NOTE

THE MISSING CIVILITY IN CIVIL DAMAGES: A PROPOSED GUIDELINES STRUCTURE FOR CALCULATING PUNITIVE DAMAGES

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"[P]unitive damages are out of control"[1]—or so tort reformers say. The past two decades have witnessed heated debates over a range of tort reform proposals, from punitive damages caps to complete punitive damages abolition. This Note proposes a middle ground for tort reform: the adoption of a punitive damages schedule based on the Federal Sentencing Guidelines. The Federal Sentencing Guidelines have enjoyed great success in both their mandatory and advisory stages because of the strong influence of numerical anchoring and the adjustment heuristic on sentencing decisions. This Note posits that the same effects of numerical anchoring may be leveraged and enjoyed by the civil system through the adoption of an advisory punitive damages schedule. By evaluating Supreme Court jurisprudence, existing data on punitive damages awards, and prior solutions proposed by tort scholars, this Note takes the first step in the long process of uncovering relevant factors necessary to creating an effective punitive damages schedule.

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1 W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 333 (1998).

INTRODUCTION

Predicting the size of a punitive damages award is about as easy as predicting the winner of an amateur game of darts. Throwing darts at their cognitive dartboards of emotions, intuitions, and biases, judges and jurors alike stumble toward what they believe to be "reasonable" awards to punish seemingly reprehensible defendants for their "evil" acts.[2]

Punitive damages, otherwise known as exemplary damages, may be awarded in civil trials in addition to compensatory damages when the factfinder deems it necessary to punish a particularly wrongful defendant for his or her egregious, malicious, or intentional conduct.[3] Unlike compensatory damages, punitive damages are not meant to compensate the plaintiff for any actual losses he or she sustained, but to punish the defendant and deter both the defendant and others from committing similar wrongful acts in the future.[4] Because of the seemingly subjective and arbitrary nature of these monetary awards, tort reform proponents have long attacked these awards—calling

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2 *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 14–15 (1991) (quoting Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 116 (1927)); *see also id.* at 18 ("[U]nlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results . . . .").

3 *See* Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353, 353–54 (1999).

4 *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 n.5 (1998).

them unpredictable, unfair, unwieldy, and even unconstitutional.[5] These arguments are not without merit: studies have shown that judges and jurors alike are influenced by many unconscious processes that alter their decision making,[6] and these processes do not disappear in the punitive damages context.[7] Because the effects of these processes are, if anything, amplified during the discretionary assignment of punitive damages awards, tort reform proponents argue that safeguards, such as punitive damages caps, must be put into place to limit factfinder discretion.[8]

Recognizing both the need for successful tort reform and the deficiencies of current proposals, this Note draws from and expands upon existing research to propose a punitive damages schedule that is both consistent with Supreme Court precedent and inspired by successful reforms in other contexts—most notably the Federal Sentencing Guidelines.[9] This Note proceeds in three parts. Part I provides background into the issues currently plaguing factfinder decision making. It goes on to discuss the successes of the Federal Sentencing Guidelines—a reform employed to combat similar issues in the criminal context—in the pre- and post-*Booker* world, and suggests how a similar structure may be adopted in the civil context. Part II proposes a more detailed structure for a potential punitive damages schedule and concludes with an example of a finalized schedule. Finally, Part III analyzes the feasibility and projected benefits of this proposal, giving particular attention

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5 *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (holding that "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor"); Eliot T. Tracz, *Half Truths, Empty Promises, and Hot Coffee: The Economics of Tort Reform*, 42 SETON HALL LEGIS. J. 311, 321 (2018) (describing three major arguments in favor of tort reform: an increase in frivolous litigation led by "greedy" lawyers, "outrageous" jury awards in favor of "undeserving" plaintiffs, and harm to the free market by deterring physicians from practicing); Viscusi, *supra* note 1, at 333–34 (noting that "[p]unitive damages are highly uncertain" and provide "no significant gains to society," and therefore concluding that these awards should be abolished). For a robust discussion of the arguments on both sides of the tort reform debate, see generally F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 456–81 (2006).

6 Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 496–97, 502 (2005).

7 *See infra* notes 15–20.

8 *See* Viscusi, *supra* note 1, at 285 ("The high stakes and high variability of punitive damage awards are of substantial concern to companies, as punitive damages may pose a catastrophic threat of corporate insolvency.").

9 *See* U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 2018).

to its legal feasibility in light of existing Supreme Court precedent.

I
BACKGROUND

The battle over punitive damages reform centers around whether punitive damages awards are "irrational, unpredictable, and outrageously large" or "rational, predictable, and too infrequently awarded."[10] Central to these arguments, whether express or implied, is the concern that unconscious processes and biases will influence factfinder decision making. Studies demonstrate that judges and jurors alike are susceptible to these unconscious influences, and these influences do not disappear in the punitive damages context.[11] This Note chooses to view these unconscious processes not as insidious and insurmountable forces, but instead as realities that society can manipulate and use to its advantage. By studying the Federal Sentencing Guidelines both before and after the landmark decision in *United States v. Booker*, this Note begins to craft a similar guidelines structure for use in the punitive damages context.

A. Current Issues with Punitive Damages Awards

Myriad studies demonstrate the existence of unconscious processes at play that influence judge and juror decision making. For instance, litigants' race, ethnicity, and gender yield differing outcomes in case dispositions in both the criminal and civil contexts.[12] Additionally, situational factors like a judge's religion, political ideology, expertise, and electability all have an influence on case dispositions.[13] Further, both judges

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10 Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 351 n.11 (2003).

11 *See infra* notes 13–17.

12 *See, e.g.*, Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 91, 99 (2012) (finding a relationship between litigants' race, judges' race, and civil suit outcomes); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 296 (2001) (finding a relationship between litigants' race, ethnicity, and gender, and the length of criminal sentences); Cassia Spohn, *The Effects of the Offender's Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 LAW & CONTEMP. PROBS. 75, 96–100 (2013) (finding interactive effects of race, ethnicity, and gender on sentencing).

13 *See* Brian H. Bornstein & Monica K. Miller, *Does a Judge's Religion Influence Decision Making?*, 45 CT. REV. 112, 114–15 (2009) (religion); Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions*, 11 AM. ECON. J. 160, 160 (2019) (political ideology); Gregory A. Huber & Sanford C. Gordon, *Accounta-*

and jurors seem to rely on intuition rather than deliberation when making "easy" decisions, suggesting that greater case familiarity may result in less deliberative and thoughtful decisions.[14]

Perhaps unsurprisingly, these unconscious processes do not disappear in the sphere of punitive damages. One of the most concerning possibilities is that biases based on litigant characteristics may influence punitive award outcomes. Though punitive damages awards are so infrequently granted that there is little data on the direct effects of race, ethnicity, and gender on punitive damages awards, high disparities on these bases have been observed in another punitive context: criminal sentencing.[15] Studies demonstrate significant sentencing disparities between defendants of different backgrounds. For example, nonwhite males are given higher sentences than white males and females of all races for the same criminal conduct.[16] This tendency for our society to be more punitive of certain races and genders over others in the criminal sphere suggests that a similar tendency may be occurring in the punitive context of civil suits, as well.

More concretely, there is substantial data showing large disparities in punitive damages awards based on geographic region and trial type. For example, "blockbuster" punitive damages awards, defined as awards exceeding $100 million, are "highly concentrated geographically," with twenty-seven out of sixty-four awards in one dataset coming from only two states.[17] Similarly shocking punitive award disparities exist

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bility and Coercion: Is Justice Blind when It Runs for Office?, 48 AM. J. POL. SCI. 247, 258 (2004) (elections); Herbert M. Kritzer, *Impact of Judicial Elections on Judicial Decisions*, 12 ANN. REV. L. & SOC. SCI. 353, 360–62, 365 (2016) (elections); Mark A. Lemley, Su Li & Jennifer M. Urban, *Does Familiarity Breed Contempt Among Judges Deciding Patent Cases?*, 66 STAN. L. REV. 1121, 1149, 1151 (2014) (experience); Christopher Zorn & Jennifer Barnes Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 J. POL. 1212, 1212 (2010) (political ideology).

14 *Cf.* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 16, 32–35 (2007) (finding that, when answering questions designed to test cognitive reflection, judges who selected an intuitive, but incorrect answer were more likely to indicate that the question was easy, and further concluding that judges and other actors can override their intuition with deliberation, but that time constraints may lead to more intuitive rather than deliberative decisions because the former are speedier and easier).

15 *See* Mustard, *supra* note 12, at 296.

16 *See* Spohn, *supra* note 12, at 99–100.

17 W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 EMORY L.J. 1405, 1405 (2004).

between bench and jury trials.[18] For example, one study found that jury trials accounted for 98% of all blockbuster awards, and found that the mean size of punitive damages awards by juries is 3.3x higher than that of judges.[19]

These disparities are less shocking when viewed alongside the array of documented difficulties factfinders face in assigning reasonable punitive damages awards. One of the most quoted studies, conducted by legal scholars Daniel Kahneman, David Schkade, and Cass R. Sunstein, demonstrated the inconsistencies of hypothetical punitive awards set by synthetic jurors in an experimental setting.[20] While the synthetic jurors agreed substantially on the hypothetical defendants' reprehensibility and the appropriate degree of punishment, the punitive awards they assigned were erratic.[21] Thus, while different factfinders have similar beliefs about abstract ideas of reprehensibility, they struggle to assign a specific and reliable monetary value to these ideas.

