

# Punitive Damages as Societal Damages

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## INTRODUCTION

Large punitive damages awards get attention.<sup>1</sup> Witness, for example, the latest punitive damages case decided by the Supreme Court: *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>2</sup> At issue was a \$145 million punitive damages award won by the Campbells, individuals who had sued their automobile insurer, State Farm, for bad faith refusal to settle within policy limits an underlying automobile accident lawsuit brought against them. The Court struck down the \$145 million award, holding that, where plaintiffs had obtained “full compensatory damages” of \$1 million, such an additional punitive award was excessive under the Due Process Clause.<sup>3</sup>

At trial, plaintiffs’ counsel had asked Utah jurors to punish State Farm for its nationwide business practices, admonishing the jurors that they were “going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable for what it’s doing across the country, which is the purpose of punitive damages.”<sup>4</sup> In upholding the \$145 million punitive damages award, the Utah Supreme Court similarly emphasized that State Farm’s nationwide insurance fraud “scheme” had “far-reaching negative effects” not only on the Campbells, but also upon other insureds and “society in general.”<sup>5</sup>

But with its decision in *State Farm*, the U.S. Supreme Court has seemingly put the brakes on such nationwide assessment of damages for widespread harms that courts like the Utah Supreme Court have sustained “under the guise” of punishment, the predominant traditional justification

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1. See, e.g., Martin T. Wells, *Analyzing Large Punitive Damages Awards*, 1 J. EMPIRICAL LEGAL STUD. (forthcoming 2004) (manuscript at 2, on file with author) (“It no longer is the mass of punitive awards that is said to be so troublesome. Rather it is the relative handful of extreme awards.”); JONI HERSCH & W. KIP VISCUSI, PUNITIVE DAMAGES: HOW JUDGES AND JURIES PERFORM 4 (Harvard Law Sch., John M. Olin Discussion Paper Series, Working Paper No. 362, 2002), [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/362.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/362.pdf) (analyzing the relationship between punitive and compensatory awards in large jury trial cases decided from 1985 to 2002, selected using “a systematic search for punitive damages awards of at least \$100 million”); see also Theodore Eisenberg, *Damage Awards in Perspective: Behind the Headline-Grabbing Awards in Exxon Valdez and Engle*, 36 WAKE FOREST L. REV. 1129 (2001).

2. 123 S. Ct. 1513 (2003).

3. *Id.* at 1517. On an even grander scale, a Florida appellate court recently struck down a \$145 billion punitive award in *Liggett Group Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003). Unlike the two-plaintiff *State Farm* case, however, this huge punitive judgment—the largest ever as a historical matter—was awarded to an entire class of Florida smokers (and former smokers) seeking damages against cigarette companies and industry organizations. The *Engle* verdict is analyzed in the context of the punitive-damages-only class action, discussed *infra* Section III.C.

4. *State Farm*, 123 S. Ct. at 1522 (quoting the opening statements at trial).

5. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1158 (Utah 2001), *rev'd*, 123 S. Ct. 1513.

for punitive damages.<sup>6</sup> Specifically, the Court has declared that due process protects against the possibility of multiple punitive damages awards to different plaintiffs for the same conduct, “for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.”<sup>7</sup> Moreover, compensation for harms to individuals other than the plaintiff before the court, or to “society” more generally, would seem to fall outside the confines of the doctrine of punitive damages, which, according to the Court, “serve the same purposes as criminal penalties.”<sup>8</sup>

But what if—as is certainly the case—not all states share this view of the purpose of punitive damages? After all, in *BMW v. Gore*, the U.S. Supreme Court made it clear that “the federal excessiveness inquiry [into the magnitude of punitive damages] appropriately begins with an identification of the state interests that a punitive award is designed to serve.”<sup>9</sup> Moreover, what should one make of the Court’s discussion in *State Farm* of the relevance of evidence of “harm to the people of Utah,” at least in cases where such an “adverse effect on the State’s general population” could be shown?<sup>10</sup> Contradictions seemingly abound in *State Farm*. A more contextualized and nuanced reading of the opinion, however, suggests that the Court was primarily concerned with limiting the extraterritorial or out-of-state reach of punitive damages. In other words, the assessment of damages to compensate for widespread harm may be appropriate—or at least constitutional—so long as it occurs within the confines of a single state. Perhaps unwittingly, then, *State Farm* legitimated a *nonpunitive* justification for punitive damages that, until now, has been submerged within the concept of punitive damages: compensatory damages for harms to individuals other than the plaintiff before the court. If that is the implicit thrust of the opinion, however, the Court stopped short of offering any constructive guidance on how our civil litigation system should treat these damages.

This is not a trivial oversight. *State Farm* represents an emerging paradigm in punitive damages cases: a single or multiplaintiff case in which, in effect, “classwide” punitive damages are assessed on a statewide or nationwide scale. Such paradigm cases, moreover, frequently arise in states that have endorsed a “public” purpose for punitive damages. Evidence of this modern phenomenon can be found not only in the large, headline-grabbing punitive damages awards such as *State Farm*, but also in

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6. *State Farm*, 123 S. Ct. at 1523. “The terms ‘punitive,’ ‘vindictive,’ or ‘exemplary’ damages, and ‘smart-money’ have been interchangeably applied to a class of money damages awarded in tort actions beyond what is needed to ‘compensate’ the plaintiff for his injuries.” Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 517 (1957).

7. *State Farm*, 123 S. Ct. at 1523.

8. *Id.* at 1520.

9. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

10. *State Farm*, 123 S. Ct. at 1525.

the general mine of cases. And although punitive damages are awarded in a relatively small percentage of all civil trial cases (both jury and bench), they are awarded in significantly larger percentages of certain categories of cases.<sup>11</sup> While one such category comprises what might be characterized as the “historical” or “traditional” cases in which punitive damages have always been awarded—intentional torts and libel/slander—more recently, nontraditional categories such as fraud, employment discrimination, and products liability have also exhibited such a trend. With increasing frequency, punitive damages are being awarded in the kinds of cases where defendants are most likely to have inflicted harms upon individuals beyond the plaintiffs named in the complaint.<sup>12</sup>

What emerges from this picture is that punitive damages have been used to pursue not only the goals of retribution and deterrence, but also to accomplish, however crudely, a *societal compensation* goal: the redress of harms caused by defendants who injure persons beyond the individual

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11. The framing of the debate over the past two decades in terms of whether punitive damages, in the aggregate, are irrational, unpredictable, and outrageously large or, alternatively, rational, predictable, and too infrequently awarded, has obscured this point. Compare, e.g., Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002) (concluding, based upon a large sample of trials in state courts, that punitive awards are highly predictable from compensatory awards as opposed to being simply random and irrationally imposed penalties), with, e.g., Jonathan M. Karpoff & John R. Lott, Jr., *On the Determinants and Importance of Punitive Damages Awards*, 42 J.L. & ECON. 527, 571 (1999) (finding that only one to two percent of the variation in punitive damages awards can be explained, and concluding that punitive awards are highly variable and unpredictable). This more recent empirical debate echoes earlier disagreement in the courts and literature. Compare *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (“Awards of punitive damages are skyrocketing.”), and John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 139 (1986) (“[P]unitive damages are out of control.”), with Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990) (arguing that punitive damages are awarded infrequently and in modest amounts), and Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 54 (“All [empirical studies] conclude that punitive damages verdicts are rare.”).

12. According to the most comprehensive data set available of punitive damages awards in civil trials (jury and bench) in 1996, collected in forty-five sampled jurisdictions chosen to represent the nation’s seventy-five largest counties, punitive damages were awarded in 4.5% of all trial cases won by plaintiffs. CAROL J. DEFRANCES & MARIKA F.X. LITRAS, U.S. DEP’T OF JUSTICE, CIVIL JUSTICE SURVEY OF STATE COURTS, 1996: CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES 9 tbl.8, 17 (1999), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc96.pdf>. The percentage figures were greater, however, for cases won by plaintiffs in intentional tort (24%), employment discrimination (19.4%), slander or libel (17%), fraud (15.4%), other employment disputes (12.5%), and other products liability (excluding asbestos and breast implant) (12.8%). *Id.* at 9 tbl.8.

An earlier 1991-1992 data set highlights these same categories: While punitive damages were awarded in 5.9% of all jury trials won by plaintiffs in the nation’s seventy-five largest counties, the figures were greater in cases won by plaintiffs for slander or libel (29.8%), employment (26.8%), fraud (21.2%), and intentional tort (18.5%). The figure for products liability is much lower (2.2%). CAROL J. DEFRANCES ET AL., U.S. DEP’T OF JUSTICE, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 8 tbl.8 (1995), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cjcavilc.pdf>.

plaintiffs in a particular case. The class action mechanism is, of course, often posited as the preferred solution to aggregate cases where the collective harm is widespread, such as in certain products liability, fraud, civil rights, and employment discrimination cases. But an increasingly common phenomenon is a jury's award of significant punitive damages in single-plaintiff (i.e., non-class action or consolidated multiparty) cases. These non-class action cases are similar to class action cases in that punitive damages are in essence assessed on a putative "classwide" basis for harms actually or potentially inflicted upon numerous individuals. Two significant differences exist, however: (1) the absence of procedural and substantive protections accorded to a class action defendant, and (2) a windfall to an individual plaintiff (or group of plaintiffs).

Over the last decade, in a series of cases culminating with *State Farm*, the Supreme Court has expressed concern that punishment is being meted out without sufficient procedural protections to ensure fair and proportionate punishment in light of the misconduct alleged. Yet over the same period (and even in the preceding decade), several states' efforts to address the "windfall" aspect of punitive damages—and, in particular, to experiment with alternative punitive damages distribution mechanisms—stayed below the Court's radar screen. Indeed, over time the plaintiff's ensuing windfall has come to be generally accepted as "simply a side effect of our common law system for punishing and deterring wrongdoers."<sup>13</sup> In limiting the extraterritorial scope of permissible punishment, *State Farm* has addressed the windfall problem to some extent. But as long as statewide "class" damages can still be awarded in single-plaintiff cases, the problem, though it may have been circumscribed, will persist.

The time is thus ripe for reconceptualizing the civil damages landscape. In this Article, I propose explicit recognition of a new category of damages—compensatory societal damages—that hitherto has comprised one significant, albeit insufficiently acknowledged, component of punitive damages. In so doing, I attempt to interject into the debates surrounding punitive damages the concept of distribution of damages and its theoretical and practical consequences.<sup>14</sup>

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13. *Romo v. Ford Motor Co.*, 122 Cal. Rptr. 2d 139, 164 (Ct. App. 2002), *vacated by* 123 S. Ct. 2072 (2003) (mem.).

14. Indeed, with the emergence of split-recovery statutes, or more accurately, with recent attention focused on rulings by the highest state courts in Alaska, Indiana, Missouri, Ohio, and Oregon, and attendant publicity, *see infra* notes 77, 334, combined with recent proposals for mandatory punitive-damages-only class actions, *see infra* notes 235-236, this Article is part of a subtle shift in the terms of the debate to the hitherto overlooked issue of the distribution of punitive awards and its consequences. Perhaps with respect to the centuries-old practice of the award of punitive damages, fresh insights are to be found not in the persistence of the controversy accompanying the doctrine, but amidst subtle shifts in the focus of the debates.

Part I presents a critical examination of the existing academic and judicial conceptions of punitive damages and plaintiffs' windfall gains. First, I summarize the predominant individual-harm paradigm of retributive punishment, most recently espoused by the Supreme Court in *State Farm*. Next, I consider the broader economic deterrence perspective advocated in the law-and-economics literature: the notion that compensatory damages should be "multiplied" in situations where the defendant conceals its wrongdoing, and accordingly, is likely to be detected only in some fraction of instances of lawbreaking. Neither approach is animated by, or concerned with, who receives the punitive damages award.

Part II canvasses nascent legislative and judicial developments in states that have focused particular attention upon the distribution of punitive damages awards. First, I provide a brief description of the split-recovery statutes currently in place in eight states, which direct a percentage of punitive damages awards to state- or court-administered funds. I pay particular attention to the differences among the statutory schemes in terms of percentages allocated to state or fund, treatment of attorneys' fees, and designation of fund recipients. I then explore the animating legislative motivations behind these statutes as well as the idea—implicit in them—that punitive damages vindicate societal, as opposed to individual, interests.<sup>15</sup>

Part II continues by describing recent judicial experimentation in the punitive damages realm, including judicial apportionment and distribution of punitive awards, absent legislative direction. I suggest that these split-recovery schemes—of both legislative and judicial variety—are, in an important sense, in search of a satisfactory nonpunitive justifying theory.

Part III introduces the concept of societal compensatory damages. The possibility that punitive damages might serve, among other things, to compensate society has been suggested by two federal judges and mentioned in passing in several pieces addressing split-recovery statutes. Nonetheless, in the now-voluminous punitive damages literature, societal compensatory damages represents a theory otherwise overlooked. Pursuant to such a theory, the jury's award of compensatory damages would consist of two parts: individual damages designed to compensate the victims before

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15. Although this may not have been the stated purpose for the enactment of these statutes, a focus on societal harms and entitlements is, nonetheless, implicit in, and central to, courts' understandings of them. *See, e.g., DeMendoza v. Huffman*, 51 P.3d 1232, 1238-39 (Or. 2002) (stating that the purposes of punitive damages in Oregon are to "punish[] a defendant for particularly egregious conduct and deter[] such conduct in the future," and that "both aspects [of this dual purpose] focus solely on vindicating society's interests"). Moreover, this shift in focus toward societal harms and entitlements—in contrast to, for example, caps on punitive damages or limitations for certain categories of cases such as medical malpractice, which focus primarily on relieving defendants of the burdens of excessive damages—distinguishes split-recovery schemes as a peculiar brand of "tort reform."

the court, and “societal” damages designed to compensate others directly harmed but not before the court. By maintaining a principal focus on compensation for real and identifiable societal losses caused by the defendant, societal damages advance the fairness and corrective justice goals embedded in our compensatory torts system. The focus upon societal damages is also closely linked to the economic theory of deterrence: Just as compensatory damages simultaneously redress losses suffered by the plaintiff and deter defendant wrongdoing by forcing the defendant to internalize these costs in his or her cost-benefit decisionmaking, so too do societal compensatory damages simultaneously redress losses suffered by society and deter wrongdoing by forcing cost internalization. Part III explores the conceptual framework for the assessment of societal damages within the category of widespread harm torts, that is, where many persons are harmed by a defendant’s single act or by repeated conduct amounting to a single “pattern or practice.” I distinguish along a continuum two separate categories of societal harms—specific harms to other identifiable members of society, and more diffuse or generalized harms to groups or society as a whole—and I note how the theory of societal damages responds to each.

The remainder of Part III relates the concept of societal damages to both class action and punitive damages theory, doctrine, and practice. From one perspective, societal damages might be understood as a doctrinal substitute for (or complement to) the class action mechanism. Instead of advocating societal damages as a possible “end run” around the procedural protections of Rule 23 (and its state law alternatives), however, I explore the possibility of developing an “ex post” class action. This “back-end” class action entails a bifurcated trial procedure, whereby Rule 23-like protections would attach in the second phase—following the first individual compensatory liability and damages phase—when societal damages would be assessed and distributed. From another perspective, a societal damages construct might be most useful where the traditional class action fails, such as when specifically harmed individuals are not readily identifiable, or when the harms inflicted are too “diffuse.” I therefore also consider how the mandatory punitive-damages-only class action, which amasses all punitive damages claims against a defendant to be assessed in a unitary proceeding, might embrace this view of societal damages.

Part IV explores additional prospects for the practical realization of the societal damages theory in both the legislative and judicial realms. Statutory or judicial mechanisms might convert a good deal of “punitive” damages into societal compensation, with an eye toward redressing widespread harms to third parties not formally before the court. By considering both legislative and judicial responses—and their respective claims of legitimacy and institutional competence—the societal damages approach examines ways to address societal harms in a more systematic



fashion. First, I discuss various modifications to existing split-recovery schemes that are a step in the direction of implementing the societal damages approach. Iowa's split-recovery scheme, which directs the jury's attention to whether the plaintiff is one of a potential class of victims of defendant's conduct, provides a suitable starting point for consideration of the specific harms category of cases. The diffuse harms category can be accommodated by legislative modifications to existing split-recovery schemes, creating narrowly tailored specialized funds for particular torts. Next, I consider the question of inherent judicial authority to apportion societal damages absent enabling legislation. The key point is that the societal damages approach might address the "public" impact of a defendant's conduct through a variety of mechanisms: legislative setting of "multipliers" in specific categories of cases, along with the establishment of corresponding proxy funds; judicial exercise of inherent equitable authority to allocate juror-assessed societal damages to specifically identified third parties who have also been harmed; or the exercise of rulemaking authority to restructure Rule 23 or its state law counterparts.

Part V evaluates how the societal damages theory might fare in practice. First, I address perhaps the most vexing—and certainly the most current—issues in punitive damages doctrine: extraterritorial conduct and the threat of overlapping multiple punishments faced by defendants. While the societal damages theory would by no means generate perfect solutions, I argue that the theory nonetheless suggests an informative parallel between the extraterritorial conduct issue—which to date has focused on the scope of allowable punishment of the defendant based upon nationwide conduct—and the issue of the scope of a permissible nationwide class action. In each realm, for example, pressing common issues include the specific scope of a state's regulatory authority and the competence of a jury (or any other single tribunal) to effectuate that power. Put differently, the introduction of societal compensatory damages—heretofore embedded within punitive damages—forces consideration of the extraterritorial conduct issue in terms other than the scope of allowable punishment. Moreover, to the extent that societal damages have already, if silently, come to comprise a significant portion of punitive damages awards, the very creation of societal damages funds directed to specifically harmed individuals could ameliorate the "double recovery" concern, at least with respect to this portion of punitive damages.

Second, I suggest that a new split-recovery mechanism based on the societal damages theory should mitigate, if not completely overcome, the most salient constitutional objections to existing split-recovery schemes: (1) that the increased role of the state as an active participant in raising and receiving punitive damages implicates the Excessive Fines Clause, (2) that directing a portion of punitive damages to any party other than the plaintiff

effects a taking of the plaintiff's private property, and (3) that instructing jurors that a portion of the punitive award will be directed to the state violates the Due Process Clause.

Third, I turn from constitutional to practical concerns to discuss additional ways in which the societal damages theory might encounter formidable barriers, given its potential power to compound many of the vexing problems that plague class actions. As a preliminary matter, I address the risk of overdeterrence, which might be exacerbated by the addition of yet another mechanism for addressing underdeterrence in a world in which class actions and criminal law might target the same harms. Next, I discuss problems that arise with respect to incentives for litigation, and the ways in which split-recovery schemes can be altered with respect to the manner in which attorneys' fees are calculated in order to affect plaintiffs' and their attorneys' incentives to bring and pursue punitive damages claims. I then address briefly two final problems that arise under both split-recovery and class action frameworks: the potential for sham litigation and the risk of collusive settlements.

Fourth, and finally, I consider the possibly enhanced role of the jury as decisionmaker, at least with respect to the specific harms category of cases. On the one hand, I acknowledge that in practice enhancing the jury's role to consider evidence beyond the facts pertaining to the individual plaintiff before it might prove unmanageable (not to mention potentially impermissible in light of *State Farm*). I also acknowledge that by aggregating claims, the societal damages theory would also increase the power of a single jury. I conclude on a decidedly more optimistic note, however, by suggesting that the jury's role in assessing societal damages emerges as a function that fits comfortably within the traditional prerogative of jury decisionmaking in torts cases. This symbiotic relationship between the jury and societal damages rests upon the compensatory nature of societal damages; that close relationship would seem to enhance the jury's ability to achieve more rational awards of what have hitherto been undifferentiated punitive damages awards, while simultaneously (though indirectly) advancing efficiency objectives.

#### I. EXISTING CONCEPTIONS OF PUNITIVE DAMAGES AND PLAINTIFFS' WINDFALL GAINS

There are few givens when it comes to the centuries-old, highly controversial doctrine of punitive damages. It is thus no small matter that courts and academic commentators on the whole do agree that there are two prevailing justifications for punitive damages: punishment (or retribution)

and deterrence.<sup>16</sup> It is also significant that the conventional historic (and modern) view of punitive damages stresses the punishment function, particularly an individual-harm paradigm, in which a single plaintiff alleges that the defendant acted in an egregiously wrongful manner toward him. This rationale has been defended not only from a philosophical perspective of moral desert, but also as most consistent with the doctrine of punitive damages—in particular, the defendant’s requisite mens rea and the fact that individual plaintiffs receive tort damages (including punitive damages) within our system.<sup>17</sup>

Modern tort cases, however, have exerted increasing pressure upon this individual-specific harm model. In particular, a small but highly visible class of tort cases has emerged in which juries have awarded vast sums in punitive damages to plaintiffs who have brought successful claims against corporate defendants by invoking theories of products liability, negligence, fraud, or certain other torts. In these cases, the plaintiff typically alleges that the corporate defendant engaged in conduct worthy of punishment because the conduct resulted in the reckless imposition of harm on a large class of

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16. See, e.g., *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (“Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to *redress* the concrete loss that the plaintiff has suffered . . . . The latter . . . operate as ‘private fines’ intended to *punish* the defendant and to *deter* future wrongdoing.” (emphasis added)). The Supreme Court uses punishment and retribution interchangeably, as distinct from deterrence. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1521 (2003); see also RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) (“Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.”).

Given that one point of this Article is to demonstrate that these two predominant justifications do not suffice—both as a descriptive and a normative matter—a more exhaustive list of extant justifications may be in order. One influential commentator lists seven purposes of punitive damages: (1) punishing the defendant, (2) specific deterrence, (3) general deterrence, (4) preserving the peace, (5) creating an incentive for private law enforcement, (6) individual compensation, and (7) attorney fee shifting. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982). The theory of societal damages pushes certain of these objectives to extend beyond satisfying the individual plaintiff (or plaintiffs) before the court. In this Article, I deal most explicitly with extensions of the punishment and deterrence goals. But certain of the other rationales are also germane. For example, the private law enforcement rationale could be explored in the realm of the “diffuse harms” category. See *infra* note 380. And the goal of “preserving the peace” might be understood as one underlying rationale of what I term “anti-social” penalties, which I include within the punishment rubric. See *infra* note 41. Neither of Ellis’s final two aims—individual compensation and attorney fee shifting—is a particular focus of the societal damages framework.

17. This Article challenges the strength of these doctrinal barriers to nonpunitive rationales. See Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 749, 817 (2002) (“Within the panoply of tort damages, the punitive damages remedy is unique: only a thin doctrinal thread ties it to individual plaintiffs.”). In particular, the split-recovery schemes described in Part II demonstrate that individual plaintiffs need not be the recipients of these damages, which are determined by focusing upon the widespread impact of the defendant’s conduct, as opposed to an individual plaintiff’s injuries.

individuals.<sup>18</sup> Accordingly, the plaintiff's attorney asks the jury to set the punitive award at a level commensurate with the vast scope of harm threatened or caused to the entire class of individuals, of which the plaintiff is only representative. This practice is in tension with the individual-based elements of punitive damages doctrine discussed above, but in line with other doctrinal features, such as state law standards for the imposition of punitive damages based upon reckless or grossly negligent conduct;<sup>19</sup> the requirement of "public" harm;<sup>20</sup> and federal appellate "reprehensibility" review that considers, as factors relevant to determining the constitutionality of the size of punitive damages in a given case, whether the defendant's conduct "evinces an indifference to or a reckless disregard of the health or safety of others" or "involved repeated actions."<sup>21</sup>

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18. See, e.g., *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 741 (Minn. 1980) (noting that a manufacturer "acted in reckless disregard of the rights of the public").

19. States at present require different evidentiary showings to sustain punitive awards. It is no longer the case that malice or wanton conduct is required; increasingly, state legislatures and courts acknowledge that reckless disregard can suffice. Compare *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 679-80 (Ariz. 1986) ("malice"), with *White Constr. Co. v. Dupont*, 455 So. 2d 1026, 1028 (Fla. 1984) ("something more than gross negligence"), *Wisker v. Hart*, 766 P.2d 168, 173 (Kan. 1988) ("elements of fraud, malice, gross negligence or oppression mingle in controversy"), *Seals v. St. Regis Paper Co.*, 236 So. 2d 388, 392 (Miss. 1970) (gross negligence and "reckless indifference to the consequences"), and *McClellan v. Highland Sales & Inv. Co.*, 484 S.W.2d 239, 242 (Mo. 1972) ("so reckless as to be in utter disregard of consequences"). The requirement of showing malice or wanton conduct has also been eliminated by some state statutes. See, e.g., UTAH CODE ANN. § 78-18-1(1)(a) (2002) (authorizing punitive damages if a tortfeasor acts with "knowing and reckless indifference toward, and a disregard of, the rights of others").

In fact, it might even be argued that the very fact that punitive damages are recoverable in a strict products liability action is at odds with any alleged doctrinal requirement of malice on the part of the defendant. See, e.g., *Toole v. Richardson-Merrell, Inc.*, 60 Cal. Rptr. 398 (Ct. App. 1967) (holding for the first time that punitive damages were recoverable in a strict products liability case); see also *Ciraolo v. City of New York*, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring) ("The term 'punitive damages' . . . fails totally to explain the not unusual use of such damages in situations in which the injurer, though liable, was not intentionally or wantonly wrongful."); *id.* at 245 n.5 (adding that "[p]unitive damages have frequently been awarded in strict products liability cases in which the premise for liability is the design and distribution of a defective product, rather than fault").

20. See, e.g., *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 825 (Fla. 1986) (stating that punitive damages are imposed for egregious conduct that constitutes a "public wrong"); *Rocanova v. Equitable Life Assurance Soc'y of the U.S.*, 634 N.E.2d 940, 944 (N.Y. 1994) ("[A] private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally.").

21. *State Farm*, 123 S. Ct. at 1521. In *State Farm*, the Court further clarified that the "repeated" instances must be of substantially similar misconduct: "Although '[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance,' in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions." *Id.* at 1523 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577 (1996) (alteration in original) (citation omitted)). The caveat "in the context of civil actions" seems important in light of the Court's holdings last Term in the "three strikes" cases. See *Lockyer v. Andrade*, 538 U.S. 63 (2003) (denying habeas for a defendant with a long record of prior offenses, who was sentenced to twenty-five years of imprisonment for stealing videotapes on two occasions); *Ewing v. California*, 538 U.S. 11 (2003) (holding that the Eighth Amendment was not violated where a defendant

Turning away from the retributive view of punishment, law-and-economics scholars have attempted to defend the practice of awarding punitive damages for large-scale recklessness as a mechanism for deterring such conduct. Ideally, from a deterrence perspective the law should require a defendant to internalize the full expected cost of its conduct to others. In so doing, the law gives the defendant, and others like it, appropriate incentives to avoid such conduct in the future. Nevertheless, defendants sometimes are not made to pay the full expected cost of harms caused by their conduct simply because many of those injured will never sue or will not prevail in their suits for reasons aside from the merits. Punitive damages are thus appropriate insofar as they address the underdeterrence or “underliability” problem.

Drawing heavily upon the law-and-economics literature, which elaborates upon this deterrence-based goal of punitive damages, my goal is to establish the existence—and the potential explanatory and normative power—of an additional nonretributive goal of punitive damages, so as to broaden our conception of the potential societal interests at stake. In sum, this Part sets the stage for the introduction of a novel category of damages (hitherto subsumed within punitive damages): societal damages to redress, or compensate for, societal harms.

#### A. *Punishment and Retribution: The Individual Harm Paradigm*

The prevailing justification for punitive damages is individually oriented, retributive punishment. The instrumentalist or behavioral consequences of punishment are not the focus of concern.<sup>22</sup> As a historical matter, punitive damages were predominantly—if not exclusively—linked to some theory of retribution.<sup>23</sup> This retributive understanding, moreover,

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convicted of shoplifting three golf clubs was sentenced to twenty-five years of imprisonment, as authorized under the state’s “three strikes” law). Pam Karlan offers a persuasive explanation for the seeming disconnect between the Court’s jurisprudence in the civil and criminal contexts. See Pamela S. Karlan, *Pricking the Lines: The Due Process Clause, Punitive Damages and Criminal Punishment*, 88 MINN. L. REV. (forthcoming 2004) (manuscript at 27-36, on file with author) (offering several reasons to explain why proportionality review is more attractive to the Supreme Court in punitive damages cases than in criminal sentencing decisions, including federalism concerns, appellate oversight, and political accountability).

22. Because my main interest in this Article is nonpunitive rationales for punitive damages, I do not dwell on theories of the goal of retributive punishment. Several scholars have, however, sought to explicate the role of retribution. See, e.g., Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1397 (1993) (stating that punishment attempts to correct an imbalance between the parties, to acknowledge the worth of the victim, and to send a public signal that the wrongdoer was blameworthy relative to the victim).

23. “Until the mid-20th century, punitive damages were available only for a relatively small group of torts involving conscious and intentional harm inflicted by one person on another. These ‘intentional torts’ included assault and battery, libel and slander, malicious prosecution, false imprisonment, and intentional interferences with property.” Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into “Punishment,”*

persists in modern times. The Supreme Court's admonition last Term in *State Farm* that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered"<sup>24</sup> provides us with an apt starting point for a critical examination of the individual-focused, retributive view of punitive damages.

*State Farm* involved a bad faith failure to settle, within policy limits, an underlying automobile accident case. In the course of making out their claim, the Campbells alleged that for two decades State Farm had pursued a nationwide pattern and practice of deliberately underestimating claims and attempting to shortchange its policyholders.<sup>25</sup> As has become fairly routine in recent cases, the plaintiff's lawyer, in his opening and summation, asked the jury to punish State Farm for its business practices throughout Utah as well as in other states. Over the course of a two-month-long trial, the Campbells were permitted to introduce extensive testimony from more than forty witnesses, including numerous experts, regarding the nationwide fraudulent practices of State Farm.<sup>26</sup>

The jury awarded \$2.6 million in compensatory damages and \$145 million in punitive damages. The trial judge remitted these damages to \$1 million and \$25 million, respectively, but the Utah Supreme Court reinstated the \$145 million punitive award.<sup>27</sup> The court intended to remedy

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54 S.C. L. REV. 47, 50 (2002) (footnotes omitted). There is some debate over whether this is "punishment" on behalf of society or, alternatively, on behalf of the individual plaintiff. Compare Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 628 (2003) ("Historically, then, punitive damages, even when regarded as punishment, were consciously limited to the amount necessary to punish the defendant for the wrong done, and the harm caused, to the individual plaintiff only."), and Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 197-201 (2003) (emphasizing the historical role of punitive damages as personal vindication and redress for insult), with THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 38-39 (New York, John S. Voorhies 1847) ("[P]unitory, vindictive, or exemplary damages . . . blend[] together the interest of society and of the aggrieved individual, and give[] damages not only to recompense the sufferer, but to punish the offender."), and Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 292 (1983) ("As courts have uniformly held, no plaintiff has a right to punitive damages: the purpose of punitive damages is to vindicate the public interest, not that of a particular plaintiff.").

24. *State Farm*, 123 S. Ct. at 1524.

25. See *id.* at 1518-19 (describing the alleged "national scheme to meet corporate fiscal goals by capping payouts on claims company wide").

26. *Id.* at 1519. According to the Utah Supreme Court, the trial court "denied State Farm's request to exclude all evidence from which the jury could infer that the Campbells were victims of an extensive, intentional scheme to defraud State Farm's policyholders" in order to allow the Campbells to rebut State Farm's defense that its actions vis-à-vis the Campbells were an isolated incident. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1156 (Utah 2001), *rev'd*, 123 S. Ct. 1513. The U.S. Supreme Court disagreed and stated further that, in any event, the jury should have been given a limiting instruction. *State Farm*, 123 S. Ct. at 1522-23. The Supreme Court's reasoning here is questionable, given that, at trial, State Farm failed to propose such a limiting instruction.

27. *Campbell*, 65 P.3d at 1171-72.

“the harmful effect” of over two decades’ worth of State Farm’s nationwide conduct “on the larger community of all those who deal[t] with the company.”<sup>28</sup> Specifically, the court took into account how State Farm’s conduct “affected other people as well as the Campbells.”<sup>29</sup> And it echoed the trial court’s sentiment that “[t]he harm is minor to the individual but massive in the aggregate.”<sup>30</sup> The court also emphasized the trial court’s finding that “State Farm’s fraudulent practices were consistently directed to persons—poor racial or ethnic minorities, women, and elderly individuals—who State Farm believed would be less likely to object or take legal action.”<sup>31</sup> In sum, State Farm’s scheme “had far-reaching negative effects on both its insureds and society in general.”<sup>32</sup>

The U.S. Supreme Court majority roundly disagreed with this approach. The Court reproached the state court for having “condemned” State Farm “for its nationwide policies rather than for the conduct direct[ed] toward the Campbells.”<sup>33</sup> Indeed, several times the Court explicitly tied the award of punitive damages to the individual harm suffered by the plaintiff, emphasizing that “[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.”<sup>34</sup>

Thus, at first glance, it might appear that the Court endorsed a fairly narrow—and exclusive—view of punitive damages as retributive-based punishment for individual, private harms.<sup>35</sup> The Court stated that “[d]ue

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28. *Id.* at 1149.

29. *Id.* (“The larger the number of people affected, the greater the justification for higher punitive damages.”).

30. *Id.* (quoting the trial court).

31. *Id.* at 1148; *see also id.* at 1154 (“State Farm’s fraudulent conduct has been a consistent way of doing business for the last twenty years, directed specifically at some of society’s most vulnerable groups.”).

Arguing in favor of affirming the \$145 million award, counsel for the Campbells emphasized at oral argument before the U.S. Supreme Court that “the ratio of the number of people [State Farm] hurt to the number who are going to be motivated to sue and able to sue is very low. . . . [A] huge number will be hurt. A very small number are going to be able to make it through that filter.” Oral Argument at 45, *State Farm* (No. 01-1289).

32. *Campbell*, 65 P.3d at 1158.

33. *State Farm*, 123 S. Ct. at 1521; *see also id.* (criticizing the state court for using the case “as a platform to expose, and punish, the perceived deficiencies of State Farm’s operations throughout the country”); *id.* at 1522 (“From their opening statements onward the Campbells framed this case as a chance to rebuke State Farm for its nationwide activities.”).

34. *Id.* at 1523; *see also id.* (“[O]ur review of the Utah courts’ decisions [does not] convince us that State Farm was only punished for its actions toward the Campbells.”); *id.* at 1524 (“The precise [punitive damages] award in any case . . . must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.”).

35. Such a view has been advocated by certain defense practitioners and academics. *See, e.g.*, Andrew L. Frey & Evan M. Tager, *Punitive Damages*, in 3 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS 307, 321 (Robert L. Haig ed., 1998) (“[T]he punishment in each individual case [should be] apportioned to the impact of the defendant’s conduct on the particular plaintiff(s).”); Victor Schwartz, *Ohio Court Overreaches*, USA TODAY, Jan. 9, 2003, at 10A (“[A] punitive damage award is granted for a wrongdoing to a plaintiff; it should not be an award for alleged wrongs that a defendant has done to society as a whole.”); *see also* Colby, *supra* note 23,

process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis."<sup>36</sup>

Upon closer examination, however, it becomes clear that the Court's foremost concern in stressing such an individual harm paradigm (at least in the case before it) appears to be to ensure that "[a] defendant's *dissimilar acts*, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."<sup>37</sup> Indeed, in discussing the relationship "between harm, or potential harm, to the plaintiff and the punitive damages award,"<sup>38</sup> the Court seems to contemplate explicitly the use of "harm to the people of Utah," at least in cases where such an "adverse effect on the State's general population" could be shown.<sup>39</sup> At the same time, the Court also explicitly recognized that "[l]arger damages might . . . 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover."<sup>40</sup>

What is of prime significance in this Article is extracting this "compensatory" component from the morass that falls within the umbrella label of punitive damages. To do so, I wish to advocate a disaggregated view of what I consider to be the multifaceted concept of punitive damages, which in fact includes nonpunitive as well as punitive goals.<sup>41</sup> Another way

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at 636 ("[T]he punitive damages doctrine can be thought of as an intellectual precursor to the modern victims' rights movement in the criminal law.").

36. *State Farm*, 123 S. Ct. at 1523. The Court premised this due process right on the need to cabin the "possibility of multiple punitive damages awards for the same conduct," which arises because "in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *Id.* The Supreme Court's language here is certainly open to interpretation. The Florida *Engle* court reads it as barring the determination of any aggregate punitive damages award. See *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 456 n.26 (Fla. Dist. Ct. App. 2003) ("In sum, punitive damages cannot be assessed in the aggregate. Punitive damages must be assessed on an individual basis, in relation to each class member's compensatory damages, if any."); see also *infra* text accompanying notes 232-233.

37. *State Farm*, 123 S. Ct. at 1523 (emphasis added); see also *id.* at 1524 ("[B]ecause the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.").

38. *Id.* at 1524.

39. *Id.* at 1525.

40. *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 593 (1996) (Breyer, J., concurring)).

41. My focus is particularly on the societal goals served by punitive damages. In this Article, I focus on *nonpunitive* societal rationales. By choosing this emphasis, however, I do not mean to imply that the possible societal interest in punishment is of lesser importance. A full taxonomy of societal punitive damages would include not only the societal compensatory damages component, which I propose in this Article, but also a separate category of retributive punishment-based damages, which I term "anti-social penalties." These anti-social penalties could be individually or societally focused. An example of the individually based penalties might be those imposed (separate and apart from other deterrence or compensation-based awards) for the commission of traditional malice or intentional torts directed at a certain person. Societally based anti-social penalties might apply in the context of "unrealized" torts, such as conduct that exposes the public to the risk of great harm. See generally John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized*



of stating this would be to say that, as a normative matter, the prevailing justification for punitive damages—to punish and to deter—constitutes at least two separate and distinct goals, as opposed to one (that of retributive punishment) whose incidental effect may be to deter. Notwithstanding the fact that the retributive-based and deterrence-based components of punitive damages are not fully separable,<sup>42</sup> and indeed have potentially synergistic or overlapping effects, there are significant gains to be achieved from treating them as conceptually distinct.

