The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory

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THE ROLE OF RETRIBUTIVE JUSTICE IN THE COMMON LAW OF TORTS:
A DESCRIPTIVE THEORY

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Justitia est constans et perpetua voluntas jus suum cuique tribuens

I. INTRODUCTION

Retribution, or just desert, is usually perceived as one of the most prominent theoretical foundations of criminal liability. Tort jurisprudence does not appear to be the natural habitat for retributive concerns. The principle of just desert focuses on a single person and inflicts upon him a sanction whose severity is determined solely by the gravity of his wrongdoing. In contrast, tort law focuses on bipolar interactions. It links the wrongdoer directly to the victim of his wrong and obliges the former to compensate the latter for her injuries if certain conditions are met. The sanction is determined by the specific plaintiff’s loss, not by the gravity of the defendant’s wrong. Given its bipolar structure and rectificatory function, tort liability is technically inconsistent with the notion of retributive justice. This may explain why just desert is usually neglected in the theoretical analysis of tort law.

A few words must be said about existing theories of tort law. In the second edition of Torts and Compensation, Professor Dobbs presented the current debate in tort scholarship as resting mainly on this question: “Should judges decide cases on the basis of corrective justice with a view to righting wrongs and doing justice between the parties? Or should they decide cases according to what

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1. “Justice is the constant and perpetual wish to render every one his due.” I THE INSTITUTES OF JUSTINIAN, D.1.1.10. (Thomas C. Sandars trans., Longmans, Green and Co. 1934) (The four books of The Institutes of Justinian were originally issued in 535 C.E.).


3. See discussion infra Parts II.A, II.B.

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is good for society as a whole? This statement may give the reader a rudimentary understanding of what appears to be the most fundamental controversy in tort theory. In a way, this is a misstatement of the true nature of the theoretical dispute. Corrective justice is a form of justice and not a substantive moral standard. It determines how justice is done, but not when it should be done. Corrective justice has been defined as an arithmetical rectification of a wrong committed through a bilateral interaction. To determine what a wrong is, one needs a substantive moral theory, be it deontological or consequentialist. Clearly, an economist may say that a person commits a “wrong” when she acts in an inefficient way. In other words, corrective justice does not necessarily exclude welfare maximization. The latter is a substantive moral commitment, whereas the former is mere form. Consequently, describing the current debate in tort scholarship as a conflict between corrective justice theory and economic theory is somewhat inaccurate, but understandable.

Corrective justice theorists usually fuse Aristotle’s notion of corrective justice with a substantive non-consequentialist moral standard, most notably Kant’s principle of right, thereby depriving corrective justice of its true meaning as a mere mathematical form. On the other hand, law-and-economics theorists focus on substance and seldom use Aristotle’s notions of justice. So it may look as if corrective justice and welfare maximization are in dispute, although the

4. DAN B. DOBBS, TORTS AND COMPENSATION 840-41 (2d ed. 1993); cf. Schwartz, Mixed Theories, supra note 2, at 1801 (“Currently there are two major camps of tort scholars. One understands tort liability as an instrument aimed largely at the goal of deterrence, commonly explained within the framework of economics. The other looks at tort law as a way of achieving corrective justice between the parties.”).

5. Dobbs is using a normative rhetoric (should judges decide), but his characterization of the current theoretical debate is equally applicable on the descriptive level.


8. Richard A. Posner, The Concept of Corrective Justice in Recent Theories of Tort Law, 10 J. LEGAL STUD. 187, 201 (1981). Posner noted that “Once the concept of corrective justice is given its correct Aristotelian meaning, it becomes possible to show that it is not only compatible with, but required by, the economic theory of law. In that theory, law is a means of bringing about an efficient (in the sense of wealth maximizing) allocation of resources . . . .”

9. WEINRIB, supra note 7, at 80-83, 114-44; Richard W. Wright, Right, Justice and Tort Law, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 159, 160-71 (David G. Owen ed., 1995) [hereinafter Wright, Right]; Richard W. Wright, The Standards of Care in Negligence Law, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249, 255-63 (David G. Owen ed., 1995). Under the Kantian concept of right, “all that is in question is . . . whether the action of one of the two parties can be united with the freedom of the other in accordance with a universal law.” WEINRIB, supra note 7, at 95.

true conflict is a substantive moral one. In any event, there seem to be only two major contestants on the theoretical battleground: corrective justice and welfare maximization.

As is clearly evident from the title, this article attempts to fill a gap in existing tort theory. It transcends the current theoretical debate and asserts that the development of tort doctrine has been influenced or inspired – to a limited extent – by the notion of retributive justice. My first, rather modest, goal is to elucidate the concept of retributive justice as an independent form of justice. My second, more ambitious, goal is to offer a descriptive theory of the role of retributive justice in the common law of torts. I contend that this notion is entrenched in tort law, although it operates only in fairly limited circumstances.

Part II defines retributive justice, and explains what kind of social inequity it is supposed to set right, and how it operates to remove this inequity. Further, it defends the view that retributive justice is an independent form of justice, not a subset of one of the two classical Aristotelian forms. Finally, it surveys various factors that may be taken into account in determining the moral gravity of human conduct, the elemental input in any retributive operation.

Part III is the cornerstone of my thesis. It explains why retributive justice cannot be regarded as the principal rationale of tort liability and argues that it nevertheless plays a limited, but noteworthy, role in tort jurisprudence. The exceptional circumstances, in which retributive justice is applied, may be subsumed under two general paradigms: the prevention of abominable disproportion paradigm and the preservation of criminal justice paradigm. In cases of the first type, tort law strives to prevent an acute imbalance between the severity of the sanction imposed on one of the litigating parties and the gravity of her conduct. In cases of the second type, tort law attempts to vindicate criminal justice as prescribed by criminal law, thereby advancing the goals of the latter.

Because the tort process links two persons and because there are two possible deviations from the principle of retributive justice (over-punishment and under-punishment), this principle may be used to justify four types of argument in tort law: (1) liability should be limited, or excluded, to prevent over-punishment of the injurer; (2) liability should be limited, or excluded, to prevent under-punishment of the victim; (3) liability should be expanded to prevent under-punishment of the injurer, and (4) liability should be expanded to prevent over-punishment of the victim. The first and second possibilities are discussed in Part IV, the third and fourth in Part V.
II. THE NOTION OF RETRIBUTIVE JUSTICE

A. Defining Retribution

The notion of retribution has been one of the most prominent justifications for criminal punishment for centuries. In his magnum opus, *Metaphysische Anfangsgründe der Rechtslehre*, Immanuel Kant argued that this was the only possible justification for punishing lawbreakers. In his translated words:

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime . . . . He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens.

Retribution may thus be defined as imposing a sanction that corresponds to individual moral desert. The wrongdoer deserves to be punished on account of her wrongful conduct, and ought to be punished fairly regardless of the consequences of her punishment. Why do wrongdoers deserve to be punished? One possible reason is that retribution communicates the value of the victim by disproving a false claim of superiority implied by a wrongful act. The wrongdoer treated her victim as inferior, and the sanction nullifies any explicit, or implicit, assertion of the former’s superiority. This explanation does not seem very persuasive. The law punishes wrongdoers even when the wrong shows no

11. See sources cited supra note 2.
13. Id. at 138.
14. See George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 52 (1999) (“[B]y the use of the easily misunderstood term ‘retributive’, I simply mean imposing punishment because it is deserved on the basis of having committed a crime . . . . [R]etributivism is a jealous theory in the sense that whatever the beneficial side-effects of punishment, if it is not deserved it cannot possibly be justified.”).
15. Retributive justice is, therefore, *retrospective*, in that it looks backward to the particular wrongdoing, not onward to the consequences of the sanction.

[A] response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer’s action through the construction of an event that not only repudiates the action’s message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.

affront to the victim’s value, and it can hardly be said that doing so is inherently unfair in the retributive sense.

A more convincing reason involves the notion of reciprocity. Every person enjoys the fact that all people abide by legal rules. Every person must obey these rules in exchange for the concessions made by others who conform to the same rules. If a person does not abide by a specific rule, societal balance is undermined. Punishment is the price she is compelled to pay for the concessions made by law-abiding citizens, given that she did not pay for them in the usual way, namely by conforming to the same rules.17

A third, and more plausible, reason is that wrongful conduct may have two aspects that ought to be dealt with: a private aspect, represented by the harm caused to the immediate victim of the wrong, and a public aspect, represented by the aggregate outrage, dissatisfaction, and loss of confidence incurred by all members of society due to the occurrence of the wrong. The private aspect is the concern of corrective justice. The wrongdoer is obliged to rectify the private harm caused by her conduct. However, the public aspect of the wrong must also be addressed. The wrongdoer deserves to pay for it somehow, in order to restore the status quo ante in full and annul the wrong. Retribution is aimed at rectifying the public aspect of wrongful conduct committed by individuals.18

Retributive justice does not require that the sanction be identical to the wrong committed, unlike the ancient lex talionis;19 it merely insists on proportionality between the severity of the sanction and the gravity of the wrong.20 The sanction

17. See Jeffrie G. Murphy, KANT: THE PHILOSOPHY OF RIGHT 142-43 (1970) (“If the law is to remain just, it is important to guarantee that those who disobey it will not gain an unfair advantage over those who do obey voluntarily.”)

18. Retribution is different from satisfying the victim's feeling of indignation. The latter can be achieved, at least partially, through bilateral private litigation, and is therefore within the corrective justice domain. Walter J. Blum & Harry Kalven, Jr., The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence, 34 U. Chi. L. Rev. 239, 268-69 (1967) (“In large part corrective justice is concerned . . . with satisfying the victim's feeling of indignation. If the victim [cannot sue the injurer], he will not get the satisfaction of seeing his wrong righted.”) (footnote omitted).

19. “The law of retaliation, which requires the infliction upon a wrongdoer of the same injury which he has caused to another.” BLACK'S LAW DICTIONARY 913 (6th ed. 1990).

20. Peter Cane, Retribution, Proportionality, and Moral Luck in Tort Law, in THE LAW OF OBLIGATIONS 141, 143, 160-61 (Peter Cane & Jane Stepleton eds., 1998); Tony Honoré, The Morality of Tort Law – Questions and Answers, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 73, 87 (David G. Owen ed., 1995) [hereinafter Honoré, The Morality of Tort Law] (retribution requires imposition of a sanction that is in proportion to the moral gravity of the misconduct, and forbids imposition of a sanction that is out of proportion to the gravity of the misconduct); Tony Honoré, Responsibility and Fault 13, 83-84, 92, 123, 138 (1999) [hereinafter Honoré, Responsibility] (recognizing that the principle of retribution requires that a penalty should not be disproportionate to the moral gravity of the offence); Hampton, The Goal of Retribution, supra note 16, at 1690; Jeffrie G. Murphy, Does Kant Have a Theory of Punishment?, 87 COLUM. L. REV. 509, 530-32 (1987); Taslitz, supra note 16, at 335; Note, Punitive Damages and Libel Law, 98 HARV. L. REV. 847, 851 (1985) (“Fairness demands that the punishment be proportionate to the
must be fair in light of the conceptual and concrete features of the wrong for which it is imposed. The fairness of a legal sanction is determined by two complementary principles: cardinal, or absolute, proportionality and ordinal, or relative, proportionality.

According to the principle of cardinal proportionality, the sanction should not be too harsh or too lenient with respect to the absolute gravity of the wrong committed. For example, it seems unfair to impose a life sentence on a person who did not pay for parking; similarly, it seems unfair to impose a small fine on a cold-blooded murderer. According to the principle of ordinal proportionality, the sanction imposed for a certain wrong must reflect the relative gravity of the wrong: if wrong X is more serious than wrong Y, the sanction for wrong X must be more severe than the sanction for wrong Y, and vice versa. For example, the punishment for murder must always be more severe than the punishment for non-payment for parking.

The principle of cardinal proportionality sets the upper and lower limits of the possible sanction in a given society regardless of the relative gravity of the wrong. The principle of ordinal proportionality narrows those boundaries, so that the order of harshness of actual sanctions will correspond to the order of gravity of the given wrongs. Suppose, for example, that in a certain society there are ten possible methods of punishment: (1) mere reproach; (2) small fine; (3) medium fine; (4) large fine; (5) short term imprisonment (6-12 months); (6) medium term imprisonment (1-10 years); (7) long term imprisonment (10-25 years); (8) life sentence; (9) life sentence with penal servitude; (10) capital punishment. Suppose further that in the same society four offenses frequently occur: (1) traffic misdemeanors; (2) larcenies; (3) armed robberies; (4) murders.

Applying the principle of cardinal proportionality may lead to the following conclusions. A person who commits a traffic misdemeanor deserves a punishment in the range of (1)-(5); a person who commits larceny deserves a punishment in the range of (4)-(7); a person who commits armed robbery deserves a punishment in the range of (6)-(9); and a person who commits murder deserves a punishment in the range of (7)-(10). Yet, according to the principle of ordinal

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21. Honoré, The Morality of Tort, supra note 20, at 86-87. Honoré discusses how retribution requires “a rough correlation between the type of fault or conduct and the weight of the punishment imposed.” Id. at 87.

22. Andrew von Hirsch, Censure and Sanctions 29-46 (1993); Andrew von Hirsch, Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals 40-46 (1985); Cane, supra note 20, at 143, 161; Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 6-7 (1982).

23. Cane, supra note 20, at 143.

24. Id.


proportionality, the sanction imposed for a given offense must not be similar to, or less than, the sanction imposed for a less serious offense. If sanction (5) is imposed for a traffic misdemeanor, sanction (4) or (5) cannot be imposed for larceny; if sanction (7) is imposed for larceny, sanction (6) or (7) cannot be imposed for armed robbery; and if sanction (9) is imposed for armed robbery, sanction (8) or (9) cannot be imposed for murder, so only capital punishment is left.  

27. For further discussion of proportionality see supra notes 20-24. Cf. Youngjae Lee, The Constitutional Right against Excessive Punishment, 91 VA. L. REV. 677, 683-87 (2005) (contending that the “Eighth Amendment [prohibition] on excessive punishment should be understood as a side constraint” that embodies the principles of ordinal and cardinal proportionality).

28. ARISTOTLE, NICOMACHEAN ETHICS 1130b30-33 (David Ross trans., rev. ed. 1980). Although the Ross translation is highly esteemed in academic circles, it does not provide precise references to Aristotle’s original work. The references were consequently taken from ST. THOMAS AQUINAS, COMMENTARY ON ARISTOTLE’S NICOMACHEAN ETHICS (C.I. Litzinger trans., 1964) [hereinafter AQUINAS, COMMENTARY].

29. Id. at 1131b25-1132b20.

30. Id. at 1131a15-b24. For an interesting discussion of the two types of justice see THOMAS AQUINAS, SUMMA THEOLOGICA, pt. II-II, q. 61 (Fathers of the Eng. Dominican Province trans., 2nd ed. 1920) (1273) [hereinafter AQUINAS, SUMMA].

31. ARISTOTLE, supra note 28, at 1132b21-23.

32. Id. at 1132b24-27.

33. Id. at 1132b23-27.

34. Id. at 1132b28-31.
associations for exchange (i.e. voluntary transactions) reciprocity in accordance with a proportion (i.e. proportionate return) and not on the basis of precisely equal return—holds men together. In his subsequent discussion of proportionate return Aristotle apparently reduces the notion of reciprocity to a principle of fair bargaining, which may be termed commutative justice. It may be argued that this principle conforms to corrective justice, in its broad sense, as it shows how to rectify the social imbalance created by one-sided performance in voluntary bilateral transactions. However, Aristotle seems to recognize that the idea of proportionate return is also applicable to involuntary transactions, wherein one person wrongs another. This may be inferred from the following paragraph:

For it is by proportionate requital that the city holds together. Men seek to return either evil for evil—and if they cannot do so, think their position mere slavery—or good for good—and if they cannot do so there is no exchange, but it is by exchange that they hold together.

The first sentence restates Aristotle’s divergence from the ancient *lex talionis*: reciprocity requires proportionate requital, not an identical response. The second sentence consists of two parts; the second part applies the principle of proportionate requital to voluntary exchange. The first part seems to apply the same principle to wrongdoing: people seek to return evil for evil, yet the response ought to be proportionate to the initial evil. This seems to be an underdeveloped retributive intuition. Aristotle does not elaborate on the subject.

According to one view, corrective justice and distributive justice, as defined by Aristotle, exhaust the possible *modes* of justice. Consequently, retributive justice must be either a mere “subset of corrective justice” or a manifestation of distributive justice. I believe that this assertion is flawed, and that Aristotle’s implicit intuition is correct. A third, retributive, form of justice exists that is incompatible with either corrective or distributive justice.

35. *Id.* at 1132b31-1133a5. In other words, “justice” in commercial transactions means that considerations must be proportionate, but not identical.

36. Note, however, that Aristotle’s discussion of reciprocity has always presented problems of interpretation. There has never been a consensus as to what reciprocity is or how it is related to the overall topic of justice. *See* Gabriel Danzig, *The Political Character of Aristotelian Reciprocity*, 95 *Classical Philology* 399, 401-04 (2000).

37. *Id.* at 408-11.


40. Wright, *Right, supra* note 9, at 174.

41. *Id.* at 175. This view might find support in *Aquinas, Commentary, supra* note 28, at 308-09.

42. Anglo-American scholars frequently refer to retributive justice as a distinct form, but they do not explain why it is independent of the two Aristotelian forms. *See* Fletcher, *supra* note 14, at 58 (observing that “[r]etrIBUTive justice combines features of both corrective and distributive justice.”); Paul A. LeBel & Richard C. Ausness, *Toward Justice in Tobacco Policymaking: A
In my view, retributive justice is not a species of corrective justice. Corrective justice, unlike retributive justice, ignores the gravity of a person’s conduct if it has caused no harm to her legal adversary. Causation of harm is central to the application of corrective justice. There can be no rectification of harm in the absence of harm. Consequently, if both A and B expose C to identical unreasonable risks, but only the risk created by A materializes, corrective justice dictates that C may sue A, but not B. A retributive model would not tolerate B’s impunity. The causation-of-harm requirement in most perceptions of corrective justice makes it inherently incompatible with retributive justice.

