

ANNOUNCING REMEDIES

Samuel L. Bray†

It is a familiar ideal that the remedy should fit the wrong—this wrong, by this wrongdoer, against this victim. Modern legal systems ordinarily pursue this kind of fit, at least in civil cases, by tailoring the remedy case by case. There is an alternative, though, which is for a legal system to announce in advance exactly what the remedy will be for all violations of a legal rule. This Article analyzes that alternative and offers a theory for when remedies should be announced.

Announcing has important social benefits. First, announcing leads to greater equality because what a successful litigant recovers is not affected by her race, gender, or other characteristics. Second, announcing produces greater compliance with legal rules because it assures the public that remedies are not being unfairly manipulated. Third, announcing reduces the “costs of telling.” When remedies are decided case by case, a plaintiff’s recovery depends on how successfully she tells her story. This telling has personal costs that are avoided when remedies are announced.

In achieving these benefits, announcing does not operate as a unitary phenomenon. Sometimes it performs a cost-saving function, sometimes a communication function, and sometimes a precommitment function. Distinguishing among these functions is critical to the proper use of announcing. Other important considerations include the interplay of rights and remedies, the need for future proofing, and the way announcing one remedy can affect the entire system of remedies.

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† Acting Professor of Law, UCLA School of Law. I am grateful for comments on previous drafts from Will Baude, Noa Ben-Asher, Kenworthy Bilz, Ryan Calo, Nathan Chapman, Richard Craswell, Marc DeGirolami, Elizabeth Emens, Chad Flanders, Abbe Gluck, Ranjit Hakim, Philip Hamburger, Bert Huang, Doug Lichtman, Ben Roin, Nicholas Quinn Rosenkranz, Bertrall Ross, Josh Sheptow, and Noah Zatz. This work also benefitted from the comments of participants in faculty workshops at UCLA, Cardozo, the University of Chicago, Minnesota, Penn State, and Stanford, and from discussions with Tun-Jen Chang, Einer Elhauge, Arden Rowell, Henry Smith, and Alexander Stremitzer.

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INTRODUCTION

On residential streets in Manhattan, there are signs that say:

DON'T HONK \$350 PENALTY

If someone honks her car horn and is apprehended by an officer, the “remedy” is the same no matter how much harm was caused. Did the car horn cause great harm because it distracted Stephen Sondheim and made him forget forever a clever turn of phrase? Or did the car horn trouble no one because the residents were all away? It does not matter: the penalty is \$350.

This is the exception rather than the rule in modern legal systems, at least with respect to civil remedies. For most violations of legal rules, we tend to think that the remedy should fit the violation. And that means that the remedy is determined case by case, usually after a violation occurs. This approach to remedies is ubiquitous in tort, contract, property, and constitutional law, as well as many other substantive domains. For the most part, it is uncontroversial. When deciding remedies case by case, legal decision makers can avoid over- and undercompensating particular victims and can consider the characteristics of particular violators that may be relevant for optimal deterrence. Of course this rosy picture is not quite complete. The tailoring of remedies requires tailors (i.e., a society must pay for

judges), and it thus increases the cost of adjudication. Generally, though, modern legal systems tailor.

The alternative is *announcing*: that is, determining and declaring in advance exactly what the remedy will be for all violations of a legal rule. This Article analyzes the social benefits and functions of announcing and develops a theory for when remedies should be announced.

The idea of announcing remedies is familiar in American legal scholarship. Some scholars have called for scheduling damages in areas such as pain-and-suffering awards in order to mitigate certain kinds of arbitrariness.¹ Other scholars writing in the literature on the optimal precision of remedies have explored the inefficiency of very precise damage awards. In particular, Kathy Spier has shown how an excessive search for precision can discourage settlement,² and Louis Kaplow and Steve Shavell have shown that the costs of obtaining more precise awards are not internalized by the litigants themselves.³ And there is a more doctrinal literature on statutory damages that is often harshly critical of their imprecision and severity.⁴ These literatures recognize a tradeoff between pursuing accuracy and reducing administrative costs. That tradeoff is important, yet there is much more to the normative analysis of announcing.

This Article makes two major contributions. The first is an investigation of the social benefits of announced remedies. One social benefit is greater equality since the size of the remedy is not affected by the race, gender, or other characteristics of the parties. Another social benefit is increased compliance with the law. For this benefit, it matters that announcing fosters not only equal treatment but also the *perception* of equal treatment. This perception encourages compliance by those who want to obey legal rules as long as they know that “the game is not rigged.”⁵ A third social benefit of announcing is reduced “costs of telling.” When remedies are determined case by case, what a litigant recovers depends on how she tells her story. But telling a story

¹ See, e.g., Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling “Pain and Suffering,”* 83 NW. U. L. REV. 908, 938 (1989).

² See Kathryn E. Spier, *Settlement Bargaining and the Design of Damage Awards*, 10 J.L. ECON. & ORG. 84, 86–94 (1994).

³ See Louis Kaplow & Steven Shavell, *Accuracy in the Assessment of Damages*, 39 J.L. & ECON. 191, 192–93 (1996).

⁴ See, e.g., Michael E. Chaplin, *What’s So Fair About the Fair and Accurate Credit Transactions Act*, 92 MARQ. L. REV. 307 (2008) (critiquing statutory damages under the Fair and Accurate Credit Transactions Act); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009) (critiquing statutory damages in copyright law); Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103 (2009) (arguing that there can be a lack of due process when statutory damages are available in class actions).

⁵ Margaret Levi, *A State of Trust*, in TRUST AND GOVERNANCE 77, 90–91 (Valerie Braithwaite & Margaret Levi eds., 1998).

can subtly transform the teller. It can change how she thinks about herself, thus thwarting her “hedonic adaptation” (i.e., the process by which most people’s happiness rebounds after a negative event).⁶ As this Article demonstrates, announcing reduces these costs of telling.

The second major contribution of this Article is a theory for when remedies should be announced. Announcing is not a unitary phenomenon, for it serves different functions depending on context. Most obviously, announcing can serve a *cost-saving function*, because determining the remedy once is cheaper than determining it over and over again. Announcing can also perform a *communication function*, especially when the audience for a legal rule is unsophisticated. Consider an example that is used throughout this Article: if most bloggers seriously underestimate the remedies for writing a defamatory post, the legal system is missing out on the deterrent effect of the remedies that it actually metes out. Announcing the remedy could cure this underestimation.

Alternatively, announcing can serve a *precommitment function* when the audience is made up of sophisticated repeat players and the remedy is meant to be a high “sanction.”⁷ In a sanctions situation—that is, when legal decision makers know the socially optimal behavior but do not know the external costs of nonoptimal behaviors⁸—legal decision makers can precommit to giving a remedy that is large, even excessive. Such a high sanction can ensure compliance by sophisticated actors, especially when “compliance” is essentially a one-time decision. An example in current law is the Right to Financial Privacy Act of 1978,⁹ which threatens banks with the possibility of high statutory damages if they illegally disclose customer information to the government and thus forces banks to adopt controls for the disclosure of customer information.¹⁰

Legal scholars and courts have overlooked the diversity of functions of announcing. Nowhere is this omission more critical than in the growing literature that calls for more vigorous constitutional review of statutory damage awards.¹¹ That literature attacks statutory damages for their excessiveness, but it fails to recognize the precommitment function of announcing. When conditions are right for

⁶ See Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 785–86 (2007) (arguing that the process of obtaining hedonic damages for disability can thwart hedonic adaptation).

⁷ This point draws on Bob Cooter’s distinction between prices and sanctions. See Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

⁸ *Id.* at 1532–37.

⁹ See 12 U.S.C. §§ 3401–3422 (2006).

¹⁰ See *id.* § 3417.

¹¹ See sources cited *supra* note 4.

precommitment, the excessiveness of the threatened remedy is not a defect. It is a feature.

The theory developed here includes important constraints on announcing, as well as a recognition of the way announcing one remedy can affect the entire system of remedies. Announcing will not be the optimal strategy for the remedy for every legal rule or even for most legal rules. But announcing has an important place in an imperfect system of remedies. It is well suited to the world of the second best—a world where knowledge of remedies is costly, trust is fragile, and the legal process is brutal even to those who prevail. In such a world, a legal system can better achieve its aims if it judiciously adopts announced remedies.

Two points about the scope of this Article are necessary at the outset. First, the term “remedies” is here used in the broad sense of anything awarded or imposed by a court in civil litigation.¹² Only civil remedies are in view because criminal penalties raise unique questions, in part because of institutional facts such as prosecutorial discretion.¹³ Second, a simplifying assumption is needed about the relationship between rights and remedies. Rights can be seen as claims to remedies; remedies can be seen as the means of carrying rights into effect. This interrelationship is useful for thinking about remedies.¹⁴ Yet it also has the potential to overwhelm the analysis here. Accordingly, this Article assumes that rights and substantive legal rules are held constant and that what can be varied is the individualization and communication of remedies. At crucial points, however, the Article sets aside this assumption to analyze how the design of remedies is intertwined with the definition of rights.

This Article proceeds as follows. Part I introduces the concept of announcing. Part II develops the social benefits of announcing. Part III articulates a normative theory for when remedies should be announced.

¹² See Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 165 (2008) (defining “remedies” as what “the court can do *for* you if you win” or what it “can do to you if you lose”). The definition, however, is contestable. See *infra* note 170.

¹³ See *infra* note 171.

¹⁴ The standard contemporary reference is Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (“[R]ights and remedies are inextricably intertwined.”). For earlier discussions, see MARSILIUS OF PADUA, DEFENSOR PACIS 189 (Alan Gewirth trans., 1956) (1324); JOHN AUSTIN, 2 LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 767–68 (Robert Campbell ed., 5th ed. 1885); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

I

INTRODUCING ANNOUNCING

This Part lays the groundwork for the argument that follows. Subpart A defines and illustrates announcing. Subpart B acknowledges the rationale for *not* announcing—namely a loss of precision—and shows where this rationale runs out.

A. Definitions

In fashioning its law of remedies, a legal system will face tradeoffs. One is the tradeoff between (1) matching the remedy with the harm to the plaintiff (or the gain to the defendant), and (2) communicating to the public in advance of any violation what the remedy will be. It is impossible for a regime of remedies to fully achieve these two aims of remedial precision and remedial communication.

If remedies are decided case by case, as is typical in the United States, the legal system seeks to maximize remedial precision. That is, it tries to maximize the degree to which the remedy fits the particular violation. But this pursuit of remedial precision comes at a cost because legal decision makers are limited in their ability to communicate to the public what the remedy will be for any particular violation.

Announcing favors the other side of the tradeoff. Typically, announcing has two aspects. First, the announced remedy is determined *ex ante* and in the aggregate for an entire class of cases. What is announced is not merely the principle by which the remedy will be determined, but rather the actual quantum of remedy, such as \$350 for all cases of honking a car horn on a residential street in Manhattan.¹⁵ Second, the announced remedy is communicated to the public, either directly (as on the “Don’t Honk” signs) or indirectly by structuring information about the remedy so that it will likely be discovered and

¹⁵ Although not developed in this Article, there can also be private ordering in the spirit of an announced remedy. In contract law, the paradigmatic example is liquidated damages, which are like an announced remedy that the parties have chosen for themselves. The analogy can be taken too far, however. Liquidated damages are determined in advance, but they are also customized to the parties’ particular circumstances in a way that general legislation ordinarily cannot be. This unusual combination of announcing and customization is critical for the modern justifications for supracompensatory liquidated damages. *E.g.*, Aaron S. Edlin & Alan Schwartz, *Optimal Penalties in Contracts*, 78 CHI.-KENT L. REV. 33 (2003) (showing that a liquidated-damages clause can encourage efficient two-sided investment). In tort law, too, there is private ordering in the spirit of announced remedies. *See* Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1532–34 (2009) (describing the personal-injury schedules used by “settlement mills”); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004) (describing devices for aggregate settlement); *cf.* Mark Koyama, *Prosecution Associations in Industrial Revolution England: Private Providers of Public Goods?*, 41 J. LEGAL STUD. (forthcoming 2012) (describing the use of reward schedules by private prosecution associations in early nineteenth-century England).

understood by potential violators.¹⁶ Most announced remedies have both aspects, aggregation and publicity, though for some only one aspect or the other really matters.

To be clear, when legal decision makers announce the remedy, they are not indifferent to the value of remedial precision. They are still trying to get it “right” in the sense of matching the remedy to the legal violation,¹⁷ but they suffer from various restrictions. One restriction is that they are determining remedies *ex ante*. Other restrictions come from the attempted communication. If the “Don’t Honk” signs in Manhattan contained an elaborate mathematical formula for calculating the fine, that would presumably increase remedial precision, but it would certainly fail as remedial communication: legal decision makers would run up against restrictions such as the amount of information that could fit on a sign and the willingness of drivers to do the math.

The definition of announcing given in this Part is streamlined for analytical purposes. The choice is not really binary, for there are also intermediate approaches, such as announcing a range and then deciding remedies case by case within that range.¹⁸ (That intermediate approach can be found in some statutory damages¹⁹ and is characteristic of the *U.S. Sentencing Guidelines*.²⁰) Or a legal system could take something of a middle path by publicizing the principle or rule of decision that will be used in determining remedies.²¹ Or the tension between remedial precision and remedial communication could be mitigated somewhat by the use of specific rather than substitutionary remedies,²² by new technologies, or by cultural developments.²³ Nevertheless, legal decision makers will never wholly escape the tradeoff between remedial precision and remedial communication.²⁴

¹⁶ Cf. Claire Grant, *Promulgation and the Law*, 2 INT’L J.L. IN CONTEXT 321, 325 (2006) (defining “publication” of laws as “the activity of taking steps to attract people’s attention to laws”). As is common in the jurisprudence literature on the publication and promulgation of laws, Grant emphasizes substantive rules, not remedies. See *id.* at 321–30.

¹⁷ A partial exception is the precommitment function considered in Part III.A.3.

¹⁸ See *infra* Part III.D.

¹⁹ Statutory damages are often used in regulatory contexts, such as consumer protection, privacy, and environmental safety. Statutory damages can be an intermediate approach, see *infra* Part III.D.1, but are instances of announcing when they are (or are in effect) a single fixed amount, see *infra* notes 128–40 and accompanying text.

²⁰ See *infra* notes 165–67 and accompanying text.

²¹ One example is expectation damages in contract law. Another example is the set of principles that courts use to determine the sanction for parties and counsel under Rule 11 of the FEDERAL RULES OF CIVIL PROCEDURE. See FED. R. CIV. P. 11(c).

