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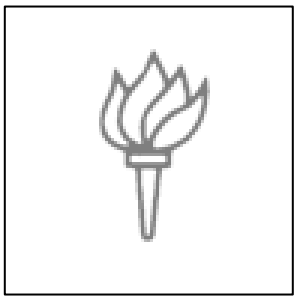

Punitive Damages Transformed into Societal Damages

Catherine M. Sharkey

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PUNITIVE DAMAGES TRANSFORMED INTO SOCIETAL DAMAGES

Catherine M. Sharkey*

I. Introduction

Whether termed civil penalties or statutory multiplied damages, 'supra-compensatory' damages are of increasing theoretical and practical interest not only in the United States, but also abroad, notably in France and Australia.[1] Notwithstanding criticisms directed at the controversial remedy of punitive damages and more generally at the notion of punishment within civil law,[2] there is a growing recognition that some form of supra-compensatory remedy may be necessary to deter certain forms of conduct on the part of actors, especially corporations. Around the world, 'supra-compensatory' damages seemingly arise phoenix-like from the ash heap of increasingly maligned 'punitive' damages.

There is a general consensus that punitive damages are intended 'to punish and to deter'. But this consensus masks deep and significant disagreements in terms of whether these purposes are, or should be, one and the same - namely retributive punishment whose corollary effectuates deterrence - or instead separable, with deterrence holding its own as a non-retributive purpose distinct from punishment.

Courts and commentators typically use the language of retributive punishment when describing the aims of punitive damages and the relevant features of the remedy. But at the same time, there is increasing recognition that the separate aim of deterrence is often at play, especially in situations where the defendant's conduct has caused widespread societal harm.[3]

Courts and commentators struggle because of this alleged mismatch - namely the awkward fit between the retributive punishment connotations of 'punitive' damages to serve societal deterrence purposes. The struggle is two-fold. First, punitive damages seem especially troubling because notions of retributive punishment, common in criminal law, seem wholly out of place in the civil sphere. For this reason, when courts award punitive damages they are inclined to place various limitations on the remedy, with the goal of avoiding 'disproportionate punishment'.

Second, notions of societal deterrence seem out of place in private law focused on bilateral interactions between the parties involved in the litigation. The notion of supra-compensatory

* Ross Steinberg (NYU 2021) provided extraordinary research assistance. I received helpful comments from the participants at the 2019 Remedies Discussion Forum in Paris, the 2019 Punishment and Private Law Conference in Singapore, and the Duke Law Faculty Workshop. I am especially grateful to Elise Bant and Jeannie Paterson, Kit Barker, James Goudkamp, and Eleni Katsampouka for providing further written comments.

[1] See, eg E Bant and J M Paterson, 'Effecting Deterrence through Proportionate Punishment: An Assessment of Statutory and General Law Principles' [3] of this volume (noting 'a significant momentum in favour of the recognition of such awards in the varied contexts of consumer law reform, intellectual property and pursuant to the common law principles of exemplary damages'); S Rowan, 'Punishment and Private Law: Some Comparative Observations' Ch [xxx] of this volume.

[2] See generally J E Penner, 'Punishments and Penalties in Private Law, with Particular Reference to the Law Governing Fiduciaries' Ch [xxx] of this volume (discussing the rationales and implications of civil law punishments).

[3] cf Bant and Paterson (n 1) [2] ('Currently [in Australia], at least under statute, courts often emphasise deterrence without exploring the measures that may be most effective at achieving that goal, while also being primarily influenced by factors that mitigate the potentially harsh, overly punitive effects of such awards'.).

damages for societal deterrence purposes injects a public regulatory purpose into private law. This dimension is significant where there are third-party effects or externalised harms onto others stemming from bilateral interactions between defendants and plaintiffs. And it is also significant with respect to corporate wrongdoing. Statutory damages recognise this public interest element; common law courts have experienced more difficulty fashioning remedies accordingly.

My aim in this chapter is to interrogate what courts are saying - typically using the language of retributive punishment - when they might actually be doing something else - namely effectuating societal deterrence. As a descriptive matter, I demonstrate that embedded within punitive damages is a component of damages designed to deter the tortfeasor. But my aim is also normative and aspirational - namely what should courts be doing to effectuate societal deterrence? Building on prior work, I explore various statutory and judicial mechanisms that could transform punitive damages into societal damages. I consider whether the case for conceptualizing punitive damages as a societal remedy is especially compelling in certain realms characterized by statutorily defined violations such as in the consumer protection realm. Moreover, I explore how a reconceptualisation of punitive damages as a societal remedy could have far-reaching effects both in terms of the evolution of US doctrine but also influencing law reform efforts in various other countries.

Parts I and II lay the necessary conceptual foundation by, first, disaggregating punitive damages by functional purpose and, second, setting forth theoretical constructs and practical factors relevant for achieving societal deterrence. Once the societal deterrence goal is acknowledged, however, the spectre of 'windfall' gains to the plaintiff looms large. It would be sheer coincidence if the amount needed to deter the defendant exactly equaled the amount of the plaintiff's losses. Part III (the heart of the chapter) presents societal damages funds - remedial funds created alternately by statute, common law courts, or private parties effectuating settlements - as an apt response to the injection of the public societal deterrence purpose within the framework of a private civil lawsuit. Finally, Part IV concludes by suggesting the far-reaching implications for debates regarding constitutional excessiveness review, insurability, and vicarious liability for punitive damages once punitive damages are transformed (in whole or in part) into societal damages.

II. Disaggregating Punitive Damages

Punitive damages are widely recognised as a controversial civil remedy designed to punish tortfeasors and to deter wrongdoing. All too often, however, after a quick nod to the goals of punishment and deterrence, courts and commentators dive headlong into analyses that, by and large, emphasise the notion of retributive punishment. Here, instead, I present a conceptual framework for disaggregating the purposes of punitive damages into distinct categories (notwithstanding the reality that such purposes may overlap in practice).

The two-by-two matrix in Table 1 below disaggregates punitive damages along two significant dimensions.[4] The first (columns along the x axis) separates the retributive punishment

[4] Table 1 is adapted from C M Sharkey, 'The Future of Classwide Punitive Damages' (2013) 46 *University of Michigan Journal of Law Reform* 1127, 1132.

goal from the non-retributive economic deterrence goal.[5] The second (rows along the y axis) distinguishes between individualistic and societal aims of the punitive damages remedy.