It may be argued that retributive justice is nonetheless a species of corrective justice. This may be because retributive justice rectifies either the dignitary injury caused to the victim, through the use of punitive damages, or the non-discrete injury to the dignity and security of each and every member of society, through the imposition of a criminal sanction. So, whatever we may call retribution is, in fact, rectification of harm. Unfortunately, this assertion fails for two reasons. First, tort law overtly redresses intangible injuries. When courts wish to compensate for such losses they do not try to conceal their intention. Therefore, when they claim that a certain sanction is not intended to compensate for harm, as is the case with punitive damages, there is no reason not to believe them.

Second, rectifying a private harm ensuing from a given wrong is different from a retributive attempt to annul its public aspect. Once it is undisputed that a wrong has been committed, corrective justice and retributive justice function differently. Corrective justice isolates the wrongdoer and the victim, and obliges the former to repair the latter’s harm directly. Both the isolation of the bipolar relationship and the obligation directly to rectify a given harm are missing in retributive justice. Retribution is concerned with the aggregate societal outrage, dissatisfaction, and loss of confidence ensuing from the wrongful conduct, and not with the implications of the wrong within a bipolar relationship. It does not oblige the wrongdoer to repair any personal harm directly.


43. 
44. 
45. See RESTATEMENT (SECOND) OF TORTS § 46(1) (1965) (stating that a person is liable for severe emotional distress caused by his outrageous conduct).
46. See infra Section V.A.1.
47. Aristotle himself clearly defines corrective justice as “justice in transactions between man and man” (ARISTOTLE, supra note 28, at 1130b33-1131a3). This point is emphasized by AQUINAS, SUMMA, supra note 30, pt. II-II, q. 61, art. 3: “commutative justice directs commutations that can take place between two persons.”
48. In my view, applying the notion of retributive justice cannot be deemed as vindicating an independent state interest but as an attempt to vindicate the aggregate interest of law abiding citizens. Therefore, it cannot be said that retributive justice is a particular application of corrective justice to the relationship between the state and its mischievous citizen.
In addition, retribution is not a species of distributive justice. Retribution focuses on the moral desert of a single person, and does not distribute a benefit or a burden among two or more persons. One may argue that retribution is in fact a distribution of sanctions among wrongdoers according to the gravity of their wrongs; however, there is a fundamental difference between a just allocation of sanctions according to the principle of retribution and a just distribution in Aristotelian terminology. Distributive justice deals with the allocation of certain benefits or burdens among certain persons. If one of the participants got too much, there is at least one other participant who received too little. Amending a distributive injustice requires a transfer from those who received too much to those who received too little. Conversely, in a retributive allocation of sanctions the class of persons who may deserve punishment for wrongful conduct is indeterminate, and there is no given burden that has to be distributed. Each wrongdoer must get due punishment; an unfair punishment in one case does not swell or shrink the pool of sanctions available for other cases. The fact that one person has been punished too severely or too leniently does not mean that it will be impossible to impose just sanctions on others. Amending an injustice does not require a transfer.

In sum, retributive justice is not an offshoot of either corrective or distributive justice; it is an independent form of justice. It does not directly rectify harms caused through bilateral interactions or distribute a certain burden among certain people. Instead, retributive justice focuses on a single person, namely the wrongdoer, and makes her suffer due to the public disapproval of her conduct.

C. The Substance Behind the Form

The content of the wrong, for which a punishment is deserved, is not consensual, nor does it have to be. Retribution is a form of justice, an apparatus, and not an independent substantive moral standard. It determines how justice should be done whenever a wrong is committed. The definition of wrong is left to legal philosophers. In practice, courts and scholars tend to evaluate the severity of human conduct in light of some or all of the following features, which are derived from both consequentialist and deontological theories of law.


50. For this reason I do not find Kaplow and Shavell’s criticism of the idea of retribution very appealing. See Kaplow & Shavell, supra note 6, at 972, 1785-86 (“Retributive theorists assert . . . that punishment should follow automatically from the commission of a wrongful act, but they fail to offer a theory of which acts are wrongful . . . .”).

51. For a brief explanation of the deontology or consequentialism dichotomy, see Heidi M. Hurd, The Deontology of Negligence, 76 B.U. L. Rev. 249, 252-54 (1996) (“Consequentialists are committed to the claim that wrongdoing consists in failing to maximize good consequences and/or
The foremost feature is the magnitude of the injury expected as a result of the conduct. This feature is determined by three factors:

1. The value of the interest that was put at risk by the given conduct. For example, threatening a person’s life is generally more acute than jeopardizing her property, or a purely financial interest.52

2. The prospective change in the condition of the interest that was put at risk. Causing a small temporary bodily harm may not be as severe as depriving a person of her entire property. Special vulnerability of the victim may influence the prospective change in the state of her interest.53 For example, abusing a person may have a more serious impact on her mental health if she is still a small child.

3. The probability of the injury. Clearly, exposing a person to a 1% chance of physical injury is not as severe as exposing her to a 100% chance of the same injury (e.g. by assault).

A second, and important, factor considered in determining the gravity of the conduct is the level of the actor’s awareness of the risk created by her conduct and of her willingness to cause harm. A person who was unaware of the risk created by her conduct does not deserve the same sanction as a person who was aware of the risk created, and neither of these deserves the same sanction as one who actually intended to cause harm.54

Other relevant features bearing on the gravity of the wrongdoer’s conduct minimize bad consequences . . . . According to deontologists . . . what is morally wrong is exclusively a function of an agent's violation of [agent-relative maxims that impose obligations or grant permissions].”).

52. Cane, supra note 20, at 147. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (“We have instructed courts to determine the reprehensibility of a defendant by considering [among other factors] whether: the harm caused was physical as opposed to economic . . . .”).

53. Campbell, 538 U.S. at 419 (noting that a victim’s financial vulnerability is relevant in determining reprehensibility).


[T]he retributive function of imposing tort liability is served by allowing recovery for emotional distress, without proof of physical harm, where a defendant’s conduct was either intentional or reckless. Where a defendant was only negligent, his fault is not so great as to require him to compensate the plaintiff for a purely mental disturbance.

Id.; ALAN CALNAN, JUSTICE AND TORT LAW 114 (1997) (explaining that the retributive inclination heavily depends on the wrongdoer’s state of mind); Honoré, The Morality of Tort, supra note 20, at 86-87; Cass R. Sunstein et al., Assessing Punitive Damages (with Notes on Cognition and Valuation in Law), 107 YALE L.J. 2071, 2085-86 (1998) (arguing that societal outrage with certain behaviors may be expressed through retributive punishments); Taslitz, supra note 16, at 335-36 (stating that a wrongdoer’s intentions can temper, or heighten, the sanction).
include: the existence or non-existence of the victim’s consent; the repetitive or isolated nature of the conduct and its duration; and the wrongdoer's wealth (the wealthier he is, the more severe monetary sanction is required to give him his due). Utilitarian theorists would add the cost of precautions needed to prevent the injury, or reduce its probability, and the level of social utility of the risk creating conduct. The foregoing factors are used only to determine the gravity of the wrong committed. They are considered within the substantive moral evaluation of the conduct. When this preliminary issue is resolved, retributive justice calls for the imposition of a sanction that roughly corresponds to the severity of the conduct.

Regardless of any possible theoretical dispute about the significance of each of the foregoing factors, empirical studies show that ordinary people evaluate the severity of various conducts similarly. Not only do they rank the severity of various cases similarly, but they also have similar judgments of the absolute severity of discrete cases on a given scale.

III. THE LIMITED EXPLANATORY POWER OF RETRIBUTIVE JUSTICE IN TORTS

A. The Fundamental Flaws of Monistic Theories

One may argue that the main purpose of the law of torts is to get even with wrongdoers. Not because society wishes to deter future injurers, but because wrongdoers deserve to be penalized. The most prominent advocate of a retributive theory of tort law is probably Professor Martin Kotler, who states:

>[M]uch of the development of tort doctrine can be understood in terms of penalties . . . [N]ot only the decision of individual cases but also the development of tort doctrine as a whole can be seen as an attempt to punish conduct which violates certain core values that comprise the underlying basis of

56. Campbell, 538 U.S. at 419 (stating that whether the conduct involved repeated actions or was an isolated incident is relevant in determining reprehensibility); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991) (stating that the “existence and frequency of similar past conduct” is relevant in determining the magnitude of punitive damages).
57. Imposing a $1,000 fine on a hard working proletarian may be enough as punishment for accidentally injuring the property of another, but it will not be enough if the injurer is a very wealthy man who will not feel the loss of $1,000. This conclusion derives from the subjective nature of retributive punishment and the diminishing utility of wealth. The community wants to make the injurer suffer in a manner proportional to the wrong committed. To do so we need to know the effect of any sanction on his well-being, and, to assess the subjective impact of the sanction, we need to know how wealthy he is.
60. Id.
moral intuition. Punishment in this context is not a means of accomplishing some other goal – efficient cost allocation or accident reduction, for example – but a means of exacting revenge or retribution.\(^{61}\)

Although most of Kotler’s work is dedicated to defining the wrong for which a sanction is due, the main idea is simple: tort law is a retributive mechanism. With respect, I disagree. The notion of retribution may play a significant role in the laymen’s understanding of tort law;\(^{62}\) perhaps this understanding has even been endorsed by one or two judicial opinions.\(^ {63}\) But it is a total misconception of tort law from a theoretical standpoint.

First, the law of negligence, which is currently the most significant division of tort law, does not penalize wrongful conduct unless damage ensues; whereas, from a retributive perspective, wrongful conduct must yield the same sanction regardless of the fortuitous occurrence of harm. Whether harm occurs or not is a fortuity that does not alter the gravity of the conduct; hence it should have no effect on the severity of the sanction.\(^{64}\) There may be only a single attempt to explain why tort liability is retributively just despite its dependence on the

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62. Id. at 1233 ("[E]xperience indicates that punishment of wrongdoers is the dominant social perception of our tort system."); Gary T. Schwartz, The Ethics and the Economics of Tort Liability Insurance, 75 CORNELL L. REV. 313, 327 (1990) [hereinafter Schwartz, Liability Insurance].
63. See, e.g., Payton v. Abbott Labs, 437 N.E.2d at 176 (noting that tort liability has a retributive function).
64. Ariel Porat & Alex Stein, Tort Liability Under Uncertainty 104 (2001); Arthur Ripstein, Equality, Responsibility, and the Law 77 (1999) (stating that from a moral standpoint those who differ only by luck should fare equally well or badly); Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 YALE L.J. 1795, 1806 (1992) ("The criminal sanction will apply even if no individual interest has suffered direct injury. The paradigmatic civil sanction . . . applies to conduct that causes actual damage to an individual interest . . . ."); Richard W. Wright, Substantive Corrective Justice, 77 IOWA L. REV. 625, 668 (1992) [hereinafter Wright, Corrective Justice] (embracing Coleman’s criticism of retributive theories). See also Schwartz, Liability Insurance, supra note 62, at 327, 328. Schwartz observes that “from the standpoint of retribution tort law behaves curiously” when it imposes liability only after injury occurs. Id. at 328. Schwartz points out that a perfectly responsive insurance scheme in which premiums reflect the exact level of risk that the insured’s own conduct occasions may eliminate this oddity. Id. at 328 The effective burden borne by the insured becomes a function of his risk taking rather, than the fortuities of what accidents happen. Id. This kind of insurance, however, is unrealistic, as Schwartz himself recognizes. Id. at 320. Furthermore, responsive insurance, at least as Schwartz defines it, is responsive only to levels of risk and not to other determinants of the gravity of a wrongful conduct. Id. Cf. Christopher Schroeder, Corrective Justice, Liability for Risks, and Tort Law, 38 UCLA L. REV. 143, 152 (1990). Schroeder offers a “liability based on risk creation” scheme. However, as Schroeder himself admits, this theory does not square with retributive justice, because expected harm is not the only determinant of the gravity of one’s wrong. Id. at 152-53. In any case, this theory is a proposal for reform; it does not intend to explain tort law as we know it.
occurrence of harm,\textsuperscript{65} but it seems to me unconvincing.\textsuperscript{66}

Second, tort law often imposes liability for conduct that cannot be deemed morally wrong. This is done especially under rules of faultless liability, such as strict and vicarious liability.\textsuperscript{67} Strict liability is imposed for begetting harm. It is independent of moral wrongfulness unless one considers causation of harm to be wrongful \textit{per se}. Vicarious liability is imposed on one person for the causation of harm by another. This is an even more peculiar doctrine from a retributive standpoint, because the sanction is borne by a person who neither committed a moral wrong nor caused any harm.

Moreover, even within the law of negligence, liability may be imposed for conduct that can hardly be considered culpable. For example, under the objective standard of reasonable conduct, even a person who lacks the subjective ability to understand or abide by the standard of reasonableness may be deemed negligent.\textsuperscript{68} The negligence \textit{per se} doctrine poses a similar problem.\textsuperscript{69}

Third, even where wrongful conduct results in harm, the severity of the sanction imposed by tort law is determined by the fortuitous amount of the plaintiff’s loss, which is usually a poor measure of the gravity of the defendant’s wrong.\textsuperscript{70} The extent of tort liability may be incompatible with the principles of cardinal and ordinal proportionality. A slight and absentminded deviation from the objective standard of care may result in serious injury and may therefore lead

\begin{itemize}
\item \textsuperscript{65} Jeremy Waldron, \textit{Moments of Carelessness and Massive Loss}, in \textit{PHILOSOPHICAL FOUNDATIONS OF TORT LAW} 387, 401-05 (David G. Owen ed., 1995). Waldron argues that tort law exposes every wrongdoer “to a risk of liability exactly equivalent to the risk of loss that [she or he] imposed on [others].” \textit{Id.}, at 403.
\item \textsuperscript{66} First, as stated above, the magnitude of the risk is not the sole determinant of the gravity of one’s wrong. Second, it is doubtful that the creation of a particular risk may be regarded as both the wrong and the sanction in a retributive model. I intend to elaborate on Waldron’s theory in a future article.
\item \textsuperscript{67} Schwartz, \textit{Liability Insurance}, supra note 62, at 326-27; Steven D. Smith, \textit{The Critics and The “Crisis”: A Reassessment of Current Conceptions of Tort Law}, 72 \textit{CORNELL L. REV.} 765, 776 (1987); Stephen D. Sugarman, \textit{Doing Away with Tort Law}, 73 \textit{CAL. L. REV.} 555, 610 (1985). One may refine one’s definition of the role of retribution in tort law by distinguishing two branches of liability: fault liability which is rooted in retribution, and strict liability which is based on some other non-retributive goal. \textit{Cane, supra} note 20, at 159-60, 165, 171. This refinement, however, does not invalidate the other criticisms of the “retributive mechanism” perception.
\item \textsuperscript{68} \textit{Cane, supra} note 20, at 141-42; Smith, \textit{supra} note 67, at 776; Sugarman, \textit{supra} note 67, at 610; Wright, \textit{Corrective Justice, supra} note 64, at 668.
\item \textsuperscript{69} Under this doctrine, an unexcused violation of a legislative act or an administrative regulation, may in itself constitute negligence. \textit{RESTATEMENT (SECOND) OF TORTS} §§ 286, 288B (1965).
\end{itemize}
to extensive liability. This outcome violates the retributive principle of cardinal proportionality. A similar violation of this principle occurs where a considerable and knowing deviation from the standard of care results in a trivial injury.

Furthermore, a loss-based sanctioning system violates the principle of ordinal proportionality. Assume that A negligently injures B, and C negligently injures D, and that B’s physical injury is identical to D’s injury. If A and C committed indistinguishable wrongful acts, but B’s earning capacity is higher than D’s, then retributive justice would demand similar sanctions on A and C; whereas, tort law will impose a more severe monetary sanction on A. Yet if B and D have equal earning capacities, but A’s conduct is more culpable than C’s, then retributive justice mandates a stricter sanction on A, while tort law imposes similar sanctions on A and C.

Fourth, retribution insists on penalizing the actual wrongdoer. The burden must be borne by the one who deserves to bear it. Yet, even in instances where a wrongful act has been committed, the wrongdoer does not always bear the burden of tort liability. Very often, liability insurance removes the burden of liability from the actual wrongdoer.\(^\text{71}\) In many cases, the wrongdoer’s employer bears the cost.\(^\text{72}\) Although higher insurance rates and job penalties may punish some wrongdoers to some extent, these unofficial sanctions are erratic and rarely correspond to the gravity of the conduct.\(^\text{73}\) Ultimately, the wrongdoer does not get her due.

**B. The Role of Retributive Justice from a Pluralistic Perspective**

So far I have shown that retributive justice cannot be regarded as the principal rationale for tort liability. However, this does not mean that the notion of retributive justice is completely absent from tort jurisprudence. Next, I shall put forward a twofold thesis. My first assertion is that retributive justice plays a certain role in tort law. Imposition, or expansion, of tort liability is a penalty on the defendant, and exclusion, or limitation, of liability is a penalty on the plaintiff. If these penalties were at times insupportably unfair from a retributive standpoint, people would probably feel that there was something wrong with the system that imposed them. Given that the idea of retribution is deeply rooted in the moral intuition of every person, including judges and jurors, one would be very surprised if there were no sign of it in tort law.

My second assertion is that the use of retributive rhetoric, or logic, in the common law of torts is reserved for fairly limited circumstances that can be subsumed under two paradigms. This is also understandable. Tort law is concerned with bilateral settings in which one person has caused harm to another and is asked to repair that harm. It is, therefore, closely linked to the notion of corrective justice.\(^\text{74}\) A systematic attempt to scrutinize tort sanctions through the

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71. Smith, supra note 67, at 795; Sugarman, supra note 67, at 573-81, 609.
72. Sugarman, supra note 67, at 609.
73. Id.
74. See, e.g., Izhak Englard, The Idea of Complementarity as a Philosophical Basis for
prism of retributive justice would undoubtedly undermine tort law’s corrective structure. The need to preserve this fundamental structure reduces the importance that can be attached to retributive concerns in tort adjudication. Ergo, the expected role of retributive justice in tort law must be limited.