²² For specific remedies such as replevin or disgorgement, the remedy may be determined case by case and yet also be fairly predictable in advance.

²³ For example, the public might better predict case-by-case remedies if betting on remedies were to become a national pastime.

²⁴ There are obvious affinities with the tradeoffs between rules and standards, as well as with similar tradeoffs between law and equity, property rules and liability rules, bright

Before turning to the primary contributions of this Article—the social benefits of announcing in Part II and the normative theory in Part III—it is important to understand the force and limits of the argument for *not* announcing remedies.

B. The Rationale for Not Announcing

In the United States, civil remedies are usually determined one case at a time. Behind this practice stands a powerful and straightforward idea: when legal decision makers determine remedies case by case they can match the remedy to the violation more precisely. This is valuable no matter what goal a legal system might pursue.

Consider the goal of optimal deterrence. A single fixed remedy for all violations of a legal rule will inevitably overdeter some people and underdeter others since individuals differ from one another in so many ways.²⁵ Choosing to tailor the remedy offers the promise of an escape from this anti-Goldilocks trap—the trap of the remedy *always* (except in a trivial number of cases) being either too large or too small. And by matching the remedy to the particular violation, legal decision makers can give potential violators “two reasons to improve their behavior” because potential violators who do make improvements can reduce the likelihood of being found liable and, if they are found liable, can reduce the level of remedy.²⁶

Remedial precision seems just as crucial if a legal system is pursuing the goal of compensatory justice. For legal decision makers to restore a wronged person to her rightful position, they need to know what her rightful position was or would have been. This is exactly the information that legal decision makers can develop and employ when focusing on a single case.

Similarly, if a legal system seeks distributive justice, legal decision makers will want to know who the parties are. With this knowledge,

lines and balancing tests, agencies and courts, preventive and remedial adjudication, and legalism and legal holes. Two of the points of departure in this Article are the concentration on remedies and the emphasis on communication.

²⁵ See, e.g., Jennifer H. Arlen, *Should Defendants' Wealth Matter?*, 21 J. LEGAL STUD. 413 (1992) (wealth); Lucian Arye Bebchuk & Louis Kaplow, *Optimal Sanctions and Differences in Individuals' Likelihood of Avoiding Detection*, 13 INT'L REV. L. & ECON. 217 (1993) (likelihood of apprehension); Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009) (experience of punishment); A. Mitchell Polinsky, *Risk Sharing Through Breach of Contract Remedies*, 12 J. LEGAL STUD. 427, 433–36 (1983) (risk aversion); John T. Scholz & Neil Pinney, *Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior*, 39 AM. J. POL. SCI. 490 (1995) (sense of duty to obey the law).

²⁶ Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 MICH. L. REV. 2185, 2205 (1999). Optimal-deterrence theory also suggests caveats. On administrative costs, see Arlen, *supra* note 25, at 427–28. On institutional capacity, see Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 384 (1984).

they can learn about the distributive allocations that currently exist and can incorporate them into decisions about remedies.

For all three of these aims, the precision of case-by-case decision making about remedies is instrumental. It allows a legal decision maker to make finer distinctions among violators who need to be deterred, or among injured persons who need to be compensated, or among existing distributive allocations that need to be taken into account. To borrow an analogy from Joseph Raz,²⁷ the virtue of this kind of case-by-case decision making is like the virtue of a sharp knife. Whatever “cuts” a legal system wants to make, it can make these cuts more carefully and less crudely when it particularizes the remedy.²⁸ This instrumental argument is powerful, and it is deeply embedded in the practices and discourse of law in the United States. Yet it depends on a crucial premise: that precision is attainable.

This premise is under strain. Scholars working in a number of substantive areas and using a variety of methodological approaches have critiqued the inconsistency and indeterminacy of damage awards. In particular, critics have shown that certain kinds of damages are radically unpredictable. These include noneconomic damages, such as those for pain and suffering or hedonic loss,²⁹ and perhaps punitive damages.³⁰ The same unpredictability bedevils the remedies for certain kinds of legal claims that are not primarily about financial loss but are instead about dignity, autonomy, and other immeasurable

²⁷ See JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 225–26 (2d ed. 2009).

²⁸ The advantage of deciding remedies case by case is only relative, however, because (1) different decision makers will not give the same remedy even in essentially identical cases, and (2) in tort law, when remedies are decided case by case, the result is a systematic overcompensation of victims with smaller losses and undercompensation of those with larger losses. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1218–21 (1992).

²⁹ See, e.g., Bovbjerg et al., *supra* note 1; Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 781–83 (1995); Stephan Landsman, *Introduction*, 55 DEPAUL L. REV. 249, 249–52 (2006) (introducing the symposium *Who Feels Their Pain? The Challenge of Noneconomic Damages in Civil Litigation*); Frederick S. Levin, Note, *Pain and Suffering Guidelines: A Cure for Damages Measurement “Anomie,”* 22 U. MICH. J.L. REFORM 303, 304–11 (1989).

³⁰ See, e.g., Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1 (2004) (finding arbitrariness and unpredictability in jury-determined punitive damage awards); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998) (same). *But see* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002) (finding a similar ratio between compensatory and punitive damages in determinations by judges and juries). For surveys of the empirical debate, see Daniel E. Ho, Comment, *Reconciling Punitive Damages Evidence*, 166 J. INSTITUTIONAL & THEORETICAL ECON. 27 (2010); Catherine M. Sharkey, *The Exxon Valdez Litigation Marathon: A Window on Punitive Damages*, 7 U. ST. THOMAS L.J. 25, 36–38 & nn.54–57 (2009).

human goods.³¹ These legal claims include defamation, invasion of privacy, trespass on real property, wrongful life, wrongful death, sexual harassment, alienation of affections, false imprisonment, malicious prosecution, and unconstitutional searches and seizures. Moreover, many of these legal claims have a public or regulatory dimension. To take one example, a defamation suit between *A* and *B* does more than resolve a dispute between two parties, for it also delineates the rules of social engagement and community membership.³² In sum, for these kinds of damages and legal claims, the harm is real and can even be extraordinarily severe, but it lacks quantifiability, countability, a distinct border, a mappable size. It is fuzzy. Indeed, it may well be that these radically indeterminate harms are becoming more central in the legal system of the United States as people increasingly devote their attention to and center their lives on experiences that are not priced or are hard to value.³³

The critics have convincingly undermined the notion that remedial precision is attainable in all kinds of cases. And in one sense, this is just the rediscovery of what jurists have known all along. There will always be indeterminacy in law, especially when a legal system insists on using money to compensate for losses suffered in a “different currency.”³⁴ Nevertheless, the radical imprecision that pervades large swathes of remedies is important for normative theory. Where remedial precision is impossible, the rationale for *not* announcing is diminished.

³¹ See Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 778–819 (1985); Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 373–77 (2006). For these harms, sometimes a court can offer only “random justice held with things half-known, / with restitution if things come to that.” GEOFFREY HILL, *Offertorium: December 2002*, in WITHOUT TITLE 22, 22 (2006).

³² See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 711–19 (1986). Or, to take another example, false imprisonment can be a denial of the liberty of all citizens—not merely of the victim. See, e.g., John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 459–60 (2006) (discussing *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (K.B.) 769; 2 Wils. 206, 207, an eighteenth-century English case that upheld a massive award of damages when the king’s agents falsely imprisoned a printer with little or no personal loss because the act was a tyrannical affront to “the liberty of the kingdom”).

³³ See generally TYLER COWEN, *THE GREAT STAGNATION: HOW AMERICA ATE ALL THE LOW-HANGING FRUIT OF MODERN HISTORY, GOT SICK, AND WILL (EVENTUALLY) FEEL BETTER* (2011) (describing the rise of industries, technologies, and activities for which reliable judgments of value are not possible, including many uses of the internet). After all, there is no reason to think that in any particular legal system there will be constant proportions, over time, of more determinate and less determinate harms.

³⁴ See Rabin, *supra* note 31, at 365. See generally WILLIAM IAN MILLER, *EYE FOR AN EYE 20* (2006) (“The worry about how hard it is to come up with equivalences is at the core of primitive systems of justice, and it is hardly something we have adequately resolved today.”); MARGARET JANE RADIN, *CONTESTED COMMODITIES* 193–96 (1996) (noting tort law’s ambition to rectify nonpecuniary harm and its recognition that doing so is impossible).

Optimal deterrence is harder to achieve when harm is indeterminate.³⁵ In trying to approximate optimal deterrence, a court is already faced with the daunting task of knowing many things about the violator of a legal rule and the victim.³⁶ If a court cannot reliably know how much harm the violator caused, the task is even more difficult, and it is more likely that the court will err in setting the remedy.³⁷ In addition, for cases involving fuzzy, indeterminate harms, potential violators may be systematically underdeterred because these harms are hard to prove and plaintiffs are entitled to recover only for proven harms.³⁸

Nor is compensatory justice largely achievable for these harms, for the indeterminacy goes to the heart of deciding what amount of compensation is actually due to the victim. At least distributive justice, it might seem, can best be achieved when there is not an obvious quantum of remedy since the indeterminacy gives legal decision makers more room to maneuver. In practice, though, even this is unlikely. Empirical scholarship on juror decision making suggests that when damages are more subjective, there is a greater risk of invidious bias.³⁹ All else being equal, then, if the harm in question is radically indeterminate, deciding the remedy case by case is likely to *exacerbate* distributive inequalities. In short, the powerful argument for deciding remedies one case at a time is diminished if there is no realistic possibility of remedial precision.

³⁵ See Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 94–96 & n.43 (2006) (developing this point, albeit with qualifications, and concluding that “the optimal provision of pain-and-suffering damages should combine predictability with optimal mean or median of awards, to preserve deterrence”); see also Bovbjerg et al., *supra* note 1, at 925 (arguing that “highly variable, unpredictable” damage awards “undercut the *deterrence* function of tort law”).

³⁶ See sources cited *supra* note 25.

³⁷ Errors in setting the remedy matter in strict-liability regimes and in negligence regimes in which courts sometimes err in determining liability. See Craswell, *supra* note 26, at 2190 (noting that in such regimes “optimal deterrence . . . requires that the penalty be set at exactly the right level, not merely that it be at or above some minimum”).

³⁸ See Taliferro v. Augle, 757 F.2d 157, 162 (7th Cir. 1985) (Posner, J.) (“A plaintiff is not permitted to throw himself on the generosity of the jury. If he wants damages, he must prove them.”).

³⁹ Cf. Bovbjerg et al., *supra* note 1, at 936–38 (finding greater variation in awards of noneconomic damages than in awards of economic damages); Joel D. Lieberman, *Head over the Heart or Heart over the Head? Cognitive Experiential Self-Theory and Extralegal Heuristics in Juror Decision Making*, 32 J. APPLIED SOC. PSYCHOL. 2526, 2536, 2538–39, 2545–46 (2002) (classifying “loss of income, loss of companionship, and punitive damages” as “subjective damages”); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1328 (2005) (expressing particular concern about inadmissible evidence when “damages . . . are inherently difficult to quantify”).

II

SOCIAL BENEFITS OF ANNOUNCING

This Part considers three social benefits of announcing: more equality (subpart A), more compliance (subpart B), and lower costs of telling (subpart C).⁴⁰

A. More Equality

In a particular case the parties are particular people. The judge or the jury will see parties who may have a racial identity or a gender identity, and may perceive them as physically attractive or unattractive.⁴¹ Of course these characteristics are not supposed to matter in deciding remedies. A pedestrian who is injured by a negligent driver should not recover less for pain and suffering because of her race or gender or physical attractiveness. Where such disparities do exist, however, they are a product of deciding remedies case by case. It is the choice to tailor that makes the remedy stage a site of retail-level inequality.⁴²

These disparities do exist in the United States. Scholars have analyzed damage awards and criminal sentences, in both experimental and nonexperimental settings, and the literature presents a disturbing picture of how personal identity shapes what a person “gets” from trial.⁴³

Although the focus of this Article is on civil remedies,⁴⁴ two of the most recent and striking studies look at the length of criminal sentences. In an experimental study, Justin Gunnell and Stephen Ceci examined the interaction of a defendant’s physical attractiveness with a juror’s style of processing information.⁴⁵ For jurors whose style of information processing depended more on emotion and personal experience, the physical attractiveness of defendants had a substantial

⁴⁰ As an analytical matter, a reduction in administrative costs could be presented as a social benefit. In this Article, such a reduction is discussed with announcing’s functions. See *infra* Part III.A.1.

⁴¹ The analysis here focuses on these characteristics. It could be extended to other forms of identity and to circumstances such as having adroit legal counsel.

⁴² Other scholars have made this point in favor of damage matrices, see Bovbjerg et al., *supra* note 1, at 944 n.167, 947, and in favor of rules, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 976 (1995).

⁴³ Given that the experimental and nonexperimental approaches have independent methodological challenges, it is noteworthy that they both support the effects described in the text. A similar observation is made in Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 633 (2005).

⁴⁴ On the difficulty of announcing in the criminal context, see *infra* note 171.

⁴⁵ Justin J. Gunnell & Stephen J. Ceci, *When Emotionality Trumps Reason: A Study of Individual Processing Style and Juror Bias*, 28 BEHAV. SCI. & L. 850 (2010).

effect. These jurors were more likely to convict physically unattractive defendants, and they sentenced them “to approximately 22 more months (or 67% longer sentences) in prison than attractive defendants.”⁴⁶ Gunnell and Ceci also found that all jurors, regardless of their information-processing style, were more likely to think that a physically unattractive person was “the type of person who could commit a crime like this.”⁴⁷

In a nonexperimental study, Ed Glaeser and Bruce Sacerdote examined the length of sentences for murder, and they found significant race and gender effects.⁴⁸ They confirmed the “well-known race-of-victim effect,”⁴⁹ finding that “white murderers receive a sentence 4 years shorter if they kill a black person instead of a white person, and black murderers receive a sentence 1.8 years shorter if they kill a black person.”⁵⁰ They also found that “[o]ffenders who kill male victims receive much shorter sentences.”⁵¹ Glaeser and Sacerdote paired this analysis of murder sentences with investigation of a subset of murders: vehicular homicide cases. This subset is important because the victims are essentially random. Thus, the usual optimal-deterrence reasons to vary sentences based on victim characteristics do not apply because the driver cannot distinguish between victims. Again, Glaeser and Sacerdote found “substantial victim effects.”⁵²

In a similar vein, there is an extensive social-science literature that finds disparities in civil remedies, though most of it is older or narrower than the Gunnell-Ceci and Glaeser-Sacerdote studies.⁵³ For instance, a RAND study of civil jury verdicts in Cook County, Illinois, from 1959 to 1979, found that, “[o]n average, black plaintiffs received only three-fourths as much compensation as whites who had the same injury, lost income, and type of legal claim.”⁵⁴

⁴⁶ *Id.* at 865.

