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Surprisingly Punitive Damages

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SURPRISINGLY PUNITIVE DAMAGES

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We acknowledge the potential for abuse when a defendant may be subjected to repeated punitive damage awards arising out of the same conduct. Yet, like the many other courts which have addressed the problem, we are unable to devise a fair and effective solution.

W.R. Grace & Co. v. Waters[1]

INTRODUCTION

Damages can add up to super-punitive amounts in unintended ways. To take a textbook example: The Defendant has caused an industrial accident or other mass tort. Plaintiff 1 sues, winning punitive damages based on the reprehensibility of that original act. Plaintiff 2 also sues—and also wins punitive damages on the same grounds. So do Plaintiff 3, Plaintiff 4, and so forth.[2] If each of these punitive awards is directed at the same general badness of that original act, then these punishments are redundant.[3] When such redundancy occurs, even

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[1] 638 So. 2d 502, 505 (Fla. 1994).

[2] To anticipate some of the analysis yet to come: Existing legal solutions for such a situation are widely seen as haphazard and inadequate. See infra Part I. Of special note is the asymmetry in preclusion law, which cannot block such redundancy (because the plaintiffs are not parties in each other's cases)—and may very well aggravate it (if the plaintiffs are able to use nonmutual offensive collateral estoppel against the defendant). See, e.g., Taylor v. Sturgell, 553 U.S. 880, 884–85 (2008) (holding that nonparties cannot be bound by the preclusive effect of past judgments or findings, except under limited conditions); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (endorsing the use of nonmutual offensive collateral estoppel). Meanwhile, aggregation devices (such as the mandatory punitive damages class action) that might serve as occasional discouragements to redundant awards have fallen into disfavor. For a fuller analysis, see infra Part I.

[3] The potential for redundancy can also be described, of course, in terms of overdeterrence rather than duplicative retribution. (The commonly advanced—and often conflicting—conceptual aims of punitive damages will

damages that are meant to be punitive can reach *surprisingly* punitive levels.[4]

  This Essay addresses two distinct ways in which unexpectedly excessive damages may arise. The first and more straightforward problem is redundant punitive damages, as in the scenario above.[5] The second and more subtle problem is what

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be considered in more detail in Part I.) For instance, overdeterrence will obviously occur if the punitive damages award in every individual plaintiff's case is set at the fully deterrent amount, and multiple plaintiffs win this amount. The need to avoid overdeterrence is clear when the aim of damages is assumed to be "optimal deterrence" (that is, forcing actors to internalize the full social costs of their conduct). But avoiding overdeterrence is also useful when the assumed aim is "absolute deterrence" (that is, erasing all private gains to the actor from the conduct, in order to reduce the activity level to zero); the most familiar reason is a need to avoid distorting *marginal* deterrence. See George J. Stigler, The Optimum Enforcement of Laws, 78 J. Pol. Econ. 526, 527 (1970) ("If the offender will be executed for a minor assault and for a murder, there is no marginal deterrence to murder.").

  [4] Courts and commentators have given this problem various names, including "successive" or "multiple" punitive damages—or simply the "multiple punishments problem." See, e.g., State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408, 423 (2003) (noting "the possibility of multiple punitive damages awards for the same conduct"); Dunn v. HOVIC, 1 F.3d 1371, 1385 (3d Cir. 1993) (en banc) ("successive punitive damages awards"); Thomas B. Colby, Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs, 87 Minn. L. Rev. 583 (2003); Jim Gash, Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry, 99 Nw. U. L. Rev. 1613 (2005); Catherine M. Sharkey, Punitive Damages as Societal Damages, 113 Yale L.J. 347, 428 (2003) ("multiple punishments").

  [5] More complicated variations of this simplified initial scenario are addressed in Part I. Note that rather than calling the problem "multiple" or "successive" punishment, I favor the term "redundant" in part to recognize that not all repetitions of punitive damages are excessive. Multiple awards of punitive damages may well be necessary (and thus not redundant) to reach the proper level of deterrence or retribution for a given act by a defendant; this might be especially true given the current state of constitutional constraints on the sizes of awards. See *State Farm*, 538 U.S. at 425

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we might call the "hyper-enforcement" of statutory damages: when successful enforcement in fact occurs more frequently than is implicitly assumed in the statutory scheme (with awards preset at super-compensatory levels to make up for some expected degree of underenforcement). The result there is that damages *not* meant to be punitive can nonetheless stack up to punishing effect, most famously when thousands or millions of claims are aggregated. Both problems are classic concerns that have defied tidy resolution despite decades of anxious recognition by courts and commentators.[6]

These two classes of problems are united by a central feature that has yet to receive conceptual articulation: In each context, the damages a defendant should pay for a single bad act contain both a "variable" component (which properly varies with the number of victims or nominal counts), as well as a "fixed" component (which should be awarded only *once* for the given act).[7] The crucial mistake that can lead to surprisingly punitive damages in each context is repeatedly awarding the "fixed" portion along with the "variable" portion when multiple awards are based on the same underlying act.

A procedural solution for neutralizing such redundancy is readily suggested by this conceptual framing: allow courts to

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(warning that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"). Such crude constraints, of course, do not generally prevent the repetition of punitive damages from reaching the point of redundancy.

[6] The first problem is indeed a textbook example of redundancy—and of courts expressing helplessness given the current state of the law. See Mark A. Franklin, Robert L. Rabin & Michael D. Green, Tort Law and Alternatives 774 (9th ed. 2011). Part I elaborates on this problem. For examples of commentary on the second problem, see Section II.A.

[7] Alternatively, for a single course of conduct that involves many acts, the "variable" component is the amount that should vary with the number of acts, and the "fixed" component is the amount that should be awarded only once for that single course of conduct.

run *concurrently* the "fixed" component of these repeated awards. This Essay explains how it can be applied to each of the two classes of problems. In earlier work, I have illustrated how the use of concurrent damages can repair the gross inaccuracies that occur when statutory damages awards are blindly pegged to a nominal count of violations rather than to the conduct's real effects.[8] Here, the focus shifts to a more complicated form of redundancy in damages, and thus to a more nuanced use of concurrent damages: The court should identify the portion of each damages award that would be redundant if repeated in other awards (in the same case or in other cases) and then designate that portion to run concurrently with the other awards.

Part I will explore how courts can apply this solution to the first problem, that of punitive damages being redundantly awarded to multiple plaintiffs for the same original act. In one basic approach, a court might view compensatory damages as the "variable" component and punitive damages as the "fixed" component of its award. On this view, the court would run (only) its punitive damages concurrently with those awarded by other courts.

Refinements to this baseline method may be needed, however, depending on what the court assumes the purpose of punitive damages to be, on how many individual punitive damages awards are needed to serve that purpose, on whether the court takes a defendant- or plaintiff-focused view of punitive damages, and on whether the court is allowed to use concurrence in anticipation of future awards (as is possible in concurrent criminal sentencing[9]). These variations are analyzed in

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[8] Bert I. Huang, Concurrent Damages, 100 Va. L. Rev. 711 (2014).

[9] See Setser v. United States, 132 S. Ct. 1463, 1473 (2012) (endorsing the power of federal courts to run criminal sentences either consecutively or concurrently with anticipated but yet-to-be-adjudicated state criminal sentences for the same conduct).

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Part I, along with the general procedural advantages of the concurrent damages solution.

Part II will turn to the statutory damages problem. Statutory damages are often said to be set at super-compensatory levels, based on the premise that enforcement will be imperfect, that proof will be difficult, or that private suits will need extra inducement. But such an understanding also implies that whenever successful enforcement is more likely than assumed in the original statutory design, the resulting expected damages will be overly deterrent.

Two variants of this hyper-enforcement problem will be addressed, along with heuristics for using concurrent damages as a corrective for each. The first variant occurs when higher counts of violations attract more enforcement attention or more avid plaintiffs, or lead to easier detection or proof.

A second variant arises due to minimum statutory per-count awards that are set at high levels to encourage individual plaintiffs to sue on claims that would otherwise be too small to be worth litigating. The problem is that beyond a certain threshold, there is no longer any need for such subsidies to continue accumulating with every count.[10] And where thousands or even millions of counts can be claimed or aggregated in a given case, the redundant accumulation of these inducements to sue can reach astonishing sums.[11]

Finally, the Conclusion will propose a thought experiment that highlights both limitations and possible extensions of the present analysis: What if these sorts of excessive damages are

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[10] The desired litigation subsidy may thus be understood as the "fixed" component of the damages scheme, in such a case.

[11] Most famous may be the flurry of class actions under the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952, based on errors in printing customer receipts—such as the suit against Chuck E. Cheese restaurants with claims potentially amounting to $1.9 billion. See infra note 68 and accompanying text.

not "surprises" at all, but instead are messages aimed at deterring overconfident actors who think they are more likely to evade enforcement than they really are?[12] Is "acoustic separation" then useful, or even necessary, for the practical application of concurrent damages?

I. REDUNDANT PUNITIVE DAMAGES

"Overkill" is what Judge Henry Friendly famously called it—and yet he could point to no general solution to the potentially "staggering" problem of redundant punitive damages.[13] The courts have not had better luck in the forty years since.[14] Neither has Congress.[15] The concern seems to have motivated

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[12] The analysis thus emphasizes the essential point that perceptions—including *misperceptions*—are what matter for ex ante incentives.

[13] Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) ("We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill. . . . We know of no principle whereby the first punitive award exhausts all claims for punitive damages and would thus preclude future judgments . . . .").