Table 1: Disaggregating Purposes of Punitive Damages

	Retribution	Deterrence
Individualistic (private interest)	I (individual punishment)	II (specific deterrence)
Societal (public interest)	III (societal punishment)	IV (general deterrence)

The individualistic, plaintiff-oriented conception of punitive damages is the more conventional and would appear to be deeply rooted in the bilateral conception of private law, focused on doing justice between the parties to a lawsuit. This individualistic 'private' interest dimension of punitive damages focuses on the harms each particular plaintiff has suffered. In certain individual lawsuits - especially intentional torts - punitive damages are deemed an essential way to achieve retribution for particularly reprehensible conduct directed at particular individuals (Quadrant I). This individualistic conception can also accommodate a separate deterrent aim, so long as the goal is specific deterrence, namely keeping the specific defendant(s) from inflicting further harms upon the particular plaintiff(s) before the court (Quadrant II).

In sharp contrast, the societal conception of punitive damages trains its focus not on the particular plaintiff before the court but instead on the defendant's conduct, especially when it has caused widespread harms. This societal conception can address holistic harm to society caused by the defendant's conduct. Moreover, it embraces '[t]he conception of an inherent *public* interest in punitive damages that is distinct from the private individual's interest in compensatory damages…'.[6]

It is not uncommon for courts to recognise that punitive damages seem like a distinct remedy in that they implicate 'societal' purposes. The Kentucky Supreme Court, for example, has recognised:

> The purpose of allowing damages of a punitive nature is to punish and discourage [the defendant] and others from similar conduct in the future. This purpose serves more of a

[5] Here, I embrace punitive damages' primary goals of retributive punishment and economic deterrence. See, eg *Exxon Shipping Co v Baker* 554 US 471, 492 (2008) ('[T]he consensus today is that [punitive damages] are aimed not at compensation but principally at retribution and deterring harmful conduct'.). In addition, I discuss below a closely related goal, namely the enforcement of property rights. See below at 9. Courts and commentators have discussed a variety of additional goals. See, eg *Kemezy v Peters* 79 F3d 33, 34–35 (7th Circuit 1996) (discussing different purposes of punitive damages including preventing under-deterrence, deterring behavior that has no redeemable social value, and expressing the moral outrage of the community).

[6] C M Sharkey, 'The BP Oil Spill Settlements, Classwide Punitive Damages, and Societal Deterrence' (2015) 64 *DePaul Law Review* 681, 682 ('BP Oil Spill'); see also C M Sharkey, 'Punitive Damages as Societal Damages' (2003) 113 *Yale Law Journal* 347, 350 (emphasis added) ('Societal Damages').

> societal interest rather than a private one as it strives to punish the wrongdoer rather than compensate the party harmed.[7]

But this recognition - that punitive damages focus on defendant's misconduct as opposed to a particular plaintiff's harm or loss and that punitive damages thereby serve a societal punishment purpose - does not fully appreciate the ways in which punitive damages might be harnessed as a societal remedy. The societal conception can be aimed at retributive punishment: 'the punitive award can be said to constitute a punishment on behalf of society'[8] (Quadrant III). Or - as I will argue in this chapter - the societal conception can be in pursuit of non-retributive general deterrence to force an actor to internalise the full costs of the harms that it has inflicted on individuals and society, including widespread, typically diffuse harms inflicted especially by corporations (Quadrant IV).

Whereas the two-by-two matrix maps a fuller potential terrain of punitive damages purposes, here I will contrast the predominant individual retributive punishment goal (Quadrant I) espoused by courts and commentators with what I deem the normatively desirable goal of societal general deterrence (Quadrant IV)

A. Individual Retributive Punishment's Stranglehold

It may hardly seem surprising that individualistic notions of retributive punishment maintain a stranglehold on 'punitive' damages - the name of which connotes punishment. And retribution is at the core of most conceptions of punishment.[9]

Indeed, punitive damages were historically awarded only in cases of malice or wilful and wanton conduct, a subset of intentional tort cases. The paradigmatic case was that of intentional battery or assault, including acts of physical violence, and dignitary affronts such as spitting upon one's adversary.[10] The standard verbal formulations of the doctrine require mental states ranging from 'intent to harm without lawful justification or excuse', to 'reckless disregard of the interests of others'.

The US Supreme Court, moreover, has seemingly embraced the goal of individualistic retributive punishment, all but rejecting the alternative economic deterrence rationales (whether individualistic or societal). Notwithstanding the fact that punitive damages is a state law tort remedy, the US Supreme Court 'constitutionalized' the remedy in 1996 with B*MW of North America, Inc v Gore*,[11] the first of a trio of cases (including *State Farm v Campbell* and *Philip*

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[7] *Osborne v Keeney* 399 SW3d 1, 20 (Ky 2012) (internal quotation marks omitted). cf *Harleysville Group Ins v Heritage Communities Inc* 803 SE2d 288, 306 (SC 2017) ('[P]unitive damages relate not to the plaintiff, but rather to the defendant's reckless, willful, wanton, or malicious conduct'.).

[8] *In re Simon II Litigation* 211 FRD 86, 104 (EDNY 2002) (Weinstein, J), *vacated* 407 F3d 125 (2nd Circuit 2005). See also E J Cabraser, 'Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication' (2001) 36 *Wake Forest Law Review* 979, 980–81 ('Punitive damages stand as a civil penalty for transgression of the social compact…to penalize conduct that violates the social contract and injures society.').

[9] For an elaborated defense of this, see K Barker, 'Private Law and Punishment: No Such Thing (Any More)?' Ch [xxx] of this volume.

[10] See Sharkey, 'Societal Damages' (n 6) 359 fn 23.

[11] *BMW of North America, Inc v Gore* 517 US 559 (1996).