⁴⁷ *Id.* at 868, 877.

⁴⁸ Edward L. Glaeser & Bruce Sacerdote, *Sentencing in Homicide Cases and the Role of Vengeance*, 32 J. LEGAL STUD. 363, 364 (2003).

⁴⁹ *Id.* at 374.

⁵⁰ *Id.* at 375.

⁵¹ *Id.* at 373.

⁵² *Id.* at 377. The gender effects were “about as strong as in the case of murders overall,” and the race effects were “quantitatively large” though not statistically significant. *Id.* at 376–78.

⁵³ See, e.g., Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 464–66 (1998); Jane Goodman et al., *Money, Sex, and Death: Gender Bias in Wrongful Death Damage Awards*, 25 LAW & SOC'Y REV. 263, 281–82 (1991); Lieberman, *supra* note 39; see also W. Jonathan Cardi, *The Search for Racial Justice in Tort Law*, in CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 115, 120–21 (Gregory S. Parks et al. eds., 2008) (reviewing literature and noting its limitations).

⁵⁴ AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS 38–39 (1985).

These disparities arise from the decision to tailor the remedy. When legal decision makers are working case by case, they see particular people. But when remedies are announced, legal decision makers set aside this information, choosing instead to be ignorant about the characteristics of both the person who violated the rule and the person who was hurt. They are like the judges in a “blind” orchestra audition who sit behind screens and do not learn the gender of auditioning musicians in order to avoid bias.⁵⁵

Announcing the remedy does not remove discretion, discrimination, and inequality from other aspects of the legal system. Invidious discrimination could still be embedded in substantive legal rules or in the way those rules are paired with announced remedies.⁵⁶ Moreover, “upstream” disparities in enforcement and adjudication can mean that formally equal announced remedies do not fall equally on all sectors of the population.⁵⁷ But all of those disparities can exist regardless of whether remedies are announced. What announcing does is prevent an *additional* layer of retail-level disparities.

The decision to announce is thus a decision about allocative mechanisms. When remedies are announced, the allocations are publicly knowable and can be determined democratically.⁵⁸ For tailored remedies, these allocative decisions—who gets a little more than the usual remedy, who gets a little less—are hidden. There is no criterion for the public to be able to assess, in individual cases, whether someone received a fair or biased award. And the allocative decisions in each case will be subject to the biases, conscious and unconscious, of whoever happens to do the tailoring.

B. More Compliance

The equality advantage of announcing has implications not only for equity but also for deterrence. When remedies are decided case by case, it is impossible for legal decision makers to offer an assurance

⁵⁵ See Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 715–16, 721–22 (2000).

⁵⁶ A familiar example from criminal law is the crack/powder cocaine sentencing disparity. See generally Briton K. Nelson, Comment, *Adding Fuel to the Fire: United States v. Booker and the Crack Versus Powder Cocaine Sentencing Disparity*, 40 U. RICH. L. REV. 1161 (2006).

⁵⁷ Compare, again in the criminal context, Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1329–35 (2004) (describing a “ratchet effect” from racial profiling that “disproportionately distributes criminal records and criminal justice contacts”).

⁵⁸ There is a danger when the political process determines these allocations that there will be higher stakes and greater political salience—and thus more competition by interest groups. See Avraham, *supra* note 35, at 103 n.81; Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 541, 586, 595 (2005).

of equal treatment. Because announcing lets legal decision makers offer this assurance, it gives the public another reason to comply with legal rules. The mechanism for this effect is grounded in how people respond to collective-action problems.

Human beings often find themselves in groups where everyone would benefit if there was cooperation, yet each person has an incentive to defect. Some of the collective-action problems that scholars have studied most intensively involve groups with access to a “common-pool resource,” such as the stock of fish in a lake.⁵⁹ To work together and overcome the collective-action problem, the members of the group can set up rules for use of the resource—how many fish each person can catch in a day, for example—but it is critical that these rules be paired with some form of monitoring and sanctioning.⁶⁰ The psychology for this is not hard to read: individual users of the common-pool resource are inclined to cooperate *only* if they think that “rules . . . and monitoring . . . will protect them against being a sucker.”⁶¹ They want “to assure themselves that others are following the rules most of the time,” so “they can continue their own cooperation without constant fear that others are taking advantage of them.”⁶²

Although there are differences between the collective-action problems of small and large groups,⁶³ the human desire not to be taken advantage of is a constant. Consider taxpayers in an industrialized nation. Some comply with tax rules because of the coercive threat of legal penalties. But coercion explains only a part of taxpayers’ compliance. Margaret Levi argues that taxpayers often engage in “quasi-voluntary compliance,” in the sense of complying voluntarily in a system where the noncompliant are sanctioned.⁶⁴ Many taxpayers want to comply but fear being taken advantage of. Like a group of fishers or woodcutters with a scarce resource, taxpayers will cooperate in a way that advances the interests of the group if and only if each

⁵⁹ See ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 79–80 (2005).

⁶⁰ *Id.* at 227–28, 265–67. A study of 178 forest user groups in twelve countries found that “regular monitoring by a local group is more important . . . in enhancing forest conditions” than are other variables, such as the “group’s social capital, the group’s dependence o[n] forest resources, and whether the group was formally organized or not.” *Id.* at 266. On the importance of punishment for cooperation in an experimental setting, see Ernst Fehr & Simon Gächter, *Cooperation and Punishment in Public Goods Experiments*, 90 AM. ECON. REV. 980, 980–81 (2000).

⁶¹ OSTROM, *supra* note 59, at 267; see also ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 44 (1990).

⁶² OSTROM, *supra* note 59, at 265, 267.

⁶³ A stylized account of these differences is found in Elinor Ostrom, *Toward a Behavioral Theory Linking Trust, Reciprocity, and Reputation*, in TRUST AND RECIPROCITY: INTERDISCIPLINARY LESSONS FROM EXPERIMENTAL RESEARCH 19, 55–61 (Elinor Ostrom & James Walker eds., 2003). For cautions about overstating the differences, see OSTROM, *supra* note 59, at 251–54.

⁶⁴ MARGARET LEVI, OF RULE AND REVENUE 52 (1988).

individual is confident that the rules are being enforced against *other people*. What is needed, then, is “voluntary co-operation in a coercive system.”⁶⁵

This quasi-voluntary cooperation is crucial to solving many kinds of collective-action problems.⁶⁶ It has a horizontal dimension and a vertical one. Horizontally, a person wants to be sure that she is not being taken advantage of by other people who are playing the game. Vertically, a person wants to be confident that the enforcers are fairly applying the rules.⁶⁷ If a person can be assured that the enforcers are effective and fair (vertically), then she will be less concerned about being taken advantage of by others (horizontally).⁶⁸

Where these dimensions of confidence exist, a group can harvest the fruits of cooperation. But where they are absent, where people suspect that the rules are not being enforced with equal rigor against other people and that they are being “had,” they will be less likely to quasi-voluntarily comply. The question, then, is how legal decision makers can assure the public that “the game is not rigged.”⁶⁹

⁶⁵ H.L.A. HART, *THE CONCEPT OF LAW* 198 (2d ed. 1994). As Levi says, “The importance of deterrence is that it persuades taxpayers that *others* are being compelled to pay their share.” LEVI, *supra* note 64, at 54. For an evolutionary model of coordinated punishment that includes contingent cooperators, see Robert Boyd et al., *Coordinated Punishment of Defectors Sustains Cooperation and Can Proliferate When Rare*, 328 *SCIENCE* 617 (2010).

⁶⁶ See LEVI, *supra* note 64; OSTROM, *supra* note 61, at 94–100; see also KAREN S. COOK ET AL., *COOPERATION WITHOUT TRUST?* 161 (2005) (describing how judicial interpretation of Australian tax rules to the benefit of the wealthy led to scandals that were followed by “increases in tax evasion by those who felt the tax agencies and laws were discriminatory and unjust”); Joseph D. Beams et al., *An Experiment Testing the Determinants of Non-Compliance with Insider Trading Laws*, 45 *J. BUS. ETHICS* 309 (2003) (finding that experimental subjects were more likely to engage in insider trading if they thought that other people would trade on the same information); cf. F.M. CORNFORD, *MICROCOSMOGRAPHIA ACADEMICA: BEING A GUIDE FOR THE YOUNG ACADEMIC POLITICIAN* 20 (1908) (“The great majority would sooner behave honestly than not. The reason why they do not . . . is that they are afraid that others will not; and the others do not because they are afraid that *they* will not.”).

⁶⁷ Cf. LEVI, *supra* note 64, at 53 (arguing that compliance with a tax regime will decrease with an increased “perception of exploitation”); Nathan S. Chapman, *Law Asks for Trust*, 85 *ST. JOHN’S L. REV.* 521, 543 (2011) (noting that “law inherently asks the subject to trust the ruler”). These two dimensions are sometimes described as “vertical trust” and “horizontal trust.” E.g., John T. Scholz & Mark Lubell, *Trust and Taxpaying: Testing the Heuristic Approach to Collective Action*, 42 *AM. J. POL. SCI.* 398, 399–400 (1998). That description is avoided here because “trust” is a freighted and contested term, and the debates over its meaning are not directly relevant.

⁶⁸ Strength on both dimensions is not necessary. *Contra* LEVI, *supra* note 64, at 53. That is, as long as people know that others are following the rules, they will be less concerned that the enforcer is ineffective (a Barney Fife scenario). And as long as people know that the enforcer is effective, they will be less concerned when they learn that someone has not complied with a legal rule (a Sherlock Holmes scenario).

⁶⁹ Levi, *supra* note 5. In Ostrom’s work on common-pool resources, this concern for accountability is built into the very definition of the monitoring design principle. OSTROM, *supra* note 59, at 259; see also *id.* at 234 (describing Indian farmers’ efforts “to ‘monitor’ the monitor”).

A distinction can be made between two ways in which the legal decision makers (in essence, the “enforcers” discussed above) might be rigging the game and failing to fairly enforce the rules. First, they might enforce the rules against some people but not others. Second, they might enforce the rules and yet show favoritism in deciding the remedies for various infractions—letting off lightly the people who are rich or white or famous or politically connected.

The first failure (differential enforcement) is something that legal decision makers can promise to avoid, but the promise is not worth making because it has zero credibility. There are so many discretionary points in the process of enforcement (by public or private actors) that it is ordinarily impossible for legal decision makers to bind themselves. Contrast this with a promise to avoid the second failure, a promise to give the same remedy to everyone whether wealthy and connected or poor and powerless. This promise is verifiable, for the public can see the promise kept every time a remedy is given. Such a steady drumbeat of remedies supports a sense of equal treatment.

Announcing thus allows legal decision makers to precommit in a way that encourages quasi-voluntary compliance.⁷⁰ No similar precommitment to equal treatment is possible when remedies are decided case by case. This is not to say that case-by-case decision making about remedies is inimical to equality. Rather, case-by-case decision making aspires to a different kind of equality: not the equality of treating everyone identically, but the equality of treating everyone proportionally.⁷¹ That equality of proportionate treatment is expressed in the maxim that like cases should be treated alike, and unlike cases should be treated differently. Each equality is a salutary aim that a legal system could pursue in its design of remedies. But only the equality of identical treatment can be the subject of a credible promise by legal decision makers, for ordinary people would have no way to confirm whether legal decision makers were living up to their promise of proportionality, not least because of the information costs for the public in learning about the remedies meted out in particular cases.⁷²

⁷⁰ Levi discusses other precommitment strategies for quasi-voluntary compliance, but not this one. See LEVI, *supra* note 64, at 60–64. On precommitment devices, see generally JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (rev. ed. 1984); JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000) [hereinafter ELSTER, *ULYSSES UNBOUND*].

⁷¹ The *loci classici* for the distinction between these two equalities are PLATO, *THE LAWS* bk. VI, 756e–758a, at 142–44 (Thomas L. Pangle trans., Basic Books, Inc. 1980) (c. 360 B.C.E.), and ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, ch. 2, 1130b–1132b, at 1005–10 (Richard McKeon ed., W.D. Ross trans., Modern Library 2001) (c. 350 B.C.E.).

⁷² Cf. Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1180 (1983) (“A sense that some people deserve better or worse treatment than others is fairly common, but rarely is that sense reducible to a quantitative formulation; simple equality

In short, when remedies are announced, people can see that the same remedy is given to everyone. They know that in this way the game is not rigged against the obedient, and they are therefore more likely to comply with legal rules. Perhaps announcing will even make the public think that legal decision makers will be fair in other ways because they have already signaled that they care about fair enforcement.⁷³ These effects come from what could be called the “meta-announcement” of announcing: an announced remedy communicates not only *what* the remedy will be but also *that the remedy will be the same for everyone*. Without announcing there is no meta-announcing; legal decision makers cannot make the critical precommitment.

The strength of this social benefit will vary with the size of the collective-action problem. It matters less in small groups. In a group of woodcutters, everyone will know the facts for each rule violation, as well as the remedy, even if the remedy is decided case by case.⁷⁴ There will thus be little additional compliance from announcing the remedy. (An exception would be a small group where the risk of abuse and favoritism is unusually high, perhaps because the group self-selects for opportunism—such as pirates. As Peter Leeson has noted, pirate crews sometimes specified the punishments for various offenses in their “pirate constitutions.”⁷⁵ Announcing the punishments was a way of limiting “quartermasters['] discretion in administering discipline” and “checking quartermasters['] power for abuse.”⁷⁶)

In a large group, the compliance benefit will usually be stronger. Here the group will be less able to follow and assess the remedies process—to monitor the monitors—because of higher information costs. The assurance of equal treatment that is provided by announced remedies will therefore be more valuable.

The strength of this social benefit also depends on how cynical the public is about legal decision makers’ commitment to fairly enforce the rules of the game. At the extremes, it would be pointless for

has an intuitive appeal as a proper proportion that does not often exist for other explicit proportions.”)

⁷³ On the idea that people are more likely to comply with legal rules when they think the legal process is fair, see generally TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (2002); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990). Or the public might respond in exactly the opposite way, suspecting that discretion will shift from the remedies to the merits, and the game will still be rigged. In predicting the reaction, as discussed below, it matters how cynical the public is.

⁷⁴ This may explain Ostrom’s emphasis on remedial flexibility. See OSTROM, *supra* note 59, at 98, 186.