Numerous other studies have similarly suggested that damages awards are influenced by the effects of anchoring and the adjustment heuristic, leading some to conclude that "the more you ask for, the more you'll get."[22] Anchoring and the

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18 *See* Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform* 35–36 (The Harvard John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 362, 2002); Eric Helland & Alexander Tabarrok, *Runaway Judges? Selection Effects and the Jury*, 16 J.L. ECON. & ORG. 306, 326–28 (2000). However, some scholars argue that these disparities are not as large as others have speculated. *See* Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman & Martin T. Wells, *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 624 (1997) ("[S]ome of the gravest concerns about punitive damages, their unpredictability and lack of relationship to compensatory damages, are less warranted than is commonly believed."); *see also* Theodore Eisenberg, Jeffrey J. Rachlinski & Martin T. Wells, *Reconciling Experimental Incoherence with Real-World Coherence in Punitive Damages*, 54 STAN. L. REV. 1239, 1258 (2002) (similar). *But see* A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. LEGAL STUD. 663, 664 (1997) ("I . . . argue that one *cannot* conclude from [Eisenberg and co-authors'] study that punitive damages are insignificant, predictable, and rational.").

19 *See* Hersch & Viscusi, *supra* note 18, at 8, 12.

20 Daniel Kahneman, David Schkade & Cass R. Sunstein, *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49, 64 (1998) (finding a consensus on social norms and general outrage towards certain conduct, but also observing that "there is considerable variability and skewness in individual judgments of dollar awards, and therefore also in the average judgments of small samples of people").

21 *See id.* at 62, 67; Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)* 7 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 50, 1997).

22 Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 522, 525–26 (1996); *see also* Chris Guthrie, Jeffrey J. Rachlinski & Andrew

adjustment heuristic occur when a person is exposed to a numerical reference point and proceeds to rely on that number—usually unconsciously—in making any later deviations from it.[23] By relying on the number as a reference, the exposed person tends to make insufficient deviations from it when attempting to reach the correct number. For example, in one experiment by Gregory B. Northcraft and Margaret A. Neale, every participant in the experiment was shown the same house and told that the house was listed for one of four prices.[24] They were then asked what a "reasonable price to pay for the house" would be.[25] Despite being shown the same house, participants who were told that the house was listed for a higher price stated a higher reasonable price to pay for the house than those who were told a lower listed price.[26]

This anchoring and adjustment effect has also been observed in other civil damage experiments. In one study, judges assigned substantially different compensatory damage awards depending on the monetary amount that hypothetical plaintiffs requested during settlement negotiations.[27] Despite the fact that this settlement information was inadmissible, the judges were still noticeably affected by this information.[28] Similar effects have been observed throughout the civil damages context[29] and are likely to be most prevalent in situations where discretion is high and empirical bases are low, for instance when factfinders are tasked with assigning pain and suffering or punitive damages awards.

B. Existing Tort Reform Proposals

Despite legitimate concerns over the inconsistency and unreliability of punitive damages awards, there are many flaws in existing proposed solutions. One of the most oft-repeated solutions is damages caps, which are absolute maximums to the amount of damages that a plaintiff may recover in a given

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J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 788 (2001); Robbennolt & Studebaker, *supra* note 3, at 359.

23 *See* Guthrie, Rachlinski & Wistrich, *supra* note 22, at 787–88; Robbennolt & Studebaker, *supra* note 3, at 355.

24 *See* Gregory B. Northcraft & Margaret A. Neale, *Experts, Amateurs, and Real Estate: An Anchoring-and-Adjustment Perspective on Property Pricing Decisions*, 39 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84, 87–89 (1987).

25 *Id.* at 87.

26 *See id.* at 89–90.

27 *See* Guthrie, Rachlinski & Wistrich, *supra* note 14, at 19–21.

28 *Id.*

29 *See id.*; CASS R. SUNSTEIN, REID HASTIE, JOHN W. PAYNE, DAVID A. SCHKADE & W. KIP VISCUSI, PUNITIVE DAMAGES: HOW JURIES DECIDE 244–48 (2002).

case.[30] However, these caps may contravene a plaintiff's right to a trial by jury under state law.[31] Some state courts have made even more novel arguments, holding that damages caps are unconstitutional violations of equal protection and separation of powers.[32]

Practically speaking, damages caps present further issues. One of the most commonsense objections to these caps are their fundamental arbitrariness: damages caps are not based on specific facts unique to each case, but instead are statutorily-implemented and inflexible.[33] Indeed, as some state courts have acknowledged, these caps prevent judges from exercising their traditional additur and remittitur review power to adjust jury awards that they believe to be inaccurate based on the unique circumstances of each case.[34] As the Supreme Court stated in *Exxon Shipping Co. v. Baker*, "there is no 'standard' tort or contract injury," so it is near-impossible for a legislature to determine an effective damages cap that will sufficiently deter and punish defendants in every case.[35]

Damages caps also undermine this deterrence objective in another way. By setting an absolute maximum for punitive damages awards, large corporations will be better appraised of the potential punitive damages they may be charged for specific tortious conduct and may choose to continue engaging in the conduct and pay these damages as they arise when it is economically beneficial to do so.[36] This concept, similar to that of

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30 *See* Ryan J. Strasser, *Punitive Damages Caps: A Proposed Middle Ground after* Exxon Shipping Co. v. Baker, 19 CORNELL J.L. & PUB. POL'Y 773, 783 (2010); *see, e.g.*, VA. CODE ANN. § 8.01-581.15 (2011) (initially setting a $1.5 million cap on total damages recoverable in medical malpractice actions); *see also* Shaakirrah R. Sanders, *Uncapping Compensation in the* Gore *Punitive Damage Analysis*, 24 WM. & MARY BILL RTS. J. 37, 38–42 (2015) (discussing the use of damages caps in many different states and contexts).

31 *See, e.g.*, Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 224 (Ga. 2010) (holding that caps on noneconomic damages in medical malpractice cases violate a plaintiff's right to a trial by jury); *see also* Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 164 (Ala. 1991) (same); Sofie v. Fibreboard Corp., 771 P.2d 711, 723 (Wash. 1989), *amended by* 780 P.2d 260 (same).

32 *See* Estate of McCall v. United States, 134 So. 3d 894, 901 (Fla. 2014) (holding that a statutory cap on noneconomic damages in wrongful death cases violates the Equal Protection Clause of the Florida Constitution); Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1080–81 (Ill. 1997) (holding that a statutory damages cap violates the constitutional separation of powers doctrine because it is a legislative infringement on the judiciary's remittitur power).

33 *See* Sanders, *supra* note 30, at 52.

34 *See id.* at 78; *Best*, 689 N.E.2d at 1079–80.

35 554 U.S. 471, 506 (2008).

36 Jenny Miao Jiang, Comment, *Whimsical Punishment: The Vice of Federal Intervention, Constitutionalization, and Substantive Due Process in Punitive Damages Law*, 94 CALIF. L. REV. 793, 827 (2006).

efficient breach in the contracts context,[37] is supported by many tort reform proponents who argue that this cost-benefit analysis results in an optimal level of deterrence.[38] However, despite its proponents, this activity may prevent society from successfully deterring undesirable and potentially dangerous conduct.

Finally, as some scholars have noted, restricting the discretion of factfinders by setting mandatory damages caps could lead to adverse reactance effects. Reactance occurs when a factfinder feels that their freedom of choice is restricted and acts in opposition to that restriction to restore their sense of autonomy.[39] Since a mandatory damages cap would restrict factfinders in setting punitive damages awards, factfinders may attempt to regain autonomy by adjusting compensatory awards to compensate for the restrictive punitive damages caps.[40]

Because of the inadequacies of punitive damages caps, some scholars have proposed other solutions, like increasing additur and remittitur review.[41] Additur and remittitur review refers to a presiding judge's ability to recommend increases or reductions of grossly inadequate or excessive jury awards in lieu of ordering a new trial.[42] While this solution definitely has some place within the punitive damages context, it alone is insufficient for two reasons. First, this solution may similarly undermine the guarantees of a trial by jury if judges too frequently override jury verdicts. Second, both judges and jurors are similarly, if not equally affected by cognitive biases that may cloud their judgments.[43] Thus, increasing judicial discretion may not be a sufficient safeguard to prevent unreliable punitive damages awards.

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37 *See Efficient Breach*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/efficient_breach [https://perma.cc/C5LY-ZH87] (last visited Apr. 23, 2021).

38 *See* Alex Raskolnikov, *Deterrence Theory: Key Findings and Challenges* 1–2 (Columbia Law & Econ., Working Paper No. 610, 2019); *see also* Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237, 237 (2000) ("Thus the economic theory of punishment in general, and of punitive damages in particular, is designed to ensure optimal deterrence of private and public misconduct.").

39 Robbennolt & Studebaker, *supra* note 3, at 356.

40 *Id.*

41 *See* David Baldus, John C. MacQueen & George Woodworth, *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV 1109, 1179–80 (1995).

42 *Id.* at 1119.

43 *See supra* notes 12–14.

C. The Federal Sentencing Guidelines

1. *Pre*-Booker *Guidelines*

Criminal sentencing is an area of the law that was similarly affected by the unconscious processes of sentencing judges. The Federal Sentencing Guidelines were adopted in the wake of "glaring disparities . . . traced directly to the unfettered discretion" of sentencing judges.[44] To combat this problem, the Sentencing Reform Act of 1984 was enacted.[45] From this, the United States Sentencing Commission was born and tasked with creating sentencing guidelines to standardize the sentencing process.[46]

The resulting Federal Sentencing Guidelines comprised[47] a sentencing table of 258 boxes, each with its own sentence range in years.[48] The horizontal axis of this table, labeled "Criminal History Category," is made up of six Roman numeral categories that are assigned to each defendant based on that defendant's criminal history.[49] The vertical axis, labeled "Offense Level," is assigned to a defendant's criminal act based on an initial predetermined base offense level for the criminal act that is adjusted upwards or downwards based on specifically-delineated aggravating and mitigating factors.[50] Once the defendant's position on both axes has been determined, their sentence is assigned by locating the sentence range in the box at which those two axes intersect. An example of the Federal Sentencing Guidelines' Sentencing Table is included below (Figure 1):

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44 S. REP. NO. 97-307, at 956 (1981).