[14] This is not for any lack of concern or notice of the problem. See, e.g., Dunn v. HOVIC, 1 F.3d 1371, 1385 (3d Cir. 1993) (en banc) ("[T]he point of 'overkill' has been reached with respect to punitive damages in asbestos litigation."). Indeed, judges have long warned of potential constitutional implications. See, e.g., Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989) (noting that "the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns"); In re Fed. Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir. 1982) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process."). But the U.S. Supreme Court has yet to address the issue directly. See infra note 17.

[15] Two attempts in the Senate failed in committee. See Multiple Punitive Damages Fairness Act of 1995, S. 671, 104th Cong. (1995) (introduced by Senator Orrin Hatch); Multiple Punitive Damages Fairness Act of 1997, S. 78, 105th Cong. (1997) (re-introduced by Senator Hatch).

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the U.S. Supreme Court in developing its due process limitations,[16] and yet the Court has also studiously avoided confronting the problem head-on.[17] A few states have devised a mixed bag of constraints, such as offsets or flat bans on later awards, but there has been little coherence among their approaches.[18]

A. Concurrent Damages as a Solution

The concurrent damages approach offers the hope of an analytically coherent solution. At least, it offers a clear conceptual frame for understanding what any fix for the problem should aspire to do. As an initial exploration, the following analysis will sketch the starting principles for running punitive damages concurrently, note some potential advantages and obstacles, and touch on how concurrence relates to other procedural devices (such as preclusion and aggregation). The analysis will focus on how to extract the right amount of punitive damages from the defendant and not on how that windfall should be

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[16] See, e.g., State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408, 423 (2003) (noting the problem of multiple punitive damages awards).

[17] See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 612 n.4 (1996) (Ginsburg, J., dissenting) (noting that the Court declines "to address the question of multiple punitive damages awards stemming from the same alleged misconduct"). The Court's latest guidance in *Philip Morris USA v. Williams* seems to inch closer to the problem: Juries are not to punish the defendant for harms done to non-parties—and yet they may still consider such non-party harms in judging the act's reprehensibility when assessing punitive damages. Philip Morris USA v. Williams, 549 U.S. 346, 353–55 (2007). But this guidance cannot bar the redundancy that occurs when each jury awards its own plaintiff for the inherent reprehensibility of the act (as supposed in the initial illustration above). Moreover, the case provides cover for jury awards that do count harms to others under the rubric of reprehensibility.

[18] On the relative virtues and shortcomings of such approaches, see infra note 46 and accompanying text.

given out to plaintiffs,[19] though it will make note of various judicial approaches already in use for allocating a single award among multiple claimants. Other important considerations—such as how the concept of concurrence may be put to work in the context of repeated settlements[20]—are reserved for future analysis.[21]

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[19] How punitive damages are allocated among plaintiffs is a secondary concern, conceptually, under the modern view that punitive damages are defendant-focused rather than plaintiff-focused. Punitive damages are now generally understood to be a windfall for (rather than an entitlement of) plaintiffs—a view reflected in split-recovery statutes that divert a large share of punitive damages away from the winning plaintiff and into the state treasury or to charitable uses. See Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008) ("Regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."); Sharkey, supra note 4, at 370–80. This distinction may be blurred in those cases where punitive damages as a practical matter serve to make up for gaps in compensation or serve as an inducement to bring suit. Although such circumstances are omitted from the present analysis, needless to say, they would not generally justify awarding exactly the *full* measure of punitive damages to *every* plaintiff. Moreover, creating a concurrence option at least allows the judge to make the call in any case involving such a tradeoff—between reducing lawsuits or undercompensating, on the one hand, and overdeterring or overpunishing, on the other—as opposed to automatically defaulting in favor of the latter. It should also be noted that, whenever it may be useful for more than one plaintiff to receive some amount of punitive damages, the concurrent damages option (which allows the possibility that punitive damages will be shared among plaintiffs) is superior to the first-come, first-served approach used in some states, which permits an award of punitive damages to only the first plaintiff. See infra notes 41–46 and accompanying text.

[20] For a recent illustration of taking a prior settlement into account in assessing later fines and penalties—in effect running them concurrently—see the Justice Department's plea agreement with SAC Management. Press Release, U.S. Dep't of Justice, Manhattan U.S. Attorney Announces Guilty Plea Agreement with SAC Capital Management Companies (Nov. 4, 2013), http://www.justice.gov/usao/nys/pressreleases/November13/

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1. "Fixed" and "Variable" Damages

One simple principle should guide the use of concurrent punitive damages: If a judge believes that some portion of the total damages in a case before him reflects an amount that this defendant should not be made to pay repeatedly, then he should designate this portion to run concurrently with the awards in other cases. To use the vocabulary introduced earlier, the judge should distinguish between the "fixed" and "variable" components of the total award in that case—in effect allowing only the variable component to be repeated in other cases, by running the fixed component concurrently.

Consider this most basic of possible scenarios (call it Scenario 1): Suppose that the judge views the punitive damages in the case as representing full legal retribution for the defen-

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SACPleaPR.php ("Because the SAC Companies have already agreed to pay $616 million to the U.S. Securities & Exchange Commission to resolve related civil insider trading charges, that amount will be credited against today's penalty [of $1.8 billion], and therefore, the additional payment required under this Agreement will be approximately $1.2 billion.").

[21] It may be worth noting here, however incompletely, three starting points for the analysis of settlements. First, the use of concurrence (or not) by the courts in determining punitive damages awards will presumably cast the shadow in which settlements are negotiated. Second, as a general matter, settlements already must specify the scope of the defendants' conduct for which liability is being released. Thus the question is not whether that information must be generated, but whether it is kept confidential between the settling parties—and if anything, one might expect the attractive prospect of later courts running their awards concurrently with past settlements to induce defendants to publicize the scope of conduct covered by those settlements. Third, the implementation mechanics of distributing funds from a settlement to future judgments (or future settlements) would not be entirely new problems, as solutions have already been developed in some contexts. See, e.g., In re Carolina Tobacco Co., 360 B.R. 702, 706–07 (D. Or. 2007) (describing the escrow account required by a settlement with states for the payment of future judgment awards).

dant's entire course of conduct. He would then run the whole of the punitive award concurrently with those in other cases.

The following refinements to this prototype approach illustrate how the use of concurrent damages can be adapted to varying circumstances: first, under competing theories about the purpose of punitive damages; second, along the spectrum of views of punitive damages, from defendant-focused to plaintiff-focused; and third, when courts are able or unable to run damages concurrently with *future* awards.

2. Differing Aims of Punitive Damages

The consensus modern view is that punitive damages serve a dual function—retribution and deterrence.[22] Yet these aims do not always align. The amount needed for retribution may not be equal to what is needed to deter. Nor is there always agreement on what each term means, and one might sensibly think that the best meaning should vary by context. Consider the question of what amount is needed to "deter": Does that refer to what is conventionally called optimal deterrence (that is, loss internalization)? Or rather, to absolute deterrence (that is, erasing any gains from the misconduct)?[23] Or to still some other understanding of deterrence?

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[22] See, e.g., Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008) ("Regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.").

[23] It should be emphasized that for both the optimal deterrence and absolute deterrence approaches, accuracy in damages is useful—not least because of the familiar need to set marginal deterrence correctly. See Stigler, supra note 3.

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Fortunately, the general usefulness of concurrence in reducing redundancy does not much depend on any particular answer to these questions. Yet in operation variations do arise depending on which purpose is assumed, because it affects the question of what portion of damages is understood to be the "fixed" component that should run concurrently across cases. As a practical matter, the importance of these variations may well be washed out by the rough-justice nature of assigning monetary damages, and especially punitive damages, in the first place. But it is still useful for the sake of conceptual clarity to point them out.

Deterrence versus retribution. — First, consider the distinction between the dual aims. How might a court focused on deterrence (whether optimal or absolute) differ from a retribution-oriented court in deciding which portion of the damages award to designate as running concurrently? One critical difference is the role of compensatory damages. A judge taking a retributive approach may view them as irrelevant to punishment (as we have assumed in Scenario 1 above). By contrast, the degree of deterrence depends on the total award, including compensatory damages.[24]

Thus a judge who believes she has achieved the full measure of deterrence, via the total damages in the case before her, would not want *any* of that amount to be revisited on this same defendant (for the same conduct) by other courts. The sum of the compensatory and punitive damages in this case alone is all the deterrence that the judge thinks is needed. The court may well have reached this result by using punitive damages to make up the difference between the compensatory damages

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[24] This is true under both the loss-internalization (optimal deterrence) and the gains-erasing (absolute deterrence) views. Compensatory damages are more closely related to the former, for obvious reasons. But under either view they should be recognized as part of the total costs to the defendant, and thus part of the deterrent.

and the desired deterrent amount. In essence, the "fixed" component of damages here is the entire award.

What this deterrence-oriented judge should run concurrently, in theory, are the total damages (not only the punitive damages). But in practice, she cannot do so. She must actually award the compensatory damages in the present case. So the best she can do is to say that the punitive damages are to run concurrently. At this point, she may seem to be acting identically to the retribution-oriented judge in Scenario 1. But here is the crucial difference: The deterrence-oriented judge should run the *punitive* damages in this case concurrently with not only the punitive damages in other cases, but with *any* damages in other cases, including those that are compensatory.

Note that although this approach minimizes overdeterrence, there may still be some slippage—if courts can only run their damages concurrently with *past* awards. Suppose that the first court awards damages in the fully deterrent amount. Then the best that the second court can do is to run its own *punitive* damages award concurrently with the *total* damages in the first case. Because the defendant will also pay the compensatory damages in this second case, the defendant ends up overpaying relative to the accurately deterrent amount (though this redundancy is far less than without concurrence).[25] This structural feature, that a court cannot designate its own compensatory damages to run concurrently, is a complication for the deterrence approach—but not for the retribution approach assumed in Scenario 1.