⁷⁵ Peter T. Leeson, *An-arrgh-chy: The Law and Economics of Pirate Organization*, 115 J. POL. ECON. 1049, 1075 (2007).

⁷⁶ *Id.*

legal decision makers to attempt, by announcing, to foster the perception of equal treatment. When cynicism is very high, the attempt will not succeed because people will suspect that legal decision makers are secretly manipulating the levels of enforcement; where cynicism is very low, the attempt will be unnecessary because people will already be assuming that legal decision makers are fairly enforcing the rules. Between these two extremes of cynicism, in large groups, there may be a significant effect on compliance when legal decision makers foster the perception of equal treatment.⁷⁷

In addition to this quasi-voluntary compliance mechanism, it is worth noting one other mechanism for how the meta-announcement of announcing might encourage compliance. Knowing that the remedy is the same for everyone keeps people from making an attributional mistake. Imagine that *A* is a blogger who hears that another blogger, *B*, after being found liable for defamation, was ordered to pay hundreds of thousands of dollars. *A*, who was herself thinking about writing a post essentially no different from the one that *B* was found liable for, might explain away the large award by attributing it to something peculiar to *B*. This mistake is not possible when remedies are announced. (Note that self-serving biases could still affect other aspects of *A*'s interpretation of what happened to *B*: *A* might say "what I did is not illegal" or "I would never be caught.") Thus, an announced remedy's meta-announcement eliminates one mistake a person could make in processing information about remedies, therefore modestly increasing deterrence. Through these two mechanisms, quasi-voluntary compliance and prevention of an attributional mistake, an announced remedy can increase compliance.

C. Lower Costs of Telling

A further social benefit of announcing is that it reduces what could be called the "costs of telling." When remedies are tailored case by case, the parties must make representations about the harm the violator inflicted because these representations will influence the remedy tailors. This is especially important for the plaintiff: to receive a remedy, she must tell her story. But telling has its costs.

Consider, for example, a person who has been disabled and seeks hedonic damages, that is, damages for the loss of enjoyment of life. In court she must "testify that the injury has made her life less enjoya-

⁷⁷ Scholars who doubt whether there would be any gain in compliance (given the potential for manipulation of levels of enforcement) may be identifying themselves as being more, rather than less, cynical. What is relevant, however, is not the cynicism of an informed observer of the legal process but rather the level of cynicism in the society at large.

ble.”⁷⁸ As Samuel Bagenstos and Margo Schlanger have argued, this testimony itself can be “debilitating,” for it can “disrupt the hedonic adaptation process that ensures that most people’s happiness rebounds after a negative event.”⁷⁹ Because the remedy is specific to the particular case, what a person says about her hedonic losses will determine how much compensation she receives. She is therefore enticed by the legal process to argue that her life is hopeless, and as she makes this claim repeatedly and publicly, it can become self-fulfilling.⁸⁰ As Theodore Dreiser once wrote about a character: “By the natural law which governs all effort, what he wrote reacted upon him. He began to feel those subtleties which he could find words to express.”⁸¹

In contrast, when remedies are announced there will often be no need for an individualized narrative about the extent of one’s injuries and the hopelessness of one’s life. Even if the remedy is announced, offering such a narrative might sometimes make sense tactically in order to help a plaintiff’s chances on the merits. But it will hardly be the essential requirement that it is when a plaintiff seeks case-specific hedonic damages. And the extent to which a narrative is useful even in this way would turn on whether there was a rule or a standard for liability. A *standard* paired with an announced remedy would invite some storytelling and contextualization, though the emphasis will usually be on the defendant and not on the interior life of the plaintiff. A *rule* paired with an announced remedy may make it entirely unnecessary for the plaintiff to tell her story. In this way and in others,⁸² the choice of a rule or a standard on the merits interacts with the use of announced remedies.

Hedonic damages for disability are often paired with damages for a more quantifiable harm (such as medical expenses).⁸³ In some cases, however, a plaintiff may be seeking a remedy only for a fuzzy,

⁷⁸ Bagenstos & Schlanger, *supra* note 6.

⁷⁹ *Id.* But see Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 555–57 (1987–88) (offering a more sanguine account of how people reconcile self-empowerment and the rhetorical demands of claiming disabled status); cf. Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 2005 ANN. REV. L. SOC. SCI. 171 (showing that people desire voice yet arguing that this desire exposes them to manipulation). On the tension between storytelling and resistance, see Elizabeth F. Emens, *Shape Stops Story*, 15 NARRATIVE 124, 129–31 (2007) (describing “resistance” as an attorney’s protection of “her client’s right not to tell her story”).

⁸⁰ See Bagenstos & Schlanger, *supra* note 6, at 785–87; Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1429 (1993); cf. ROBERT JERVIS, *SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE* 147–49 (1997) (discussing the per se reinforcing nature of information and descriptions, whether accurate or not).

⁸¹ THEODORE DREISER, *SISTER CARRIE* 193 (Modern Library 1997) (1900).

⁸² See, e.g., *infra* Part III.B.1.

⁸³ See, e.g., *Ark. Dep’t of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 273 (2006) (“[The tort victim] claimed damages not only for past medical costs, but also for permanent physical injury; future medical expenses; past and future pain, suffering, and mental

hard-to-measure harm. Think of defamation cases not involving financial loss.⁸⁴ Subject to constitutional limitations, a plaintiff suing for defamation may recover “damages for loss of reputation, shame, mortification, humiliation, loss of standing in the community, and mental anguish and suffering.”⁸⁵ How can a plaintiff establish these harms? As the leading treatise on defamation puts it, the plaintiff can put on evidence of her “avoidance of social contact” or “sleeplessness and anxiety” or “marital stress” or “change in . . . personality or demeanor.”⁸⁶ Yet once a plaintiff asserts these injuries and adduces these kinds of proof, the claims can become self-fulfilling just as in a disability suit for hedonic damages.⁸⁷ Additionally, if the plaintiff’s spouse, friends, colleagues, or clergy give corroborating evidence,⁸⁸ their telling of the plaintiff’s story can affect how they perceive and interact with the plaintiff, further reinforcing her sense of hopelessness.

In addition, announcing may even have a positive effect on hedonic adaptation. It could be that announcing generates a social consensus about what is due for a violation. This consensus about remedies gives a wronged person a criterion for knowing when the wrong has been set right and thus increases her sense of satisfaction at receiving the remedy.⁸⁹

Even for pecuniary harms, tailoring the remedy can impose “costs of telling.” An example can be seen in Omri Ben-Shahar and Lisa Bernstein’s work on the “secrecy interest” of contracting parties.⁹⁰ A firm that sues for breach of contract will usually want to recover for lost profits. But establishing lost profits may force the firm to disclose sensitive business information, “such as materials and labor costs, inventory size, availability of alternative suppliers, the identity of her downstream contracting partners (customers), and, in the case of newer businesses, her business plan.”⁹¹ These disclosures are a conse-

anguish; past loss of earnings and working time; and permanent impairment of the ability to earn in the future.”).

⁸⁴ See 1 ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* § 10:1 (4th ed. 2011) (“Rarely do damages for libel or slander consist in any significant part of compensation for measurable pecuniary loss.”); *id.* § 10:3:2 (“[A]ctual pecuniary loss resulting from defamation is typically difficult to establish.”).

⁸⁵ *Id.* § 10:5:1.

⁸⁶ *Id.* § 10:5:1 & n.200 (noting that successful plaintiffs have produced these kinds of evidence—the words “marital stress” are quoted from *Draghetti v. Chmielewski*, 626 N.E.2d 862, 868 (Mass. 1994), where the plaintiff also suffered “physical symptoms”).

⁸⁷ See Minow, *supra* note 80 (arguing that “victim talk” has a rebounding quality).

⁸⁸ See SACK, *supra* note 84, § 10:5:1 n.207.

⁸⁹ On remedies and social consensus, see *infra* notes 113–15 and accompanying text.

⁹⁰ See generally Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 *YALE L.J.* 1885, 1885–90 (2000).

⁹¹ *Id.* at 1886; *cf.* *Snepp v. United States*, 444 U.S. 507, 514 (1980) (*per curiam*) (concluding that punitive damages would be a deficient remedy in a case where a former CIA

quence of deciding remedies one case at a time: when the plaintiff's recovery depends on her particular harms, she must tell her story and disclose business information.⁹²

The process of tailoring remedies to particular cases is like an engine. It runs on the representations of the parties; to make the engine go, the parties must tell their stories. These costly stories can be avoided when remedies are announced.

III

A THEORY OF ANNOUNCING

The social benefits of announcing—more equality, more compliance, and lower costs of telling—are valuable. Yet announcing also has its costs, especially the loss of remedial precision. What is needed, then, is a general theory for when remedies should be announced. This Part develops that theory. Subpart A explains the diverse set of functions performed by announcing. Subpart B introduces constraints. Subpart C discusses system effects, or the way that announcing one remedy can affect the perception of other remedies. Subpart D evaluates the intermediate approaches. And subpart E summarizes the theory.

A. Three Functions

1. *The Cost-Saving Function*

Announcing can be used to reduce administrative costs. When remedies are case-specific, litigants must put on evidence about their particular harms, and the court must decide the remedy anew in every dispute. In contrast, when remedies are announced, a decision about the remedy must be made only once.

Scholars writing in the literature on the optimal precision of remedies have done important work related to this point. As noted above, Spier has demonstrated that “finely tuned” damages can induce litigants to disagree about the appropriate award⁹³ and that this disagreement can interfere with settlement. Kaplow and Shavell have shown that litigants do not fully internalize the administrative costs of determining the remedy.⁹⁴ As a result, when a legal system pursues a high degree of accuracy in assessing damages (e.g., by tailoring remedies),

agent was publishing confidential information because proving damages “might force the Government to disclose some of the very confidences” that were at issue).

⁹² The contracting parties can attempt to avoid these costs of telling, as Ben-Shahar and Bernstein note, by using liquidated-damages provisions. See Ben-Shahar & Bernstein, *supra* note 90, at 1902–04. On the analogy between announced remedies and liquidated damages, see *supra* note 15.

⁹³ See Spier, *supra* note 2, at 85.

⁹⁴ See Kaplow & Shavell, *supra* note 3.

it can encourage litigants to engage in wasteful efforts to produce proof about the severity of injury.⁹⁵ The work by these scholars does not need to be repeated here. But several points should be emphasized about the cost-saving function of announcing.

First, announcing should perform this function when administrative costs are large relative to the quantum of the remedy. The classic example is a parking fine, which is usually announced because the amount is so small compared to the administrative costs of deciding the fine *ex post* in every case.

Second, for this function, the aspect of announcing that is dominant is aggregation, not publicity.⁹⁶ Administrative costs are reduced by *deciding* the remedy once for the entire class of cases. Administrative costs are not reduced by communicating the remedy to the public. Indeed, publicity can entail additional costs, costs that might not be justified because the size of the remedy is so small (imagine a parking fine of ten dollars). And even if publicity were costless, the quantum of remedy might still be so insignificant that the mindspace of the public should not be crowded with the information.

Third, even when announcing should perform this function, it still might make sense to decide remedies case by case as a “tailoring experiment.” In the experiment, if the distribution of remedies were narrow, then that distribution would be a useful guide for setting the level of the announced remedy.⁹⁷ Or, if the tailoring experiment revealed a bimodal distribution of remedies, there may be grounds for dividing the two peaks into different legal rules.⁹⁸ The idea of a tailoring experiment can be put in very practical terms: What would a jury award in damages when a double-parked car prevents another car from leaving? What would a jury award in damages (payable to the state) for parking in an illegal spot? Knowing the answers to these questions could be useful for legal decision makers even if it was clear

⁹⁵ See *id.* at 201. For extensions of this analysis, see Robert A. Mikos, *Accuracy in Criminal Sanctions*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (Alon Harel & Keith Hylton eds.) (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1598436, and Amy Whritenour Ando & Wallapak Polasub, *Envelope Backs or the Gold Standard? Choosing the Accuracy of Damage Assessment Methods*, 82 LAND ECON. 424 (2006).

⁹⁶ On the two aspects of announcing, see *supra* Part I.A.

⁹⁷ Compare the experiment two decades ago, in asbestos litigation, of trying a handful of representative claims and using the results to establish valuations for a much larger set of claims. See Issacharoff & Witt, *supra* note 15, at 1626.

⁹⁸ The tailoring experiment could encourage moral deliberations about the appropriate remedy in keeping with Seana Shiffrin’s argument for the deliberative virtue of standards. See Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1222 (2010) (arguing that the uncertainty of standards can be valuable because it requires citizens to grapple with moral concepts). *But cf.* LON L. FULLER, *THE MORALITY OF LAW* 51 (rev. ed. 1969) (arguing that publishing the law uniquely allows it to be “subject to public criticism”).

that in the long run these remedies should be announced for cost saving.⁹⁹

2. *The Communication Function*

There are remedies and then there are public perceptions of remedies. The two do not always coincide. A gap between remedy and perception is a problem chiefly when the potential violators of a legal rule seriously underestimate what the remedy will be. In such a scenario, the legal system is leaving deterrence on the table. It is being secretly severe, yet without gaining that severity's effect on potential violators. And the legal system is failing to provide a basic good of human societies: making sure citizens know the legal consequences of their actions.¹⁰⁰ A gap between the reality and perception of remedies can therefore strike at the heart of a society's ability to control human behavior through law.

Consider a blogger who is thinking about writing a salacious and defamatory post. How likely is the blogger to be able to predict the remedy (assuming she would be found liable)? The blogger has probably never been sued for defamation, so learning from experience is unlikely. Nor can the blogger make a reasonable inference from the remedies in defamation suits against other people. Even if the blogger knew what the damage awards were in other cases, she would still need to know how much her own case would be like those cases on many dimensions—egregiousness of violation, characteristics of defendant, skill of legal counsel, identity of legal decision maker, and so on. The blogger would have to swim through a huge sea of litigation flotsam and jetsam, all of which is marginally relevant but none of which is very helpful for predicting the remedy in her own case.

The point can be described in more formal terms with reference to the literature on information overload for consumers. This litera-

⁹⁹ In the experiment, whether the distribution of remedies is narrow or broad may depend on who makes the case-by-case decisions and what procedures are used.