Morris USA v Williams) that created an edifice of federal constitutional review of punitive damages awards, setting forth a template for restrictions on punitive damages. In each of its cases, the Court has reiterated the twin purposes of punitive damages: to punish and to deter. But the Court has never specified its conception of deterrence, though it has intimated that punishment is the predominant purpose of punitive damages, with deterrence perhaps an incidental effect.[12]

In *Williams*, the Court insisted that the defendant could only be punished for the specific harms suffered by the particular plaintiff in the case; the jury could not punish the defendant for harms inflicted upon others, whom the Court characterised as 'strangers to the litigation'.[13] Somewhat cryptically, the Court elaborated that '[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible'.[14] But the Court was nonetheless emphatic that 'a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties'.[15] In sum, according to the Court, although evidence regarding a defendant's widespread harms could be relevant to the degree of reprehensibility of the defendant's conduct, judges have a responsibility to guard against the possibility that juries would punish the defendant for harms inflicted on those other than the named plaintiff.

Without a doubt, in *Williams*, the Court implicitly adopted the individualistic retributive conception of punitive damages. The Court did not, however, 'constitutionalize' this conception of punitive damages. To the contrary, in all of its punitive damages cases, the Court has consistently maintained that when reviewing punitive damages for excessiveness, courts should look first to 'a State's legitimate interests in punishing unlawful conduct and deterring its repetition'.[16] As I have argued, 'even as the U.S. Supreme Court intervenes to scrutinize punitive damages awarded under state law, it always begins with an opening salvo of deference to the "state interests" served by punitive damages. Nothing in *Williams* changes this key federalism point…'.[17] The individualistic retributive conception is thus not the only constitutionally permissible purpose for punitive damages.[18]

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[12] The situation is the same, moreover, in the Commonwealth, namely the courts in England, Canada, Australia invariably stop short of offering any meaningful explanation of the concept of deterrence. I thank James Goudkamp for this observation.

[13] *Philip Morris USA v Williams* 549 US 346, 353 (2007).

[14] ibid 355.

[15] ibid.

[16] ibid 352; *State Farm Mut Auto Ins Co v Campbell* 538 US 408, 416 (2003); *BMW of North America* (n 11) 587 (1996).

[17] C M Sharkey, 'Federal Incursions and State Defiance: Punitive Damages in the Wake of *Philip Morris v. Williams*' (2010) 46 *Willamette Law Review* 449, 470. See also *Johnson v Ford Motor Co* 113 P3d 82, 92 (Cal 2005) ('[W]e are not convinced the high court's precedents dictate that states take such a narrow view as to "what is to be deterred" through punitive damages as to blind state juries and courts to the state's public interest in deterring a wrongful course of conduct'.).

[18] But see M P Allen, 'Of Remedy, Juries, and State Regulation of Punitive Damages: The Significance of *Philip Morris v. Williams*' (2008) 63 *New York University Annual Survey of American Law* 343, 352 (arguing that the US Supreme Court 'was itself establishing the constitutionally legitimate purposes of th[e] historically state-defined remedial device [of punitive damages]'.).

Some courts and commentators have nonetheless over-read *Williams* to claim that the Court dealt 'a crippling blow' to the entire category of societal punitive damages (wiping out Quadrants III and IV above).[19] While I agree that the Court foreclosed punitive damages as societal punishment (Quadrant III), it remained silent regarding punitive damages as a vehicle for non-retributive societal deterrence (Quadrant IV). And so long as punitive damages' non-retributive societal deterrence purpose is set forth (by state legislatures and/or courts) as a legitimate state interest, it should persist as constitutionally legitimate.[20]

B. Societal General Deterrence's Emerging Influence

The nature of the legitimate state interest in the punitive damages remedy has changed and evolved over time. As mentioned above, the historical roots of the award of punitive damages are tied to retributive punishment. As tort and criminal law emerged as distinct areas of law from an earlier historical period of undifferentiated wrongdoing, the concept of malice carried over into tort law to signify especially reprehensible conduct on the part of the tortfeasor (who acted with cruelty or the desire to wrong another) in the realm of intentional torts.[21]

But, in more recent times, a newer generation of punitive damages cases has emerged that falls outside this narrow band of malicious, intentionally wrongful conduct. Such cases award punitive damages for a tortfeasor's 'reckless' conduct, performed with lack of attention to the consequences for the health and safety of others in society.[22] Cases in this category tend to involve conduct that has caused widespread harms. Policing such wrongdoing, often involving conduct that moves considerably away from punitive damages' historical roots in cruelty between

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[19] Sharkey (n 4) 1137. See, eg R Nagareda, 'Embedded Aggregation in Civil Litigation' (2010) 95 *Cornell Law Review* 1105, 1136 ('The constitutional message in *Williams*-that punitive damages are ultimately about punishment for the wrong done to the plaintiff at hand-gives a considerable nod to what [is] described as plaintiff–focused views in torts literature'.); P B Rietema, 'Reconceptualizing Split-Recovery Statutes: *Philip Morris v. Williams*, 127 S. Ct. 1057 (2007)' (2008) 31 *Harvard Journal of Legislation and Public Policy* 1159, 1166 (suggesting *Williams* signals the demise of societal punitive damages); S B Scheuerman, 'Two Worlds Collide: How The Supreme Court's Recent Punitive Damages Decisions Affect Class Actions' (2010) 60 *Baylor Law Review* 880, 932 ('[T]he Supreme Court has premised its [punitive damages] due process theory on a one-on-one model of adjudication that focuses on the parties' relationship to one another and not the impact on non-parties or larger social issues'.).

[20] See, eg *Johnson* (n 17) 92 ('California law has long endorsed the use of punitive damages to deter continuation or imitation of a corporation's course of wrongful conduct, and hence allowed consideration of that conduct's scale and profitability in determining the size of award that will vindicate the state's legitimate interests'.); see also below at 12 for further discussion of this.

[21] See generally M O DeGirolami, 'Reconstructing Punitive Damages: The Wrong of Malice' 52 (unpublished draft) (constructing a theory of malice with "deep roots in the shared history of criminal law and tort law form the thirteenth to the nineteenth century" where "[a]t its core, malice denoted cruelty, whether the hot desire to wrong or the cold disposition of the depraved heart").