### B. *Deterrence: The Societal Harm Paradigm*

Commentators (mostly of the law-and-economics persuasion) have noted that “punitive damages” may be a misnomer if applied to the entire category of extracompensatory damages, i.e., all damages given above and beyond individual compensatory damages. This is a matter of consequence because the misnomer allows the retributive or punishment function to overshadow completely the deterrence function.<sup>43</sup>

It bears repeating that I take as a starting point the normative view that economic deterrence is *one* goal of punitive damages (and our tort law system), but not, as some law-and-economics scholars would have it, the exclusive goal.<sup>44</sup> My position, instead, is consonant with the view expressed

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*Torts*, 88 VA. L. REV. 1625 (2002); Richard A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121 (1998). There might also be room within this category for species of “moral outrage” torts. These anti-social penalties are more akin to criminal fines and raise distinct issues with respect to the role of legislatures and courts in setting such penalties—issues which, by and large, are not the focus of this Article.

42. Then-Chief Judge Richard Posner, for example, has observed that the punitive damages formulation—to deter and to punish—is cryptic, since deterrence is a purpose of punishment, rather than, as the formulation implies, a parallel purpose, along with punishment itself, for imposing the specific form of punishment that is punitive damages.” *Kemezy v. Peters*, 79 F.3d 33, 34 (7th Cir. 1996) (Posner, C.J.).

43. See, e.g., *Ciraolo v. City of New York*, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring) (“[P]unitive damages . . . improperly emphasize[] the retributive function of such extracompensatory damages at the expense of their multiplier-deterrent function.”); Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 7-14 (1990) (termining punitive damages “augmented awards” based solely on considerations of deterrence); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 890-91 (1998) (“[T]he adjective ‘punitive’ may sometimes be misleading. . . . [E]xtracompensatory damages may be needed for deterrence purposes in circumstances in which the behavior of the defendant would not call for *punishment*.”). Nonetheless, the multiplier approach advocated by Polinsky and Shavell, focusing on the underenforcement problem due to nondetection of wrongdoing, hews more closely to the punishment model of punitive damages, see *infra* Subsection I.B.2, than does the societal compensatory-based rationale that I develop in this Article.

44. See, e.g., Dan B. Dobbs, *Ending Punishment in “Punitive” Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831 (1989) (arguing that deterrence is the only legitimate goal of punitive damages); Polinsky & Shavell, *supra* note 43, at 874 (asserting that since “punitive damages ordinarily should be awarded if, and only if, an injurer has a chance of escaping liability for the harm he causes,” such underdeterrence damages should in essence comprise the entire category of punitive damages (emphasis omitted)). An important recent article

by the Supreme Court that “deterrence is not the only purpose served by punitive damages,” nor is its interest furthered “*only* by economically ‘optimal deterrence.’”<sup>45</sup> But deterrence is nonetheless a very significant justification for punitive damages, at least in certain types of torts.<sup>46</sup>

At least since the 1960s, there has been a proliferation of punitive damages awards assessed on the basis of reckless (as opposed to malicious) conduct.<sup>47</sup> Accordingly, it makes sense to entertain seriously the idea of a

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has made some strides toward extending Polinsky and Shavell’s analysis in order to attempt to model explicitly the desire for punishment along with a concern for economic efficiency. Peter Diamond, *Integrating Punishment and Efficiency Concerns in Punitive Damages for Reckless Disregard of Risks to Others*, 18 J.L. ECON. & ORG. 117 (2002).

45. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 439 (2001). An argument could be made that the Supreme Court has distanced itself from this view by its embrace of an individual harm, retributive punishment paradigm in *State Farm*. See *supra* Section I.A. Along these lines, the Court explicitly rejects reliance on the kind of “underenforcement error” evidence that has been used to justify a deterrence-based view of punitive damages. See *State Farm*, 123 S. Ct at 1519; see also *id.* at 1525 (“[T]he argument that State Farm will be punished in only the rare case . . . had little to do with the actual harm sustained by the Campbells.”). Nevertheless, the Court does reiterate repeatedly that the purpose of punitive damages is twofold: retribution (or punishment) and deterrence. See *id.* at 1519. Although providing no further explication of its meaning of “deterrence,” the Court in no way disavows its previous discussion in *Cooper Industries*; indeed, to the contrary, the Court cites its previous decision approvingly. I discuss below what is nonetheless an important distinction between the “punitive” multiplier and the “remedial” multiplier suggested by the societal damages theory. See *infra* text accompanying notes 195-198.

46. Given the inherent difficulties of measurement, it is difficult to know, as an empirical matter, whether punitive damages in fact deter. Viscusi has attempted to demonstrate empirically that punitive damages do not deter. See W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285 (1998); W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381 (1998). But Theodore Eisenberg and Martin Wells, in a rejoinder, have argued that Viscusi’s analysis “rests on an erroneous view of states’ punitive damages regimes.” Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59, 73 n.45 (1999). Even if punitive damages did deter and one could tackle more seriously the job of measuring that effect (a daunting task), Eisenberg argues that Viscusi’s sample size was too small to expect to detect that effect at a statistically significant level. See Theodore Eisenberg, *Measuring the Deterrent Effect of Punitive Damages*, 87 GEO. L.J. 347, 349-52 (1998).

47. See *supra* note 12 (discussing the significance of punitive damages in fraud, employment discrimination, civil rights, and products liability cases); see also *supra* notes 18-19. It may well be the case that, in terms of absolute numbers, punitive damages are awarded in relatively few products liability cases. Nonetheless, the point here is that they are awarded in this category of case—which does not require “malicious” conduct—at all.

Moreover, there is some empirical evidence that the number of products liability cases in which punitive damages are awarded may be increasing. Early studies confirmed that juries infrequently awarded punitive damages in such cases. See, e.g., MARK PETERSON ET AL., PUNITIVE DAMAGES: EMPIRICAL FINDINGS (1987) (reviewing 24,000 jury verdicts in Cook County, Illinois, and San Francisco, California, from 1960 to 1984, and identifying six jury trials in which punitive damages were awarded in products liability cases); Daniels & Martin, *supra* note 11, at 38 tbl.5 (reviewing approximately 25,000 jury verdicts in forty-seven jurisdictions from 1981 to 1985, and finding 967 products liability cases, of which thirty-four resulted in punitive damages awards). A study covering the years 1965 to 1990 uncovered 355 punitive damages verdicts in products liability jury-trial cases across the nation. See Thomas Koenig &

nonretributive rationale for punitive damages. Moreover, the existence of a nonretributive rationale for punitive damages might reshape the terms of the discussion surrounding several key issues within the broader punitive damages debate.

1. *Economic Theory: The Internalization of Full Costs*

I begin with an exploration of the economic concept of optimal deterrence, which “is achieved by threatening . . . defendant[s] with damages equal to the aggregate tortious loss.”<sup>48</sup> The goal is to force tortfeasors, and others similarly situated, to internalize the harms to society caused by their conduct. The basic idea is that full internalization of the harms will lead to socially efficient outcomes. Social welfare is maximized by minimizing the sum of the costs of (1) losses produced by accidents; (2) defendants’ efforts to exercise care; (3) plaintiffs’ efforts to take precautionary measures; and (4) the costs of administering the torts (or alternative) system.

Ordinary compensatory damages, in addition to compensating plaintiffs or making them whole, also contribute to this deterrent function:

The association of negligence with purely compensatory damages has promoted the erroneous impression that liability for negligence is intended solely as a device for compensation. Its economic function is different; it is to deter uneconomical accidents. As it happens, the right amount of deterrence is produced by compelling negligent injurers to make good the victim’s losses. Were they forced to pay more (punitive damages), some economical accidents might also be deterred; were they permitted to pay less than compensation, some uneconomical accidents would not be

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Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Product Liability*, 16 JUST. SYS. J. 21, 34 (1993).

In addition to this empirical “real world” evidence, there is a general perception among researchers that this category of “recklessness” punitive damages cases is growing in importance. Thus, for example, a recent book by Cass Sunstein and collaborators focuses all of its experimental research on this category of cases. CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* 221 (2002) (“The issue of malice rarely arises in the accidental injury cases (products liability and environmental damages) that are the focus of the present research program.”).

48. David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 853 (2002). Indeed, one now-well-recognized goal of the tort system is to ensure that actors bear the costs of their activities. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 68-94 (1970); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987).

deterred. It is thus essential that the defendant be made to pay damages and that they be equal to the plaintiff's loss.<sup>49</sup>

Thus, an individual or a firm will be deterred from persisting in unreasonably risky conduct expected to cause potentially widespread harm by the prospect of the imposition of an additional cost in the form of a compensatory damages judgment.<sup>50</sup> Indeed, to the extent that compensatory damages approximate the full costs of the defendant's activities, they achieve optimal deterrence. This raises the question of why punitive damages are necessary at all, at least for deterrence purposes. One answer lies in the problem of underdeterrence arising from defendants' ability to evade liability for wrongdoing.

Total costs may not be sufficiently reflected in compensatory damages because defendants often evade liability altogether. There are at least three categories of situations that lead to this problem of underdeterrence (or "underliability") of defendants.<sup>51</sup> The first category involves cases in which the victim is aware of his or her injuries but, for some reason, does not bring a lawsuit against the tortfeasor either because (1) the probable compensatory damages are too low;<sup>52</sup> or (2) the victim is not particularly litigious, is unsophisticated, lacks the necessary financial resources, or perhaps has been harmed by a "shaming tort."<sup>53</sup> This tort category arises

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49. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 143 (2d ed. 1977); *see also*, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." (internal quotation marks omitted)); *In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) ("Whether . . . compensatory damages . . . deter bad future acts depends on whether [they] greatly exceed the expense of avoiding such accidents, not whether the amounts are compensatory or punitive.").

50. As Ian Ayres has emphasized, there is a difference, from a deterrence perspective, between lump-sum payments and some form of ongoing payments of fines or penalties. *See* Ian Ayres, *Using Tort Settlements To Cartelize*, 34 VAL. U. L. REV. 595, 599 (2000). Specifically, Ayres contrasts lump-sum awards that, as sunk costs, should not affect the marginal cost of future service, with the tobacco settlement, which adds to the marginal costs of future sales. Of course, some punitive damages awards encourage defendants to take new precautions, which also add to marginal cost.

51. There is also underdeterrence because not all deserving plaintiffs win. Indeed, for any particular cause of action, we can specify "exogenous" and "endogenous" barriers to the rate of litigation. Exogenous barriers include immunity doctrines, statute of limitations bars, and restrictive standing doctrines. Endogenous barriers include litigation costs that exceed the expected award.

52. Class actions are a potential solution to this problem of "negative value" claims. *See infra* note 200 and accompanying text.

53. A wide variety of torts might fit the bill. Constitutional torts provide a good example: [T]he conditions of constitutional tort litigation for harm caused by law enforcement officials are ones in which the deterrent effect is likely to be on the low side. The potential plaintiffs, after all, are individuals who are in contact with the criminal justice system, generally as suspects or defendants. Many are unlikely to bring suit for harm suffered, whether because of ignorance of their rights, poverty, fear of police reprisals, or the burdens of incarceration. Moreover, in many cases the harm suffered by individuals from the constitutional violation itself may be small, widely dispersed, and

from “overt acts” by the defendant. By contrast, the second category arises from “concealed acts,” where the injurer has a chance of escaping liability either because (1) the injuries suffered are concealed or difficult to detect; or (2) while the harm can be detected, the identity of the defendant, who has covered his tracks, is unknown. The classic example of the latter is the case of the midnight dumping of toxic substances.<sup>54</sup> The third and final category is comprised of more “diffuse” societal harms, which could stem from either overt or concealed acts by the defendant. In each of these categories, in theory, the addition of punitive damages in some amount above and beyond compensatory damages is warranted so that the wrongdoer internalizes all of the costs of its actions, and is thus appropriately deterred from causing harm. Of course, assessing the right amount of punitive damages to reach this result is where the real difficulty arises.

## 2. *The Punitive Damages “Multiplier” and Its Limitations*

A. Mitchell Polinsky and Steven Shavell have suggested a “punitive damages multiplier” formula for calculating the amount of punitive damages needed to achieve optimal deterrence: Total damages should equal the amount of loss in a particular case, multiplied by the inverse of the probability that the injurer will be found liable.<sup>55</sup> According to Polinsky and

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intangible, providing little incentive for potential plaintiffs to sue, especially given the lack of sympathy that this group of plaintiffs can expect from the trier of fact.

Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284 (1988) (footnotes omitted); see also *infra* note 167.

It may also be that potential litigants are deterred by the reality that they would be subject to much unpleasantness in the legal system. See, e.g., Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 64 (1994) (noting that some tort plaintiffs are frustrated by “mass production techniques”). Moreover, victims of certain types of torts that are particularly demeaning might be ashamed to come forward to press charges; these “shaming torts” might include violations of bodily integrity, sexual harassment, and the like. See *infra* note 170 and accompanying text.

54. A more macabre recent example can be found in a number of prominent scandals involving crematoriums and funeral homes that have been the target of class action lawsuits following disclosure of improper handling of corpses, including a \$31 million settlement in 1984 with the relatives of 5000 people whose ashes were dumped over land rather than scattered over the mountains and ocean; a \$25 million settlement in 1991 to relatives of people whose body parts were harvested and sold, and the bodies cremated in groups, with mixed ashes returned to the families; and, most recently, a suit for improper disposal of hundreds of bodies at a Georgia crematorium. See Duane D. Stanford, *Lawyers Target Funeral Homes, Not Crematory*, ATLANTA J.-CONST., Mar. 3, 2002, at 1A. A Georgia federal district court has certified a class of next of kin of the decedents to proceed against the Georgia crematory and the funeral homes that allegedly used it for their cremations. See *In re Tri-State Crematory Litig.*, 215 F.R.D. 660 (N.D. Ga. 2003). With respect to punitive damages, however, the court rejected class certification, given that the plaintiffs were from twenty-four different states, whose standards for recovery of punitive damages varied. *Id.* at 679.

55. Polinsky & Shavell, *supra* note 43, at 874 (“When an injurer has a chance of escaping liability, the proper level of *total damages* to impose on him, if he is found liable, is the harm caused multiplied by the reciprocal of the probability of being found liable.”). Robert Cooter

Shavell, “[P]unitive damages ordinarily should be awarded if, and only if, an injurer has a chance of escaping liability for the harm he causes.”<sup>56</sup>

Inspired by Jeremy Bentham’s and Gary Becker’s criminal law enforcement theories, this punitive damages multiplier approach is based upon an estimation of the defendant’s likelihood of escaping detection for wrongdoing.<sup>57</sup> Polinsky and Shavell posit a variety of devices that might be used to estimate the probability of underdetection; these include, for example, setting up electronic monitors on roadways to track the number of dump trucks that cross certain routes in the dead of night.<sup>58</sup>

The utility of the punitive damages multiplier model is, however, limited. First, the approach confines itself to a somewhat narrow conception

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termed this formula the “rule of the reciprocal.” Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1148 (1989). For a cogent summary of criticisms of the multiplier analysis as oversimplified and incomplete, see KEITH N. HYLTON & THOMAS J. MICELI, SHOULD TORT DAMAGES BE MULTIPLIED? (Boston Univ. Sch. of Law, Working Paper Series, Working Paper No. 02-05, 2002), [http://www.bu.edu/law/faculty/papers/pdf\\_files/HyltonMiceli060302.pdf](http://www.bu.edu/law/faculty/papers/pdf_files/HyltonMiceli060302.pdf). I do not dwell on these nuances of the multiplier rule, for the proposal I advance in this Article—that of societal damages assessed by legislatures, juries, and courts—serves only to approximate and to extend the multiplier rule, and thus the further refinements to the rule take on much less significance.

56. Polinsky & Shavell, *supra* note 43, at 874. There are other ways in which punitive damages could “price” conduct in order to deter it effectively. In contrast to Polinsky and Shavell’s “optimal deterrence” multiplier theory, for example, Keith Hylton advocates what he terms “complete deterrence.” The idea is to make certain expropriations valueless to the expropriator. See Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 456 (1998). Choosing between these two possible measures moves beyond the scope of this Article. Nonetheless, the framework of property rules and liability rules propounded by Guido Calabresi and Douglas Melamed might provide a useful framework for choosing between these two measures. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). The cost-internalization approach—advocated by Polinsky and Shavell—is akin to “liability rule” protection, whereas the disgorgement of profits stemming from the harmful conduct—advocated by Hylton—approximates a higher level of “property rule” protection. Although the analogy does not appear in the literature, Keith Hylton suggested its relevance in an amicus brief he submitted in *State Farm*. See Brief of Keith N. Hylton as Amicus Curiae in Support of Respondents at 12 n.16, *State Farm Mut. Auto Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) (No. 01-1289).

Certain torts, such as sexual assault, may well belong in a further category, attracting what I call “super-property rule protection,” where the purpose of the punitive damages component would be to “prohibit” even voluntary market-based exchanges. Following this terminology, anti-social penalties (i.e., the residual component of punitive damages remaining once the societal damages component is extracted) could be described as “super-property” rule protections, reserved for situations in which there were no societal benefits derived from the conduct at issue. See *supra* note 41.

57. The idea that punishment levels should vary with the reciprocal of the probability of detection dates back to Jeremy Bentham. See JEREMY BENTHAM, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM, 365, 402 (John Browning ed., Russell & Russell Inc. 1962) (1843) (“[A]s there are always some chances of escape, it is necessary to increase the value of the punishment, to counterbalance these chances of impunity.”). This idea is further explored in Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 POL. ECON. 169 (1968).

58. See Polinsky & Shavell, *supra* note 43, at 891-92 (“[P]ressure-sensitive recording devices laid across the road could be used to determine the volume of traffic on the road at night, and the resulting data could be employed to calculate the odds that someone would drive by during a particular interval of time.”).

of underdeterrence or, more precisely, defendants' underliability. Instead of total cost internalization, it suggests that augmented (or extracompensatory) damages are justified in a more limited realm: where a defendant's harm is difficult to detect.<sup>59</sup> But this limitation fails to include other potentially significant categories, including instances where there is more "diffuse" societal harm, or (relatedly) where an individual is subject to a shaming tort or a constitutional tort. In other words, the punitive multiplier, which focuses on underenforcement error due to nondetection of harms, is in some sense a subset of the broader economic deterrence goal of internalization of total costs.

Second—and of particular legal importance—the Supreme Court, at least in *State Farm*, cast doubt upon use of a strict punitive damages multiplier.<sup>60</sup> Despite the fact that Utah, like other jurisdictions, considers deterrence as a factor when conducting appellate review of punitive damages awards,<sup>61</sup> the U.S. Supreme Court emphasized that "the argument that State Farm will be punished in only the rare case . . . had little to do with the actual harm sustained by the Campbells."<sup>62</sup> Indeed, according to

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59. The multiplier approach of Polinsky and Shavell harkens back to Bentham but captures the essence of only one of Bentham's "Rules" regarding the measure of punishment. Among those that are significantly excluded are: (1) "[t]hat the value of the punishment must not be less, in any case, than what is sufficient to outweigh that of the profit of the offence," BENTHAM, *supra* note 57, at 399; (2) that "[t]he punishment should be adjusted in such manner to each particular offence, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it," *id.* at 401; and (3) "[t]hat the value of the punishment may outweigh the profit of the offence, it must be increased in point of magnitude, in proportion as it falls short in point of certainty." *Id.* The multiplier approach instead focuses on the following Benthamite "Rule":

When the act is conclusively indicative of a habit, such an increase must be given to the punishment as may enable it to outweigh the profit, not only of the individual offence, but of such other like offences as are likely to have been committed with impunity by the same offender.

*Id.* at 402. Underdetection is one salient source of such lack of certainty, feeding the "chance[] of escape." *Id.* But it is by no means the exclusive source.

60. See *supra* note 45. What is not clear, however, is whether the Court would have similarly disavowed use of a multiplier where defendant's conduct (1) had a sufficient nexus to the type of conduct directed toward the plaintiff, and (2) harmed other individuals within the state of Utah.

61. See *Crookston v. Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991). This case outlines that, when awarding punitive damages, courts should consider:

(i) the relative wealth of the defendant; (ii) the nature of the alleged misconduct; (iii) the facts and circumstances surrounding such conduct; (iv) the effect thereof on the lives of the plaintiff and others; (v) the probability of future recurrence of the misconduct; (vi) the relationship of the parties; and (vii) the amount of actual damages awarded.

*Id.* at 808; see also *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 941 (Utah 1993) (concluding that a punitive damages multiplier is warranted when "a company [can] predict that its systematic fraudulent conduct [will] evade detection in many instances"). As mentioned, in *BMW v. Gore*, the U.S. Supreme Court made clear that "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). At least one of these interests is deterrence.

62. *State Farm Mut. Auto. Ins. Co. v. Cambell*, 123 S. Ct. 1513, 1525 (2003). In reinstating the \$145 million award, the Utah Supreme Court cited (among other things) the trial court's finding—one not challenged by State Farm on appeal—that "State Farm's actions, because of

the Court, such an argument would only support “a departure from well-established constraints on punitive damages.”<sup>63</sup>

Finally, with the adoption of the “penal” punitive damages multiplier come various nefarious consequences, particularly with respect to the allocation and distribution of punitive awards, the issue to which I turn next.

### C. *The Plaintiff’s Windfall as a Necessary Consequence*

Neither the individual-harm, retributive-punishment paradigm nor the “punitive” multiplier approach is motivated by, or concerned with, a plaintiff’s windfall gains. In *State Farm*, the Court paid no attention to the distribution of the punitive damages, either as cause or effect, in emphasizing an individual retributive harm model of punitive damages.<sup>64</sup> Likewise, conventional economic opinion has traditionally remained completely agnostic with respect to the distribution of punitive damages.<sup>65</sup> It has long regarded the plaintiff’s windfall as a necessary byproduct of adequately deterring the defendant. The traditional focus of punitive

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their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability.” *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1154-55 (Utah 2001), *rev’d*, 123 S. Ct. 1513.

63. *State Farm*, 123 S. Ct. at 1525. The Court, however, provided scant reasoning here. Indeed, in almost the same breath in which it criticized the punitive multiplier approach, the Court echoed approvingly its statement from *Gore* that a higher ratio of punitive to compensatory damages might be necessary where “the injury is hard to detect.” *Id.* at 1524 (internal quotation marks omitted).

64. The Court makes one cryptic reference to the unfairness of defending a massive punitive damages award by reference to *State Farm’s* assets, “which, of course, are what other insured parties in Utah and other States must rely upon for payment of claims.” *Id.* at 1525. This remark is somewhat ironic given the Court’s complete neglect of the distribution of the punitive damages in the case before it. Given this, I think it is fair to say that the Court’s embrace of the individual-harm, retributive-punishment paradigm is motivated exclusively by its due process concerns and the lack of procedural protections faced by civil defendants. *See id.* at 1520 (“Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding.”); *see also infra* notes 286-288 and accompanying text.

65. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 78 (1972) (“[T]hat the damages are paid to the plaintiff is, from an economic standpoint, a detail. It is payment by the defendant that creates incentives for more efficient resource use. The transfer of the money to the plaintiff affects his wealth but does not affect efficiency or value.” (footnote omitted)). Here, Judge Posner was discussing compensatory damages, but the same argument would hold for punitive damages as well. In a slightly different vein, an early commentator on the punitive damages debate noted:

If wealth is taken from a defendant to achieve retribution or deterrence or for other reasons, we must do something with the money. It could be destroyed as is often done with confiscated contraband, deposited in the public treasury as are fines, donated to an object of our benevolence, or randomly distributed. That none of these uses has been chosen may reflect society’s decision that the best use of the wealth acquired through punitive damages—the use that will result in the greatest increase in welfare, utility or happiness—is to compensate plaintiffs for losses or attorneys’ fees.

Ellis, *supra* note 16, at 11.



damages scholarship has been on controlling and sanctioning defendants' behavior, without directly considering the effect of the receipt of punitive damages on the conduct of plaintiffs (or their attorneys).<sup>66</sup>

More recent scholarship, however, has identified two potential inefficiencies associated with windfall awards to plaintiffs: unnecessary or frivolous litigation and inadequate precautionary measures undertaken by plaintiffs.<sup>67</sup> To address these inefficiencies, A. Mitchell Polinsky and Yeon-Koo Che, in a seminal paper, advocate the "decoupling" of the liability system, such that the award to the plaintiff could be either greater than or less than the payment by the defendant.<sup>68</sup> For any given level of "coupled" liability (i.e., where the plaintiff receives an award exactly equal to the amount paid by the defendant), Polinsky and Che's model demonstrates that there exists a "decoupled" system of liability that lowers social costs (which are defined as the sum of the injurer's cost of taking care, the victim's expected harm, and litigation costs).<sup>69</sup> As Polinsky and Che

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66. See, e.g., Galligan, *supra* note 43, at 58 ("[F]rom the pure perspective of deterrence, the windfall concept is irrelevant."). Nor is this, by any means, an "outdated" view. David Rosenberg is a strong proponent of the view that we should focus our attentions on deterrence and not on distribution of moneys to any particular victims. See David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002).

67. See Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 763 (1989); Polinsky & Shavell, *supra* note 43, at 921-23; James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1165 (1984). For arguments that the defense of contributory negligence solves the victim precaution problem when courts award punitive damages, see Cooter, *supra* note 55, at 1175 n.57.

68. A. Mitchell Polinsky & Yeon-Koo Che, *Decoupling Liability: Optimal Incentives for Care and Litigation*, 22 RAND J. ECON. 562, 562 (1991); see also Polinsky & Shavell, *supra* note 43, at 923 ("Decoupling mitigates the propensity of punitive damages awards to encourage unnecessary litigation, but does not dilute deterrence because defendants' damage payments are unaffected."). David Rosenberg has extended this principle in the mass torts context. See Rosenberg, *supra* note 66, at 1874. Rosenberg has outlined a model whereby a "class action court . . . could impose class-wide liability and damages, but pay compensation only for claims of serious loss should they arise." *Id.*

Polinsky and Che also noted that "decoupled liability has been proposed in the context of private antitrust suits." Polinsky & Che, *supra*, at 562 & n.3 (citing Warren F. Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075 (1980)); see also A. Mitchell Polinsky, *Detrebling Versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement*, 74 GEO. L.J. 1231, 1231 (1986) (noting that Schwartz's article was unique in proposing the decoupling of antitrust damages, whereas most proposals contemplate "detrebling"). This idea has likewise been applied in the takings context by Michael Heller and James Krier. See Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 1000 n.13 (1999) ("Our development and application of uncoupling in the takings context is novel, but the general idea of separating two things ordinarily tied together has appeared before.").

69. A fairly simple insight underlies their mathematical model: Assume a given level of liability and corresponding level of care exercised by the defendant. First, increase the fine imposed on the defendant. This will cause the defendant to exercise greater caution. Second, lower the recovery to each individual plaintiff. This will reduce the plaintiff's incentive to bring suit, which correspondingly induces the defendant to take less care. (Note that Polinsky and Che do not differentiate between the plaintiff's incentive to bring suit based on amount of recovery and

acknowledge, their system of decoupled liability draws heavily upon Gary Becker's theory of public enforcement: Namely, the best system of public enforcement involves increasing fines on the few defendants who are apprehended as opposed to investing resources in apprehending more wrongdoers so as to achieve any given amount of deterrence with the lowest investment in detection resources.<sup>70</sup>

Both the multiplier approach and the idea of decoupling have been embraced in the law-and-economics academic literature, and the former (at least in broad principle) by a few federal judges.<sup>71</sup> Its more tepid reception in the broader academic torts literature and in practice might stem, at least in part, from its severance of the link between deterrence and compensation and from its lack of any attention to distributional consequences.

## II. NASCENT DEVELOPMENTS IN THE STATES FOCUSING ON DISTRIBUTION OF PUNITIVE DAMAGES AWARDS

While largely ignored by the Supreme Court and the law-and-economics literature, several states, in both legislative and judicial arenas, have confronted head-on the unfairness of plaintiffs' windfall gains as well as the more fundamental disconnect between the societal purposes for which punitive damages are awarded and their receipt by individual plaintiffs. The central concept—implicit in the modern innovations of split-recovery schemes—is that societal, as opposed to individual, interests may be vindicated by punitive damages.<sup>72</sup> Indeed, as recognized most recently

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that of his attorney, who is most likely operating on a contingency basis. *See infra* Subsection V.C.2.) The amount of recovery should be lowered until the level of care exercised by the defendant is back to the initial level. Hence, the defendant still has the same incentive to exercise care because he faces a larger penalty for each violation, but there are "litigation cost savings" because plaintiffs will bring fewer suits.

70. *See* Becker, *supra* note 57, at 169. Indeed, Polinsky and Che suggest that their system is a "private litigation analogue" to Becker's theory of public enforcement. Polinsky & Che, *supra* note 68, at 569.

71. *See, e.g.,* Perez v. Z Frank Oldsmobile, Inc., 223 F.3d 617, 621 (7th Cir. 2000) (Easterbrook, J.) ("Frauds often escape detection, and the need to augment deterrence of concealable offenses is a principal justification of punitive damages."); Ciraolo v. City of New York, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring) ("Such a [multiplier] conception of punitive damages, again, is not new, and it has been recognized by courts as well as scholars."); Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996) (Posner, C.J.) (reasoning that "[w]hen a tortious act is concealable, a judgment equal to the harm done by the act will underdeter," since the tortfeasor "will not be confronted by the full social cost of his activity"); Zazú Designs v. L'Oréal, S.A., 979 F.2d 499, 508 (7th Cir. 1992) ("Punitive damages are appropriate when some wrongful conduct evades detection; a multiplier then both compensates and deters."); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) ("A higher ratio [of punitive to compensatory damages] may . . . be justified in cases in which the injury is hard to detect . . ."). It remains to be seen whether *State Farm* has, in effect, disavowed this principle. *See supra* notes 45, 60-63 and accompanying text.

72. *See, e.g.,* Stroud v. Lints, 790 N.E.2d 440, 445 (Ind. 2003) ("Current law recognizes that punitive damages may serve the *societal* objective of deterring similar conduct by the defendant or others by way of example." (emphasis added)); DeMendoza v. Huffman, 51 P.3d 1232, 1238

by the Ohio Supreme Court as it divided a large punitive damages award between the plaintiff and a court-designated charity recipient, “At the punitive-damages level, it is the *societal* element that is most important.”<sup>73</sup> This decision, as well as those interpreting split-recovery statutes, brings the windfall issue to the fore.<sup>74</sup>

Beginning in the mid-1980s and continuing to the present day, state legislatures and courts have experimented with so-called split-recovery schemes. Eight states currently have split-recovery statutes of some form: Alaska, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon, and Utah.<sup>75</sup>

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(Or. 2002) (stating that the purposes of punitive damages in Oregon are to “punish[] a defendant for particularly egregious conduct and deter[] such conduct in the future,” and that “both aspects [of this dual purpose] focus solely on vindicating society’s interests”).

73. *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 145 (Ohio 2002) (emphasis added). According to the court, “The plaintiff remains a party, but the de facto party is our society . . .” *Id.* The court upheld a remitted \$30 million punitive award against the defendant for cutting off medical payments for a woman who died of cancer, but conditioned its remittitur on plaintiff’s acceptance of \$10 million, with the remainder (after payment of the plaintiff’s attorneys) directed to a cancer research fund established by the court. *See id.* at 146. The divided (4-3) court’s decision is “historic” in that it effects a split-recovery type allocation of a punitive damages award, absent state law directing it to do so. *See Ohio Court Issues Historic Ruling Against Anthem*, INDIANAPOLIS STAR, Dec. 22, 2002, at A12 (“[T]he justices made Ohio history by diverting the majority of the punitive damages to a cancer-research fund they established . . .”).

The decision has elicited more incendiary responses from legal commentators, who have called it “radical” and “grotesque.” *See, e.g., Adam Liptak, Court Dictates How To Spend Award*, N.Y. TIMES, Dec. 28, 2002, at A12 (quoting defense practitioner Theodore J. Boutros and law professor Richard Epstein, respectively). This case is discussed as a prime example of an innovative judicial response in a non-split-recovery state. *See infra* Section II.B.

74. Of course, the concern that punitive damages provide a windfall to individual plaintiffs is by no means a new issue. Consider the late-nineteenth-century view of Chief Justice Ryan of the Wisconsin Supreme Court:

It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should receive anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public on whose behalf he is punished.

*Bass v. Chicago & N.W. Ry. Co.*, 42 Wis. 654, 672-73 (1877); *see also* Lewis Lawrence Smith, *Punitive Damages*, 32 AM. L. REG. & REV. (n.s.) 517, 518-19 (1893) (“[T]he essential idea of such damages being punitive, why is the jury not instructed to separate the damages, and give only the compensatory part to the plaintiff and the balance to the county? The plaintiff is surely not entitled to them.”). Indeed, the modern arguments on the whole simply echo their historical precedents. Thus, as Justice Harlan observed, “From the standpoint of the individual plaintiff punitive awards are windfalls. They are, in essence, private fines levied for purposes that may be wholly unrelated to the circumstances of the actual litigant.” *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 74 (1971) (Harlan, J., dissenting); *see also id.* at 84 (Marshall, J., dissenting) (“These awards are not to compensate victims; they are only windfalls.”); *see also* *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) (stating that the plaintiff’s receipt of punitive damages amounts to a “windfall recovery . . . likely to be both unpredictable and, at times, substantial”).

75. In addition to the current eight states, four additional states—Colorado, Florida, Kansas, and New York—had such statutes on their books at one time.

Kansas and New York each had a short-lived experience with a split-recovery scheme, after which the enabling legislation was allowed to expire. Kansas allowed its statute, which applied only to punitive damages awards in medical malpractice cases, to expire in 1989. *See Kan. Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 264 (Kan. 1988). New York likewise

Going beyond statutory requirements for the distribution of damages, as mentioned, the Ohio Supreme Court recently directed a portion of a punitive damages award to a court-established charity, thus heading off the debate—considered previously by courts in Alabama, California, and Texas—over whether it is within courts' inherent remedial authority to allocate a percentage of the punitive award to a state- or court-administered fund, even in the absence of a statute expressly authorizing them to do so.<sup>76</sup> This proliferation of legislative and judicial experimentation with split-recovery schemes suggests that it is time for serious scholarly treatment of this modern development in the law.<sup>77</sup> Moreover, split-recovery

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allowed its statute to expire on April 1, 1994, under the law's sunset provision. Act of Apr. 10, 1992, 1992 N.Y. Laws, ch. 55, § 427(dd). Under this legislation, twenty percent of the punitive award was payable to the state general fund. *See id.* § 393 (codified at N.Y. C.P.L.R. 8701 (McKinney Supp. 1994)) (expired Apr. 1, 1994).

Florida repealed its statute in 1995. *See* Act of May 24, 1997, 1997 Fla. Laws ch. 97-94, § 16, at 574. Its previous legislation provided that, in actions involving personal injury or wrongful death, sixty percent of an award of punitive damages was payable to the Public Medical Assistance Trust Fund. FLA. STAT. ANN. § 768.73(2)(b) (West 1986), *quoted in* Gordon v. State, 585 So. 2d 1033, 1035 n.1 (Fla. Dist. Ct. App. 1991). In all other actions, sixty percent of the award was directed to the state's General Revenue Fund. *Id.* Note that the 1986 legislation was amended in 1992 to change the percentage directed to the state to thirty-five percent. *See* Act of April 8, 1992, 1992 Fla. Laws ch. 92-85, § 2, at 822.

Colorado is the only state in which the legislation was struck down as unconstitutional. Under the old law,

One-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund. The remaining two-thirds of such damages collected shall be paid to the injured party. Nothing in this subsection . . . shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due.

COLO. REV. STAT. § 13-21-102(4) (1989) (repealed 1995). In *Kirk v. Denver Publishing Co.*, the Colorado Supreme Court concluded that this statute amounted to an unconstitutional taking under the state and federal constitutions. 818 P.2d 262, 270-72 (Colo. 1991). The court emphasized that the statute "affirmatively disavowed" any state interest in the judgment before payment becoming due. *Id.* at 272. The Colorado Supreme Court thus far stands alone in having struck down split-recovery legislation on a takings ground. *See infra* Subsection V.B.2.

76. *See infra* Section IV.B.

77. While split-recovery schemes have not hitherto generated a great deal of attention from legal academics, they have been in the news of late, as a result of recent constitutional challenges to the state statutes and the controversy spawned by the Ohio court's action. For recent discussions of the Ohio State Supreme Court case, see Liptak, *supra* note 73; Peter Page, *Ohio Court Creates Charity Funded by Punitives*, NAT'L L.J., Jan. 6, 2003, at A4; and Rein In "Lottery" Aspect of Windfall Lawsuit Awards, USA TODAY, Jan. 9, 2003, at 10A. *See also* Adam Liptak, *Pain-and-Suffering Awards Let Juries Avoid New Limits*, N.Y. TIMES, Oct. 28, 2002, at A14 (discussing split-recovery statutes generally and noting that while "[o]ther states have diverted some punitive awards to their treasuries," Oregon, on the other hand, has "allocated 60 percent of them to a state fund for crime victims").

There is a surprising dearth of legal literature addressing the split-recovery statutes, notwithstanding the fact that they are "[o]ne of the most touted reform proposals in the past decade." Michael Finch, *Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the Nation?*, 86 MINN. L. REV. 497, 538 (2002). Numerous student-written pieces are the notable exception to the lack of attention. These pieces focus primarily on the "windfall" rationale (and, even more, on the constitutional implications) of split-recovery systems. *See, e.g.*, James A. Breslo, Comment, *Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis*, 86 NW. U. L. REV. 1130 (1992); Sharon G. Burrows, Comment, *Apportioning a Piece of a Punitive*

schemes—which in some sense are in search of a justifying theory—might draw upon the societal damages theory for grounding and inspiration.