¹⁰⁰ See TIMOTHY A.O. ENDICOTT, *VAGUENESS IN LAW* 185 (2000) (finding a consensus that the "organizing principle" of the rule of law's requirements is that "the law must be capable of guiding the behaviour of its subjects" (quoting RAZ, *supra* note 27, at 214)). Some have argued that predictability matters less for remedies than for substantive rules. See, e.g., Andrei Marmor, *Should Like Cases Be Treated Alike?*, 11 *LEGAL THEORY* 27, 33–34 (2005) (arguing that allowing potential criminals to accurately predict their punishment would probably not enhance the deterrent effect of the criminal system); Shiffrin, *supra* note 98, at 1241–43 (arguing that people have a legitimate interest in sufficient notice to plan their conduct but not in predicting specific remedies). Such arguments may have merit in criminal and quasi-criminal contexts, but they have less force for ordinary civil violations, especially in situations where the harm to which the remedy corresponds is radically indeterminate. That is, it can be good for people to know not only *that* the law proscribes certain conduct, but also the *intensity* with which it does so (as expressed through the choice and quantum of remedy). Cf. *infra* note 114 and accompanying text (noting that it is more difficult to intuit a remedy than a substantive rule).

ture distinguishes between information quantity and information quality.¹⁰¹ All else being equal, giving consumers a higher *quantity* of information reduces their decision-making effectiveness.¹⁰² But giving them a higher *quality* of information does the reverse; it makes their decision making more effective.¹⁰³ For a blogger trying to predict a tailored remedy for defamation, the quantity of relevant information is enormous, but all of it is of relatively low quality (for the purpose of knowing what the remedy will be in her own case).¹⁰⁴

The blogger might rely on an information intermediary—an attorney—to predict what the remedy would be.¹⁰⁵ But the blogger would have to delay publishing the post and would have to pay for legal advice, and at any rate the blogger would still be concluding on her own that the potential liability is great enough to justify talking to an attorney in the first place. For millions of bloggers, this is not a realistic solution. Their notions about remedies may be extremely rough and inexact, but they are the medium through which law's deterrence must move.

Now assume *arguendo* that most bloggers radically underestimate the damages that are awarded for defamatory posts.¹⁰⁶ To the extent

¹⁰¹ See, e.g., Kevin Lane Keller & Richard Staelin, *Effects of Quality and Quantity of Information on Decision Effectiveness*, 14 J. CONSUMER RES. 200, 200 (1987). This literature examines the processing of information for a different decision—not a citizen's decision to comply with a legal rule, but a consumer's choice of goods. Nevertheless, the need to gather and process information is common to both decisions.

¹⁰² See *id.* at 211; see also Nicholas H. Lurie, *Decision Making in Information-Rich Environments: The Role of Information Structure*, 30 J. CONSUMER RES. 473 (2004) (adding analysis of information structure and, though contradicting Keller and Staelin on one point, supporting the thesis that a higher quantity of information can impair decision making and increase its costs).

¹⁰³ See Keller & Staelin, *supra* note 101, at 211.

¹⁰⁴ Cf. Robert J. MacCoun, *Media Reporting of Jury Verdicts: Is the Tail (of the Distribution) Wagging the Dog?*, 55 DEPAUL L. REV. 539, 540 (2006) (“Yet even today, there is no simple way to statistically forecast the expected value of any given case—the published data are inevitably dated, and they do not readily permit one to project the combined effects of case type, jurisdiction, and injury characteristics, much less a host of other potentially relevant factors not coded by the researchers.”).

¹⁰⁵ The literature on legal advice is diverse in its conclusions and methods. Good starting points are Louis Kaplow & Steven Shavell, *Private Versus Socially Optimal Provision of Ex Ante Legal Advice*, 8 J.L. ECON. & ORG. 306 (1992), and William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555 (2008).

¹⁰⁶ Little is known about bloggers' perceptions. As of November 2009, there were “109 pending or resolved [defamation] cases against bloggers.” Kaitlin M. Gurney, Comment, *MySpace, Your Reputation: A Call to Change Libel Laws for Juveniles Using Social Networking Sites*, 82 TEMP. L. REV. 241, 255–56 (2009) (noting also “an \$11.3 million verdict against a Florida woman in 2006 stemming from defamatory statements she posted on an online bulletin board”). A Twitter defamation case recently settled for nearly half a million dollars. See Matthew Perpetua, *Courtney Love Settles Twitter Defamation Suit For \$430,000*, ROLLING STONE (Mar. 3, 2011, 6:35 PM), <http://www.rollingstone.com/music/news/courtney-love-settles-twitter-defamation-suit-for-430-000-20110303>. It is worth noting, though, that media cover-

that these damages are meant to deter violations, the legal system will fail to get the deterrent force it should, and bloggers who are found liable for defamation will be understandably shocked to discover what they must pay. These deterrence and fairness problems could be addressed, however, by announcing the remedy. Legal decision makers could look to past awards, perhaps setting the announced remedy at the level of the median award for a defamatory post. Of course, there would be some loss of remedial precision, for the announced remedy would be too high in some cases and too low in others. But to a significant degree that is true even now, when the remedy is decided case by case, because the harms caused by defamation are so indeterminate.¹⁰⁷ And if the remedy were announced, news of it would travel quickly through the blogosphere. The gap between remedy and perception would be erased.¹⁰⁸

The bottom line is that when potential violators seriously underestimate the remedy, legal decision makers will often be better off announcing instead of deciding the remedy case by case. But when, exactly, is this likely to occur? With due recognition that this inquiry is ultimately contextual and empirical, a theoretical foundation can be laid here for future investigations.

It is important to demarcate two broad categories of cases in which the relevant public is *not* likely to underestimate the remedy. One category is cases in which the potential violators of the legal rule are sophisticated repeat players. Consider, for example, Ford Motor Company and a Mafia family, both of which are sophisticated parties in the “market” for legal violations. Both face competitive pressures to acquire information about remedies.¹⁰⁹ If Ford systematically over- or underestimates what it will have to pay for breaching contracts with suppliers, in the long run it will be at a disadvantage relative to a rival carmaker. If a Mafia family systematically over- or underestimates the criminal penalties that its hit men will incur, it will be disadvantaged in the long run relative to other Mafia families.¹¹⁰ Both are repeat players. They learn from their violations,¹¹¹ and the information they

age of outlier verdicts may eventually lead to bloggers’ *overestimating* the damages for defamatory posts. See MacCoun, *supra* note 104, at 558–61.

¹⁰⁷ See *supra* Part I.B; see also *supra* notes 84–88 and accompanying text.

¹⁰⁸ This sketch of the decision to announce is simplified to illustrate the communication function. Other relevant considerations are discussed below, including constraints and system effects. See *infra* Part III.B–C.

¹⁰⁹ Cf. RICHARD B. MCKENZIE, PREDICTABLY RATIONAL?: IN SEARCH OF DEFENSES FOR RATIONAL BEHAVIOR IN ECONOMICS, at xiv–xv (2010) (advancing this competitive-pressure argument for the rationality assumption in neoclassical economics).

¹¹⁰ This is one reason that individual criminals are ignorant of legal penalties while criminal syndicates are more likely to acquire this information.

¹¹¹ See generally Omri Ben-Shahar, *Playing Without a Rulebook: Optimal Enforcement When Individuals Learn the Penalty Only by Committing the Crime*, 17 INT’L REV. L. & ECON. 409

procure once about remedies can be used over and over again.¹¹² For such actors, then, there will be little ignorance about remedies to “cure” via announcing.

Another category is cases in which the legal remedy is able to track a social consensus. As in the ancient example of the *lex talionis*, there might be a social consensus that the remedy for taking another’s eye is the loss of your own eye. Or there might be a social consensus that the remedy for stealing a boat is returning the very same boat (instead of, say, paying its value). Or that the remedy for slandering someone is a public apology in the same medium. In each of these examples, a social consensus is achievable because the remedy does not scale. If the violation were a little worse than usual, the violator would not have to give 110% of an eye or a boat or an apology.¹¹³ And in each example the remedy is in the same “currency” as the loss: eye for eye, boat for boat, repair of reputation for loss of reputation.

This kind of convergence between legal remedy and social consensus is fairly unusual, though, in modern American law. Most violations are translated into another currency, usually money, and money scales continuously. Because of the lack of convergence, there is an important difference in American law between substantive requirements and remedies. Substantive requirements will often track a social norm. It is therefore easier for the public to intuit them. Consider a law against defaming your neighbor or a law requiring infants to ride in car seats or a law prohibiting the hacking of another person’s email account. All of these laws track, sometimes closely and sometimes roughly, a social norm.

For violations of each of these laws, what should be the remedy? Should it be monetary? On these questions there is no social norm or consensus. Generally speaking, whenever remedies are translated into dollars (or into continuously scaling units of time, as in a prison sentence), it will be hard for the public to intuit what the remedy is. And social consensus about the remedy will therefore prove elusive—or at least, more elusive than a social consensus about the rule of behavior.¹¹⁴

(1997) (showing that apprehension can give criminals opportunities to learn about enforcement policies).

¹¹² On returns to scale from information, see Kenneth J. Arrow, *The Economics of Information: An Exposition*, 23 *EMPIRICA* 119, 123–25 (1996).

¹¹³ There will, of course, be boundary questions: What if the eye or the boat or the reputation was already injured? But in the central case, the remedy is binary—giving back versus not giving back the boat, for example—and by stipulation the social consensus is that if *A* took the boat, *A* will have to give it back.

¹¹⁴ This lack of convergence between the legal remedy and a social consensus may mean that communication should occupy a more central place in normative theory about remedies than it does in the merits-focused literature on rules and standards.

And where there is no convergence between legal remedy and social consensus, unsophisticated actors can face high information costs and low returns from learning about remedies. Information costs can be high because these actors lack background knowledge and specific expertise in acquiring information about the remedies that are being handed out. The returns can be low because, unlike Henry Ford or Don Corleone, they cannot use the information about remedies repeatedly over a broad range of conduct.¹¹⁵

Of course, if unsophisticated potential violators are ignorant about remedies, it does not automatically follow that they will be seriously underestimating them. But it needs to be taken seriously as a possibility since there are mechanisms by which this could happen. For instance, the relevant public for a legal rule might suffer from optimism bias. Or, in the words of Beccaria, uncertainty about penalties can spur people to violate the law since “ignorance and uncertainty of punishment open[] the way to the eloquence of the emotions.”¹¹⁶

In short, when potential violators, for whatever reason, seriously underestimate the remedies for violation, the remedy can be announced as a means of reducing information costs and improving communication. This function of announcing is not a rejection of optimal deterrence but rather an indirect way of achieving it.¹¹⁷

¹¹⁵ See Arrow, *supra* note 112. On the importance of audience on information costs, see generally Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003).

¹¹⁶ BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 17 (Richard Bellamy ed., Richard Davies et al. trans., Cambridge Univ. Press 1995) (1764). People may be deterred more by certain remedies than by uncertain ones of equal expected value; supporting this conclusion are behavioral findings about salience and prospect theory (with its claim that people are generally risk-averse with respect to gains but risk-seeking with respect to losses). See, e.g., Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297 (1992) (updating prospect theory). Alternatively, people may be more deterred by uncertain remedies; supporting this conclusion are findings of uncertainty aversion and the various qualifications to prospect theory (e.g., options in framing, different results for low-probability risks, and the effect of decision-maker expertise). See, e.g., John A. List, *Neoclassical Theory Versus Prospect Theory: Evidence from the Marketplace*, 72 ECONOMETRICA 615, 615, 624 (2004) (finding prospect theory less applicable for experienced decision makers). The argument in this Article does not depend on any view of whether people are usually more deterred by certain or uncertain remedies. For a recent survey of the empirical evidence on deterrence and certainty, in the context of the criminal law, see Steven D. Levitt & Thomas J. Miles, *Empirical Study of Criminal Punishment*, in 1 HANDBOOK OF LAW AND ECONOMICS 455 (A. Mitchell Polinsky & Steven Shavell eds., 2007); see also Francesco Drago et al., *The Deterrent Effects of Prison: Evidence from a Natural Experiment*, 117 J. POL. ECON. 257 (2009) (finding evidence of deterrence when prisoners were released early and knew the exact quantum of time that would be added to their prison sentences if they reoffended).

¹¹⁷ Compare Dick Craswell's point that “a reform that seems obviously unsound from the standpoint of one route to optimal deterrence could be perfectly sound from the standpoint of another.” Craswell, *supra* note 26, at 2210.

When legal decision makers choose this indirect approach, they lose the power to make distinctions between violators in particular cases.¹¹⁸ What they gain is an assurance that the perception of remedies will live up to the reality.

3. *The Precommitment Function*

The two functions of announcing discussed so far are addressed to the smallest remedies (cost-saving) and the least sophisticated audiences (communication). Announcing performs a very different function at the opposite end of these spectra—when the remedy is massive and the audience is highly sophisticated. Here, announcing can work as a precommitment device.

In understanding this function, the starting point is Bob Cooter's distinction between two situations.¹¹⁹ In the first, legal decision makers know the external costs of conduct, but they do not know what the socially optimal conduct is.¹²⁰ In the second, legal decision makers know the socially optimal conduct, but they do not know the external costs of suboptimal conduct.¹²¹ In this latter situation, Cooter says, it is appropriate to use "sanctions," which are costs for doing what is forbidden, and which can escalate for intentional or repeated violations.¹²²

In a sanctions situation, legal decision makers may want to throw the book at violators. After all, what the remedy would deter is, by definition, a deviation from the socially optimal behavior. In fact, legal decision makers may want to threaten a very high, almost Beckeresque sanction¹²³—a sanction so high that it deters essentially all violations of the legal rule.

But the threat of a high sanction is usually not credible. If legal decision makers are determining remedies case by case, they face two severe constraints on their ability to mete out a high sanction.

¹¹⁸ See *supra* Part I.B.

¹¹⁹ Cooter, *supra* note 7, at 1533. Cooter's piece is usually invoked for the dichotomy between prices and sanctions. For a normative theory about announcing, what is more useful is Cooter's distinction between the *situations* in which prices and sanctions should be used. *Id.*

¹²⁰ *Id.* Think of driving and smog: legal decision makers might know the costs of driving a mile in terms of statistical lives lost from smog, but they do not know how many miles it would be socially optimal for drivers to travel.

¹²¹ *Id.*

¹²² *Id.* at 1537–38.

¹²³ See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180 (1968). Since Becker's article began the modern turn toward optimal deterrence, other scholars have offered many qualifications of its argument for maximal fines. *E.g.*, Steven Shavell, *A Note on Marginal Deterrence*, 12 INT'L REV. L. & ECON. 345, 346–47 (1992). The high sanction referenced in the text would be "almost Beckeresque" because there are points of departure from Becker's argument: one is that the high sanction should not be overused; another is that enforcement is not reduced.