45 U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *United States v. Booker* on Federal Sentencing pt. A, at 10 (2012).

46 *See* 28 U.S.C. § 994(f) (2018) ("The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.").

47 And indeed, still comprise. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM'N 2018) (Sentencing Table).

48 *See id.*; James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 277 (1999).

49 U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A. (U.S. SENTENCING COMM'N 2018); Anderson, Kling & Stith, *supra* note 48, at 278.

50 U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A. (U.S. SENTENCING COMM'N 2018); *see, e.g.*, *infra* Figure 6.

Figure 1

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	0–6	2–8	4–10	8–14	12–18	15–21
8	0–6	4–10	6–12	10–16	15–21	18–24
9	4–10	6–12	8–14	12–18	18–24	21–27
10	6–12	8–14	10–16	15–21	21–27	24–30
11	8–14	10–16	12–18	18–24	24–30	27–33
12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24	21–27	27–33	33–41	37–46
15	18–24	21–27	24–30	30–37	37–46	41–51

The Guidelines, as originally imagined by Congress, were mandatory, and sentencing judges were required to sentence defendants within the sentencing table's assigned range.[51] Despite frequent criticisms of the mandatory Guidelines,[52] the years following their enactment enjoyed significant reductions in sentencing disparities.[53]

2. *Post*-Booker *Guidelines*

The landmark decision in *United States v. Booker* marked a new era known as the "*Booker* revolution."[54] In *Booker*, the Supreme Court held that the mandatory structure of the Federal Sentencing Guidelines was an unconstitutional violation of

51 U.S. SENTENCING COMM'N, *supra* note 45, at 14–15. There were two exceptions to this mandatory structure, but these are not relevant for the purposes of this Note.

52 *See, e.g.*, Vincent L. Broderick, *The Importance of Flexibility in Sentencing*, 78 JUDICATURE 182, 182 (1995) (providing examples of when departing from rigid sentencing guidelines is "required by the interests of justice").

53 *See* U.S. SENTENCING COMM'N, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining*, 5 FED. SENTENCING REP. 126, 129–30 (1992); Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 273 (1999); *see also* Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. 1, 10–11 (2010).

54 543 U.S. 220 (2005); Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 513 (2014).

the Sixth Amendment's guarantee to a trial by jury.[55] Surprisingly, the Court went on to hold that the Guidelines need not be entirely eliminated, but may instead be applied in advisory form.[56] The Court further required that district courts "consult [the] Guidelines and take them into account when sentencing."[57] Thus, courts still consider the Guidelines as one factor in assigning criminal sentences today.[58]

Perhaps to the shock and chagrin of the many commentators that criticized the *Booker* decision, the *Booker* revolution has not been nearly as revolutionary as many expected. Quite the contrary, compliance with the advisory guidelines has been consistently high in the wake of the *Booker* decision. A 2011 report by the United States Sentencing Commission stated that 82.3% of sentences were compliant with the Guidelines manual.[59] This compliance has stayed relatively constant, with the most recent reported compliance in 2019 at 75%.[60]

What is causing this substantial and consistent compliance with the long-advisory Federal Sentencing Guidelines? While there are many plausible explanations, the most compelling one put forth by some scholars[61] is that there are other forces at play: anchoring and the adjustment heuristic.[62] Though sentencing judges now have greater discretion to deviate from the Guidelines, by being exposed to the recommended Guidelines sentence range, they are caught in the "gravitational pull" of its recommended sentences. Thus, judges exposed to the Guidelines dole out sentences that are closer to the recommended range than they otherwise would be.[63] While some argue that this anchoring effect of the Guidelines is unde-

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55 *Booker*, 543 U.S. at 226–27.

56 *Id.* at 233.

57 *Id.* at 264.

58 *See* 18 U.S.C. § 3553(a) (outlining seven factors that a judges should consider in criminal sentencing, only one of which is the Federal Sentencing Guidelines); *see also* Gall v. United States, 552 U.S. 38, 49–50 (2007) (describing the acceptable post-*Booker* sentencing procedure to be a three-step process in which courts should consider, in order: 1) the guideline range under the Federal Sentencing Guidelines, 2) any relevant departures it may make under the Guidelines, and 3) the factors of 18 U.S.C. § 3553(a) as a whole); U.S. SENTENCING COMM'N, *supra* note 45, at 28.

59 *See* U.S. Sentencing Comm'n, 2010–2019 Datafiles, Figure 8.

60 *See id.*

61 As well as some skeptics of the *Booker* decision. *See, e.g.*, Rita v. United States, 551 U.S. 338, 390 (2007) (Souter, J., dissenting) (discussing the "substantial gravitational pull to the now-discretionary Guidelines").

62 Bennett, *supra* note 54, at 519–523.

63 *See id.* at 521.

sirable,[64] the result is clear: sentencing disparities are lower in the post-Guidelines world.[65] Thus, while society could continue to live in fear of the "irrational"[66] anchoring effects caused by guidelines structures, society could instead choose to use them to its advantage. In doing so, society may learn from the example of the Federal Sentencing Guidelines to create a similar socially-desired advisory guidelines structure to anchor factfinders to a reasonable range of punitive damages awards.

II
PROPOSED SOLUTION: PUNITIVE DAMAGES SCHEDULE

The concept of implementing a punitive damages schedule, and even a schedule based on the Federal Sentencing Guidelines, is not new.[67] However, despite being an oft-repeated solution to reduce disparities in punitive awards, there has been little discussion of the primary factors that should be considered in crafting such a schedule.[68] Beyond this, prior proposed schedules adopt tentative and seemingly arbitrarily selected monetary ranges for recommended damage awards instead of using multiplier ranges, a method that this Note will propose in greater detail in the next section.[69] Because of this, other proposed schedules do not necessarily solve the problems associated with the arbitrariness of punitive awards, as well as have the potential to contravene Supreme Court

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64 For a summary of the criticisms of the anchoring effect's influence on federal sentencing, see *id.* at 523–25.

65 *See* U.S. SENTENCING COMM'N, *supra* note 45, at 58.

66 United States v. Ingram, 721 F.3d 35, 40 n.2 (2d Cir. 2013) (Calabresi, J., concurring).

67 *See, e.g.*, Jiang, *supra* note 36, at 815–20 (proposing a different punitive damages schedule); *see also* Sunstein, Kahneman & Schkade, *supra* note 21, at 67 (discussing how damages schedules and scaling through comparison to similar case examples have been used in the settlement of mass tort cases); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1259 (suggesting that courts adopt guidelines or schedules for "amorphous categories of damages—like pain and suffering damages").

68 For the most robust discussion of factors that should be considered in crafting a punitive damages schedule, see generally Jiang, *supra* note 36, at 815–20 (using a case example to demonstrate how a punitive damages schedule may be created and applied to the tort of aggravated failure to settle a claim by an insurer).

69 While one other damages schedule proposed by Polinsky and Shavell used multipliers based on compensatory damages, these multipliers were assigned based on a subjective determination of the probability that the defendant will escape future liability, not based on the more objective criteria proposed in this Note. *See* Polinsky & Shavell, *supra* note 4, at 924, 962.

precedent.[70] This Note presents the first attempt at creating a basic structure for a punitive damages schedule composed of award multipliers that are determined by reprehensibility and tortious history levels. The intention of this Note is not to finalize the damages schedule, but to provide a foundation of research upon which reform experts may build.

A. Basic Structure of Proposed Schedule

Punitive damages are an exceptional remedy designed to punish a defendant for truly egregious conduct. As such, this damages schedule should only be accessible for factfinder consideration once the factfinder has determined that the defendant's conduct meets a threshold requirement of reprehensibility, egregiousness, or gross negligence. Therefore, the first step in creating the schedule should be setting a threshold question that factfinders must answer to determine whether a plaintiff is entitled to this exemplary award.

Once this threshold question has been affirmatively answered, the factfinder may consult the schedule to determine the recommend size of the punitive award. This schedule will mirror the Federal Sentencing Guidelines: comprised of an x- and y-axis that intersect at a recommended award multiplier range.[71] The x-axis will be labeled "Tortious History Level," and will be comprised of Roman numeral categories ranking the tortious history of a defendant from least to most severe. The y-axis will be labeled "Reprehensibility Level," comprised of a range of numeric categories indicating the objective reprehensibility of the defendant's tortious act. This will be determined by a base reprehensibility level for the tortious act that is adjusted upwards or downwards based on delineated aggravating or mitigating factors.

Once the factfinder has determined a defendant's tortious history level and reprehensibility level, the intersection of these two axes on the schedule will indicate the suggested multiplier range for a punitive award. These multipliers indicate how large a punitive award should be in relation to the plaintiff's compensatory award.[72] An example of the basic outline of this structure is included below (Figure 2):

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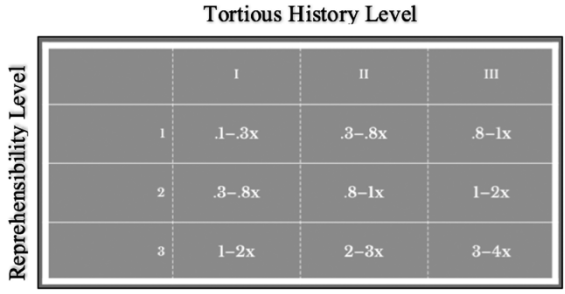
70 For a greater discussion of the legality of this particular proposal, see *infra* subpart III.A.

