The ill-gotten gains would not be insurable,⁷⁸ since ill-gotten gains typically arise from noninsurable risks that would be excludable both by legislation and contract.⁷⁹ However, should a situation arise in which one accrues ill-gotten gains through insurable risks (in this case, insurance for retributive damages arising from reckless actions), the defendant would be required to disgorge related profit and should be forced to endure the other relevant parts of the retributive damages sanction as well. If the defendant in question paid retributive damages insurance, that insurance, under my framework, should not cover the entirety of the penalty that is imposed. As I wrote in the proposed framework, there must also be some form of “coinsurance” paid after the adjudication; a coinsurance requirement helps create the signal that the defendant is being condemned and sanctioned.⁸⁰

It is true, however, that I did not specify the precise amount of coinsurance, so I view Professor Owen’s challenge here as prompting a friendly amendment: the insurance coverage provided in any given case involving a retributive damages sanction should not exceed the difference between the full retributive damages sanction (i.e., all four parts if applicable) and the disgorgement of any ill-gotten gains net of compensatory damages.⁸¹ Under such a formula, there would never be an insurance recovery for retributive damages that includes the portion for any ill-gotten gains. But other aspects of the retributive damages penalty could be insured when the underlying reckless conduct deals with probabilities rather than intended or expected harms.

Professor Owen’s second insurance-based challenge, respecting “punishment” being “shifted” to innocent third parties, warrants more

⁷⁸ As Professor Miriam Baer has pointed out, “[t]he principle that appears to divide the insurable from the noninsurable conduct is fortuity. . . . If the insured knows only that there is a great risk that an event will occur, the event is insurable because it is fortuitous.” Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1083 (2008).

⁷⁹ See *supra* note 63 and accompanying text.

⁸⁰ Markel, *Punitive Damages*, *supra* note 2, at 1463.

⁸¹ Thus, if the total retributive sanction is \$100,000, and the amount of ill-gotten gains was \$20,000, then insurance should not be permitted to cover more than \$80,000.

skepticism than clarification. This challenge rests on the erroneous conflation of the normative concept of retributive punishment as an intended, authorized, and coercive deprivation with the incidental suffering of the offender or a third party. Thus, the claim that insurance shifts punishment to innocent third parties is not true here any more than it is true *whenever there are incidental (third-party) effects resulting from punishment*. There is an important distinction here. To illustrate, when an offender who is also a father or a business owner defrauds someone else and is then imprisoned, prison *punishes* the offender even though the offender's family or employees may suffer. The punishment incontrovertibly occurs here and still retains its retributive nature even when the offender, on account of his cheerful disposition, views the time in prison as an escape from the rat race and as an opportunity to express contrition, get in shape, and write poetry.⁸²

An offender who experiences fewer distills (or less sting) or negative consequences associated with objective punishments because of his cheerful disposition is not much different than the offender who has insurance for retributive damages or who borrows the amount for retributive damages through a loan from friends, family, or a credit line. Retributive justice does not, in the main, focus on an offender's distills in response to punishment.⁸³ If the state (or jury) assigns retributive damages of \$10,000, then that is a sum of money you no longer have the liberty to control in the manner you see fit. In the criminal context, we do not tell offenders who need to pay a fine that they may not borrow money from friends and family to do so. And even when they do borrow money, competent offenders understand that they are still being sanctioned by the public.

As far as I can tell, the main difference between these scenarios is that insurance allows someone to pay money in advance toward a policy of coverage whereas a loan for a fine would typically occur after the misconduct occurs and a sanction is imposed.⁸⁴ Morally speaking, this

⁸² Cf. Adam Liptak, *A Mediocre Criminal, but an Unmatched Jailhouse Lawyer*, N.Y. TIMES, Feb. 8, 2010, at A12 (discussing Shon Hopwood, who flourished in the prison law-library as a jailhouse lawyer and now plans to attend law school).

⁸³ See generally Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CAL. L. REV. (forthcoming 2010) (arguing that the various ways in which people experience punishment is not critically relevant to way liberal democracies shape retributive punishment).