[22] Sharkey, 'Punitive Damages as Societal Damages' (n 6) 351 (noting that '[w]ith 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'-in particular, in the realms of fraud, employment discrimination, and products liability), 358 fn 19, 364, 394–99 (describing hostile work environment claims as 'a useful venue for exploring the concept of distribution of societal damages to quasi-plaintiffs'). cf E Buyuksagis and others, 'Punitive Damages in Europe and Plea for the Recognition of Legal Pluralism' (2016) 27 *European Business Law Review* 137 (implying that allowing for 'compensatory' damages in Switzerland without actually having to demonstrate harm in cases of discrimination or harassment has a deterrence function). Note that punitive damages are also included in the categories of cases where there are likely to be quasi-plaintiffs, such that one might reconceptualise such damages as having a societal compensation aspect.

individuals, may be under-enforced. An especially salient example is in the realm of mass disasters, such as oil spills, where widespread harms cannot be fully deterred (or remedied) by individual (or even classwide) compensatory awards.

Another apt paradigm centers on patterns and practices of corporate misconduct. In the United States today, for example, punitive damages are awarded frequently in widespread harm cases against corporations. It is striking that in each of the US Supreme Court trilogy of cases - *BMW v Gore*, *State Farm v Campbell*, and *Williams v Philip Morris* - individual plaintiffs sued a corporate defendant seeking punitive damages on account of the corporation's practices and policies. Indeed, in the United States, plaintiffs seek and are awarded punitive damages more often against businesses than against individuals. According to the most recent comprehensive data collected from state courts across the United States, individuals sought punitive damages in 10 per cent of cases against individuals as compared to 16 per cent against businesses.[23] And punitive damages were awarded more frequently in cases that individuals won against businesses (7 per cent) than against individuals (4 per cent).

In the United Kingdom, the situation is reversed - namely, punitive damages are sought more often against individuals than against corporations; and they are likewise awarded more frequently against persons than against corporations.[24] A similar pattern, moreover, emerges from Australia, where punitive damages are likewise awarded more frequently against individuals than against corporations.[25] Moreover, the number of successful punitive damages claims in both the United Kingdom and Australia pale in comparison to the thousands in the United States on an annual basis.[26]

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[23] T Cohen and K Harbacek, 'Punitive Damage Awards in Large Counties 2005' (*Bureau of Justice Statistics*, 3 March 2011) www.bjs.gov/content/pub/pdf/pdasc05.pdf. 'Businesses' are defined to include 'insurance companies, banks, [and] other businesses and organizations.' T H Cohen, 'Punitive Damage Awards in Large Counties, 2001' (*Bureau of Justice Statistics*, 3 March 2005) www.bjs.gov/content/pub/pdf/pdalc01.pdf. And where businesses are plaintiffs, they sought punitive damages in 7% of cases against individuals as compared to 13% of cases against businesses.

[24] See J Goudkamp and E Katsampouka, 'An Empirical Study of Punitive Damages' (2018) 38 *OJLS* 90, 106. The Goudkamp/Katsampouka study looks at all 146 cases (accessible electronically and not including appeals) in which liability was found and punitive damages awards were sought in the United Kingdom between 2000 and 2016. Of the 146 cases, punitive damages were sought from individuals in 56 (38.3%), from corporations in 30 (20.6%) and against public bodies in 60 (41.1%). Punitive damages were awarded more frequently against individuals (67.9%) than against corporations (30%) or public bodies (18.3%).

[25] F Maher, 'An Empirical Study of Exemplary Damages in Australia' (2019) 43 *Melbourne University Law Review* 1, 10, 18. The Maher study replicates the Goudkamp/Katsampouka study in Australia - looking at all 252 cases (accessible electronically and excluding appeals) in which liability was found and punitive damages awards were sought in Australia between 2000 and 2016. Punitive damages are awarded against individuals 47% of the time they are sought, as compared to 32% of the time against corporations.

It may well be that a robust system of civil penalties enforced by regulators against corporations fills this gap. See Bant and Paterson (n 1) [12] ('Australia's powerful and overarching statutory schemes now embrace civil penalties as a core deterrent mechanism for serious commercial misconduct'). Bant and Paterson highlight the public aspect of the Australian civil penalties jurisdiction, namely that it is enforced by regulators, with fines going into the public purse. I am grateful to Elise Bant and Jeannie Paterson for this insight.

[26] Thus, the Goudkamp/Katsampouka sample includes 146 cases of plaintiff win cases seeking punitive damages from 2000-2016; the corresponding figure for the Maher study (also from 2000-2016) is 252 cases; whereas in 2005 alone, the US comprehensive sample of state cases includes thousands of such cases.

This empirical reality - namely, that in the United States, plaintiffs seek (and are awarded) punitive damages against corporations proportionally more than plaintiffs in either the United Kingdom or Australia - tells us something about the perceived legitimate state interests in punitive damages. In the United States, where punitive damages are awarded more frequently against corporations whose conduct has led to widespread harms, the economic deterrence goal resonates,[27] whereas, in the United Kingdom and Australia, the aim seems more closely tethered to the historical origins in malicious, intentional bilateral conduct between individuals.[28]

This newer generation of punitive damages cases illustrates the changing nature of cases in which punitive damages are awarded. The legitimate state interest in punitive damages can therefore be seen to be both historically contingent but also evolving. States could, moreover, be more explicit about the evolving legitimate aims for punitive damages, particularly with respect to embracing a non-retributive societal deterrence goal. Because the remedy of punitive damages lies squarely within the purview of state law, state legislatures and courts possess a degree of freedom to articulate state-based goals of punitive damages - such as economic deterrence - even in the face of heavy-handed federal constitutional review imposed by the US Supreme Court.

III. Societal Deterrence

Once societal general deterrence is recognised as a legitimate purpose of punitive damages, two further challenges remain. First, as a matter of theory, general deterrence may be pursued via loss internalisation or gain elimination. Second, as a matter of practice, legislatures and courts (and juries) must be able to point to objective factors as proxies to measure societal deterrence. Whereas, at present, courts often consider 'proportionate punishment' factors, I argue that they should instead be directed to societal deterrence factors (whether premised on loss internalisation or gain elimination).