71 *See supra* Figure 1.

72 For example, if the compensatory award is $1,000, and the suggested multiplier range is .1–.3x, then the recommended punitive award is between $100 and $300.

Figure 2



This proposed schedule uses multiplier ranges instead of monetary ranges for two reasons. First, tying punitive awards to compensatory awards provides a rational foundation for calculating punitive damages. Without tying the punitive award to any actual harm, how can it be said that a given monetary range for an award is "reasonable"? It simply makes logical sense to use multiplier ranges to tether the punitive award to the actual harm the defendant caused. Indeed, many states endorse this approach and already use multipliers to determine the size of punitive awards.[73] Second, a system of multiplier ranges based on compensatory award size is more consistent with Supreme Court precedent, a topic that is discussed in greater detail in section III.

The following sections break down the process for developing a punitive damages schedule in greater detail. These sections discuss this process in several steps, detailing some of the considerations that are relevant in proceeding with each step of the schedule's creation.

1. *Threshold Question*

Prior to consulting the damages schedule, the factfinder will need to answer a threshold question: is the defendant deserving of punishment? By examining the relevant factors that state and federal courts consider in determining whether a given defendant's conduct is sufficiently egregious to entitle a plaintiff to punitive damages, this section presents a draft of a threshold question that will determine whether punitive damages may be awarded. This threshold question considers the

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73 *See* Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *The Supreme Court's Common Law Approach to Excessive Punitive Damages Awards: A Guide for the Development of State Law*, 60 S.C. L. REV. 881, 882 & n.2 (2009).

most commonly appearing factors from courts across the nation.[74]

As a threshold matter, factfinders should answer "yes" to the following question:

Is the weight of the evidence reasonably satisfactory to support[75] the conclusion that Defendant's conduct was:

1. Intentional, willful, malicious, or committed with an otherwise evil motive?;
2. In reckless disregard or indifference to the safety or rights of others?; or
3. Grossly or wantonly negligent, deviating outrageously far from the expected standard of care that a reasonable person would exercise?[76]

If the factfinder answers "yes" to any of these questions, then the plaintiff is entitled to a punitive award, and the factfinder may refer to the punitive damages schedule to determine the suggested magnitude of the award. However, if the factfinder answers "no" to each question, then the defendant's conduct does not meet the standard necessary to entitle the plaintiff to punitive damages, and the plaintiff may not collect a punitive award.

2. *Base Reprehensibility Level*

Once the factfinder has determined that a plaintiff is entitled to a punitive damages award, the factfinder may proceed to the actual punitive damages schedule outlined in this Note to

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74 To draft this threshold question, all state and federal cases on Westlaw from the last three years that discussed whether punitive damages should be awarded were reviewed. The factors discussed in each case were then compiled based on both jurisdiction and frequency, and the frequency with which each factor appeared within the dataset were observed. The factors that appeared most frequently were included in this draft of the threshold question.

75 While some states require plaintiffs to satisfy a heightened standard of "clear and convincing" evidence to justify awarding punitive damages, *see, e.g.*, Alaska Stat. Ann. § 09.17.020(b) (West 2021) (stating that a factfinder may only award punitive damages if the plaintiff sets forth "clear and convincing evidence" of the defendant's wrongdoing), the Supreme Court held in *Pacific Mutual Life Insurance Co. v. Haslip*, that this standard is not constitutionally necessary and that the Due Process Clause requires only that the factfinder be "reasonably satisfied from the evidence" that the plaintiff is entitled to collect a punitive award, *see* 499 U.S. 1, 23 n.11 (1991).

76 It is significant to note that, while most jurisdictions allow punitive awards for gross negligence, some have held that gross negligence is insufficient to support a punitive award. *See, e.g.*, Ebaugh v. Rabkin, 99 Cal. Rptr. 706, 708 (Cal. Ct. App. 1972) ("[E]ven gross negligence is not sufficient to justify an award of punitive damages."); Great Am. Ins. Co. v. Ratliff, 242 F. Supp. 983, 989 (E.D. Ark. 1965) ("[M]ere negligence, no matter how gross, is not sufficient to justify a jury in awarding punitive damages.").

determine the award's suggested magnitude. The first step in determining the award's suggested magnitude will be for the factfinder to establish the base reprehensibility level for the defendant's tortious act. Like the Federal Sentencing Guidelines, each cognizable tort claim should have a corresponding section in the finalized Punitive Damages Guidelines Manual that sets a base reprehensibility level for the tort from which the final reprehensibility level can be adjusted upwards or downwards.[77] While determining a finalized base reprehensibility level for every possible tort is beyond the scope of this Note, this section suggests a method that may be useful in developing base reprehensibility levels for all torts in the future.

Because of the unpredictability of current punitive damages awards, it is difficult to adopt an empirical method for determining base reprehensibility levels.[78] Instead, this Note suggests starting from scratch by using an intuitive method for assigning base reprehensibility levels. As its name suggests, this method rests on the intuitive principle that "some wrongs are more blameworthy than others"[79] and can be sorted accordingly. There are simply some torts that are more reprehensible than others. For example, society likely views battery as more blameworthy than assault, even though they are both intentional torts.

Despite this, while there are certain torts that can be intuitively organized, there are others whose relative reprehensibility is not so easily classified. Thankfully, the Supreme Court previously articulated what has been dubbed the "hierarchy of reprehensibility."[80] In this hierarchy, the Court drew a distinction between conduct that causes "purely economic harm" and conduct causing personal injury.[81] Among torts causing purely economic harm, the Court considered conduct more

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77 *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2A2.2 (U.S. SENTENCING COMM'N 2018) (assigning a base offense level to the crime of aggravated assault and listing specific characteristics of the act that will result in an upwards adjustment to this offense level in a particular case).

78 *See, e.g.*, THOMAS H. COHEN & KYLE HARBACEK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 233094, PUNITIVE DAMAGE AWARDS IN STATE COURTS, 2005, at 1 (2011) (summarizing statistics of punitive damages awards in various state courts).

79 BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

80 Schimizzi v. Ill. Farmers Ins. Co., 928 F. Supp. 760, 785 (N.D. Ind. 1996); *see Gore*, 517 U.S. at 575–76.

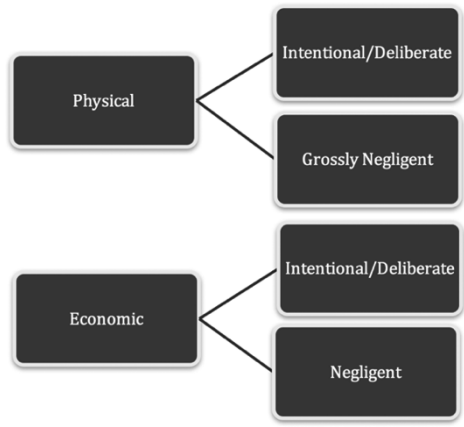
81 Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* State Farm, 6 U. PA. J. CONST. L. 423, 456 (2004) (citing *Gore*, 517 U.S. at 576).

reprehensible if it was done "intentionally through affirmative acts of misconduct" or if it was directed at a "financially vulnerable" victim.[82] This decision has been interpreted by some scholars to be a "sliding scale of reprehensible conduct":

> [V]iolent crimes more reprehensible than nonviolent crimes; trickery and deceit more reprehensible than negligence; conduct causing physical harm more reprehensible than conduct causing purely economic harm; deliberate false statements more reprehensible than omissions of material facts; and repeated conduct more reprehensible than an isolated incident.[83]

This hierarchy provides a necessary framework from which this Note draws to intuitively organize various tortious acts. Below, this Note attempts to conceptualize these distinctions into a visually organized hierarchy of reprehensibility (Figure 3):

Figure 3



After organizing these categories conceptually, some of the most common torts can be placed into categories within the hierarchy as follows (Figure 4):

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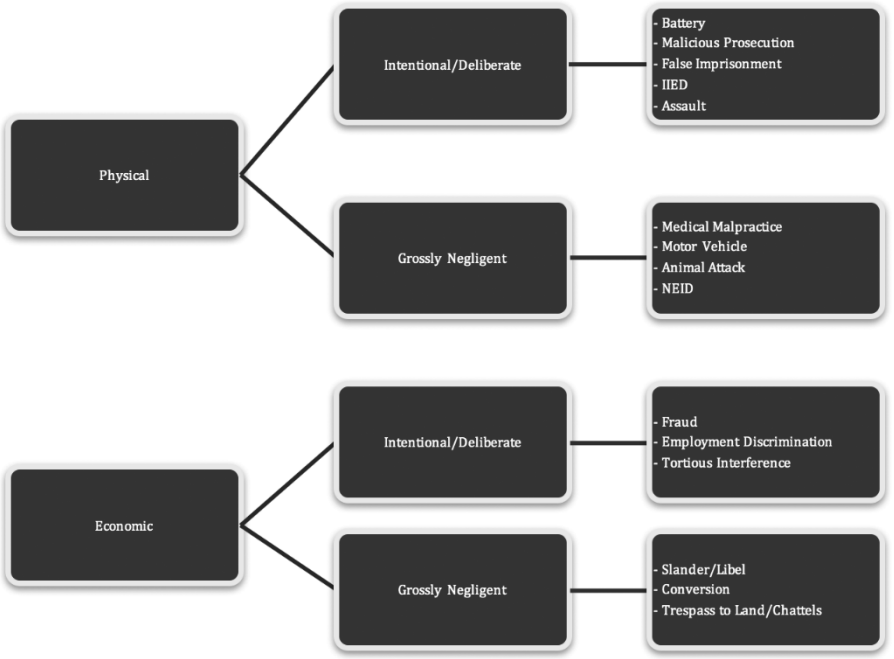
82 *See Gore*, 517 U.S. at 576. The Court has since elaborated and expanded on these factors in *State Farm Mutual Automobile Insurance Co. v. Campbell*, but they are substantially similar. *See* 538 U.S. 408, 422 (2003).