### A. *Split-Recovery Legislation*

States began to introduce split-recovery statutes in the mid-1980s<sup>78</sup> as part of a more general tort reform movement that, in turn, was a response to the then-prevailing perception that businesses were exposed to excessive liability and that an insurance liability crisis loomed.<sup>79</sup> Irrationally high punitive damages awards were specifically blamed for the impending insurance crisis.<sup>80</sup> The normative legislative goal was to discourage

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*Damage Award to the State: Can State Extraction Statutes Be Reconciled with Punitive Damage Goals and the Takings Clause?*, 47 U. MIAMI L. REV. 437 (1992); Note, *Economic Analysis of the Plaintiff's Windfall*, 105 HARV. L. REV. 1900 (1992); Paul F. Kirgis, Note, *The Constitutionality of State Allocation of Punitive Damages Awards*, 50 WASH. & LEE L. REV. 843 (1993). In connection with the “right” of the public, a few of these pieces do mention a vague concept of the “social compensation” function. See, e.g., Breslo, *supra*, at 1139-40 (arguing that diversion of state recovery to a “special compensation fund for victorious plaintiffs” would restore the “compensation” purpose of punitive damages).

Andrew Daughety and Jennifer Reinganum, whose primary focus is on the revenue-raising function of split-recovery statutes, are the only ones among the law-and-economics scholars examining split-recovery statutes, see *infra* note 148, who even mention a possible social compensation role for punitive damages. See Andrew F. Daughety & Jennifer F. Reinganum, *Found Money? Split-Award Statutes and Settlement of Punitive Damages Cases*, 5 AM. L. & ECON. REV. 134, 137 (2003). Nonetheless, they do not attempt to tie the social compensation function in with their analysis or evaluation of the efficiency effects of the statutes.

78. Alaska's statute was introduced in 1997. ALASKA STAT. § 09.17.020 (Michie 2002) (amended 2003). Each of the other state's statutes became effective in either 1986 or 1987. GA. CODE ANN. § 51-12-5.1 (2000); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 2003); IND. CODE ANN. § 34-51-3-6 (Michie 1998); IOWA CODE ANN. § 668A.1(2)(b) (West 1998); MO. ANN. STAT. § 537.675(3) (West 2000 & Supp. 2003); OR. REV. STAT. § 18.540 (2001); UTAH CODE ANN. § 78-18-1 (2002).

In 1987, the American Bar Association proposed that a portion of punitive damages be awarded to plaintiffs and plaintiffs' attorneys as compensation for bringing suits to court, with the remainder going to the state. See ABA, REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM 19 (1987) (“[A]fter deducting costs and expenses, the court should determine what is a reasonable portion of the punitive damages award to compensate the plaintiff and counsel for bringing the action and prosecuting the punitive damages claim, with the balance of that award allocated to public purposes.”); see also ABA WORKING GROUP ON CIVIL JUSTICE SYS. PROPOSALS, ABA BLUEPRINT FOR IMPROVING THE CIVIL JUSTICE SYSTEM 85 (1992) (discussing the “concept of public allocation of portions of punitive damage awards in single judgment actions”).

79. Other tort reform measures include limits, or caps, on punitive damages, heightened evidentiary standards, and bifurcated trials. Each of these limited the payoff to the plaintiffs and the incentives to file suits, either directly or else by increasing the costs of pursuing a case. See, e.g., David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1121 (1995) (discussing legislative measures to limit punitive damages, either by creating fixed dollar limits or else by limiting the allowable ratio of punitive to compensatory damages).

80. See, e.g., Kathy T. Graham, *1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?*, 24 WILLAMETTE L. REV. 283, 301 (1988) (“The reason for the change in distribution procedure [with the enactment of split-recovery legislation] stems from the legislature's fear that the prospect of punitive damages may be driving up insurance costs in

plaintiffs from bringing punitive damages claims by decreasing the amount of their recovery.<sup>81</sup> The Illinois split-recovery statute, for example, was enacted specifically to discourage punitive damages, which “had been identified as a particularly important reason for the rapidly increasing cost and diminished availability of liability insurance.”<sup>82</sup> The Alaska legislature’s more recent statement of purpose in its tort reform act similarly highlighted the need to discourage frivolous claims.<sup>83</sup> Of course, split-recovery statutes offer a rather oblique and indirect means if the end is to discourage only frivolous punitive claims or to lower plaintiffs’ recoveries. In particular, it would seem that legislative caps on punitive damages would more effectively serve the purpose of limiting such recoveries.<sup>84</sup>

A second, complementary normative goal was to eliminate plaintiffs’ alleged windfall gains. In the words of the Iowa Supreme Court, the split-recovery scheme is justified by the underlying rationale that “a plaintiff is a fortuitous beneficiary of a punitive damages award simply because there is no one else to receive it.”<sup>85</sup>

A third, perhaps more controversial, normative goal was use of the split-recovery statute as a revenue-raising measure.<sup>86</sup> Florida’s (now

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Oregon.” (citing *Hearing on S.B. 323 Before the Conference Comm.*, 1987 Leg., 64th Sess. 10-11 (Or. 1987)); Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska’s Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1335 (2000) (stating that Alaska enacted tort reform legislation, including its split-recovery scheme in 1997, in response to its “reputation[] for unusually high punitive awards”). See generally George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

81. The effect, of course, would also be to lower defendants’ expected liability.

82. 735 ILL. REV. STAT. 1987, ch. 110, ¶ 2-1207 historical and practice notes (West 1987).

83. See Act of May 9, 1997, ch. 26, § 1(1), 1997 Alaska Sess. Laws 1, 1 (stating that one purpose was to “encourage the efficiency of the civil justice system by discouraging frivolous litigation”). Other jurisdictions similarly cited the discouragement of punitive damages claims as a justification for similar split-recovery provisions. See, e.g., 735 ILL. REV. STAT. 1987, ch. 110, ¶ 3 historical and practice notes (West 1987) (stating that the split-recovery provision was “seen as [a way] to place disincentives in the way of seeking punitive awards, for the party and particularly his attorney, and so to cut down on their use”).

84. In fact, several of the states that enacted split-recovery schemes likewise enacted some form of punitive damages cap, but others did not. Statutes with caps include: ALASKA STAT. § 09.17.020(f) (Michie 2002) (limiting punitive damages to the greater of three times compensatory damages or \$500,000); GA. CODE ANN. § 51-12-5.1(e)(1), (f)-(g) (2000) (capping punitive damages—except in products liability and intentional harm cases—at \$250,000); IND. CODE ANN. § 34-51-3-4 (Michie 1998) (enacting a cap of the greater of three times compensatory damages or \$50,000); and 735 ILL. COMP. STAT. ANN. 5/2-1115.05(a) (West 2003) (enacting a general cap of three times economic damages). The Illinois Supreme Court held section 5/2-1115.05 unconstitutional in *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997).

85. *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 869 (Iowa 1994) (internal quotation marks omitted); see also 735 ILL. REV. STAT. 1987, ch. 110, ¶ 2-1207 historical and practice notes (stating that the state’s split-recovery provision “squarely meets the argument that one of the vices of punitive damages is that they give the plaintiff who receives them what by definition is a windfall”).

86. This revenue-raising motivation has been emphasized by Daughety and Reinganum. In their opinion,

repealed) statute endorsed this goal.<sup>87</sup> And, at least according to one federal court, Georgia specifically included revenue raising, along with improving the business climate in the state, as grounds for its statute.<sup>88</sup>

While such split-recovery statutes share the common feature of directing some portion of punitive damages awards to a party other than the plaintiff, they also exhibit significant differences in the details of their operation. First, with respect to how much of an award is allocated to the state- or court-administered fund, a majority of states require a fixed percentage—50% (Alaska, Missouri, and Utah),<sup>89</sup> 60% (Oregon),<sup>90</sup> or 75% (Georgia, Indiana, and Iowa)<sup>91</sup>—whereas in Illinois, it is left to the trial

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[A] punitive damages award presents a particularly attractive target for a legislature, since the defendant has been judged to be grossly negligent and thus deserves to pay while the plaintiff, having already received compensatory damages, arguably does not deserve to receive a windfall. . . . Revenue maximization is therefore an alternative objective of interest.

Daughety & Reinganum, *supra* note 77, at 150. Daughety and Reinganum conclude that “Oregon and (especially) Indiana appear to be motivated primarily by deterrence reduction; whereas Alaska, Georgia, Iowa, Utah, and (especially) Missouri seem to be motivated primarily by revenue generation.” *Id.* at 159. Note that Alaska, Georgia, and Utah each direct funds directly to the state’s general revenue fund. *See infra* note 98.

The use of the split-recovery scheme (or other feature of the tort law system) in addition to, or in lieu of, the tax system for revenue generation is controversial. Compare Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) (arguing that the effects of using the legal system to redistribute income will always be dominated by the effects of an income tax), with Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000) (arguing that social optimality implies the active use of multiple means of redistributing income, including the legal system). The theory of societal damages as outlined in this Article, however, focuses on targeted redistribution; for this reason, it could not be effectuated satisfactorily by general taxation measures.

87. *Cf. Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992) (noting that one “legitimate legislative objective was to allot to the public weal a portion of damages”).

88. *See McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563, 1568 (M.D. Ga. 1990).

89. *See* ALASKA STAT. § 09.17.020(j) (“If a person receives an award of punitive damages, the court shall require that 50 percent of the award be deposited into the general fund of the state.”); MO. ANN. STAT. § 537.675(3) (West 2000 & Supp. 2003) (“The state of Missouri shall have a lien for deposit into the tort victims’ compensation fund to the extent of fifty percent of the punitive damage final judgment . . . .”); UTAH CODE ANN. 78-18-1(3)(a) (2002) (requiring fifty percent of the recovery in excess of \$20,000, after subtraction of fees and costs, to be paid to the state treasurer for deposit in the state’s general fund).

90. *See* OR. REV. STAT. § 18.540(1)(b) (2001) (“Sixty percent shall be paid to the Criminal Injuries Compensation Account . . . to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.”). The statute was amended in 1997. *See* Act of Apr. 17, 1997, ch. 73, 1997 Or. Laws 154. Formerly, the statute allocated fifty percent to the Criminal Injuries Compensation Account. *See id.*

91. *See* GA. CODE ANN. § 51-12-5.1(e)(2) (2000) (“Seventy-five percent of any amounts awarded . . . as punitive damages [in a tort case in which the cause of action arises from products liability], less a proportionate part of the costs of litigation, including reasonable attorneys’ fees, all as determined by the trial judge, shall be paid into the treasury of the state . . . .”); IND. CODE ANN. § 34-51-3-6(b)(2) (Michie 1998); IOWA CODE ANN. § 668A.1(2)(b) (West 1998).

court's discretion.<sup>92</sup> Second, Georgia's statute singles out products liability cases for the split-recovery scheme;<sup>93</sup> in all other states, the apportionment applies to all cases where punitive damages are allowable. Third, and especially significant with respect to the effects of such statutes on plaintiffs' and their attorneys' incentives to pursue punitive damages claims,<sup>94</sup> the statutory schemes differ on whether attorneys' fees are taken out before the allocation to the state or fund or, alternatively, whether they are to be paid out of the plaintiff's portion of the award. In most states, the percentage allocated to the state is calculated after payment of all applicable costs and fees, including the plaintiff's attorney's full contingency fee, based upon the entire punitive award.<sup>95</sup> In Indiana and Oregon, however, the state's percentage is calculated before the attorneys' fees and costs are deducted.<sup>96</sup> And, as mentioned above, in Illinois such an issue is left

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92. See 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 2003) (providing that the trial court has discretion to "apportion the punitive damage award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Human Services"). As one court explained,

The Illinois General Assembly has expressed its reservations regarding punitive damages by permitting courts to enter a remittitur, grant a conditional new trial, or apportion the award among the plaintiff, the plaintiff's attorney, and the Illinois Department of Rehabilitat[on] Services [later absorbed into the Illinois Department of Human Services] in cases in which a jury awards punitive damages.

Pazdziora *ex rel.* Pazdziora v. Syntex Labs., Inc., 774 F. Supp. 1100, 1103 n.10 (N.D. Ill. 1991).

93. See GA. CODE ANN. § 51-12-5.1(e)(2). Georgia's statute was successfully challenged, *inter alia*, on the ground that its exclusive targeting of products liability cases as subject to the split-recovery scheme violated equal protection. See *McBride*, 737 F. Supp. at 1569. *But see* Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 639-40 (Ga. 1993) (upholding the constitutionality of the split-recovery statute).

94. See *infra* Subsection V.C.2.

95. See ALASKA STAT. § 09.60.080 (Michie 2002) ("[T]he contingent fee due the attorney shall be calculated before that portion of punitive damages due the state . . . has been deducted from the total award of damages."); GA. CODE ANN. § 51-12-5.1(e)(2); MO. ANN. STAT. § 537.675(3) (West 2000 & Supp. 2003); UTAH CODE ANN. § 78-18-1(3) (2002). These are the so-called net levy states, because the allocation between the plaintiff and the state is "net" of the attorneys' fees. In Iowa, plaintiffs' attorneys' fees are paid out of the state's seventy-five percent share. See *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 772 (Iowa 1999). Iowa is nonetheless treated along with the "net levy" statutes, for in each case, plaintiffs' attorneys receive their full contingency fee, based upon the entirety of the award.

96. See IND. CODE ANN. § 34-51-3-6(b)(2) (Michie 1998); OR. REV. STAT. § 18.540(1)(b) (2001). Until its repeal, Florida's statute also operated in this manner, limiting plaintiffs' lawyers' contingency fees to the portion of the award retained by the plaintiff. See FLA. STAT. ANN. § 768.73(7) (West 1994) (repealed 1997). These are the so-called gross levy states, in which the plaintiffs' attorneys' fees are paid out of (and presumably based solely upon) the portion of the punitive award allocated to the plaintiffs.

The Indiana statute does not expressly provide whether an attorney may nonetheless collect from the plaintiff a percentage of the punitive damages award allocated to the state. By contrast, Oregon's statute sets an explicit limit upon the amount that plaintiffs' attorneys can receive out of the plaintiffs' forty percent share of the punitive award. See OR. REV. STAT. § 18.540(1)(a) (2001) ("Forty percent shall be paid to the prevailing party. The attorney for the prevailing party shall be paid out of the amount allocated under this paragraph, in the amount agreed upon between the attorney and the prevailing party. However, in no event may more than 20 percent of the amount awarded as punitive damages be paid to the attorney for the prevailing party."). Until 1997, when its split-recovery statute was amended, Oregon had a "net levy" statute, whereby the



entirely to the discretion of the trial court, which apportions the punitive award among the plaintiff, his attorney, and the State of Illinois Department of Human Services.<sup>97</sup>

Finally, the split-recovery schemes differ with respect to where the money (other than the portion retained by the plaintiff) is directed. In Alaska, Georgia, and Utah, the state's portion is deposited into a general revenue fund.<sup>98</sup> Other states have set up specialized funds.<sup>99</sup> For example, Missouri deposits its portion into a fund designed to compensate tort plaintiffs unable to collect judgments from insolvent defendants.<sup>100</sup> In similar fashion, other states have designated specific recipients: a Violent Crimes Compensation Fund (Indiana);<sup>101</sup> a Civil Reparations Fund (Iowa);<sup>102</sup> and a Criminal Injuries Compensation Account (Oregon).<sup>103</sup>

In Illinois, the distinction between the state general treasury and a specialized fund is less clear-cut, and indeed is a matter of some controversy. While the split-recovery provision authorizes trial courts to direct any portion of punitive damages awards to the Department of Human Services, it does not specify where the Department must deposit the funds or under what conditions they may be spent. The Department has taken the view that any punitive damages awards should be directed to a locally held, specialized fund to provide services to disabled persons, rather than to the general revenue fund in the state treasury.<sup>104</sup> While virtually ignored for

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state's share (which was then fifty percent) was calculated only after other plaintiffs' attorneys received their fees. *See* Act of Apr. 17, 1997, ch. 73, 1997 Or. Laws 154.

97. *See* 735 ILL. COMP. STAT. ANN. 5/2-1207.

98. *See* ALASKA STAT. § 09.17.020(j) (funds deposited into general fund of state); GA. CODE ANN. § 51-12-5.1(e)(2) (funds paid into the state treasury through the Office of Treasury and Fiscal Services); UTAH CODE ANN. § 78-18-1(3) (funds remitted to the state treasurer for deposit into the general fund). The idea is that, with more revenue, the state can assess lower taxes, saving the public money. The use of the tort system as a substitute for general welfare taxation is very controversial. *See supra* note 86.

99. These specialized funds are analogous to restitution funds, in which criminal fines and forfeitures are "redistributed to a sometimes intersecting but conceptually distinct category of crime victims." Jennifer Gerarda Brown, *Robbing the Rich To Feed the Poor?*, 3 BUFF. CRIM. L. REV. 261, 262-63 (1999).

100. *See* MO. ANN. STAT. § 537.675(3) (requiring damages collected by the state attorney general to be deposited into the Tort Victims' Compensation Fund). Seventy-four percent of all payments received into the Fund is to be used for the sole purpose of assisting uncompensated tort victims. *Id.* § 537.678(1). The remaining twenty-six percent is directed to the Legal Services for Low-Income People Fund. *Id.* § 537.675(5).

101. *See* IND. CODE ANN. § 34-51-3-6(b)(2). In the case of hazardous waste violations, however, the punitive damages are targeted entirely for deposit into the state's Hazardous Substances Response Trust Fund. *See id.* § 13-25-4-10(d).

102. *See* IOWA CODE ANN. § 668A.1(2)(b) (West 1998).

103. *See* OR. REV. STAT. § 18.540(1)(b) (2001).

104. At one time, the Department of Rehabilitation Services (whose functions were subsumed by the Department of Human Services) considered proposing legislation to provide the Department with the authority to deposit punitive damages awards into a specialized "State Project Fund." It is not clear whether the suggested changes ever made it beyond the proposal stage within the Department. *See* E-mail from Erin K. Bonaes, Assistant General Counsel, Illinois Department of Human Services (Aug. 5, 2003) (on file with author); Facsimile from Erin K.

most of its seventeen-year history,<sup>105</sup> the Illinois split-recovery provision has been thrust into the limelight by the recent case, *Price v. Philip Morris Inc.*, a worldwide class action in which plaintiffs alleged that the cigarette manufacturer defrauded “Lights” cigarette smokers by suggesting that the cigarettes were less hazardous than their full-flavor counterparts.<sup>106</sup> Judge Byron ordered Philip Morris to pay \$3 billion in punitive damages and apportioned the entirety of the award to the state of Illinois.<sup>107</sup>

### B. *Judicial Experimentation*

In a recent decision, the Ohio Supreme Court put itself out ahead of the fledgling academic debate over judicial intervention, absent statutory authorization, in the apportionment and distribution of punitive awards.<sup>108</sup> Reviewing a case in which the jury had awarded \$2.5 million in compensatory damages and \$49 million in punitive damages for a defendant insurance company’s bad faith in denying reimbursement for

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Bonales, Assistant General Counsel, Illinois Department of Human Services (Apr. 1, 2003) (on file with author). In any event, the legislation sought to codify what had been the Department’s existing practice (at least with respect to the only two previously received awards, *see infra* note 105).

105. Since the split-recovery provision went into effect in 1987, the Department has only received two disbursements from punitive damages awards: one for \$2000 in 1990, and another for \$23,000 in 1995. *See* Facsimile from Erin K. Bonales, *supra* note 104.

Several factors apparently contribute to the infrequent invocation of the split-recovery provision in Illinois: general unfamiliarity with the provision, its voluntary and discretionary nature, the scarcity of punitive damages awards in the state, and the lack of an effective monitoring process. *See* Laura Duncan, *Courts Not Sharing Punitive Awards with Disabled Under 7-Year Old Law*, CHI. DAILY L. BULL., Feb. 28, 1994, at 20; Laura Duncan, *State Not Taking Cut of Punitive Damages*, CHI. DAILY L. BULL., Apr. 24, 1993, at 1 [hereinafter Duncan, *State Not Taking Cut of Punitive Damages*].

106. *Price v. Philip Morris Inc.*, No. 00-L-112 (Ill. 3d Cir. Ct. Mar. 21, 2003), [http://tobacco.neu.edu/PR/supportdocs/miles\\_decision.htm](http://tobacco.neu.edu/PR/supportdocs/miles_decision.htm).

107. The judge also awarded \$7.1 billion in compensatory damages. In an unusual step, the Illinois Supreme Court has agreed to hear a direct appeal by Philip Morris. *See id.*, *appeal docketed*, No. 96,236 (Ill. Sept. 2003); *see also* Christina Cheddar Berk, *Illinois High Court Takes Altria Appeal*, WALL ST. J., Sept. 19, 2003, at A23.

Meanwhile, even apart from the appeal, Illinois’s ability to collect the punitive damages award remains in doubt. Philip Morris asked a judge in Cook County, Illinois, to rule that the State of Illinois cannot receive the punitive damages because Illinois is part of the Master Settlement Agreement that forty-six states reached with four tobacco companies in 1998. In response, lead counsel for the plaintiff class filed a motion with Judge Byron in Madison County, Illinois, asking him to award the punitive damages to charities if the State is not allowed to receive them. *See* Brian Brueggemann, *Charities, Rather than State, Could Get Award*, BELLEVILLE NEWS-DEMOCRAT, Apr. 22, 2003, at 1A (reporting that plaintiffs’ counsel argued that \$3 billion “should be paid into a charitable fund maintained by the Illinois Attorney General and distributed to organizations that promote health services to the needy”). Judge Byron ruled that if Illinois is not entitled to the \$3 billion, it will go to the plaintiff class. Brian Brueggemann, *Philip Morris Bond Is “a \$6 Billion IOU,” Expert Says*, BELLEVILLE NEWS-DEMOCRAT, Apr. 25, 2003, at 1A.

108. *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002). I discuss the debate surrounding judicial action absent enabling legislation in Section IV.B.

plaintiff's (now deceased) wife's cancer treatments, the court emphasized the "philosophical void between the reasons we award punitive damages and how the damages are distributed."<sup>109</sup> The court explained:

[A] punitive damages award is about the defendant's actions. "The purpose of punitive damages is not to compensate a plaintiff but to punish the guilty, deter future misconduct, and to demonstrate society's disapproval." At the punitive-damages level, it is the societal element that is most important. The plaintiff remains a party, but the de facto party is our society, and the jury is determining whether and to what extent we as a society should punish the defendant.<sup>110</sup>

With this in mind, the court, which remitted the punitive award to \$30 million on the grounds that it was excessive under Ohio (but not federal) law, added an explicit condition to its remittitur order: that the plaintiff (should he accept the court's remittitur) would receive only one-third (or \$10 million) of the punitive award. After attorneys' fees were paid out,<sup>111</sup> the remainder of the award would be directed to a cancer research fund established by the court.

Significantly, the court had in mind achieving a closer fit between the justifications for punitive damages and the recipients of the awards. The court argued that, apart from the one-third portion allocated to the plaintiff<sup>112</sup> and the prescribed attorneys' fees, the remainder of the award "should go to a place that will achieve a societal good, a good that can rationally offset the harm done by the defendants in this case."<sup>113</sup> The court clearly recognized that the victims of the defendants' bad faith extended beyond the single plaintiff in the case before it. Specifically, the court did not hesitate to affirm the jury's finding that "a pervasive corporate attitude existed with the defendants to place profit over patients."<sup>114</sup> Moreover, the court was cognizant of the fact that defendants' health insurance industry

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109. *Id.* at 145.

110. *Id.* (quoting *Davis v. Wal-Mart Stores, Inc.*, 756 N.E.2d 657, 661 (Ohio 2001) (Sweeney, J., concurring in part and dissenting in part) (citation omitted)). The court was obviously focused on a *punishment*-based societal rationale.

111. *See id.* at 146. In this manner, the scheme resembled that set out under the "net levy" statutes. *See supra* note 95.

112. The court recognized the incentive effects upon plaintiffs:

Clearly, we do not want to dissuade plaintiffs from moving forward with important societal undertakings. The distribution of the jury's award must recognize the effort the plaintiff undertook in bringing about the award and the important role a plaintiff plays in bringing about necessary changes that society agrees need be made.

781 N.E.2d at 146.

113. *Id.* The court explained further that "[d]ue to the societal stake in the punitive damages award, we find it most appropriate that it go to a state institution." *Id.* The court designated Ohio State University as the recipient of the research fund.

114. *Id.* at 142 (internal quotation marks omitted).

played a “central role in the lives of so many Ohioans”; in fact, the court explicitly relied on this fact in justifying a punitive award of significant magnitude.<sup>115</sup>

The Ohio Supreme Court is not the first court to have experimented with judicial apportionment and distribution of punitive awards. Beginning in the early 1990s, Justice Janie Shores of the Supreme Court of Alabama advocated judicial allocation of some percentage of punitive damages awards.<sup>116</sup> In a special concurrence in *Fuller v. Preferred Risk Life Insurance Co.*, Justice Shores (joined by two other justices) proclaimed that, even absent enabling legislation, “the court may determine [how to] best serve the goals for which punitive damages are allowed in the first place: vindication of the public and deterrence to the defendant and to others who might commit similar wrongs in the future.”<sup>117</sup> Such a theory did not gain immediate acceptance,<sup>118</sup> but it was adopted by the Alabama Supreme Court in 1996 in *Life Insurance Co. of Georgia v. Johnson (Johnson I)*, in which an elderly woman who had been sold a worthless Medicare supplement insurance policy sued the insurer for engaging in intentional and reckless fraud, and the jury returned a verdict of \$250,000 in compensatory damages and \$15 million in punitive damages.<sup>119</sup> After reducing the punitive damages award to \$5 million, the Supreme Court held that in future cases, any punitive damages awards would, after deduction of litigation expenses, be shared equally by plaintiffs and a state general fund.<sup>120</sup> The clear aim was to mitigate plaintiffs’ windfall gains. In fact, the

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115. *Id.* at 144.

116. See Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damages Awards To Eliminate Windfalls*, 44 ALA. L. REV. 61, 95 (1992) (“Such eminent jurists and scholars as Chief Justice Rehnquist and Dean Robert McKay have expressed the opinion that justice would be served by allocating punitive damages awards to entities other than the prevailing plaintiff. This author urges courts to do so in proper cases.”).

117. 577 So. 2d 878, 886-87 (Ala. 1991) (Shores, J., concurring specially). The case involved a punitive damages award of \$1 million against a health and hospitalization insurer. Justice Shores was joined by Justices Houston and Steagall. Justice Houston subsequently reiterated this position in concurring opinions in *Principal Financial Group v. Thomas*, 585 So. 2d 816, 819-20 (Ala. 1991) (Houston, J., concurring specially), and *Southern Life & Health Insurance Co. v. Turner*, 586 So. 2d 854, 859 (Ala. 1991) (Houston, J., concurring specially).

118. In 1990, relying on Justice Shores’s concurrence, a trial court in a medical insurance fraud case allocated one-half of the punitive damages award to the Alabama affiliate of the American Heart Association. *Smith v. States Gen. Life Ins. Co.*, No. CV-89-002449 (Ala. Cir. Ct. Dec. 19, 1990), *rev’d*, 592 So. 2d 1021 (Ala. 1992). The jury had awarded \$250,000 in punitive damages as a result of fraudulent representations by the defendant regarding insurance coverage of heart disease. The Alabama Supreme Court reversed, declaring that “[a]bsent a finding that the verdict was constitutionally infirm, the trial court lacked the authority to reduce [plaintiff’s] punitive damages award.” 592 So. 2d at 1025. The Supreme Court viewed the trial court’s actions as an impermissible encroachment on the common law jury right to determine damages. *Id.*

119. 684 So. 2d 685, 687 (Ala.) (6-3 decision), *vacated by* 519 U.S. 923 (1996) (mem.). The trial court reduced the punitive damages to \$12.5 million. *Id.* at 691. Justice Shores authored the majority opinion for the Alabama Supreme Court.

120. The procedure would work as follows:

court was emphatic that “[i]f this is done, then the time-honored and constitutionally mandated right to trial by jury will not be perceived, insofar as punitive damages is concerned, as Alabama’s lottery, as it is now perceived by so many.”<sup>121</sup>

Although the fear of windfall gains and not the goal of societal compensation drove the *Johnson* court, it was nonetheless attuned to factors similar to those that influenced the Ohio Supreme Court. In canvassing the evidence before it, the Alabama Supreme Court emphasized the fact that Life of Georgia’s fraudulent conduct was “not an isolated event.”<sup>122</sup> The trial court had referred to “[t]he class of plaintiffs” that was “preyed upon” by Life of Georgia.<sup>123</sup> Similarly, the plaintiff had “proved that there was a sizable group of Alabama citizens who were put at risk by the defendant’s wrongful conduct.”<sup>124</sup> Moreover, the court was moved by the fact that “there are many people situated such as Plaintiff who are unable due to sickness, age, infirmity or whatever to pursue such a case.”<sup>125</sup>

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After any post-verdict review is concluded by the trial court, and after appellate review, if any, the amount of the judgment as finally determined shall be paid into the trial court. The trial court shall order all reasonable expenses of the litigation, including the plaintiff’s attorney fees (as determined in accordance with any agreement between the plaintiff and the plaintiff’s attorney), paid. The trial court shall then order the clerk of the court to divide the remaining amount equally between the plaintiff and the State general fund.

*Id.* at 699.

Presumably, to avoid any Eighth Amendment entanglements, the court added, “The fact that the State may ultimately share in some part of a punitive damages award does not mean that the State has a vested interest in a private lawsuit seeking damages. The State shall have no right to intervene or participate in such cases.” *Id.* For a discussion of the Eighth Amendment excessive fines issue, see *infra* Subsection V.B.1.

121. 684 So. 2d at 698 (internal quotation marks and citation omitted). The Alabama Supreme Court subsequently abandoned its decision in *Johnson I*, but it did not reject the concept of a trial court’s discretion to allocate punitive damages awards absent enabling legislation. Instead, Justice Shores, writing a second opinion following a vacate-and-remand order from the U.S. Supreme Court in light of *BMW v. Gore*, further reduced the \$5 million punitive damages award to \$3 million. Having thus reduced the punitive award, the Court concluded that, post-*BMW*, it was no longer necessary to adhere to a split-recovery scheme. See *Life Ins. Co. of Ga. v. Johnson (Johnson II)*, 701 So. 2d 524, 532 (Ala. 1997). The Alabama court’s express link between excessiveness review and plaintiffs’ windfall gains is questionable. The Alabama legislature, however, subsequently enacted a statutory provision prohibiting the allocation of punitive damages awards. See ALA. CODE § 6-11-21(*l*) (Supp. 2002) (“No portion of a punitive damage award shall be allocated to the state or any agency or department of the state.”).

122. *Johnson II*, 701 So. 2d at 527-28 (“Plaintiff further produced clear and convincing evidence through the testimony of three live pattern witnesses that Life of Georgia’s conduct in selling these policies to elderly, uneducated, single black women was not an isolated event and had not ceased and these people were paying a very substantial portion of their fixed income for useless policies.”).

123. *Johnson I*, 684 So. 2d at 692 (“The class of plaintiffs Life of Georgia preyed upon were from a group of citizens that need the most protection: elderly, uneducated, and low income.” (internal quotation marks omitted)).

124. *Johnson II*, 701 So. 2d at 530.

125. *Id.* at 533 (internal quotation marks omitted). This prompted a dissenting justice to remark upon the unfairness of awarding classwide damages in a single-plaintiff case: “With 116,000 potential plaintiffs, Life of Georgia could well be exposed to an aggregate punitive

Nonetheless, the court did not attempt in any way to direct compensation to this class of absent plaintiffs. In other words, while it recognized that “a sizable group of Alabama citizens” may have been affected, there was no attempt to try to identify them. Nor was there any attempt to direct the money to a specialized fund.<sup>126</sup> Instead, the court set up (prospectively) a scheme whereby one-half of punitive awards would revert to the state’s general treasury fund.

Ohio and Alabama courts, while the only courts to have experimented explicitly with diverting punitive damages to “public purposes” or charities, are not the only ones to have contemplated doing so. Courts in California, for example, though not subject to split-recovery legislation, are unequivocally guided by the principle that the purpose of punitive damages “is a purely *public* one.”<sup>127</sup> And at least one judge has made the link between the public purpose of punitive damages and the rightful recipients of these funds. In *Hilgedick v. Koehring Finance Corp.*, the California Court of Appeals upheld a remitted punitive damages award against a lender based on interference with business relations.<sup>128</sup> Writing a separate concurrence, Justice Peterson took the opportunity to address the issue of the allocation of punitive damages awards to the public, an issue that had “too long remained dormant in the case law concerning punitive damages.”<sup>129</sup> Specifically, Justice Peterson suggested that after deductions

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liability of many multiples of the \$3 million punitive award approved in this case.” *Id.* at 536 n.10 (See, J., concurring in part and dissenting in part). Thus, according to Justice See, the majority would “permit avoidance of the Supreme Court’s limit on punitive damages through the filing of numerous separate actions against a defendant in the place of the filing of a single class action.” *Id.*; see also *infra* Subsection V.A.2 (discussing the problem of multiple punishments).

126. One justice endorsed the concept of allocating the award but dissented for the discrete reason that the undifferentiated state government was undeserving of the punitive damages award:

Common sense dictates . . . that the apportionment should be used to attack the underlying problem at its source. . . . [I]f there is to be apportionment to the state, it should be used to expand and strengthen the department or agency that polices the industry being punished. For example, in a case such as this, where an insurance company is found guilty of consumer fraud, the apportionment should be paid to the Alabama Department of Insurance. The punitive damages award would then become a meaningful investment in deterrence, rather than an unconditional gift to the State’s General Fund.

*Johnson I*, 684 So. 2d at 719 (Butts, J., concurring in part and dissenting in part).

127. *Adams v. Murakami*, 813 P.2d 1348, 1350 (Cal. 1991); see also *id.* (“The public’s goal is to punish wrongdoing and thereby to protect itself from future misconduct, either by the same defendant or other potential wrongdoers.”). The public purpose goal of punitive damages was affirmed most recently in *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP*, 69 P.3d 965, 970-71 (Cal. 2003).

128. 8 Cal. Rptr. 2d 76 (Ct. App. 1992).

129. *Id.* at 92 (Peterson, J., concurring); see also *id.* at 94 (“No case in California . . . has addressed an important and neglected issue: why an award of punitive damages, assessed in the public interest to punish and deter a defendant’s outrageous and egregious conduct, and *not* to reward further a plaintiff who is made whole by the compensatory damages received, is uniformly paid to the plaintiff—thereby patently rewarding him, despite the constant disclaimer of reviewing courts that such result occurs or is intended.”).

for costs and attorneys' fees, punitive damages be paid to the state's general treasury fund "to benefit the public, for whose protection and aid they are always imposed."<sup>130</sup>

As was the Alabama Supreme Court in *Johnson*, Justice Peterson was primarily concerned with windfall gains to plaintiffs.<sup>131</sup> But, again, viewed instead from the perspective of the societal damages theory, it seems highly relevant that evidence was presented in this case that defendants' conduct harmed not only the plaintiffs, but also the state and federal governments, through defendants' "gross indifference to sales and payroll tax matters."<sup>132</sup>

Similarly, a decade earlier, Justice Pope of the Texas Supreme Court (joined by Justice Gonzalez) admonished in dissent that "[i]f we are to continue using punitive damages as a private system of law enforcement for conduct that offends public standards, we must consider innovative ways to improve that system."<sup>133</sup> Chief among the innovations contemplated was the allocation of punitive damages, after deduction of attorneys' fees, equally between the plaintiffs and the state's general fund.<sup>134</sup>

Finally, still other courts, in what might be more broadly termed creative decisionmaking in the punitive damages realm, have, upon invocation of their equitable powers, retained continuing jurisdiction over a case in order to handle the punitive damages issue in a novel way. In *O'Gilvie v. International Playtex, Inc.*, the plaintiff alleged that his deceased wife's use of defendant's tampons caused her death from toxic

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130. *Id.* at 96. In fact, Justice Peterson would hold "every punitive damages award in California mandatorily subject, on proper motion, to posttrial review *and disposition* by the trial court, subject to a further review *de novo* by appellate courts." *Id.* at 98-99 (citation omitted). Under the proposed scheme, the court "must order the defendant to pay the balance of the punitive damages award [after plaintiff's reasonable costs and attorneys' fees are deducted] . . . to the general fund of the State of California for the benefit of the public." *Id.* at 99.

131. *Id.* at 97 ("[T]he California plaintiff is, in fact, always the only one rewarded, as in this case, with a windfall frequently exceeding that produced by a winning lottery ticket.").

132. *Id.* at 105 (Smith, P.J., concurring in part and dissenting in part). In addition, [A] hundred or more jobs were lost through the ruin of these businesses, casting innocent third parties out of work, many without notice. . . . Pacific Trencher employed 30 to 40 in the Bay Area and another 30 to 35 in Los Angeles. Perhaps the most harm was to a Pacific Trencher secretary who was left with a \$36,000 personal federal tax lien. Pacific Trencher had been taken over by defendants and so was not itself a plaintiff. The trial judge could logically view [one of the individual plaintiffs] as the proper recipient of damages for harm to the Pacific Trencher employees since he spent most of his energies working at that business.

*Id.* at 110.