Section A elaborates the theoretical goals of societal deterrence, based alternatively on loss internalisation or gain elimination. At this juncture, it is worth acknowledging that, while the theoretical case for societal deterrence is sound, its empirical validity in the real world is indeterminate. There is, at present, scant empirical evidence that imposing punitive damages in widespread harm cases affects the behavior of individuals and companies. But given the soundness of the theory, Section B takes up the task of identifying relevant factors. Indeed, should certain

[27] Sam Buell has argued persuasively that corporations cannot be retributively punished. See S W Buell, 'The Impossibility of Corporate Retribution' 83 Law & Contemporary Problems (forthcoming) ('Because corporations cannot experience such pain, suffering, or deprivations, they cannot be punished *on retributive grounds*.').

[28] According to Katsampouka 'the main purpose of punitive damages in England is retribution'. E-mail from Eleni Katsampouka to author (22 December 2019). See also *Rookes v Barnard* [1964] AC 1129 (HL), 1221 (punitive damages can be sought only where there is '[o]ppressive, arbitrary or unconstitutional actions by servants of government', '[w]here the defendant's conduct was "calculated" to make a profit for himself', and '[w]here a statute expressly authorises the same'). Moreover, in the United Kingdom 'it is well established that punitive damages may not be awarded if other remedies are sufficient to achieve the goals of punishment and deterrence or if other sanctions have already been imposed on the defendant for the conduct concerned'. Goudkamp and Katsampouka (n 24) 94. And similarly, in Australia, '[e]xemplary damages will not be available…where substantial punishment has been imposed on the defendant by the criminal law'. Maher (n 25) 7.

states (or countries) take the lead in setting forth such schemes, they could serve as 'laboratories' of experimentation upon which further empirical testing might be based.

A. Theoretical Goals

The primary economic rationale of optimal deterrence for supra-compensatory damages dates back to Jeremy Bentham, who set forth the loss internalisation principle, namely that actors would internalise the future expected monetary damages awards for harms in order to weigh whether the benefits of their conduct outweighed the harms.[29] Only in recent decades, however, has this rationale been formalised in the specific context of punitive damages. Alternative economic rationales - disgorgement of ill-gotten gains and enforcement of property rights - have been proposed to align the theory with the historic and conventional focus of punitive damages on intentionally wrongful behavior.[30]

As explained above, the contemporary expansion of punitive damages in the United States into reckless indifference (most prominently in products liability cases) suggests additional room for expansion of the loss internalisation rationale, with both descriptive and prescriptive payoff.

(i) Loss Internalisation

The predominant law-and-economics rationale for punitive (or supra-compensatory) damages is based upon optimal deterrence or loss internalisation and focuses on the under-enforcement problem: supra-compensatory damages are needed when under-detection of harms or other factors leads to inefficiently low expected liability, which is insufficient to induce optimal care. In other words, in situations where compensatory damages alone will not adequately deter, supra-compensatory damages (in the form of punitive damages) are necessary to force the actor to internalise the full societal costs inflicted by its conduct.

Mitchell Polinsky and Steven Shavell put forth a punitive damages 'multiplier' equal to the inverse of the probability of detection, highlighting the need for supra-compensatory damages where wrongdoing is not likely to be detected.[31] For example, if a tortfeasor's misconduct is likely to be detected and enforced against only one out of every 10 times, then the compensatory damages (equal to the harms inflicted in the one time in which it is detected and enforced) should be multiplied by 10 (the inverse of 1/10, the probability of detection) in order to force the tortfeasor to internalise the total societal costs.[32]

In prior work, I extended this under-detection or under-enforcement rationale for supra-compensatory damages to a wider domain of situations, including those of diffuse harms inflicted

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[29] See J Bowring (ed), *The Works of Jeremy Bentham* (vol 1, New York, Russell & Russell, 1962) 365, 401–02; see also G S Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169.

[30] The Calabresi-Melamed property rule/liability rule dichotomy provides one framework for choosing between the loss internalisation (liability rule) and gain elimination/voluntary market transfer (property rule) models. For further elaboration, see C M Sharkey, 'Economic Analysis of Punitive Damages: Theory, Empirics, and Doctrine' in J Arlen (ed), *Research Handbook on the Economics of Torts* (Northampton, Edward Elgar, 2013).

[31] A M Polinsky and S Shavell, 'Punitive Damages: An Economic Analysis' (1998) 111 *Harvard Law Review* 869, 889-90.

[32] See *Mathias v Accor Econ Lodging Inc* 347 F3d 672, 677–78 (7th Circuit 2003) (articulating this example).

on individuals and society that are not likely to be enforced by either individual or class action litigation.[33] For many reasons, tortfeasors may not internalise the full costs of the harms they inflict on people, property, and publicly held resources: not only under-detection, but also under-compensation, and other imperfections in the litigation system such as false negatives in adjudication (ie, where defendants erroneously get off scot-free) and the prohibitive cost of adjudication.

The domain for optimal deterrence theory is a socially productive, yet externality producing (ie, inflicting harms onto third parties) activity. Purely compensatory damages will not induce optimal care if negligent injurers expect to avoid liability for some of the harms they cause. The primary goal of punitive damages is to address the under-enforcement problem by increasing damages for the harms that are detected and sanctioned by a sufficient amount to ensure that injurers' expected liability equals the social cost of their harm-producing conduct. Punitive damages are warranted in all cases where under-enforcement is an issue; there is no reason to distinguish between intentional and purely negligent (or even strict liability) harms.

(ii) Gain Elimination

The domain for theories of gain elimination or prevention of wrongful takings (sometimes referred to as 'complete deterrence' theories) is intentional, conscious wrongdoing. There is a distinct shift in focus away from losses suffered by the plaintiff or society and toward the defendant's wrongful conduct. In this realm, one worries about under-deterrence, but less so about over-deterrence. The primary goal of gain elimination is the complete deterrence of socially unproductive activities.

According to Keith Hylton, gain elimination is the primary goal of punitive damages, because complete deterrence (ie stopping the wrongful conduct altogether), rather than some form of optimal deterrence, is the goal. In other words, where punitive damages are used for disgorgement purposes (to teach that 'torts do not pay') rather than for incentive purposes (to teach that 'precautions pay'), society has implicitly chosen a goal of absolute (or complete) deterrence rather than relative (or optimal) deterrence in tort.[34] Here, the realm of 'efficient torts' is correspondingly limited; the focus instead is on eliminating the wrongful conduct altogether.