83 Franze & Scheuerman, *supra* note 81, at 456 (footnotes omitted).

Figure 4



As some may note, this attempt at organization can be arbitrary, which is the obvious flaw of this intuitive method. Some torts may "float" between categories—for example, the torts listed as grossly negligent economic harms can also be performed intentionally. Because of this, the Guidelines Manual should include upwards adjusters to higher reprehensibility levels when those torts are committed intentionally rather than negligently. Essentially, this means that torts floating between multiple categories should be assigned the lowest base reprehensibility level possible. This assures that defendants will only be subjected to greater punishment if, under the specific set of facts, their conduct is deserving of an adjustment to a higher reprehensibility level.

Additionally, because the intuitive model is just that—intuitive—it should also be supported by some amount of empirical research or other logical methodology. This can include simple solutions like surveying the population on the types of conduct that they view to be more or less reprehensible. For instance, online crowdsourcing programs may be employed to gather data on the general populace's viewpoints regarding cer-

tain conduct.[84] Additionally, because the behaviors that both society and the law want to deter can change over time, base reprehensibility levels can be adjusted over time to reflect those values. By combining society's intuitions and changing opinions, base reprehensibility levels can be effectively generated and adjusted.

As an example of this process, Figure 5 below features sample base offense levels for some of the most common torts. These sample levels represent the average of each tort's hypothetical intuitive and empirical scores. The intuitive scores are numerical values between 1 and 10, which were assigned based on the intuitive hierarchy outlined above in Figure 4. The empirical scores are also numerical values between 1 and 10, which were assigned based on hypothetical data reflecting society's opinions on the reprehensibility of each tort.[85]

Figure 5

Tort	Base Offense Level
Motor Vehicle	3
Animal Attack	3
Conversion	3
Slander/Libel	4
Assault	5
Fraud	5
False Imprisonment	6
IIED	6
Employment Discrimination	6
Tortious Interference	6
Battery	7
Malicious Prosecution	7
Med Mal	7

84 *See, e.g.*, *Mechanical Turk*, AMAZON, https://www.mturk.com/ [https://perma.cc/AXY7-P46V] (last visited Apr. 23, 2021) (demonstrating an example of an online crowdsourcing platform that can be used to survey the general populace's opinions).

85 For the purposes of this Note, these hypothetical values were derived using data gathered by the Bureau of Justice Statistics. *See* THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 228129, TORT BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 6–7 (2009); COHEN & HARBACEK, *supra* note 78, at 1–2; THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 208445, PUNITIVE DAMAGE AWARDS IN LARGE COUNTIES, 2001, at 1–3 (2001); LYNN LANGTON & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 223851, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 5–6 (2008). "Society's opinions" on the reprehensibility of each tort were determined by evaluating the relative size and frequency of punitive awards for each tort, with a higher score given to those torts that were awarded large punitive awards more frequently. However, given that punitive damages awards are largely unpredictable and unreliable, this process would be better recreated using crowdsourced data reflecting the general populace's actual opinions about the relative reprehensibility of different tortious acts.

3. *Upwards and Downwards Adjustments*

Once the factfinder has determined the base reprehensibility level for a given tortious act, this level may be adjusted depending on the existence of fact-specific aggravating or mitigating factors. As an illustration of this concept, review the example from the Federal Sentencing Guidelines below (Figure 6), which denotes the aggravating and mitigating factors that entitle a judge to make adjustments when sentencing a defendant for Aggravated Assault:

Figure 6

(2) If (A) a firearm was discharged, increase by **5** levels; (B) a dangerous weapon (including a firearm) was otherwise used, increase by **4** levels; (C) a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by **3** levels.

(3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	DEGREE OF BODILY INJURY	INCREASE IN LEVEL
(A)	Bodily Injury	add **3**
(B)	Serious Bodily Injury	add **5**
(C)	Permanent or Life-Threatening Bodily Injury	add **7**
(D)	If the degree of injury is between that specified in subdivisions (A) and (B),	add **4** levels; or
(E)	If the degree of injury is between that specified in subdivisions (B) and (C),	add **6** levels.

As demonstrated in this example,[86] aggravating and mitigating adjusters are fact-specific and based on the exact details of a criminal defendant's illegal act. Similarly, aggravating and mitigating adjusters under the proposed damages schedule should be fact-specific and directly related to the exact factual sequence of the defendant's tortious act.

Jenny M. Jiang, who proposed a different punitive damages schedule from the one proposed in this Note, outlined a process by which upwards and downwards mitigating adjusters may be determined.[87] In her Comment, Jiang adopted aggravating adjusters for the tort of Aggravated Failure to Settle a Claim by an Insurer. In crafting the aggravating adjusters,[88] Jiang drew "from the insurance liability case law of the various states."[89]

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86 U.S. SENTENCING GUIDELINES MANUAL § 2A2.2 (U.S. SENTENCING COMM'N 2018).

87 *See* Jiang, *supra* note 36, at 815–20.

88 While Ms. Jiang does not include mitigating adjusters in her damages schedule, she endorses their use if a final damages schedule were to be created. *See* Jiang, *supra* note 36, at 815 n.142.

89 *Id.* at 817 n.149.

The work done in Jiang's Comment is thorough and bears repeating: successful mitigating and aggravating adjusters can be compiled from existing case law and thereafter codified. This can be most effectively done by gathering a large, random sample of case law from state courts around the country—preferably incorporating all or most state jurisdictions within the sample—and taking note of the specific facts—including actions by both the plaintiffs and defendants, the defendants' *mens rea*, and the defendants' remorse or lack thereof—that may tend to increase or alleviate a defendant's reprehensibility. The most commonly occurring facts should then be codified into set upwards and downwards adjusters in the Guidelines Manual.

This method is likely to be effective in creating the most socially reliable upwards and downwards adjusters for two primary reasons. First, by taking into account the factors considered by all of the states in the union, this method assures that this proposed damages schedule, while uniform in nature and intended to be adopted wholesale, adequately represents the range of factors considered nationwide in determining how to assign this state-law-based remedy. Second, this method preserves one of the positive elements of existing punitive damages jurisprudence: a stockpile of well-reasoned and historically supported factors for assessing the reprehensibility of a given tortious act. While this proposed damages schedule aims to overhaul a large amount of the existing and unreliable punitive damages regime, the non-monetary factors currently considered by courts are likely to be reliable and reflective of society's beliefs.[90]

4. *Tortious History Level*

While Jiang's work crafting an example of a damages schedule provides an excellent base model upon which this Note draws, this Note builds upon this work by suggesting an additional axis that previously suggested schedules like Jiang's do not include: a Tortious History Level x-axis. Like the Federal Sentencing Guidelines,[91] a punitive damages schedule should evaluate a given defendant's record of tortious conduct

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90 *See* Kahneman, Schkade & Sunstein, *supra* note 20, at 50 (demonstrating that synthetic jurors, while unable to agree on the appropriate *monetary* values to assign to given punitive awards, were in substantial agreement as to the relative reprehensibility of hypothetical tortious conduct).

91 *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (U.S. SENTENCING COMM'N 2018).

to determine whether they are a repeat tortfeasor who is deserving of more substantial punishment. As with criminal punishment, the goal of awarding punitive damages in the civil context is primarily based on the principles of retribution and deterrence.[92] Thus, to realize these goals, it is necessary to not only punish a defendant for his or her conduct as it occurs, but to increase his or her punishment as this conduct repeats.

Additionally, considering a defendant's tortious history should help mitigate the concern that punitive damages schedules allow defendants to economically gain from their tortious conduct.[93] Behind this belief is the idea that, in creating a transparent calculation for assigning punitive damages, potential tortfeasors will conduct cost/benefit analyses to determine whether the gain from committing the tortious act will be higher than the damages that they will pay. If so, some argue that defendants will view these damages as the "costs of doing business," and will continue to commit the tortious acts as long as it is more economically beneficial for them to simply pay out damage awards as they arise.[94] If this is the case, critics argue, the deterrence objective of punitive damages will be undermined. However, by factoring a given defendant's prior tortious history into the punitive damages analysis, this concern may be mitigated because a defendant will be more severely punished for repeat conduct and will therefore eventually be deterred from the wrongful conduct by the compounding punitive losses.

But how is one to determine a given defendant's tortious history level? Thankfully, the Federal Sentencing Guidelines can continue to be the guiding light. Consider the below excerpt from the Federal Sentencing Guidelines (Figure 7):[95]

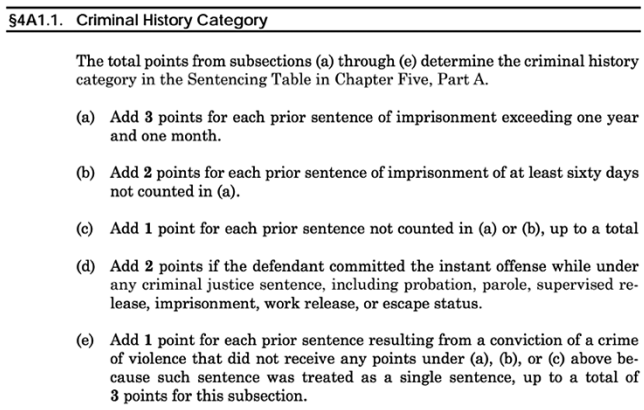
92 *See* Polinsky & Shavell, *supra* note 4, at 873 n.5.