Shared and individual components of retribution. — Next, let us consider how courts focused on only one of the dual aims, retribution, might nonetheless vary in their ideal use of concur-

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[25] As we shall see, reducing or avoiding such slippage may be possible if the courts can also run damages concurrently with *future* awards. See infra Subsection I.A.3.

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rence. Imagine a variation on Scenario 1: What if a judge does not view the punitive damages in her case as reflecting the full legal retribution this defendant should have to face, and so she believes that further punitive damages in other cases may be warranted (to some extent)? For instance, she might see her role as assigning punitive damages to serve retribution on behalf of this specific plaintiff, but not on behalf of other victims.[26]

She might then conceive of this plaintiff's total punitive damages as having two parts: One portion serves the aim of retribution for the defendant's reprehensibility as directed only at this specific plaintiff. She may well expect other judges to award such a portion to their plaintiffs as well. She would view these per-plaintiff portions not as redundant, but as a "variable" component of punitive damages and thus properly cumulative across cases.

Meanwhile, she may see a separate portion of this plaintiff's punitive damages as serving the aim of retribution for the inherent, general badness of the defendant's conduct (from which this plaintiff also suffered)—the "fixed" quantum of reprehensibility shared among the victims, punishable by a one-time levy against the defendant. This portion of the punishment *would* be redundant if other courts also awarded it. (And yet at least *one* court must mete out this part of the punishment.) Because retribution on behalf of any plaintiff would be incomplete without this component, each court's award should include it.[27] But then each court should also run this

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[26] The judge would thus be acting in the spirit of *Philip Morris*, discussed supra note 17.

[27] Note again that including such a shared component of reprehensibility would not likely run afoul of *Philip Morris* (as discussed supra note 17) because it *is* properly part of the punishment for *this* plaintiff's harm—just as it would be for any other plaintiff.

portion of the punitive award (and *only* this portion) concurrently with the awards in other cases.

The usual principle thus still applies, but now the "fixed" portion is only a subset of the punitive damages in each individual case. The narrower point here is that the portion of the damages a court runs concurrently need not always be the full punitive damages award.[28]

The more general point is that concurrence is an option, not a command. Its use can be flexibly adapted to understandings of punitive damages that vary from judge to judge, or from situation to situation.[29]

3. Anticipation of Future Awards

Should the concurrence device be only backward-looking, with later courts running their new awards concurrently with past awards? Or should it be used even by earlier courts, in a forward-looking way, as is possible with concurrent criminal sentencing?[30] There is no conceptual reason that concurrence cannot be used in anticipation of future awards—and there are good practical reasons to encourage such use. Concurrence is a more powerful, and more user-friendly, tool when it can be used by earlier courts as well as by later courts.

Think again of the deterrence-focused judges described above, who are hamstrung by not being able to run *compensatory* damages concurrently. If concurrence is only backward-looking, then even if all punitive damages run concurrently,

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[28] The chosen subset may be of any size, of course: At one extreme, the "subset" may be as large as all of the punitive damages (as it was in Scenario 1 above). At the other extreme, it may be a null set, in which case the judge forgoes concurrence altogether.

[29] The complications that can arise when successive judges (dealing with the same conduct) disagree about the use of concurrence will be explored in the next section.

[30] See, e.g., Setser v. United States, 132 S. Ct. 1463 (2012).

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the compensatory damages will continue to accumulate case by case—each time causing the defendant to overpay further beyond the fully deterrent amount.

But notice how the problem dissipates if concurrence can be used in a forward-looking, anticipatory way. In the first case, the judge announces that the punitive damages award is to run concurrently with any past *or future* damages (both compensatory and punitive) for the same course of conduct.[31] The task for the second judge is identical, and so forth for each later court. As successive cases occur, their formal punitive awards not only run concurrently with each other—but also partially or fully absorb the accumulation of compensatory damages.

To illustrate, consider a defendant who causes identical harms to Plaintiffs 1 through 5. Suppose that for this act, the courts adopt an optimal deterrence purpose for punitive damages. The courts are (collectively) aiming for full loss internalization; that is, aggregate damages should total five times the individual harm. Court 1 achieves this optimal deterrence amount by awarding compensatory damages (one times the harm) and makes up the rest using punitive damages (four times the harm). Suppose Court 2 does the same.

Imagine if Court 1 can run its punitive damages concurrently with *future* damages, including Court 2's compensatory damages. Now both Court 1 and Court 2 can simply say, "My punitive damages run concurrently with any past or future damages in any other cases." First the defendant will pay one measure of harm to each of Plaintiff 1 and Plaintiff 2 (as compensatory damages). Suppose the defendant then pays three further measures of harm to Plaintiff 1, as punitive damages. Now, Court 2's punitive damages award is also satisfied via

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[31] By doing so, the first judge has in effect solved the next judge's problem of not being able to declare that compensatory damages are to run concurrently (because the first judge has already made that happen).

concurrence, because those four measures of harm have been paid to Plaintiff 1. At the same time, Court 1's punitive damages award is also fully satisfied, because three measures of it have been directly paid to Plaintiff 1, and one measure is running concurrently with Plaintiff 2's compensatory damages.[32] (The logic works just as well if any or all of the three extra measures of harm are paid to Plaintiff 2 instead.)

The defendant has thus discharged his liability upon paying five times the harm, as desired. At the same time, the defendant cannot satisfy both courts' awards by paying any less. Moreover, further judgments (by Courts 3, 4, and 5) are similarly absorbed; in particular, the compensatory damages that must be paid to those plaintiffs are credited to the punitive damages of the other courts, and again the defendant will not ever pay more (nor can it get away with paying less) than the optimal amount of five times the harm.

The illustration above shows how the use of anticipatory concurrence can mitigate the slippage problem noted above. More importantly, it highlights an approach in which each court need only follow a simple heuristic, one that relieves them of needing to know how many other courts are giving awards, and how much those awards might be. Unlike other possible anticipatory adjustments (such as reducing damages in an earlier case based on a prediction that later cases will arise), no such guesswork is needed here: A court need only declare that its awards are to run concurrently with any past or future awards.

Allocating among plaintiffs. — There is a tradeoff to such simplicity at the adjudication stage, however, in that the courts

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[32] In contrast, if concurrence is only possible in a backward-looking way, then Court 2 would run its punitive damages concurrently with Court 1's damages award; but the compensatory damages in Court 2 would push the defendant's payments from the optimal deterrence amount of five times harm up to six times harm (and so forth for each further case).

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will then need to make practical determinations about how to allocate the concurrent amount among the plaintiffs who do materialize. Allocation of this sort is a familiar (if not always an easy) task for the courts. For instance, think of bankruptcy proceedings, "contribution" among joint tortfeasors, or any case involving multiple plaintiffs sharing a "limited fund." One might even think of such allocation among plaintiffs as a sort of joint-and-several *recovery*.

These analogies suggest two points: First, in the present context there is arguably less at stake in precisely how the concurrent amount is allocated than in the other settings. The reason is that punitive damages are generally understood to be the penalty the *defendant* deserves to pay, not compensation that *plaintiffs* deserve to receive;[33] this is perhaps best illustrated by "split-recovery" statutes that reallocate a large share of punitive damages away from winning plaintiffs to the state treasury or to charitable funds.[34] Second, as a technical matter, the various devices that the courts have used to serve these other allocation needs—such as escrows or trusts, equitable allocation principles, or time limits for further plaintiffs to come forward—may be adaptable to the distribution of the concurrent award.[35] For example: Court 1 can require the defendant

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[33] See supra note 19.

[34] See, e.g., 735 Ill. Comp. Stat. 5/2–1207 (2012); Iowa Code § 668A.1(2)(b) (2013); Or. Rev. Stat. Ann. § 31.735 (West 2013). For further analysis of such "split-recovery" statutes, see Sharkey, supra note 4, at 375–80.

[35] See, e.g., Dunn v. HOVIC, 1 F.3d 1371, 1394 (3d Cir. 1993) (en banc) (Weis, J., dissenting) (observing that in another case, "[t]he district court intervened to impose measures for a more equitable distribution of the funds and eventually approved an arrangement that altered the distribution process so that those most seriously injured were paid first. In addition, a serious attempt was made to predict future claims so that present and future claimants would be paid an equitable percentage of their claims' value." (citations omitted)). Courts have used escrow accounts for the payment of future judgment awards. See, e.g., In re Carolina Tobacco Co., 360 B.R. 702,

to pay Plaintiff 1 her compensatory award immediately, but set aside funds in escrow or trust for the punitive award, on the understanding that Plaintiff 1 will be paid an equitable share of those reserved funds after a fixed time period (a share that depends on how many other plaintiffs have won punitive damages in that time).[36] Court 2 can then require that some or all of the payment to Plaintiff 2 come from that initial escrow or trust (which Court 1 will allow because that is the very point of setting up such a fund), or Court 1 can release an appropriate amount of the reserved funds back to the defendant, based on the amount the defendant verifies it has directly paid to Plaintiff 2.[37]

706–07 (D. Or. 2007) (describing escrow account required by a settlement with states for the payment of future judgment awards). Courts have also used trusts to collect and distribute punitive damages awards. See, e.g., Sampson v. Vasey, No. LA28882, 2007 WL 4555839, at *1 (Iowa Dist. Ct. Sept. 4, 2007) ("[T]he punitive damages shall be deposited into the plaintiff's attorney's trust account for distribution after reduction of attorney fees and a proportionate share of the out of pocket costs of recovery with 25% of the gross recovery of punitive damages to the Plaintiff and the remainder paid into the civil reparations trust fund." (citing Fernandez v. Curley, 463 N.W.2d 5 (Iowa 1990) regarding Iowa's split-recovery statute)); Payne v. Cmty. Blood Ctr., No. 0210-10211, 2004 WL 5400536, at *3 (Or. Cir. Ct. Oct. 25, 2004) ("[T]he Court notes that allegations of punitive damages remain pending against Defendant Cryolife, Inc., and that both compensatory and punitive damages may, at some future time, be deposited into the Trust.").