One is time-inconsistent preferences. Today, legal decision makers may want to threaten a high sanction for violations of a legal rule. But tomorrow they will not exact such a remedy when they are faced with an actual defendant.¹²⁴ It is one thing to say that any retailer who violates a legal rule should be put out of business. It is another to say that *this* retailer, who has a business at this intersection and employs these three-dozen people, should be put out of business.

The second constraint is institutional. One institution may know the socially optimal behavior and want to threaten a high sanction—the legislature. But it is another institution that will determine the quantum of remedy in a particular case. Even if the legislature could credibly signal *its* willingness to carry out a high sanction, that would hardly signal the willingness of a jury not yet in being to do the same. The upshot of these constraints is that when remedies are determined case by case, any threat of a high sanction is not credible.

These constraints could be evaded if legal decision makers could precommit to giving a high sanction. The precommitment device that legal decision makers need is announcing. When they announce the remedy in advance, they are eliminating options they would otherwise have.¹²⁵ Legal decision makers are deciding (at time 1) to eliminate the option (at time 2) of giving what will seem to be the appropriate remedy in a particular case. To paraphrase Jon Elster, when legal decision makers announce a high sanction, they are rationally committing themselves to be irrational.¹²⁶

Announcing a high sanction will work only in the right circumstances. First, the threat has to actually “get through” to the relevant public, which is more likely if that public is made up of sophisticated repeat players. Second, for the threat to be credible, it cannot be used indiscriminately and for trivial violations. It has been said of eighteenth-century England that the death penalty could deter a murderer but not a pickpocket.¹²⁷ Third, announcing works best as a precommitment device when compliance with a legal rule is effectively a one-time decision.

A statute that illustrates this function is the Right to Financial Privacy Act of 1978.¹²⁸ The Act prohibits financial institutions from dis-

¹²⁴ ELSTER, ULYSSES UNBOUND, *supra* note 70, at 34–45. This failure to give a high sanction could also be considered weakness of will. *See id.* at 9.

¹²⁵ On “the elimination of options” as a precommitment device, *see id.* at 41.

¹²⁶ *Id.* at 24.

¹²⁷ *See* Kennedy, *supra* note 42, at 1696 (“Death is likely to be an ineffective penalty for theft.”); *see also* Douglas Hay, *Property, Authority, and the Criminal Law*, in ALBION’S FATAL TREE 17, 22–23 (Douglas Hay et al. eds., 1975) (noting that the death penalty was prescribed for many property crimes in eighteenth-century England but was applied only rarely).

¹²⁸ 12 U.S.C. §§ 3401–3422 (2006).

closing certain customer records to the government.¹²⁹ Pursuant to the statute, a financial institution can avoid liability by relying in good faith upon a certificate of compliance from a government authority.¹³⁰

This is a classic sanctions situation. It is hard to measure the external costs of a bank illegally disclosing a person's financial records to the government. Some of the harms sound in dignity and privacy. Other harms are pecuniary but may be hard to quantify because they are diffuse and probabilistic, and because they extend into the future. Imagine, for example, that a bank illegally discloses customers' records to the IRS, that doing so increases the risk of an audit, that the customers are in fact audited (but was it because of the disclosure?), and that they must pay accountants and suffer sharply reduced credit scores. It is relatively easy, though, for legal decision makers to know what the socially optimal behavior is: a bank should never turn over customer records to the government without a certificate of compliance.¹³¹

The Right to Financial Privacy Act coerces obedience by announcing a high sanction. Customers whose records are illegally disclosed can sue the government agency or financial institution for statutory damages of \$100 per violation, with the real bite being the possibility of a class action for millions of dollars in statutory damages.¹³² Here, the law is speaking to sophisticated repeat players, violations are serious, and compliance is essentially a one-time decision to adopt policies and controls that prevent the disclosure of customer records to the government.¹³³

¹²⁹ *Id.* § 3403(a); L. RICHARD FISCHER, *THE LAW OF FINANCIAL PRIVACY: A COMPLIANCE GUIDE* ¶ 2.01, at 2-3 (2d ed. 1991).

¹³⁰ 12 U.S.C. § 3417(c); *see also* FISCHER, *supra* note 129, ¶ 2.07[1], at 2-126.

¹³¹ The certificate-of-compliance provision has been criticized by one commentator for how it "significantly limits the bank customer's ability to obtain relief for unauthorized disclosures." Michael Rogovin, *Privacy of Financial Records*, 1986 ANN. SURV. AM. L. 587, 591. But that provision is critical to the remedial scheme: it limits the prohibition to conduct that legal decision makers *know* is not socially optimal and thus makes it appropriate to impose a high sanction.

¹³² *E.g.*, Complaint at 16-21, *Stein v. Bank of Am. Corp.*, No. 1:11-cv-01400 (D.D.C. Aug. 2, 2011), 2011 WL 3323841. The statute also authorizes punitive damages and actual damages. *See* 12 U.S.C. § 3417(a)(2)-(3). The former are rare, and the latter are hard to prove. A case in point is *Neece v. IRS*, 41 F.3d 1396, 1399 (10th Cir. 1994), where the plaintiffs claimed \$1.2 million in actual damages under the Act but recovered only the cost of repairing vehicles seized by the IRS—a mere \$1,580.

¹³³ Note how different this normative analysis is from the rules/standards literature on substantive legal requirements. Louis Kaplow has written that the most important normative consideration in choosing a rule or a standard is "the frequency with which a law will govern conduct" (with greater frequency indicating a need for rules). Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 621 (1992). In contrast, for the precommitment function of announcing, the frequency of the underlying conduct is at best a tertiary consideration, and in the Right to Financial Privacy Act example above, the

Another statute that illustrates the precommitment function is the Fair and Accurate Credit Transactions Act of 2003.¹³⁴ Until recently, retailers often printed on each receipt the customer's full credit card number and other identifying information. This practice was prohibited by the Act.¹³⁵ The socially optimal conduct is clear—do *not* print the information. It is not clear, however, what the external costs are. A customer's bank or credit card company might cover immediate financial losses, but the customer might still experience a loss of dignity and autonomy, as well as future financial losses, the loss of time spent reviewing and altering her financial life, the cost of protective countermeasures such as password software, and perhaps even a brooding sense of unease with commercial transactions.

Yet no jury is going to put a grocery store out of business because of what it prints on receipts. Retailers know this. For the Holmesian bad retailer,¹³⁶ the rational response would likely be to go on printing receipts with all of the customers' identifying information, while waiting to see what remedies are meted out under the statute. The rational response for the Holmesian bad retailer would change, however, if legal decision makers committed themselves to awarding a high sanction, no matter how justified or unjustified it was in a particular case.

This is effectively what the statute does. Among the remedies made available to customers are statutory damages of at least \$100 per violation.¹³⁷ When aggregated in a class action, these damages are so massive that they would put out of business even a large grocery store chain.¹³⁸ Legal decision makers have precommitted themselves to give extravagant remedies as a way to coerce immediate compliance. Again, the relevant audience is sophisticated,¹³⁹ violations are non-trivial (because identity theft is serious), and compliance with the Act is essentially a one-time decision to upgrade equipment.

remedy is announced in order to ensure that the incidence of the underlying conduct approaches zero.

¹³⁴ 15 U.S.C. § 1681 (2006).

¹³⁵ See 15 U.S.C. § 1681c(g).

¹³⁶ For the generative text for the "Holmesian bad man," see Holmes, *supra* note 14, at 459–61.

¹³⁷ 15 U.S.C. § 1681n(a)(1)(A); see also Scheuerman, *supra* note 4, at 105.

¹³⁸ Scheuerman, *supra* note 4, at 105–06 ("When pursued as a nationwide or statewide class action, the statutory damages [under the Fair and Accurate Credit Transactions Act] create devastating liability that would put the defendant out of business simply for failing to redact information from a retail receipt."). On the intersection of statutory damages and class actions, see *id.* at 107–15, and Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of Philip Morris v. Williams*, 46 WILLAMETTE L. REV. 449, 471 n.104 (2010).

¹³⁹ Some retailers are less sophisticated, but other actors (e.g., trade groups and manufacturers of cash registers) have an incentive to inform them of the remedy.

Recognition of this precommitment function is strikingly absent from the existing scholarship on the Fair and Accurate Credit Transactions Act and the Right to Financial Privacy Act. Legal scholars have sharply criticized both statutes and have called for the application of the Supreme Court's jurisprudence on punitive damages, including a particularized assessment of the injury suffered by each plaintiff.¹⁴⁰ What these scholars are objecting to is the disconnect between the meager provable harm in a particular case and a staggering award of damages. What these scholars are missing is the precommitment function of announcing.

In both examples, it is not that announcing works because it approximates the measurable harm in the median case. Nor is announcing working in spite of its failure to approximate the measurable harm. Rather, these announced remedies can be successful *because they exceed the measurable harm in actual cases*. The high, even excessive, announced remedy is meant to front-load compliance by sophisticated actors; once this is achieved, the remedy will in effect no longer be needed. The law is announcing *in terrorem*.¹⁴¹

4. Summary

"Announcing" is a term that can be applied to three very different strategies. For announcing as cost saving, the remedy is decided in the aggregate in order to solve a problem of high administrative costs. For announcing as communication, the remedy is decided in the aggregate and publicized in order to solve a different problem—

¹⁴⁰ See Chaplin, *supra* note 4; Scheuerman, *supra* note 4. For similar criticisms of statutory damages for copyright infringement, see Samuelson & Wheatland, *supra* note 4. Federal courts have traditionally reviewed statutory damage awards under a highly deferential standard. See *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919) (stating that the statutory damage award must be "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable" to justify deviation from it). As a general rule, moving to a more vigorous form of constitutional review (or, for that matter, more frequent use of remittitur) would make it difficult for announced remedies to serve any of the three functions described in this Article. Administrative costs would increase both for litigants and the public because parties would brief and judges would decide another set of questions in every case. Information costs would go up because it would be harder for potential violators to predict what the remedy would ultimately be. See Ronen Avraham & Álvaro Bustos, *The Unexpected Effects of Caps on Non-Economic Damages*, 30 INT'L REV. L. & ECON. 291 (2010). And precommitment would be impossible because even if legal decision makers tried to commit themselves to a high sanction at time 1, the commitment could be unraveled by courts at time 2.

¹⁴¹ The precommitment described here is possible only for remedies, not for substantive legal requirements. Legal decision makers could choose an inappropriate rule, thereby committing themselves to be irrational (e.g., a twenty-mph speed limit on a highway). But that irrationality would not by itself promote immediate compliance; there would *also* have to be a commitment to a high remedy. The remedy, not the use of a rule, would be achieving most of the *in terrorem* effect. For more on the interplay of announced remedies with rules and standards, see *infra* Part III.B.1.

the serious underestimation of the remedy by the relevant public. For announcing as precommitment, the remedy is decided in the aggregate and publicized in order to solve a problem internal to legal decision makers themselves—their inability to credibly commit to giving a high sanction.

Each function achieves a different mix of the social benefits of announcing described in Part II. The cost-saving function achieves greater equality. But it is unlikely to increase compliance if the remedy is not publicized. And it is unlikely to have much effect on the costs of telling because the amount at stake is just too small to make “telling” worthwhile in the first place. The communication function achieves all three social benefits: greater equality, greater compliance, and reduced costs of telling. The precommitment function achieves the equality and compliance benefits. Whether the costs of telling will be reduced is more contextual. For a bank or retailer, hedonic adaption is not a useful construct. But there may still be reduced costs of telling along the lines of the secrecy interest described by Bernstein and Ben-Shahar.¹⁴²

These functions also require different kinds of competence from legal decision makers. The cost-saving and communication functions require that legal decision makers be good at setting the fixed remedy since the exact level of the remedy will affect the behavior of potential violators at the margin. The precommitment function requires that legal decision makers be good at determining what the optimal behavior is, but it does not require the same competence for setting the exact level of the remedy. After all, the point of the high sanction is that it should be sufficiently high that potential violators are not faced with a close call about whether to comply. These three functions of announcing therefore vary in their benefits and institutional demands.

B. Three Constraints

1. *Interplay of Rights and Remedies*

Whether a remedy should be announced turns not only on the functions it would serve but also on the breadth of conduct that would be covered.

To return to the example of defamation by bloggers,¹⁴³ an announced remedy would be more appropriate for defamatory posts than for all cases of defamation in all media. To raise the level of generality still further, there should certainly not be a single an-

¹⁴² See *supra* notes 90–92 and accompanying text.

¹⁴³ See *supra* Part III.A.2 (discussing the effect announced remedies would have on bloggers).

nounced remedy for something like “all cases of intangible injury to another person.” The range of phenomena covered by one remedy would simply be too wide (or, put differently, the legitimate range of variation between cases would be too great).¹⁴⁴

Or imagine a single announced remedy for breaches of contract—say, for example, \$1 million. This would radically overcompensate and overdeter in the case of an owner of a food truck thinking of breaking her contract with a supplier of paper plates. But it would radically undercompensate and underdeter in the case of a mammoth corporation like Apple deciding whether to breach a major contract with a supplier. (A single announced remedy for breaches of contract could operate, however, as a default rule to force contracting parties to use liquidated-damages provisions.)

Where exactly this is true—that is, where the range of phenomena becomes too much for a single announced remedy—is a matter of judgment. This judgment call is nonetheless crucial for deciding whether to announce.

Another way to put this is that it matters how the “legal violation” space is carved up among different kinds of claims. Where there is a single kind of legal claim that covers conduct for which there will be a wide range of diverse phenomena (e.g., breach of contract or fraud¹⁴⁵), the remedial precision offered by tailoring is more valuable. The hard work of differentiating cases is being done at the back end instead of up front with a distinction between different kinds of claims.¹⁴⁶ But where the legal-violation space is carved up into an array of legal claims, each fairly precise, it is likely that there will be a narrower range of phenomena covered by each claim. Then the case for announcing the remedy for any given claim will be stronger. Also relevant is the degree to which legal claims are overlapping. Where a single act might give rise to a number of different legal claims (or causes of action), announcing the remedy for any one of those legal

¹⁴⁴ Or to put it still another way, even if the announced remedy was set at the right level for the median case, the number and magnitude of Type 1 (overcompensation for a minor injury) and Type 2 (undercompensation for a major injury) errors would lead to serious deterrence problems. See Avraham, *supra* note 35, at 102 & n.74.

¹⁴⁵ See 2 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 408 (Richmond, Shepherd & Colin 3d ed. 1846) (quoting a letter from Lord Hardwicke to Lord Kaimes for the proposition that because “fraud is infinite,” no one could ever “lay down as a general proposition what constitutes fraud, or establish any invariable rule which should define it”).