93 *See id.* at 918.

94 Jiang, *supra* note 36, at 827.

95 U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (U.S. SENTENCING COMM'N 2018).

Figure 7



§4A1.1. Criminal History Category

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total

(d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of **3** points for this subsection.

From this excerpt, it is clear that certain factors are relevant in assigning a criminal history category: prior prison sentences, convictions while under a prior sentence, and convictions without a prison sentence. While these factors are not directly applicable to the civil context, analogies can be drawn. For instance, analogies can be drawn between prior prison sentences by length and prior punitive damages paid by size, between prior convictions and prior findings of liability for similar tortious offenses, and between convictions without a prison sentence and settlements made by defendants in previous tort suits. Thus, this Note proposes assigning numerical values to a defendant's tortious history level based on the defendant's: (1) previously paid punitive damages awards, (2) history of similar civil liability, and (3) settlement history for similar conduct.

Assigning values based on previously paid punitive damages awards is the least complicated analysis. Like the Federal Sentencing Guidelines, the number of points a given defendant earns for previously paid punitive awards should be based on two factors: the size of the previous punitive awards, and the number of previous punitive awards.[96] The size of previous awards can be most effectively broken down into eleven monetary-range categories spanning from zero to greater than ten million dollars, each category doubling in size from the last.[97] From there, each monetary range can be assigned a point value that accrues for each instance of a previous punitive award of a

96 *See id.*

97 *See, e.g.*, Jiang, *supra* note 36, at 816–17 (using a similar method to assign award size ranges for a different purpose).

given size. An example of this structure appears below (Figure 8):[98]

Figure 8

Size of Punitive Award	Points Per Award
1K–10K	0.25
10K–20K	0.5
20K–40K	0.75
40K–80K	1
80K–160K	2
160K–320K	3
320K–640K	4
640K–1.28M	5
1.28M–2.6M	6
2.6M–5.2M	7
5.2M–>10M	8

A similar rubric can be created for previous and similar tort adjudications where the defendant was found liable for compensatory, but not punitive damages. However, prior to creating such a rubric, it is necessary to define "similar torts." The best way to do so is to create a bright-line classification system for tortious conduct. Drawing from the classifications created in Figure 3 of section D.2, four primary tort classifications appear: (1) intentional torts generating physical harm, (2) grossly negligent torts generating physical harm, (3) intentional torts generating economic harm, and (4) grossly negligent torts generating economic harm.[99]

A defendant's tortious history level may be thereby increased if they were previously found liable for tortious conduct of the same classification. This can be done using a very similar rubric to the one outlined above for prior punitive damages—adding a point value for each finding of previous civil liability for similar tortious conduct.[100] However, points should only be added under this category if they have not been added under the first punitive damages category to avoid re-

98 Thus, if a given corporate defendant has paid three awards of one million, two awards of one-hundred thousand, and one award of ten thousand, then that defendant will accrue a point value of 17.25. ((5 x 3) + (2 x 2) + (1 x .25)).

99 Though there is limited case law classifying different torts, this distinction seems to match the limited amount of Supreme Court precedent available. Additionally, these categories are consistent with classifications recognized in basic tort law. *See* RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS xi, xxii (11th ed. 2016).

100 The point values on this rubric are half of the values from the previous rubric because a previous finding of liability for compensatory damages suggests that the given conduct was less egregious than conduct generating a punitive award.

dundant calculations. An example of this structure appears below (Figure 9):

Figure 9

Size of Compensatory Award	Points Per Award
1K–10K	0.1
10K–20K	0.25
20K–40K	0.35
40K–80K	.5
80K–160K	1
160K–320K	1.5
320K–640K	2
640K–1.28M	2.5
1.28M–2.6M	3
2.6M–5.2M	3.5
5.2M–>10M	4

Finally, a defendant's tortious history level should be adjusted based on prior settlements for related tortious conduct. This, however, is a difficult area to address because of its potential conflict with the Federal Rules of Evidence (FRE), and particularly FRE 408, which excludes evidence of settlement offers and negotiations for specified purposes.[101] To avoid this issue, one option would be to exclude all settlement evidence entirely. While this is a viable option—and may be viewed favorably by many who view settlements as an important feature of the civil system—this solution could allow repeat offenders to avoid the increasing costs of punitive awards by consistently settling their claims instead of having them adjudicated.[102]

Because of this risk, a better solution may be a limited exception to Rule 408 that allows factfinders to consider evidence of finalized settlements for the same tortious conduct[103] for the limited purpose of determining a defendant's tortious history level after the defendant's liability for punitive damages has already been ascertained.[104] Recognizing that one of the

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101 *See* FED. R. EVID. 408.

102 Indeed, there have been reports of repeated instances of sexual harassment going unnoticed because they were resolved through binding arbitration rather than public trials. *See* Elizabeth Dias & Eliana Dockterman, *The Teeny Tiny Fine Print That Can Allow Sexual Harassment Claims to Go Unheard*, TIME (Oct. 21, 2016), https://time.com/4540111/arbitration-clauses-sexual-harassment/ [https://perma.cc/67ER-9GZ9].

103 Because of the lower probative value of settlements as compared to final adjudications, this Note would require the same tortious conduct rather than the "similar classification" rule applied to previous civil litigation above.

104 While perhaps a drastic solution, Rule 408 already includes multiple exceptions for which prior settlement evidence is admissible. *See* FED. R. EVID. 408(b).

stated purposes of Rule 408 is that there is a low probative value of settlements,[105] this exception should only apply to settlement awards that are greater than a set number, for example $100,000. While a somewhat arbitrary number, its large size would hopefully assure that this settlement evidence is more probative of previous instances of tortious conduct. To further increase the probative value of any included settlement evidence, there should be evidence of multiple large settlements previously paid by the defendant for the same tortious conduct before any points accrue. For example, consider the rubric below (Figure 10):

Figure 10

Number of Settlements	Points Per Award
3–5	1
6–8	2
8–10	3
10–20	5
20–30	7
30–50	9
50+	10

In assigning points for each prior offense, care should be given to assure that defendants are only penalized for conduct that occurred within a reasonable amount of time from the given tortious act. For prior adjudications leading to either compensatory or punitive awards, only tortious acts that were committed within a ten-year period from the initiation of the instant litigation should be considered. For evidence of prior settlements, only tortious acts committed within five years of the initiation of the litigation should be considered. This should hopefully assure that defendants, and especially corporate defendants whose lifetimes are potentially infinite, are not punished for prior conduct for which they have sufficiently reformed.

Once a defendant's raw tortious history score has been calculated by adding together the results from the three rubrics above (Figures 8–10), these raw scores can be translated into a set offense history level based on the table below (Figure 11):

105 *See id.* advisory committee's note to 2006 amendment.

Figure 11

Tortious History Level	I	II	III	IV	V	VI
Raw Score:	0–3	3–5	5–10	10–15	15–20	20 or More

5. *Final Discretionary Adjustments*

Because this schedule will be advisory, not mandatory, in nature, it is necessary to conclude with an instruction that allows the factfinder to deviate from the recommended punitive award range in exceptional cases. This instruction will be similar to those of the Federal Sentencing Guidelines—giving the factfinder the ability to make departures if the guidelines fail to adequately consider the mitigating or aggravating circumstances of a given case.[106] Drawing from the text of the Federal Sentencing Guidelines, a final instruction may appear as follows:

> The sentencing court may depart from the applicable guideline range if the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the guidelines that, in order to advance the objectives set forth in drafting these guidelines, should result in a punitive award different from that described.[107]

One of the primary grounds for a departure not addressed by the guidelines structure as proposed in this Note is the defendant's ability to pay. In many states, a defendant's wealth is considered in calculating the size of a punitive award.[108] However, many scholars discourage using a defendant's income in assigning punitive damages awards because this may result in a windfall to plaintiffs if they have the luck of suing a defendant with "a deep pocket."[109] Because of this, the damages schedule suggested in this Note discourages consideration of a defendant's wealth in calculating punitive awards.

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106 *See* U.S SENTENCING GUIDELINES MANUAL § 5K2.0 (U.S. SENTENCING COMM'N 2018).

107 *See id.*

108 *See* Ronen Perry & Elena Kantorowicz-Reznichenko, *Income-Dependent Punitive Damages*, 95 WASH. U. L. REV. 835, 854 nn.137–38 (2018).

109 *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991); Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 418 (1989); Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in* Haslip, 42 AM. U. L. REV. 1365, 1377 (1993).

Despite this, it is impossible to ignore the disparate impact punitive awards will have on different defendants based on wealth. Though the proposed guidelines structure attempts to mitigate this problem by basing punitive awards directly on actual damages, this may not always solve the problem. In such instances, the proposed final instruction may be of some assistance to allow factfinders to take into account the excessive or inadequate deterrent and punitive effects of a given punitive award based on a defendant's ability to pay.

B. Using Final Multiplier to Determine Punitive Award

Once the final recommended multiplier range has been established using the completed schedule, it should be multiplied by the compensatory award to assess the final punitive award. The multiplied compensatory award should only include actual economic losses incurred by the plaintiff and not any other extracompensatory damages—like attorneys' fees and prejudgment interest—that may have been awarded.[110]

C. An Example of the Completed Schedule

This subpart compiles the results of the foregoing discussions into an example of what a completed punitive damages schedule may look like.