As will be shown below, retributive justice is one of the leading explanations, whether explicit or implicit, for certain components of tort doctrine. This does not necessarily mean that retributive justice receives its proper weight in tort law. Some may argue that it is given too much weight, others that its use is overly restrained. However, this article focuses on the actual utilization of retributive concerns in tort jurisprudence, and not on their precise normatively defensible role. The latter issue must await further research.

As tort adjudication links two persons, and given that there are two possible deviations from the principle of retributive justice (an excessively severe or a too lenient sanction), this principle may be utilized in four ways, at least theoretically. There may be a contraction of liability where the severity of the defendant’s conduct justifies a more lenient sanction than that prescribed by the notion of corrective justice; contraction, or even exclusion, of liability where the severity of the plaintiff’s conduct entails such a response; expansion of liability where the gravity of the defendant’s wrong requires a more severe sanction than that prescribed by the notion of corrective justice; and imposition or expansion of liability where corrective justice would leave an unduly onerous burden on the shoulders of the plaintiff.

Tort law is in fact responsive to retributive concerns within two conceptual paradigms:

• *Prevention of abominable disproportion.* Tort law can hardly ever impose a sanction that accurately fits the wrong. Disproportion between the gravity of the wrong and the severity of the sanction is an inevitable consequence of the primacy of corrective justice. Yet, tort law does not seem to tolerate especially alarming disparities between sanctions and wrongs. It endeavors to prevent the imposition of sanctions that are abominably too severe or too lenient, in light of the respective wrongs. The application of corrective justice is thereby limited when it leads to extreme injustice from a retributive perspective.

• *Preservation of criminal justice.* Tort law sometimes appears to function as a servant of criminal law. Several tort doctrines may be explained as an attempt to preserve and vindicate criminal justice, as prescribed by the principles and rules of criminal law and procedure. The principal justifications for criminal punishment are currently understood to be retribution and deterrence. Consequently, when tort law vindicates

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*Pluralism in Tort Law, in Philosophical Foundations of Tort Law* 183, 194 (David G. Owen ed., 1995) (“In the light of the initial bilateral setting of tort adjudication, special weight should be given to the notion of corrective justice”); Schwartz, *Mixed Theories, supra* note 2, at 1816.

75. See *supra* Subsection IV.B.1.c and Section IV.B.2.

76. See sources cited *supra* note 2.
criminal justice, it may be said to further these twin goals.

IV. THE ROLE OF RETRIBUTIVE JUSTICE IN LIMITING LIABILITY

A. Protecting the Injuror from an Excessive Sanction

1. The Main Idea

The concept of retributive justice cannot explain tort liability; tort law is basically a manifestation of corrective justice. It surely penalizes the wrongdoer but it also compensates the immediate victim of the wrong. One is interlinked with the other. Trying to punish the wrongdoer according to the principle of retributive justice may result in under-compensation or over-compensation in nearly all cases. Nonetheless, retributive justice is applied by the courts in extreme circumstances, where it is thought that imposing liability according to the principle of corrective justice may result in an abominable disproportion between the burden of civil liability and the severity of the defendant’s conduct. This utilization of retributive justice has two aspects. Courts find it unfair to impose an extremely onerous burden on a person whose only mischief was a slight absentminded deviation from an objective standard of care.\(^77\) At the same time, they find it iniquitous to let the doer of an extremely shocking and intentional act pay only for the actual loss caused, especially where, fortuitously, the loss is not serious.

The first component of the prevention-of-abominable-disproportion argument seems to be one of the most plausible justifications for two common law rules that exclude, or limit, liability for relational economic loss and relational emotional harm. Relational economic loss may be defined as financial loss consequent upon negligent infliction of harm to the person or property of a third party, or to an ownerless tangible resource. The same definition applies, mutatis mutandis, to relational emotional injury. These two topics shall be discussed consecutively.

2. Relational Economic Loss

Liability for relational economic loss is excluded in most common law jurisdictions. In another article, I have elaborated on the history and rigid application of the “exclusionary rule.”\(^78\) Some of the most frequently cited

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77. See Honoré, supra note 20, at 89 (“[T]he compensation payable may be disproportionate to what is often a minor fault. To avoid this disproportion, the retributive principle seems to require that defendants should not be exposed to disproportionately heavy losses”). Honoré posits that insurance may be a needed solution for the problem of disproportionate burden. Id. at 89-90. However, insurance is not always obtainable, especially where the risk is indeterminate.

78. See generally Ronen Perry, Relational Economic Loss: An Integrated Economic
justifications for this rule rest on the fear of open-ended liability. In the seminal case of Ultramares Corp. v. Touche, which is not a relational loss case, the late Justice Cardozo observed that allowing claims for pure economic loss may expose the wrongdoer to “liability in an indeterminate amount for an indeterminate time to an indeterminate class.” Nonetheless, the same rationale has been invoked in numerous relational loss cases as the principal reason for exclusion of liability. Two questions must be answered in this respect. First, is the fear of open-ended liability reasonable? Second, why should the likelihood of indeterminate liability result in exclusion of liability for relational losses?

The answer to the first question seems self-evident. A negligent infliction of injury to one person may result in economic loss to her relatives, customers, creditors, suppliers, employers, partners, and so on; the economic loss of any entity may economically affect others without any foreseeable end. Similarly, injuring a factory may cause economic loss to its suppliers of raw materials, distributors, and consumers. If the halted factory was manufacturing components for products assembled in another factory, the latter may also suffer economic loss. Employers of the halted factories may lose their income, at least temporarily, further, owners of shops and restaurants where those workers or their dependants customarily shop and dine may lose profits, and so on.

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79. 174 N.E. 441 (N.Y. 1931).

80. Id. at 444. This case was a negligent misrepresentation case. Id. at 442. Defendants had been employed by a third-party to prepare and certify a balance sheet exhibiting the condition of third-party’s business. Id. Defendants were aware that a third-party would use its certificate of audit to obtain credit for the operation of its business. Id. Although capital and surplus were certified to be intact, “in reality, both had been wiped out and the business was insolvent.” Id. On the faith of defendants’ certificate, plaintiff made several loans to defendant. Id. at 443. Plaintiff brought an action against the defendants to recover the loss it suffered in reliance upon the audit. Id.


82. See, Champion Well Serv., Inc. v. NL Indus., 769 P.2d 382, 385 (Wyo. 1989) (holding that an employer cannot recover economic losses consequent upon a negligent infliction of harm to its key employee).

83. See, e.g., PPG Indus., Inc. v. Bean Dredging, 447 So. 2d 1058, 1061-62 (La. 1984) (denying recovery by a customer of the gas company when a gas pipeline was negligently injured by the defendant, and the customer was required to obtain gas from another source during the repairs at an increased cost); see also J.A. Smillie, Negligence and Economic Loss, 32 U. TORONTO L.J. 231, 241 (1982) (illustrating that interruption of production in one factory may cause economic loss to those who supply it with raw materials, those who distribute the products and those who purchase its products).

84. Smillie, supra note 83, at 241.


86. Smillie, supra note 83, at 241.
Relational losses may spread serially or in parallel. For instance, when an electricity cable is damaged, resulting in total black out in an industrial area, the economic losses of the halted plants are parallel; they all ensue from a single injury, the damage caused to the property of the electricity company, not from each other. When a railway bridge owned by the state is harmed, the lost profits of the private railway company using the bridge, and the additional outlays incurred by the owner of the cargo that cannot reach its destination in the usual way, are serially linked. The loss of the cargo owner results from the inability of the railway company to function, which was caused by the damage to the bridge.

In most cases, however, relational losses grow in complex patterns. Any relational loss, whether or not it has parallels, may generate further losses, which are parallel but serially linked to their antecedent. Each of the subsequent losses may, itself, become the source of further losses. For example, marine oil pollution may cause economic loss to fishermen, oystermen, crabbers, and their like. These losses are parallel. The inability of a certain fisherman to work may cause economic loss to seafood restaurants or retailers that generally buy his catch. Their losses are parallel and serially linked to the fisherman’s loss. The inability of a seafood merchant to buy from fishermen may also cause financial loss to fish canneries, fish processing factories, and more. Theoretically, such proliferation of economic losses is boundless, so the number of potential relational victims is vast and indeterminate. This phenomenon has rightly been termed “the ripple effects,” “the domino effect,” or the “chain reaction.”

The potential number of victims may, in itself, have some normative significance, but its relevance largely depends on the rough correlation between the number of valid claims and the extent of tort liability. The larger the number of valid claims the more extensive the liability; if the potential number of

87. See, e.g., Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).
88. Cf. In Re Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 625 (1st Cir. 1994) (denying claims by seafood dealers, tackle shop operators, restaurant owners and employees, a scuba equipment and canoe rental shop, and a variety of other shoreline businesses for economic loss arising from an oil spill).
93. See, e.g., Stevenson v. East Ohio Gas, Co., 73 N.E.2d at 203 (“[T]o permit recovery of damages . . . would open the door to a mass of litigation which might very well overwhelm the courts . . . .”); Perry, supra note 78, at 761-63 (discussing the benefits of primary loss-spreading to society).
victims is indeed large and uncertain, then potential liability is also large and uncertain.

Now, the second question: why is the likelihood of open-ended liability deemed normatively relevant? Several answers are possible; however, one is of special interest to this article. It is very frequently said by Commonwealth jurists that allowing recovery for relational losses may give rise to an abominable disproportion between the severity of the sanction and the gravity of the wrong, given that liability may be unlimited. An insignificant and perhaps absentminded deviation from the objective standard of care cannot justify the imposition of such an onerous penalty. As stated by Justice Gibbs in the well-known Australian case of Caltex Oil (Austl.) Pty. Ltd. v. The Dredge “Willemstad”

[I]f through the momentary inattention of an officer, a ship collided with a bridge, and as a result a large suburban area, which included shops and factories, was deprived of its main means of access to a city, great loss might be suffered by tens of thousands of persons, but to require the wrongdoer to compensate all those who had suffered pecuniary loss would impose upon him a burden out of all proportion to his wrong.

This type of reasoning is also employed by American jurists. For example, in Phoenix Prof’l Hockey Club, Inc. v. Hirmer, the Supreme Court of Arizona observed that the imposition of liability for relational losses “could impose a severe penalty on one guilty of mere negligence.” Similarly, the Superior Court of Pennsylvania concluded in Aikens v. Baltimore & Ohio R.R. Co., that imposition of such liability “would create a disproportion between the large amount of damages that might be recovered and the extent of the defendant’s

94. For example, it may be said that as the extent of tort liability grows the marginal deterrent effect diminishes, either because no further precautions are available or because the total amount of the claims exceeds the upper limit of the injurer’s liability (natural or legal). Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1029 (5th Cir. 1985).


96. (1976) 136 C.L.R. 529 (Austl.).

97. Id. at 551; see id. at 562-63 (Stephen J., concurring), 591 (Mason J., concurring). For further analysis of the Caltex decision see Perry, supra note 78, at 724.

98. 502 P.2d 164, (Ariz. 1972) (dismissing an action by an employer to recover out-of-pocket expenses in hiring a replacement for an employee injured as a result of defendant's negligence).

99. Id. at 165.

fault.” 101 The Second Restatement of Torts adopted the exclusionary rule, 102 and specifically embraced the likelihood of abominable disproportion as one of its principal justifications. 103 The same reasoning has been cited by numerous tort scholars. 104

The prevention-of-abominable-disproportion argument is obviously inapplicable where the extent of potential liability is limited ex lege. For example, the liability of ship owners for losses caused by collision has been limited, by statute, for centuries in most Western jurisdictions. 105 Currently, there are two established methods for such limitation. In the United States, for example, the owner’s liability cannot exceed the amount or value of her interest in the vessel, and its freight then pending. 106 In Australia, Canada, and England, on


102. RESTATEMENT (SECOND) OF TORTS § 766C (1979). This section excludes liability for negligent interference with contract or prospective contractual relation. Id. It does not deal with "pure" economic expectations that are not based on existing or expected contracts. Id. at Comment a. However, it seems that if tort law does not protect contractual expectations from negligent interference by third parties, then it does not protect pure expectations. Note that the drafts of the third Restatement of Torts do not currently consider liability for non-physical harm, although § 766C is occasionally mentioned. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 6 cmt. d, and § 29 cmt. a (Proposed Final Draft No. 1 2005).

103. RESTATEMENT (SECOND) OF TORTS § 766C cmt. a (1979) ("[C]ourts apparently have been influenced by . . . the probable disproportion between the large damages that might be recovered and the extent of the defendant's fault . . .").


The liability of the owner of any vessel . . . for any embezzlement, loss, or destruction by anyone of any property, goods, or merchandise shipped or put on board of such vessel, or for
the other hand, the maximal liability of the owner is proportionate to the tonnage of the vessel. 107 In the twentieth century, liability of airlines was limited in a similar manner. 108 Whenever potential liability is limited, liability insurance is readily available, and abominable disproportion is highly unlikely. In these cases, however, the exclusionary rule may be supported by other legitimate considerations. 109

3. Relational Emotional Harm

Relational emotional harm is an emotional distress consequent upon a negligent infliction of harm to the person, or property, of another. It may result from: witnessing the occurrence in which a third party, or some property, is injured or imperiled; learning about the ensuing injury after its occurrence; sympathizing with the mental anguish of another relational victim. According to the traditional rule of the common law, relational emotional harm was irrecoverable. At the beginning of the twentieth century, liability for negligent infliction of emotional harm was recognized in the United States only in so far as that harm culminated in illness or bodily impact. 110 Pure emotional (intangible) harm was irrecoverable. 111 Moreover, even when emotional distress culminated in physical manifestation, the victim could not recover if it was occasioned by fear of injury to property or to the person of another. 112

any loss, damage, or injury by collision . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Id.; see also THOMAS J. SCHONBAUM, ADMIRALTŸ AND MARITIME LAW 808-33 (3rd ed. 2001).


108. Civil Aviation (Carriers' Liability) Act, 1959, § 11A (Austl.) (limiting carrier liability to 260,000 SDRs as a general rule); Carriage by Air Act, R.S.C. ch. C-26, art. 22 sched. 1 (1985) (Can.) (limiting carrier liability to the sum of 125,000 francs for each passenger); Carriage by Air Act, 1961, 9 & 10 Eliz. 2, c. 27, § 4 sched. 1 (Eng.) (limiting carrier liability by aggregate number of passengers).

109. For example, if there is a limited pool that all valid claims need to share, courts may deny recovery for relational losses in order to guarantee full recovery for injuries to physical interests which are deemed more worthy of legal protection.

110. RESTATEMENT (SECOND) OF TORTS § 313(1) (1965) (“If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if [certain conditions are met] . . . ”).

111. RESTATEMENT (SECOND) OF TORTS § 436A (1965) (“If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.”).

112. S. Ry. Co. v. Jackson, 91 S.E. 280 (Ga. 1916) (finding no recovery for fright induced by the apprehension for another person's safety); Cleveland, C., C. & St. L. Ry. Co. v. Stewart, 56 N.E. 917, 922 (Ind. App. 1900) (stating that mere fright was not enough to rise to the level to incur
Most, if not all, jurisdictions eventually recognized at least a limited exception to the exclusionary rule. The most restrictive approach allows a person to recover for emotional harm that she suffered from witnessing another person being injured in a certain incident only if she was physically injured in the same incident. This has been called the physical-impact doctrine. Today, this rule prevails in few jurisdictions. A more generous approach, once conceived as the majority view in the United States, enables a person to recover for relational emotional harm if she was among those who were physically endangered by the conduct that caused the physical injury to the third party. This is perceived as the zone-of-danger doctrine, and it still holds in many jurisdictions. In its narrow form, this doctrine applies only where the emotional harm culminates in physical manifestation. In its broader form, the zone of danger doctrine applies to any serious emotional harm. From a logical perspective, the zone-of-danger exception encompasses (and is therefore broader than) the physical-impact exception.

In many common law jurisdictions liability for relational emotional harm was expanded even further. Dillon v. Legg was the turning point. The Supreme Court of California overruled its earlier decisions, holding that liability for relational emotional harm should depend on its foreseeability. In determining whether the harm was reasonably foreseeable, courts should consider: (1) “whether the plaintiff was located near the scene of the accident or a distance...
away from it”; (2) whether or not the plaintiff’s shock resulted from the “sensory and contemporaneous observance of the accident”; (3) whether or not the plaintiff and the victim were “closely related.” The court stated that “the evaluation of these factors [would] indicate the degree of the defendant’s foreseeability” in each case. The court confined its ruling to cases in which the plaintiff’s fear was manifested in physical consequences. This requirement was eventually replaced by the need to show that the plaintiff’s emotional distress was serious.

More than half of the states have adopted Dillon’s holding that recovery for emotional distress suffered by bystanders is not limited to persons who suffer physical impact in the same incident or are in the zone of danger. Among these states, only a few allow recovery on the basis of seriousness and foreseeability (with reference to the Dillon guidelines). All other states hold that foreseeability does not suffice, and that other specific requirements must also be met. In many of them, including California, the Dillon guidelines have been practically converted, sometimes with variations or additions, into substantive limitations on recovery. For example, it is generally necessary that the plaintiff have a close relationship with the injured victim. Additionally, in most states, recovery is allowed only where the harm culminates in physical manifestation, or is at least serious or severe.
In summation, courts have always been reluctant to impose liability for relational emotional harm. In the past, courts excluded liability for these harms altogether. Some jurisdictions still adhere to the exclusionary rule, subject to a limited exception, such as the physical-impact exception or the zone-of-danger exception. Others currently resolve cases of relational emotional harm with concrete limiting formulas. Only a few jurisdictions allow recovery on the basis of severity and foreseeability, but seem hesitant to conclude that emotional harm is indeed foreseeable unless the circumstances are such that liability could have been allowed in other jurisdictions as well.131

Relational emotional harms, just like relational economic losses, tend to ripple. Whenever a person is negligently injured, many others may suffer emotional distress. The first cycle of relational victims includes those who witnessed the accident or its consequences, be they relatives, friends, neighbors, or casual bystanders. The second cycle includes those who learned about the injury from another source, who was or was not a bystander. The third cycle includes those who sympathize with the mental anguish of other relational victims. A single physical injury may bring about numerous relational emotional afflictions. Once again, although the potential number of victims may, in itself, have some normative significance, its relevance greatly depends on the correlation between the number of valid claims and the extent of liability. If the potential number of victims is large and uncertain, the scope of potential liability is also large and uncertain.