¹⁴⁶ For an insightful discussion of these tradeoffs in the context of willful breaches of contract, see Richard Craswell, *When Is a Willful Breach “Willful”? The Link Between Definitions and Damages*, 107 MICH. L. REV. 1501 (2009).

claims will do little to reduce inequality, the perception of inequality, and the costs of telling.¹⁴⁷

And there is another interplay between announcing and substantive legal requirements. If the substantive legal requirement is a standard, rather than a rule, the effects of announcing will be diminished. For example, the perception of equal treatment might not be as strong if the public suspects favoritism and bias in the application of the standard. A standard would also increase the costs of telling because it encourages storytelling and contextualization on the merits.¹⁴⁸ The use of a standard would also make it harder for legal decision makers to really precommit to giving a high sanction. Discretion could shift hydraulically from the remedy to the merits if the pressure is great enough—as it often will be in the precommitment cases. In contrast, using a rule makes each of the advantages and functions of announcing stronger. But also more brittle. A rule means there is no merits-stage safety valve if the announced remedy proves far too harsh. Whether legal decision makers should double down on announcing (by using a rule) or soften its edges (by using a standard) will depend on context.

2. *Future Proofing*

Announcing can produce an enduring change in public expectations about remedies, but this durability has its disadvantages. An announced remedy is like a drug that acts quickly, immediately entering the blood stream and affecting the patient, but also staying in the patient's system for a long time. It may outlast changes in culture or technology or the real value of money, and the level of an announced remedy that today seems perfectly sensible might one day be a ridiculous anachronism.

In the United States, the future-proofing problem is familiar from the Seventh Amendment's preservation of the right to a civil jury trial "where the value in controversy shall exceed twenty dollars."¹⁴⁹ This number has never been updated, and though it once represented a large sum of money, it is now equivalent to less than ninety seconds of billable time for leading attorneys.

An illustration from Roman law is more connected to remedies. The Twelve Tables assigned fixed penalties for several kinds of wrongs, but the devaluation of the currency between the fifth and late third centuries B.C.E. made the penalties very much out of date.¹⁵⁰

¹⁴⁷ This is a major problem with announcing in modern American criminal law. See *infra* note 171.

¹⁴⁸ See *supra* text accompanying note 82.

¹⁴⁹ U.S. CONST. amend. VII.

¹⁵⁰ See ALAN WATSON, *LAW MAKING IN THE LATER ROMAN REPUBLIC* 46–49 (1974).

One Roman jurist tells the story of a young man named Veratius, in a time when the penalty of twenty-five *asses* (the *as* being a Roman coin) was no longer a great sum. Veratius “amused himself by striking passers-by in the face while a slave followed him with a purse full of *asses* and counted out twenty-five to each victim, according to the law of the XII Tables.”¹⁵¹

A similar point regarding the need for updating could be made about time-delimited remedies, such as a ten-year suspension from professional activity. If the lifespan in a country changes dramatically in either direction, then old time-delimited remedies may become absurd.

How, then, does a legal system ensure that announced remedies are updated over time? Lawmakers have two choices, each with its own costs. One is to have a regular and automatic form of updating, much like cost-of-living increases for Social Security.¹⁵² There could be a small notice—such as “Updated Annually”—that accompanies the announcement of the remedy, thus telling the public that there will be continual modernization. Creativity will be necessary because the consumer price index will hardly be a good mechanism for updating every remedy. For example, it is not clear that a fine for unsafe working conditions in mines or on oil rigs should stay the same, even while the value of the mining or drilling operation expands dramatically. If the civil penalties for unsafe working conditions are to keep pace with the potentially offsetting economic incentives of management, the penalties might be indexed to the value of the mine or well, and so on.¹⁵³ Automatic updating will work better when a legal rule

¹⁵¹ *Id.* at 46. The primary source is 3 AULUS GELLIUS, *THE ATTIC NIGHTS*, bk. XX.1.13, at 410–13 (John C. Rolfe trans., rev. ed. 1978) (c. 165 A.D.). On analogues in other ancient legal systems, see generally Martha T. Roth, *Mesopotamian Legal Traditions and the Laws of Hammurabi*, 71 CHI.-KENT L. REV. 13 (1995).

¹⁵² See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 64–68 (1982) (outlining the complexities and tradeoffs of automatic updating); see also KEITH S. ROSENN, *LAW AND INFLATION* 247–50 (1982) (making the case for automatic updating through an example of a negligence victim receiving meager compensation due to a damage-limitation provision that did not adjust for inflation). See generally Jim Chen, *The Price of Macroeconomic Imprecision: How Should the Law Measure Inflation?*, 54 HASTINGS L.J. 1375 (2003) (suggesting ways courts can address inflation). Note that although announced remedies are especially vulnerable to inflation (or deflation), similar problems can arise when remedies are decided case by case. Compare Melvin M. Belli, *The Adequate Award*, 39 CALIF. L. REV. 1, 3–5 (1951) (decrying the fact that damage awards had not kept up with the cost of living), with Deborah R. Hensler, *Jurors in the Material World: Putting Tort Verdicts in Their Social Context*, 13 ROGER WILLIAMS U. L. REV. 8, 19 (2008) (noting growth in size of damage awards, even after inflation is taken into account).

¹⁵³ Perhaps taking inspiration from the Income Tax space in the game *Monopoly*, Congress has specified that the maximum amount of statutory damages in class actions under the Truth in Lending Act is “the lesser of \$500,000 or 1 per centum of the net worth of the creditor.” 15 U.S.C. § 1640(a)(2)(B) (2006). In other contexts it may be appropriate to use the *greater* of a fixed amount and a percentage of profit or net worth.

regulates the conduct of only a small slice of the public, for the information costs of keeping up with the remedy will be high and the frequent updating and lack of round numbers will decrease the salience that the announced remedy might otherwise have had.

The other way to update an announced remedy is to do so less frequently but in larger jumps. Imagine updating fines every thirty years. Here, the information costs are kept low because a person's knowledge will remain accurate for a long time. But of course this means that the remedy should be set too high at first and then it will become too low as the years run by. Once again, we meet the inescapable tension between remedial precision and remedial communication. When announced remedies are updated frequently, a legal system emphasizes precision over communication; when they are not updated frequently, the reverse is true. Which value a legal system should prioritize (after it has already made the decision to announce) will depend primarily on whether the relevant public is small or large (as a proxy for the degree to which the relevant public will learn about and respond to more frequent updates).

3. *Crowding Out Social Norms*

One more constraint warrants mention, though this one is more chimerical than real. Some readers may be concerned that if remedies were announced, then potential violators would come to see the remedy as merely a price to be paid, as a cost of doing business. This concern might be phrased in terms of diminished respect for the law, or in terms of social norms being crowded out by a solipsistic calculation of legal consequences. In either form, the idea is that announced remedies will make people think of lawbreaking as just another commodity for sale.

This idea might seem to gain support from Uri Gneezy and Aldo Rustichini's famous daycare experiment.¹⁵⁴ Some of the daycares in the experiment set a fine for parents who were late picking up their children.¹⁵⁵ The fine did not decrease the behavior. In fact, in the daycares that adopted the fine, the percentage of parents who were late actually *increased* because the fine crowded out the social norm against being late to pick up one's children.¹⁵⁶ Are announced remedies counterproductive like the fines in the experiment, seeming to deter but really only leading to more violations?

The answer is no, at least as a general matter, for there is a critical difference between announced remedies and the fines in Gneezy and Rustichini's experiment. In their experiment, the fine replaced a re-

¹⁵⁴ Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1 (2000).

¹⁵⁵ *Id.* at 1.

¹⁵⁶ *Id.* at 3, 14.

gime of no formal penalties at all,¹⁵⁷ not a regime of penalties determined case by case. In other words, the choice that the daycare operators faced was whether to rely solely on social norms or to add a formal penalty (the fine). When legal decision makers are deciding whether or not the remedy should be announced, they have already moved past the point of relying solely on social norms and are imposing legal penalties.

C. System Effects

The analysis so far has considered the desirability of announcing for individual legal rules. But the decision to announce the remedy for one legal rule depends in part on whether the remedies for *other* legal rules are announced. Remedies in a particular society are a system, and choices about one remedy will have “system effects.”¹⁵⁸ These choices affect one another in several interconnected ways.

1. *Diminishing Returns and High Priorities*

Given the limited amount of information that human beings can process, there are diminishing marginal returns for announcing remedies. In a system where every remedy is case-specific, there may be a huge informational effect for the first announced remedy. It is the remedial equivalent of the very first billboard on a highway. But if a legal system has tens of thousands of rules governing the public, and thousands of these have announced remedies, announcing one more remedy will have little effect (either as communication or as precommitment). Because the effect of announcing is lessened with each new announced remedy, lawmakers should think carefully about which remedies to announce. They should, in other words, pluck the low-hanging fruit.

2. *Announcing as a Reset*

For the violations already discussed, such as unauthorized bank disclosures to the government, it makes sense to establish an announced remedy and maintain it over time. But it is worth noting that there are rare circumstances in which the ideal strategy might be a temporary use of announcing. Assume that for a given legal rule, in the long run it will be better to determine the remedy case by case, though this is a fairly close question. But also assume that at present

¹⁵⁷ See *id.* at 4.

¹⁵⁸ The foundational work on system effects is JERVIS, *supra* note 80, at 147–49. For application to legal analysis, see Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009). Vermeule offers this definition: “A *system effect* arises when the properties of an aggregate differ from the properties of its members, taken one by one.” *Id.* at 6.

there is little public agreement about what the remedy is likely to be for a violation,¹⁵⁹ and there is severe inequality at the remedy stage, with remedies varying dramatically based on the race, gender, or other personal characteristics of the wrongdoer and the victim. In these circumstances it might make sense to shift to announcing in the short run, as a way of resetting public expectations about remedies for this particular rule—making those expectations more uniform across the public and reducing invidious disparities. After this reset, there could be a more enduring switch back to deciding the remedy case by case.¹⁶⁰

This use of announcing should be relatively rare; the benefits will rarely outweigh the disruption of shifting back and forth. And this kind of reset is practical only for announcing as communication. For the other two functions, there would be no lasting effects from having previously announced the remedy.

3. *The Hierarchy of Violations and Remedies*

Another system effect is important and subtle. People often think about violations in relative, hierarchical terms. This legal violation is worse than that one, but not as bad as some other one. And scholars in many different areas, including punitive damages, pain-and-suffering damages, and criminal penalties, have found a degree of agreement among the public, or among experimental subjects, about how to do this ordinal ranking of different legal violations.¹⁶¹

When remedies are decided case by case, people are likely to change their perception of the relative severity of different violations slowly. As discussed above, when unsophisticated actors try to learn about remedies, they face high information costs.¹⁶² This means it is harder for a person to know that her view about the relative seriousness of a legal violation is out of line. Thus, whatever views a person has are likely to persist over time. But when a legal system announces a remedy, there may be sudden changes in this perceived hierarchy of

¹⁵⁹ See *supra* Part III.A.2.

¹⁶⁰ Announcing as a reset is the inverse of the “tailoring experiment” described in Part III.A.1, where announcing is used in the long run to save administrative costs, but case-by-case decision making is used in the short run to help set the quantum of the announced remedy.

¹⁶¹ See Daniel Kahneman et al., *Shared Outrage, Erratic Awards, in PUNITIVE DAMAGES: HOW JURIES DECIDE* 31, 34–36 (Cass R. Sunstein et al. eds., 2002); Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1832 (2007); Sunstein et al., *supra* note 30, at 2077–78, 2097–2100 (finding strong correlations in experimental subjects’ judgments about outrage and punitive intent when those subjects were given descriptions of products liability cases). This agreement breaks down when these ordinal rankings must be translated into cardinal numbers. See Sunstein et al., *supra* note 30, at 2100–07.

¹⁶² See *supra* Part III.A.2.

violations and remedies. Some people who previously did not have a very clear idea of what the remedy would be, or who had a mistaken idea, will now know exactly what the remedy is for a violation. And this can change what someone thinks about the remedies for other legal rules.

For some people, announcing can produce a change in the hierarchy of remedies that is *local*. Imagine a person who sees the Manhattan sign and says, “I didn’t know honking a car horn in Manhattan was so serious. It’s a really big deal.” The rest of this person’s hierarchy of remedies stays in place, but one particular violation—the honking of a car horn on a residential street—suddenly moves up the hierarchy.

But for other people, announcing can produce a change in the hierarchy of remedies that is *global*. Imagine a person who sees the Manhattan sign and says, “If that’s the fine for honking a car horn, just think what the fine would be for double parking!” For this person, the particular violation (honking a car horn on a residential street) stays in its place in the hierarchy, but the entire hierarchy—or at least some part of it, such as “violations related to cars”—might suddenly be perceived differently.

It is an empirical question whether announced remedies will have a local or a global change on a person’s hierarchy of violations and remedies. The answer will probably vary from place to place and from rule to rule. Yet it matters for the design of an announced remedy, for either a local or global response could be useful.

Assume, for instance, that people are more likely to respond globally. Then perhaps a legal system could announce the remedy for one violation and suddenly reap the benefits from people taking more seriously (or less seriously as the case may be) a host of related violations. Here, legal decision makers could counteract the diminishing-marginal-return problem of announcing: to get a great deal of value from announcing, a legal system might need to announce only a small number of remedies. Announcing only one or two “focal remedies” within a certain domain of substantive rules (such as the rules governing the conduct of drivers, accountants, or bloggers) could shape perceptions of what other remedies are likely to be in the domain.

Or assume that people respond to announcing by making only local changes in their hierarchy of violations and remedies. Then remedies could be announced with less concern about the unintended consequences of how announcing a remedy will affect public perception of many other remedies. (Each alternative poses not only an opportunity but also a danger. For instance, if people respond globally, there is more risk of unintended consequences from announcing.)

In short, remedies function as a system, and the decision to announce the remedy for one legal rule is related to the same decision about other legal rules.

D. Intermediate Approaches

The analysis so far has treated remedies in binary fashion. They are, or are not, announced. As noted in Part I, however, the choice is not always so sharp. Intermediate or mixed approaches of several kinds are considered here: (1) announcing a range and then, within that range, determining the remedy case by case; (2) announcing the remedy that will be exacted from violators of a legal rule but tailoring the remedy that is given to victims; and (3) determining the remedy case by case but publicizing the median or most recent remedy.¹⁶³ All of these intermediate approaches show the value of considering the different functions of announcing.