B. Relevant Factors

Once societal deterrence is recognised as a legitimate state interest or goal for the award of supra-compensatory damages, state legislatures and common law courts face the challenge of setting forth relevant factors to measure deterrence, whether premised on loss internalisation or gain elimination. State legislatures could affirmatively defend supra-compensatory damages based on under-enforcement and under-deterrence rationales. For example, they might set forth statutory multipliers for certain torts based on likelihood of under-detection. More radically, common law courts, relying on their interpretations of the underlying state law policies justifying supra-compensatory punitive damages, could develop interstitial common law standards, identifying

[33] See generally Sharkey, 'Societal Damages' (n 6).
[34] K N Hylton, 'Punitive Damages and the Economic Theory of Penalties' (1998) 87 *Georgetown Law Journal* 421, 452–54.

factual situations where under-detection, under-enforcement, or societal deterrence prerogatives predominate. Here, I briefly consider factors relevant to such undertakings.

(i) Undetected Harms: Repeat Offenders

As a proxy for undetected harms, courts might look for the existence of repeat offenders. The US Supreme Court has maintained that 'repeated misconduct is more reprehensible than an individual instance of malfeasance'.[35] But it is also the case that repeated misconduct suggests that the penalty for the earlier misconduct did not sufficiently deter the offender.

Consider the case of the enforcement of California's 'lemon laws' for the sale of defective automobiles.[36] There is some evidence of under-enforcement of such laws.[37] Further, there is some evidence that large automobile companies proceed by seriatim confidential settlements when caught in violation of such laws.[38] Moreover, in *Johnson v Ford Motor Co*, the California Supreme Court drew from the US Supreme Court's language in *BWM v Gore* that 'strong medicine is required to cure the defendant's disrespect for the law'[39] to hold that 'a defendant [who] has repeatedly engaged in profitable but wrongful conduct tends to show that "strong medicine is required" to deter the conduct's further repetition'.[40] Thus, a strong case can be made that, in an instance of successful prosecution via litigation, supra-compensatory damages should be awarded in light of the likely existence of a pattern and practice of flouting of the law, having likely caused previously under-detected harms. Indeed, as the *Johnson* court recognised:

> California has long endorsed the use of punitive damages to deter continuation or imitation of a corporation's course of wrongful conduct, and hence allowed

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[35] *BMW of North America* (n 11) 577 (1996).

[36] See California Civil Code § 1793.2, (d)(2) (stipulating that a vehicle that cannot be repaired in a 'reasonable number' of attempts must be reacquired or replaced).

[37] R Blumenthal and E Markey, 'Blumenthal & Markey Introduce Legislation to Protect Car Shoppers from Buying, Leasing, or Loaning Unsafe Used Cars' (*Senator Markey*, 26 June 2019) www.markey.senate.gov/news/press-releases/blumenthal-and-markey-introduce-legislation-to-protect-car-shoppers-from-buying-leasing-or-loaning-unsafe-used-cars ('State laws exist that prohibit the selling of unsafe vehicles, but these laws are not being adequately enforced'.); see also Consumers for Auto Reliability and Safety, www.carconsumers.org.

[38] See, eg Consumers for Auto Reliability and Safety and others, 'Auto Safety / Consumer Organizations Sue Federal Trade Commission, over Decision Allowing General Motors and Car Dealerships to Engage in False Advertising of Unrepaired Recalled "Certified" Used Cars' (*Auto Safety*, 6 February 2017) www.autosafety.org/wp-content/uploads/2017/02/FTC-Release.pdf ('State laws prohibit dealers from engaging in such practices. However, some of those laws may not be enforced until after someone has already been injured or killed. Victims of dealers who sold unrepaired recalled cars, or their surviving family members, have sued dealers for wrongs such as negligence or wrongful death, and have received confidential settlements'.); MASSPIRG, 'Car Dealers Attack Massachusetts Protections Against Dangerous Recalled Used Cars' (*MASSPIRG*, 15 July 2019) www.masspirg.org/news/map/car-dealers-attack-massachusetts-protections-against-dangerous-recalled-used-cars ("Consumers in Massachusetts and other states have been suing car dealers who sold them recalled used cars…and winning in court or receiving confidential settlements"); see also Consumers for Auto Reliability and Safety, www.carconsumers.org.

[39] *BMW of North America* (n 11) 577 (1996).

[40] *Johnson* (n 17) 92 (Cal 2005) (emphasis added). In *Johnson* the plaintiffs sued Ford Motor Co. for concealing the used automobile's history of transmission repairs and replacements when reselling the car. Plaintiffs presented evidence of corporate practices by Ford amounting to a pattern and practice of similar fraud. The court reasoned that '[t]o the extent the evidence shows the defendant had a practice of engaging in, and profiting from, wrongful conduct similar to that which injured the plaintiff, such evidence may be considered on the question of how large a punitive damages award due process permits'. ibid 97.

consideration of that conduct's scale and profitability in determining the size of award that will vindicate the state's legitimate interests.[41]

(ii) Widespread Harms to Other Individuals

One of the benefits of focusing the measure of supra-compensatory damages on harms to individuals other than the plaintiff(s) before the court is that it provides an objective measure (albeit likely a lower limit) of the societal harm inflicted by the defendant. Thus, just as compensatory damages that focus on quantifying the losses or harms suffered by the plaintiff(s) before the court simultaneously satisfy the loss internalisation deterrence goal of tort law, so tethering supra-compensatory damages to losses suffered by other individuals not before the court can likewise serve the societal deterrence goal.

(iii) Public Impact

Legislatures have at their disposal wider berth than courts to consider the 'public' impact of certain kinds of conduct, especially unfair or deceptive conduct that might have widespread societal impact.

Consider, for example, in the United States the proliferation of unfair and deceptive acts and practices (UDAP) statutes in each of the 50 states, where offending public policy is part and parcel of being an unfair practice. Whereas the public impact dimension is relevant under most states' statutory frameworks, it is a required prima facie element in seven states.[42] Thus, in Colorado, courts have made explicit the societal purpose underlying their UDAP statute: 'It is in the public interest to invoke the state's police power to prevent the use of methods that have a tendency or capacity to attract customers through deceptive trade practices… The Colorado Consumer Protection Act is an outgrowth of this conclusion…'.[43]

Statutes in Kentucky and Maryland, moreover, explicitly tie the public impact requirement to the 'preventive' and 'remedial' as distinct from 'punitive' purpose of the statutory damages.[44]

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[41] ibid 93.