[36] It will likely be in the defendant's interest to inform Court 1 of any other future potential punitive damages awards (and future claimants) it may face for the same conduct once Court 1 has decided on the amount of punitive damages and is considering whether to run them concurrently.

[37] To be clear, each plaintiff will receive its full compensatory damages. But beyond that, how much of the remaining windfall goes to Plaintiff 1 and how much goes to Plaintiff 2 can be guided by any equities in play. As a practical matter, such equities may be weighed by the fund administrator, as is commonly done in distributing a "limited fund" or class-wide damages. The possibility of allocating among plaintiffs based on the equities— rather than based on factors such as who won the race to the courthouse—

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When courts disagree. — A conceptually more important complication is that successive courts may disagree about whether the punitive awards (or how much of the awards) should run concurrently, in the first place. The mechanism illustrated above may seem to favor the courts that *do* think the award should run concurrently, in that a court always has the power to unilaterally reduce how much the defendant pays to that particular plaintiff (with the compensatory amount as the presumptive floor) but cannot require another court to award more. For example, Court 2 may decide to run its punitive damages award concurrently with that assessed by Court 1. But, assuming it does not manipulatively overinflate its own award, Court 2 cannot undo Court 1's decision to run punitive damages concurrently with later awards. The influence of Court 1 is also limited, however: Undermining Court 1's intentions (in favor of those courts that think the punitive awards *should* accumulate) is still possible if more courts decline to run their awards concurrently. The reason is that Court 1's use of concurrence can only effectively discount future awards by the amount of punitive damages that Court 1 itself has assessed. Extending this logic further, then, one might see the end result of the successive courts' independent decisions about concurrence to be, loosely speaking, a sort of weighted average of their choices.[38]

may be seen as a further advantage of the concurrence option over the alternative devices noted in Subsection I.B.2.

[38] To extend the earlier illustration: If Courts 1, 2, 3, and 4 all run their awards concurrently as before but Court 5 refuses to do so, then the defendant will end up paying nine (as opposed to five) measures of individual harm; this is still less than the multiplier of 25 that would occur in the absence of a concurrence option.

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B. Procedural Advantages

This section will highlight a few procedural advantages of using the concurrent punitive damages device. The wellspring of these advantages is the conceptual integrity of this approach: Concurrence is not an ad hoc adjustment or judicial "fudging" (in contrast to preemptive reductions of earlier awards or complete bars on later awards). Quite the opposite. The concurrence mechanism neatly suits the reality of the overlapping enforcement problem: When there are concurrent enforcers, isn't the most natural solution just to give concurrent awards?

1. Information Costs

Think back to this salutary aspect of using anticipatory concurrence: Hardly any anticipation is needed at all. The court need not be aware of other cases addressing the same conduct—much less of whether those cases have resulted (or will result) in awards of any given size. Court 1 does not even need to know that it is Court 1, and Court 2 does not need to know that it is Court 2.[39]

This feature speaks to a more general advantage of the concurrence approach: Each court can determine its own award *as if* it had the only case against this defendant. Each can simply declare the full amount of punishment deserved, on behalf of its plaintiff. Notably, such undiminished declarations may also serve the public notice and socially expressive aims of allowing

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[39] Note again, however, that as a practical matter the defendant will have good reason to inform Court 1 about the possibility of future punitive damages in Court 2, once Court 1 has decided to award punitive damages. Likewise, if Court 2 imposes punitive damages and is considering running them concurrently, the defendant will want to inform Court 2 about the penalty it already faces in Court 1.

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each court, in each jurisdiction and in each plaintiff's case, to mark its own condemnation of the act.

The practical upshot is that the information demands on the courts are lightened in setting their awards: No court needs to figure out how much to remit its award because another court has given (or might yet give) punishment for the same act.[40] It also does not matter how many other such cases there will be. A corollary is that Court 1 then has no need to predict whether its outcome will encourage future lawsuits in Courts 2, 3, or 4.

2. Anti-gaming and Robustness

For similar reasons, the concurrence approach is also "robust" to later changes in other courts' awards. This is a potential advantage over the alternative solution of barring subsequent awards. Suppose that a given state bars Plaintiff 2 from seeking punitive damages because an earlier case has already awarded them to Plaintiff 1.[41] But what if Plaintiff 1's award is later reduced or overturned on appeal? Plaintiff 2's award cannot then be increased, unless that case can be reopened for new proceedings on damages, and so the defendant may well gain a windfall.

The use of concurrent damages, by contrast, can avoid such a lapse in punishment and deterrence because Plaintiff 2's

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[40] By contrast, under a forward-looking scheme like Minnesota's, Court 1 must speculate as to what subsequent courts might do because punitive damages in the present case are to be assessed (and thus pre-adjusted) with an eye toward "the total effect of other punishment likely to be imposed upon the defendant." Minn. Stat. § 549.20 subdiv. 3 (2012).

[41] This can occur in first-come, first-served states such as Florida. See Fla. Stat. § 768.73(2)(a) (2013) ("[P]unitive damages may not be awarded against a defendant in a civil action if that defendant establishes . . . that punitive damages have previously been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages.").

formal award will have already been declared in full. No matter what happens to Plaintiff 1's punitive award, the defendant remains on the hook for at least the amount announced for Plaintiff 2.[42]

The same advantage applies to forward-looking reductions as well: What if Plaintiff 1's punitive damages are preemptively reduced (as some courts have done)[43] due to a worry that future plaintiffs might also sue—but then it turns out that no other plaintiffs come forward? Again, using concurrent damages can avoid the problem of remittitur regret.

A closely related advantage is that the concurrence approach takes the profit out of manipulative gaming of the system (by either side). As a foil, consider those states that have adopted a first-come, first-served approach, barring punitive awards beyond the first case that awards them.[44] The opportunities for gaming by defendants are self-evident: litigating against the weakest plaintiff first, forum shopping, and so forth. The concurrence approach eliminates such incentives for manipulation, both because it requires each court to declare the full amount of the proper punitive award and because, crucially, the defendant will always end up having to pay the highest

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[42] An alternative approach of reducing or offsetting a later punitive award by the amount of earlier awards could in theory share this advantage, if in operation the credit for an earlier award could be revoked as needed.

[43] One such example is Judge Friendly's case. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838–44 (2d Cir. 1967). Again, Minnesota's punitive damages statute also invites such speculative, anticipatory reduction. See supra note 40.

[44] Florida is a leading example. See supra note 41. Other states have resisted this approach. See, e.g., Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 413 (Ky. 1998) ("[I]t would be unfair to this plaintiff to bar his claim for punitive damages just because other plaintiffs have previously recovered damages arising out of the same conduct.").

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formal amount.[45] In a parallel way, if anticipatory concurrence is known to be available, its general use can avoid the sort of racing to the courthouse by *plaintiffs* that is likely to occur under those alternative solutions that favor the first plaintiff (such as offsets or bars on later awards).[46]

3. Complementing Preclusion Law

The law of preclusion does not solve the redundant punitive damages problem. To the contrary—nonmutual offensive collateral estoppel, as endorsed by the U.S. Supreme Court in *Parklane Hosiery Co. v. Shore*,[47] potentially allows Plaintiff 2 to

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[45] Note that this advantage is shared by the "offset" approach adopted in a handful of states. See infra note 46.

[46] For an example of an offset policy, see Mo. Rev. Stat. § 510.263(4) (2000), which describes an offset system whereby a later punitive damages award is reduced by the amount of a prior punitive damages award. Notably, this Missouri statute generated a dispute over how to apply the offset when two cases proceeded at roughly the same time and their sequencing became tangled. See Barnett v. La Societe Anonyme Turbomeca, 963 S.W.2d 639, 653–54 (Mo. Ct. App. 1997). Other states with an offset system include Oklahoma and Oregon. See Okla. Stat. Ann. tit. 23, § 9.1(C)(2) (West 2011) (providing that the "[t]rial court shall reduce any award for punitive damages" by the amount of punitive damages the defendant has previously paid); Or. Rev. Stat. § 31.730(3) (2013) ("In reducing awards of punitive damages . . . the court shall consider the amount of any previous judgment for punitive damages entered against the same defendant for the same conduct giving rise to a claim for punitive damages."). Some states allow previous awards to be considered in assessing a new award. See Gagnon v. Continental Cas. Co., 260 Cal. Rptr. 305, 306–07 (Cal. Ct. App. 1989) (noting that "whether punitive damages previously have been imposed for the same conduct" is a relevant consideration in deciding the amount of a punitive damage award); Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 38 (Tex. 1998) ("[E]vidence about . . . previously paid punitive damage awards . . . for the same course of conduct is relevant and may be admitted when a defendant offers it to mitigate punitive damages.").

[47] 439 U.S. 322, 329–31 (1979) (upholding federal court's application of nonmutual offensive collateral estoppel, in its discretion, while also articu-

piggyback on Plaintiff 1's victory.[48] Asymmetrically, however, the defendant cannot make use of Plaintiff 1's victory and windfall against Plaintiff 2.[49] (Nor could it use Plaintiff 1's loss.) This may all be quite sensible as far as the law of preclusion goes. But the asymmetry feeds the repetitive damages problem by encouraging piggybacking by Plaintiff 2, Plaintiff 3, and so forth. The use of concurrent punitive damages rebalances this asymmetry by deflating the incentives to pile on, and, more generally, by reducing redundancy in the awards that might result.