133. *Hofer v. Lavender*, 679 S.W.2d 470, 480 (Tex. 1984) (Pope, C.J., dissenting). Justice Gonzalez reiterated this position in 1996 in a concurring opinion in *General Resources Organization, Inc. v. Deadman*, 932 S.W.2d 485, 485 (Tex. 1996) (Gonzalez, J., concurring). There, he specifically "recommend[ed] that the Legislature enact a law apportioning one-half of punitive damages awards to the State." *Id.* at 487. Moreover, Justice Gonzalez recognized that "punitive damages are generally awarded in situations in which the defendant's conduct has *damaged society as a whole* as well as the individual plaintiff." *Id.* at 486 (emphasis added).

134. *Hofer*, 679 S.W.2d at 480 (Pope, C.J., dissenting).

shock syndrome.<sup>135</sup> After a jury imposed a \$10 million punitive award in the plaintiff's favor, the district court offered to reduce the award substantially if, in exchange, defendant's president agreed to acknowledge publicly the jury's findings and to announce the removal of the product from the market. Defendant agreed, and the award was reduced to \$1.35 million.<sup>136</sup> In *Miller v. Cudahy Co.*, landowners and lessees sued a salt plant operator for salt pollution damage to their property.<sup>137</sup> The court, following a bench trial and sitting in equity, held the defendant liable. But after awarding plaintiffs \$10 million in punitive damages on account of defendant's intentional acts of pollution, the court held the punitive award in abeyance, contingent upon the defendant's initiation of a comprehensive cleanup effort. It went so far as to retain jurisdiction in order to supervise the cleanup.<sup>138</sup> In justifying its decision, the court noted that the problem at issue in the case was "not limited just to the plaintiffs in this lawsuit and the land they own or lease" and that unless the cleanup was accomplished, "the salt . . . will continue to move downstream" and affect many others.<sup>139</sup> The court thus suggested that its authority might include an inherent power to remedy harms experienced by others than the plaintiffs before it.<sup>140</sup>

### C. *In Search of a Justifying Theory*

Legislatures and courts, reacting to the unfairness of awarding windfall gains to a single plaintiff—particularly in a situation where the defendant's conduct has caused more widespread harm—have focused attention on the allocation and distribution of punitive damages awards via split-recovery statutes or innovative judicial decisionmaking. These developments exert increasing pressure on the traditional justifications for punitive damages. Most courts and commentators, nonetheless, continue to emphasize the historical retributive punishment rationale of punitive damages when

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135. 609 F. Supp. 817 (D. Kan. 1985), *rev'd in part*, 821 F.2d 1438 (10th Cir. 1987).

136. The district court's remittitur order was, however, reversed on appeal by the Tenth Circuit, which determined that the trial court was "without authority under either state or federal law" to reduce the award. *O'Gilvie*, 821 F.2d at 1450.

137. 592 F. Supp. 976 (D. Kan. 1984).

138. *See id.* at 1009.

139. *Id.* at 999. Ultimately, however, this plan was derailed. After three years, the court determined that no feasible cleanup plan had been presented, and that defendant had not demonstrated a good faith effort. Consequently, it declined to remit any portion of the \$10 million award. *Miller v. Cudahy*, 656 F. Supp. 316, 356-57 (D. Kan. 1987), *aff'd in part, rev'd in part*, 858 F.2d 1449 (10th Cir. 1988).

140. Heller and Krier have offered a similar proposal in the takings context. *See Heller & Krier, supra* note 68, at 1000 ("When the government is required to pay deterrence damages, but not to make a specific distribution, we call the payment a *general distribution*. For example, the responsible government bureau could be required to pay deterrence damages into a special fund, or even into general revenues.").



advocating that a portion of these damages be allocated to the state.<sup>141</sup> This has intuitive appeal. Seen through the punishment prism, punitive damages are closely akin to criminal fines; it follows, then, that these damages should go to the state, as opposed to individual plaintiffs.<sup>142</sup>

This punishment-based perspective has dominated the sparse academic commentary on split-recovery statutes, typified by the view that “an increasing number of states have reaffirmed the penal role of punitive damages by appropriating a share of the plaintiff’s punitive award. Such shared recovery laws emphasize that punitive awards now vindicate ‘public wrongs,’ and so fulfill the historical purpose of penal laws.”<sup>143</sup> This conception has been increasingly invoked by courts seeking to justify split-recovery schemes. In *Dardinger v. Anthem Blue Cross & Blue Shield*, the Ohio Supreme Court defended its diversion of a significant portion of a punitive damages award away from the individual plaintiff and toward a court-established charity on the ground that, with respect to punitive damages claims, “[t]he plaintiff remains a party, but the de facto party is our society, and the jury is determining whether and to what extent we as a society should punish the defendant.”<sup>144</sup> There may be much to commend this punishment-based focus, at least in particular types of “malice” torts, but alternative (possibly complementary) nonpunitive rationales may exist that are more firmly rooted in civil common law, and that would apply with particular force in other kinds of “recklessness-based” widespread-harm torts.

What then of the societal goal of general deterrence advocated by law-and-economics scholars as a justification for split-recovery schemes? In *Evans ex rel. Kutch v. State*—a divided 2002 opinion by the Alaska Supreme Court upholding Alaska’s split-recovery statute against a facial constitutional challenge—the plurality, in defending Alaska’s split-recovery scheme, stated that “[p]unitive damages are assessed as a deterrent to

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141. See *supra* note 74; see also James E. Duffy, Jr., *Punitive Damages: A Doctrine Which Should Be Abolished*, in DEF. RESEARCH INST., THE CASE AGAINST PUNITIVE DAMAGES 4, 9 (1969) (commenting that punitive damages are “imposed in the form of a criminal fine (which should be paid to the state, if anyone)”); John D. Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 886 (1976) (“If a punitive award is a punishment by society of the errant defendant, something is to be said for paying the penalty to society rather than to some third party beneficiary.”).

142. For the moment, I bracket the fact that such a punishment-focused view buttresses arguments that punitive damages should be exclusively a species of criminal law, as opposed to tort law, and that the Eighth Amendment’s prohibition on excessive fines should apply in situations where the state is the direct recipient of these “fines.” See *infra* Subsection V.B.1.

143. Finch, *supra* note 77, at 502; see also Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 993 (1989) (“That punitive damages are more like ‘fines’ than ‘damages’ has become increasingly clear as states have enacted legislation to divert a portion of them from plaintiffs’ pockets to the public coffers.”).

144. 781 N.E.2d 121, 145 (Ohio 2002); see also *Ford v. Uniroyal Goodrich Tire Co.*, 476 S.E.2d 565 (Ga. 1996) (holding that the goal of a split-recovery statute was to punish defendants who had the potential to damage society at large).

prevent future harm to the public, and setting aside a portion of the damages collected for the public's use is reasonably related to the deterrence goal."<sup>145</sup> The dissent countered, however, that so far as deterrence was concerned, the monetary recipient was irrelevant.<sup>146</sup>

Under the "decoupling" theory of Polinsky and Che,<sup>147</sup> split-recovery statutes might be seen as a potential efficiency-enhancing policy tool, whereby a given level of deterrence could be maintained at lower social cost (on account of a reduction in litigation costs because plaintiffs would bring fewer suits). Polinsky and Che, like split-recovery legislation's proponents, aim to discourage such suits, but on different normative grounds: Polinsky and Che seek to minimize litigation costs, while split-recovery schemes generally strive to protect against the overdeterrence that may result from the overcompensation of plaintiffs. It is this distinction in goals that drives split-recovery schemes to decrease defendants' expected liability, while Polinsky and Che would increase the fines upon defendants so as to hold constant their expected liability (and thus the deterrent effect in terms of level of care exercised by defendants).

More recent scholarship examining these schemes is decidedly less sanguine about the prospects for using split-recovery schemes as an effective policy tool aimed at achieving optimal deterrence at minimal cost. Several scholars, who focus upon the various factors affecting the incentives of plaintiffs and plaintiffs' attorneys to litigate or to settle cases, disagree as to whether the split-recovery statutes either discourage the number of punitive damages claims brought by plaintiffs (the intended legislative goal) or optimally deter defendants' wrongdoing (the intended economic goal).<sup>148</sup> It thus seems fair to say that, at a minimum, no

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145. 56 P.3d 1046, 1058 (Alaska 2002) (2-2 decision). Because the court was equally divided on this issue, the decision has the effect of a plurality opinion.

146. The dissenters challenged:

[A]n award of full punitive damages to the plaintiff serves to deter future harm as fully as an award that splits the punitive damages between the state and the plaintiff. . . . (In fact . . . the [split-recovery] provision results in less deterrence by discouraging future punitive damages claims.) . . .

The plurality's reliance on general deterrence of public harm thus begs the key question: What legitimate objective [is there] . . . for replacing the existing law, which achieved general deterrence by awarding full punitive damages to the plaintiff, with a [split-recovery] provision that achieved no greater deterrence but required the plaintiff to surrender half the award to the state?

*Id.* at 1075-76 (Bryner, J., dissenting in part).

The dissenters' criticism here—though well-taken—is overly simplistic. It turns out that the incentive effects are indeterminate as a result of several factors including: (1) whether the statute allows the deduction of attorneys' fees prior to calculating the percentage allocation between the plaintiff and the state, and (2) agency costs between the plaintiff and his attorneys. *See infra* Subsection V.C.2.

147. *See supra* notes 68-70 and accompanying text.

148. Several prominent law-and-economics scholars have formally modeled the economic effects of split-recovery awards on litigant choices. *See* Daughety & Reinganum, *supra* note 77; Marcel Kahan & Bruce Tuckman, *Special Levies on Punitive Damages: Decoupling, Agency*

consensus emerges with respect to the efficiency rationale for split-recovery statutes. A void thus remains to be filled by linking these recovery schemes—and the compensatory trends of punitive damages more broadly—to a broader theory of damages. It is to such an endeavor that this Article now turns.

### III. A NEW CATEGORY OF COMPENSATORY SOCIETAL DAMAGES

In this Part, I propose that we recognize a new category of damages: compensatory societal damages assessed to redress widespread harms caused by the defendant, harms that reach far beyond the individual plaintiff before the court. I wish to demonstrate not only that this societal compensatory component already lurks within the existing morass of punitive damages, but also that we should reconceptualize the civil damages landscape to add a new, explicit category of damages to achieve this societal compensation goal.

The concept of societal damages is particularly relevant to widespread harm torts. These torts comprise two categories: (1) single tortious acts by defendants that harm multiple victims; and (2) “pattern or practice” torts, which consist of repeated conduct that likewise affects multiple parties. If a defendant’s conduct toward the plaintiff is part of a pattern of similar repeated conduct, a higher punitive damages award may be permissible. Prior to *State Farm*, at least, this was well-established law.<sup>149</sup> But even in that decision’s less-than-certain wake,<sup>150</sup> it seems likely that, at a minimum, the effect of the defendant’s similar conduct upon other individuals and entities within the territorial boundaries of the plaintiff’s state can be taken into account.<sup>151</sup>

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*Problems, and Litigation Expenditures*, 15 INT’L REV. L. & ECON. 175 (1995); ALBERT CHOI & CHRIS WILLIAM SANCHIRICO, SHOULD PLAINTIFFS WIN WHAT DEFENDANTS LOSE?: LITIGATION STAKES, LITIGATION EFFORT, AND THE BENEFITS OF “DECOUPLING” (Univ. of Va. Law Sch., Law & Economics Research Paper Series, Working Paper No. 02-1, 2002), [http://ssrn.com/abstract\\_id=304193](http://ssrn.com/abstract_id=304193); see also *infra* note 383 and accompanying text.

149. In *TXO Production Corp. v. Alliance Resources Corp.*, the defendant company’s top-level executives engaged in a deliberate plan of trickery and deception. In evaluating the punitive damages award, the Supreme Court considered what “the defendant’s conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as *the possible harm to other victims* that might have resulted if similar future behavior were not deterred.” 509 U.S. 443, 460 (1993) (emphasis added); see also *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991) (upholding an application of Alabama’s punitive damages statute, which permitted consideration of “the existence and frequency of similar past conduct,” among other factors).

150. As Justice Ginsburg remarked in her dissent in *State Farm*, “*TXO* . . . noted that ‘[u]nder well-settled law,’ a defendant’s ‘wrongdoing in other parts of the country’ . . . [is a] factor[] ‘typically considered in assessing punitive damages.’ It remains to be seen whether, or the extent to which, today’s decision will unsettle that law.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1531 n.2 (2003) (Ginsburg, J., dissenting) (quoting *TXO*, 509 U.S. at 462 n.8 (first alteration in original)).

151. See *supra* notes 10-11, 39 and accompanying text.

The concept of societal damages dovetails with a primary goal of tort law: the compensation of individuals, in this case, those other than the plaintiff who have also been harmed by the wrongdoer. The theory is distinct, however, from the now all-but-discredited historical conception of punitive damages as a supplement to individual compensatory damages.<sup>152</sup> As a “nonpunitive” rationale, the notion of societal compensation fits squarely within the predominant dual functions of tort law—compensation and deterrence. Despite the fit, the concept of societal damages remains undertheorized. This is partly because lawyer-economists’ social welfare models have not focused specifically on victim compensation. As we have seen, for example, Polinsky and Shavell altogether exclude consideration of victim compensation from their definition of social welfare.<sup>153</sup>

Polinsky and Shavell reveal the principal reason why the notion of societal compensation embedded within punitive damages has been largely overlooked to date: “[P]unitive damages are generally extracompensatory; thus, whether or not they are paid typically does not affect fulfillment of the compensation objective.”<sup>154</sup> This is true, to a point: Punitive damages are extracompensatory when they are paid, in their entirety, to the plaintiff. But what if those damages are distributed not only to the plaintiff but also to the society of similarly harmed individuals, and are distributed for the purpose of compensating those individuals for the same (or substantially similar) harms suffered by the plaintiff himself?

Polinsky and Shavell’s multiplier theory ignores the distribution of these augmented damages. The societal damages approach restores the

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152. The Supreme Court recently reiterated the principle that “[p]unitive damages are not compensatory” and thus are not an available remedy to “make good” an individual plaintiff who suffered loss on occasion of a violation of Spending Clause legislation. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002).

Attorneys’ fees and compensation for individual plaintiffs are rationales that garner official support in some states but have lost credence as mainstay justifications. It should be noted, however, that some states continue to view the primary purpose of punitive damages as compensation for plaintiffs. *See, e.g., Berry v. Loiseau*, 614 A.2d 414, 435 (Conn. 1992) (“[P]unitive damages serve primarily to compensate the plaintiff for his injuries and, thus, are properly limited to the plaintiff’s litigation expenses less taxable costs.”); *Eide v. Kelsey-Hayes Co.*, 427 N.W.2d 488, 498 (Mich. 1988) (allowing punitive damages for compensation, not punishment, purposes); *see also Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1173 (1966) (“When utilized to permit compensation for otherwise non-compensable losses, the law of punitive damages serves its historical function of expanding the law of compensatory damages.”).

Moreover, the general consensus regarding the appropriate purposes of punitive damages of course says nothing as to whether “jurors may illegitimately use the punitive awards as a form of compensation.” SUNSTEIN ET AL., *supra* note 47, at 217 n.7. Indeed, Sunstein and his collaborators report one study in which twenty-five percent of respondents indicated that they intended the punitive award to serve as additional compensation to the plaintiff. *Id.*

153. *See Polinsky & Shavell, supra* note 43, at 878 n.15 (“[Our] definition of social welfare does not incorporate the compensation of victims as a social benefit, even though most individuals consider compensation to be a social goal.”).

154. *Id.*

broken link between compensation and deterrence and places heightened emphasis on distributional consequences.<sup>155</sup> In so doing, the societal damages approach also advances fairness and corrective justice goals by placing unique independent emphasis upon the assessment and the distribution of punitive damages. Given that punitive or exemplary damages are deemed to vindicate societal as opposed to individual interests, why should a plaintiff, who has no particular entitlement to these damages, receive any—much less all—of them? To push this inquiry a bit further, why should a plaintiff receive windfall gains that might otherwise be used to compensate other individuals who incurred injuries as a consequence of the same wrongdoing by the same defendant? The corrective justice goal is met by providing a remedy for individuals who have suffered specific harms at the hands of a defendant over whom the court has jurisdiction. Thus, the concept of societal damages expands the boundaries of a single lawsuit's ability to achieve the tort system's varied goals by allowing a jury to assess damages against a defendant whose conduct has had harmful effects radiating far beyond the particular plaintiff who has initiated suit.<sup>156</sup>

#### A. *Societal Compensation*

The theory justifying societal damages draws heavily from deterrence-based theories of torts and punitive damages. At the same time, it puts forth societal compensation as an independent goal, based upon additional fairness and corrective justice rationales. The societal damages concept should thus meet the demands of the law-and-economics approach—which, as explained above, has exalted deterrence to the exclusion of all competing interests—and the latter's vehement critics, who in defending fairness or

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155. The societal damages model laid out here shares certain attributes with Rosenberg's model. See *supra* note 68. Both schemes attempt to meet the tort system's dual deterrence/compensation (or insurance) goals. The societal damages fund, however, would not entirely "decouple" the two functions. Cf. Rosenberg, *supra* note 66, at 1876-77 ("By separating the determination of aggregate liability from the distribution of damages, the basic model effectively decouples the optimal deterrence and insurance functions of mass production tort liability."). For this reason, it may be more practically useful, especially when viewed as a doctrinal complement to class actions.

I nonetheless recognize that by embracing this starting premise, which preserves the doctrinal linkage of compensation and deterrence, there will be other tradeoffs. Thus, for example, tort law's use as an effective compensation scheme is, in some sense, compromised by its insistence on awarding compensation only in situations where the defendant's conduct warrants deterrence. Moreover, the system will fail to deter adequately those defendants who injure victims who fail to litigate for one reason or another.

156. The approach might be aptly described as an "incrementalist" public law approach to private tort law. It takes as given tort law's doctrinal linkage of compensation and deterrence. But at the same time it distinctly moves beyond the tort law's model of a simple "bipolar private law relationship of plaintiff to defendant." ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 19 (1995). In other words, the approach combines traditional tort law features with innovative public law-inspired design reforms that are relevant in both the legislative and judicial realms.

corrective justice have felt pressure to resist the concept of economic deterrence.<sup>157</sup> It may be, in the words of the late Gary Schwartz, that “the combination of deterrence and justice can provide a better or fuller explanation for [tort] doctrines than can either theory standing on its own.”<sup>158</sup> Moreover, the societal damages theory places particular emphasis on the distributional consequences of adopting a remedially focused approach.

Societal damages, as envisioned in this Article, would redress the harms inflicted by the defendant upon parties not before the court. Societal harms can be roughly divided into two categories along a continuum: “specific harms” to identifiable individuals, and more “diffuse harms” that affect society in general. The “diffuse harms” category moves us toward the realm of general social welfare, and away from the more narrowly focused welfare considerations of specifically harmed individuals. It is important to attempt to disentangle these broad categories of societal harms to consider not only the relationship between the societal damages theory and the class action mechanism and punitive damages multiplier approach, but also (as I discuss in Part IV) to evaluate the comparative merits and feasibility of potential legislative and judicial responses.

### 1. *Specific Harms*

We begin our exploration of the societal damages theory in the realm of specific harms to identifiable individuals.<sup>159</sup> The specific harms category can be broken down further into two subcategories of harmed individuals, which I term “absent plaintiffs” and “quasi-plaintiffs.” The groups differ in terms of the degree to which they have been harmed: “Absent plaintiffs” might be thought of as individuals with present legally cognizable tort injury claims, and “quasi-plaintiffs” as similarly situated individuals, harmed to some lesser degree and thus lacking legally cognizable tort injury claims.

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157. See, e.g., JULES COLEMAN, RISKS AND WRONGS 374-82 (1992) (focusing on the “structure” of the tort suit, which confirms a corrective justice interpretation of tort and refutes the idea of deterrence as an appropriate goal for tort); Galanter & Luban, *supra* note 22 (developing a retributive account of punitive damages).

158. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997); see also David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 272 (1989) (“While from some perspectives these two goals—compensation and deterrence—often conflict, from an economic viewpoint they walk closely in hand.”).

159. As I explore further in Part IV, the category of specific harms is, in some sense, the more interesting (if much more challenging) realm within which to examine the full implications of the societal damages approach. For it is here that the greater divergence between this approach and the multiplier approach emerges, and it is also where a distinct new role for courts and juries (as opposed to legislatures) emerges.

a. *Absent Plaintiffs*

Societal damages to absent plaintiffs might be particularly relevant, for example, in cases where a single plaintiff alleges some violation of his or her clearly established constitutional rights occurring pursuant to an official policy. In order to sue a municipality under § 1983, a litigant must trace his injury to the existence of a government “policy or custom,”<sup>160</sup> which ordinarily at least is likely to have affected numerous similarly situated individuals.

For illustrative purposes, let us consider how the jury might have evaluated societal damages in the case of Debra Ciralo, who was subjected to an unconstitutional strip and body cavity search by two female New York Corrections Department employees.<sup>161</sup> Ciralo brought an individual suit, in which the jury awarded her \$19,645 in compensatory damages and \$5 million in punitive damages. The unconstitutional search of Ciralo, however, was “not an isolated incident”;<sup>162</sup> to the contrary, it was the result of established city policy.<sup>163</sup> In the end, the award was vacated on the ground that municipalities are immune from punitive damages,<sup>164</sup> but for our purposes it is still relevant that, according to records kept by the city and introduced into evidence, approximately 65,000 arrestees had actually been subjected to the unlawful strip search policy.<sup>165</sup>

Taking the multiplier approach of Polinsky and Shavell, we might say that the total damages awarded in this case necessarily would underdeter, assuming for the moment that the jury’s award of nearly \$20,000 in compensatory damages is a fair measure of the individual harm caused by

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160. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978). Other analogies to the “policy or custom” might be cases in which it is necessary to demonstrate a “persistent course of conduct” in order to establish the defendant’s failure of due care. *See, e.g., Pulla v. Amoco Oil Co.*, 882 F. Supp. 836 (S.D. Iowa 1994), *rev’d in part on other grounds*, 72 F.3d 648 (8th Cir. 1995); *cf. Carter v. Spells*, 494 S.E.2d 279, 281 (Ga. Ct. App. 1997) (holding that it would be necessary to establish a “pattern or policy” of dangerous driving). In these cases, we might go so far as to say that a plaintiff must establish “societal” harm as part of his or her prima facie case.

161. *See Ciralo v. City of New York*, 216 F.3d 236 (2d Cir. 2000).

162. *Id.* at 237.

163. Pursuant to the city’s policy, all arrestees (including misdemeanants, such as Ciralo) were to be searched upon arrival at the correctional facility, regardless of any reasonable suspicion of hidden contraband. Indeed, both parties stipulated to the existence of the city’s strip-search policy as well as to the fact that there was no evidence that any of the officers believed that Ciralo might have been concealing contraband. *Id.* at 238. Such a policy violated the Fourth Amendment of the U.S. Constitution, as well-established precedent made clear. *Id.*

164. *See id.* at 242 (noting that the court was “constrained by the Supreme Court’s holding in” *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981)). Nonetheless, Judge Calabresi wrote a separate concurrence to “suggest that the policies behind punitive damages and the purpose of § 1983 would be better furthered by a different outcome.” *Id.* (Calabresi, J., concurring).

165. *Id.* at 247.

the city's unconstitutional policy.<sup>166</sup> Total damages instead should exceed \$1 billion, assuming that there was only a one in 65,000 chance that the city would be held accountable for its policy.<sup>167</sup> Indeed, following at least the spirit—if not all of the normative implications—of Polinsky and Shavell's multiplier, Judge Calabresi suggested (in a concurrence) that the jury might be instructed to “calculate the probability that the defendant would otherwise evade full liability for its act.”<sup>168</sup>

*Ciraolo* presents a fairly easy case for the application of either Polinsky and Shavell's “punitive” multiplier approach or the societal damages “remedial” approach. Of course, as I have emphasized above, the distributional consequences vary significantly: The difference is whether a single plaintiff receives a \$1 billion (or \$5 million, as the jury in fact awarded) windfall, or alternatively, whether a group of similarly harmed “absent plaintiffs” can receive compensation without bringing their own lawsuit.<sup>169</sup>

#### b. *Quasi-Plaintiffs*

Far more controversial, but worth exploring, is whether the concept of societal damages could be extended to particular torts when harms have been inflicted upon others that, in and of themselves, do not amount to legally cognizable injuries; in other words, the “quasi-plaintiffs” category of specific harms cases.

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166. I recognize that this is a contestable assumption, especially given variability in noneconomic awards, such as pain and suffering.

167. One might argue that, while from an *ex ante* perspective the chance of an illegal search being challenged is one in 65,000, *ex post* (i.e., following the first lawsuit) it should be close to 100%. In other words, after the first successful lawsuit, future potential plaintiffs will bring their own lawsuits and there should no longer be any need for the multiplier. But two responses are in order here. First, such a line of argument assumes that the constitutional challenge being brought was in some sense “novel”; whereas, in this particular situation, it was held to be a violation of a clearly established constitutional right. Second, and perhaps more significantly, there may be reason to believe that victims of certain types of wrongdoing—constitutional violations and “shaming” torts being perhaps the most salient examples—are likely to avoid bringing suit, even for clear violations of their rights.

Nonetheless, it cannot be gainsaid that the first successful lawsuit might have a dramatic effect on the incentives of others (and especially their attorneys) to bring suit. And, in fact, a class action followed closely on the heels of judgment in the *Ciraolo* case. See Benjamin Weiser, *New York Will Pay \$50 Million in 50,000 Illegal Strip-Searches*, N.Y. TIMES, Jan. 10, 2001, at A1.

168. *Ciraolo*, 216 F.3d at 246 n.7 (Calabresi, J., concurring). According to Judge Calabresi, “Such a calculation would rarely be precise. A rough estimate, however, would not be more unlikely than many other estimates that courts currently ask juries to make.” *Id.* Judge Calabresi termed this component of punitive damages “socially compensatory damages,” which are “designed to make society whole” as opposed to compensatory damages, which are “assessed to make an individual victim whole.” *Id.* at 245.

169. These distributional consequences may also be critical to the legal analysis (especially in light of *State Farm*) in terms of distinguishing a “remedial” multiplier from an inappropriate “penal” one. See *infra* text accompanying notes 195-198.



Hostile work environment claims provide a useful venue for exploring the concept of distribution of societal damages to quasi-plaintiffs. My focus here is on the possibility of using the concept of societal damages to construct broader remedial inquiries. The concept of societal damages may be particularly apt in the context of workplace harassment, especially because the problem of underdetection (and thus underdeterrence) is likely to be quite pervasive.<sup>170</sup> Nor is it far-fetched to conceive of Title VII suits as “tort-like” causes of action.<sup>171</sup> Consider, for example, Justice O’Connor’s observations regarding the tort-like quality of Title VII actions, with a particular emphasis on their “public law” aspect: “Functionally, the law operates in the traditional manner of torts: Courts award compensation for invasions of a right to be free from certain injury in the workplace. Like damages in tort suits, moreover, monetary relief for violations of Title VII serves a public purpose beyond offsetting specific losses.”<sup>172</sup>

A plaintiff may establish a Title VII violation by proving that sexual harassment, a form of discrimination based on sex, has created a hostile or abusive work environment.<sup>173</sup> What of conduct directed at those other than

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170. As Susan Sturm explains, “[M]ost [potential] plaintiffs do not sue.” Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 554 (2001); see also Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 30 n.121 (1999) (“It is difficult to state the frequency of such workplace harassment—a recent Bureau of Labor Statistics Survey suggested that up to 58% of harassment and 43% of threats in the workplace are never reported to management—but what evidence there is suggests that workplace harassment is widespread.”).

Of course, one might object that while there may be significant underreporting of violations, there may also be overreporting, for example by either overly sensitive individuals or else individuals bringing “nuisance” suits, pressuring firms to give them money to go away. If this is a concern, it will only be compounded by a societal damages inspired framework. Cf. Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. (forthcoming) (manuscript at 39, on file with author) (“We have more than aggregation at work. We have a wholesale distortion of the substantive standards, the chief effect of which is to facilitate a finding of discrimination in cases where it is highly unlikely to appear.”).

171. See *United States v. Burke*, 504 U.S. 229, 254 (1992) (O’Connor, J., dissenting) (noting that Title VII “offers a tort-like cause of action to those who suffer the injury of employment discrimination”). I do not wish, however, to limit the realm of possibility to Title VII; instead, I would include not only state law discrimination claims, but tort causes of action as well. See, e.g., Ehrenreich, *supra* note 170, at 4-5 (advocating “the development of broad, tort-based remedies for the many kinds of nondiscriminatory and nonsexual dignitary harms that injure both men and women in the workplace,” and suggesting that “common-law tort causes of action contain the germ of a more general right to be free of severe dignitary harm in the workplace”).

As a practical matter, common law claims will provide more room for exploration of the societal damages theory. This is because § 1981 limits the damages available to a claimant under Title VII. See 42 U.S.C. § 1981a(a)(1)-(2) (2000). The cap applies to compensatory and punitive damages and depends on the number of persons employed by the defendant. *Id.* § 1981a(b)(3). Discrimination claims, however, can ordinarily be brought under both federal and state law, and several states have civil rights statutes that are not subject to any damages caps. See, e.g., Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2801 (West 2001); Pennsylvania Human Relations Act, 43 PA. CONS. STAT. ANN. §§ 955-955.3 (West 1991 & Supp. 2003).

172. *Burke*, 504 U.S. at 250 (O’Connor, J., dissenting).

173. See 42 U.S.C. § 2000e-2(a)(1) (barring covered employers from discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of employment,

the plaintiff? Proof of such conduct is often necessary to establish that a workplace environment was sufficiently hostile or abusive.<sup>174</sup> If that fact is established, the societal damages model could allow the jury to assess damages for those harms to other individuals—whether or not they amounted to any cognizable tort in and of themselves.<sup>175</sup>

Take for example the case of Mary Howard, an alleged victim of hostile environment sexual harassment at a truck stop in Nebraska, where she worked as an assistant manager.<sup>176</sup> Howard testified that a coworker made repeated sexual innuendos, threatened that he was “going to get [her],” and brushed up against her in a sexual manner.<sup>177</sup> Howard alleged that for a long time her complaints to the supervisor fell on deaf ears. When she eventually sued, the trial evidence was not limited to sexual innuendos and inappropriate behavior directed at Howard (even though she brought the suit in her individual capacity); evidence of the coworker’s harassment of other female employees came in as well. In particular, four other women had been targets of the coworker’s offensive conduct. Their testimony (as relayed by Howard and others) established that they had been subjected to similar lewd gestures, offensive jokes, and foul language. The jury awarded Howard \$1000 in actual damages and \$2000 in punitive damages on her hostile environment claim.<sup>178</sup>

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because of such individual’s . . . sex”). Workplace sexual harassment has been established as a species of Title VII sex discrimination. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). To recover punitive damages under § 1981, the plaintiff must also demonstrate that the defendant engaged in a discriminatory practice “with malice or with reckless indifference to the federally protected rights” of the employee. 42 U.S.C. § 1981a(b)(1), *construed in* *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 534-39 (1999).

174. *See* Henry L. Chambers, Jr., *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 773 n.189 (2002) (citing numerous cases in which the courts determined that incidents of sexual harassment directed at employees other than the plaintiff could be used to establish plaintiff’s claim of a hostile work environment).

175. It might be objected that such a societal damages model would in effect lower the required standard of proof on the part of defendants from a negligence-based standard to one of strict liability. *Cf. Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (warning that the combination of the class action mechanism and statutory damages might “expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages—yet ones that are awarded as a matter of strict liability, rather than for the egregious conduct typically necessary to support a punitive damages award”). This might not be the end result, however, for two reasons. First, it might be the case that harm to other individuals must be established as part of the plaintiff’s prima facie case, *see supra* notes 160, 174 and accompanying text, so that the defendant’s conduct would have to meet the same threshold (i.e., more severe harm to the plaintiff, plus additional lesser harms to others), and the societal damages model would be primarily distributive in nature. Second, an underlying premise for the necessity of societal damages in certain types of cases, including sexual harassment, is that there is an underdeterrence (as opposed to an overdeterrence) problem. Thus, while of course it is not the case that the underdeterrence and overdeterrence concerns will exactly balance each other out, we might not be as worried about any lowering of the threshold for defendant’s liability in certain types of torts and civil rights violations.

176. *See* *Howard v. Burns Bros.*, 149 F.3d 835 (8th Cir. 1998).

177. *See id.* at 838.

178. *See id.* at 838-40.

It is not clear whether the other four women either could have or would have maintained their own individual suits. My point here is simply to suggest that in such a case the jury might be called upon to assess the amount of harm to Howard, and then to each of the others individually, on the basis of the severity of the harm suffered by each.<sup>179</sup> It is not so far-fetched to speculate as to whether the \$2000 punitive award in this case was, in some sense, used to hold the defendant responsible for the harms to these other women; if so, then the societal damages theory suggests that there might be a workable mechanism through which they could receive compensation, even if they would not otherwise choose to maintain litigation on their own.<sup>180</sup>

I am aware that such a scheme raises numerous difficulties. First, it is not at all clear whether such evidence of harms to others should be admitted, even in a hostile work environment case. Moreover, even assuming that such evidence is admissible, it cannot simply be assumed that the other quasi-plaintiffs would perceive the sexual innuendos in a like-minded way. In fact, they might not be plaintiffs in their own right precisely because they have not perceived themselves as having been “injured” in any way sufficient to establish a hostile workplace resulting from sexual harassment.

An even more fundamental hurdle is presented in this quasi-plaintiff category of cases. The law has long recognized that not all actions causing injury warrant redress in the courts; indeed, even in instances where society might find a party’s conduct to be highly offensive, inappropriate, or condemnable, the rule of *damnum absque injuria* bars recovery when the party’s conduct does not amount to a cause of action, or when the victim’s injuries are not otherwise legally cognizable.<sup>181</sup> Ordinarily, therefore, the particular legal theory upon which a claim for damages is asserted is of paramount importance, because failure to establish each of the elements of a given cause of action makes the difference between an injury for which the law provides recourse and one for which there is no legal remedy at all.

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179. We might also want to give some additional reward (or compensation) to Howard for the burden of coming forward, especially if we are particularly worried about the possibility of “free-riding” on the part of other harmed individuals. In similar fashion, class representatives are sometimes given additional compensation (as compared with absent plaintiffs) for shouldering the extra burden in class action litigation. See *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (“Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.” (quoting *In re S. Ohio Corr. Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997))).

180. The mechanism could be a societal damages fund, from which the absent or quasi-plaintiffs could choose to collect, see *infra* Section III.B, or else funds might be used in a more general “rehabilitative” manner, such as for the provision of workplace anti-harassment training.

181. See, e.g., BLACK’S LAW DICTIONARY 398 (7th ed. 1999) (“There are cases in which the law will suffer a man knowingly and wilfully to inflict harm upon another, and will not hold him accountable for it.” (quoting JOHN SALMOND, JURISPRUDENCE 372-73 (Glanville L. Williams ed., 10th ed. 1947))).

Moreover, a claimant must also overcome the traditional barriers of the case or controversy requirement (in federal court) and standing requirements (in state and federal court). At first blush, it might appear that I am positing an end run around such doctrinal and procedural requirements. This is not, however, my aim. Instead, I wish to suggest that there may be a significant distinction between these doctrinal constraints at the liability stage and at the remedial stage.<sup>182</sup>

Here I want to draw an analogy to injunctive relief remedies, which provide benefits to a much wider class of individuals than the immediate plaintiff in a case. In other words, where a single plaintiff brings an action for injunctive relief against an institutional actor, the remedy benefits not only the individual plaintiff, but also all other similarly situated individuals.<sup>183</sup> In similar fashion, I want to suggest that once the court establishes a societal damages fund (which is based on the jury's assessment of harms to individuals other than the plaintiffs before the court), the court's allocation and distribution of the fund—based upon its ancient equitable remedial authority—need not be constrained by the doctrinal limitations of standing, legally cognizable injury, and the like. Nor would this necessarily violate our usual understanding of either standing or *damnum absque injuria*. For, just as in the injunctive relief analogy, there need only be one individual with standing, and with a particularized, legally cognizable injury, to generate liability.<sup>184</sup>

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182. Cf. Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1358-59 (1991) (challenging the conception, in the realm of public law, that the role of courts in the "remedial process" must necessarily be the same as their role in "determining liability").

183. See, e.g., Samuel Issacharoff, *Preclusion, Due Process, and the Right To Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1058-59 (2002) ("[A] school desegregation challenge may or may not succeed, but if it does it will establish the wrongful conduct directed across a group of affected school children. . . . While each aggrieved child is deemed to have standing to bring a claim for wrongful deprivation of a claimed right to integrated schools, no child has an individual stake in the outcome of that litigation separate from that of the other similarly situated children."). Or, as Richard Nagareda explains, "A winning effort to stop the disputed conduct (or to compel legally required conduct) would, as a practical matter, redound to the benefit not just of those who are parties to the litigation but also to other affected persons who remain on the sidelines." Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 180 (2003). Indeed Rule 23(b)(2) class actions are often denied certification on this very ground, namely that no class is necessary because an injunction in favor of the named plaintiff would cause the defendant to alter its conduct with respect to all affected parties.

184. With the similar aim of "underscor[ing] the collective and diffuse harms imposed by cultures of harassment," Judith Resnik has proposed an alternative strategy: "to challenge current jurisprudential constructions of the harm of sexual harassment, exemplified by rulings on who has 'standing' to seek redress." Judith Resnik, *The Rights of Remedies: Collective Accountings for and Insuring Against the Harms of Sexual Harrassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 247, 257 (Catharine MacKinnon & Reva Siegel eds., 2003). Specifically, Resnik advocates "facilitating such lawsuits through doctrines such as 'associational injury' . . . 'third-party standing' . . . or through a reconception of discrimination." *Id.* at 258. The societal damages approach might nonetheless complement such an approach, by focusing attention on the distribution of damages to the other harmed individuals, not presently before the court.