[42] See *National Consumer Law Center*, 'Consumer Protection in the States: Appendix C' (*National Consumer Law Centre*, 2018) www.nclc.org/images/pdf/udap/udap-appC.pdf. These states are Colorado, Georgia, Minnesota, Nebraska, New York, South Carolina, and Washington. Of these, Nebraska does not permit punitive damages. See ibid. Minnesota does not permit punitive damages to be awarded under its UDAP statute. See *In re Lutheran Bhd Variable Ins Prod Co Sales Practices Litig* 2004 WL 909741, 7 (D Minn 28 April 2004). New York sharply limits the size of a punitive award under its UDAP statute.

[43] *People ex rel Dunbar v Gym of America Inc* 493 P2d 660, 668 (Colo 1972) (emphasis added); see also *May Department Stores Co v State ex rel Woodard* 863 P2d 967, 972 (Colo 1993) ('Because the CCPA's civil penalty requirement is intended to punish and deter the wrongdoer and not to compensate the injured party, the CCPA is intended to proscribe deceptive acts and not the consequences of those acts'.).

[44] For further discussion of statutory damages, see Sharkey (n 17) 471–76, which argues that:

> '[s]tatutory damages occupy a netherworld somewhere between compensatory and punitive damages. If statutory multiple damages are enacted for a retributive punishment purpose, then it would seem that the U.S. Supreme Court's constitutional due process apparatus should apply, full stop. But, if instead, these legislatively enacted damages serve non-retributive, legitimate state interests - such as deterrence and compensation - then they would fall on the non-punitive side of things and outside of the Court's constitutional due process purview'.

Thus, the interest in the well-being of the community is referenced along with the desire that the statutory damages serve compensatory and deterrent functions.[45] Kentucky's statute reads:

> The General Assembly finds that the public health, welfare and interest require a strong and effective consumer protection program to protect the public interest and the well-being of both the consumer public and the ethical sellers of goods and services; toward this end, [the UDAP is] hereby created for the purpose of aiding in the development of preventive and remedial consumer protection programs and enforcing consumer protection statutes.[46]

Maryland's statute lays out an equally broad public-oriented objective to 'take strong protective and preventive steps to investigate unlawful consumer practices, to assist the public in obtaining relief from these practices, and to prevent these practices from occurring in Maryland'.[47]

The public impact element offers an avenue for admission of evidence of harm to non-parties - notwithstanding the constitutional proscription against punishing a defendant for harm to non-parties in an individual case.[48] In *State ex rel Wilson v Ortho-McNeil-Janssen Pharms*, the court recognised that 'counsel for the State directly linked the elements of [South Carolina's] UTPA [Unfair Trade Practices Act] to [defendant's] misleading and deceptive practices' and explicitly approved such arguments as 'within [the] proper bounds as the State sought to establish that [defendant] acted willfully and contrary to the public interest'.[49]

Statutory multipliers exists in roughly half (25/50) of the state acts.[50] The existence of the statutory multiplier, moreover, is correlated with an express legislative statement regarding the public impact of the conduct.[51] If the legislature intends statutory multiplied damages to serve a societal compensatory purpose, it makes sense that it would be more likely to authorise such a multiplier if it can be assured it would be triggered only when there is a public impact.

Moreover, punitive damages in this context might be an apt substitute for the statutory multiplier.[52] In Idaho, supra-compensatory damages are awarded in cases of 'repeated or flagrant'

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[45] Similarly, statutes in California, Texas, and Idaho reference an interest to protect consumers as a whole and to use efficient economic procedures to do so.

[46] Kentucky Revised Statutes Annotated § 367.120 (emphasis added).

[47] Maryland Code Annotated Commercial Law § 13-102.

[48] See above at 4–5 (discussing *Williams* and the prohibition against *punishing* a defendant for harms committed to non-parties).

[49] *State ex rel Wilson v Ortho-McNeil-Janssen Pharmaceuticals Inc* 777 SE2d 176, 190 (SC 2015).

[50] See Carolyn Carter, 'Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws' (*National Consumer Law Center*, March 2018) www.nclc.org/images/pdf/udap/udap-report.pdf.

[51] The majority of states that *require* a public impact element (5 out of 7) authorise a statutory damages multiplier; whereas slightly less than half (20 out of 43) of states without a required public impact element authorise statutory multipliers. See ibid; *National Consumer Law Center*, 'Consumer Protection in the States: Appendix C' (2018) www.nclc.org/images/pdf/udap/udap-appC.pdf.

[52] The majority of states, though not all of them, allow punitive damages to be awarded under their consumer protection statutes. See *National Consumer Law Center* (n 42).

It is worth asking whether states would continue to reject punitive damages in the UDAP context were they reconceptualised as societal compensatory damages. Indeed, the potential effects could be far-reaching, even beyond the United States, as mentioned in the text to follow above.

violations of the relevant consumer protection act.[53] As outlined above, repeat offenses could be an apt proxy for the existence of prior under-detected harms. Washington's UDAP statute has a public impact requirement; moreover, it allows for punitive damages under UDAP, but denies them more generally for other common law causes of action (even in cases of egregious misconduct).[54] By allowing punitive damages selectively for UDAP statutory causes of action, the Washington state legislature signals its embrace of the societal purpose for punitive damages. As one judge explained:

> If private remedies under the act are not restricted to those which arise out of the transactions which the Attorney General might sue to restrain (those affecting the public interest), the act does indeed become another remedy for purely private wrongs, and an authorization of punitive damages for such wrongs.[55]

Australia's statutory consumer protection regime (which covers commercial transactions as well) provides further illustration.[56] An option for calculating the maximum civil pecuniary penalty that may be awarded is a three-times statutory multiplier of the benefit obtained by violation of the Australian Consumer Law (ACL).[57] In Australia, unlike the United States, only public regulators can seek this remedy, whereas individuals are restricted to damages, and a range of flexible court ordered compensation orders aimed at affecting redress for loss or damage suffered. Punitive damages, however, have been ruled out. As Elise Bant and Jeannie Paterson have noted:

> even on the most generous terms, there are limits to the boundaries of orders that may be made under ss 237–8 of the ACL given the statutory direction that they must 'compensate', 'prevent or reduce' loss or damage suffered because of misleading conduct…Thus, exemplary damages, which both punish and deter contraventions of the law, are not available under the ACL.[58]

Bant and Paterson reach their conclusion given that '[o]n any view, exemplary damages are not compensatory in nature, but rather focus wholly on the egregious conduct of the

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[53] *Mac Tools v Griffin* 879 P2d 1126, 1131 (Idaho 1994).