Consequently, the rhetoric of the courts in cases of relational emotional harm has been somewhat similar to that employed in cases of relational economic loss. Courts have frequently observed that allowing recovery for relational emotional harm may result in an unfair sanction, out of proportion to the gravity of the wrong committed. This line of reasoning was and is still being used by the proponents of all methods of limitation. For example, in its well-known decision in Tobin v. Grossman132 the Court of Appeals of New York concluded that

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131. See, for example, Gardner, 435 S.E.2d at 328, where the Supreme Court of North Carolina observed that a plaintiff’s absence from the scene at the time of the tort, although not decisive, militates against the foreseeability of her resulting emotional distress.

relational emotional harm must be irrecoverable, stating that “[e]very injury has ramifying consequences, like the ripplings of the waters, without end,” and that allowing recovery may give rise to “unduly burdensome liability.” Over twenty years later, the Court of Appeals opened an avenue to bystander recovery, but due to the weighty influence of the Tobin reasoning, expansion was very limited. Likewise, the Supreme Court of Georgia very recently adopted the physical-impact doctrine. It apparently believed that “to avoid . . . liability out of all proportion to the degree of a defendant’s negligence, . . . the right to recover for negligently caused emotional distress must be limited [in this manner].”

The history of the zone-of-danger doctrine also revolves around the fear of abominable disproportion. In Waube v. Warrington, for example, a woman “was looking out the window of her house watching her child cross the highway, and witnessed the negligent killing of the child by the defendant”; she died soon after because of emotional upset. The Supreme Court of Wisconsin stated that a defendant’s duty cannot “be extended to any recovery for physical injuries sustained by one out of the range of ordinary physical peril as a result of the shock of witnessing another’s danger.” The court opined that allowing recovery for relational emotional harm would impose liability that is “wholly out of proportion to the culpability of the negligent tort-feasor.” This paragraph was cited with approval by the Supreme Court of California as one of the justifications for denying recovery outside the zone-of-danger exception in Amaya v. Home Ice, Fuel & Supply Co., only five years prior to Dillon.

Both Wisconsin and California have departed from the restrictive approach employed in Waube and Amaya, but the abominable disproportion reasoning has been applied by many courts that still adhere to this time-honored

133. Id. at 419-20.
134. Id. at 424.
135. Id. at 423.
137. Lee v. State Farm Mut. Ins. Co., 533 S.E.2d 82, 85 (Ga. 2000). According to the traditional approach in Georgia, mental suffering was recoverable only where it resulted from the physical injury sustained by the physical impact. Id. at 84. The court in Lee stated that [w]hen . . . a parent and child sustain a direct physical impact and physical injuries through the negligence of another, and the child dies as the result of such negligence, the parent may attempt to recover for serious emotional distress from witnessing the child’s suffering and death without regard to whether the emotional trauma arises out of the physical injury to the parent. Id. at 86-87.
138. Id. at 86 n.7.
139. 258 N.W. 497 (Wis. 1935).
140. Id. at 497.
141. Id. at 501.
142. Id.
methodology. For example, although the Court of Appeals of New York eventually lifted the absolute bar to bystander recovery, it adopted a rather narrow version of the zone-of-danger doctrine \textsuperscript{145} under the influential caveat laid down in \textit{Tobin}.\textsuperscript{146} Similarly, the Court of Appeals of Arizona recently upheld a constricted version of the zone-of-danger exception to the traditional rule of no recovery,\textsuperscript{147} stating that “[a] dominant concern has been the perceived need to maintain a proportionate economic relationship between liability and culpability, the failure to do which underlies much of the criticism of the foreseeability test.”\textsuperscript{148} Finally, the Supreme Court of the United States applied similar reasoning in \textit{Consolidated Rail Corp. v. Gottshall},\textsuperscript{149} where it held that liability for negligent infliction of emotional distress under the Federal Employers’ Liability Act (FELA)\textsuperscript{150} was limited to plaintiffs who were within the zone-of-danger.\textsuperscript{151}

Even in its radical decision in \textit{Dillon}, the Supreme Court of California explained that there was a need to “limit the otherwise potentially infinite liability which would follow every negligent act.”\textsuperscript{152} The court believed, however, that the foreseeability test, accompanied by the requirement for physical manifestation, sufficed.\textsuperscript{153} In his forceful dissent, Justice Burke challenged this assumption. Liability based on foreseeability seemed to him too open-ended.\textsuperscript{154} When the same court converted the \textit{Dillon} guidelines to preconditions for recovery more than twenty years later, it did so explicitly in order to “avoid limitless liability out of all proportion to the degree of a defendant’s negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread.”\textsuperscript{155}

The need to prevent abominable disproportion was regarded as the primary

\textsuperscript{145}. Trombetta v. Conkling, 626 N.E.2d 653, 656 (N.Y. 1993) (finding that victim’s aunt is not a member of immediate family); Bovsun v. Sanperi, 461 N.E.2d 843, 848 (allowing recovery only if the plaintiff was (1) within the zone of danger and (2) a member of the direct victim’s immediate family).

\textsuperscript{146}. Trombetta, 626 N.E.2d at 656; Bovsun, 461 N.E.2d at 847; Tobin v. Grossman, 249 N.E.2d 419, 424.


\textsuperscript{148}. \textit{Id}. at 27.

\textsuperscript{149}. 512 U.S. 532, 551.

A more significant problem is the prospect that allowing such suits can lead to unpredictable and nearly infinite liability for defendants . . . . This concern . . . is based upon the recognized possibility of genuine claims from the essentially infinite number of persons, in an infinite variety of situations, who might suffer real emotional harm as a result of a single instance of negligent conduct.

\textit{Id}. at 552.


\textsuperscript{151}. \textit{Gottshall}, 512 U.S. at 557.

\textsuperscript{152}. \textit{Dillon}, 441 P.2d at 919.

\textsuperscript{153}. \textit{Id}. at 920-21.

\textsuperscript{154}. \textit{Id}. at 927-28 (Burke, J., dissenting).

\textsuperscript{155}. Thing v. La Chusa, 771 P.2d 814, 826-27.
consideration to be weighed against “the impact of arbitrary lines [that] deny recovery to some victims whose [harms are] very real.” Similar reasoning was applied by other courts that adopted analogous prerequisites for liability. This line of reasoning has been supported in the academic literature. It is arguable, as one author noted, that “[a]llowing enormous damages to flow from merely negligent conduct runs the risk of unfairly penalizing a morally innocent defendant and of being perceived as grossly disproportionate to the defendant’s fault.” One of the key concerns that ought to be addressed, when trying to solve the problem of relational emotional harm, is the need to prevent a grossly disproportionate penalty for merely negligent conduct. Even those who reject the exclusionary rule, with its impact or zone-of-danger exceptions, understand that some mechanism must be utilized to prevent abominable disproportion.

The preceding analysis leads to the following conclusions. First, although courts and scholars differ on the proper method of limitation, no one has ever contended that any foreseeable emotional harm caused by the negligent infliction of injury upon a third party must be remedied. Second, this consensus can be partly explained by the fear of abominable disproportion between the gravity of one’s conduct and the severity of the ensuing sanction. In this article I do not attempt to determine where the line should be drawn. Perhaps there is no justifiable stopping-point beyond the zone of danger. Maybe a combination of seriousness and foreseeability is defensible. However, all possible resolutions are undeniably sensitive to the prospect of retributive injustice.

4. Addressing Several Criticisms

In the previous sections I argued that the courts have been reluctant to impose liability for relational losses at least partly due to the fear of an abominable disproportion between the gravity of the defendant’s wrong and the severity of the sanction that it may entail. Critics may argue that the same fear exists with regard to negligently caused mass-disasters, such as an airplane crash, a collision at sea, or the collapse of a building. In cases of mass disaster the potential loss is indeed very large, and tort liability for the entire loss may be wholly out of proportion to the gravity of the wrong committed; nonetheless, the common law does not exclude liability for physical injuries caused in such incidents. Consequently, it cannot be said that prevention of abominable disproportion is

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156. Id. at 827; see also id. at 821 (indicating that the post-Dillon decisions have not given adequate consideration to the “importance of avoiding the limitless exposure to liability that the pure foreseeability test of 'duty' would create.").


158. Miller, supra note 127, at 19-20.

159. Id. at 3, 20, 35.

160. Id. at 35-36.

161. “Cause” is used here in its factual sense (i.e. cause-in-fact or causa sine qua non).

Second, even if recovery for physical injuries were not legally limited, the physical impact of an accident—as opposed to its economic ramifications—would usually be determinate.\footnote{163}{Supra note 108.} The ability to assess in advance the magnitude of the loss makes liability insurance far more feasible, and this militates against abominable disproportion between the burden actually incurred by the injurer and the gravity of his or her conduct. Relational losses, on the other hand, may ripple indeterminately, making full liability insurance either infeasible or extremely expensive. In either case, an injurer may have to bear a grossly disproportionate sanction.

Third, proportionality is not the primary concern of tort law. On the contrary, it is usually overshadowed by other legitimate goals of civil liability. It is arguable that the non-retributive considerations that support liability in cases of mass-disaster are much stronger than the considerations that support liability for relational losses, both economic or emotional. For example, one may say that life and bodily-integrity are a lot more valuable than purely economic or emotional interests from a social perspective, and, therefore, merit more

\footnote{164}{Supra notes 106-07 and accompanying text.}
\footnote{165}{33 U.S.C. § 2704 (2005).}
\footnote{166}{42 U.S.C. § 2210 (2005).}
\footnote{167}{E.g., Ryan v. New York Central R.R. Co., 35 N.Y. 210, 216-17 (1866) (finding that a person who negligently starts a fire is not liable to his neighbors for all property damage resulting from the fire).}
\footnote{168}{For example, an airline, or an airplane manufacturer, can predict with accuracy the number of casualties in case of an airplane crash; similarly, a building contractor can foresee the number of victims in case of a collapse.}
comprehensive protection by the law.\textsuperscript{169} It may, thus, be justifiable to render them more extensive protection, even if the outcome is extremely unjust from a retributive perspective.

Critics of my fundamental argument may also argue that while allowing recovery for relational losses may give rise to disproportion between the extent of liability and the gravity of the defendant’s conduct, exclusion of liability will definitely result in disproportion between the burden incurred by the relational victim and her complete innocence.\textsuperscript{170} However, from a retributive perspective the fairness of imposing a certain sanction on a certain person must be determined by a single factor, namely the gravity of the wrong for which the sanction is imposed.\textsuperscript{171} If the severity of a certain sanction does not fit the gravity of the wrong, retributive justice mandates not to impose it, regardless of any other retributive injustice that may ensue:\textsuperscript{172} one cannot resolve one retributive injustice by actively creating another. The status of the relational victim will be similar to that of a person injured by non-negligent conduct of a doctor, a hurricane or lightning.\textsuperscript{173} If it is believed that her suffering merits reparation, on retributive or other grounds, other mechanisms should be employed to deal with it (such as social security or mandatory insurance).

Furthermore, it seems that courts do not consider the grievance that may result from exclusion of liability for relational losses to be as appalling as the one that may arise from imposition of liability. If the exclusionary rule were abolished, a person who deviated from the objective standard of care only slightly and absentmindedly could nonetheless face a staggering, and abominably disproportionate, liability. On the other hand, exclusion of liability makes the innocent victim incur only a small fraction of the aggregate loss.\textsuperscript{174}

Lastly, no argument based on the injurer’s fault and the victim’s innocence can ignore two common traits of tort settings. First, the defendant is very often the “innocent” employer of the actual wrongdoer. Second, at least in certain cases of relational economic loss, the victim may not be deemed wholly innocent.


\textsuperscript{170} Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821, 823.

\textsuperscript{171} See sources cited supra note 20.

\textsuperscript{172} One may think of another example of this principle. When a murderer is incarcerated, his family may lose a breadwinner and incur serious financial, and emotional, harm. If the family members are innocent, the sanction imposed on them will probably be considered too harsh. From a retributive perspective, this does not make the criminal less deserving of his punishment.

\textsuperscript{173} In other words, the relational victim is not entitled to recover for her loss, despite the fact that she may have been completely innocent.

\textsuperscript{174} Cf. Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513, 525

It begs the question to argue that “If the loss is out of all proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's innocence.” That obvious truism could be urged by every person who might adversely feel some lingering effect of the defendant's conduct, and we would then be thrown back into the fantastic realm of infinite liability.

\textit{Id.} (citations omitted).
because she could easily have protected herself from the harm through first-party insurance, contractual provisions, *ex ante* precautions, or *ex post* measures of mitigation.  

**B. Punishing the Victim for Illicit Conduct**

1. The Notion of Ex Turpi Causa Non Oritur Actio

   **a. Introduction**

   In the seminal case of *Holman v. Johnson*, Lord Mansfield acknowledged, for the first time in English jurisprudence, the principle later known as *ex turpi causa non oritur actio*, or the illegality defense. In his words, “[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.” Lord Mansfield made this statement in a contractual context, and its applicability within the law of contracts is now uncontested. It is universally accepted that a contract whose formation or performance is criminal, immoral, or otherwise counter to public policy should be deemed invalid.

   In many jurisdictions the doctrine of *ex turpi causa* eventually extended to tort law. Clearly, whenever an action in tort is based on a breach of an illegal contract, such action must fail. But the abstract idea that enforceable legal rights should not arise from unlawful conduct does not, and should not, depend upon the exact manifestation of unlawfulness. As noted by Lord Diplock forty years ago:

   
   [E]x turpi causa non oritur actio, is concerned not specifically with the lawfulness of contracts but generally with the enforcement of rights by the courts, whether or not such rights arise under contract. All that the rule means is that the courts will not enforce a right . . . if the right arises out of an act

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175.  *See* Perry, *supra* note 78, at 757-58, 766-68, 774.
177.  *Id.*
181.  *See*, e.g., Hall v. Corcoran, 107 Mass. 251, 253 (1871), in which Justice Gray states that [C]ourts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of the action is in contract or in tort, the test in each case is, whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part.
   *See also* Miller v. Bennett, 56 S.E.2d 217, 219 (Va. 1949) (“The principle applies to civil actions, whether based on tort or contract.”).
committed by the person asserting the right... which is regarded by the court as sufficiently anti-social to justify the court’s refusing to enforce that right.\textsuperscript{182}

The line between the contributory negligence defense and the \textit{ex turpi causa} doctrine is not always drawn correctly. The former focuses on the fact that the plaintiff’s conduct endangered herself,\textsuperscript{183} whereas the latter focuses on the unlawfulness of the plaintiff’s conduct in relation to others. The justification for the contributory negligence doctrine is that one cannot sue another for the materialization of risk created by oneself.\textsuperscript{184} As such, contributory negligence and its modern variation—comparative negligence—clearly comply with the notion of corrective justice.\textsuperscript{185} The defendant must compensate the plaintiff for any harm caused by his wrongful conduct, while the plaintiff must bear her loss or a certain fraction of it if it was caused by her own wrongful conduct.

Although the \textit{ex turpi causa} defense is normally contingent on the causal connection between the plaintiff’s conduct and her harm,\textsuperscript{186} it is much less

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\textsuperscript{183} \textit{Restatement (Second) of Torts} § 463 (1986). “Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection...” \textit{Id.}; \textit{see also id.} § 466(b) (defining contributory negligence as “conduct which... falls short of the standard to which the reasonable man should conform in order to protect himself from harm”).

\textsuperscript{184} Smith v. Smith, 19 Mass. 621, 623 (1824); Whirley v. White, 38 Tenn. 610, 619 (1858) (“[If] by ordinary care and prudence plaintiff might have avoided her harm, she must be regarded as the author of her own misfortune.”); Francis H. Bohlen, \textit{Contributory Negligence}, 21 Harv. L. Rev. 233, 256 (1908).

[Where... the defendant’s delinquency would have caused no harm to the plaintiff save for his own misconduct in not caring for himself, there is no reason that the law should regard one as the delinquent rather than the other. There is no reason to throw upon the one rather than the other the burden of preventing an accident actually preventable by proper care on the part of either, or of answering for the ensuing harm. It is for this reason, and because the law will not aid a plaintiff who having the power and consequent duty to protect himself has failed to do so... that the defendant is relieved from liability by the plaintiff's contributory negligence. \textit{Id.}

\textsuperscript{185} For further discussion of the substitution in negligence actions of the principles of damage apportionment embodied by the comparative negligence doctrine for the “all or nothing” approach of the contributory negligence doctrine see Thomas R. Trenkner, Annotation, \textit{Modern Development of Comparative Negligence Doctrine Having Applicability to Negligence Actions Generally}, 78 A.L.R.3d 339 (1977). \textit{See also Restatement (Second) of Torts} § 467, Special Note (1965) (explaining the notion of comparative negligence without using the actual term). For a Tennessee perspective see Brian P. Dunigan & Jerry J. Phillips, \textit{Comparative Fault in Tennessee: Where Are We Going, and Why Are We in this Handbasket?}, 67 Tenn. L. Rev. 765 (2000).