Another preclusion device sometimes touted as a potential solution—the mandatory punitive damages class action—has yet to prove palatable to the courts,[50] and the outlook is not

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lating factors to be considered by the courts in exercising this discretion). Note that the *Parklane* factors tend not to be especially useful for counseling a court against applying preclusion in the context of redundant punitive damages. For instance, although one factor is whether plaintiffs are likely to take advantage of the availability of preclusion by waiting until another plaintiff wins, such a strategy seems unlikely for plaintiffs seeking punitive damages—who, if anything, may tend to race to the courthouse instead. See id. at 330 (describing the "wait and see" criterion). Similarly, the worry that the "defendant in the first action is sued for small or nominal damages" and may thus have "little incentive to defend vigorously" seems plainly irrelevant in cases involving punitive damages. Id.

[48] Likewise, the same phenomenon may occur in the many states that also permit nonmutual offensive collateral estoppel. See, e.g., Tofany v. NBS Imaging Sys., 616 N.E.2d 1034, 1038 (Ind. 1993) (endorsing the use of nonmutual offensive collateral estoppel); Falgren v. Bd. of Teaching, 545 N.W.2d 901, 907–08 (Minn. 1996) (same); In re Caranchini, 956 S.W.2d 910, 914 (Mo. 1997) (same); Silva v. State, 745 P.2d 380, 384 (N.M. 1987) (same); Koch v. Consol. Edison Co. of N.Y., 468 N.E.2d 1, 6 (N.Y. 1984) (same).

[49] See Taylor v. Sturgell, 553 U.S. 880, 884 (2008) (noting that, generally, nonparties cannot be bound by the preclusive effect of past judgments or findings, except under limited conditions).

[50] For now, the one shining example, in the case of the *Exxon Valdez* oil spill, remains an anomaly. See Linda S. Mullenix, Nine Lives: The Punitive Damages Class, 58 U. Kan. L. Rev. 845, 863–67 (2010) (recognizing the *Exxon*

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promising.[51] And of course, it cannot be a general solution, because many redundant punitive damages situations are unsuitable for the class action form. One might then suppose that non-class aggregation—such as consolidation—may be able to do some good, but that approach depends on whether the cases are all located in the same state or are removable to (or already within) the federal system.[52] Concurrence, by contrast, is used by a court unilaterally[53]—and does not depend on any such happenstance of procedural alignment with other cases.

A deeper problem remains, anyway, in relying on aggregation devices (including non-class forms): There is no guarantee that aggregated proceedings will result in lower awards than in separately tried cases. True, there may be some natural compression when a single court deals out the punitive dam-

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Valdez case to be a unique instance of the mandatory punitive damages class). The *Exxon Valdez* example is also anomalous in that punitive damages were barred in parallel state court litigation based on "deference to [the] federal court order creating a federal mandatory punitive damages class." Chenega Corp. v. Exxon Corp., 991 P.2d 769, 775 (Alaska 1999). There is no general guarantee, of course, that any future court would defer to another in this way.

[51] See In re Simon II Litig., 407 F.3d 125, 134–36 (2d Cir. 2005) (rejecting District Judge Jack Weinstein's attempt to certify a mandatory punitive damages class using a "limited punishment" theory). Given the U.S. Supreme Court's recent habit of raising the bar for class certification at almost every turn, the prospects for class-action solutions to the redundant punitive damages problem appear grim.

[52] Moreover, consolidation can bring together only cases that are already pending; when claims arise over time, it is easy to imagine situations where "consolidation would not prevent multiple punitive damages awards." Richard A. Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37, 62 n.141 (1983).

[53] The tradeoff entailed by the unilateral nature of the use of concurrence is, of course, that earlier and later courts addressing the same conduct by the same defendant might nonetheless disagree about whether (and to what extent) concurrence should be used. See supra Subsection I.A.3.

ages for many plaintiffs at once.[54] But think of juries calculating punitive damages by applying a multiplier to compensatory damages; the sum total punitive amount would be the *same* whether the cases were aggregated or tried one by one. This is where a concurrence option can be crucial, allowing the compression to happen as the court deems appropriate. To be clear, concurrence can work in the absence of aggregation—the point here is that concurrence may in fact be needed for aggregation to do any real work at all.

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[54] For instance, a deterrence-focused court that would have assessed a higher multiplier ($1/P$) in a single-plaintiff case might, in an aggregated case, recognize that P is in fact higher (and hence the proper multiplier should be lower).

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II. HYPER-ENFORCEMENT OF STATUTORY DAMAGES

Damages of at least $750 per song;[55] at least $1000 per unauthorized login;[56] at least $5500 per false invoice[57]; and at least $10,000 per wiretap[58]—the high dollar ranges often found in statutory damages provisions carry an unmistakable *in terrorem* message. One might understand the not-so-subtle warning as: "Even if you think your chances of getting caught are low, penalties like these make it not worth the risk." One might also perceive a message aimed at potential *plaintiffs*: "Penalties like these make it worth your while to sue."[59]

Both messages reflect aims that are said to motivate the use of minimum awards in statutory damages schemes: respec-

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[55] Copyright Act of 1976, 17 U.S.C. § 504(c) (2012) (providing a standard range of $750 to $30,000 per work, if the infringements are not willful).

[56] Electronic Communications Privacy Act (Title II, or the Stored Communications Act), 18 U.S.C. § 2707(c) (2012) ("[I]n no case shall a person entitled to recover receive less than the sum of $1,000."). As glossed by the courts, this is calculated as a per-intrusion amount. See Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 759 F. Supp. 2d 417, 428–29 (S.D.N.Y. 2010); In re Hawaiian Airlines, Inc., 355 B.R. 225, 232 (D. Haw. 2006). The nuances of the courts' interpretations of this provision are discussed in Subsection II.A.1 of my earlier article. See Huang, supra note 8, at 747-50.

[57] False Claims Act, 31 U.S.C. § 3729(a) (2006) (mandating "a civil penalty of not less than $5,000 and not more than $10,000"). This range, currently adjusted for inflation, is $5,500 to $11,000.

[58] Electronic Communications Privacy Act (Title III, or the Wiretap Act), 18 U.S.C. § 2520(c)(2)(B) (2012) (mandating "statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000").

[59] See, e.g., Parker v. Time Warner Entm't, 331 F.3d 13, 22 (2d Cir. 2003) (noting that minimum statutory damages in the Cable Act are intended "to encourage the filing of individual lawsuits . . . often because there would otherwise be no incentive to bring an individual claim"); see also infra note 62.

tively, deterrence and inducing litigation.[60] Each aim is vulnerable, however, to what we might call the problem of "hyper-enforcement": when the levels of enforcement (or the chances of proving liability) turn out to be higher than anticipated in the statutory design, leading to overdeterrence in expectation and possibly to surprisingly punitive levels of damages.[61] This Part considers each vulnerability in turn, explaining how the notions of "fixed" and "variable" damages map onto each problem—and how the procedural device of running damages concurrently can be used to solve it.

A. Redundant Inducements to Sue

The high per-count ranges or minimums in certain statutory damages provisions are said to have the purpose of "encourag[ing] the prosecution of cases that would otherwise be

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[60] The messages also interact, of course, not least in suggesting to defendants that plaintiffs are likely to sue—thus giving more force to the deterrent effect.

[61] Note that even the statutory damages schemes that include amplified ranges of per-count awards (such as for "willful" or more egregious behavior)—and thus have a punitive flavor—can reach "surprisingly" punitive levels if those ranges are set based on predictions of a lower probability of successful enforcement than turns out to be true. More generally, it has not gone unnoticed that statutory damages may acquire a punitive effect. See Pamela Samuelson & Tara Wheatland, Statutory Damages in Copyright Law: A Remedy in Need of Reform, 51 Wm. & Mary L. Rev. 439, 462 (2009) ("Even when judges or juries do not explicitly say they are intent on punishing defendants, the [statutory damages] awards they sometimes make are punitive in effect."). In practice, however, whether they have such a punitive effect may have little or no effect on appellate review, as long as the damages remain within the statutory limits. See 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 14.04(B)(1)(a) (2009) ("Although the standards enunciated for awarding statutory damages run from approval of a punitive approach to disapproval of punishment, those standards are largely precatory; as long as the district court acts within the prescribed statutory limits, its discretion will probably be upheld on appeal.").

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too costly for an individual plaintiff to pursue."[62] That is, the minimum award per count is artificially inflated to include an inducement to bring suit. The problem with this system is self-evident: Ideally, such a bonus for inducing suit would not be embedded in the *per-count* award, but rather take the form of a fixed *per-case* subsidy. Yet in reality the per-count bonus remains typical of statutory damages schemes.[63]

Embedded in each statutory award, then, is a bonus to induce litigation that should not be automatically repeated with every further count. Whatever the level of the desired litigation subsidy, it is a "fixed" and not a "variable" component of the damages in a given enforcement action.[64] With more and more

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[62] Parker v. Time Warner Entm't, 631 F. Supp. 2d 242, 247 (E.D.N.Y. 2009); accord *Parker*, 331 F.3d at 22 (noting that, in a Cable Act case, minimum per-customer statutory damages are imposed "usually in order to encourage the filing of individual lawsuits"); see also Sony BMG Music Entm't v. Tenenbaum, 721 F. Supp. 2d 85, 115 (D. Mass. 2010), aff'd in part, vacated in part, 660 F.3d 487 (1st Cir. 2011) (noting that the Copyright Act's "statutory damages ranges likely include some amount to compensate copyright owners for the costs entailed in investigating and detecting infringing behavior," and citing a report of the Register of Copyrights, which noted the aim of ensuring recovery adequate "to warrant the expense of detecting infringements"); Forman v. Data Transfer Inc., 164 F.R.D. 400, 404 (E.D. Pa. 1995) (noting that the Telephone Consumer Protection Act's statutory damages minimum of $500 per violation "is designed to provide adequate incentive for an individual plaintiff to bring suit on his own behalf").