1. *Announcing a Range and Tailoring Within It*

In the last several decades, many scholars have criticized the inconsistency and arbitrariness of damage awards for noneconomic injuries, such as pain and suffering.¹⁶⁴ One suggestion that is often made is to schedule damages more or less in the manner of the U.S. *Sentencing Guidelines*.¹⁶⁵ In general, the idea is that for a particular kind of injury or tort there should be a range of possible damage awards, and then within that range the jury should have discretion to choose the

¹⁶³ These are the most common or attractive intermediate approaches, but others are possible. For example, legal decision makers could announce a cap on damage awards and then decide the remedy case by case beneath that cap. *But see* Avraham, *supra* note 35, at 97–101 (criticizing caps). Or legal decision makers could announce a remedy as a formal matter but in actual practice determine remedies case by case. But if the public learns what the announced remedy is—which is, after all, usually the point—then people will inevitably see the discrepancy between the announced remedy and actual practice. None of the social benefits of announcing would then be achieved, and in particular there would be heightened cynicism about whether legal decision makers are fairly enforcing the rules of the game, thus undermining quasi-voluntary compliance. *See supra* Part II.B.

¹⁶⁴ For a nuanced review of this literature, see Avraham, *supra* note 35, at 90–97.

¹⁶⁵ *See, e.g.,* Bovbjerg et al., *supra* note 1, at 925, 975 (proposing the scheduling of noneconomic damages, assuaging concerns about rigidity with the optional use of a range instead of a mandatory point or with a separate administrative process for outliers, and noting the analogy to criminal sentencing); Sunstein et al., *supra* note 30, at 2122 (“In the criminal law . . . the determination is made by the judge subject to the Sentencing Guidelines. Why would not the same approach make sense for punitive awards?”); Wistrich et al., *supra* note 39, 1328–29 (suggesting advisory guidelines, especially for damages that are “inherently difficult to quantify”); Levin, *supra* note 29, at 303–04 (arguing for pain-and-suffering guidelines modeled on state criminal sentencing guidelines); *see also* Ronald J. Allen et al., *An External Perspective on the Nature of Noneconomic Compensatory Damages and Their Regulation*, 56 DEPAUL L. REV. 1249, 1257, 1275 (2007) (advocating legislative schedules, either exact amounts or ranges, which would be “modeled, in part, after sentencing guidelines used in the states”).

award that best fits the facts.¹⁶⁶ In the terms of this Article, what these scholars are suggesting is not announcing but rather an intermediate approach. Legal decision makers would first “announce” a range, and then within that range the remedy would be determined case by case.¹⁶⁷

The usefulness of this intermediate scheduling approach depends on which function announcing is supposed to have. If announcing is meant to save administrative costs, then this approach would be unwise. After all, administrative costs would increase because there would be both the costs of determining the appropriate range and the costs of making case-by-case decisions.

Nor is this approach useful for announcing as precommitment. Only the bottom of the range would likely matter. Although legal decision makers may at time 1 specify a range with a very high upper bound, they will not likely give such a remedy at time 2 when faced with an actual case. This will be discovered by sophisticated repeat players—exactly the audience for whom the precommitment function is meant to work.¹⁶⁸

For the communication function of announcing, it is a closer question. One problem would be solved: potential violators would not be able to expect that the remedy exacted from them would be *below* the announced range. But recall the situations in which the communication function is useful—situations in which unsophisticated potential violators have difficulty learning about remedies and seriously underestimate what they will be. In such circumstances, the potential violators would still face high information costs in predicting where the remedy would fall within the range. There would be an inevitable loss of precision in the cases that are true outliers. And another loss of precision might come from how the range itself could bias jury de-

¹⁶⁶ Bob Rabin, who does not advocate such an approach, has described the “[s]cheduling of damage awards” as the creation of “profiles of harm, crystallized into discrete categories of specified awards *with upper and lower limits*, ranked according to severity of physical injury.” Rabin, *supra* note 31, at 376 (emphasis added).

¹⁶⁷ That this approach is an intermediate one is not widely appreciated. Scholars often describe the U.S. SENTENCING GUIDELINES as if they were an instance of what this Article calls “announcing” instead of an intermediate approach. See, e.g., Spier, *supra* note 2, at 85 n.3; Sunstein et al., *supra* note 30, at 2125. On announcing and the criminal law, see *infra* note 171.

¹⁶⁸ This is not to say a range will thwart an otherwise effective precommitment. The Fair and Accurate Credit Transactions Act, described above, contemplates a range of statutory damages from \$100 to \$1000. See *supra* notes 134–38 and accompanying text. But the remedy works because the conditions are right for precommitment and the bottom number is sufficiently high (when claims are aggregated in a class action). That there is a range is irrelevant.

cision making through anchoring effects.¹⁶⁹ Still, this intermediate approach may be useful if the value of retaining a little flexibility outweighs these disadvantages.

2. *Announcing for Violators, Tailoring for Victims*

Another intermediate approach would be for legal decision makers to bifurcate the remedy they take and the remedy they give. The remedy could be announced vis-à-vis potential violators. Then these fixed amounts could be collected into a compensation fund. Amounts tailored to particular victims could then be paid out of that fund. For instance, if this approach were to be used for defamatory blog posts, then there would be an announced remedy that the blogger would have to pay into the compensation fund (e.g., \$50,000), but the amount paid out to a victim would vary with the facts of the particular case.¹⁷⁰

This is an elegant and appealing solution, because it plays to the strength of each approach. Legal decision makers get the remedial communication of announcing without giving up the remedial precision of deciding on compensation one case at a time. It is therefore of more use than the intermediate scheduling approach.

Nevertheless, it is important to keep in mind certain limitations. First, this approach would entail greater administrative costs than using either of the “pure” approaches. It would therefore be inappropriate if the function of announcing were cost saving.

Second, because the public’s attention is finite, the announced remedy would still have diminishing returns, so it would hardly be efficient to adopt this approach universally.

Third, this approach would not fully secure any of the social benefits of announcing. There would be a formal equality in what violators pay into the compensation fund, but what a person receives from the fund could be affected by retail-level bias, and this might foster a

¹⁶⁹ See Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damage Caps*, 80 N.Y.U. L. REV. 391, 422–28 (2005). Alternatively, on using advisory damage schedules as *more accurate* anchors, see Wistrich et al., *supra* note 39, at 1328–29.

¹⁷⁰ This kind of decoupling of deterrence and compensation has been considered in the tort theory and optimal deterrence literatures and is controversial. See, e.g., Martin Stone, *On the Idea of Private Law*, 9 CAN. J.L. & JURISPRUDENCE 235, 238–39 & 239 n.18 (1996) (criticizing such decoupling); see also Nuno Garoupa & Chris William Sanchirico, *Decoupling as Transactions Tax*, 39 J. LEGAL STUD. 469 (2010) (discussing the effect of this decoupling on the primary activity). As a threshold matter, how receptive one is to such decoupling will depend on whether one accepts the broad definition of “remedy” employed in this Article, see *supra* note 12 and accompanying text, or instead insists that a remedy must be a *remedying*, a restoring of particular persons to their rightful position. An insightful account of the rise of this latter, more particularistic conception of remedies in tort law can be found in Goldberg, *supra* note 32, at 447–62; cf. Issacharoff & Witt, *supra* note 15, at 1573–77 (offering an account of aggregate-settlement devices that questions the individualistic conception of tort remedies).

perception of unequal treatment. And victims would still incur the costs of telling. In essence, this hybrid starts with case-by-case decision making about remedies and then pays some additional administrative costs, either for the purpose of sharply reducing information costs for potential violators or for the purpose of allowing legal decision makers to credibly commit to a high sanction. It can therefore be a useful way of achieving two of the functions of announcing.

3. *Tailoring and Publicizing the Remedy*

A variation on the preceding intermediate approach would edge even closer toward case-by-case decision making. The remedy that is extracted and paid would be determined one case at a time, just as most remedies in the United States currently are. But there would be a serious effort to communicate something about the remedy to the public—what is communicated might be the median remedy, for example, or the most recent remedy.

Imagine that there were electronic signs on the desks of accountants indicating in real time what the most recent civil penalty was for publication of falsified financial statements. Or imagine that blogging platforms (e.g., WordPress) were required to display to new bloggers in a clearly visible way the median damage award for a defamatory post in the United States.

There would be many downsides: the cost of publicizing the remedy, the risk of distraction and overdeterrence, no achievement of the social benefits of announcing, no credible precommitment to give a high sanction. And yet this intermediate approach might still work. In effect, it starts with tailored remedies and then accepts some additional administrative costs in order to reduce information costs. If the relevant public is seriously underestimating the remedy, this kind of soft bifurcation might be useful.

E. Summary

Announcing is not a single phenomenon but rather a collection of different strategies or functions. Where awarding remedies case by case is not worth the administrative costs, announcing can perform a *cost-saving function*. Where unsophisticated potential violators seriously underestimate the remedies that courts are awarding, announcing can perform a *communication function*. And where potential violators are sophisticated actors, and legal decision makers know the socially optimal conduct but not the external costs of deviation, announcing can perform a *precommitment function*.

Announcing can generate important social benefits. In addition to reducing administrative costs, it can increase equality and compliance, and it can reduce the costs of telling. Yet it is subject to impor-

tant constraints. Its suitability depends on how the legal-violation space is carved up among different legal rules or causes of action. And it is vulnerable to changes in culture, technology, and the real value of money. In short, it is powerful, if kept within bounds.

For normative theory and legislative design, the central question is which function announcing is meant to perform. From the answer to this question flows almost every other part of the analysis: quantum of remedy, audience, situation, social benefits, constraints, system effects, and intermediate approaches. The following chart summarizes the characteristics of each function:

TABLE: FUNCTIONS OF ANNOUNCING

	COST-SAVING	COMMUNICATION	PRECOMMITMENT
<i>Which aspects of announcing matter?</i>	Aggregation	Aggregation and publication	Aggregation and publication
<i>How large is the remedy?</i>	Roughly equals remedy determined case by case	Roughly equals remedy determined case by case	Larger than remedy determined case by case
<i>Who is the audience?</i>	Anyone	Unsophisticated	Sophisticated
<i>Is this useful for sanctions situations?</i>	No	Yes, though not exclusively	Yes, exclusively
<i>Which social benefits are achieved?</i>	Equality	Equality, compliance, costs of telling	Equality, compliance, possibly costs of telling
<i>Which constraints are most relevant?</i>	Interplay of rights and remedies, future proofing	Interplay of rights and remedies, future proofing	Interplay of rights and remedies (especially choice of rule or standard), future proofing
<i>Which system effects matter?</i>	None	Diminishing returns, resets, global responses	Diminishing returns
<i>Which intermediate approaches can work?</i>	None	Announcing ranges, announcing only for violators, tailoring and publicizing	Announcing only for violators

This theory of announcing is inevitably incomplete. Empirical inputs will always be needed. For example, does the public underestimate the remedy? Because these inputs will vary over time, a legal system cannot make a once-and-for-all decision about whether to announce a remedy. The decision will also be shaped by the aspirations

and institutions of specific areas of law.¹⁷¹ And it cannot be made in isolation, for it is affected by whether the remedies for other legal rules are announced. For these reasons, the normative analysis offered here is not meant to determine how the announcing decision should come out for every remedy. Rather, it is meant to give scholars and legal decision makers a set of organizing principles for thinking through this decision.

If a legal system frequently alternated between announced and case-by-case remedies with respect to a given substantive rule, or if it frequently changed what the announced remedy was, it would be undermining many of the reasons to announce in the first place. Frequent alternation would impose new administrative costs. It would also increase information costs because it would be hard for the public to keep up with what the remedy was at any particular moment. And frequent alternation would hardly foster the perception of equal treatment: imagine that at times 1, 3, and 5 the remedies were decided case by case, but at times 2, 4, and 6 the remedies were announced. Thus announcing requires some stability to be advantageous.

What is needed is both a measure of stability and creative experimentation with announcing. In Plato's *Laws*, the Athenian Stranger compares the succession of lawmakers in a polity to a painter who "never seems to finish working on each of the figures, but keeps touching up or highlighting," without ever "reach[ing] a point where there can be no further improvement of the paintings as regards beauty and clarity."¹⁷² And yet the Athenian Stranger recognizes the virtue of stability, advising lawmakers to "learn[] from yearly practice" and make "corrective changes," but only "until what seems to be a satisfactory definition of such customs and practices has been reached."¹⁷³ This length of time, the Athenian Stranger cheerfully

¹⁷¹ An extreme example is criminal law, which is why this Article focuses on civil remedies. In the criminal context there are special reasons to announce: liberty is at stake; overdeterrence is unlikely; and remedial precision will always be elusive because the sentence reflects unquantifiable harms to the social order and is never just a tallying up of pecuniary harm to the victim. And there are special reasons to value the precision of case-by-case decision making: criminal penalties are severe, difficult to insure against, and imposed at a great cost to society. But the main obstacle to effective announcing in American criminal law is institutional. See generally Samuel L. Bray, *Power Rules*, 110 COLUM. L. REV. 1172, 1187–89 (2010) (arguing that use of power rules in U.S. law increases prosecutorial discretion); James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. LEGAL ANALYSIS 119, 153–55, 159–60 (2009) (critiquing institutional problems of the American criminal-law system). Because prosecutors in the United States routinely have discretion to charge a defendant with one or more of a broad array of offenses, announcing the penalty for any one offense would not lead to greater equality, a greater perception of equality, or reduced costs of telling.

¹⁷² PLATO, *supra* note 71, bk. VI, 769a–b, at 156.

¹⁷³ *Id.* at bk. VI, 772b, at 159–60.

says, will be about ten years.¹⁷⁴ The length of time is utopian, but the prescription for the lawmaker is not. It is appropriate for legal decision makers to be modest and incremental, given their institutional and epistemic constraints. But new approaches are needed, and experimentation in the art of remedies is overdue.

CONCLUSION

The determination of remedies case by case has implications that have not been fully understood. Deterrence can be undermined when the public, unable to predict the remedy, seriously underestimates what it will be. Justice is more elusive when jury awards depend on the race, gender, or physical attractiveness of the parties. Compliance with the law is diminished when remedies seem to be dispensed unequally. And hedonic adaption is difficult when what you get from a court depends on how vividly you tell your story.

These realities are not wholly inevitable, for they depend in part on the decisions a legal system makes about announcing. Through judicious adoption of announced remedies, a legal system can achieve a greater measure of both efficiency and justice. In furthering these aims, announcing does not require heroic assumptions about legal decision makers or the public. Instead, it accepts, and even exploits, the bounded knowledge and weakness of will that characterize all human beings. It is a perfect fit for an imperfect legal system.

¹⁷⁴ *See id.*