\textsuperscript{186} \textit{See, e.g.}, Havis v. Iacovetto, 250 P.2d 128, 130 (Colo. 1952) (finding that plaintiff’s illegality does not bar recovery because it was not a proximate cause of the injury); Johnson v. Thompson, 143 S.E.2d 51, 54 (Ga. 1965) (finding that plaintiff’s gambling does not bar recovery when there is no causal connection); Martinez v. Rein, 146 So. 787, 787 (La. Ct. App. 1933)
interested in the fact that the plaintiff’s conduct contributed to her harm and in the extent of such contribution than in the fact that the plaintiff’s conduct was offensive to the public at large. \(^\text{187}\) Accordingly, \textit{ex turpi causa} cannot be regarded as a manifestation of corrective justice. The Supreme Court of Canada correctly observed that “[i]iability for tort arises out of the relationship between the alleged tortfeasor and the injured claimant,” \(^\text{188}\) whereas, the power of the court to deny recovery under \textit{ex turpi causa} “represents concerns independent of this relationship.” \(^\text{189}\) Based on the foregoing, the argument that the \textit{ex turpi causa} defense was implicitly abolished by the legislature when it replaced the traditional rule of contributory negligence with the more flexible principle of comparative negligence is unfounded. \(^\text{190}\) The above argument is an inevitable outcome of a misconception of \textit{ex turpi causa}. \(^\text{191}\)

Traditionally, \textit{ex turpi causa} functioned as a bar to recovery for any harm incurred by the plaintiff during, or following, the performance of any criminal offense, regardless of its severity. \(^\text{192}\) The underlying rationale for this practice was that those who transgress the criminal code should not receive aid from the

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\(^{187}\) See, e.g., Newton v. Illinois Oil Co., 147 N.E. 465, 468 (Ill. 1925) (finding that plaintiff was not entitled to recover for the wrongful death of his son at work because he permitted his son to be employed contrary to the prevailing child labor laws); Fristoe v. Boedeker, 194 Ill. App. 52, 57 (1915) (finding that plaintiff was not entitled to compensation for severe injuries incurred while he was hunting on private land without the owner's permission, when such sanctions were a misdemeanor under State law); Lencioni v. Long, 361 P.2d 455, 457-58 (Mont. 1961) (finding that plaintiff was not allowed to recover for injuries sustained during his work at a brothel, the operation of which was illegal under State law); Curtis v. Murphy, 63 Wis. 4, 7-8 (1885) (finding that plaintiff was not allowed to recover from a hotel whose clerk stole plaintiff’s money because he checked into that hotel to have illicit intercourse with a prostitute).
In other words, a person who breaks the law does not deserve to be protected by the law against the consequences of her own conduct. A few notable examples demonstrate the harshness of this perception. In Bosworth v. Swansey, the plaintiff was injured because of a defect in the road for which defendant was responsible. However, because the accident occurred on Sunday, and traveling on Sunday for secular purposes was prohibited by criminal statute, the court denied recovery. In Heland v. Lowell, the plaintiff was injured while riding his horse “at a rate faster than a walk” across a bridge maintained by the defendant in violation of a penal by-law. Following the rationale in Bosworth, the court stated that “when a plaintiff’s own unlawful act concurs in causing the damage that he complains of, he cannot recover compensation for such damage.”

194. A second frequently used justification for the traditional version of ex turpi causa was that “one may not profit from one’s own wrongdoing.” Manning v. Brown, 689 N.E.2d 1382, 1384 (N.Y. 1997); see Wiley v. County of San Diego, 966 P.2d 983, 990 (Cal. 1998). However, this rationale seems dubious given that in most cases exclusion of liability does not, in fact, deprive the plaintiff from any profits of her wrongdoing. See Gail D. Hollister, Tort Suits for Injuries Sustained during Illegal Abortions: The Effects of Judicial Bias, 45 VILL. L. REV. 387, 392 (2000); Joseph H. King, Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law, 43 WM. & MARY L. REV. 1011, 1044 (2002); see also THE LAW COMMISSION, CONSULTATION PAPER NO. 160: THE ILLLEGALITY DEFENCE IN TORTS 77 (2002) [hereinafter THE ILLLEGALITY DEFENCE IN TORTS]. “[I]n most tort cases the rationale of preventing a claimant profiting from his or her own wrongdoing will not justify the application of the illegality doctrine.” Id.

A third justification for the traditional rule is that it deters potential criminals. For several persuasive criticisms of this reasoning see King, at 1045-46 (observing, among other things, that most criminals do not expect to be negligently injured, and, therefore, would seldom be influenced by the illegality defense; that whenever there is an apparent risk of personal injury it generates, by itself, a significant deterrent; and that in any case ex turpi causa can hardly augment the deterrent effect of criminal sanctions).

195. 51 Mass. 363 (1845).
196. Id. at 365.
197. Id. at 365-66; accord Hinckley v. Penobscot, 42 Me. 89, 93 (1856); Read v. Boston & Albany R.R. Co., 4 N.E. 227 (Mass. 1885) (finding that plaintiff locomotive engineer was barred from recovering for injuries caused by defective track because he was running an unauthorized Sunday train); Lyons v. Desotelle, 124 Mass. 387, 390 (1878) (finding that unlawful traveling on Sunday bars recovery for harm resulting from defendant’s negligence); Smith v. Boston & Maine R.R., 120 Mass. 490, 493 (1876); Gregg v. Wyman, 58 Mass. 322, 325-26 (1849) (finding that plaintiff could not recover for injury to horse rented in violation of a statute prohibiting horse rental on Sunday). For further discussion of cases denying recovery for injuries sustained while violating Sunday laws see THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACTS 152-55 (1880).
199. Id. at 408.
Denial of recovery under the traditional understanding of \textit{ex turpi causa} was a sanction attached to \textit{every} crime, beyond any sanction prescribed by criminal law. It served as an integral part of criminal punishment, although it was formally imposed by tort law. So its justifications had to be similar to those of criminal punishment, i.e. retribution and deterrence.\textsuperscript{201} In time, courts came to understand that the draconian application of \textit{ex turpi causa} was inconsistent with at least one of its apparent justifications: denial of recovery for any crime-related harm, regardless of the gravity of the crime and the severity of the actual or expected punishment under criminal law, seems unfair from a retributive perspective.\textsuperscript{202}

At present, most jurisdictions do not deny recovery for any harm or injury suffered by an offender during or in consequence of her own criminal conduct.\textsuperscript{203} The old doctrine applies in limited circumstances only. The extent of its application varies among different jurisdictions, but it does not usually transcend the following archetypal categories: (1) cases in which plaintiff’s conduct is participated in the same illegal conduct. . . . \[I]\textsuperscript{1} If a sanction has already been imposed on the plaintiff in respect of his or her unlawful conduct, then the additional denial of civil relief might be regarded as unduly harsh.

\textit{Id.; } Ernest J. Weinrib, \textit{Illegality as a Tort Defence}, 26 U. TORONTO L.J. 28, 45-46 (1976) (setting forth that if criminal penalty is retributively just, an additional sanction would make the aggregate penalty undue).

\textsuperscript{201} Cf. Harold S. Davis, \textit{The Plaintiff’s Illegal Act as a Defense in Actions of Tort}, 18 HARV. L. REV. 505, 513 (1905) (explaining that the doctrine of \textit{ex turpi causa} operates “in the nature of a punishment for the plaintiff’s wrongdoing.”).

\textsuperscript{202} Hall v. Herbert, [1993] 101 D.L.R. (4th) 129, 152 (Cory J., concurring). “There does not seem to be any rational basis for a court to impose an additional sanction upon a convicted person by denying what may well be fair and just compensation for injuries received as a result of a tortious act.” \textit{Id. See also THE LAW COMMISSION, CONSULTATION PAPER NO. 154: ILLEGAL TRANSACTIONS: THE EFFECT OF ILLEGALITY ON CONTRACTS AND TRUSTS} 106 (1999) [hereinafter THE EFFECT OF ILLEGALITY ON CONTRACTS].

The simple refusal of civil relief is generally a very arbitrary and blunt method of meting out punishment, since the penalty is not in any way tailored to fit the illegality involved. And clearly there will be a risk of “double punishment” where the plaintiff has already been convicted of a criminal offence or made to pay damages for a legal wrong in respect of the same conduct. . . . \[I]\textsuperscript{2} If a sanction has already been imposed on the plaintiff in respect of his or her unlawful conduct, then the additional denial of civil relief might be regarded as unduly harsh.

\textit{Id.; } Ernest J. Weinrib, \textit{Illegality as a Tort Defence}, 26 U. TORONTO L.J. 28, 45-46 (1976) (setting forth that if criminal penalty is retributively just, an additional sanction would make the aggregate penalty undue).

\textsuperscript{203} See, \textit{e.g.}, Barker v. Kallas, 468 N.E.2d 39, 44 (Jasen J., concurring) (“This so-called ‘outraw’ doctrine of tort law -- i.e., depriving a violator of the law of any rights against a tort-feasor - has long since been discarded by most, if not all, American jurisdictions.”); \textit{cf. THE ILLEGALITY DEFENCE IN TORTS}, supra note 194, at 9 (“[T]he law does not allow even a criminal who has committed a serious offence to be deprived of all his or her rights under either the civil or criminal law. This would amount to outlawry, and this has quite clearly, and in our view rightly, been rejected by the courts.”) (discussing UK law).
overlap, are discussed in detail below. It will be shown that denial of liability in at least two of them may have a retributive foundation.

b. Punishing Extremely Grieved Conduct

In recent decades, courts employed *ex turpi causa* to exclude recovery by plaintiffs whose conduct was perceived to be extremely grievous. For example, in *Barker v. Kallash* a teenager was injured when a pipe-bomb that he was constructing using materials supplied by the defendants exploded. The Court of Appeals of New York reasoned that, when the plaintiff’s injury is a direct result of his knowing and intentional participation in a criminal act, he cannot seek compensation for the loss when the criminal act is judged to be *so serious an offense* as to warrant denial of recovery. Justice Jasen opined that the court would bar recovery only if the plaintiff’s violation of the law was either gravely immoral or grievously injurious to the public interests, as is the case with rape or arson. In this particular case, “the plaintiff’s grievous criminal conduct . . . was so plainly violative of paramount public safety interests, [that] the public policy of this State dictates that recovery be denied.” In subsequent cases, the Court of Appeals adhered to the rule that liability will be denied only if the plaintiff’s conduct constitutes such a serious offense that public policy precludes her recovery. This condition was usually met when the plaintiff knowingly and significantly jeopardized the lives of other people, as in the *Barker* case.

Similarly, the Supreme Court of Alaska concluded in *Ardinger v. Hummel* that the principle of no-recovery applied only in cases involving serious criminal conduct that intentionally threatened the safety of others, such as homicide, rape, and arson. The court reasoned that the harsh sanction of no-recovery should be reserved for extreme circumstances. Consequently, the court rejected the

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204. The examples that follow in the text are taken from American case law. However, similar rhetoric may be found in non-American jurisdictions. See, e.g., *Standard Chartered Bank v. Pakistan Nat’l Shipping Corp.* [1998] 1 Lloyd’s Rep. 684, 705-06 (Eng.). “Whatever theory founds a defence of *ex turpi*, the defendant must establish [among other things] that the plaintiff’s conduct is so clearly reprehensible as to justify its condemnation by the Court.” *Id.* at 705.

205. 468 N.E.2d 39.

206. *Id.* at 41 (emphasis added). The court reiterates the same idea throughout the opinion. *Id.* at 41-44; see also *id.* at 45 (Jasen J., concurring) (arguing that recovery should be denied only where plaintiff's conduct was “so egregious an offense that permitting recovery would be inimical to the public interest”).

207. *Id.* at 45 (Jasen J., concurring).

208. *Id.* For further examples see King, *supra* note 194, at 1025-27.


210. *Manning*, 689 N.E.2d at 1384-85 (finding that reckless unauthorized joyriding without a driver's license constitutes a serious violation).

211. 982 P.2d 727 (Alaska 1999).

212. *Id.* at 736.

213. *Id.*
argument that a person driving a car without its owner’s permission, in violation of an Alaska statute, should not be allowed to recover for injuries incurred in the course of such driving.\textsuperscript{214}

In \textit{Lewis v. Miller},\textsuperscript{215} the Superior Court of Pennsylvania found that a person whose violation of the law shows conscious indifference to her own safety and to public safety generally cannot recover for her consequent injuries.\textsuperscript{216} Denial of recovery requires proof of “wantonness,” at a minimum.\textsuperscript{217} In \textit{Lewis}, the claim was dismissed because the decedent was found to have engaged in wanton conduct, namely participating in a “drag race” on a dangerous blind curve while intoxicated.\textsuperscript{218}

Finally, in \textit{Oden v. Pepsi Cola Bottling Co.},\textsuperscript{219} the Supreme Court of Alabama found that the law precludes “any action seeking damages based on injuries that were a direct result of the injured party’s knowing and intentional participation in a crime \textit{involving moral turpitude}.\textsuperscript{220} The same court explained, in a subsequent case, that a crime involving moral turpitude exhibits “an inherent quality of baseness, vileness, or depravity in regard to the duties one owes to society.”\textsuperscript{221} \textit{Ex turpi causa} was reserved, at least in theory, for extreme cases.

The court in \textit{Oden} denied recovery to the parents of an adolescent who was killed when a soft-drink vending machine fell on him while he attempted to steal drink cans.\textsuperscript{222} This case does not seem as heinous as \textit{Barker} or as aggravating as \textit{Lewis}. Those who believe that \textit{ex turpi causa} must be reserved for especially heinous cases may, consequently, consider its application in \textit{Oden} inappropriate; however, the significance of \textit{Oden} lies not in the specific application of the archaic doctrine, but in the determination of its limited role in tort law. The court applied this limitation more convincingly two years later, when it found that knowingly being a passenger in a car driven by another, without license or permission, does not involve base, vile, or depraved conduct. Hence, the passenger may recover for injuries resulting from the negligence of third parties.\textsuperscript{223}

The view that denial of recovery on grounds of illegality ought to be reserved for the most grievous offenses appears to be motivated by the notion of

\begin{itemize}
  \item \textsuperscript{214} \textit{Id.} “The offense on which [defendant] relies cannot reasonably be equated with crimes such as homicide, rape, and arson for purposes of barring recovery on public policy grounds. . . . Such a violation does not represent the level of serious criminal conduct generally necessary to bar recovery.” \textit{Id.}
  \item \textsuperscript{215} 543 A.2d 590 (Pa. Super. Ct. 1988).
  \item \textsuperscript{216} \textit{Id.} at 592-93.
  \item \textsuperscript{217} \textit{Id.} at 592.
  \item \textsuperscript{218} \textit{Id.}
  \item \textsuperscript{219} 621 So. 2d 953 (Ala. 1993).
  \item \textsuperscript{220} \textit{Id.} at 955 (emphasis added).
  \item \textsuperscript{221} Lemond Constr. Co. v. Wheeler, 669 So. 2d 855, 861 (Ala. 1995).
  \item \textsuperscript{222} \textit{Oden}, 621 So. 2d at 954.
  \item \textsuperscript{223} \textit{Lemond Constr. Co.}, 669 So. 2d at 861.
\end{itemize}
retributive justice. This hypothesis is supported by two possible lines of argument. First, it may be said that the judicial restriction of the traditional doctrine was aimed at preventing abominable disproportion between the severity of the sanction imposed on the offender and the gravity of her conduct. To understand this contention one must recall that traditionally ex turpi causa was used to deny recovery for any crime-related harm. This is the positive baseline.

Assume, for the moment, that the criminal offender is punished by criminal law. If the criminal penalty is determined considering the need for just desert, an additional sanction in the form of no-recovery for personal injuries in tort may produce disproportion between the crime and the punishment. Indeed, this type of injustice may occur regardless of the gravity of the offense. This perception might call for a total abolition of ex turpi causa.

However, as courts seem reluctant to abolish well established and time-honored common law doctrines, it is more likely that highly problematic doctrines will be restricted rather than eliminated by the judiciary. It is, therefore, conceivable that while hesitant to abolish the ex turpi causa defense, courts will limit its application to extreme cases in order to ensure that the discrepancy between the gravity of the wrong and the severity of combined sanction is not too significant. The more grievous the conduct, the less likely it is that depriving the offender of her civil remedy will result in considerable (not to say abominable) disproportion. The more heinous the crime, the more likely it is that denial of tort recovery will not violate the principles of proportionality at all.

The alternative line of argument is that, regardless of the historical baseline, denial of tort liability when the plaintiff’s illegal conduct is “serious” may be justified within the prevention of abominable disproportion paradigm. This is so only if a second factor is introduced into the equation: the lenience of the actual or expected criminal sanction. The ex turpi causa defense can be justified as preventing abominable disproportion if without its application the plaintiff may escape any penalty, or face a relatively lenient sanction, for a serious wrongdoing. This may happen when the plaintiff’s crime is left with impunity, or when her conduct is outrageous but not prohibited by penal law. Private law, tort law in particular, will not always be capable of fixing such abominable disproportion. It can do so only when the unpunished offender seeks the aid of the court in a civil action linked with her illicit conduct. On the other hand, given its commitment to corrective justice, tort law does not attempt to fix regular discrepancies. Courts concede corrective justice for the sake of proportionality only in rare cases.

This line of argument may explain cases like Barker, Manning, Lewis, Oden, and many others, in which the plaintiffs committed serious crimes but were not indicted in criminal courts. The plaintiff in Barker could not be held criminally responsible for his conduct because he was a minor at the time of the incident.

224.  Deterrence does not seem to be an equally persuasive explanation. See supra note 194.
225.  One should bear in mind that the principles of ordinal and cardinal proportionality do not dictate a precise sanction for a given wrong. They allow the imposition of various sanctions within a certain range.
In Manning, the plaintiff plead guilty to charges relating to her crime, but she later withdrew her plea and was never prosecuted, perhaps due to the injuries she sustained.\(^{227}\) The victims in Lewis and Oden were killed while participating in “serious” criminal activities, so they could not be indicted at all.\(^{228}\) It is true that the courts in all four cases emphasized the seriousness of the conduct and neglected the absence of a criminal sanction, but perhaps they might have changed their decision if the offenders had been convicted and incarcerated for their grievous crimes.