[63] The problems with the linearity of per-count award schemes may simply have escaped the attention of the drafters of some such statutes. In the case of the Copyright Act, the drafters appear to have dismissed the possibility out of hand: "We believe that the danger of exorbitant awards in multiple infringement cases is more theoretical than real. . . . We know of no case where the resulting total was considered excessive." General Revision of the U.S. Copyright Laws, 3 Omnibus Copyright Revision History 105 (George S. Grossman ed., 2001).

[64] The analysis offered here can easily be adapted to situations in which the desired litigation subsidy increases (though not linearly) with the num-

counts, as the artificially inflated per-count awards stack up, any need for further encouragement evaporates.[65] In cases with a large number of counts, moreover, such stacking-up will rapidly outstrip the ideal level of damages and reach heights fairly described as "surprisingly punitive." See Figure 1.

The best known variation of this hyper-enforcement problem occurs when class actions are brought seeking statutory damages for each of thousands or even millions of total counts.[66] Most famous may be the proposed class of 12 million Time Warner customers—in a case about disclosure of customer information—in which the statutory minimum of $1000 per count would imply a minimum of $12 billion in damages.[67] Or consider the potentially $1.9 billion in statutory damages claimed against Chuck E. Cheese for a technical violation in the printing of millions of customer receipts.[68]

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ber of plaintiffs or violations. But for exposition's sake, the implicit assumption is that the desired inducement subsidy is fixed per case.

[65] One potential complication here is that in some cases it may take multiple counts' worth of accumulated bonuses before reaching the supposedly desired level of litigation subsidy; if so, it is only after such a threshold is met that the further litigation bonuses become redundant.

[66] For a collection of cases, see Sheila B. Scheuerman, Due Process Forgotten: The Problem of Statutory Damages and Class Actions, 74 Mo. L. Rev. 103, 105–06 (2009).

[67] See *Parker*, 331 F.3d 13. The assumption running throughout the following analysis, perhaps a debatable one, is that the $1000 minimum is more than the true harm to each victim (of the unacknowledged disclosures)—so that not all of it is properly considered "variable" in our conceptual framework. Were this amount deemed to be entirely a "variable" component, of course, then there would be no cause for concern, and a court could simply forgo the use of concurrence in such a case.

[68] Blanco v. CEC Entm't Concepts L.P., No. CV 07-0559 GPS (JWJx), 2008 WL 239658 (C.D. Cal. Jan. 10, 2008). This and other startling cases under the federal Fair and Accurate Credit Transactions Act, as well as the rather weak Congressional response to such cases (namely, creating a grace period

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What is wrong here, observers typically say, is that such a litigation bonus becomes extraneous when the class action device is available as an alternative solution to the problem of enforcing small individual claims.[69] As a leading commentator neatly put it, the standard worry is "that class treatment would turn the per-customer statutory damages . . . into a hammer so heavy as to be beyond any plausible account of the underlying remedial scheme . . . [b]ecause Congress already had set the remedial scheme to make claims worthwhile on a disaggregated basis."[70]

But that cannot be the whole problem. After all, it is not multi-party aggregation per se that is driving the surprisingly punitive amount at stake. Rather, the driver is simply the huge

for a narrow category of non-willful violations), are discussed in Scheuerman, supra note 66, at 105–06 & n.11.

[69] See, e.g., *Parker*, 331 F.3d at 22 ("We acknowledge Judge Glasser's legitimate concern that the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class, may raise due process issues. Those issues arise from the effects of combining a statutory scheme that imposes minimum statutory damages awards on a per-consumer basis—usually in order to encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws—with the class action mechanism that aggregates many claims—often because there would otherwise be no incentive to bring an individual claim.").

[70] Richard A. Nagareda, Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA, 106 Colum. L. Rev. 1872, 1903 (2006) (discussing *Parker*, 331 F.3d 13); see also Stephen B. Burbank & Tobias Barrington Wolff, Redeeming the Missed Opportunities of *Shady Grove*, 159 U. Pa. L. Rev. 17, 73–74 (2010) (discussing tension between "the possibility of crushing aggregate penalties" and "providing remedies that will induce individual enforcement"); J. Maria Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, 53 Wm. & Mary L. Rev. 1137, 1191–92 (2012) (noting possible "remedial overkill"); cf. Shady Grove Orthopedic Assocs., v. Allstate Ins., 130 S. Ct. 1431, 1472 (2010) (Ginsburg, J., dissenting) (analogizing class action limitation to damages cap).

number of *counts*. And a large number of counts is possible even when there is only a single plaintiff. Thus, even if the class-action difficulty can be averted, say, by a refusal to certify such a class, the general problem does not go away so easily.

A more general solution may be possible, however. In both the single-plaintiff scenario and the class action variant, a concurrent damages option can be used to counteract such excessive piling-on of the litigation bonus. There are at least two ways to use concurrent damages here.[71] First, taking a cruder approach, a court can truncate the accumulation of damages (beyond a certain desired level of total award) by running any further counts concurrently.

Second, taking a more conceptually precise approach, the court can designate a fraction of each count's award as representing the "variable" component—for instance, reflecting the harm done by each count. The remaining fraction of each award would then be counted toward the litigation subsidy; thus, for any counts beyond those needed to reach the desired level of subsidy, the court would run those portions concurrently. See Figure 2. After that point, only the variable portion of each award would be allowed to accumulate for each further count, and properly so.[72]

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[71] Either way, in the class action variant of the problem, the properly contained amount would then be allocated among the class.

[72] As is evident from comparing Figures 1 and 2, the approach described here creates a damages curve lying between the subsidized harm curve and the unsubsidized harm curve (and parallel to both). A court wishing instead to approximate the subsidized harm curve can do so simply by allowing more per-count subsidies to accumulate first (in effect, following the statutory damages curve until it meets the subsidized harm curve in Figure 1, before starting to run concurrently any further per-count subsidies). In theory, a court can also approximate the unsubsidized harm curve while taking advantage of the per-count subsidies—though such a path is probably too complicated to be attractive in practice (namely, following the statutory damages curve until reaching the level of desired subsidy, then flat-

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B. More Counts, More Enforcement?

A more general problem of hyper-enforcement can occur when statutory damages are understood to serve deterrence.[73] In copyright, for example, statutory damages are said to serve not only to compensate but also to "discourage wrongful conduct";[74] they "furnish the deterrence . . . necessary for prospective infringers."[75] For trademark violations, they are aimed partly at compensation and partly "at deterrence of future counterfeiting—both by the bad actor in question and by other potential counterfeiters."[76] Notably, some statements suggest that the statutory penalties are inflated because the real or perceived probability of being penalized is low. For example, leg-

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lining by running entire per-count awards concurrently, before proceeding up the unsubsidized harm curve once it surpasses the level of desired subsidy).

[73] The following exposition will speak in terms of optimal deterrence, but the main points are easily translatable to absolute deterrence (by substituting gains for harms, as the touchstone).

[74] F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952).

[75] Staff of S. Comm. on the Judiciary, 86th Cong., Copyright Law Revision, Studies 22–25, at 9 (Comm. Print 1960). These studies are taken as legislative history for the Copyright Act of 1976. See also Staff of H. Comm. on the Judiciary, 87th Cong., Rep. of the Register of Copyrights on the General Revision of the U.S. Copyright Law 103 (Comm. Print 1961), *reprinted in* 3 Omnibus Copyright Revision Legislative History (George S. Grossman ed., 1976) ("[S]tatutory damages are intended (1) to assure adequate compensation . . . and (2) to deter infringement.").

[76] Stark Carpet Corp. v. Stark Carpet & Flooring Installations Corp., 954 F. Supp. 2d 145, 154 (E.D.N.Y. 2013); see also Burberry Ltd. v. Euro Moda, Inc., No. 08 Civ. 5781 (CM) (AJP), 2009 WL 4432678, at *4 (S.D.N.Y. Dec. 4, 2009) (observing that the award should operate "to discourage further wrongdoing by the defendant and others"); Staff of H. Comm. on the Judiciary, supra note 75, at 156 (noting that the award "will serve both as a specific deterrent for Defendant and a general deterrent for others contemplating the infringement of valid trademarks").

islative history accompanying an enhancement to the statutory damages provisions of the Copyright Act expressly noted, about downloading and file-sharing, that "[m]any computer users . . . simply believe that they will not be caught or prosecuted for their conduct" and that thus "more stringent deterrents" were needed.[77]

One might thus view the high dollar awards specified in some statutes as making up for presumptively low probabilities of detection, litigation, or proof.[78] (This aim has also been recognized, of course, as one purpose served by punitive damages.[79]) But what if the resulting statutory awards ranges are

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[77] H.R. Rep. No. 106-216, at 2–3 (1999) (explaining the purpose of House Bill 1761, which became part of the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999). For an analysis of file-sharing liability in light of the Copyright Act's history, see Peter S. Menell, In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age, 59 J. Copyright Soc'y U.S.A. 1 (2011).