STEP 1: ANSWER THRESHOLD QUESTION

1. Is the weight of the evidence reasonably satisfactory to support the conclusion that Defendant's conduct was:

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110 While some state courts have included extracompensatory damage awards in the punitive damages calculus, this method is ill-advised. *See generally* Mark A. Behrens, Cary Silverman & Christopher E. Appel, *Calculating Punitive Damages Ratios with Extracompensatory Attorney Fees and Judgment Interest: A Violation of the United States Supreme Court's Due Process Jurisprudence?*, 48 Wake Forest L. Rev. 1295, 1307–13 (2013) (summarizing which state and federal courts incorporate attorney costs into punitive damages ratios). Scholars Behrens, Silverman, and Appel have identified three primary reasons why extracompensatory awards should not be considered in the punitive damages calculus. *Id.* at 1318–26. First, this method may contradict Supreme Court precedent because the Court has stated that the punitive award should be comparable to the "actual harm" caused by a defendant. *Id.* at 1318; *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 583 (1996). Second, including extracompensatory damages in the punitive damages calculus could result in an "[u]nsound [e]xpansion of [p]unitive [d]amage [a]wards" that is contrary to the Supreme Court's stated rationale for punitive awards. *See* Behrens, Silverman & Appel, *supra*, at 1322. Third, this method could result in complicated collateral litigation in the event that attorneys' fees, and therefore the resulting punitive award, are challenged and need to be recalculated. *Id.* at 1325. Thus, the most effective method is to include only actual, provable economic damages in the punitive damages calculus.

2. Intentional, willful, malicious, or committed with an otherwise evil motive?;
3. In reckless disregard or indifference to the safety or rights of others?; or
4. Grossly or wantonly negligent, deviating outrageously far from the expected standard of care that a reasonable person would exercise?
5. If the answer to any of these questions is "yes," then the plaintiff is entitled to punitive damages.

STEP 2: LOCATE BASE REPREHENSIBILITY LEVEL IN GUIDELINES MANUAL

Figure 12

Tort	Base Offense Level
Motor Vehicle	3
Animal Attack	3
Conversion	3
Slander/Libel	4
Assault	5
Fraud	5
False Imprisonment	6
IIED	6
Employment Discrimination	6
Tortious Interference	6
Battery	7
Malicious Prosecution	7
Med Mal	7

STEP 3: MAKE UPWARDS AND DOWNWARDS ADJUSTMENTS

Upwards and downwards adjusters are tort-specific and fact-dependent. They should be developed based on a comprehensive study of cases from across the nation to determine what factors courts find relevant in increasing or decreasing a punitive award.

STEP 4: ASSIGN TORTIOUS HISTORY LEVEL

First, calculate the defendant's raw tortious history score by determining Defendant's score under each of the following three rubrics:

Figure 13

a. Previously Paid Punitive Awards for Similar Tortious Conduct

Size of Punitive Award	Points Per Award
1K–10K	0.25
10K–20K	0.5
20K–40K	0.75
40K–80K	1
80K–160K	2
160K–320K	3
320K–640K	4
640K–1.28M	5
1.28M–2.6M	6
2.6M–5.2M	7
5.2M–>10M	8

b. Previously Paid Damages (Not Considered in Part a.)

Size of Compensatory Award	Points Per Award
1K–10K	0.1
10K–20K	0.25
20K–40K	0.35
40K–80K	.5
80K–160K	1
160K–320K	1.5
320K–640K	2
640K–1.28M	2.5
1.28M–2.6M	3
2.6M–5.2M	3.5
5.2M–>10M	4

c. Previous Settlements for the Same Tortious Conduct

Number of Settlements	Points Per Award
3–5	1
6–8	2
8–10	3
10–20	5
20–30	7
30–50	9
50+	10

To determine Defendant's total raw tortious history score, add the total calculated from each of the three previous rubrics. Then, apply this total to the rubric below to determine the Tortious History Level that corresponds with the defendant's raw score.

Figure 14

Tortious History Level	I	II	III	IV	V	VI
Raw Score:	0–3	3–5	5–10	10–15	15–20	20 or More

STEP 5: APPLYING FINAL LEVELS TO DAMAGES SCHEDULE

Apply Defendant's Reprehensibility Level and Tortious History Level to the Damages Schedule by finding where the assigned Reprehensibility Level and Tortious History Level are located on the x- and y-axes of the Damages Schedule and following their respective rows and columns to locate where the two axes intersect. The intersecting box is the suggested damages multiplier.

Figure 15

	Tortious History Category					
R. Level	I	II	III	IV	V	VI
1	.1–.3	.2–.5	.3–.6	.4–.8	.5–.9	.6–1
2	.2–.5	.3–.6	.4–.8	.5–.9	.6–1	.7–1.2
3	.3–.6	.4–.8	.5–.9	.6–1	.7–1.2	.8–1.5
4	.4–.8	.5–.9	.6–1	.7–1.2	.8–1.5	1.2–1.8
5	.5–.9	.6–1	.7–1.2	.8–1.5	1.2–1.8	1.6–2
6	.6–1	.7–1.2	.8–1.5	1.2–1.8	1.6–2	1.9–2.5
7	.7–1.2	.8–1.5	1.2–1.8	1.6–2	1.9–2.5	2.3–2.8
8	.8–1.5	1.2–1.8	1.6–2	1.9–2.5	2.3–2.8	2.5–3
9	1.2–1.8	1.6–2	1.9–2.5	2.3–2.8	2.5–3	2.8–3.5
10	1.6–2	1.9–2.5	2.3–2.8	2.5–3	2.8–3.5	3.3–3.8
11	1.9–2.5	2.3–2.8	2.5–3	2.8–3.5	3.3–3.8	3.5–4
12	2.3–2.8	2.5–3	2.8–3.5	3.3–3.8	3.5–4	3.8–4.3
13	2.5–3	2.8–3.5	3.3–3.8	3.5–4	3.8–4.3	4–4.5
14	2.8–3.5	3.3–3.8	3.5–4	3.8–4.3	4–4.5	4.3–4.8
15	3.3–3.8	3.5–4	3.8–4.3	4–4.5	4.3–4.8	4.5–5
16	3.5–4	3.8–4.3	4–4.5	4.3–4.8	4.5–5	4.8–5.3
17	3.8–4.3	4–4.5	4.3–4.8	4.5–5	4.8–5.3	5–6
18	4–4.5	4.3–4.8	4.5–5	4.8–5.3	5–6	5.5–7
19	4.3–4.8	4.5–5	4.8–5.3	5–6	5.5–7	6.5–8
20	4.5–5	4.8–5.3	5–6	5.5–7	6.5–8	7.5–9

STEP 6: FINAL DISCRETIONARY ADJUSTMENTS

The sentencing court may depart from the applicable guideline range if the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the guidelines that, in order to advance the objectives set forth in drafting these guidelines, should result in a punitive award different from that described.

III
FEASIBILITY AND BENEFITS

Now that this proposed schedule has taken shape, it is important to consider three broader questions. First, is a wide-sweeping legal reform like the one in this proposal legally feasible to implement? Even if it is legally feasible, is it practically feasible? And finally, regardless of the actual feasibility of this proposal, would it actually help? This section explores these questions.

A. Legal Feasibility: The Continued Influence of Discretion

While the Supreme Court has never expressly declared punitive damages awards to be unconstitutional, the Court has, on many occasions, cautioned that excessive punitive awards are a violation of a defendant's constitutional right to Due Process under the Fourteenth Amendment.[111] Despite this cau-

111 *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

tioning, the Court has been hesitant to assign any particular mathematical formula for calculating punitive damages awards, and it has, in fact, explicitly refused to do so on many occasions.[112] Luckily, however, in *Gore* the Court delineated three due process guideposts for determining the size of punitive awards.[113] In determining an award's size, courts should consider: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[114]

Unlike punitive damages schedules proposed by other scholars, the schedule proposed in this Note seeks to specifically incorporate each of these guideposts. The first guidepost is satisfied by this schedule's use of base reprehensibility levels and tortious history levels for a defendant's current and previous conduct, as well as through the use of state-law-based mitigating and aggravating adjusters. In doing so, the reprehensibility of a defendant's conduct is assessed based on both empirically set and theoretically rooted bases, as well as by fact-specific situational adjustments. The second guidepost is satisfied by this schedule's use of compensatory damage multipliers to determine punitive awards, which assure that the punitive award is directly proportionate to the actual harm caused by the defendant. Finally, the third guidepost is satisfied by the schedule's use of data from other cases in developing its upwards and downwards adjusters. This will ensure that punitive damages awards assigned through this schedule are consistent with state court precedent nationwide. Additionally, this guidepost will be continually satisfied by virtue of this damages schedule working to standardize punitive awards over time. By taking into account each of these guideposts, these proposed guidelines should comport with the Fourteenth Amendment's Due Process requirements.

While following the *Gore* guideposts suggests that this proposed schedule would not violate a defendant's due process rights, can the same be said about a plaintiff's rights? Considering the Supreme Court's reluctance to adopt a strict calculus

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112 *Gore*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.").

113 *Id.* at 575.

114 *Campbell*, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 575).

for punitive damages, is it possible that a damages schedule could be said to infringe on a plaintiff's valid claim to a punitive award? Though the Court has denied the use of a strict calculus in the past,[115] there are many reasons to believe that this specific proposal would overcome the Court's previous objections and, if anything, comport more closely with the Supreme Court's directions on punitive awards.

In *Gore*, the Court held that "grossly excessive" punitive awards violate the Due Process Clause of the Fourteenth Amendment.[116] Later, the Court stated that "[lower] courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."[117] In doing so, the Court seems to have prioritized limiting juries' discretion in favor of heightened Due Process protections for civil defendants. While the Court has been hesitant to set any specific punitive award calculation,[118] it has stated that "[s]ingle-digit multipliers are more likely to comport with due process."[119] Thus, in most circumstances, the use of multipliers is consistent with and encouraged by the Court's punitive damages and Due Process jurisprudence.