### c. Preserving Criminal Justice

In many jurisdictions the primary function of *ex turpi causa* is to preserve criminal justice as prescribed by criminal law.\(^{229}\) It prevents tort liability from overriding the criminal sanction, either directly, by compensating the offender for the criminal penalty she had to endure, or indirectly, by allowing the offender to retain the benefits of her crime. The Supreme Court of Canada explicitly limited the application of the *ex turpi causa* defense in this manner. In *Hall v. Herbert*,\(^{230}\) Justice McLachlin, with whom Justices La Forest, L’Heureux-Dubé and Iacobucci concurred, opined that:

> [C]ourts should be allowed to bar recovery in tort on the ground of the plaintiff’s immoral or illegal conduct only in very limited circumstances. The basis of this power, as I see it, lies in the duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit to an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand.\(^{231}\)

Although there are no similar clear-cut definitions of the role of *ex turpi causa* in other jurisdictions, this doctrine is frequently used to vindicate criminal justice in contemporary Anglo-American case law, as will be demonstrated in the following paragraphs.

Clearly, one of the most prominent functions of *ex turpi causa*, in modern times, is to prevent compensation for a criminal penalty that was rightly imposed, and for criminal proceedings that were justifiably initiated.\(^{232}\) For example, in

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228. Then again, it may be argued that in these two cases a capital punishment was too harsh.
231. Id. at 160.
232. See Weir, supra note 202, at 50-54.
Braunstein v. Jason Tarantella, Inc., the producers of an obscene film sued its distributors, *inter alia*, for negligence in distributing the film in a way that subjected the producers to criminal prosecution and for fraud in misrepresenting the number of places where such a film could be legally shown. The Appellate Division of the Supreme Court of New York found that since the producers themselves committed the crime of obscenity in New York, they could not sue the distributors for making it possible for the producers to be caught and prosecuted. To allow recovery would, in essence, permit the producers to recover the fine they paid upon their conviction. Civil liability would offset a duly imposed criminal sanction.

Similarly, it was held that a man convicted of manslaughter for the fatal shooting of another could not recover damages from the manufacturer and the seller of the shotgun for the legal consequences of his deeds; a woman who was convicted for murdering her husband could not recover damages from her psychiatrist on the theory that he negligently failed to prevent her from committing the murder; and, a man, convicted and incarcerated for kidnapping, raping, and assaulting a woman while intoxicated, could not recover damages from a bar and a bartender on the theory that they caused his imprisonment by negligently serving him alcoholic beverages after he became intoxicated.

An English counterpart is *Clunis v. Camden & Islington Health Authority.* In *Clunis*, the plaintiff was convicted of manslaughter, and he argued that the defendant’s failure to provide him with proper mental health care led to the commission of the crime and his subsequent conviction. The plaintiff’s claim was dismissed. Had he been allowed to recover, his punishment might have been diminished because of the monetary amends.

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234. *Id.* at 864.
235. *Id.* at 866.
236. *Id.* Prior to dismissing the tort claims the Appellate Division rejected the producers' contractual claim for the proceeds of distributing the film in New York and in other states, saying that to allow recovery "would be to call upon this court to serve as pay master of the wages of crime." *Id.* at 865.
237.  Adkinson v. Rossi Arms Co., 659 P.2d 1236, 1239-40 (Alaska 1983). The court's denial of liability was phrased as a no-duty decision, but the formal pigeon hole into which the case was classified is of little relevance here. The court stated that "allowing a criminal . . . who has been convicted of an intentional killing, to impose liability on others for the consequences of his own anti-social conduct runs counter to basic values underlying our criminal justice system." *Id.* at 1240.
241.  *Id.* at 984-85.
242.  *Id.* at 990, 993.
denial of liability thwarted the plaintiff’s clear attempt to shirk responsibility and preserved criminal justice.²⁴³

Denial of compensation for criminal penalty may be justified, at least in part, by the notion of just desert. If tort law allowed the offender to receive compensation for being tried and punished it would counteract criminal justice; the law would give with one hand (tort law) what had been taken with the other (criminal law). As observed by Justice Denning in Askey v. Golden Wine Co.,²⁴⁴ the objects of criminal law “would be nullified if the offender could recover the amount of the fine and costs from another by process of the civil courts.”²⁴⁵ Denial of recovery maintains criminal justice, thereby advancing its primary goals of retribution and deterrence.

A second function of ex turpi causa is to prevent the criminal offender from acquiring the benefits of her illegal conduct, thereby sustaining the severity of the criminal punishment. In fact, this function is the only one that is truly consistent with one of the most frequently cited justifications for the ex turpi causa doctrine in Anglo-American jurisprudence: “[O]ne may not profit from one’s own wrongdoing.”²⁴⁶ For example, in Mettes v. Quinn,²⁴⁷ the plaintiff sued her former attorney, claiming that his negligent advice caused her fraudulent acts to be uncovered, depriving her of the expected benefit of the fraud.²⁴⁸ It was held that a court “will not aid a fraudfeasor who invokes the court’s jurisdiction to profit from his own fraud by recovering damages.”²⁴⁹

An English parallel is Thackwell v. Barclays Bank Ltd.,²⁵⁰ in which the plaintiff claimed reimbursement of sums that represented the proceeds of a fraud

²⁴³. See also Colburn v. Patmore,[1834] 149 Eng. Rep. 999, 1003 (Exch. Div.). In that case, plaintiff publisher, who had been convicted and fined for publishing a criminal libel, sued the editor who had published the material without plaintiff’s knowledge. Id. at 999-1000. The plaintiff sought to force the editor to compensate him for the amount of the criminal fine the plaintiff had been forced to pay because of the editor’s acts and recovery was denied. Id. at 999. Allowing recovery in such a case would have nullified the effect of the criminal law.


²⁴⁵. Id. at 38.

²⁴⁶. See King, supra note 194 (quoting Manning v. Brown, 689 N.E.2d 1382, 1384 (N.Y. 1997)).


²⁴⁸. Id. at 550-51.

²⁴⁹. Id. at 551; accord Lewis v. Brannen, 65 S.E. 189, 191 (Ga. Ct. App. 1909) (denying claim by plaintiff who lost the proceeds of selling a medicine due to the negligent supply of one of its ingredients by the defendant because he sold the drug without the necessary license); J.R. Kessinger (Wood River Sand Co.) v. Standard Oil Co., 245 Ill. App. 376, 380-88 (1925) (denying plaintiff’s claim for damages when his excavation business was shut down due to the defendant’s negligence because excavation was illegal); Desmet v. Sublett, 225 P.2d 141, 141-42 (N.M. 1950) (denying plaintiff’s claim for compensation for lost profits from illegal operation of his truck, which had been wrongfully detained by the defendant); Harper v. Grasser, 150 P. 1175, 1176 (Wash. 1915) (finding that defendants were not entitled to damages on a counterclaim for being prevented by the plaintiff from fishing with a drag seine, given that this fishing method was prohibited).

in which he participated. \(^{251}\) Recovery was denied on grounds of illegality. The court observed that if it allowed recovery, it would “be indirectly assisting the commission of a crime.”\(^{252}\) Note that the *ex turpi causa* defense is used not only to bar an entire claim, but also to disallow compensation under particular heads of damages, if only those reflect the lost proceeds of an illegal business, occupation, or activity.\(^{253}\)

Deprivation of criminal profit may also be justified, at least in part, by the notion of retributive justice. If tort law enabled the offender to obtain the benefits of her crime, then criminal law would be undermined: the expected profit would offset the expected sanction and allow crime to pay. By preventing the offender from acquiring the criminal profit, criminal justice is preserved. Since criminal justice is based on retribution and deterrence, denial of liability also serves these twin goals.\(^{254}\) From a retributive perspective denial of recovery for the loss of criminal profits sustains the necessary correlativity between crime and punishment.

In several tort cases, it was held that liability for crime-related losses should be denied if there was *statutory intent* to the effect that a person in breach of the relevant penal provision would be deprived of a private right of action.\(^{255}\) The statutory-intent test has been used by both English and Australian courts; in England as a guideline for the application of the *ex turpi causa* defense,\(^{256}\) and in Australia as a policy factor that may negate the duty of care.\(^{257}\) This conceptual

\(^{251}\) *Id.* at 679.

\(^{252}\) *Id.* at 689.

\(^{253}\) See, e.g., McNichols v. J. R. Simplot Co., 262 P.2d 1012, 1015-16 (Idaho 1953) (determining that if illegal business is conducted in a certain building that is affected by a nearby nuisance, the owner will not be compensated for lost profits; however, he may recover for injuries to the structure itself); *The Illegality Defence in Torts*, *supra* note 194, at 40 n.181 (“The illegality defense may operate to affect a head of damage, rather than the entire claim”).

\(^{254}\) *The Illegality Defence in Torts*, *supra* note 194, at 74.

For the law to proscribe particular conduct and yet allow the offender successfully to sue to ensure that he or she profits from that conduct is, we believe, an unacceptable situation, and one that would, in effect, undermine the law. It would have the result that to allow someone to benefit from his or her wrongdoing would mean that “crime would pay.”

*Id.*

\(^{255}\) See cases cited *infra* notes 256-57.

\(^{256}\) See, for example, *Cakebread v. Hopping Brothers Ltd.*, [1947] 1 K.B. 641, 654, in which the plaintiff employee claimed for injuries suffered as a result of the employer’s breach of statutory and regulatory duties. *Id.* at 642. The employer raised the illegality defense, claiming that the plaintiff had aided and abetted the illegality. *Id.*. The defense failed because, “[t]he policy of the . . . Act makes it plain that such a defence as that put forward here would be inconsistent with the intention of Parliament.” *Id.* at 654. *See also The Illegality Defence in Torts*, *supra* note 194, at 79 (“[T]he illegality doctrine should operate in a way which supports the purpose of the rule which makes the conduct illegal in the first place. Conversely, if allowing the claim would not in any way undermine the purpose of the rule which made the conduct illegal, this rationale will not support the application of the doctrine.”).

difference is not very significant from a theoretical standpoint. What matters is that illegality bars recovery whenever this is consistent with the statutory intent. Since criminal statutes are generally intended to advance the goals of retribution and deterrence, the question becomes whether the additional sanction of no-recovery in tort also serves these goals. Logically, whenever a court finds that denying liability is consistent with the statutory intent, it is actually finding that this denial serves retribution, deterrence, or both. Consequently, the application of ex turpi causa, or equivalent doctrinal frameworks, in light of the statutory intent, may be viewed, at least in part, as another manifestation of retributive justice.

The need to prevent the offender from being compensated for criminal penalty and from acquiring the benefits of her wrong, may, in fact, be deemed to derive from the more general desire to implement the intent of criminal statutes. It is always a part of the purpose of a penal provision that a violator will not be able to evade the prescribed sanction or obtain a benefit from such violation; otherwise, the conduct would not be banned and penalized. It may be that these two derivatives do not exhaust the scope of statutory intent. However, the desire to implement the statutory intent, and its two alleged derivatives, are ultimately the by-products of the more abstract idea of preserving criminal justice.

d. Disallowing Liability Between Joint Offenders

A limited variation of the ex turpi causa defense provides that a party who consents to, and participates in, an immoral or illegal act cannot recover damages from other participants for the consequences of that act. This formula has been consistently adhered to by the Supreme Court of Virginia. For example, in Zysk v. Zysk, the court rejected a woman’s claim against her husband for a sexually transmitted disease contracted through sexual intercourse before marriage, given that pre-marital intercourse constituted the punishable misdemeanor of fornication. In Miller v. Bennett, the same court denied

258. The Illegality Defence in Torts, supra note 194, at 79-80 (arguing that statutory-intent theory may explain denial of compensation for criminal punishment and its consequences). But see Weinrib, supra note 202, at 31. Weinrib opines that it is impossible to determine the legislative intent for “a problem regarding which the legislature did not express, and probably did not have, an intention.” Id. In my view, any criminal provision has an implicit intent to maintain the penalty it expressly imposes.

259. This formulation seems broader than the maxim in pari delicto potior est conditio defendentis. The latter bars recovery only if the plaintiff and the defendant are “equally criminal.” Wash. Gas Light Co. v. D.C., 161 U.S. 316, 327 (1895). Ex turpi causa does not require equality.


261. 404 S.E.2d at 721.

262. Id. at 722.

263. 56 S.E.2d at 217.
recovery for the injuries and subsequent death of a woman resulting from an illegal, negligently performed abortion.\textsuperscript{264}

The principle of no-liability between participants in a criminal venture, at least where the crime committed was particularly risky, seems to have been recognized by English courts as well.\textsuperscript{265} A similar principle, within the duty-of-care framework, was accepted and applied in Australia. In \textit{Smith v. Jenkins},\textsuperscript{266} for example, the plaintiff and the defendant assaulted a car owner and fled with the car.\textsuperscript{267} The plaintiff, who was a co-conspirator, sat in the passenger seat, and was injured by the negligent driving of the defendant.\textsuperscript{268} The High Court of Australia denied recovery; Chief Justice Barwick found that no duty of care arises between joint participants in criminal conduct with regard to injuries or losses linked with such conduct.\textsuperscript{269} Comparable conclusions were reached by his colleagues.\textsuperscript{270} In subsequent cases the applicability of this principle was limited to cases of especially dangerous crimes.\textsuperscript{271} In Scotland, it was similarly found that no duty of care is owed between persons engaged in a common criminal enterprise.\textsuperscript{272} Here too, the rule was subsequently limited to cases of serious criminal activity.\textsuperscript{273}

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\textsuperscript{264} Id. at 218-19; accord Hunter v. Wheate, 289 F. 604, 606-07 (D.C. Cir. 1923) (finding that a physician was not liable for injuries ensuing from an illegal and negligently-performed abortion); Nash v. Meyer, 31 P.2d 273, 274 (Idaho 1934); Castronovo v. Murawsky, 120 N.E.2d 871, 875 (Ill. App. Ct. 1954); Szadiwicz v. Cantor, 154 N.E. 251, 252 (Mass. 1926); Reno v. Djavid, 369 N.E.2d 766, 767 (N.Y. 1977); Henrie v. Griffith, 395 P.2d 809 (Okla. 1964); Martin v. Morris, 425 S.W.2d 207, 207 (Tenn. 1961); Andrews v. Coulter, 1 P.2d 320, 321 (Wash. 1931). For a criticism of this line of cases, see Hollister, \textit{supra} note 194. Cf. Goldnamer v. O'Brien, 335 S.W. 831, 832 (Ky. Ct. App. 1896) (finding no cause of action against persons who induced plaintiff to undergo an illegal abortion which resulted in personal injury); Bowlan v. Lunsford, 54 P.2d 666, 667-68 (Okla. 1936), \textit{But see} True v. Older, 34 N.W.2d 700, 701 (Minn. 1948) (finding that if a pregnant woman is forced to submit to abortion by threats of such a serious nature as to destroy her own volition, there is no wrong on her part that bars recovery).

\textsuperscript{265} See, e.g., Pitts v. Hunt, [1990] 3 All E.R. 344, 358 (Balcombe L.J., concurring); Colburn v. Patmore, 149 Eng. Rep. 999, 1003 ("[A] person who is declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission.").

\textsuperscript{266} (1970) 119 C.L.R. 397 (Austl.).

\textsuperscript{267} Id. at 405.

\textsuperscript{268} Id.

\textsuperscript{269} Id. at 400.

\textsuperscript{270} Id. at 403 (Kitto J., concurring), 422 (Windley J., concurring), 426 (Owen J., concurring), 429, 433 (Walsh J., concurring); \textit{accord} Progress & Properties Ltd. v. Craft, (1976) 135 C.L.R. 651, 668 (Austl.) ("A joint illegal activity may absolve the one party from the duty towards the other to perform the activity with care for the safety of that other.").


Several explanations may be given for the principle of no-recovery between participants in a criminal venture, with regard to harm or injury ensuing from the manner in which they performed the crime. However, most of these explanations can justify exclusion of liability only in certain types of criminal joint ventures. More important, most explanations seem to be unrelated to the notion of retributive justice. One possible explanation is that in certain cases courts are unable to determine the level of care owed by one criminal to her partner during the performance of their crime. However, this explanation is not applicable to all cases of criminal joint ventures. It is relevant only where the crime itself is of such a risky nature that it is impossible to say when the risk created by one of the participants becomes “unreasonable.” This explanation conforms to the corrective structure of tort law.

A closely related explanation is that criminal conduct, by its very nature, defies legal norms; therefore, one who associates with another to commit a crime cannot expect the other to comply with legal standards while perpetrating the crime. This supposition is implicit in the agreement to commit the crime. Disallowing the participants to sue each other for resulting injuries, or losses, may be roughly described as a variation of the principle of volenti non fit injuria. This explanation seems to apply only to risky crimes, not to all crimes, because a person who agrees to carry out a non-dangerous crime with another does not expect the other to create unreasonable risks during its commission. As denial of recovery under this explanation is founded on the

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274. See, e.g., Jackson 138 C.L.R. at 455-56.

A more secure foundation for denying relief, though more limited in its application—and for that reason fairer in its operation—is to say that the plaintiff must fail when the character of the enterprise in which the parties are engaged is such that it is impossible for the court to determine the standard of care which is appropriate to be observed.


275. This may be so, for example, where the plaintiff and the defendant participate in a reckless joyride. If courts were totally incapable of setting the standard of care owed by criminals to their partners during the performance of their crime, this would be a good reason to disallow tort claims between joint offenders altogether. But this does not seem to be the case.