[78] See, e.g., Williams v. Pub. Fin. Corp., 598 F.2d 349, 355–56 (5th Cir. 1979) (explaining that the Truth-in-Lending Act provision awarding plaintiff actual damages plus twice the finance charge of the loan, and all attorney and court costs, is "designed to deter generally illegalities which are only rarely uncovered and punished"); Louis Vuitton Malletier, S.A. v. LY USA, No. 06 Civ. 13463(AKH), 2008 WL 5637161, at *1 (S.D.N.Y. Oct. 3, 2008) (explaining that statutory damages are useful when counterfeiters' records are "nonexistent, inadequate or deceptively kept in order to willfully deflate the level of counterfeiting activity actually engaged in, making proving actual damages in these cases extremely difficult if not impossible"). For a fuller discussion of the variety of reasons for enhancing damages to compensate for a low probability of sanction, see Sharkey, supra note 4, at 366–67. For an economic analysis, see Keith Hylton & Thomas Miceli, Should Tort Damages Be Multiplied?, 21 J.L. Econ. & Org. 388 (2005).

[79] See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) (noting that "[a] higher ratio may also be justified in cases in which the injury is hard to detect").

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based on assumptions of low enforcement—and yet actual enforcement turns out to be higher?[80]

The following analysis focuses on one intuitive but tricky form of this problem: when the probability of successful enforcement increases with the number of violations.[81] It is easy to imagine why this may occur. Private enforcers may be more motivated to pursue cases with higher counts and thus higher potential winnings.[82] Some public enforcers may also act this way.[83] More mechanically, monitoring by both private and

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[80] The general problem of setting deterrence multipliers when enforcement probabilities can change (such as based on the salience or seriousness of the offense) is thoroughly examined in Richard Craswell, Deterrence and Damages: The Multiplier Principle and Its Alternatives, 97 Mich. L. Rev. 2185 (1999).

[81] What makes this variant of the problem more difficult is that the seemingly direct approach—adjusting the statutory minimum up or down—is not a well-tailored solution to the problem of variation in probabilities from case to case.

[82] Class actions, of course, are the archetype of this phenomenon. Punitive damages are also seen as motivating for plaintiffs in a similar way. See, e.g., Dan B. Dobbs, Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies, 40 Ala. L. Rev. 831, 846–47 (1989) ("In some cases damages may be so limited that the citizen who considers suing is discouraged from doing so, even though a suit would be socially useful. . . . The potential of a punitive award may make a claim worthwhile that otherwise would not be."); A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869, 895 (1998) (explaining that punitive damages, by incentivizing suits, decrease the chances that a defendant will escape liability).

[83] Joint public-private enforcement also occurs in some contexts, such as in qui tam litigation under the False Claims Act. See David Freeman Engstrom, Harnessing the Private Attorney General: Evidence from Qui Tam Litigation, 112 Colum. L. Rev. 1244 (2012) (empirically assessing qui tam litigation). For evidence that public enforcers differentiate between larger and smaller targets in their likelihood of pursuing enforcement, see, e.g., Stavros Gadinis, The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers, 67 Bus. Law. 679, 682, 685 (2012).

public enforcers may be more likely to detect actors who engage in multiple violations—and likewise, proof of wrongdoing may be easier to establish.[84]

The device of concurrent damages can be used to neutralize the extra multiplier for *expected* damages caused by such increases in the probability of successful enforcement. (It should be emphasized that the use of concurrence does not imply undercompensating plaintiffs. Recall that the awards are assumed to be already inflated beyond actual harm, by design; the use of concurrence in effect adjusts the degree of that inflation.)

To illustrate, think of a fast-flowing river, and assume that each discharge of pollutants by a factory causes the same amount of harm. For instance, each successive discharge may contaminate the river water in essentially the same way—say, temporarily raising the concentration of contaminants from zero to a certain amount. Now consider two factories, each discharging ten times (and thus their activities are equally harmful) in its own river. Factory 1 does so over the course of one day. Factory 2 does so once a day for ten days. It is easy to imagine how the chance of detection for Factory 2 could be higher than for Factory 1; indeed, the probability may well be ten times higher. This would be the case, for instance, if the enforcer monitors by auditing, randomly choosing one day a month to observe water quality in a given river.[85]

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[84] Moreover, a rise in expected per-count penalties may increase with *N* (the number of counts) for other reasons. For example, proving a higher *N* may also raise the chance of proving the behavior to be willful or knowing—thus triggering further statutory multipliers, such as treble damages. See, e.g., 17 U.S.C. § 504(c)(2) (2012) (increased maximum under the Copyright Act); 47 U.S.C. § 227(b)(3) (2006) (treble damages under the Telephone Consumer Protection Act).

[85] This auditing method is constructed so that the probability of detection for each factory can be calculated simply as the ratio (number of days in

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Assume that discovery of any single discharge leads to the eventual revelation of each factory's complete polluting behavior.[86] The expected penalty internalized by Factory 2 would thus be ten times greater than for Factory 1, even though for optimal deterrence they should be internalizing the (same) total harm they each cause.[87] If the statutory penalty is appropriately set for deterring Factory 1, then it is ten times too large for Factory 2.

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which any discharge occurs/number of days in the month). This simplification is for exposition's sake, and of course other relationships between the number of counts and the probability of enforcement are possible. For variations, including the more difficult problem when the probability increases faster than proportionally with the increase in counts, see infra note 95, .

[86] One judge has noticed such a problem in the context of the Copyright Act:

> However, the Copyright Act does not contain a provision to correct for the fact that once a recording company has decided to devote the resources necessary to detect one act of infringement by a file sharer, the marginal cost of detecting additional acts of infringement is likely low since the investigation of the file sharer's account on a peer-to-peer network will generally reveal a treasure trove of unlawfully downloaded works. As a result, the imposition of statutory damages in file-sharing cases where multiple copyrighted works have been infringed can produce awards much greater than necessary to provide copyright owners with an adequate incentive to investigate and detect infringement.

Sony BMG Music Entm't v. Tenenbaum, 721 F. Supp. 2d 85, 115 (D. Mass. 2010) (Gertner, J.).

[87] The assumption, as before, is that the penalty is applied to each discharge separately if they occur on the same day. This is the reading courts have given to the Clean Water Act's damages under 33 U.S.C. § 1319(d) (2006). See Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810, 817–18 (2001) (interpreting "per day for each violation" under 33 U.S.C. § 1319(d)).

Consider now Factory 3, which discharges only once—say, on the first day.[88] Factory 2 causes ten times as much harm as Factory 3, and yet its expected penalty is one hundred times higher (because its probability of detection is also ten times higher). As before, Factory 2's penalty needs to be compressed by a factor of ten. This contrast between Factory 2 and Factory 3 sets in sharp relief the difficulty for any court trying to articulate the reason for compressing Factory 2's damages,[89] if it were to do so by directly reducing the per-count award.

Imagine what the court would have to say: "The award per discharge for the factory with ten violations should be *lower* than for the factory that did it only once—and in fact, it should be only one-tenth as large." It may well be possible for the court to explain this (logically sound) discount, but the seeming injustice of it may remain a practical obstacle.

1. Using Concurrent Damages

The option of running damages concurrently offers an alternative way to compensate for the extra multiplier on expected damages, due to a higher probability of enforcement, in cases where the statutory award range was set assuming a lower probability.[90] It is especially useful when a minimum statutory award precludes lowering the per-count award directly, of course, but it is also useful when such an artificial adjustment is undesirable even if the range would allow it.[91]

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[88] Thus Factory 3, like Factory 1, faces accurate incentives from the optimal deterrence perspective.

[89] Doing so would be tricky in either an opinion or jury instructions.

[90] The order-of-magnitude errors that are possible are not easy to accept as "rough justice," even if the probabilities at issue are knowable only as rough approximations.

[91] The potential disadvantages of such "artificial averaging" or fictional pricing are explored in my earlier article. See Huang, supra note 8, at 738–41.

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To see its application in the case of the three factories, assume as before that the statutory per-count award is set appropriately for Factories 1 and 3 (that is, it is inflated to account for their low chances of being sanctioned). For Factory 2, then, the court would recognize the ten counts, one for each discharge—but run them all concurrently. On this illustration's assumptions, such a compression exactly adjusts for the extra multiplier due to this polluter's higher probability of detection.

The use of concurrence can be readily generalized (beyond such a stylized illustration) through the careful application of our conceptual framework of "fixed" and "variable" portions of damages. The key is understanding these components to be responsive to the probabilities of successful enforcement. As the probability increases, the "variable" component of each award diminishes (for the simple reason that there is less of a need for the artificial per-count boost meant to make up for low probabilities). Thus, in the case of Factory 2, the "variable" component is one-tenth of each award, rather than the full award; only that fraction should be repeated for each of the ten counts. In essence, then, the court is running the remaining nine-tenths of each per-count award concurrently with all other awards.[92] This is the more conceptually precise—and more generalizable—way of understanding what is described in the simplified illustration above as running all the counts concurrently.

2. Enforcement Motivations

One further intuitive and possibly more realistic variation should be addressed: What if the reason for the increase in probability is partly motivational—say, because the enforcer is

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[92] The similarity should thus be quite apparent between this usage and the use of anticipatory concurrence in the punitive damages setting, as described in Subsection I.A.3.

more likely to pursue a case with a larger potential recovery?[93] Consider a Factory 4 that discharges on five separate days, twice a day. It thus faces a five times greater chance of being caught in an audit than Factory 3. Suppose further that, upon detection, the enforcer is twice as likely to pursue a "large" case (say, one with a potential recovery of at least ten times the single-discharge award). Factory 4 therefore faces a ten times higher chance of sanction than Factory 3. But now the needed compression is no longer achieved by running all ten counts concurrently (unlike for Factory 2). Rather, it is achieved by running the ten counts concurrently as two awards (compressing by a factor of five)—which if anticipated by the enforcer would lead to a further reduction in the chance of enforcement (by a factor of two), thereby resulting in the correct degree of deterrence.[94]

Notice how the use of concurrent damages would properly deflate the motivation to enforce, whether the exaggeration factor is two (as above) or some other number *X*. This mechanism implies that the court faces conveniently low information demands: To achieve proper deterrence, nothing had to be known about how much the enforcer's motivation might be exaggerated by the size of the award. The reason is simply that the concurrent damages option is used to reach the *accurate*

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[93] An analogous story can be told in which the enforcer is more likely to audit in the first place, when it knows that there is bigger game to be caught.