More generally, class action settlements occasionally provide benefits extending beyond class members.<sup>185</sup> In this particular realm, then, the judiciary might benefit from looking outside itself to the processes that it has sparked, pursuing a kind of “adjudication in the shadow of settlement.” I am aware that, in the controversial realm of sexual harassment, the “offending” conduct might affect various absent and quasi-plaintiffs quite differently. But it is likewise typical that “[s]ome class members may benefit more or less from a class settlement whereby the defendant promises to make changes in the disputed conduct short of all relief sought in the class complaint.”<sup>186</sup>

Catharine MacKinnon, whose pioneering work established the concept of sexual harassment, has criticized traditional tort law for its neglect of group-based harms.<sup>187</sup> Societal damages directed toward quasi-plaintiffs in tort cases, however, may provide one fruitful way of dealing with at least certain aspects of the group harm issue.<sup>188</sup> It may be the case, nonetheless, that this type of analysis edges us closer to the category of more “diffuse” harms.<sup>189</sup>

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There are clearly some parallels in the realm of affirmative action. I will not pursue that issue here, other than to suggest the possible relevance of the Supreme Court’s disagreement over standing in its most recent affirmative action case, *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003). According to the dissent, the majority offered a “new gloss on the law of standing.” *Id.* at 2438 (Souter, J., dissenting). Specifically, Justices Stevens and Souter objected to according petitioner standing “to obtain injunctive relief to protect third parties from similar harms.” *Id.* at 2435 (Stevens, J., dissenting).

185. *See, e.g.*, *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 984 (E.D. Tex. 2000) (“The settlement benefits not only members of the class, but also all future purchasers of Toshiba products and all persons who rely on the integrity of data that might have been damaged by the [defective] condition in Toshiba computers.”). For a discussion of cy pres distributions in class action litigation and settlements, see *infra* note 243.

186. Nagareda, *supra* note 183, at 172. Nagareda distinguishes between damages class actions and those seeking only injunctive or declaratory relief on the ground that the latter need not focus upon “allocation within the class of the gains from settlement.” *Id.*

187. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 88 (1979) (“[B]y treating the incidents [of sexual harassment] as if they are outrages particular to an individual woman rather than integral to her social status as a woman worker, the personal approach on the legal level fails to analyze the relevant dimensions of the problem.”); *see also* Ehrenreich, *supra* note 170, at 33 (“With its emphasis on individual behavior—individual intent or negligence, and individual suffering—tort law seemed poorly equipped as a means of pointing out that sexual harassment was part of large-scale male backlash against women in the workplace.”). Richard Epstein, however, has endorsed the individual focus of private law. *See* Epstein, *supra* note 170 (manuscript at 20) (“When someone is run over by a truck, gouged by a monopolist, victimized by discrimination, consumer or securities fraud, he sustained his loss in his individual capacity. The usual demand is for cash relief, to be paid to each person separately.”).

188. In order to establish a hostile work environment claim, a plaintiff must establish, *inter alia*, that he or she belongs to a protected group. The societal damages theory might be profitably exploited in a variety of other contexts, including affirmative action, hate crimes, and reparations. But expansion into these realms must await another day.

189. “Group harms” in fact arise at the boundary between “specific” and “diffuse” harms. The “diffuse harm” element of group harms would be best addressed by the legislature, which, as I discuss in the next Part, could establish a remedial damages multiplier. These damages might

## 2. *Diffuse Harms*

Diffuse harms comprise a residual category of widespread harm cases in which the harm extends beyond the individual plaintiffs and other specifically identifiable individuals. At one far end of the spectrum, damages addressing such diffuse harms are tantamount to the idea of an effluent tax, or taxing defendants for the general welfare: An example here would be “sin” taxes on alcohol. The diffuse harm category might also include, for example, actions that harm the public health generally, such as cigarette use. Thus, in some sense, the Master Settlement Agreement payments—to the extent that the payments were used to support, for example, CAT scans for smokers in order to detect cancer—might be seen as an example of an attempt to direct money from the manufacturer to some form of alleviation of the more diffuse harms it has caused.

Although the problem is somewhat conceptually distinct, I also consider here “concealed acts” on the part of harmdoers. “Concealed harms” include actions such as fraud and other cover-ups whereby the harm to specifically identifiable plaintiffs may be evident, but it is nonetheless impossible to identify the specific wrongdoer who caused the harm.<sup>190</sup> These two categories of harms—diffuse and concealed—are considered together because in each case it may be difficult to identify all of the parties who have been harmed by a specific defendant’s actions, either because the nature of the harm is more generalized or directed at society as a whole (i.e., identifiable but as-yet-unidentified plaintiffs), or else because the harm is subject to fraudulent concealment (i.e., identifiable but as-yet-unidentified defendants).

For illustration, I return to *State Farm*. Recall that the Utah Supreme Court and the jury—which was asked by the plaintiffs’ attorney to send a message to State Farm, to make it “stand accountable” for its nationwide business practices—were influenced to a significant degree by the harms inflicted on individuals other than the plaintiffs before the court. Assume for the moment that, due to State Farm’s concealment of its fraudulent behavior,<sup>191</sup> it is not possible for specifically harmed other individuals to trace their harm to State Farm.

With respect to such concealed acts, we might have the jury—or, more likely, the legislature—estimate a punitive multiplier. At present, there are a limited number of legislative examples of multiplier estimates. Statutory

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then be placed within a societal damages fund, which could be used, for example, for harassment education and training in the workplace. Again, this type of arrangement is often part of settlement agreements.

190. So-called market share liability cases—cases in which we know that the tortfeasor is one of a limited group who could possibly have committed the tort—would be included here.

191. See *infra* note 410 (noting the concealment of records).

trebling of damages might be considered one form of the punitive damages multiplier.<sup>192</sup> Antitrust violations are the best known of the federal treble damages statutes.<sup>193</sup> In one sense, societal damages might be seen as an extension of the punitive damages multiplier approach, which itself allows present plaintiffs to claim an award of punitive damages based on predictable, undetected injuries to other (nonpresent plaintiff) individuals.<sup>194</sup> But as described above, *State Farm* appears to have disavowed (albeit cryptically) the penal multiplier approach.

Pursuant to the societal damages theory, however, the court—or the legislature, as the case may be—would not merely rely on these societal harms as a justification for an increased “penalty” on the defendant (and the concomitant windfall to the plaintiffs), but would go one step further: It would attempt, either directly or indirectly, to *redress* these societal harms—and, in so doing, to mitigate or even eliminate the plaintiff’s windfall problem. Indeed, a little-recognized Supreme Court case from last Term provides a significant germ of support for this approach. In *Cook County v. United States ex rel. Chandler*, a decision holding that local governments are “persons” subject to qui tam suits under the False Claims Act, the Court explained that “it is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives.”<sup>195</sup> In other words, “[T]he damages multiplier has *compensatory* traits along with the punitive.”<sup>196</sup>

By reconceptualizing these underdeterrence damages as societal compensation, as opposed to quasi-fines or penalties, the societal damages approach would seem to survive the retributive-punishment-focused due process constraints of *State Farm*—more so, if such remedial damages were

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192. See, e.g., *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769 (2000); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). Ordinarily, punitive damages are not allowed on top of these multipliers. See *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 933-34 (11th Cir. 2000) (holding that the Fair Labor Standards Act does not provide for the recovery of punitive damages). But see *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 111-12 (7th Cir. 1990) (holding that the anti-retaliation section of the Act does permit punitive damages because retaliation claims are not covered by the double-damages rule).

193. See, e.g., *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1331-32 (10th Cir. 1996). We might likewise consider other instances where Congress has specified a multiplier, such as statutory double damages for willful violations of wages and hours requirements under the FLSA. See, e.g., *Shea v. Galaxie Lumber & Constr. Co.*, 152 F.3d 729, 735 (7th Cir. 1998). One might argue instead that these multipliers are imposed in cases of egregious wrongdoing, and thus reflect the punitive or retribution-based component of punitive damages. Such an argument seems stronger in the case of certain willful violations than it does, for example, with respect to antitrust violations.

194. Seen another way, the societal damages approach in essence reduces the “work” that the multiplier, which focuses on the risk of nondetection, would have to do.

195. 123 S. Ct. 1239, 1246 (2003).

196. *Id.* (emphasis added). In the case before it, the Court had in mind compensation for the government for the costs, delays, and inconveniences occasioned by fraudulent claims.

limited within statewide boundaries.<sup>197</sup> Moreover, the approach would favor a new kind of distributive scheme that would attempt either to compensate society directly for the imposition of those harms or else to direct compensation to some proxy that would attempt to compensate categories of individuals likely harmed by a defendant's similar wrongdoing.<sup>198</sup>

Thus, courts and legislatures need not be at a loss in terms of addressing the more diffuse societal harms. For example, the legislature, based on as much evidence as it could gather, might establish a multiplier (e.g., five times compensatory damages) in particular types of cases (e.g., bad faith insurance fraud). Instead of being directed to the individual plaintiffs harmed in a particular case, however, these augmented damages could be directed to a specific fund designed to offset the type of harm at issue in the case (e.g., some sort of insurance assistance program).<sup>199</sup>

#### B. *Ex Post Class Action*

With particular examples drawn from split-recovery states as well as innovative judicial responses absent such enabling legislation, we have seen that courts are often faced with single-plaintiff cases (or at least non-class action cases) in which the defendant's conduct has caused more widespread harm. Thus far I have attempted to demonstrate how, in such cases, the theory of societal damages might further the tort system's compensatory and deterrence goals. On one level, of course, a mechanism in the law for achieving the societal compensation goal already exists: the class action. The class action mechanism has been described as "a complex machinery capable of rectifying huge wrongs spread amongst millions of people who, standing alone, would lack both the incentive and the ability to act with

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197. For a discussion of the Court's extraterritoriality concerns in the punitive damages context—but, as of yet, absent in the "remedial" class action context—see *infra* Subsection V.A.1.

198. No such distributive scheme exists at present. Yet, as I discuss below, with some modification, split-recovery schemes might take on this role. See *infra* Subsection IV.A.2.

199. The "multiple punishments" problem might be a serious concern, however. I discuss in Subsection V.A.2 how, at least with respect to the "specific harms" category of cases, this problem is mitigated. Nonetheless, this might be one reason to prefer—at least in the realm of the "diffuse harms" category of cases—the punitive-damages-only class action of the type discussed below in Section III.C.



such curative effect.”<sup>200</sup> Moreover, along with this aggregation machinery comes a whole host of procedural protections for the defendant.<sup>201</sup>

So the question arises: Are we in essence really talking about a means by which to aggregate “classwide” damages in a single-plaintiff case without providing due process and Rule 23 protections?<sup>202</sup> Or, put differently, could the entirety of the societal damages theory be boiled down to an attempt to evade these limitations?

Certainly, barriers to class certification—especially in the torts and civil rights contexts—provide one powerful explanation of the empirical reality of single-plaintiff suits in situations of more widespread harms inflicted by defendants. In the mass tort area, class certification motions in cases seeking damages have encountered considerable judicial resistance. Efforts to certify such classes for trial increasingly fail, and the same holds true of efforts to certify for settlement purposes only.<sup>203</sup> Failure is particularly likely if certification is sought on a nationwide basis.<sup>204</sup>

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200. *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 951 (E.D. Tex. 2000). A frequently advanced justification for certification of a class action is the insufficiency of resources of individual litigants facing a common course of conduct by a repeat actor. For example, it may be the case that the value of the claim is itself too small to justify the cost of prosecution. These are commonly described as “negative value” claims; without the certification of a class action, they are not litigationally viable. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1351-52 (1995) (terming such groups “small claimant” classes).

201. Every proposed class action must satisfy the four, well-known prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure (and similar state class action laws patterned thereon): numerosity, commonality, typicality, and adequacy of representation. In addition, the parties seeking class certification must demonstrate that they meet the requirements of Rule 23(b)(1), (2), or (3). Typically, claims seeking money damages are certified under Rule 23(b)(3), in which case class members must be provided with notice and an opportunity to “opt out,” and the class itself must meet the “predominance” and “superiority” requirements. FED. R. CIV. P. 23(b)(3). By contrast, class members cannot opt out of mandatory Rule 23(b)(2) classes, which likewise do not have to meet the predominance and superiority requirements. Rule 23(b)(2) covers classes primarily seeking injunctions or other equitable relief.

202. I use “Rule 23” as shorthand for Rule 23 of the Federal Rules of Civil Procedure and its state law counterparts.

203. *See, e.g.,* FED. R. CIV. P. 23(b)(3) advisory committee’s note (explaining that mass tort cases are likely to present “significant questions, not only of damages but of liability and defenses of liability, . . . affecting the individuals in different ways . . . [such that] an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried”); *see also Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (holding that class certification in tobacco litigation was barred because of individual issues such as addiction, causation, and affirmative defenses); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 209 F.R.D. 323, 343 (S.D.N.Y. 2002) (denying certification of a class seeking treatment and monitoring of a contaminated groundwater well on the ground that defendants “demonstrat[ed] the existence of individualized issues”); *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 445 (Fla. Dist. Ct. App. 2003) (decertifying a statewide class of smokers based upon the fact that “individualized issues of liability, affirmative defenses, and damages, outweigh[] any ‘common issues’”).

204. The certification of nationwide classes raises not only the problem of “individual issues” but also the problem of variation among different states’ substantive laws. According to some judges and commentators, these variations reduce the predominance of common issues and place considerable strains on the operation of the class. *See, e.g., In re Bridgestone/Firestone, Inc. Tires*

Indeed, the entire theory of societal damages may be attacked as an end run around class certification rules and procedures—allowing punitive damages to serve as “the poor man’s class action.”<sup>205</sup> To put it slightly differently, one (anticipated) response to this Article is that I have made a strong case for eliminating punitive damages and requiring those who allege a societal harm beyond their own individual losses to utilize the class action form. If so, however, the fact remains that existing split-recovery schemes should likewise be similarly attacked—an argument that has yet to be made in the courts or academic literature. In fact, split-recovery schemes, as they now exist—especially those that give over a significant portion of punitive damages awards directly to the state—would provide particularly egregious examples: The state is in effect “bribed” to overlook the compromise of procedural protections, and the state is under no duty to use its recovery to effectuate compensation (or any other goal). For this reason, the societal damages theory presented thus far is relevant, whether one accepts or rejects it.

I have an even more ambitious goal, however. I wish to set out how the assessment of societal damages and the creation of a damages fund might be accommodated within our civil litigation system, through a “back-end” or “ex post” class action, which would accord potential plaintiffs (including absent plaintiffs, quasi-plaintiffs, and diffuse harm plaintiffs) and defendants the basic procedural protections enshrined in Rule 23. Such an ex post class action would respond not only to the “end run” criticism, but also might fill in some of the “deterrence gap” that exists in a world where class actions are not mandatory.<sup>206</sup> A role for the ex post class action is also

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Prods. Liab. Litig., 288 F.3d 1012, 1018 (7th Cir. 2002) (“Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable.”), *cert. denied*, 537 U.S. 1105 (2003); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300-01 (7th Cir. 1995). On this view, a nationwide class might be more plausible for causes of action based upon federal law. Nonetheless, even here, it is more often than not the case that federal and state law causes of action are bound up in the same lawsuit.

205. I borrow this phrase from a conversation with my colleague Victor Goldberg.

206. David Rosenberg argues that only mandatory classwide treatment of all exposed persons’ claims would rectify what he sees as the underdeterrence produced by existing nonclass litigation in tort, where defendants’, but not plaintiffs’, counsel can capture the full extent of the gains from additional investment in the development of the litigation. *See, e.g.*, David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don’t*, 37 HARV. J. ON LEGIS. 393, 430-31 (2000). On the other hand, some judges and commentators have argued that aggregating the claims of multiple alleged victims in a single case may place a defendant “under intense pressure to settle” rather than to “roll the[] dice” and risk potentially bankrupting liability. *Rhone-Poulenc Rorer*, 51 F.3d at 1298; *see also* Epstein, *supra* note 170 (manuscript at 24) (“[T]he creation of a huge nationwide class makes it impossible for a defendant to diversify its litigation portfolio. The litigation may easily assume what some courts have called ‘you-bet-the-company’ proportions and lead to what has been called perhaps somewhat loosely coercive settlements.” (footnote omitted)). *But see* Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (refuting the “blackmail” thesis on the basis of empirical evidence).

suggested by the existence of situations in which a class action is brought after the successful conclusion of an individual suit.<sup>207</sup>

Central to the societal damages theory is the concept of a societal damages “fund,” from which other harmed individuals could collect compensation should they so choose. There has been a recent surge of interest in the concept of damages funds, prompted in large part by their utilization in successful class action settlements and by the existence of the September 11th Victim Compensation Fund of 2001.

My proposal is to set up a more formal ex post class action, in which the usual procedural protections of Rule 23 would be in play. To effectuate this scheme, I envision a bifurcated trial process. In phase one, the jury would consider individual compensatory liability and damages. In the subsequent “societal damages” phase, the same jury would determine whether the threshold requirement of recklessness on the part of the defendant was met.<sup>208</sup> If so, the jury (or judge) would hear evidence of other individuals similarly harmed. At this second phase, the more formal procedural requirements of Rule 23 would kick in, to create in essence an ex post class action.

The ex post class action would ensure (at least prior to assessment of societal damages), through Rule 23(a)’s “commonality” and “typicality” requirements and Rule 23(b)(3)’s “predominance” and “superiority” requirements, that class certification was limited to cases where there was a “common nucleus of operative facts,” or the “same event or practice or course of conduct that gives rise to the claims of other class members,” or a common pattern or practice, such as that required for civil RICO or civil rights violations.<sup>209</sup> Such an ex post class action could in fact alleviate one

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In any event, it seems fair to say that of late various “proceduralist” concerns with the class action as a mechanism to effectuate the broader goals of the tort system have tended to predominate. See Samuel Issacharoff, “*Shocked*”: *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1926 (2002) (declaring the “proceduralists” victors over the “distributionists” (including Rosenberg)—“whose interests were primarily dictated by the compensatory and distributive concerns underlying the foundations of the tort system”).

207. See *supra* note 167. If the “punitive” award in the individual suit were converted into societal damages, which were then distributed to the other harmed individuals, either directly or else through a mechanism approximating the formation of a “back-end” or “ex post” class action, the suit could achieve the same result, without relying on the likelihood that an independent class action would also be brought. To the extent that the ex post class action scheme would eliminate the necessity for such follow-up suits, it might provide additional advantages from a docket caseload or case management perspective.

208. In this way, the procedure mirrors that of Title VII cases, in which a general liability phase is often followed by a remedial phase. A further anti-social penalties phase would be reserved for cases in which plaintiffs would have to meet the heightened malice standard. See *supra* note 41.

209. I will not delve into the subtleties of Rule 23(a)’s typicality and adequacy requirements. It suffices for my purposes here that so long as the claims of named and unnamed plaintiffs “arise[] from the same event or practice or course of conduct . . . [and] are based on the same legal theory,” then “[t]he typicality requirement may be satisfied even if there are factual distinctions

concern that has been raised about class actions: that “the critical decision on class action certification often has to take place prior to any genuine assessment as to what the ultimate shape of the claims will be.”<sup>210</sup> The back-end or ex post class action opens up the possibility for a deferred merits-based certification determination (whether implicit or explicit), which may in fact mitigate the problems of distortion in either direction, i.e., whether due to mistaken grants or mistaken denials of certification.<sup>211</sup> The ex post class action framework is, nonetheless, open to criticism from a variety of perspectives, including that of defendants, plaintiffs, and institutions, which I consider briefly in turn.

To begin, such a scheme would be subject to a defendant’s likely objection to the introduction of “common course of conduct” evidence, given the lack of any threshold determination that the defendant’s reckless conduct was in fact the cause of the harms to such individuals. The first (not very satisfactory) response is that such an objection, while valid, is one that could be made to the system that currently exists. Evidentiary rules control the extent to which examples of defendants’ “other bad acts” come before the jury deciding an individual case. The Supreme Court did not provide resolute guidance in its latest pronouncement on the subject in *State Farm*, when it stated that, to be probative, “conduct must have a nexus to the specific harm suffered by the plaintiff.”<sup>212</sup> While the Court was clear that “evidence of other acts need not be identical to have relevance in the calculation of punitive damages,” it stopped short of providing further guidance, except to observe (questionably in my view) that, in the case before it, the evidence “had nothing to do” with the lawsuit at hand.<sup>213</sup>

Undeniably, the societal damages approach places added weight upon the definition of the “pattern” or “scheme” of admissible similar bad

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between the claims of the named plaintiffs and those of other class members.” De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983) (internal quotation marks omitted). Modern class action practice places particular emphasis upon ensuring that a named plaintiff is an adequate representative, i.e., that he or she can fairly and adequately protect the interests of the class. The animating principle underlying this requirement is that there must be no significant conflict of interests between the named plaintiff and the absent class members. I assume here that no such conflict of interest exists in the realm of societal damages, and leave for another day critical examination of this assumption. See also *infra* notes 378-379 and accompanying text.

210. Epstein, *supra* note 170 (manuscript at 20).

211. See *infra* note 369.

212. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1522 (2003).

213. *Id.* at 1523. Justice Ginsburg, writing in dissent, had quite a different view:

The Court dismisses the evidence describing and documenting State Farm’s . . . policy and practices as essentially irrelevant, bearing no relation to the Campbells’ harm. It is hardly apparent why that should be so. What is infirm about the Campbells’ theory that their experience with State Farm exemplifies and reflects an overarching underpayment scheme, one that caused repeated misconduct of the sort that injured them?

*Id.* at 1530 (Ginsburg, J., dissenting) (citation and internal quotation marks omitted).

conduct.<sup>214</sup> Developing a workable “other bad acts” framework, modeled upon the “substantial similarity” and “proximity in time” standards developed to interpret Federal Rule of Evidence 404(b) (and its state law counterparts) would be a tall task.<sup>215</sup> Plaintiffs would carry the burden of establishing that those other bad acts are an outgrowth of the same, or very similar, conduct by the defendant, for which the plaintiff is seeking redress on behalf of others.

The second (more satisfying) response is that courts could draw upon the rich case law interpreting “common nucleus” or “course of conduct” tests under Rule 23 to limit the introduction of such evidence. Another apt source of authority might be common law interpretations of state law statutory provisions that attempt to limit subsequent punitive damages awards for “the same act or single course of conduct” for which punitive damages have already been awarded.<sup>216</sup>

A further set of objections relates to the disproportionate risk faced by the defendant under the proposed scheme. Once a plaintiff loses his or her individual lawsuit, he or she would be barred from seeking further recovery from any societal damages fund.<sup>217</sup> Following the threshold determination of liability for societal damages, the ex post class action would increase,

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214. See, e.g., Brief for Petitioner at 14, *State Farm* (No. 01-1289) (“If permitted to stand as precedent, the Utah Supreme Court’s decision could be construed to authorize a roving inquiry into a corporate defendant’s nationwide ‘way of doing business’ over decades whenever a plaintiff claims that the defendant’s particular conduct toward him or her was part of an improper ‘pattern’ or ‘scheme.’” (citation omitted)).

215. See, e.g., *Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991) (“A showing of substantial similarity is required when a plaintiff attempts to introduce evidence of other accidents as direct proof of negligence, a design defect, or notice of the defect.”). Under the “substantial similarity” standard, minor or immaterial dissimilarity does not prevent admissibility. See, e.g., *W. Recreational Vehicles, Inc. v. Swift Adhesives, Inc.*, 23 F.3d 1547, 1555 (9th Cir. 1994).

Such an evidentiary “hook” may not be necessary where proof of a wider course of conduct or policy is part of the plaintiff’s prima facie case. See *supra* notes 160, 174-175 and accompanying text.

216. E.g., FLA. STAT. ANN. § 768.73(2)(a) (West 2000) (“[P]unitive damages may not be awarded against a defendant in a civil action if that defendant establishes, before trial, that punitive damages have previously been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages.”); see also CAL. CIV. CODE § 3294(d) (West 1997) (barring “multiple recoveries of punitive or exemplary damages based upon the same wrongful act”); GA. CODE ANN. § 51-12-5.1(e)(1) (2000) (providing that only one punitive damages award may be recovered from a single defendant “if the cause of action arises from product liability”); *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 224 (Ala. 1989) (explaining that after a punitive damages award has been rendered, the reviewing court considers whether there have been other civil actions against the defendant based on “the same conduct” that should be considered in mitigation of the punitive damages award).

217. See *Nagareda*, *supra* note 183, at 161 (“[A] bedrock principle of claim preclusion is that the seller cannot sue again not only on those claims advanced in the original lawsuit but also on any additional claims that could have been brought. The observation that class actions operate as a vehicle for the sale of claim preclusion on a mass basis is a familiar feature of the academic literature.” (citation omitted)).

albeit modestly, the degree of claim and issue preclusion—the source of defendants’ much desired sense of finality.<sup>218</sup> But whereas under the traditional class action procedure the plaintiffs must bind themselves to the result of the lawsuit before they are aware of the outcome, under the ex post class action procedure the potential absent plaintiffs, quasi-plaintiffs, and diffuse harm plaintiffs need not bind themselves until they can determine whether the ruling in the individual plaintiff’s case is potentially favorable. This, in effect, seems precisely like the type of efforts at one-way intervention that the 1966 amendments to Rule 23(b)(3) were designed to cure. This risk, however, is no less present absent the ex post class action. Defendants face a similar disproportionate risk under *Parklane*’s doctrine of nonmutual offensive issue preclusion.<sup>219</sup> Under this doctrine, plaintiffs—but not defendants—can benefit from prior advantageous rulings.<sup>220</sup> Moreover, in certain circumstances the absence of the ex post class action option might increase the defendant’s fiscal liability because the potential plaintiffs would file new lawsuits rather than share in the societal damages award of the original suit.

At the same time, defendants would not be at risk—at least with respect to the societal damages portion of punitive damages—for multiple separate assessments of these damages.<sup>221</sup> Should an individual choose instead to pursue his or her own separate litigation, then the portion of the fund

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218. “Claim preclusion” and “issue preclusion” are increasingly substituted for the more dated terms “res judicata” and “collateral estoppel,” respectively. See 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4402 (1981).

219. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). The Court held that offensive collateral estoppel should only apply in limited circumstances but that trial courts should be given broad discretion to determine whether it is appropriate. The general test adopted by the Court provides that “where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive collateral estoppel would be unfair to a defendant, a trial judge should not allow [its] use.” *Id.* at 331.

Richard Epstein has voiced the concern, with respect to traditional class actions, that we “make sure that those who hang back . . . do not get the benefit of the offensive use of res judicata should the class action be successful, while reserving the right to bring their individual suits anew should that action fail.” Epstein, *supra* note 170 (manuscript at 23).

220. Nagareda states:

Since the adoption of Rule 23 in 1966, the law of issue preclusion has changed. Today, a victory for a given plaintiff on a particular disputed issue vis-à-vis a defendant in conventional civil litigation may conceivably have issue-preclusive effect in subsequent lawsuits by other, similar plaintiffs eager to prevail on the same issue against the same defendant. But that defendant may not invoke issue preclusion to extend a victory for the defense on a particular issue in one plaintiff’s lawsuit to subsequent lawsuits brought by other similar plaintiffs who wish to relitigate that issue.

Nagareda, *supra* note 183, at 162 (footnote omitted). Thus, with respect to class action litigation, “[O]pt-out claimants could attempt to invoke *Parklane* issue preclusion in order to get the benefit of a class victory against the defendant.” *Id.* at 180.

221. The multiple punishments problem is discussed further below. See *infra* Subsection V.A.2. A defendant might raise a separate due process concern—that the aggregation of claims against him or her will inevitably distort the substantive outcome of the case against him or her. See *infra* note 369.

allocated to his or her injuries would either be held in escrow pending resolution of the claim, and then used to offset any damages awarded in the litigation, or else returned to the defendant.<sup>222</sup>

From the plaintiff's perspective, as soon as we posit that the societal damages for these "same bad acts" will redound to the benefit of other harmed individuals and not to the plaintiff (or representative plaintiff, as the case may be), then the obvious question arises: Why would it ever be in the interest of a plaintiff (or plaintiffs' attorneys) to develop such evidence? It thus becomes apparent that any theory of societal damages must take into account the incentives of plaintiffs and their attorneys to litigate. I return to this issue—with an additional focus on the pressures to settle—below in Section V.C.

And in response to the likely due process objections on behalf of absent or quasi-plaintiffs, I should make clear that these individuals would in no way be bound by the societal damages award. They can opt out of the ex post class action and resort to their own individual (or class action) suit. In that suit, they can recover individual compensatory damages and, if applicable, individual retributive-based punitive damages.<sup>223</sup>

Finally, from an institutional perspective, formidable administrative and procedural difficulties will doubtless exist with the establishment and maintenance of such a fund, which in essence would operate much akin to distribution of class action funds at the "back end."<sup>224</sup> Difficulties with such

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222. Polinsky and Shavell describe this solution in more detail:

A way to avoid the problem of excessive damages when there are multiple suits is to use *escrow accounts* for punitive damages. Under this approach, the defendant would pay punitive damages into an escrow account rather than immediately to the plaintiff. If, over time, more plaintiffs bring suits than the court had anticipated, the damage awards to the plaintiffs can be financed from the escrow account rather than charged to the defendant. In this way, the defendant will not be made to pay more in total damages than the harm done. If, at some natural termination date, funds remain in the escrow account, they can be distributed to plaintiffs whose punitive damages awards had been placed in escrow.

Polinsky & Shavell, *supra* note 43, at 925 (footnotes omitted).

223. This feature reemerges as highly significant in my discussion of the settlement effects in Subsection V.C.3. While preserving the plaintiff's (or absent plaintiffs') due process rights, such opt-out procedures are accompanied by a familiar set of problems that plague class action procedures, including sham litigation and reverse auctions.

224. That being said, the operation of the societal damages fund would avoid a significant portion of the high administrative costs that characterize most such funds—for instance, the existence of, and proceedings before, a decisionmaker (such as a regulator) to determine the compensation issues in the first instance. Thus, the societal damages fund would not be as administratively difficult as the September 11th Victim Compensation Fund of 2001. Instead, the jury, based upon the specific evidence before it, will already have assessed the damages awardable to the other harmed individuals. Wrapped up in this single sentence, however, are perhaps the most formidable criticisms of the societal damages theory: (1) the scope of admissible evidence as to "absent" or "quasi-plaintiffs," which I have already discussed, *see supra* notes 212-216 and accompanying text; and (2) the ability of the jury to assess competently this third-party evidence, which I discuss further below, *see infra* Section V.D.

funds have arisen in the past.<sup>225</sup> One formidable challenge might be phony claimants, a difficulty that has plagued both formal class actions and more specific funds such as the September 11th Victim Compensation Fund of 2001.<sup>226</sup>

### C. *Punitive-Damages-Only Class Action*

The societal damages approach can reach even further than the ex post class action, to address important additional sources of underdeterrence: the categories of diffuse and concealed harms. Neither the traditional class action nor the ex post variety is available when specifically harmed individuals are not readily identifiable, or when the harms inflicted are too diffuse. What I wish to consider here is how class actions might nonetheless be used in conjunction with the societal damages theory to address more diffuse harm to society, or widespread harms resulting from concealed wrongdoing. In this regard, I examine the potential embrace of the societal damages theory by the “modern” innovation of a mandatory punitive-damages-only class action, which would amass all punitive damages claims against a defendant to be assessed in a unitary proceeding.<sup>227</sup>

At first blush, it may appear that any societal compensatory justification for punitive damages largely dissolves in the context of a class action, at least assuming that all of the relevant harmed individuals are before the court.<sup>228</sup> The classwide treatment of punitive damages might justifiably

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225. Consider, for example, the \$180 million fund created by the settlement of the Agent Orange class action litigation. See *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984) (Weinstein, C.J.), *aff'd*, 818 F.2d 145 (2d Cir. 1987). According to then-Chief Judge Weinstein, who presided over the class action settlement, the creation of such a fund was “[t]he most practicable and equitable method of distributing benefits to” those claiming who did not meet the eligibility criteria for cash payments. *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396, 1431 (E.D.N.Y. 1985) (Weinstein, C.J.), *aff'd in part, rev'd in part*, 818 F.2d 179 (2d Cir. 1987). On appeal, the Second Circuit reversed the portion of the distribution plan that had allowed an independent foundation to monitor the funding of projects to assist the class, but allowed the district court to establish and supervise such a fund. 818 F.2d at 184-86. “During the 10-year period of the settlement, \$196.5 million was distributed as cash payments to approximately 52,000 class members. . . . Approximately \$71.3 million of the fund was distributed through the Class Assistance Program.” *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 255 (2d Cir. 2001), *aff'd in part, vacated in part*, 123 S. Ct. 2161 (2003) (per curiam).

226. See, e.g., Susan Saulny & David W. Chen, *Woman Faces New Charges of Falsely Obtaining 9/11 Funds*, N.Y. TIMES, Feb. 21, 2003, at B7.

227. The concept of the mandatory punitive damages class action first arose in the context of Agent Orange litigation. See *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (Weinstein, C.J.) (certifying a mandatory Rule 23(b)(1)(B) class for punitive damages on the ground that “[t]here must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction”), *mandamus denied sub nom. In re Diamond Shamrock Chem. Co.*, 725 F.2d 858 (2d Cir. 1984).

228. See, e.g., *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 133 F. Supp. 2d 162, 178 (E.D.N.Y. 2001) (“[I]n a sense the class action or quasi-class action such as the present one, where many claims are aggregated, takes care of the problem of social payment for the full



place less emphasis on the issue of societal damages because its premise is that all claimants are (or will be) before the court.<sup>229</sup> This, however, would mean that only where the factfinder could articulate a retributive rationale (either on behalf of the individual or society) could punitive damages be awarded at all.

Under this view, the punitive damages would be concerned entirely with what I have termed the “anti-social penalties” component.<sup>230</sup> At the same time, while the classwide treatment of these damages might be an innovative approach to assessing these penalties (assuming they should be assessed by the jury at all), it offers scant support for its prescription of pro rata distribution to each of the victims, unless premised entirely on an individual interest in retribution. And one might plausibly reject such a retribution-based interest and conclude that any award of punitive damages on top of societal damages in effect would be “double counting,” leading to overdeterrence.<sup>231</sup>

At the more practical level, the viability of such an aggregate determination of punitive damages for an entire class (which may or may not be certified for liability and compensatory damages purposes) has yet to be conclusively determined. Opponents and supporters of the device take equal solace in the Supreme Court’s ruminations in *State Farm*. Opponents of punitive-damages-only classes claim that the Court tipped its hand in their favor by emphasizing that “due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis.”<sup>232</sup> And indeed, in a recent opinion, the Florida District Court of Appeal read *State Farm* to hold that “punitive damages cannot be assessed in the aggregate. Punitive damages must be assessed on an individual basis, in relation to each class member’s compensatory damages, if any.”<sup>233</sup>

Advocates of the punitive-damages-only class action, however, likewise look to *State Farm* for support. After all, the Court premised a newly fashioned due process right on the part of defendants on the very

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cost of damages a defendant caused. Whether the punitive damages would “overpay” social costs or would be justified as punishment for extra defendant value may be left for an answer on a later day.”).

229. Of course, because the action is a punitive-damages-only class action, it may not be right to assume that all victims will get compensatory damages.

230. See *supra* note 41.

231. Richard Epstein makes this argument in the context of questioning whether treble damages, authorized for antitrust violations under the Sherman Act, should be allowed in class actions. See Epstein, *supra* note 170 (manuscript at 35) (“Combining the two mechanisms [class action and statutory treble damages] . . . creates a form of double-counting which could easily lead to overdeterrence.”).

232. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1523 (2003).

233. *Liggett Group Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003).

need to cabin the “possibility of *multiple* punitive damages awards for the same conduct.”<sup>234</sup> And a few recent court decisions have followed this line of reasoning to embrace a mandatory punitive damages class.<sup>235</sup>

The Second Circuit is poised to determine the fate of the mandatory punitive-damages-only class action certified by Judge Weinstein in the *Simon II* tobacco litigation, consolidated before him in the Eastern District of New York.<sup>236</sup> The class was certified pursuant to Federal Rule 23(b)(1)(B), which authorizes mandatory non-opt-out class certification in situations where “adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.” At present, such a punitive-damages-only class action has been defended primarily using the traditional punishment rationale for punitive damages.<sup>237</sup> According to Judge Weinstein, “[T]he punitive award can be said to constitute a *punishment* on behalf of society . . . .”<sup>238</sup> Recent commentators have acknowledged the

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234. *State Farm*, 123 S. Ct. at 1523 (emphasis added).

235. See, e.g., *Ferguson v. Loeff, Cabraser, Heimann & Bernstein, LLP*, 69 P.3d 965, 972 (Cal. 2003) (“[C]ourts have encouraged the use of mandatory class actions to handle punitive damages claims in mass tort cases. Mandatory class actions avoid . . . the possible unfairness of punishing a defendant over and over again for the same tortious conduct.” (quoting *In re Exxon Valdez*, 229 F.3d 790, 795-96 (9th Cir. 2000) (alteration in original))). Another example of a punitive-damages-only class action is *Exxon Valdez*, but there the parties agreed to have punitive damages determined on a classwide basis. See *infra* note 373.