276. Miller v. Bennett, 56 S.E.2d 217, 219 (Va. 1949) (“[C]onsent or participation in an immoral or unlawful act by plaintiff precludes recovery for injuries sustained as a result of that act, on the maxim volenti non fit injuria.”); Smith v. Jenkins, 119 C.L.R. 397, 422 (Windley J., concurring) (observing that disallowing liability between joint offenders may be regarded as an extension of the volenti defense); Weinrib, supra note 202, at 34-35 (discussing the possible elision of ex turpi causa in the volenti defense). Cf. Gala v. Preston, 172 C.L.R. 243, 254 (Austl. 1991) (“[T]he participants could not have had any reasonable basis for expecting that a driver of the vehicle would drive it according to ordinary standards of competence and care.”).

277. But cf. Cooley, supra note 197, at 152 n.3:

[It] may be said that usually it is only reckless parties who plan and engage in unlawful action, and therefore the want of care and prudence on the part of the associates ought to be assumed as one of the probable concomitants, the risks of which each must be understood to take upon himself when he engages in the unlawful act.

Cooley emphasized the nature of criminals rather than the nature of the specific crime.
concept of implied consent within the bilateral interaction, it also conforms to corrective justice.

A third possible account for the joint-offenders version of ex turpi causa is that resolving disputes between criminal offenders, concerning the consequences of their joint crime, may impair the dignity and reputation of the courts and the legal system (at least in cases of serious or heinous illegality). The court may seem to operate as an “underworld peacemaker.”278 This is obviously an institutional concern, having nothing to do with retribution.

There are at least two possible explanations that link (albeit rather loosely) the unique version of ex turpi causa discussed here with the notion of retributive justice. First, under criminal law, when several persons knowingly contribute to the joint commission of a crime, their acts are non-severable for the purposes of legal responsibility. In other words, if a person is guilty of a crime she is responsible for all of its constituents, including those performed by her accomplices.279 Thus, it may be said that, in the current context, the plaintiff is legally responsible for the act that resulted in her own harm or injury. Therefore, she cannot claim damages from other participants for that harm or injury.280 It follows that the joint-offenders version of ex turpi causa supports a general principle of criminal responsibility and thereby advances the goals of criminal law.

Second, one could argue that a criminal who brings suit against her accomplice, with regard to the upshot of their criminal joint venture, often attempts to retrieve the benefits of the criminal agreement and conduct. Applying ex turpi causa deprives the plaintiff of these benefits, and thereby reinforces criminal justice and its underlying goals. There are two versions of this argument. According to the narrow version, denying recovery is justified only when the plaintiff attempts to recoup the expected proceeds of the respective crime. This version is actually independent of the fact that the plaintiff and the defendant were involved in a joint venture. Allowing a criminal to recover the proceeds of her crime from any person, accomplice or other, would undermine the

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278. As observed by the British Law Commission in a similar context, “[r]ather than stooping to the indignity of inquiring into the relative merits and demerits of the parties . . . courts should simply leave matters as they are.” The EFFECT OF ILLLEGALITY ON CONTRACTS, supra note 202, at 87. Contra Smith, 119 C.L.R. at 432 (Walsh J., concurring) (“However, I do not think that the essential reason for a rule by which the courts refuse to recognize a right of action in some cases of criminality is not a shrinking by the court from the seamy facts of life or a scrupulous regard for its dignity and reputation.”)

279. MODEL PENAL CODE § 2.06(2)(c) (1962) (“A person is legally accountable for the conduct of another person when . . . he is an accomplice of such other person in the commission of the offense.”). A person may be regarded as an accomplice of another person in the commission of an offense if “with the purpose of promoting or facilitating the commission of the offense,” he aids or agrees or attempts to aid such other person in planning or committing it. Id. § 2.06(3)(a)(ii); Am. Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 904 (Cal. 1978) (“[A]ll members of a ‘conspiracy’ or partnership [to commit a crime] are equally responsible for the acts of each member in furtherance of such conspiracy.”); Gilmore v. Fuller, 65 N.E. 84, 87 (Ill. 1902).

280. Gilmore, 65 N.E. at 87-88; Smith 119 C.L.R. at 404 (Kitto J., concurring).
criminal punishment, as observed in the previous subsection.\textsuperscript{281}

According to the broad version, denying recovery is justified whenever it prevents enforcement of an agreement to commit a crime or any part of it. If two persons agree to commit a crime together, they have certain expectations that are incorporated, either explicitly or implicitly, into their initial agreement. Among other things, a participant may expect her partner to perform his part with prudence. Allowing her to claim damages for an injury caused by his negligence during their joint action, would put into effect their illegal agreement. For example, in cases of negligently performed illegal abortions, one could say that allowing the woman to claim damages is equivalent to enforcing an implied term concerning the abortionist’s level of care. By invalidating an agreement to commit a crime, whether or not it can be regarded as a “contract” in the legal sense, the court deprives the offender of any advantage accruing from the agreement and thereby upholds the severity of the criminal sanction imposed on each of the contracting parties. This explanation seems to complement the implied-consent argument discussed above: if the crime is so risky that its perpetrator cannot expect her accomplice to comply with legal standards during its commission, the latter applies; whereas if it can be implied that each participant expected the other to act with due care the former applies.

2. The Innocence Requirement in Malpractice Claims Against Defense Attorneys

In ordinary malpractice proceedings the plaintiff must prove four elements to establish her cause of action: duty of care, breach of that duty, damage, and a causal link between the breach and the damage.\textsuperscript{282} Yet, when a criminal defense attorney is sued for not achieving a less onerous outcome for her client in criminal proceedings, a fifth element is added in most jurisdictions. In some, the plaintiff has to prove that she is factually innocent of the underlying charge.\textsuperscript{283} In other jurisdictions, the plaintiff must obtain post-conviction relief as a precondition to recovery.\textsuperscript{284} Stated differently, she must prove that she is legally innocent under

\begin{itemize}
\item \textsuperscript{281} See supra Subsection IV.B.1.c.
\item \textsuperscript{284} Shaw v. State, 816 P.2d 1358, 1360 (Alaska 1991); Steele v. Kehoe, 747 So. 2d 931, 933 (Fla. 1999); Morgano v. Smith, 879 P.2d 735, 737 (Nev. 1994); Stevens v. Bispham, 851 P.2d 556, 561 (Or. 1993); Gibson v. Trant, 58 S.W.3d 103, 107 (Tenn. 2001); Peeler v. Hughes & Luce, 909 S.W.2d 494, 495, 497-98 (Tex. 1995); Adkins v. Dixon, 482 S.E.2d 797, 801 (Va. 1997).
\end{itemize}
the rules of criminal law and procedure. It may be generalized that in most jurisdictions a convicted felon who files a suit against her defense attorney for malpractice is required to show that she is innocent, either factually or legally. Although this requirement is somewhat related to one of the modern applications of *ex turpi causa*, there is a notable difference between the two. *Ex turpi causa* is a defense that operates only when raised and substantiated by the defendant, whereas the innocence requirement adds an essential element to the plaintiff’s cause of action.

Three justifications are suggested for the innocence requirement. First, it is said that the additional element ensures the readiness of lawyers to take criminal defense cases, especially when the defendant is indigent and there is no financial motivation to do so. However, encouraging lawyers to represent the *needy* criminal-defendant does not, by itself, justify a general innocence requirement. It cannot justify the application of this requirement where the motivation to represent could exist without it. Moreover, if the doctrine is intended to encourage criminal lawyers to accept indigent clients, it seems peculiar that the incentive depends on the fortuitous fact of the client’s innocence. Oddly, the innocence requirement only creates an incentive to represent the guilty.

The second justification is that the innocence requirement serves as a deterrent to frivolous litigation. It is sometimes said that inmates may fill their free time pursuing civil actions against their former attorneys; however, statistics show that prisoners do not have such a litigious nature. Furthermore, the fear of frivolous claims should be dealt with through the laws of evidence and procedure, rather than through substantive law.

The third, and most plausible justification, is that the innocence requirement serves as a means for preserving criminal justice by ensuring that a convicted felon is not compensated for the criminal punishment and its consequences unless she did not deserve to be punished in the first place. The innocence requirement thereby prevents stultification of the criminal punishment and advances the goals of criminal law.

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285. See supra Subsection IV.B.1.c.
286. However, in at least one jurisdiction that has adopted the *legal* innocence requirement, the defendant can raise the issue of the plaintiff’s *factual* guilt as an affirmative defense. Shaw v. State, 861 P.2d 566, 572 (Alaska 1993).
287. Glenn, 568 N.E.2d at 788 (noting that the innocence requirement encourages attorneys to take criminal defense cases); Gibson, 58 S.W.3d 103 at 115-16 (stating that the requirement of post-conviction relief provides an incentive to represent indigent clients).
289. Stevens, 851 P.2d at 563 (citing Shaw, 816 P.2d at 1361).
291. Id. at 501 (stating that “the force driving the recent decisions is a desire to promote the
The third justification has attracted several criticisms. For example, it has been argued that “courts that manipulate tort remedies to further criminal law goals risk reckless, and unnecessary doctrinal blurring.” However, at this stage the reader might not find this “doctrinal blurring” so disturbing; the same “blurring” has existed for centuries in the areas of punitive damages (discussed below) and ex turpi causa (examined above). In addition, what may seem, at first glance, to be “doctrinal blurring” may, in fact, guarantee consistency within the law. Returning to the words of Judge McLachlin, the law refuses to give by its right hand (tort law) what it takes away by its left hand (criminal law).

Another criticism is that the innocence requirement fosters attorney negligence and thereby increases expected sanctions and undermines the retributive effort. However, this argument misapprehends the idea of retributive justice. Unlike deterrence, retributive justice focuses on the fairness of the actual punishment, in light of the circumstances of the specific case, not on the expected sanction, which combines the severity of the penalty with the probability of crime-detection, indictment, and conviction. The fact that professional negligence may increase the probability of sentencing is irrelevant from a retributive perspective. What matters is that the severity of the actual sanction is proportional to the gravity of the crime.

A better formulated criticism would be that the innocence requirement may lead to an increase in the severity of criminal punishment, as lawyers would not exert their best efforts to acquit their clients or minimize their punishments. This fear seems exaggerated. The innocence requirement does not affect the incentive not to be negligent in representing innocent clients because these clients are entitled to compensation in cases of malpractice. The innocence requirement may reduce the lawyer’s incentive to make an effort for the guilty. But if a client is convicted and sentenced for a crime she actually committed, it can rarely be said that the attorney’s negligence resulted in an undue punishment. Perhaps the attorney could have obtained a lesser sanction in such situations, but this does not make the actual punishment excessive in the retributive sense.

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292. Id. at 505.
294. Recent Case, supra note 290, at 505-06.
295. There is, perhaps, only a marginal effect, because innocent clients will not always be able to prove their innocence in a civil action.
V. THE ROLE OF RETRIBUTIVE JUSTICE IN EXPANDING LIABILITY

A. Punishing the Injuror for Illicit Conduct

1. Punitive Damages

Punitive damages have been recognized in the common law of torts for centuries, and are now firmly entrenched in most Anglo-American jurisdictions.\(^{296}\) Clearly, a doctrine that awards extra-compensatory damages is inconsistent with theories of corrective justice that focus on rectification of the harm caused.\(^{297}\) One might ask what, then, is the purpose of punitive damages? In the past, it was frequently said that the aim of these awards was “to punish and deter.” This language has been used in court decisions,\(^{298}\) professional and academic literature,\(^{299}\) and even jury instructions.\(^{300}\) However, this phrase is somewhat misleading, because punishment, as the word is currently understood, is not a purpose but a mechanism. Punishment may be defined as “imposing a sanction,”\(^{301}\) and it may have various purposes, such as retribution, deterrence,
appeasement of the victim, incapacitation of the wrongdoer, and education. Saying that punitive damages are meant to punish is consequently tautological. It may be transformed into the odd sentence, “the purpose of imposing this sanction is to impose a sanction.”

Still, it is clear that the word “punish” as used in the phrase “to punish and deter,” has not been used in vain. The truth is that courts and scholars sometimes use the terms “punishment” and “retribution” interchangeably. While such usage is perplexing it is still accepted. Therefore, it seems that when courts say that punitive damages are supposed to “punish and deter,” they suggest that punitive damages are aimed at retribution and deterrence. This is the most reasonable explanation for the classical punish-deter dichotomy. In more recent American decisions, the terminology has become more accurate. For example, in *State Farm Mutual Automobile Insurance Co. v. Campbell* the Supreme Court of the United States stated that “[c]ompensatory damages ‘are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct.’ . . . By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution.”

Between deterrence and retribution, retribution seems to be the dominant goal. Proponents of the economic analysis of the law offer a deterrence-based rationale for this doctrine. Their main argument is that punitive damages may be used to overcome problems of under-enforcement. Under this perception, total damages should equal the harm, multiplied by the reciprocal of the probability that the defendant will be found liable in cases where she should be found liable; punitive damages would then consist of the excess of total damages over compensatory damages. However, this theory has very weak descriptive power and severe normative deficiency. From a descriptive standpoint, an under-enforcement rationale can hardly explain why punitive damages are unusual in all common law jurisdictions and why they hinge on the defendant’s state of mind.

From a normative perspective, administrative and criminal law may also be regarded as efforts to compensate for private under-enforcement of law; if tort

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304. Id. at 416 (citations omitted). See also id. at 417 (opining that punitive damages awards “serve the same purposes as criminal penalties”); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) (discussing punitive damages close relationship with criminal penalties).


306. For further discussion of this rationale see sources cited supra note 305.

law also attempts to handle under-enforcement through punitive damages, over-
deterrence may ensue.\footnote{308}

Thus, retribution is the better explanation for punitive damages. That is so not only on the theoretical level but also in practice. Empirical evidence suggests that juries do not attempt to promote optimal deterrence, but to “punish” wrongdoing, with at most a signal designed to ensure that certain misconduct will not happen again.\footnote{309} Ordinary people do not spontaneously think in terms of optimal deterrence when asked questions about appropriate punishment, and it is very hard to get them to think in these terms.\footnote{310} Jurors assume their roles with retributive intuitions, and “it remains unclear whether and to what extent the courtroom can overcome those intuitions.”\footnote{311}

As previously mentioned, punitive damages are accepted in nearly all common law jurisdictions; however, they are highly unusual. Awarding non-compensatory damages is inconsistent with the corrective structure of tort law. Therefore, punitive damages are merely awarded at the margins, within the prevention of abominable disproportion paradigm. They are used only when the courts determine that a compensatory award is an extremely lenient sanction with regard to the gravity of the defendant’s conduct. In other cases, the discrepancy between the gravity of the wrong and the severity of the sanction is left untouched for the sake of corrective justice. According to the Supreme Court, it should be presumed a plaintiff has been made whole for his or her injuries by compensatory damages; so “punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve retribution or deterrence.”\footnote{312}

Because retribution is the primary goal of punitive damages, courts have been cautious not to award such damages in violation of the principles of retributive justice. According to the principle of cardinal proportionality a sanction should not be too harsh or too lenient with regard to the absolute gravity of the wrong committed. In particular, punitive damages should not increase the overall burden imposed on the defendant beyond what is due.\footnote{313} Consequently, the Supreme Court has determined that an award of punitive damages must reflect the gravity of the respective wrong,\footnote{314} and that the “Due Process Clause of

\footnotesize{308. Sunstein, et al., supra note 54, at 2084.}
\footnotesize{309. Id. at 2085.}
\footnotesize{310. Id. at 2111.}
\footnotesize{311. Id.}
\footnotesize{313. Overall burden consists of sanctions of a legal nature, such as criminal, administrative, and civil as well as sanctions of an extra-legal nature, such as reputational harm.}
\footnotesize{314. Day v. Woodworth, 54 U.S. 363, 371 (1851). In Day, the Court also stated “the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct. . . .” Id.}
the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” A jury’s punitive damages award is, therefore, subject to substantive due process review under the Fourteenth Amendment.

In BMW v. Gore, the Supreme Court counseled that in reviewing whether punitive damages awards are grossly excessive under the Due Process Clause courts ought to consider three guideposts: (1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases.

The first, and most important, guidepost can be easily explained in retributive terms. Determining the severity of the sanction in light of the degree of reprehensibility is clearly an exercise of retributive justice. The third guidepost seems to be an attempt to maintain ordinal proportionality: comparable wrongs deserve similar sanctions. The second guidepost can also be linked with the notion of retributive justice because the potential harm is one of the primary indicators of the gravity of the defendant’s conduct. However, it seems that the second guidepost is also intended to prevent the plaintiff from acquiring an unreasonable windfall, and not just to ensure that the defendant’s sanction is due.

In any event, the first guidepost is dominant. True, the Supreme Court found in Campbell that a single-digit ratio between punitive and compensatory damages is more likely to accord with due process than awards with ratios in range of 500 to 1 (or even 145 to 1); however, the Court emphasized that greater ratios may be consistent with the Due Process Clause “where ‘a particularly egregious act has resulted in only a small amount of economic damages.” Egregious conduct can give rise to various types of sanctions, legal (criminal, administrative, civil, or disciplinary), and extra-legal (such as reputational harm). Thus, to avoid disproportion between the overall burden imposed on the


316. BMW, 517 U.S. at 575.

317. Id. at 575 (“[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”).

318. 538 U.S. at 425.

319. Id. Perhaps TXO represents such an exceptional case because while compensatory damages were $19,000, the punitive damages were set at $10M after the Court determined that the defendant had pursued “a malicious and fraudulent course.” TXO Prod. Corp., 509 U.S. at 462. (1993).
defendant and the gravity of her wrong, these sanctions must be considered when deciding whether punitive damages may be awarded and in determining their amount. In many jurisdictions, this consideration is kept in mind.320

Another feature of the law of punitive damages which can also be explained in retributive terms is the common law’s consistent and express refusal to award punitive damages against municipalities.321 The Supreme Court found that absolute immunity from punitive damages in common law extends to claims under 42 U.S.C. § 1983.322 Courts distinguish between compensation for injuries inflicted by a municipality’s officers or agents and the award of punitive damages for bad-faith conduct by the same officers or agents.323 Compensation is an obligation properly shared by the municipality itself, whereas punishment is properly applied only to the actual wrongdoers.324 The underlying rationale is that innocent citizens should be protected from unjust punishment.325 An award of punitive damages against a municipality only punishes the taxpayers, either through increased municipal taxes or by a decrease in public services, although they took no part in the wrongdoing.326 Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct. Awarding punitive damages against a municipality violates this principle.