[94] The question arises whether this shift from more to less avid enforcement is a good thing. The answer necessarily varies by context, of course. One might argue, for instance, that it is good for public enforcers (because of savings to the fisc) but bad for private enforcers (from the ex post perspective, as some would not pursue compensation). For an analysis suggesting that costly private enforcement, induced by high potential damages, can be welfare-reducing, see A. Mitchell Polinsky & Daniel L. Rubinfeld, The Welfare Implications of Costly Litigation for the Level of Liability, 17 J. Legal Stud. 151 (1988).

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award; consequently, any amount of an enforcer's extra motivation from anticipating a further windfall would be deflated just by bringing the award down to size.[95]

<div align="center">CONCLUSION: ON ACOUSTIC SEPARATION</div>

Consider the following thought experiment, which overturns a central assumption of the preceding analysis: What if the excessive damages described thus far are not unexpected or unintended but instead are purposeful messages aimed at deterring a class of overconfident actors who *misperceive* their chances of escaping liability as better than they actually are?

Up to now, it has been assumed that violators know when their probability of liability is low and when it is high. But their perceptions may not be correct. What if they are overconfident about getting away with their misconduct? For deterrence purposes, it may be better for such overconfident actors *not* to know that concurrence may be used, even if will be.[96]

[95] Several technical notes are in order. It is probably too far a stretch to think that the following variations could be identified by the court in any real case (beyond the simplest kind of rough proportionality suggested in the text), but they are worth noting for the sake of completeness. First, what if P increases more slowly than N? If the chance of enforcement increases $(1/F)$ times as fast as N, then the N concurrence awards should be run concurrently as F awards. Second, what if P increases faster than N? If it is not possible to run N awards concurrently as a fraction of an award, then concurrence can only partially adjust toward the accurate multiplier (unless there is the dual mechanism at work, as noted above). Finally, what happens when P reaches 1, at a high enough N? The court should no longer increase its compression beyond that point, of course. This seems an unlikely concern in many relevant contexts, as the chance of enforcement is not often one hundred percent.

[96] Recall the story of Factory 2 by the river, discharging on ten different days. Its expected damages are inflated by a factor of ten because the probability of detection increases with the number of days of discharge (and the polluter knows it). What if instead this polluter does *not* anticipate that discharging on more days entails a greater chance of being caught? Precisely

And if all violators were overconfident in this way, then there might be no use for concurrence.

But the problem is the existence of *other* actors who have more accurate perceptions. For them, believing that concurrence can and will be used is what prevents overdeterrence.[97] This tension forces a tradeoff for the legal designer deciding whether to include a concurrence option, and for the court deciding whether to apply it. Should concurrent damages be used, thus underdeterring the overoptimists—or not, thus overdeterring the realists? Should concurrence be used, but the damages range increased somewhat, as a compromise approach? Should concurrence be forgone, but the damages range decreased?

A release from this dilemma may be possible when there is "acoustic separation" in a concurrent damages regime; that is, when the availability of concurrent damages is not salient to some potential violators, due to their naivety about the legal system.[98] It then becomes possible to decouple what the overoptimists expect (a harsh damages regime) from what the real-

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because it *misperceives* its own chances of enforcement, this polluter ends up *correctly* deterred; in a sense, the relentless linearity of the damages schedule offsets overoptimism about evading detection.

[97] Seeing the inflated statutory damages imposed without concurrence, as suggested for the overoptimist's case, would have an overdeterring effect on these more realistic actors. Perhaps in a few cases it may be easy for such a realistic actor to recognize that concurrence was forgone in a prior case because the earlier actor was an overoptimistic type (for example, a seasoned illegal infringer of copyrighted music might see the defendants in the Sony and Capitol Records end-user downloading cases as naïve and overoptimistic). See Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899 (8th Cir. 2012); Sony BMG Music Entm't v. Tenenbaum, Civ. No. 07-11446-RWZ, 2012 WL 3639053 (D. Mass. Aug. 23, 2012). But generally, what happens in prior cases probably casts a shadow for future actors in a more generic way.

[98] The concept of "acoustic separation" is introduced in Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625 (1984).

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ists expect (the potential use of concurrence)—*if* the overoptimists tend also to be more naïve about how damages are actually applied.[99]

But that is a big "if." The correlation is presumably positive in some contexts; those who are naïve about how damages are assessed might tend to overlap with those who are unaware of the real chances of enforcement. Still, poor overlap in a given context would weaken the case for such decoupling through acoustic separation. And in a plausible sort of reversed situation, with the *sophisticates* thinking they can elude detection, acoustic separation should be actively avoided: These sophisticates need to know that concurrence will be properly forgone in their cases, while the naïve need to be told that concurrence will properly be used in theirs.

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[99] A similar logic applies to overoptimism of other sorts—such as about the harm that may be done. For instance, in the statutory damages context, if an overoptimist mistakenly thinks that she will not cause much harm (and that therefore she will not be liable for much in damages), then the harsh message of a linear statutory damages scheme may be just what she needs to hear. It is an especially accurate message if she thinks her harms are marginally diminishing, when in fact they do add up linearly. (In the reverse situation, with the actor thinking her harms are linear when in fact they are marginally diminishing, the court *should* use concurrence ex post—and make this practice widely known ex ante. That is, acoustic separation should be actively avoided.) For a fuller discussion of "diminishing marginal harm," see Huang, supra note 8, at 730–35. Likewise, overoptimism about *gains* may also be counteracted through such decoupling, if the aim is *absolute* deterrence. In the case of gains, the information demands on the court may seem unusual: How could a court have a more accurate sense of the gains curve than the violator? For further analysis, see A. Mitchell Polinsky & Steven Shavell, Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?, 10 J.L. Econ. & Org. 427 (1994) (discussing costs of legal error under each approach).
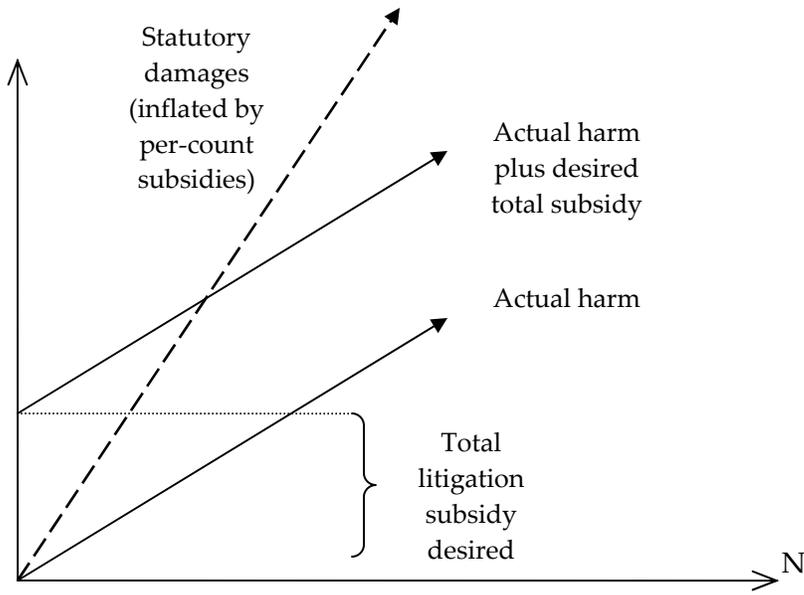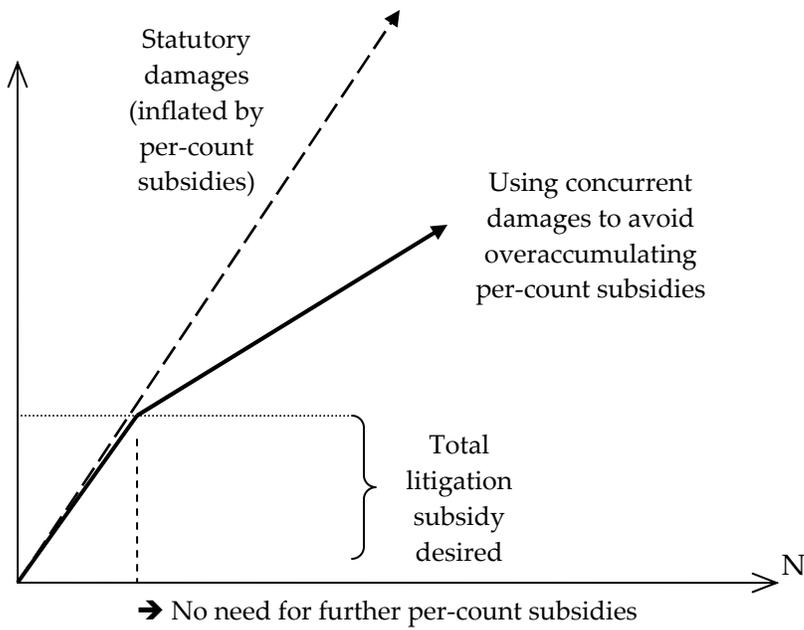
FIGURE 1

FIGURE 2