236. *In re Simon II Litig.*, 211 F.R.D. 86 (E.D.N.Y. 2002). A recent case sheds some light, at least with respect to one Second Circuit judge’s views. In *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13 (2d Cir. 2003)—an appeal of the district court’s denial of Rule 23(b)(3) certification of a plaintiff class of approximately twelve million cable subscribers in twenty-three states whose privacy interests allegedly were violated by the defendants’ disclosure and sale of subscriber information—Judge Newman, in a separate concurrence, argued that “a district court has discretion to certify a (b)(3) class with the aggregate amount of statutory damages limited substantially below what a literal application of the statute might seem to require.” *Id.* at 23 (Newman, J., concurring). Of particular relevance to both the societal damages theory in general and the issue of determining aggregate punitive damages in particular, Judge Newman remarked, “Although statutory damages amounts might be calculated in part to *compensate* for actual losses that are difficult to quantify, they are often also motivated in part by a *pseudo-punitive* intention to address and deter overall public harm.” *Id.* at 26 (emphasis added) (internal quotation marks omitted). Judge Newman advocated this as a compromise alternative designed “to achieve to a considerable extent the objectives of both the statute and the class action rule.” *Id.* at 27.

237. Such a mandatory punitive damages class action has been defended on the “limited fund” rationale; namely that, given that a defendant’s total assets are finite, a huge punitive award to one plaintiff might send the defendant into bankruptcy, thereby jeopardizing future plaintiffs’ ability to recover compensatory damages (let alone punitive damages) for their individual harms. See, e.g., Laura J. Hines, *Obstacles to Determining Punitive Damages in Class Actions*, 36 WAKE FOREST L. REV. 889 (2001).

A potentially more powerful defense (and in fact, the one relied upon by Judge Weinstein) is the “limited punishment” theory—namely, that given the existence of some due process constraint on the total amount of punishment that may be inflicted upon a defendant for a given course of conduct, an award of punitive damages to a single plaintiff necessarily affects future plaintiffs’ ability to collect punitive damages, regardless of the financial resources of the defendant.

238. *Simon II*, 211 F.R.D. at 104 (emphasis added); see also JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS*,

*societal* nature of the punishment. In the words of Elizabeth Cabraser, a leading class action plaintiffs' attorney, "Punitive damages stand as a civil penalty for transgression of the social compact . . . to penalize conduct that violates the social contract and injures society."<sup>239</sup> Consistent with this view, there is a strong sense that, as John Coffee said, "[p]unishment should be put to a public purpose, not awarded in a lottery."<sup>240</sup>

But what if we were to view the punitive damages award in these cases through the lens of compensation, and not punishment?<sup>241</sup> If some component of these damages is, indeed, an entitlement of "society," then it would seem fitting that they be distributed not to individual class members (as more conventionally argued), but more widely for the benefit of society, perhaps even directly to the state.<sup>242</sup> We might consider whether a class of plaintiffs can itself serve as a proxy for society, or at least for a wider societal group. In this vein, there may be several possible avenues for equitable allocation or cy pres-like utilization of an appropriate aggregate

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CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 171 (1995) (suggesting that punishment-based fines and punitive damages in mass toxic tort cases should go to health and welfare programs because "[t]he injury is really to society as a whole").

239. Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST L. REV. 979, 980-81 (2001); see also Elizabeth J. Cabraser & Thomas M. Sobol, *Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damages Claims*, 74 TUL. L. REV. 2005, 2006 (2000).

240. Tom Perrotta, *Viability of National Class in Tobacco Case Debated*, N.Y. L.J., Sept. 23, 2002, at 1; see also John C. Coffee, Jr., *The Tobacco Wars: Peace in Our Time?*, N.Y. L.J., July 20, 2000, at 1 (advocating in favor of "put[ting] the [tobacco] industry's punishment [via punitive damages] to some socially useful purpose").

241. Indeed, Judge Weinstein acknowledges that while "[t]he primary function of punitive damages is to punish," they also "compensate for social damages not likely to be fully reflected in compensatory damages to individuals." *Simon II*, 211 F.R.D. at 159 (citations omitted). If, however, punitive damages in a class action case were justified on a societal damages theory—as opposed to the traditional punishment rationale—then the premise of a "limited punishment" rationale based upon the due process limitations of punishments might unravel. See *supra* note 237.

242. In this regard, the punitive-damages-only class action resonates distinctly with the split-recovery schemes discussed in Part II. Indeed, it is surprising to me that the emerging literature on class treatment of punitive damages has thus far ignored split-recovery schemes. To the extent such proposals entertain a nationwide class, by necessity, they would have to take into account variances in state laws on the standard for punitive damages, as well as the distribution mechanism set up by dint of state law. These variances are hardly inconsequential. See, e.g., *White v. Ford Motor Co.*, 312 F.3d 998, 1017 (9th Cir. 2002) ("By imposing ten times what Alaska would allow, with all the money going to the [plaintiffs] and their attorneys, rather than half of it to the state government, Nevada has created very different incentives from Alaska for manufacturers, distributors, and plaintiffs' attorneys."). But see *Simon II*, 211 F.R.D. at 174 (arguing that punitive damages will be largely determined by the U.S. Constitution and the Federal Rules of Civil Procedure—i.e., national law). The fact that the punitive damages class action is based on a Rule 23(b)(1)(B) "limited fund" or "limited punishment" notion of constitutional due process limits on total punishment does not, of course, speak to the separate issue of whether state law split-recovery schemes can be ignored in deciding the allocation of those awards.

award.<sup>243</sup> Indeed, Judge Weinstein was willing to consider such measures not only for actual class members, but also for those falling outside the certified class, including, for example, ongoing medical monitoring of potential victims, or funds designated to effect appropriate “restitution” for harms inflicted by the defendant’s conduct.<sup>244</sup>

In sum, the societal damages theory, as it pertains to specific harms to other individuals, might be considered a doctrinal substitute for class action litigation in certain types of cases. But to extend the societal damages theory to more diffuse societal harms would move into territory that is not presently handled by class action litigation. All of this is to suggest that, while societal damages-inspired modifications to class actions are well worth pursuing, it may not make sense to rely exclusively on the ability of the class action mechanism to achieve fully the goal of societal compensation.

#### IV. REALIZATION OF THE SOCIETAL DAMAGES CONCEPT

So far, we have been largely in the realm of the theoretical, imagining a conceptual framework within which the societal damages might operate. I now explore, from a practical standpoint, where a commitment to societal damages might lead. Split-recovery schemes are a step in the direction toward one possible avenue for implementation of the societal damages theory.<sup>245</sup> Indeed, they may be a particularly fruitful one, as it appears that much of the groundwork has already been laid. As I discussed in Part II above, legislatures and (even more so) courts interpreting these schemes

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243. It is not uncommon for class action litigation and settlements to include a designation of a charity for residual money uncollected by class members. *See, e.g.*, *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 961 (E.D. Tex. 2000) (approving a \$2.1 billion settlement agreement on behalf of the owners of roughly five million defective Toshiba computers and stating that “the charity created by this settlement does not harm the class members because the charity receives funds only after all class members making claims have been paid pursuant to the proposed Settlement Agreement”); *Price v. Philip Morris Inc.*, No. 00-L-112 (Ill. 3d Cir. Ct. Mar. 21, 2003), [http://tobacco.neu.edu/PR/supportdocs/miles\\_decision.htm](http://tobacco.neu.edu/PR/supportdocs/miles_decision.htm) (directing, pursuant to the cy pres doctrine, that unclaimed funds from the \$7.1 billion compensatory damages judgment be distributed through the Illinois Bar Foundation to various groups, including Illinois-based law schools, the American Cancer Society, domestic violence programs, and Legal Aid Services), *appeal docketed*, No. 96,236 (Ill. Sept. 2003); *cf. In re Vitamin Cases*, 132 Cal. Rptr. 2d 425, 429-35 (Ct. App. 2003) (upholding the cy pres distribution of a \$38 million consumer settlement fund in a vitamin price fixing case, where the total amount was distributed to charitable, governmental, and nonprofit organizations that promote the health and nutrition of the consumer class members or that otherwise further the purposes underlying the lawsuit).

244. *See Simon II*, 211 F.R.D. at 186 (“The punitive function served by this certified class could be utilized in part for persons outside the class as, for example, passive breathers of the smoke exuded by others, those with diseases other than those represented by this certified class, and future diseased persons. This result could be accomplished through grants for research and treatment.”).

245. Other avenues might include, for example, actions initiated by the state or the attorney general, private attorney general statutes, or qui tam actions.

have in some sense been groping toward a societal damages approach to punitive damages. Even if some of the more venturesome judicial reforms are ultimately rejected, much can still be accomplished within the legislative realm, which is far less vulnerable to attack. For this reason, I explore possible legislative reforms before turning to the more troublesome judicial arena.

#### A. Legislative Realm

The societal damages rationale for split-recovery schemes has yet to be explored, at least in part because no split-recovery scheme has been designed for the explicit purpose of redressing societal harms (whether of the specific or more diffuse kind). Nor have states typically identified any “public” purpose beyond revenue raising. Oregon’s legislative goals include funding the Criminal Injuries Compensation Account, in addition to the more typical one of “reducing litigation expenses.”<sup>246</sup> And Illinois has explicitly recognized that state collection of punitive damages awards serves a “public purpose,” although its courts have not explained specifically the nature of that public purpose.<sup>247</sup> Nonetheless, through split-recovery statutes, states have implemented a variety of methods to redistribute punitive damages awards to “society.” Indeed, at a certain level of generality, some of the court-administered specialized funds might be viewed as attempts—at least when applied in certain types of cases—to remedy societal harms of the diffuse variety. Thus, for example, in an insurance fraud case in Iowa, a portion of the punitive damages award will be directed to the Civil Reparations Fund, one purpose of which is to provide for insurance assistance programs.<sup>248</sup> The catch, however, is that the general fund is the recipient of a portion of punitive awards in all types of cases; thus, no real attempt exists to redress the injury to other harmed individuals, or even to target the specific type of defendant wrongdoing.<sup>249</sup> Nonetheless, with slight modification, such schemes might target more specifically third-party, nonplaintiff victims of defendant wrongdoing—whether they can be specifically identified or not.

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246. *Honeywell v. Sterling Furniture Co.*, 781 P.2d 379, 380 (Or. Ct. App. 1989), *aff’d in part, rev’d in part*, 797 P.2d 1019 (Or. 1990); *see also* *DeMendoza v. Hoffman*, 51 P.3d 1232, 1238 (Or. 2002) (stating that punitive damages “focus solely on vindicating society’s interests”).

247. *See* 735 ILL. REV. STAT. 1987, ch. 110, ¶ 2-1207 historical and practice notes (West 1987) (“[A] principal justification for punitive damages is that visiting financial distress on wickedness serves a public purpose.”); *cf.* *Naqvi v. Rossiello*, 746 N.E.2d 873, 880 (Ill. App. Ct. 2001) (“[P]unitive damages are levied for the public purpose of punishment and deterrence.”).

248. *See* IOWA CODE ANN. § 668A.1 (West 1998).

249. One apparent exception is the special case of hazardous waste violations in Indiana, where the state’s portion of the punitive damages award is deposited in the state’s Hazardous Substances Response Trust Fund. *See* IND. CODE ANN. § 13-25-4-10 (Michie 1998).

1. *Specific Harms: The Iowa Split-Recovery Statute as a Model*

The Iowa split-recovery scheme, which directs the jury's attention to whether the defendant's act created more widespread harm to a class of individuals beyond the plaintiff, provides a suitable model—or at least a starting point—for exploration of the societal damages theory as applied to the specific harms category.

Under the Iowa scheme, the jury is asked via special interrogatories “[w]hether the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived.”<sup>250</sup> If the answer is yes, then the plaintiff recovers 100% of the punitive damages.<sup>251</sup> If the answer is no, then the plaintiff receives 25% of the award, and the remaining 75% is given over to the Civil Reparations Trust Fund, used to benefit civil litigation programs for the indigent or insurance assistance programs.<sup>252</sup> This apportionment occurs automatically; beyond answering the special interrogatories to determine whether the statute applies (without knowing that it is doing so), the jury is not involved in the allocation process itself.<sup>253</sup>

The Iowa Supreme Court has articulated a “different plaintiff” test to interpret the meaning of “directed specifically at the claimant.” The “different plaintiff” test “suggests that any time there is a *class of potential victims*, the conduct is not ‘directed specifically at’ the individual claimant.”<sup>254</sup> In other words, “the court does not look [solely] at the victims at whom the defendant's conduct was directed, but at whether other possible victims exist.”<sup>255</sup> A “class of victims” who might benefit from a lawsuit not initiated as a class action, but by a single plaintiff or group of

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250. IOWA CODE ANN. § 668A.1(1)(b).

251. *Id.* § 668A.1(2)(a). The classic type of tort that is “directed specifically” at a plaintiff is the intentional tort of battery. Thus, for example, in *Claus v. Whyte*, punitive damages were awarded to a defendant who was sexually abused by her father. 526 N.W.2d 519, 523 (Iowa 1994). Torts “directed specifically” at the claimant hew more closely to the “traditional” or “historical” retributive punitive damages model, corresponding to the “anti-social” penalties residual category of damages. *See supra* note 41. I should be clear that I am not upholding this result of the Iowa scheme in any way as an exemplar or model. Instead, I am focusing here on the counterpart of the scheme, i.e., awards in those cases where the defendant's conduct was *not* specifically directed at the plaintiff.

252. *See* IOWA CODE ANN. § 668A.1(2)(b) (“[A]fter payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator.”).

253. *See infra* Subsection V.B.3 (discussing issues raised by informing the jury about the allocation of societal damages).

254. *Chadima v. Nat'l Fid. Life Ins. Co.*, 894 F. Supp. 1300, 1307 (S.D. Iowa 1995) (construing *Sanford v. Meadow Gold Dairies, Inc.*, 534 N.W.2d 410 (Iowa 1995); and *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612 (Iowa 1991)).

255. *Id.* at 1309-10.

plaintiffs, lends itself particularly well to application of the societal damages theory at the specific harm level.

Consider the case of Kevin Wilson, an employee injured on the job who brought a slander action against his employer IBP and the company's nurse for the nurse's statements, made to an examining physician, that implied that Wilson was faking injury.<sup>256</sup> A jury awarded \$4000 in compensatory damages and \$15 million in punitive damages.<sup>257</sup> By special interrogatory, the jury concluded that the conduct of the defendant was not specifically directed at Wilson.<sup>258</sup> Evidence came in at trial that the nurse "made remarks to doctors that other injured IBP workers were lying about their injuries."<sup>259</sup> Moreover, it came to light that IBP had a financial incentive program, ironically called "the safety award system," which provided management with strong incentives to reduce the number of lost workdays due to injuries.<sup>260</sup> Pursuant to this policy, Wilson was encouraged to come in to work to punch his card just three days after he ruptured a disc in his spine.<sup>261</sup> Other workers were likewise told to report to work to punch their cards even when it was apparent that they would not be able to work.<sup>262</sup> In sum, there was a pervasive "climate of suspicion toward the legitimacy of injuries to workers and their treatment."<sup>263</sup>

In upholding a remitted \$2 million punitive damages award on appeal, the Iowa Supreme Court emphasized the fact that the plaintiff's treatment as an injured worker was "not a one-time or isolated instance."<sup>264</sup> To the contrary, "Other workers with injuries could be profoundly affected as a result of the policy actions carried out by [defendants]."<sup>265</sup> As a result, the court apportioned twenty-five percent of the award (\$500,000) to the plaintiff and the remainder (less attorneys' fees) to the Civil Reparations

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256. *See* Wilson v. IBP, Inc., 558 N.W.2d 132 (Iowa 1996). IBP is described as "the largest producer of fresh beef and pork in the world." *Id.* at 148.

257. *Id.* at 136.

258. *Id.* at 141-42.

259. *Id.* at 143.

260. *See id.* ("As part of the safety award system, IBP recorded the number and severity of injuries and the number of work days missed by employees due to work-related injuries. Employees of the division with the lowest injury statistics received gifts or extra year-end bonuses.")

261. *Id.*

262. *See id.* ("Other workers had been told by IBP to report to work the same day they were scheduled for surgery, or the day after having had a finger amputated.")

263. *Id.* at 144. The Iowa Supreme Court found that the offending nurse "knowingly engaged in a malicious course of conduct that was in line with the climate established by IBP concerning its injured workers." *Id.* at 148.

264. *Id.* The trial judge had remitted the \$15 million punitive award to \$100,000. On appeal, the Iowa Supreme Court held that the \$15 million award was excessive, but that the record supported a punitive award of \$2 million.

265. *Id.*

Trust.<sup>266</sup> The court specifically determined that its ruling would fulfill a deterrence objective as well.<sup>267</sup>

One might object that any dispute in the employment context could, on a broad reading of the “different plaintiff” test, be transformed into a de facto class action against the employer. But the contrasting case of Thaddeus Pulla demonstrates otherwise. Pulla was an employee who alleged that his credit card records were wrongfully examined by his employer in an effort to determine whether he had been abusing sick leave.<sup>268</sup> His employer, Amoco, determined, via inspection of these records, that Pulla had gone on a shopping spree around town on days that he had claimed to be home sick. On his claim for invasion of privacy, Pulla was awarded \$1 in actual damages for pain and suffering, \$1 for future pain and suffering, and \$500,000 in punitive damages.<sup>269</sup> At first blush, one might think that his case could be seen, like Wilson’s, as involving a company policy that resulted in Amoco’s intrusion upon employees’ privacy. The jury, however, found that Amoco’s conduct—unlike that of Wilson’s employer—was specifically directed at Pulla. On appeal, the Eighth Circuit held that the \$500,000 punitive award violated substantive due process.<sup>270</sup> The court reasoned:

We emphasize that, because Pulla failed to present any evidence that Amoco put any other individual’s privacy at risk (e.g., Pulla did not suggest that the search of his credit card records stemmed from a company policy), the potential harm from the search of his credit cards can only be analyzed as the search affected him.<sup>271</sup>

The touchstone was the potential harm that would have likely resulted from the dangerousness inherent in the defendant’s *actual* conduct; in other words, absent evidence of some company policy affecting other employees, the jury (and court) could not simply infer such a policy. The court specifically distinguished this case from “a manufacturer who puts several thousand potentially dangerous products into the marketplace.”<sup>272</sup>

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266. *See id.*

267. *See id.* (“For these reasons, we find the future deterrence aspect of our reviewing principles to be of great importance.”)

268. *See Pulla v. Amoco Oil Co.*, 882 F. Supp. 836 (S.D. Iowa 1994), *rev’d in part on other grounds*, 72 F.3d 648 (8th Cir. 1995).

269. *Pulla*, 72 F.3d at 653.

270. *Id.* at 659-60. On remand, the district court remitted the punitive award to \$2000, which was then affirmed by the Eighth Circuit. *See Pulla v. Amoco Oil Co.*, 112 F.3d 514 (8th Cir. 1997) (unpublished table decision).

271. *Pulla*, 72 F.3d at 660. The court went on to say that it “would view Amoco’s conduct in a more critical light if Pulla had presented any evidence rebutting Amoco’s assertion that this was an isolated and rare incident.” *Id.*

272. *Id.*



The approach of the Iowa Supreme Court is, as might be expected, not without sharp critics.<sup>273</sup> Indeed, one cannot lightly dismiss the criticism that jury findings that a defendant's conduct is, or is not, specifically directed at the plaintiff may be counterintuitive or illogical.

Nor can there be full confidence that an appropriate administrative scheme is in place. In *Revere Transducers, Inc. v. Deere & Co.*, the Iowa Supreme Court observed that

there is no established procedure by which the Civil Reparations Trust Fund is notified that a verdict on a punitive damages award has been entered in district court and that the jury has found that the defendant's acts were not directed at the plaintiff, thus implicating possible benefits to the Civil Reparations Trust Fund under section 668A.1(2)(b).<sup>274</sup>

As a result, as the court noted, “[T]he Civil Reparations Trust Fund sometimes learns of such awards by notice from the court and sometimes by newspaper or television.”<sup>275</sup> In fact, in that case, although the jury had answered “no” to the special interrogatory asking whether the defendant's conduct was directed specifically at the plaintiff, the district court had nonetheless entered judgment in the plaintiff's favor for the entirety of the punitive damages award.<sup>276</sup> In order to ensure proper notice, the Iowa Supreme Court directed that the district court notify the Reparations Fund, which could then intervene in the proceedings.<sup>277</sup>

Simply because the “different plaintiff” test has been applied somewhat haphazardly and the split-recovery scheme faces formidable administrative hurdles, however, it does not follow that the underlying framework is misguided. Instead, by considering whether the plaintiff is one of a potential class of victims of the defendant's conduct, it is at least theoretically possible to allocate damages in line with the societal damages theory. The idea here is that it might be possible to create a fund to

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273. *E.g.*, *Chadima v. Nat'l Fid. Life Ins. Co.*, 894 F. Supp. 1300, 1300 (S.D. Iowa 1995) (“With all due respect to the Iowa Supreme Court, I believe they have erroneously interpreted the precedent I must apply in this action. . . . I believe that the Iowa Supreme Court is wrong.”).

274. 595 N.W.2d 751, 772 (Iowa 1999).

275. *Id.*

276. *Id.* at 771.

277. *Id.* at 772. Other split-recovery schemes have encountered similar difficulties. For example, audits of Missouri's Tort Victims' Compensation Fund found Missouri “had not established procedures to ensure circuit clerks notified it of final judgments awarding punitive damages; did not follow up when attorneys failed to respond to requests for payment; and did not verify amounts when it did receive payment by requiring attorneys to document their fees and expenses.” Todd M. Johnson, Comment, *A Second Chance: A Proposal To Amend Missouri's Tort Victims' Compensation Fund*, 67 UMKC L. REV. 637, 642 (1999); see also Duncan, *State Not Taking Cut of Punitive Damages*, *supra* note 105 (“Without an effective system in place for a government agency to monitor the process, there's no way the [Illinois State] Department of Rehabilitation can expect money from awards to fall in its lap.”).

compensate the specific other harmed workers, assuming that they could be identified. For example, returning to the case of Kevin Wilson, we might consider that \$1.5 million (less applicable attorneys' fees) was allocated for harms inflicted upon a society of individuals similarly harmed: Wilson's coworkers, who had suffered from the company's policy of systematically downplaying legitimate injuries on the job. The societal damages theory would take this a step further and have the jury specifically determine the damages to such other coworkers. Moreover, a societal damages fund would then be created (as opposed to the generic Reparations Trust Fund), and the other harmed coworkers could choose whether to receive some portion of their recovery from this fund in lieu of bringing their own litigation. Under the ex post class action model, Rule 23 would guide the procedures for certification of would-be "absent plaintiffs" who suffered at the hands of "common conduct" of the defendant.

Under an alternative conception of diffuse harm—which might be especially applicable if it is not possible or feasible to identify the other harmed individuals—the funds might be put to use for harassment training or some other "rehabilitative" measure in the workplace.<sup>278</sup> I turn next to this alternative.

## 2. *Diffuse Harms: Establishing Specialized Proxy Funds*

It is not difficult to imagine how to transform the specialized court-administered funds set up by split-recovery statutes into more narrowly tailored funds that would attempt to provide redress or compensation for more diffuse harms to individuals or groups caused by the same, or similar, wrongdoing on the part of the defendant. An easy starting point might be the Illinois scheme. Recall that Illinois has a purely discretionary model, where the trial court may apportion the punitive damages award among the plaintiff, the plaintiff's attorney, and the State of Illinois Department of Human Services. Although the legislature has heretofore not designated particular types of torts warranting specific funds, the court is able to evaluate on a case-by-case basis whether a portion of the punitive damages should be diverted from the plaintiff.<sup>279</sup> With some modification, the legislature might designate a variety of tort-specific funds—as opposed to the default, the Department of Human Services—as recipients.<sup>280</sup>

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278. See *supra* note 180 (discussing similar remedial measures in sexual harassment cases).

279. See *supra* text accompanying note 97. Compare here the Georgia scheme, which targets exclusively products liability cases as an area of litigation where diversion of some portion of the punitive damages is appropriate. See *supra* note 93 and accompanying text.

280. Recall the debate over whether the Department has authority to direct disbursements to the State Project Fund rather than the general revenue fund of the state treasury. See *supra* notes 104-107 and accompanying text.

For another illustration, I return again to *State Farm*. Recall that the goal of the Utah Supreme Court was to remedy “the harmful effect” of over two decades worth of State Farm’s nationwide conduct “on the larger community of all those who deal with the company.”<sup>281</sup> The court was particularly concerned with misconduct that had “far-reaching negative effects on both its insureds and society in general”<sup>282</sup>—in other words, conduct that “affected other people as well as the Campbells.”<sup>283</sup> In particular, “State Farm’s fraudulent practices were consistently directed to persons—poor racial or ethnic minorities, women, and elderly individuals—who State Farm believed would be less likely to object or take legal action.”<sup>284</sup>

A difficult issue arises here, for although we may take as given that State Farm’s misconduct was “directed specifically at some of society’s most vulnerable groups,”<sup>285</sup> it may be impossible to identify specific individuals other than the plaintiff who have been harmed. Even so, given the twin goals of deterrence and third-party societal compensation, a split-recovery scheme, coupled with targeted court-administered funds, provides a possible solution.

Indeed, Utah has a split-recovery statute, although its existence was all but ignored in the briefs and arguments before the Supreme Court in *State Farm*.<sup>286</sup> At oral argument, petitioner’s counsel appeared unaware of the legislation. When asked about the distribution of the \$145 million punitive award, counsel stated that 40% (approximately \$56 million) went to the plaintiff’s attorneys, 10% to the plaintiff, and the remaining 50% to the plaintiffs in the original case against the Campbells.<sup>287</sup> Nor did respondent’s counsel do much to alert the Court to the state law scheme.<sup>288</sup> Nonetheless, after the Utah Supreme Court reinstated the \$145 million judgment in this case, the Attorney General of Utah sent a letter to counsel for respondents indicating the State’s “statutory right” to 50% of the award, pursuant to Utah’s split-recovery statute.

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281. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1149 (Utah 2001), *rev’d*, 123 S. Ct. 1513 (2003).

282. *Id.* at 1158.

283. *Id.* at 1149.

284. *Id.* at 1148.

285. *Id.* at 1154. The Utah Supreme Court’s words here mimic the Iowa Supreme Court’s “different plaintiff” test. *See supra* text accompanying notes 254-255.

286. Indeed, in the whole of petitioner’s brief, Utah’s split-recovery statute is mentioned just once, indirectly and in passing. *See* Brief for Petitioner at 49, *State Farm* (No. 01-1289) (“[T]he award will benefit Utah plaintiffs and possibly the State of Utah at the expense of State Farm policyholders across the country.” (citing UTAH CODE ANN. § 78-18-1(3) (2002))).

287. Oral Argument at 18-19, *State Farm* (No. 01-1289).

288. *See, e.g., id.* at 37 (“[Plaintiffs] get a relatively small piece of this. The family of the dead young man [i.e., claimants against the Campbells in the underlying action] gets part of it. The State may get part of it.”).

Although transferring 50% of the punitive damages award directly to the state's general treasury—as is the result under Utah's particular split-recovery statute—does not effectuate the societal compensation goal, the point here is that a mechanism already exists, which need be modified only modestly in order to achieve this goal.

B. *Judicial Realm: Court Action Absent Enabling Legislation*

Do courts have inherent authority to allocate punitive damages awards without legislation directing such an allocation? If so, then the Iowa and Illinois models might extend beyond the reach of the other split-recovery states to inspire state (and federal) court judges throughout the United States. In this Section, I consider whether such an apportionment of a punitive damages award is within the remedial powers of a court (as the Ohio Supreme Court recently determined<sup>289</sup>), even absent the enabling legislation that exists in split-recovery states.

Several scholars have argued convincingly that a broad power to shape and effectuate remedies is deeply rooted in our common law system—i.e., lawmaking and policymaking by judges.<sup>290</sup> Punitive damages in particular are an outgrowth of the common law system. Moreover, because the purpose of societal damages is to redress harm to society at large, it would seem particularly appropriate that settled conceptions of judicial authority to shape remedies in public law litigation might apply, at least to some extent, in this context.<sup>291</sup>

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289. See *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002).

290. The common law is “derived not from authoritative texts such as constitutions and statutes, but from human wisdom collected case by case over countless generations to form a stable body of rules that not only determine immediate controversies but also guide future conduct.” Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 5 (1995). See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); OLIVER W. HOLMES, JR., *THE COMMON LAW* (Mark DeWolfe Howe ed., Macmillan 1968) (1881); ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* (1921). Relying on the common law, courts have prescribed remedies requiring continuing supervision of various enterprises. See Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 467-94 (1980).

291. Cf. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (pointing to a model of public law litigation whereby “the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court”). But see Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 941-42 (2003) (“Even the most enthusiastic defenders of structural reform litigation recognize that courts are at best sub-optimal decision makers in these contexts.” (internal quotation marks omitted)). As Dorf concedes, “One can give an account of experimentalist judging which sees it as an improvement of, rather than a break with, structural reform litigation.” *Id.* at 942 n.240 (citing Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805 (1990)).

An apt analogy in the realm of judicial action absent enabling legislation might be several courts' adoption—absent any legislative mandate—of the doctrine of comparative negligence. Thus, for example, in *Li v. Yellow Cab Co.*,<sup>292</sup> the “long standing and time honored” common law rule of contributory negligence in California was superseded by judicial fiat with a new rule of comparative negligence.<sup>293</sup> The California Supreme Court in *Li* articulated a “common law evolution rationale” for its authority to initiate such a revision in the common law.<sup>294</sup>

This same evolving common law rationale might undergird a reevaluation of common law punitive damages schemes, especially in light of the “modern” problem of the disconnect between the societal justifications for punitive damages—including the societal compensation goal advanced here—and the distribution of such windfall awards to individual plaintiffs. A further analogy might be drawn to the Supreme Court's “common benefit” doctrine, as applied in the context of attorneys' fees, which ensures that those who benefit from the efforts of designated counsel in multidistrict litigation (MDL) proceedings contribute to the fee award.<sup>295</sup> The “common benefit” doctrine, which predates both the modern class action and MDL litigation by decades, might be a useful guideline for

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292. 532 P.2d 1226 (Cal. 1975).

293. *Hilgedick v. Koehring Fin. Corp.*, 8 Cal. Rptr. 2d 76, 95 (Ct. App. 1992) (discussing *Li*).

294. 532 P.2d at 1241; *see also id.* (“[T]he time for a revision of the means for dealing with contributory fault in this state is long past due . . . [I]t lies within the province of this court to initiate the needed change by our decision in this case.”). Specifically, the court rejected the view that the enactment of the Civil Code in 1872, which codified existing common law, “insulate[d] the matters therein expressed from further judicial development; rather, it was the intention of the Legislature to announce and formulate existing common law principles and definitions for the purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution.” *Id.* at 1233.

In a scathing dissent, Justice Clark characterized the majority's decision as “a gross departure from established judicial rules and role,” one driven by “judicial chauvinism.” *Id.* at 1246-47 (Clark, J., dissenting). In his view, the majority decision “depart[ed] significantly from the recognized limitation upon judicial action—encroaching on the powers constitutionally entrusted to the Legislature.” *Id.* at 1246. Justice Clark also rejected the majority's assumption that “our society's evolution has now rendered the normal legislative process inadequate.” *Id.* at 1247.

While the vast majority of jurisdictions abrogated common law contributory negligence by way of statutory enactment, California does not stand alone in having achieved this result via judicial fiat. *See, e.g.*, *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Boasiako v. Checker Taxi Co.*, 488 N.E.2d 672 (Ill. App. Ct. 1986); *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984); *Placek v. City of Sterling Heights*, 275 N.W.2d 511 (Mich. 1979); *Scott v. Rizzo*, 634 P.2d 1234 (N.M. 1981). In New York, the legislature embraced comparative fault several years after the groundbreaking judicial decision. *Compare Dole v. Dow Chem. Co.*, 282 N.E.2d 288, 294-95 (N.Y. 1972), with *N.Y. C.P.L.R. 1411* (McKinney 1976).

295. *See, e.g.*, *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Trustees v. Greenough*, 105 U.S. 527 (1881); *see also In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006 (5th Cir. 1977).

a court seeking to exercise its equitable powers to mitigate unjust enrichment in wider contexts.<sup>296</sup>

Objectors will sound the alarm of unrestrained judicial activism; indeed, it is difficult to escape from the almost palpable anxiety that haunts any talk of judicial lawmaking.<sup>297</sup> The usually politically inspired charges of judicial activism, however, ignore a key distinction between the roles of state court versus federal court interpretative authority and practice.<sup>298</sup> State courts, as opposed to federal courts, are, after all, “the keepers of the common law.”<sup>299</sup> And, despite pronouncements that common law innovation is passé in the modern “age of statutes,”<sup>300</sup> “the inherent, yet principled flexibility of the common law remains the defining feature of the state court judicial process today.”<sup>301</sup>

Nonetheless, the legitimacy of any judicial action actually taken may depend, to a significant degree, on whether societal damages are assessed for, and directed toward, specific harms suffered by particular individuals (or categories of individuals) other than the plaintiff, as opposed to cases involving diffuse harms, where the nonplaintiff recipient of a portion of the punitive damages award is the state or some other judicially established proxy. One could plausibly argue that courts are usurping the legislative

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296. See *Sprague*, 307 U.S. at 166 (stating that the common benefit doctrine acknowledges “the original authority” of the district courts “to do equity in a particular situation” to prevent unjust enrichment).

297. Legal commentators termed the Ohio Supreme Court’s decision to allocate a portion of a punitive award to a charity absent enabling legislation, “judicial activism at its height.” Liptak, *supra* note 73. But see Abner J. Mikva, *Judges on Judging: Statutory Interpretation: Getting the Law To Be Less Common*, 50 OHIO ST. L.J. 979, 979 (1989) (“The ‘judicial activism’ . . . so criticized by today’s conservatives (and yesterday’s liberals) is really ‘judicial naturalism’—judges doing what comes naturally—what most of them were taught to do.”). See generally CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 157-59 (1990) (distinguishing an approach to statutory construction that includes “develop[ment of] interpretive norms” from “an unanchored or entirely open-ended inquiry into the best outcomes in a particular case”).

298. See generally William J. Brennan, Jr., *State Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective*, Address at the University of Florida Law Review Annual Banquet (Sept. 20, 1966), in 19 FLA. L. REV. 225 (1966) (describing the distinct roles of state and federal Supreme Court Justices in evaluating, applying, and deferring to state action). Justice Brennan was one of only three twentieth-century Justices—the other two were Holmes and Cardozo—to be elevated to the U.S. Supreme Court from a state high court. As Larry Kramer has noted, “Contemporary scholars speak in general terms and offer general solutions while in fact dealing only with a narrow set of issues associated with the federal government. . . . State courts and state legislatures are ignored. . . .” Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 279 n.55 (1992).

299. Kaye, *supra* note 290, at 6; see also *id.* at 20 (“[S]tate courts regularly, openly, and legitimately speak the language of the common law whereas federal courts do not.”).

300. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); see also Allan C. Hutchinson & Derek Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752, 1753 (1982) (reviewing CALABRESI, *supra*) (observing that “[t]he distinguishing feature of twentieth-century legal history has been the shift from the common law to statutes as the major source of law”).

301. Kaye, *supra* note 290, at 10.

“power of the purse” when they move away from assessing and distributing money for specific harms to individual plaintiffs and toward raising money for general funds as a result of tort damages. In the latter type of case, the court seems to be taxing defendants for the general welfare.

This was in fact the ground of one of the dissents in *Life Insurance Co. of Georgia v. Johnson*, the Alabama Supreme Court case that endorsed a prospective scheme allocating one-half of all punitive damages awards to the state treasury.<sup>302</sup> Two dissenting justices questioned the court’s authority to direct payment of damages recovered in a civil case into the state’s general treasury fund: “[T]he power to collect revenue for the State treasury,” they argued, “is a plenary power of the Legislature, and is beyond the powers of this Court.”<sup>303</sup> So long as there is enabling legislation (such as split-recovery statutes), there may be no problem with courts effecting a tax of this sort, even if it is for the general welfare. But absent legislative authorization, such distribution raises problems of institutional legitimacy.

The tort system has been more generally criticized for functioning akin to a system of general welfare taxation. A prime example might be the Master Settlement Agreement payments as a result of the large-scale state settlement with the tobacco companies.<sup>304</sup> A plausible argument can be made that, absent legislative authority, judges lack the power to become involved in setting up general welfare funds, whether by attempting to direct payments from a tortfeasor who has harmed public health or society generally to a source dedicated to alleviating the same or similar type of harm, or else to some charitable or “public purpose” wholly unrelated to the

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302. 684 So. 2d 685 (Ala.), *vacated by* 519 U.S. 923 (1996) (mem.).

303. *Id.* at 707 (Maddox, J., concurring in part and dissenting in part); *see also id.* (“I do not believe that this Court has the power, or that it should assume the power, of determining that a portion of an award of punitive damages must be distributed to the State.”); *id.* at 719 (Butts, J., concurring in part and dissenting in part) (“It is for the legislature to determine whether a portion of a punitive damages award should be paid to the State and, if so, what percentage of the award the State should receive, and it is for the legislature to determine the State fund or agency to which the monetary award should be allotted.”).

304. Consider the fact that much of the money received by the states in the Master Settlement Agreement has not been put to use in health-related efforts:

[S]tates have used their tobacco payments to finance programs that bear little relation to the actual health costs of smoking. States did not allocate the funds to shore up Medicaid or even to launch vigorous antismoking campaigns. Rather, programs such as public works projects, highway construction, juvenile detention centers, legal fees for policemen accused of brutality, and sidewalk repair often head the list of uses.

W. KIP VISCUSI, *SMOKE-FILLED ROOMS* 8-9 (2002). Reports in 2001 by the National Conference of State Legislatures and the General Accounting Office found that only approximately five to seven percent of the money was being used for tobacco programs, including smoking prevention and cessation. *Id.* at 56.