An interesting question concerns judicial readiness to award punitive damages against private firms. Firms are not persons, and when punitive damages are imposed on them those who suffer may not be wrongdoers at all. A punitive damages award may end up injuring not the firm so much as dispersed stockholders (if the firm absorbs the cost or a fraction of it), consumers (if the firm spreads the cost ex post through price increases), and employees (if the firm is forced to perform cutbacks, or goes into liquidation), who were not involved in the wrongful act. It is far from clear that juries awarding punitive damages are aware of this point, and it is also far from clear that they can be easily convinced that this point is correct.327

A possible explanation for the difference in attitude toward municipalities as against firms is that the former are supposed to perform acts for the common good, while the latter exist for private gain.328 A malicious act performed by an

320. Saunders v. Gilbert, 72 S.E. 610, 615 (N.C. 1911) (finding that pecuniary punishment in a criminal procedure can be considered in reduction of punitive damages); Annotation, Assault: Criminal Liability as Barring or Mitigating Recovery of Punitive Damages, 98 A.L.R.3d 870 (1980); Weinrib, supra note 202, at 46.
322. Newport, 453 U.S. at 271.
323. Id. at 262-66.
324. Id. at 263.
325. Id.
326. Id. at 267; McGary v. President & Council of Lafayette, 12 Rob. 674, 677 (La. 1846).
327. Sunstein, et al., supra note 54, at 2114 n.157; accord Ellis, supra note 22, at 66-67; Kaplow & Shavell, supra note 6, at 1067-68.
officer of a municipal authority cannot be said to have been carried out in the name of the municipality and in the furtherance of its interests. A firm, on the other hand, may advance its interests by willfully and maliciously harming others. A malicious act by a firm’s agent in the course of her employment can be regarded as an act performed in pursuit of the firm’s interests. The fact that punishing the firm may also harm innocent parties should not prevent such punishment. After all, innocent third parties are sometimes harmed even when an individual is punished. From a retributive standpoint, the key question is whether or not the firm deserves to be punished. Admittedly, this explanation is debatable, so the municipality/private-corporation distinction in the law of punitive damages seems somewhat anomalous.

2. Relaxing Fundamental Preconditions of Tort Liability

A few tort doctrines that temper traditional and fundamental preconditions of tort liability (i.e. actual harm, causation in fact, and proximate causation) seem to have been developed under the influence of retributive considerations.

The first doctrine is the collateral source rule. This rule holds that the injurer’s liability is not reduced when the plaintiff receives benefits from other sources, even if those benefits have partially or wholly mitigated her loss. Thus, the victim may recover for harm that she did not actually incur. Although there may be a modern economic explanation for the collateral source rule, the late Professor Fleming observed that a “constantly recurring refrain, with strong overtones of moral outrage, is that the defendant is a wrongdoer who should not be ‘let off’ from any portion of what is his due by the exertions and foresight of his victim or those who stood by him in his hour of need.” Accordingly, the collateral source rule “condones multiple recovery to avoid giving the tortfeasor a ‘windfall.’” Fleming indicated that this extreme position was based largely on obsolete prejudice regarding the function of tort law, later referred to as “punitive.” Another author remarked that “notions of retribution” could be found in the “rhetoric that surrounds the collateral source rule.” However, the presumed link between the collateral source rule and retribution is dubious. The scope of damages usually depends on the extent of the plaintiff’s injury, not on the degree of the defendant’s fault. Since the extent of the plaintiff’s injury is usually fortuitous, it cannot be deemed an appropriate measure for the

329. For example, if a person is incarcerated, her relatives may lose her financial support.
331. See, e.g., Shavell, supra note 10, at 142-43.
332. Fleming, supra note 70, at 1483.
333. Id. at 1544.
334. Id.
retributively just sanction, and cannot be adhered to so ardently on retributive grounds.\textsuperscript{336}

A second doctrine that is sometimes said to have a retributive goal is an exception to the general rule that applies to proof of causation. The imposition of liability usually depends on the plaintiff’s showing that “her injuries were caused by an act of the defendant or by an instrumentality under the defendant’s control.”\textsuperscript{337} In many jurisdictions, an exception to this rule arises “[w]here the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one caused it.” Under the exception, each actor has the burden of proving that he did not cause that harm.\textsuperscript{338} This is sometimes called “the alternative-liability theory.”\textsuperscript{339} The consequences of this rule may be quite inconsistent with corrective justice. Liability may be imposed on various persons who caused no harm to the plaintiff, just because they acted negligently. The reason for this exception is the injustice that would result from permitting proven wrongdoers, one or some of whom inflicted injury on an entirely innocent plaintiff, to escape liability simply “because the nature of their conduct and the resulting harm” somehow “made it difficult or impossible to prove which of them . . . caused the harm.”\textsuperscript{340} A reputable tort scholar observed that this argument “becomes more a penal [retributive] argument than a tort [corrective] argument.”\textsuperscript{341} However, the retributive effect is incomplete because the defendant can exonerate herself from liability for wrongful conduct by proving that her conduct was not the cause-in-fact of the plaintiff’s injury.

A retributive rationale may also be attributed to a more liberal exception to the general proof-of-causation requirement, namely the doctrine of market-share liability, first recognized by the Supreme Court of California in the renowned DES case, \textit{Sindell}.\textsuperscript{342} Under this theory, a plaintiff who sustains an injury or

\textsuperscript{336} Cf. \textit{Note, Unreason in the Law of Damages: The Collateral Source Rule}, 77 \textit{Harv. L. Rev.} 741, 749 (1964) (“Even the most flagrant wrongdoer ordinarily is not liable for damages unless harm in fact results from his conduct; and when harm does occur, his liability depends, not on the degree of fault, but on the extent of injury, the physical idiosyncrasies and earning capacity of the injured person, and on the latter’s own degree of culpability.”).

\textsuperscript{337} Sindell v. Abbott Labs., 607 P.2d 924, 928 (Cal. 1980); accord \textit{Restatement (Second) of Torts} § 433B(1) (1965).

\textsuperscript{338} \textit{Restatement (Second) of Torts} § 433B(3) (1965); accord Sindell, 607 P.2d at 928; Martin v. Abbott Labs., 609 P.2d 368, 375 (Wash. 1984); Collins v. Eli Lilly & Co., 342 N.W.2d 37, 45 (Wis. 1984).


\textsuperscript{340} \textit{Restatement (Second) of Torts} § 433B(3) cmt. f (1965).


\textsuperscript{342} 26 Cal.3d at 936. The doctrine was later adopted in other jurisdictions. \textit{See, e.g.}, Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. 1989). Other courts applied similar theories of liability in cases of the same type. \textit{See, e.g.}, \textit{Martin}, 689 P.2d at 382 (finding that joinder of a substantial share of the market is not required and stating that “a particular defendant's potential
illness by using a fungible product and cannot identify the specific manufacturer whose product caused her injury or illness, can sue the manufacturers of a substantial share of the relevant product at the time of consumption.\footnote{343} Each defendant will be held liable in an amount determined by its share of the market, unless it can prove that it could not have manufactured the product that actually caused plaintiff’s harm.\footnote{344} Once again, a person may be held liable for harm that he did not cause, solely because his conduct was negligent. Moreover, since the plaintiff is not required to join all manufacturers of the relevant product, at the relevant time, it is possible that none of those who may be eventually found liable actually manufactured the specific product that harmed the plaintiff.\footnote{345} The doctrine of market-share liability is, therefore, a more significant inroad on the corrective structure of tort law. It theoretically enables courts to impose tort liability on those who created certain risks, even though none of them caused the plaintiff’s injury or illness.

Another principle (or better, tendency) that seems to rest on retributive grounds applies within the conceptual framework of proximate causation. The fact that a person’s conduct is intentional or reckless, rather than merely negligent, is taken into account in determining whether it was the proximate cause of a given harm.\footnote{346} Proximate causation may be found in cases of intentional or reckless misconduct even though it might not have been found if the defendant’s conduct were merely negligent.\footnote{347} In particular, while foreseeability usually sets the upper limit of liability for negligence,\footnote{348} a person may be held liable even for

\footnote{343} Sindell, 607 P.2d at 937.

\footnote{344} Id.

\footnote{345} Id. at 936-37.

\footnote{346} Under the assumption that the wrongful conduct was a cause-in-fact of the same harm.

\footnote{347} United Food & Commercial Workers Unions, Employers Health & Welfare Fund v. Philip Morris, Inc., 223 F.3d 1271, 1274 (11th Cir. 2000); Meyers v. Epstein, 282 F. Supp. 2d 151, 154 (S.D.N.Y. 2003); Rodopoulos v. Sam Piki Enters., Inc., 570 So. 2d 661, 666 (Ala. 1990); Koval v. Hoffer, 436 A.2d 1, 3 (Conn. 1980); Kimberlin v. DeLong, 637 N.E.2d 121, 126-28 (Ind. 1994); Prosser & Keeton, supra note 92, at 37; Restatement (Second) of Torts §§ 435B, 501(2) (1965). Cf. Restatement (Third) of Torts: Liability for Physical Harm (Draft No. 3) § 33(b) (2003) (stating that a person “who intentionally or recklessly causes physical harm is subject to liability for a broader range of harms than the harms for which [he] would be liable if acting negligently.”).

\footnote{348} The wrongdoer is “not liable for harm different from the harms whose risks made the [wrongdoer’s] conduct tortious.” Restatement (Third) of Torts: Liability for Physical Harm (Draft No. 3) § 29 (2003). In cases of negligence it is clear that the only risks whose creation may make one's conduct negligent are foreseeable risks. Id. § 29 cmt. d. See also Restatement (Third) of Torts: Liability for Physical Harm (Draft No. 1) § 3 (2001) (stating that primary factors in ascertaining whether the creation of a certain risk is wrongful are the foreseeable probability that harm may ensue and the foreseeable severity of the harm that may ensue).
unintended and unforeseeable consequences of his intentional conduct.\textsuperscript{349} Imposing liability for unforeseeable harm seems superfluous from an efficient-deterrence perspective because the conduct of a potential injurer cannot be affected \textit{ex ante} by unforeseeable liability for unforeseeable consequences.\textsuperscript{350} The primary justification for imposing liability for unforeseeable consequences in cases of intentional wrongdoing thus seems to be retributive. Tort law enables courts to expand liability when they sense that applying ordinary principles of proximate causation may give rise to an abominable disproportion between the severity of the sanction and the gravity of the wrong. In this respect, relaxation of the proximate cause requirement operates much like punitive damages. Clearly, an award of punitive damages is a better vehicle for the advancement of retributive justice, since the extent of punitive damages is far more flexible than the extent of liability based on actual loss. However, relaxation of the proximate cause requirement may be preferred by the judiciary because it appears to operate within the corrective structure of tort law.\textsuperscript{351}

\textbf{B. Protecting the Victim from an Undue Burden}

Generally, tort law does not allow a completely innocent victim to bear her loss if it was caused by the wrongful conduct of another.\textsuperscript{352} This principle derives from, and is therefore compatible with, the notion of corrective justice that underlies tort law. Yet, in most cases it also produces a just result from a retributive perspective (focusing on the victim): the wholly innocent victim is not punished by having to bear the loss.

A practical problem may arise where an innocent victim cannot recover from the tortfeasor because the latter is impecunious, legally immune, or untraceable. Tort law cannot resolve the ensuing retributive, and corrective, injustice where there is only one tortfeasor. However, it does seem to address the retributive concern in multiple-tortfeasor settings in which at least one tortfeasor can be sued and can pay damages. Under the well established principle of joint-and-several liability, if several persons act in concert to commit a tort, the victim may recover the full amount of the damages from any one or any combination of them.\textsuperscript{353}

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\textsuperscript{349} Caudle v. Betts, 512 So. 2d 389, 392 (La. 1987) (finding that where the wrong is intentional, the defendant may be held responsible even for unintended unforeseeable harms); \textit{accord} Mayer v. Hampton, 497 A.2d 1206, 1209-10 (N.H. 1985); Seidel v. Greenberg, 260 A.2d 863, 872-74 (N.J. Super. Ct. Law Div. 1969); Baker v. Shymkiv, 451 N.E.2d 811, 813 (Ohio 1983); \textit{Prosser \\& Keeton, supra} note 92, at 40. \textsuperscript{350}\textit{Shavell, supra} note 10, at 129-30. \textsuperscript{351} Liability corresponds to actual losses caused, in the factual sense, by the defendant's conduct. \textsuperscript{352} However, as shown above, retributive concerns may result in exclusion of liability where allowing recovery by innocent victims may give rise to an abominable disproportion between the gravity of the defendant’s conduct and the severity of the aggregate sanction imposed on him. \textit{See supra} Section IV.A. \textsuperscript{353} Am. Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 904 (Cal. 1978); \textit{Restatement}
More importantly, when independent negligent actions of several persons are each a proximate cause of an indivisible injury, the victim, may sue any one or any combination of them to obtain full recovery, at least when certain preconditions are met. Clearly, the principle of joint-and-several liability may be justified in terms of corrective justice. Yet another plausible and very common justification for this principle is that it prevents a completely innocent person from being burdened by an uncompensated harm. Put differently, the principle of joint-and-several liability prevents an abominable disproportion between the (non-)culpability of the victim and the gravity of the burden she may incur in its absence. This is definitely a retributive formulation.

One may argue that the principle of joint-and-several liability may give rise to an abominable disproportion between the gravity of the defendant’s conduct and the severity of the sanction that he incurs. This argument is unconvincing for two reasons. First, in many cases the doctrine only shifts to the defendant the burden of tracing the other injuring and litigating against them. It guarantees that the innocent plaintiff will not be “punished,” but does not necessarily make the singled-out defendant bear the entire loss. Second, even if a single defendant in a multiple-tortfeasor setting is obliged to bear the entire loss, the discrepancy between the gravity of the wrong and the severity of the sanction is comparable to the typical disproportion in a single-tortfeasor setting. In the ordinary case, the defendant is “penalized” for wrongful conduct that was the actual and proximate cause of the plaintiff’s harm or injury, and the severity of the penalty is determined by the extent of the actual loss. The principle of joint-and-several liability does not change this reality. A person whose wrongful conduct was the

354. Am. Motorcycle Ass’n, 578 P.2d at 906-07; Restatement (Second) of Torts §§ 875, 876 (1979); Bargren, supra note 353, at 455-56; Wright, Joint and Several Liability, supra note 353, at 71.

355. Wright, Joint and Several Liability, supra note 353, at 54-62 (noting that each defendant whose tortious behavior was an actual and proximate cause of the injury is an actual and proximate cause of 100% of the injury, and is therefore individually fully responsible for the entire injury).

356. Am. Motorcycle Ass’n, 578 P.2d at 905 (noting that in some cases if joint and several liability were to be abandoned “a completely faultless plaintiff, rather than a wrongdoing defendant, would be forced to bear a portion of the loss if any one of the concurrent tortfeasors should prove financially unable to satisfy his proportioned share of the damages”); accord Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 122 (1983); Parks v. Union Carbide Corp., 602 S.W.2d 188, 200 (Mo. 1980).

357. The principle of joint-and-several liability is unique in that it seems to conform to both corrective and retributive considerations.

358. See, e.g., McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992) (noting that the principle of joint-and-several liability “may fortuitously impose a degree of liability that is out of all proportion to fault.”).
actual and proximate cause of the harm is obliged to pay for it.\textsuperscript{359} True, disproportion may ensue. But ordinary (as opposed to abominable) disproportion cannot be taken into account within a predominantly corrective mechanism, in which the extent of liability is usually determined by the fortuitous magnitude of the actual loss.

\section*{VI. Conclusion}

This article attempts to fill a gap in tort theory. Nowadays most theorists perceive tort doctrine as resting on either the notion of corrective justice, or on utilitarian-economic grounds. The concept of retributive justice remains outside the fierce controversy. This is quite understandable. Tort law—as a bipolar rectificatory mechanism—cannot attain retributive justice, nor can it be expected to. It frequently imposes sanctions on non-culpable parties; it does not impose sanctions on all wrongdoers; the extent of a sanction is usually determined by the magnitude of actual loss and cannot be adjusted to fit the gravity of the respective wrong, and in the end, the burden is not necessarily borne by the actual wrongdoer.

Nonetheless, the notion of retributive justice seems to have exerted a limited influence on the development of tort doctrine. The common law of torts is responsive to retributive concerns in two ways. First, it strives to prevent \textit{abominable} disproportion between the severity of the sanction imposed on one of the litigating parties, and the gravity of his or her conduct. Second, it attempts to vindicate criminal justice as prescribed by criminal law where possible. These two paradigms have various manifestations.

Courts are inclined to limit or exclude liability where allowing full recovery would expose the defendant to an abominably excessive sanction in light of the gravity of his or her conduct. This inclination is apparent in the field of relational loss, \textit{or dommage par ricochet}. Moreover, courts are likely to limit or exclude liability where allowing full recovery may enable the plaintiff to evade punishment for serious misconduct, or stultify his or her criminal liability. This has been done especially through the \textit{ex turpi causa} defense. Courts also utilize retributive arguments to expand liability when ordinary principles of tort law impose an extremely lenient sanction on a culpable defendant. The foremost example, of course, is punitive damages. However, it has been argued that a similar rationale may explain the relaxation of the cause-in-fact and proximate cause requirements in certain types of cases. Finally, retributive concerns are brought into play where the defendant’s liability is expanded to ensure that an innocent plaintiff will not have to bear any part of her loss.

To conclude, this article has had a descriptive purpose only. It has concentrated on the actual utilization of retributive concerns in tort jurisprudence and not on their precise normatively defensible role. The latter issue must await further research.

\textsuperscript{359} The moral gravity of the wrong is not reduced by its co-existence with other wrongs.