⁸⁴ Of course, if the insurer knew the harm to be insured was intentional, it would not only have no reason to insure the conduct (since the harm is not a function of probabilistic risk) but it could also be complicit in the wrongdoing if it knew the in-

distinction is irrelevant. Perhaps criminal offenders should not be permitted to borrow money from friends, banks, or family to pay off their criminal fines. But this again seems misguided by the intuition that a defendant should subjectively *feel* a setback of a particular number of disutils in his hedonic apparatus in response to the punishment. Importantly, and for reasons elaborated elsewhere,⁸⁵ this emphasis on subjective experience and the equation of punishment with suffering is not a retributive idea, *contra* some recent scholarship suggesting otherwise.⁸⁶ It is better thought of as more closely related to vengeance rather than retributive justice.

As I explain in the proposed framework, an insured who had insurance for retributive damages arising from reckless misconduct would still understand the award of retributive damages as a condemnatory intermediate sanction, and society should still feel comfortable with the idea that such damages are an intermediate civil sanction. After all, they go beyond compensation or victim vindication or cost internalization and the prerequisite for their award is that the court or jury found the defendant in violation of the retributive damages statutory structure (for example, by acting with malice or recklessness) thus creating a condemnatory rebuke of the defendant's actions.

Last, Professor Owen seems perplexed by my claims that insurance availability in the context of retributive damages predicated on reckless behavior can facilitate compensation from judgment proof defendants, reduce risks, and achieve loss spreading.⁸⁷ I am not sure what is "elusive" about the reasoning I used, but I am fairly certain that these arguments for insurance are commonly made.⁸⁸ Perhaps it was unclear why an avowed retributivist would care about these ostens-

sured was planning on harming someone and was seen as bankrolling or ratifying that conduct somehow.

⁸⁵ Markel & Flanders, *supra* note 83; *see also* David C. Gray, *Punishment as Suffering*, 64 VAND. L. REV. (forthcoming 2010) (critiquing those scholars who have failed to distinguish between punishment and suffering).

⁸⁶ *See generally* John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1038-39 (2009) (arguing that defendants' capacities for hedonic adaptation should call for adjustments in the amount of punishment they receive); Kolber, *supra* note 35, at 196-97 ("Any justification of punishment that ignores subjective experience, whether retributivist or consequentialist, is incomplete and doomed to fail.").

⁸⁷ *See* Owen, *supra* note 1, at 189 n.34 ("[Markel's] arguments with respect to judgment-proof defendants and loss spreading . . . are quite elusive.").

⁸⁸ *See, e.g.,* Baer, *supra* note 74, at 1035; George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1009-11 (1989).

ibly nonretributive considerations.⁸⁹ If that is the concern, it should be laid to rest, as I never identified myself as a monomaniacal retributivist who cared nothing about consequences or considerations other than just deserts. Indeed, I am an admitted (and early) adherent to the camp of consequentialist retributivism,⁹⁰ which tries to explain the internal intelligibility and attractiveness of a practice such as retributive justice without thinking that such a socio-legal practice must be maximized as against all other valuable social projects or moral duties.

CONCLUSION

It is a pleasure to have distinguished scholars such as Professors Owen and Krauss assess one's work and to have the opportunity to clarify or modify one's positions upon exchange and reflection. I am very grateful to both Professors Krauss and Owen for taking the time to read my work and respond to it in this forum. Their responses reveal a passionate concern for asking hard questions, and they have provided me (and others) with much food for thought. I certainly found the conversation stimulating, and I hope that it spurs future discussions about the endlessly interesting topic of punitive damages.

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⁸⁹ It is worth noting that the reduction of risks against persons' protected rights and interests is properly understood as relevant to retributive analysis. See Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 110-11 (discussing how philosopher Jean Hampton's retributive theory incorporates concerns for prevention); Markel, *Retributive Damages*, *supra* note 2, at 268 (arguing that under the theory of confrontational retributivism, the establishment of institutions furthering retributive justice will in practice facilitate the prevention of future wrongdoing).

⁹⁰ See, e.g., Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 834 (2007).