One might argue here that money given over to the state is in some sense wholly fungible; therefore, even if it were earmarked for specific purposes, subsequent legislatures might undo the earmarking by cutting the relevant budget and then reallocating. Nonetheless, the legislature might face some political costs were it to so act.

specific type of harm at issue.<sup>305</sup> But the same argument lacks purchase in the specific harms category of cases. In these cases, my argument is that it falls comfortably within a judge's common law remedial authority to direct the jury to consider harms to other specifically harmed individuals and to assist with the creation of a societal damages fund for their distribution.

Because judicial allocation schemes, even if technically within the authority of courts, might provoke further wariness, a few additional responses are in order. As an initial matter, the fact that a function could be performed by other lawmakers does not imply that we should dismiss the idea of expanding the judicial role into the area. For one thing, legislatures might be slow to act, and thus less likely to provide flexible, incremental solutions to emerging modern problems.<sup>306</sup> In a slightly different vein, in their recent works on "experimentalist courts," Michael Dorf and Charles Sabel have applauded creative decisionmaking on the part of courts as problem solvers.<sup>307</sup> And, in attempting to defend judges over regulators, Dorf has suggested that "[t]he independence of the judiciary relative to administrative agencies means that even if experimentalist courts and agencies are functionally indistinguishable, there are circumstances in which the formal location of authority in the judiciary makes a difference."<sup>308</sup> But defending the judicial system over other possible alternatives, in particular administrative regulation, is beyond the scope of this Article. Instead, I am primarily interested in how we can improve the judicial system's ability to achieve the tort system's compensation and deterrence goals.

Take for example the *Dardinger* case, decided recently by the Ohio Supreme Court.<sup>309</sup> The court was primarily concerned with "offsetting," as opposed to redressing, the harm to individuals other than the plaintiff.<sup>310</sup> In

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305. See Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1165 n.73 (1998) ("Suppose that Congress were to authorize a few lawyers, supervised by a judge, to resolve nationwide tort problems without any guidelines as to how funds are to be allocated among right holders. The invalidity of such delegation would seem obvious.").

306. Justice Peterson of the California Court of Appeals relied on this justification in advocating judicial allocation of punitive damages awards, noting that "[w]hile this concern is unquestionably capable of legislative solution, none has been forthcoming," thus necessitating "solution by the courts." *Hilgedick v. Koehring Fin. Corp.*, 8 Cal. Rptr. 2d 76, 94 (Ct. App. 1992) (Peterson, J., concurring). To similar effect, the Tennessee Supreme Court, in a decision adopting comparative fault, stated, "We recognize that this action could be taken by our General Assembly. However, legislative inaction has never prevented judicial abolition of obsolete common law doctrines, especially those . . . conceived in the judicial womb." *McIntyre v. Balentine*, 833 S.W.2d 52, 56 (Tenn. 1992).

307. E.g., Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000).

308. Dorf, *supra* note 291, at 950.

309. *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002).

310. *Id.* at 146 (stating that punitive damages should "rationally offset the harm done by the defendants").



other words, its action is best described as an intervention to address diffuse harm as opposed to specific harms. For this reason, the court may have exceeded its authority. That is not to say, however, that I would agree with the dissent, which, though “sympathetic to the motives of the majority,” objected to the fact that the court acted absent statutory authorization.<sup>311</sup> The dissent relied heavily on the fact that “every American court that engages in the alternative distribution of punitive damages awards has acted pursuant to statutory authorization” to conclude that “the legislative branch is better equipped to establish a uniform mechanism for alternative distribution.”<sup>312</sup> The dissent’s position was not only overbroad, but also rigidly so; it objected to the court’s playing a “central role” in the apportionment and distribution of punitive damages, given that the Ohio legislature is in no way “precluded from modifying the common law of punitive damages by the enactment of legislation.”<sup>313</sup>

As I argued above, the fact that the legislature could modify the common law of punitive damages does not preclude judicial intervention in this sphere, at least within the category of remedial action addressing specific harms to individuals. In this case, then, the court might well be justified in directing the jury to consider evidence that other Ohioans,<sup>314</sup> in addition to the plaintiff’s deceased wife, were subject to the same “pervasive” corporate policy of bad faith denial of authorization for medical procedures.

To be fair, the dissent was of course reacting to the particular case before it, and it justifiably bristled at the “unintended and undesirable consequences” that would stem from “a judge’s unbridled discretion to allocate punitive damages to his/her preferred charity.”<sup>315</sup> The risks here might go beyond those identified by the dissent; they might include not only “capture” of judges seeking reelection, but also potential rent-seeking on the part of judges who wished to be associated with a particular good cause.<sup>316</sup> Such a concern about judicial intervention to remedy diffuse societal harms, however, by no means dictates a wholesale rejection of judges’ common law remedial authority in the realm of punitive damages.

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311. *Id.* at 147 (Moyer, C.J., concurring in part and dissenting in part); *see also id.* at 149 (Cook, J., concurring in part and dissenting in part) (“I dissent from the majority’s atypical distribution of the punitive-damages award.”).

312. *Id.* at 147-48 (Moyer, C.J., concurring in part and dissenting in part).

313. *Id.* at 148.

314. The court itself spoke of the defendant insurance industry’s presence in the lives of other Ohioans. I defer for the moment the question of whether evidence as to other harmed individuals from other states might be considered as well. *See infra* Subsection V.A.1.

315. *Dardinger*, 781 N.E.2d at 147 (Moyer, C.J., concurring in part and dissenting in part).

316. The fact, for example, that Justice Pfeifer, author of the majority opinion, is a graduate of Ohio State University, the recipient of the court-designated cancer research fund, might raise a few suspicious eyebrows. *See also infra* note 357 and accompanying text.

What has yet to be tried is an innovation—based perhaps on the “different plaintiff” test of the Iowa split-recovery statute—in the specific harms category of cases. As outlined above in Part III, such a scheme would entail jury involvement in assessing damages to those other than the plaintiff before it in court. Moreover, and as discussed above, courts already have at their disposal the ability to form an ex post class action, utilizing the familiar procedural mechanism of Rule 23. Therefore, the innovation required might well be modest. The tools for addressing the classwide nature of the remedy are at hand—whether through existing legislation, procedural mechanisms under Rule 23, the equitable authority of judges, or some creative combination of all three.

#### V. SOCIETAL DAMAGES: BETTER IN THEORY THAN IN PRACTICE?

Having elaborated upon the new category of societal damages and having discussed its practical realization in the legislative and judicial realms, it seems natural to turn to a more critical evaluation from constitutional and institutional perspectives of how such a theory might fare in practice. Taking up potential constitutional challenges first, I discuss in turn the due process issues raised by punitive damages generally—extraterritoriality and multiple punishments—and then turn to specific challenges to split-recovery schemes, derived from the Excessive Fines, Takings, and Due Process Clauses. I focus on how the societal damages approach responds to each type of constitutional challenge. Next, I explore ways in which the societal damages approach might exacerbate and compound existing problems that plague class actions in our civil justice system. Finally, I consider additional formidable institutional and practical barriers to implementation of the societal damages approach, weighing the competing advantages and disadvantages of enhancing the role of juror decisionmaking.

##### A. *Due Process Challenges Based on Extraterritorial Conduct and Risk of Multiple Punishment*

Two of the main objections to modern punitive damages jurisprudence are that juries are permitted to punish a defendant in a single lawsuit for “nationwide” conduct that may or may not be treated differently by other states, and that defendants are susceptible to multiple punishments for the same course of conduct. These “extraterritoriality” and “multiple punishments” concerns are of course interrelated; juries in one state can punish conduct occurring in another state, which itself may be the subject of a lawsuit in that state, leading to a separate punitive damages award, and so on. While a full discussion of these concerns and possible solutions is

beyond the scope of this Article,<sup>317</sup> brief mention is warranted, if only to demonstrate that the societal damages theory propounded here at best would mitigate some of these concerns and, at worst, would do no greater harm.

### 1. *Extraterritoriality*

With respect to the vexing issue of extraterritoriality, the societal damages theory, while it can offer no solution, does offer the possibility of an innovative way of looking at the issue, by bringing to the fore the class action analogy. This is, of course, not the occasion to revisit the historically rich topic of the extraterritorial nature (or effect) of law.<sup>318</sup> Instead, I want to focus more narrowly on a particular seeming inconsistency: While the Supreme Court has recently indicated enthusiasm for imposing extraterritorial limitations upon the scope of one court's (or jury's) allowable punishment in litigation by a single plaintiff, it has not demonstrated a similar verve in limiting the territorial scope of allowable class actions. If, however, punitive damages indeed include a significant portion of societal damages, then it no longer makes sense to condition territorial scope on the dichotomy between punishment and compensation.

*BMW v. Gore* made clear that the starting point for exploring the excessiveness of punitive damages is “an identification of the state interests that a punitive award is designed to serve.”<sup>319</sup> The case itself involved deceptive trade practices and a failure to disclose a presale repainting job that affected the resale value of a new car. The Court explained that “each State has ample power to protect its own consumers, [and] none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.”<sup>320</sup> Moreover, “principles of state sovereignty and comity” dictate “that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.”<sup>321</sup> Specifically, states lack the “power . . . to punish [a defendant] for [out-of-state] conduct that was lawful where it

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317. For a summary of various reforms designed to protect against excessive multiple punishment, see Colby, *supra* note 23, at 658-66.

318. It would, nonetheless, be extremely interesting to place into historical context the emergence of the Supreme Court's modern preoccupation with extraterritoriality in punitive damages cases. The idea of extraterritorial limits on states' regulatory powers—a once-powerful organizing principle of cases in the nineteenth and twentieth centuries—greatly waned in the wake of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), only to resurface, albeit weakly, in, for example, negative Commerce Clause cases. In its modern incarnation, extraterritoriality has emerged as a major issue in international conflict of law, especially in antitrust, copyright, and Internet disputes.

319. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

320. *Id.* at 585.

321. *Id.* at 572.

occurred and that had no impact on . . . its residents.”<sup>322</sup> In *State Farm*, the Court extended this extraterritorial limitation to include *unlawful* out-of-state conduct.<sup>323</sup>

The Supreme Court thus imposed federalism-based territorial limitations on punitive damages. As it reiterated in *State Farm*, “A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.”<sup>324</sup> The issue has been framed in terms of limiting the ability of a single jury or court to encroach upon the autonomy of other states to determine their own policies and enforce their own penal laws.<sup>325</sup> But through the lens of the societal damages theory, one might question whether an extraterritorial limitation on the state’s power to *punish* a defendant should apply similarly to its power to regulate the defendant’s conduct via assessment of societal damages, a peculiar species of compensatory damages subsumed within punitive damages. Thus, the class action comparison resurfaces.

The Supreme Court, while demonstrating grave fear of the extraterritorial scope of punishment, has not expressed similar misgivings about the scope of remediation with respect to class action lawsuits extending to citizens of more than one state, at least so long as the requirements of Rule 23 are met. In *Phillips Petroleum Co. v. Shutts*,<sup>326</sup> the Court rejected defendants’ challenges under the Due Process Clause to a state’s personal jurisdiction over absent class members—primarily those in other states—in a class action for money damages, so long as the procedural requirements of Rule 23 were satisfied. Specifically, the Court held that “a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though the plaintiff may not possess the

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322. *Id.* at 573.

323. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1522 (2003) (“Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.”). The Court in *BMW* had left open the question of whether a state could impose punitive damages to punish unlawful (as opposed to lawful) conduct in other states. 517 U.S. at 574 n.20.

324. *State Farm*, 123 S. Ct. at 1523.

325. *See, e.g., id.* at 1522 (quoting *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (“A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.”)); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (“[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.”); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (“Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extra-territorial effect only by the comity of other States.”).

326. 472 U.S. 797 (1985).

minimum contacts with the forum which would support personal jurisdiction over a defendant.”<sup>327</sup>

To be sure, to obtain in personam jurisdiction over nonresident class members in damage actions, the state must provide at least notice and an opportunity to opt out of the class.<sup>328</sup> Indeed, in *State Farm*, after proclaiming seemingly resolute extraterritorial limits to the state’s ability to punish defendants for out-of-state conduct, in its next breath the Court, citing *Shutts*, added that “[a]ny proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction.”<sup>329</sup> Thus, the Court reveals the core of its extraterritorial concern to be (once again) the need for procedural protections inherent in Rule 23 as well as choice-of-law concerns.

Several implications emerge. First, the extraterritorial limitation stops at the state’s boundary. Second, and of even greater significance here, the Court suggests the reemergence of a penal versus remedial distinction. While punishment may stop at the state’s boundaries, remedial compensation need not. The Court has yet to develop any underlying justification for such a distinction, at least with respect to states’ respective territorial spheres of regulation. In fact, it is difficult to imagine any such justification based upon its previously announced principles of sovereignty, comity, and choice of law. Moreover, lower federal courts may increasingly push the Court toward reconciling its principles of extraterritoriality in the

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327. *Id.* at 811.

328. Moreover, adequate representation has emerged as a third requirement in its own right, taking on increasing significance as courts face the question of whether adequacy of representation can be raised by collateral attack. *See, e.g., Vermont v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003) (permitting a judgment rendered in an Alabama class action to be collaterally attacked in Vermont courts on the ground, inter alia, that class counsel and the named plaintiff inadequately represented the class). Henry Monaghan has argued persuasively that, absent minimum contact, *Shutts* requires adequate representation at all times in order to establish in personam jurisdiction over nonresident class members. Monaghan, *supra* note 305, at 1172. More to the point, however, Monaghan asks the provocative question: “[W]hat precisely was Kansas’s interest in reaching beyond its borders and adjudicating the overwhelming portion of the interests of the *Shutts* claimants, the vast majority of whom were nonresidents who neither owned land in Kansas nor affirmatively consented to such an adjudication?” *Id.* at 1170 n.95.

329. *State Farm*, 123 S. Ct. at 1522 (citing *Shutts*, 472 U.S. at 821-22). The referenced passage of *Shutts* pertains to the choice-of-law issue:

[W]hile a State may . . . assume jurisdiction over the claims of plaintiffs whose principal contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law. . . .

. . . Given Kansas’ lack of “interest” in claims unrelated to that State, and the substantive conflict with [other] jurisdictions . . . we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.

472 U.S. at 821-22.

punitive damages and class action spheres.<sup>330</sup> The end result would be a regime in which class actions and punitive damages are equally circumscribed by state lines.

## 2. *Multiple Punishments and Preclusion*

The multiple punishments problem has confounded jurists and scholars for the better part of the past three decades.<sup>331</sup> The U.S. Supreme Court grappled with the issue in *State Farm*.<sup>332</sup> While I do not purport to offer in this Article a comprehensive solution to the problem, it is plausible to believe that the application of the societal damages theory mitigates the problem.

Imagine, for example, a single plaintiff who brings an employment discrimination action against his employer. The jury awards compensatory damages, but also significant punitive damages, in large part based on evidence of a “discriminatory policy” that affected numerous employees. At

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330. In denying nationwide class actions, lower federal courts are beginning to enunciate rationales that resonate with that of the extraterritorial limitation for punitive damages. For example, in a recent opinion, the Seventh Circuit considered a successive appeal to its previous decision denying certification of a nationwide class covering multiple models of Ford vehicles and Firestone tires sold between 1990 and 2001. *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763 (7th Cir. 2003). Ford and Firestone asked the district court to enforce the Seventh Circuit’s denial of a nationwide class by enjoining the filing of subsequent class actions, whether nationwide or statewide. The district court denied their motion. *See id.* at 765. On appeal, the Seventh Circuit held that “the district court properly denied Ford’s request for an injunction that would preclude” any statewide class action, but that it erred in not granting the injunction with respect to attempts to file subsequent nationwide class actions. *Id.* at 766; *see also id.* (“Each state may apply its own choice-of-law rules (and its own substantive law, if otherwise appropriate) in a way that a federal court, trying to apply nationally homogenized law, could not.”).

331. Judge Friendly’s influential decision in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 834, 839-40 (2d Cir. 1967)—a case involving an anti-cholesterol drug found to produce adverse effects in consumers, hundreds of whom filed lawsuits against the drug manufacturer—ushered in the modern debate on this issue. Judge Friendly expressed his concern over how “such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.” *Id.* at 839. He indicated that a solution to multiple awards, if one could be fashioned, would be to bring all of the plaintiffs into one court so that a jury could make one award of punitive damages. *Id.* at 839 n.11; *see also* Issacharoff, *supra* note 206, at 1934 (“One of the pressing and thus far unresolved issues in mass torts is whether there is some due process limitation, as normatively it appears that there must be, on how many times a particular defendant may be exposed to punitive damages awards for the same conduct, without successive juries even being informed that punitive damages for the egregiousness or social harm of the conduct had previously been awarded.”).

332. *State Farm* argued before the Court that “[t]here is a fundamental unfairness in allowing one policyholder to collect punitive damages for conduct directed at others who are not before the court and who are free subsequently to seek punishment for the same conduct.” Brief for Petitioner at 27, *State Farm* (No. 01-1289).

Indeed, Laurence Tribe (counsel for the Campbells) suggested in oral argument before the Supreme Court that “there ought to be some double jeopardy like doctrine that if [defendants] can show that they’ve already been punished for this course of conduct, they ought not to have to pay the penalty a second time.” Oral Argument at 46-47, *State Farm* (No. 01-1289). When pressed for authority for his assertion, however, Tribe conceded that he “just made it up.” *Id.* at 47 (“I just made it up. I said there ought to be such a doctrine.”).

present, whether or not the punitive damages are directed in toto or in part (via split-recovery statutes) to the individual plaintiff, other harmed individuals are still able to bring their own individual actions for both compensatory and punitive damages. But suppose that the jury were to award individual compensatory damages and societal damages in the first case, apportioning a compensatory damages amount for each of the other harmed individuals, which, when paid, would have a preclusive effect upon that particular individual. Then it becomes clear that at least a significant portion of the “double recovery” or multiple punishments problem is avoided.

Pursuant to the ex post class action, a binding award would cover any plaintiffs (so long as they had not opted out). Even absent the formal procedural protections of Rule 23, and assuming that the courts had simply established a societal damages fund, should one of the other harmed individuals choose to bring his own suit, then the defendant would in essence receive a “credit” for the amount allocated by the first jury. Instead of reverting to a single plaintiff—or to the state for that matter—the moneys would be set aside to compensate for the additional harms inflicted by the defendant. Of course, since in this Article I have put to one side the issue of retributive “punitive” damages (as a separate third category), what I discuss here will only temper, as opposed to solve, the multiple punishments dilemma.

#### B. *Constitutional Challenges to Split-Recovery Schemes*

Split-recovery statutes raise myriad additional constitutional issues.<sup>333</sup> The statutes have been challenged on various state and federal constitutional grounds as levying excessive fines, violating constitutional provisions against double jeopardy, denying the claimant due process and equal protection, and not affording the right to trial by jury.<sup>334</sup>

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333. The literature on split-recovery statutes has tended to focus on the constitutional concerns raised. *See, e.g.*, Nicholas M. Miller, Note, *'Tis Better To Give than To Receive: Charitable Donations of Medical Malpractice Punitive Damages*, 12 J.L. & HEALTH 141, 160 (“Split awards enlarge government and face constitutional complications.”); *see also* sources cited *supra* note 77.

334. Within the past year, state supreme courts in Alaska, Indiana, Missouri, and Oregon have upheld the constitutionality of their respective split-recovery statutes. *See Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002) (upholding a statutory provision directing 50% of punitive awards to the state); *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003) (ruling that section 34-51-3-6 of the Indiana Code, which allows the state to appropriate 75% of a punitive damages award, neither effects an unconstitutional taking of property nor places a demand on an attorney’s particular services in violation of the Indiana Constitution); *Hoskins v. Bus. Men’s Assurance*, 79 S.W.3d 901 (Mo. 2002) (holding that a statutory provision authorizing the state to assert a lien on 50% of any final judgment for punitive damages, after deduction of attorneys’ fees and expenses, violates neither the Excessive Fines nor Takings Clauses of the state or federal constitutions); *DeMendoza v. Huffman*, 51 P.3d 1232 (Or. 2002) (holding that a statutory provision allocating

The constitutional concerns emerge because punitive damages involve the government to some degree. At the most basic level, they are damages provided for by the state, by common law, or by statute. In other words, “[P]unitive damages are imposed through the aegis of courts and serve to advance governmental interests.”<sup>335</sup> In general, the modest level of governmental involvement in awarding punitive damages is sufficient to trigger protections of the Due Process Clause, but not the Excessive Fines, Takings, or Double Jeopardy Clauses. While split-recovery schemes arguably present exceptions to the general rule, I explore the ways in which modifications inspired by the theory of societal damages put such schemes on firmer constitutional ground.

### 1. *Excessive Fines*

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, the Supreme Court noted that the Excessive Fines Clause had been “appl[ied] primarily, and perhaps exclusively, to criminal prosecutions and punishments.”<sup>336</sup> This, the Court explained, is because “the primary focus of the Eighth Amendment was the potential for governmental abuse of its ‘prosecutorial’ power, not concern with the extent or purposes of civil damages.”<sup>337</sup> Most relevant here, the Eighth Amendment “does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”<sup>338</sup>

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60% of each punitive damages award to the state’s Criminal Injuries Compensation Account does not violate the state constitution); *see also infra* note 346 (discussing takings challenges).

335. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (holding that punitive damages constitute “private fines levied by civil juries” furthering the objectives of government).

336. 492 U.S. at 262. In subsequent cases, the Court has reassessed the civil-criminal distinction. In *Austin v. United States*, a case in which the U.S. government initiated forfeiture proceedings against a body shop and mobile home after their owner was convicted of cocaine possession on those properties, the government argued that the Excessive Fines Clause did not apply because the forfeiture did not constitute a punishment because it protected the public from future drug trade and acted as compensation for expenses incurred in enforcement of the drug laws. 509 U.S. 602 (1993). In rejecting the government’s argument and holding that forfeiture of money to the government constitutes punishment, the Court did not limit its holding to criminal forfeitures. *See id.* at 608-09.

337. 492 U.S. at 266.

338. *Id.* at 263-64. The Supreme Court noted: “Here the government of Vermont has not taken a positive step to punish, as it most obviously does in the criminal context, nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual.” *Id.* at 275. In a footnote, the Court distinguished its previous decision in *United States v. Halper*, 490 U.S. 435 (1989), because the government, and not a private party, exacted punishment. Significantly, the Court implied that a government’s recovery of punitive damages in a civil action may raise Eighth Amendment concerns, but explicitly left the issue open. 492 U.S. at 275 n.21.

Nor did the Supreme Court resolve the issue in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). The Court was clearly aware of the fact that the state was to



It may therefore make a significant difference whether, in particular split-recovery schemes, the money reverts to the general state treasury or to a designated court-administered fund.<sup>339</sup> Iowa has placed heavy reliance upon the fact that the moneys revert not to the general state treasury (which might raise Excessive Fines Clause issues), but instead are directed to a fund with clear authority to disburse funds for specified purposes only.<sup>340</sup>

Another factor that might be relevant to the Excessive Fines Clause analysis is what role the state plays in the litigation—in other words, whether or not it can intervene in the proceedings at any stage. Here the states differ in approach. For example, Missouri is emphatic that the state cannot intervene at any stage.<sup>341</sup> There are of course risks inherent in such a laissez-faire approach.<sup>342</sup> In contrast, in Iowa, staff in the Attorney General's Office file appearances to protect the State's interest in punitive damages cases.<sup>343</sup>

While existing split-recovery schemes (and especially those where the money reverts solely to the general state treasury) may have to grapple with these issues, the societal damages theory I espouse in this Article largely avoids such complications. As explained in Part III above, societal damages would serve a remedial, as opposed to punitive, purpose.<sup>344</sup> Moreover, the

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receive sixty percent of the punitive damages award. *See id.* at 429. Moreover, the Court made clear that the Excessive Fines Clause applied to state governments through the Fourteenth Amendment, *id.* at 433-34, which the Court had declined to state in *Browning-Ferris*. It is not altogether clear, therefore, even if the Excessive Fines Clause were to apply to review of punitive damages awards, whether that review would differ in any significant regard from the Fourteenth Amendment due process review. Thus, for example, it is difficult to defend the action taken by the Georgia federal district court that struck down the split-recovery statute on the grounds that it violated the Excessive Fines Clause, as opposed to deciding that the particular punitive damages award exceeded the amount allowable by the Clause. *See McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990).

339. Indeed, the situation where the money reverts solely to the state treasury adds a level of complication, both constitutional as well as administrative and practical. *See, e.g.*, Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 364-77 (2000).

340. In the words of the Iowa Supreme Court, "We find a clear distinction between the Fund and the general state treasury. The damage awards are not commingled with state revenues and are to be disbursed only for the purposes of indigent civil litigation programs or insurance assistance programs." *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 868-69 (Iowa 1994) (internal quotation marks and citation omitted).

341. *See Hoskins v. Bus. Men's Assurance*, 79 S.W.3d 901, 904 (Mo. 2002) ("The statute makes clear that the state cannot intervene in the case. Moreover, the state has no interest in the amount awarded as punitive damages until that amount is reduced to a final judgment."); *see also* ALASKA STAT. § 09.17.020(j) (Michie 2002) ("This subsection does not grant the state the right to file or join a civil action to recover punitive damages.").

342. *See supra* note 277.

343. They also advise litigants in posttrial negotiations.

344. *Cf. United States v. Bajakajian*, 524 U.S. 321, 329 (1998) ("[F]orfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss."); *Austin v. United States*, 509 U.S. 602, 610 (1993) (holding that conduct constitutes punishment when it "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes" (quoting *United States v. Halper*, 490 U.S. 435 (1989))); *cf. James D. Ghiardi, Punitive Damages: State Extraction Practice Is Subject to Eighth*

state has no direct interest in a societal damages award, eliminating the conditions for application of the Eighth Amendment to any societal damages award that might be rendered.<sup>345</sup>

## 2. Takings

A property right protected by the Takings Clause of the Fifth Amendment may not vest in a party to an action at a time before the property comes into existence or is subject to state control. The courts in split-recovery states have virtually unanimously held that a party has no vested property right in a claim for punitive damages, at least not until judgment is entered.<sup>346</sup> Bucking this trend, the Colorado Supreme Court struck down the state's split-recovery statute on the ground that it "effectuates a forced taking of the judgment creditor's property interest in the judgment."<sup>347</sup> The court characterized a judgment for exemplary damages as a "property interest."<sup>348</sup> Significantly, however, the court relied upon the statute's "disavowal . . . of any state interest in a claim for exemplary damages 'at any time prior to payment becoming due,'" which it deemed "an implicit legislative acknowledgment of the property interest created in the judgment creditor by virtue of the judgment itself."<sup>349</sup> Thus, Colorado's "asserted interest [was] not in the judgment itself but in the

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*Amendment Limitations*, 26 TORT & INS. L.J. 119, 128 (1990) ("It appears as though courts are concerned most with whether the amount collected pursuant to a civil sanction serves to reimburse the government (or society in general) for some harm or cost incurred by reason of the defendant's conduct. If it does, then the courts are prone to find the sanctions to be 'remedial' in nature.").

345. This might not be the case where the state plays a more active role, such as intervening at an early stage of the litigation in order to develop evidence.

346. Statutes in Alaska, Florida, Georgia, Indiana, Iowa, and Oregon have withstood takings challenges. *See Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1058 (Alaska 2002) (holding that an Alaska statute that limited punitive damages before they were awarded was not constitutionally infirm); *Gordon v. State*, 608 So. 2d 800, 801-02 (Fla. 1992) ("The right to have punitive damages assessed is not property; and it is the general rule that, until a judgment is rendered, there is no vested right in a claim for punitive damages." (quoting *Ross v. Gore*, 48 So. 2d 412, 414 (Fla. 1950))); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 639 (Ga. 1993); *Cheatham v. Pohle*, 789 N.E.2d 467, 473 (Ind. 2003); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991); *DeMendoza v. Huffman*, 51 P.3d 1232, 1247 (Or. 2002); *cf. Smith v. Wade*, 461 U.S. 30, 52 (1983) (remarking that punitive damages "are never awarded as of right, no matter how egregious the defendant's conduct"); *Louisville & Nashville R.R. v. Street*, 51 So. 306, 307 (Ala. 1909) (holding that no property rights existed in a punitive damages award); *Smith v. Hill*, 147 N.E.2d 321, 325 (Ill. 1958) ("There being no vested right in any plaintiff to exemplary, punitive, vindictive or aggravated damages the legislature may therefore restrict or deny the allowance of such damages at its will. In this view we are joined by a number of our sister States."); *Fust v. State*, 947 S.W.2d 424, 431 (Mo. 1997) (holding that the adoption of a split-recovery statute did not violate the "certain remedy" provision of the Missouri State Constitution); *Osborn v. Leach*, 47 S.E. 811, 813 (N.C. 1904) (reasoning that punitive damages are awarded "on grounds of public policy" and are "therefore not property").

347. *Kirk v. Denver Publ'g Co.*, 818 P.2d 262, 264 (Colo. 1991).

348. *Id.* at 267.

349. *Id.* (quoting COLO. REV. STAT. § 13-21-102(4) (1989) (repealed 1995)).

monies collected on the judgment, and that interest [arose] only at a point in time after the judgment creditor's property interest in the judgment ha[d] vested by operation of law."<sup>350</sup> Given the unique provision of Colorado's split-recovery statute, the Colorado Supreme Court stands alone among state supreme courts in striking down the statute as an unconstitutional taking.

Absent this legislative idiosyncrasy (primarily an issue with respect to appropriate drafting of the split-recovery statutes, which generally assert that the state's interest arises "upon entry of the verdict"), the case for a state or federal takings claim for split-recovery statutes appears weak.<sup>351</sup> Such an argument may have more strength, however, if split-recovery schemes are seen as achieving the general purpose of revenue raising.<sup>352</sup> In that case, a more persuasive claim can be made that such schemes inappropriately force plaintiffs to "bear a disproportionate burden of funding the operations of state government, which, 'in all fairness and justice, should be borne by the public as a whole.'"<sup>353</sup>

Moreover, the takings issue is more complicated where judges enforce such a split-recovery scheme (especially without any prior notice) absent enabling legislation. Indeed, Richard Epstein is quite convinced, for example, that the recent action of the Ohio Supreme Court amounts to a governmental taking of the plaintiff's property.<sup>354</sup> But if we set to one side the special issue of retroactivity,<sup>355</sup> the takings issue is not as clear-cut as Epstein seems to think. The fact that plaintiffs have no vested right to punitive damages—which, after all (at least in most states), are assessed to punish and to deter the defendant, not to compensate the plaintiff in any fashion—remains a formidable barrier to any takings challenge.<sup>356</sup>

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350. *Id.* at 272.

351. *See, e.g., id.* (arguing that absent statutory repudiation of a state interest in the judgment, the split-recovery statute "might be read to defeat any reasonable economic expectation on the part of the judgment creditor to the total judgment").

352. *See supra* note 86 and accompanying text.

353. *Kirk*, 818 P.2d at 271-72 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980)). This was an alternate ground on which the Colorado statute was struck down.

354. *See Liptak, supra* note 73 ("Normally what courts do is supply remedies to people who ask for them . . . . This is a judicial gift. If I were the United States Supreme Court, I would stretch to find a way to strike this down." (internal quotation marks omitted)); *id.* ("Your jaw is basically hanging down to your midchest . . . . It strikes me as being grotesque." (internal quotation marks omitted)).

355. In the unusual case in which the split-recovery scheme was enforced retroactively, one could plausibly argue that once a punitive damages judgment has been entered in favor of a plaintiff, it has "vested."

356. Arguably, consideration of the history of punitive damages—at least Sedgwick's view, *see supra* note 23—provides evidence that any legislative (and most likely judicial) change in punitive damages law would not be a taking of a property right, because such damages were never considered an individual's property right in the first place.

### 3. *Due Process*

If the state is the direct beneficiary of a punitive damages award, broader due process concerns might be implicated by the very fact that the government and its officers (i.e., judges) have an arguable pecuniary interest in the case. Judges are, of course, authorized to impose criminal fines, at least so long as they are acting in their official capacity as government officers (and not out of personal interest).<sup>357</sup> Heightened due process concerns are raised, however, in the context of various court-administered funds, which might be exacerbated by any scheme that allowed unfettered discretion to judges (or juries) to apportion money damages.

Given these concerns, in split-recovery states jurors are not informed that a certain percentage of the punitive award will be directed to the state or a specific fund.<sup>358</sup> The conventional wisdom appears to be that if juries are told, they might assess a greater amount either to ensure that the plaintiff gets a sufficient award, or else to support what they consider “charitable” or good causes.<sup>359</sup> After all, judges and jurors are residents

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357. This concern harkens back to *Tumey v. Ohio*, in which the mayor of the town, who served as the judge of the village “liquor court,” was dependent upon convictions of defendants for receiving his compensation. 273 U.S. 510 (1927). The most memorable holding from that case is the reaffirmation that “officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided.” *Id.* at 522. But, the Court continued, “[T]he pecuniary interest of the Mayor in the result of his judgment is not the only reason for holding that due process of law is denied to the defendant here.” *Id.* at 532. The further concern of the Court—and the one most relevant for our purposes here—was that “the village council and its officers [had] a means of substantially adding to the income of the village to relieve it from further taxation.” *Id.* at 533. Of course, in *Tumey*, this concern was exacerbated by the fact that the mayor functioned not only as chief executive of the village, but also as judicial officer. But even absent this conflict of interest, split-recovery schemes that direct portions of the award directly to the state do threaten to run afoul of defendants’ due process interests to the extent that the state, judge, or jurors act in their own pecuniary self-interest.

358. See, e.g., IND. CODE ANN. § 34-51-3-3 (Michie 1998) (requiring that the jury not be informed of the allocation). Alaska’s statute does not indicate whether or not the jury is to know about the allocation of funds to the state. See ALASKA STAT. § 09.17.020 (Michie 2002) (amended 2003). Courts that have considered the matter have generally agreed that instructing the jury regarding distribution of funds to the state constitutes reversible error. See, e.g., *Burke v. Deere & Co.*, 6 F.3d 497, 512-13 (8th Cir. 1993) (applying Iowa law); *Ford v. Uniroyal Goodrich Tire Co.*, 476 S.E.2d 565, 571 (Ga. 1996) (holding that a jury instruction that revealed the percentage of the punitive damages award that would go to the state was improper); *Honeywell v. Sterling Furniture Co.*, 797 P.2d 1019, 1020 (Or. 1990).

In similar fashion, juries are not told of statutory caps on punitive damages. See, e.g., *Cent. Bering Sea Fishermen’s Ass’n v. Anderson*, 54 P.3d 271, 281 (Alaska 2002). In my opinion, however, this is more defensible on the ground that empirical evidence supports an “anchoring effect.” See *infra* note 402. And there is no countervailing need for the jury to know.

359. See, e.g., *Honeywell*, 797 P.2d at 1022 (concluding that informing the jury could cause the jury to determine “that a plaintiff should receive a certain amount of money and, in order to ensure that he does, to add additional amounts to pay for attorney fees and contributions to the Criminal Injuries Compensation Account” (internal quotation marks omitted)). Sparing no hyperbole, one commentator has cautioned: “If jurors realized that any punitive damage award were to be returned to public use, the size of the awards would not simply skyrocket. They would

(and thus taxpayers) in the state and therefore have an indirect interest in the award.<sup>360</sup> On the other hand, if the jurors are not told, they may attempt to mitigate the windfall gain to the plaintiff by awarding a smaller punitive damages award than what is warranted in order to punish and deter the defendant.<sup>361</sup> Either way, the effect points in the same direction: Telling the jury tends to inflate punitive awards.

Courts (and commentators), in concurring that the jury should be shielded from this information, are missing an important part of the equation. In *Honeywell v. Sterling Furniture Co.*, the Oregon Court of Appeals proclaimed that “[t]o instruct the jury how its award will be distributed injects into its deliberation factors that are not proper considerations in deciding whether to award punitive damages and, if they are awarded, the amount.”<sup>362</sup> The Oregon Supreme Court agreed that so instructing the jury “does nothing to further or even to inform the jury as to the proper goals of punitive damages awards.”<sup>363</sup> In other words, given that the sole issue for the jury is the amount of money necessary to punish and deter the defendant, it is irrelevant who will be compensated by the award or how much the plaintiff will receive.<sup>364</sup>

But of course, the societal damages theory posits that it is relevant to whom the moneys go; in fact, it is important at the prior stage when the jury determines the amount of the societal compensatory award. As soon as the jury focuses not solely upon the defendant’s actions (as it does when it considers what amount is sufficient to punish the defendant), but upon the harms to particular individuals who have been harmed (as it would to determine the societal damages award), then it becomes necessary to inform the jury about the fund recipients.

Because none of the split-recovery states allows for jurors to be informed about the allocation of the award to either the state- or court-administered fund, it is difficult to have an empirical sense of whether or

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follow the Voyager spacecraft out of the solar system.” Steven J. Sensibar, *Punitive Damages: A Look at Origins and Legitimacy*, 41 FED. INS. & CORP. COUNS. Q. 375, 387 (1991).

360. See, e.g., *Uniroyal Goodrich Tire Co. v. Ford*, 461 S.E.2d 877, 884 (Ga. App. 1995) (“It is no concern of the jury . . . that 75 percent of the award will be paid into the state treasury for the benefit of all Georgia citizens, including the members of the jury.”), *aff’d in part, rev’d in part*, 476 S.E.2d 565 (Ga. 1996); see also Daughety & Reinganum, *supra* note 77, at 142 n.12 (“This information is supposed to be kept from juries to avoid obvious incentive problems because they are citizens of the states that would receive the share of the award.”).

361. See, e.g., E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 855 (1993) (arguing that juror suspicion that the plaintiff will reap a windfall actually deflates some punitive awards).

362. *Honeywell v. Sterling Furniture Co.*, 781 P.2d 379, 380 (Or. Ct. App. 1989), *aff’d in part, rev’d in part*, 797 P.2d 1019.