The final question of legal feasibility is whether this proposal would interfere with a defendant's Seventh Amendment right to a trial by jury in federal civil suits, or with comparable state laws.[120] This question is rooted in the concern that the holding in *Booker*—that a mandatory guidelines structure for assigning criminal sentences is a violation of a criminal defendant's Sixth Amendment right to a trial by jury[121]—applies similarly in the civil context.

The advisory structure of these guidelines is essential in alleviating this concern. While there are many reasons to believe that the *Booker* decision would not be an issue in the civil context,[122] it is advisable to avoid this issue altogether by

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115 *Gore*, 517 U.S. at 582.

116 *Id.* at 562 (quoting TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 454 (1993)).

117 *Campbell*, 538 U.S. at 426.

118 *See Gore*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line [for assigning punitive damages awards] is marked by a simple mathematical formula . . . .").

119 *See Campbell*, 538 U.S. at 425. However, the Court did not rule out the possibility of larger awards in particularly egregious cases. *Id.*

120 *See* U.S. CONST. amend. VII.

121 United States v. Booker, 543 U.S. 220, 226–28 (2005).

122 For instance, the fact that the same factfinder assigns both liability and damage awards using a preponderance of the evidence standard. *Cf. id.* at

maintaining an advisory structure.[123] By using advisory instead of mandatory guidelines, factfinder discretion is preserved and jurors may still deviate from the guidelines if they believe the specific facts of the case justify it. Thus, this is not a substantial impediment to the right to a trial by jury. Beyond this legal concern, an advisory structure provides the necessary safety valve to allow factfinders to adjust punitive awards in extreme circumstances that cannot be adequately anticipated. Though this schedule attempts to assign numeric variables and monetary values to abstract concepts like reprehensibility and morality, the punitive damages calculus is inherently a fact-specific inquiry that should be performed on a case-by-case basis with room for the exercise of discretion.[124]

B. Practical Feasibility

While this specific punitive damages schedule is novel, there are many other instances in which schedules and multipliers have been successfully used to determine damages awards. This suggests that a similar application in the punitive damages context would be feasible. For example, when a copyright is infringed, copyright owners can elect to forgo the collection of actual damages in exchange for recovering statutory damages.[125] These statutory damages work like a damages schedule: the plaintiff receives between $750 and $30,000 per infringed work when they fail to prove intentional infringement, between $750 and $150,000 when they prove intentional infringement, and between $200 and $30,000 when the defendant was not aware that their acts constituted infringement.[126] An example of the use of multipliers can be seen in antitrust suits, in which treble damages are awarded as punishment for corporations that harbor anticompetitive sentiments.[127] Similarly, many state courts already use multipliers to root punitive

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226–28 (holding the mandatory Federal Sentencing Guidelines unconstitutional because they allowed judges to consider facts during sentencing that were not presented to the jury during the guilt phase of the trial on only a preponderance of the evidence standard).

123 Further, other Supreme Court precedent suggests that a mandatory equation is undesirable and perhaps unconstitutional. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

124 *See, e.g.*, TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 466 (1993) (affirming a punitive damages award that was over five-hundred times larger than the compensatory damages award).

125 PETER S. MENELL, ROBERT P. MERGES, MARK A. LEMLEY, SHYAMKRISHNA BALGANESH, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2020, at 869 (2020).

126 *Id.*

127 *See* Clayton Act, 15 U.S.C. § 15 (1982).

damages awards to compensatory damages[128]—a method endorsed by the Supreme Court.[129]

From these examples, it is clear that damages schedules and multipliers are neither new nor foreign to the civil system. However, while this solution is not novel and is likely feasible to implement, there are still a handful of concerns raised by some scholars that must be addressed.

First, some scholars have speculated that a damages schedule, being a transparent and publicly accessible document, encourages a form of "[e]fficient [b]reach" by allowing businesses to better appraise the amount of punitive damages that they will pay for given tortious acts.[130] These scholars argue that, if the expected punitive award is smaller than the cost to adjust the tortious behavior, businesses will continue to engage in the behavior and write off the projected cost of punitive damages as the "costs of doing business."[131] However, this risk is mitigated by the presence of the Offense History Level metric on the damages schedule. By punishing tortious conduct more severely each time it occurs, it is likely that eventually the defendant will stop engaging in the conduct as it becomes incrementally less rewarding. Additionally, as this schedule is advisory, not mandatory, the factfinder could consider evidence of a tortfeasor engaging in efficient breach in deciding whether to adjust the punitive award to increase its deterrent effect.

Similarly, some scholars argue that businesses will offset any higher punitive damages awards as a higher cost to their customers.[132] In addition to being unlikely, this possibility already exists, and poses a much greater risk to consumers under the current system, which allows massive and inconsistent awards to run rampant.[133] Therefore, this proposal's attempt to make punitive awards more reasonable should, if anything, provide a benefit to consumers.

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128 *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (2021) (applying both damages caps and multiplier limits to punitive damages awards); FLA. STAT. ANN. § 768.73 (2002) (same).

129 *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("Single-digit multipliers are more likely to comport with due process . . . .").

130 *See* Jiang, *supra* note 36, at 827; *Efficient Breach*, *supra* note 37.

131 *See* Jiang, *supra* note 36, at 827.

132 *See id.*

133 *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 49 (1991) (O'Connor, J., dissenting) ("Our cases attest to the wildly unpredictable results and glaring unfairness that characterize common-law punitive damages procedures."); Hersch & Viscusi, *supra* note 18, at 4.

Another argument raised by some scholars is the idea that, by creating a calculus for punitive damages that is contingent on the size of the compensatory award, factfinders will adjust compensatory awards to influence the punitive award size. As a practical matter, existing Supreme Court precedent already requires a reasonable relationship between compensatory and punitive awards, so it is likely that if this is a problem, it is already occurring.[134] Beyond this, the advisory nature of the proposed schedule gives the factfinder discretion to adjust the suggested punitive award if it does not successfully accomplish the goals of retribution and deterrence. Because of this built-in discretion, it seems a bit nonsensical to believe that factfinders would adjust compensatory awards—which are theoretically meant to be factually-based and awarded according to actual, established harm[135]—just to alter the more discretionary punitive award.

C. Benefits

Finally, would this proposal actually help alleviate the problems currently plaguing the assignment of punitive damages awards? There are four main ways in which this solution may help.

First, this proposed solution takes advantage of the benefits of numeric anchoring and the adjustment heuristic, just as the Federal Sentencing Guidelines did in the wake of the *Booker* decision. Although this proposed system is merely advisory, by suggesting a range of punitive damages award multipliers, factfinders will likely be anchored to this range and, should they choose to adjust the award at all, will adjust less substantially than they otherwise would have, so the awards are still significantly less arbitrary than those seen without any guidelines. By basing the suggested punitive damages award on empirically-based reprehensibility levels, tortious history levels, and upwards and downwards adjusters, this schedule assures that factfinders are first influenced by empirical and socially desirable punitive damages ranges before deciding to deviate from them.

Second, and similarly, by anchoring punitive awards to a specified range, there should be a reduction in disparities across punitive damages awards. As discussed in Part I, there

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134 *See Campbell*, 538 U.S. at 426.

135 *See Actual Damages*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/actual_damages [https://perma.cc/D5QB-9DRR] (last visited Apr. 23, 2021).

are many extrinsic factors that can play a role in factfinder decision making. However, by presenting these suggested awards to factfinders, they should reign in their discretion to comport more closely with the numeric recommendation. This should provide greater uniformity in punitive damages awards both across jurisdictions and between trial types.

Third, by creating a clear calculus for determining punitive awards that is publicly accessible and rooted in an empirical basis, this punitive damages schedule should increase the ease of appellate review. Since *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, in which the Supreme Court suggested that the appropriate standard of review for a punitive damages award is *de novo*, large punitive awards are susceptible to being overturned or reduced at higher rates.[136] However, with clear guidelines adopted, appellate courts should infrequently overturn punitive awards that fall within the suggested range. Furthermore, awards by judges that deviate from the accepted range will likely be accompanied by well-reasoned opinions explaining why a deviation was necessary, so these cases should also be less susceptible to being overturned on review.

Finally, this proposed solution should increase transparency in the civil system, and thereby increase the rates of settlement. Currently, our system relies on settlements to dispose of the majority of cases before the courts.[137] By revealing exactly which factors are relevant in determining a punitive damages award, litigants on both sides can better assess whether punitive damages will be awarded and how large the award will be and can therefore decide on whether and how much to settle for accordingly.

CONCLUSION

A comprehensive punitive damages schedule is a practical and feasible solution to the currently observed variability of punitive damages awards. The agency tasked with creating this schedule will need to consider the many factors that go into determining the reprehensibility level of a given tort—something that this Note has made a first, but definitely not last, attempt at doing. From here, it will be necessary to gather more data on nationwide trends in punitive damages awards to

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136 532 U.S. 424, 436 (2001); *see also* Hersch & Viscusi, *supra* note 18, at 2 ("Very large punitive damages awards are typically reduced on appeal.").

137 *See* Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 112 (2009) ("[S]ettlement is the modal civil case outcome.").

thoroughly analyze what factors are relevant in determining whether punitive damages should be awarded and how large the awards should be. Additionally, researchers should investigate what potential solutions may be available to incorporate evidence of prior settlements into a damages schedule's consideration without violating the Federal Rules of Evidence. Despite these challenges, with the right agency behind this effort, a well-developed punitive damages schedule may present just the middle ground that tort reform proponents and opponents alike have been searching for.