363. *Honeywell*, 797 P.2d at 1021.

364. See also *Ford*, 476 S.E.2d at 570 (finding that an instruction about the distribution of the punitive damages award was erroneous because “the purpose of punitive damages is to punish and deter the defendant, not to compensate the victim”).

not such knowledge would artificially inflate the awards (as the commentators presume). This may become increasingly important, as the jury broadens its scope of remedial authority.<sup>365</sup> Despite the proliferation of mock jury studies, there are only a couple of experimental studies that examine the effect of allocation to the state or fund on the size of the punitive damages award. Michelle Anderson and Robert MacCoun have found, contrary to the prevailing wisdom, that jurors were more likely to award punitive damages when they were directed to the plaintiff as opposed to the state or specially created state fund.<sup>366</sup> Where an award was given, however, there was no discernible difference in the amounts of awards given in the two regimes.<sup>367</sup>

Anderson and MacCoun suggest that their results imply that punitive damages serve a symbolic restorative function that is dependent upon receipt by the plaintiff.<sup>368</sup> Of course, this corrective justice approach, in which jurors attempt to set the balance right between the injurer and the victim, might be a product of the particular context of the case; for their study, Anderson and MacCoun chose to examine personal injury cases. Moreover, it is not altogether clear that such a “corrective justice” approach would be foreclosed in the realm of the societal damages theory, under which jurors would similarly be correcting a balance—just one that extends beyond the actual plaintiffs before them in court.

Leaving the realm of constitutional concerns, I turn next to an evaluation from an institutional perspective of how the societal damages approach might be implemented within our civil justice system.

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365. It is more obviously an issue in existing split-recovery schemes where money reverts either directly to the state or to some charitable purpose. But, in similar fashion, jurors may be influenced to inflate (or deflate) their awards in situations where the state intervenes in a more direct fashion (for example, to assist in prosecuting a diffuse harm), depending on whether they perceive the state to be a ward for the public good.

366. See Michelle Chernikoff Anderson & Robert J. MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 *LAW & HUM. BEHAV.* 313, 320-21 (1999). Their study asked students to award damages in response to a personal injury case. In the case of the state funds, the study used the following charities: State Children’s Trust Fund for the Prevention of Child Abuse, California Breast Cancer Research Fund, California Firefighters’ Memorial Fund, California Public School Library Protection Fund, and California Infectious Disease Research Fund. *Id.* at 323; see also Jonathon Baron & Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 *J. RISK & UNCERTAINTY* 17, 25 (1993) (reporting a study in which twenty-four of eighty-three participants were awarded greater amounts of compensation—and only four participants were awarded less—when the money was to be paid directly to the plaintiff rather than when the penalty was to go to the government, which would then compensate the injured party).

367. Anderson & MacCoun, *supra* note 366, at 321.

368. *Id.* at 326-27. This appears to be the exclusive, appropriate role for punitive damages as put forth, for example, by Colby, *supra* note 23.

C. *Compounding the Problems That Plague Class Actions?*

Most of the vexing problems that attend class actions threaten to persist in a societal-damages-inspired scheme, particularly one that established a back-end class action. I address here certain of these problems: overdeterrence, litigation incentives, and collusive settlements and sham litigation.<sup>369</sup>

1. *Risk of Overdeterrence*

Class actions and the societal damages theory alike must confront a basic question: Is it necessary for the private litigation system to be involved at all in redressing diffuse harms to society, as opposed to specific harms to individuals?<sup>370</sup> Concerned with such an overdeterrence problem, Richard Epstein offers a somewhat different gloss on this issue:

The underlying system is such that the dislocations that produce losses to some individuals also produce inadvertent gains to others. Think of the man who is lucky enough to marry the widow; or the junior employee who gets the opportunity to shine because his boss is no longer able to do the job. These can never be taken into account, so that full compensation for all losses results in systematic overdeterrence. To avoid these difficulties, the standing doctrine cuts off the second and more removed circle of harms which it is inefficient for any legal system to remedy.<sup>371</sup>

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369. Other objections that are raised to the class action would, however, also be transferable here. For example, Richard Epstein has recently argued that the aggregation of individual claims within the class action format leads to a distortion of the underlying substantive law—which, in his view, works typically in favor of plaintiffs. See Epstein, *supra* note 170 (manuscript at 18) (“[W]e should be careful to see that the amalgamation of claims does not alter the balance of power between the two sides except insofar as it overcomes the transactional obstacles that justify the use of the class action in the first place.”).

Others worry about enhancing the role and power of a single jury to decide the fate of an entire business. See, e.g., *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (rejecting class certification in a nationwide class action brought by hemophiliacs who became infected with HIV after using blood solids manufactured by the defendant drug companies based, inter alia, upon “a concern with forcing these defendants to stake their companies on the outcome of a single jury trial”).

370. Focusing explicitly upon what he deems the serious potential risk of overdeterrence, Victor Goldberg has noted that the tort law regime places very different limits on the tracing of consequences of directly damaged victims as opposed to victims who are indirectly damaged. See Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at Robins Dry Dock v. Flint*, 20 J. LEGAL STUD. 249 (1991); see also Victor P. Goldberg, *Recovery for Economic Loss Following the Exxon Valdez Oil Spill*, 23 J. LEGAL STUD. 1 (1994).

371. RICHARD A. EPSTEIN, INTO THE FRYING PAN: STANDING AND PRIVACY UNDER THE TELECOMMUNICATIONS ACT OF 1996 AND BEYOND (Univ. of Chi., John M. Olin Law & Econ. Working Paper No. 174 (2d ser.), 2002), [http://www.law.uchicago.edu/Lawecon/WkngPprs\\_151-175/174.rae.standing-privacy.pdf](http://www.law.uchicago.edu/Lawecon/WkngPprs_151-175/174.rae.standing-privacy.pdf).

I will use a provocative example here: the case of the Exxon Valdez Alaskan oil spill. Plaintiffs in that case include more than 30,000 fishermen, Alaska natives, property owners, and others affected by the massive 1989 oil spill in Prince William Sound. Compensatory damages so far tallied are \$507.5 million, and those due other plaintiffs such as cannery workers and fish tenders remain to be calculated.<sup>372</sup> On top of these compensatory damages, a federal jury awarded \$5 billion in punitive damages.<sup>373</sup> In upholding a reduced \$4 billion punitive damages award, the district court judge emphasized additional societal harms: “The social fabric of Prince William Sound and Lower Cook inlet was torn apart.”<sup>374</sup> A critic of such societal damages, however, would point to the fact that, in addition to the vast amount of compensatory damages to the numerous parties directly harmed by its actions, Exxon faced the possibility of paying more than \$5 billion in criminal and civil penalties for the spill. Exxon pleaded guilty to five criminal counts, potentially subjecting it to \$5.1 billion in fines. And the company could have been assessed civil fines of about \$64 million by the state and federal governments for its spilled oil. Instead, in a settlement with the federal and state governments, Exxon paid a \$25 million criminal fine, plus \$100 million in restitution.<sup>375</sup>

Before requiring a defendant to internalize societal harms or losses, then, it might be important to consider whether there are other deterrents at work, or even any offsetting societal gains.<sup>376</sup> Even more relevant for our purposes here, however, we might be forced to articulate reasons why, in particular types of torts, our greater concern is with underdeterrence rather

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372. This is the figure arrived at by the Alaska federal district court as the “best indicator[] of actual compensatory damages” in the case. *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1058-60 D. Alaska 2002), *vacated and remanded by* No. 03-35,166 (9th Cir. Aug. 18, 2003). It remains sharply disputed by the litigants.

373. The Alaska federal district court, at Exxon’s request, certified a mandatory Rule 23(b)(1)(B) punitive damages class for trial. *See In re Exxon Valdez*, No. A89-0095-CV, 1995 WL 527990, at \*9 (D. Alaska Jan. 27, 1995). The Ninth Circuit vacated and remanded the jury’s classwide \$5 billion punitive damages verdict for recalculation in light of the Supreme Court’s intervening decisions in *BMW v. Gore* and *Cooper Industries*. *In re Exxon Valdez*, 270 F.3d 1215, 1225 (9th Cir. 2001). With notable reluctance, the district court reduced the award to \$4 billion. *See* 236 F. Supp. 2d at 1068.

374. *Exxon Valdez*, 236 F. Supp. 2d at 1062.

375. *Exxon Valdez*, 270 F.3d at 1245-46.

376. Viscusi has emphasized this latter factor in the context of lawsuits brought by the states for economic losses suffered as a result of smokers. *See* VISCUSI, *supra* note 304, at 62 (pointing out that, while there may be higher health insurance costs associated with smoking-related illnesses, “[t]here may be offsetting cost savings from earlier mortality through reduced costs of pensions, Social Security, Medicare, and health expenditures later in life”). So that there is no misunderstanding, I should be clear that Viscusi’s argument is not that premature death should be considered a societal gain; instead, he was responding to the narrower point that if the states bring lawsuits for pure economic losses (due to harms to smokers), then it should be relevant whether states have enjoyed any corresponding economic gains.



than overdeterrence.<sup>377</sup> Reconceptualizing the underdeterrence dilemma in terms of the broader cost-internalization framework at the heart of the societal damages theory, as opposed to the narrower underenforcement framework espoused by the multiplier theory, might be a necessary step in this direction.

## 2. *Incentives for Litigation*

Two salient objections to the societal damages theory might be raised: First, plaintiffs and their attorneys will have little interest in developing evidence and pursuing litigation on behalf of other harmed individuals. Second, if the plaintiffs' attorneys did have such an interest (or financial stake), their interest would conflict with that of their clients.<sup>378</sup> The second concern is largely beyond the scope of this Article; it raises perplexing conflict-of-interest issues that are always rife in any form of representative litigation, and would persist in this context, where the plaintiffs' attorneys, for all intents and purposes, represent a wider class of individuals.<sup>379</sup>

Focusing, then, solely on a joint incentive to develop evidence and pursue punitive damages claims, it is clear that some percentage of the societal damages must be paid to plaintiffs' attorneys in order to induce them to develop the evidence and pursue the case beyond the immediate

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377. See *supra* text accompanying notes 51-55 (discussing conditions that may generate underdeterrence); see also *supra* notes 170, 175 and accompanying text.

378. In other words, where the societal damages component is significant the plaintiff may have little interest in pursuing punitive damages, whereas his attorney may have a substantial interest. This could lead, for example, to a situation where the attorney might counsel his client to reject an offer at the top of the compensable range, even though acceptance might be in his individual client's best interest. One solution might be allowing a malpractice claim against the plaintiff's attorney for this type of failure to settle, but this moves us beyond the scope of the present Article.

379. For more thorough discussions of the problems inherent in adequacy of representation in class actions, see John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); and Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997). For discussion of the same problems inherent in nonclass mass litigation, see Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. (forthcoming) (manuscript at 10-20, on file with author).

One might nonetheless object that, although a class is likely to include members with some conflicting interests, by and large class action procedures—including notice and opt-out—provide sufficient safeguards to protect the interests of class members. Erichson's insights are particularly relevant here, given his observation that, in many cases, "non-class mass representation strongly resembles class actions in the way the lawyers conduct the litigation." *Id.* (manuscript at 21). Thus, the conflict-of-interest issue raised by the societal damages model is by no means unique to my proposal. Moreover, Erichson offers some potentially fruitful responses:

[By applying] Model Rules of Professional Conduct 1.7 and 1.8(g) construed in mass litigation in light of the commonalities between class actions and non-class collective representation, lawyers can create opportunities for autonomous client decisions at the outset and at settlement, as a substitute for client autonomy in the course of litigation and negotiation.

*Id.* (manuscript at 12).

interests of their clients. What I envision here—at least in the realm of specific harms cases—is a scheme where the attorney is paid what is in essence a contingency fee for the recovery on behalf of other members of society. In this way, the plaintiffs’ attorneys would be paid by the other harmed individuals, and not directly by the state.<sup>380</sup>

In fact, the majority of existing split-recovery schemes already treat attorneys’ fees in similar fashion. The statutes impose “net levies” upon punitive damages awards—levies imposed only *after* plaintiffs’ attorneys’ fees and costs are deducted from the total award.<sup>381</sup> Thus, in the majority of split-recovery states, the plaintiff’s attorney will receive his full contingency fee, based on the entire punitive damages award, regardless of what portion of the award is allocated to the state- or court-administered fund. Ironically, perhaps, while this result hardly makes sense from the perspective of a legislative desire to discourage punitive damages claims, it makes eminent sense if instead the statutory schemes are to effectuate the societal damages theory.

### 3. *Collusive Settlements and Sham Litigation*

Finally, two additional problems inherent in class action litigation—collusive and sham litigation—likewise challenge split-recovery schemes. Once again, the societal damages theory can offer a modicum of comfort.

Split-recovery schemes have been criticized on the ground that they simply force more plaintiffs to settle meritorious punitive damages claims. The logic of the argument is that to induce the plaintiff to settle, the defendant need only offer the plaintiff’s expected share of punitive damages or, alternatively, offer to divide the amount that would otherwise go to the state.<sup>382</sup> At present, it is an open question—both as a matter of theory and of

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380. Here, I distinguish a scheme of societal damages, based upon specific harms to individuals, from the “private attorneys general” paradigm—the notion that the prospect of receiving punitive damages provides an incentive for plaintiffs to “prosecute” claims that the state would not otherwise pursue—often said to be at work in punitive damages cases. *See, e.g., Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 642 (Ga. 1993) (Benham, J., concurring in part and dissenting in part) (noting that punitive damages awards provide “the financial incentive for private citizens to pursue vigorously contested claims for punitive damages”).

381. These are distinguished from “gross levies,” which are imposed upon the total award prior to such deductions. *See Kahan & Tuckman, supra* note 148, at 177 (coining the terms “net levy” and “gross levy”). Oregon and Indiana have gross levy statutes, whereby attorneys’ fees are limited to the portion retained by the plaintiff. And in Illinois, the district court exercises complete discretion in allocating punitive damages awards between the plaintiff, his lawyers, and the state fund. Thus only in these latter three states might plaintiffs’ attorneys hesitate to bring punitive damages claims. Consistent with this theoretical prediction, Daughety and Reinganum conclude that “Oregon and (especially) Indiana appear to be motivated primarily by deterrence reduction.” Daughety & Reinganum, *supra* note 77, at 159.

382. Polinsky and Che acknowledge this increase in the likelihood of settlement. *See Polinsky & Che, supra* note 68, at 563. For them, however, increased settlement is not a problem;

empirics—whether, relatively speaking, more punitive damages cases have settled in split-recovery states.<sup>383</sup>

Regardless of whether collusive settlements are a real concern with existing split-recovery schemes, however, the problem of the incentive for the plaintiff and defendant to settle in order to cut out the state's portion evaporates in the realm of the societal damages theory—at least as applied to specific harms to other harmed individuals—because the plaintiff and defendant would not be able to settle and cut off recovery to the other harmed individuals. Under the societal damages fund model, individuals retain the ability to bring their own individual lawsuits. And, under the ex post class action model, individuals would retain the right to opt out of the societal damages class.

The potential risk of “sham litigation” nonetheless looms large. Thus, a defendant might agree to overpay a single “sham” plaintiff in compensatory damages in exchange for some assistance in getting a ruling of no liability for societal damages that would have preclusive effect going forward, at least under the ex post class action mechanism.<sup>384</sup> This might be exacerbated in the interstate context, as, for example, Nevada might

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in fact, it is unmitigated social good, for it lowers the litigation costs of achieving optimal deterrence. *Id.* at 568.

383. Kahan and Tuckman have argued that split-recovery statutes may in fact shrink the settlement region between the two parties, given their effect upon litigation effort. In particular, they note that, while Polinsky and Che acknowledged the effect of lowering recovery on the incentives of plaintiffs' counsel to bring suit, they did not consider the effect on how vigorously counsel (on both sides) would prosecute and defend their respective claims. They attempt to demonstrate that by decreasing effort levels, split-recovery statutes can make it “cheaper” to litigate and thus discourage settlement. Kahan & Tuckman, *supra* note 148, at 180.

The comprehensive data necessary to study this question effectively is simply not available. Thomas Eaton and others have conducted a case study in Georgia, which amounts to the “first empirical examination” of the effect of the decision to seek punitive damages on settlement. Thomas A. Eaton et al., *The Effect of Seeking Punitive Damages on the Processing of Tort Claims 1* (July 20, 2002) (unpublished manuscript), <http://www.terry.uga.edu/people/dmustard/torts.pdf>. The authors compiled a “comprehensive and unique” data set of more than 25,000 cases filed between 1994 and 1997 in six counties in Georgia. *Id.* at 3, 8. Of particular relevance here, the authors found that “tort suits with uncapped punitive damages claims [which include products liability cases, as well as intentional torts and libel/slander] were less likely to be disposed by settlement than suits with capped punitive damages claims.” *Id.* at 20. But the authors did not distinguish between products liability cases, which are subject to the split-recovery provision, and the other uncapped intentional torts, which are not.

384. Many commentators consider the risk of “sell-outs”—whereby defendants can avoid class action trials by settling parallel cases that moot class members' claims—as significant. According to Charles Silver,

In practice, sellouts often succeed, and the threat of settling a parallel case is often sufficient to create a “reverse auction,” i.e., a bidding war in which competing plaintiffs' attorneys attempt to undercut each other. The winner, chosen by the defendant, is the attorney willing to support a global resolution at the lowest price.

Silver, *supra* note 206, at 1404 (footnotes omitted).

facilitate sham litigation to preclude California from receiving its fair share from defendants.<sup>385</sup>

#### D. *Jurors as Decisionmakers*

I start with the premise that the task of assessing societal damages is akin to that of assessing compensatory damages—a function traditionally reserved for the jury. This insight—that the category of societal damages, a particular species of compensatory damages, is presently subsumed within the category of punitive damages—is extremely significant in light of the recent hostility directed toward juries in the punitive damages decisionmaking realm. An effort is made to conceptualize punitive damages as wholly distinct from compensatory damages, and thus as an anomaly within our torts system.<sup>386</sup>

Moreover, there is an additional significant implication: Given that societal damages are more akin to juror-assessed compensatory damages, they might be subject to the same deferential abuse-of-discretion standard of review. The more stringent de novo standard should be reserved for the “morally”-based retributive “punitive” damages. Such differential treatment of societal damages is not only permitted by the present doctrinal structure, but it also would seem to follow explicitly from the Supreme Court’s ruminations on punitive damages in *Cooper Industries*.<sup>387</sup>

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385. A related concern was brought to the Supreme Court’s attention in *State Farm*. See Brief of Amicus Curiae National Association of Manufacturers at 18, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) (No. 01-1289) (“If Utah’s extraction [i.e., split-recovery] statute is applied here, Utah will benefit at the expense of other States in which petitioner’s challenged conduct occurred. Because the constitutional limits articulated in *BMW* apply to the aggregate of constitutional awards . . . States that have extraction statutes similar to Utah’s would thus be denied the benefit of any punitive damage award that their own courts otherwise would have awarded.”).

386. In *Punitive Damages: Should Juries Decide?*, I challenge the rigid separation of “retributive-based” punitive damages, which are linked to jurors’ moral evaluations, from “remedial-based” compensatory damages (including pain-and-suffering), which are not. Calls to banish the jury selectively from punitive damages decisionmaking stem—at least implicitly—from such a misconception. See Catherine M. Sharkey, *Punitive Damages: Should Juries Decide?*, 82 TEX. L. REV. (forthcoming Dec. 2003) (manuscript at 21-27, on file with author) (reviewing SUNSTEIN ET AL., *supra* note 47).

387. The Court held that punitive damages are subject to de novo appellate review when challenged on federal constitutional grounds. This holding was based, in significant part, on the fact that punitive damages, as “moral” assessments, are not purely “factual” determinations. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 439-40 (2001). Two other implications of such a conceptualization of punitive damages might be: (1) to change the terms of the debate over whether—and to what extent—a defendant’s wealth should be considered a relevant factor in assessing punitive damages, and (2) to challenge the historical doctrinal immunity of municipalities from punitive damages awards.

### 1. *Disadvantages*

I have suggested that a natural fit between jurors and societal damages emerges when one considers the compensatory nature of these damages. In other words, there is a certain congruence between having the same institutional body determine both individually compensatory and societal compensatory damages. In our existing tort system, the role of jurors is firmly entrenched in the former; thus, the latter could be seen as a somewhat natural extension of their role.<sup>388</sup> Assessment of societal damages is closely akin to the jury's determination of compensatory damages because it amounts to the jury's attempt to place a dollar value on harms incurred, albeit by individuals other than the plaintiff before it.

It might be objected, however, that the jury, even if well-suited to make compensatory damages determinations, would not be equally competent at making the broader societal damages determinations. Such an objection is really to the quantity or quality of the evidence put before the jury, rather than to the jury itself.<sup>389</sup> There are two responses to this objection.

First, specific evidence of harm to nonplaintiff individuals is often presented to the jury under our current system. The "easiest" cases from a societal damages theory perspective are those, such as the strip search example discussed above as an exemplar of harm to absent plaintiffs, where there is evidence as to the number of identifiable other harmed individuals, and they are each harmed, more or less, to the same degree. These constraints are, to be sure, rather tight; nonetheless, they do not limit us entirely to the § 1983 civil rights and employment discrimination case paradigms.

Such conditions pertained as well in *BMW v. Gore*, which involved a failure to disclose a presale repainting job that affected the resale value of a new car. Specifically, plaintiff Dr. Gore claimed that the undisclosed repainting diminished the resale value of his car by approximately \$4000. Evidence was presented in the case that BMW's nondisclosure policy had resulted in 983 repainted cars sold nationwide. Of these 983 cars, fourteen had been sold in Alabama, and at least 600 were sold in states where BMW's nondisclosure was not in violation of state law.<sup>390</sup> As discussed above, the Supreme Court struck down the punitive damages award in this

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388. Of course, it might be the case that it is a smaller extension in certain types of cases—for example, civil rights or employment discrimination cases affecting relatively few individuals (or "absent plaintiffs")—but a much more radical (and less feasible) extension in others—for example, complex mass tort cases, where the jury might be asked, on the basis of seeing and hearing evidence regarding one individual plaintiff, to extrapolate to thousands of others, who may have some things in common, but not others.

389. It may also be an objection to the enhanced power of a *single* jury to determine the fates of so many individuals. See *supra* note 369.

390. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 564 (1996).

case—\$4 million awarded by the jury, which had been reduced to \$2 million by the Alabama Supreme Court—and held that punishing BMW for “extraterritorial” conduct (i.e., conduct outside of Alabama), which was lawful where it occurred, violated federalism principles of comity and state sovereignty.<sup>391</sup> But what is significant here is that on remand, the Alabama Supreme Court reduced the amount of punitive damages to \$50,000. Although it is true that “the Court offered no explanation for its decision that a \$50,000 punitive damages award was appropriate,”<sup>392</sup> it is striking that this figure approximates the amount of harm found by the jury (\$4000) multiplied by the number of affected cars in Alabama (fourteen).<sup>393</sup>

Juxtaposed against such “easy” cases, however, are complicated mass tort cases. Even if it might similarly be said that evidence as to widespread harm—even specific harm to identifiable other individuals—is before the jury,<sup>394</sup> difficult questions of scientific causation and individual reliance certainly add layers of complexity.<sup>395</sup> Moreover, in mass tort class action litigation, as opposed to consumer, securities, and antitrust classes, not all members of the plaintiff class are typically harmed to the same modest degree.<sup>396</sup> Mass tort cases thus present difficult calculation and estimation issues—issues, I should add, that are vexing to our existing torts system, particularly as dealt with within the class action framework.<sup>397</sup> I fully

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391. *Id.* at 559-60. Nonetheless, when considering whether the \$2 million punitive award was unconstitutionally excessive, the Supreme Court used the fourteen in-state car sales as the relevant reference point, not simply the single wrongful sale to Dr. Gore. *See id.* at 582 n.35 (“Even assuming each repainted BMW suffers a diminution in value of approximately \$4,000, the award is 35 times greater than the total damages of all 14 Alabama consumers who purchased repainted BMW’s.”).

392. Karlan, *supra* note 21 (manuscript at 24 n.105).

393. The jury’s initial punitive damages award (\$4 million) also approximates the harm (\$4000) multiplied by the number of total cars affected (983). And, in fact, “[u]sing the actual damage estimate of \$4,000 per vehicle, Dr. Gore argued that a punitive award of \$4 million would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth.” 517 U.S. at 564.

394. *See, e.g.,* Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1127 (9th Cir. 1994) (“[E]vidence presented at trial established that a large number of Dow silicone gel breast implants had been implemented in thousands of women.”); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1056 (D.N.J. 1989) (“[E]ach jury is told how many persons have been injured or have died or are likely to do so as the result of the defendant’s conduct. Those statistics undoubtedly play a substantial role in the jury’s decision to award punitive damages and in determining the amount to be imposed.”).

395. *See, e.g.,* Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633 (2000); *see also* Liggett Group Inc. v. Engle, 853 So. 2d 434, 446 (Fla. Dist. Ct. App. 2003) (holding that the “individualized showing of reliance” required to establish a misrepresentation claim precludes class certification).

396. *Compare* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (“Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.”), *with* Engle, 853 So. 2d at 447 (“Particularly in this type of smoking case where proof of damages is essential to liability, damages cannot be determined on a class-wide basis because the issue of damages requires individualized proof with regard to each smoker.”).

397. It is often for these reasons that mass tort cases are denied certification as class actions. *See supra* note 203.

recognize that these issues by no means are mitigated in the context of the societal damages theory.<sup>398</sup>

My main assertion here, instead, is that in certain types of cases, while the bulk of the evidence necessary for a jury's assessment of societal damages is, in most states, already before it, there has been insufficient attention devoted to how juries might be instructed to evaluate this evidence in a systematic way to assess societal damages. At present, the evidence is simply included as part of the jury's overall (and arguably highly imprecise) evaluation of the amount of punitive damages necessary to punish and deter like conduct by the defendant and others.<sup>399</sup> Most often, in fact, the "evidence" consists of thinly supported arguments made by plaintiffs' counsel during closing arguments, the principal effect of which seems to be the arousal of the passions of the jury.<sup>400</sup> Even if the territorial scope of this evidence is limited, however, the point remains that widespread in-state conduct can be the basis of a haphazard assessment of the amount of punishment warranted. By contrast, what I propose here is that the jury be instructed to use that evidence carefully, to assess societal damages in addition to individual compensatory damages.

A second response to the juror-competence objection is that while it may well be true that, at least in certain respects, the evidence that is introduced as to the harms to other harmed individuals might be less complete and less subject to verification than the fully adversarially tested information about the plaintiff,<sup>401</sup> the jury is likely to do a better job with respect to this imperfect assessment, based upon a systematic evaluation of the evidence before it, rather than either estimating an abstract probability of the defendant's evasion of liability or (as is often the case) simply

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398. Instead, the point is that to the extent that solutions are developed in the mass torts realm, such as the use of damage averaging in mass torts settlements, those devices might also be employed here. See, e.g., Issacharoff, *supra* note 206, at 1928, 1934 (discussing how the claims evaluation process is "routinely reduced to a few factors that can be plotted onto injury grids to determine the value of a claim").

399. See, e.g., Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 865 (Iowa 1994).

400. For example, in *White v. Ford Motor Co.*, the plaintiffs' closing argument exhorted the jury that its "verdict for punitive damages must be loud enough so that it is on the front page of every newspaper tomorrow morning, so every person in this country knows, if they have that vehicle, they can take it into the shop and get it fixed." 312 F.3d 998, 1015 (9th Cir. 2002) (internal quotation marks omitted). In a similar vein, the plaintiffs' attorney urged the jury to punish Ford on behalf of purported victims "across the country." *Id.* The jury awarded \$1.4 million in compensatory damages and over \$150 million in punitive damages, which was later remitted to \$69 million. *Id.* at 1029. The Ninth Circuit recently reversed the punitive damages verdict on the grounds that this evidence violated a federalism-based territorial limitation on punitive damages. See *id.* at 1019-20.

401. In fact, defendants lodge these same objections to the present punitive damages scheme, especially with respect to consideration of "extraterritorial conduct." The main argument is that they are unable to test sufficiently plaintiffs' allegations of out-of-state conduct, because to do so would lead to multiple "mini-trials" on collateral issues. The problem then, according to defendants, is that such assertions of out-of-state conduct are often credited and leveraged into multimillion-dollar punishments, on the basis of the most minimal evidentiary showings.

relying upon plaintiffs' counsel's inflammatory arguments during closing argument.

I do not mean to suggest that other reforms might not be profitably put in place, in particular to address the issue of curbing potentially inflammatory jury arguments—a serious problem, given the susceptibility of the jury to the “anchoring effect” of large numbers presented before it.<sup>402</sup> My argument here is that there is no reason why the societal damages approach could not complement such reform measures, rather than work at cross purposes.

## 2. *Advantages*

The case for the jury's role in assessing societal damages is strengthened when we consider its potential to fulfill efficiency-based goals and arrive at more rational punitive damages awards.

### a. *Pursuit of Efficiency-Based Goals Through Democratic Decisionmaking*

It has been recognized in many contexts that jurors prefer fairness and other equitable considerations to economic and utilitarian considerations as guides for decisionmaking.<sup>403</sup> Whether this is due to “cognitive failures” in jurors' decisionmaking or antiutilitarian tastes or social norms, or a combination of both, is a question as yet unresolved.<sup>404</sup> Either way, the societal damages theory provides a unique opportunity to combine the efficiency-based goal of economic deterrence with the “equitable fairness” goal of just compensation (for absent plaintiffs).<sup>405</sup>

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402. I expand upon possible reforms addressed to this anchoring effect in Sharkey, *supra* note 386 (manuscript at 31-33). A critic might argue that jurors, if given discretion to award damages for societal harms, will be even more susceptible to attempts by plaintiffs' attorneys to inflame their passions. For example, one commentator discussing the *Exxon Valdez* case reports that the plaintiffs' attorneys sought to portray Exxon as “uncaring, an arrogant giant that needed to be punished.” DAVID LEBEDOFF, *CLEANING UP: THE STORY BEHIND THE BIGGEST LEGAL BONANZA OF OUR TIME* 184 (1997). Whether, as a normative matter, jurors should or should not be influenced by such measures of the callousness of large corporations—or by utilitarian calculations on the part of such corporations—is a separate matter. It is, nonetheless, highly relevant not only to the competence of jurors as decisionmakers, but—even more so—to the tools jurors are given to make their decisions.

403. See, e.g., Baron & Ritov, *supra* note 366, at 19 (finding a lack of willingness among members of the public to apply deterrence-based utilitarian decision procedures in common criminal, administrative, and tort settings).

404. For mention of the debate in the literature, see Sharkey, *supra* note 386 (manuscript at 9 n.29).

405. Significantly, the societal damages rationale is arguably more consistent with the “historic” understanding of the jury. See, e.g., Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 154 (1991) (“The jury served a dual role for the Antifederalists as an inculcator of civic virtue and as the only remaining means of the common people to exercise a modicum of political



With a societal damages theory of punitive damages, the economic “efficiency” rationale can be redefined (and thereby explained to the jury) in terms of satisfying the “equitable” goal of societal compensation.<sup>406</sup> Just as compensatory damages serve the dual function of compensating plaintiffs for injuries sustained and deterring injurious behavior on the part of defendants, so too the concept of societal damages could operate to compensate harmed individuals (other than the plaintiffs) and simultaneously to deter. Putting forth a societal damages theory designed to “make society whole,” or, with respect to “specific harms,” to make other harmed individuals in society whole raises with particular force the distributional issue—i.e., it emphasizes the recipients of the money. Moreover, the choice among a variety of recipients for these funds presents the opportunity for the economic deterrence rationale to be combined with a fairness rationale of compensating absent would-be plaintiffs equally harmed by a defendant’s conduct or actions.

b. *Potential Rationalizing Effect on Punitive Awards*

My intuition is that jury instructions that adequately explain the societal damages theory are far more likely than those of our existing system to produce more rational deterrence-based awards.<sup>407</sup> By “rational,” I mean awards that bear a logical or reasonable connection to the approximation of the full harm caused by the defendant’s activities. “Rational” does not imply a priori either higher or lower punitive damages awards.<sup>408</sup>

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power. . . . Juries were not thought of as utilitarian instruments of factually correct adjudication, but rather as organs of democratic government . . . .”).

406. My idea here is related to, but not the same as, Kaplow and Shavell’s argument in *Fairness Versus Welfare* that “political actors” like judges, in response to “citizens’ limited capacities” to comprehend economic analysis, may need to hide the true bases of their decisions by couching their public statements in the “language of fairness.” Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1319 (2002); cf. GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 26 (1978) (“Evasion, disguise, temporizing, deception are all ways by which artfully chosen allocation methods can avoid the appearance of failing to reconcile values in conflict.”).

407. Often the jury system is singled out for blame. My narrow response here is that it may well be that certain punitive damages awards are irrational precisely because they are ungrounded. But the wholesale indictment of the jury need not follow. My point is that the award of punitive damages, informed by some sort of coherent theory, will likely fare better than that informed by no theory at all (which is often how the case is put to jurors).

408. See *supra* note 11 (noting debate on this question more generally). There is some evidence that as jurors are asked to calculate more precise damages awards, they will be correspondingly larger. See, e.g., 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, 1268 (1992) (“Any change that help[s] jurors to more accurately compute damages is likely to operate to increase awards.”); see also Jane Goodman et al., *Runaway Verdicts or Reasoned Determinations: Mock Juror Strategies in Awarding Damages*, 29 JURIMETRICS J. 285, 298-300 (1989); Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 161-62 (1958).

It does, however, comport with the Supreme Court's directive that punitive damages awards be "reasonable [and] proportionate to the wrong committed."<sup>409</sup> *State Farm* provides an apt occasion for a comparison between the societal damages approach and existing alternatives. First, it seems most likely that the jury, faced with reams of evidence of "bad acts" on the part of State Farm, simply came up with a number that would "send a message," or make State Farm "stand accountable for what it's doing across the country"—which, after all, is what it was admonished to do by plaintiffs' counsel. We might call this the status quo situation, whereby evidence as to other harmed individuals is allowed in, but the jury is not given any guidance or instruction about how to use such evidence in assessing the punitive damages award.

Next, we might consider whether the Utah Supreme Court in fact followed the "penal" multiplier approach of Polinsky and Shavell. If, in fact, State Farm would be held accountable only in roughly one out of every 50,000 instances of wrongdoing, then the \$145 million punitive award might be too low by several orders of magnitude. But as this example reveals, the multiplier approach is highly dependent upon the underlying basis for its determination.<sup>410</sup>

What the societal damages theory would instead require is that specific evidence as to other harmed individuals—those members of the "larger community of all those who deal with the company" and who were specifically harmed by State Farm—form the basis for the jury's assessment. And this determination, even taking into account all of its inherent weaknesses, is likely to result in a more "rational" punitive award—i.e., one that can be justified by the goals of deterrence and compensation.

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409. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1526 (2003).

410. In an amicus brief, Polinsky & Shavell suggest an alternative reason for the error of the Utah Supreme Court's ways:

In determining the probability that State Farm's actions would escape liability, the court failed to focus on the specific form of misconduct engaged in by State Farm in the present case—the unreasonable rejection of a settlement offer in a case against one of its insureds—and instead focused on a much more diverse range of alleged wrongs, including the purported underpayment of first-party claims by State Farm. Because these discrete forms of misconduct involved different likelihoods of generating liability, there is no foundation in deterrence theory for the court's conclusion that a very high ratio between punitive damages and compensatory damages was warranted in this case.

Brief Amicus Curiae of A. Mitchell Polinsky et al. in Support of Petitioner at 14-15, *State Farm* (No. 01-1289).

Polinsky and Shavell ignore one critical fact, however: that State Farm "as a matter of policy, keeps no corporate records related to lawsuits against it, thus shielding itself from having to disclose information related to the number and scope of bad faith actions in which it has been involved." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1148 (Utah 2001), *rev'd*, 123 S. Ct. 1513.

## CONCLUSION

In this Article, I have attempted to demonstrate that the concept of societal damages represents both a necessary and feasible reconceptualization of the civil damages landscape that our existing torts system can accommodate. The societal damages approach rejects the polarizing positions staked out in the current punitive damages debate. On one extreme is the view, held primarily by defense lawyers, the tort reform lobby, and some academic commentators, that punitive damages serve exclusively as retributive-based punishments for individual private harms.

Such an argument neglects the possibility of a societal damages theory of the sort advocated here. Ironically, it was made in *State Farm* without mention of the split-recovery nature of the Utah statute, which would divert fifty percent of the punitive award from the individual plaintiffs. In a world without the possibility of split-recovery schemes (of the legislative and judicial varieties), such an argument might carry the day as a sort of “second best” solution. But as I have demonstrated in this Article, we can do better.

At the other extreme lies the defense of the status quo, often embraced by the plaintiffs’ lobby as well as some courts and academic commentators. They insist that the present situation—replete with windfalls for plaintiffs—is a necessary side effect of the common law punitive damages doctrine’s pursuit of the goal of punishing the defendant.

But we must recognize that the doctrine of punitive damages fulfills not only a retributive function, but also the separate, nonretributive goal of societal compensation, and act upon that discovery. Legislatures and courts have at their disposal various ways to transform existing understandings of punitive damages into societal damages. Courts, when presented in a single-plaintiff case with evidence of widespread harms that have injured multiple individuals who are not before the court, might instruct or empower the jury to assess damages that compensate those other harmed individuals—by explicit legislative authorization, or perhaps as part of their inherent remedial authority, guided (implicitly or explicitly) by Rule 23 and similar state class action rules. In this way, one significant component of the seemingly anomalous doctrine of punitive damages—which I have termed societal damages—begins to realign itself comfortably within our jury-based torts system, striving ever so imperfectly to achieve simultaneously the goals of compensation and deterrence.