[54] See *McKee v AT&T Corporation* 191 P3d 845, 860 (Wash 2008) ('Washington is one of only a few states that does not provide generally for punitive damages for particularly egregious conduct'.).

[55] *Anhold v Daniels* 614 P2d 184, 189 (Wash 1980) (Rosselini, J, concurring).

[56] Primarily the Australian Consumer Law (ACL) in *Competition and Consumer Act* (2010) (AUS), schedule 2.

[57] More precisely, under ACL s 224(3A), the maximum penalty options are the greater of:

> (a) $10,000,000;
> (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission - 3 times the value of that benefit;
> (c) if the court cannot determine the value of that benefit - 10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the act or omission occurred or started to occur.

[58] E Bant and J M Paterson, 'Should Specifically Deterrent or Punitive Remedies Be Made Available to Victims of Misleading Conduct Under the Australian Consumer Law?' (2019) 25 *Torts Law Journal* 99, 109.

defendant'.[59] Here, too, then, the reconceptualisation of punitive damages as societal damages might transform these damages into ones recognised under Australia's consumer law.

(iv) Defendant's Financial Status

The vast majority of states that allow punitive damages allow juries to consider a defendant's financial status when considering the amount of the punitive award.[60] In fact, juries are required to consider defendant's wealth in a sizeable number of state jurisdictions.[61] Courts typically assert that the 'defendant's financial condition is logically one of the essential factors to consider in determining an amount of punitive damages that will appropriately accomplish the goals of punishment and deterrence'.[62] The intuition is as follows:

> A punitive sanction of $1,000.00 for reprehensible conduct may be sufficient to deter an individual of modest means from subsequently engaging in similar conduct, while that sanction could be utterly ineffective to deter an individual with vast financial resources from engaging in the same conduct. Similarly, a punitive sanction of $1,000.00 may constitute a significant level of punishment for an individual of modest means, but it could amount to an inconsequential penalty for an individual with vast financial resources. Conversely, a $100,000.00 punitive sanction may sufficiently punish and deter a wealthy individual who has engaged in reprehensible conduct; yet, if that same sanction would bankrupt an individual of modest means who has engaged in the same conduct, it could therefore constitute an excessive penalty.[63]

Not only do the courts fail to distinguish the underlying retributive punishment rationale from the economic deterrence rationale, but each is applied to an individual defendant, with no appreciation for how a corporation might respond differently from an individual.

Economists are divided on the question whether the wealth of the defendant is relevant to economic deterrence (apart from the limited case of the judgment-proof tortfeasor, when all agree it is relevant). Robert Cooter argues that consideration of the defendant's wealth is 'inappropriate to deterrence of economically self-interested decisionmakers' because the 'controlling factor in a purely self-interested calculus…is the cost of compliance relative to the cost of liability'.[64] Polinsky and Shavell concur, asserting that wealth should never be taken into account for corporations as long as they can correctly balance the 'costs of precautions against the resulting reduction in harm'.[65]

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[59] ibid.

[60] The exceptions are Alabama (*In re Tylenol (Acetaminophen) Mktg Sales Practices & Prods Liab Litig* 144 F Supp3d 680, 685 (ED Pa 2015)), Colorado (Colorado Revised Statutes § 13-21-102), Kentucky (*Nami Res Co LLC v Asher Land & Mineral LTD* 554 SW3d 323, 339 (Ky 2018)), and North Dakota (North Dakota Century Code § 32-03.2-11).

[61] See L C Orr, 'Making a Case for Wealth-Calibrated Punitive Damages' (2004) 37 *Loyola of Los Angeles Law Review* 1739, 1743 fn 26 ('Alaska, California, Illinois, Louisiana, Maine, Mississippi, Montana, New Jersey, New York, South Dakota, Tennessee, Utah, and West Virginia all require that a defendant's wealth be considered'.).

[62] *Seltzer v Morton* 154 P3d 561, 597 (Mont 2007).

[63] ibid. See also *Mosing v Domas* 830 So 2d 967, 978 (La 2002).

[64] R D Cooter, 'Punitive Damages for Deterrence: When and How Much?' (1989) 40 *Alabama Law Review* 1143, 1176-77.

[65] Polinsky and Shavell (n 31) 910–14.

By contrast, Jennifer Arlen argues that to the extent society wants to maximise social utility in the presence of risk-aversion, then negligence regimes must take into account wealth differences in establishing the duty of care and further argues that both strict liability and negligence regimes should consider differences in wealth in setting the level of compensatory damages.[66] Hylton also suggests that 'the wealth of the defendant is relevant in the determination of a punitive award when either the victim's loss or the defendant's gain from wrongdoing is unobservable and correlated with the defendant's wealth'.[67]

Moreover, to the extent that gain elimination (as opposed to loss internalisation) is the variant of deterrence being pursued, then the defendant's profits tied to its misconduct is the relevant measure. This is readily encompassed within Connecticut's 'general rule' that 'the aims of punitive damages are punishment, deterrence, and profit disgorgement'.[68]

(v) Over-deterrence

Finally, to the extent that optimal deterrence (not complete deterrence) is the goal, legislatures and courts must be attuned to the risk of over-deterrence. To date, scholars have devoted insufficient attention to the interplay between punitive (or supra-compensatory) damages and other mechanisms - either regulatory or market-driven (eg reputational forces especially in the age of the Internet) - that likewise deter wrongful conduct.[69]

IV. Societal Damages Funds

Legislatures and courts can extend their recognition of the societal deterrence purpose of punitive damages by taking creative approaches that recognise the societal nature of the harm caused by the defendant. More than 15 years ago, I published 'Punitive Damages as Societal Damages', in which I argued for a reconceptualisation of retributive, criminal-law inspired 'punitive' damages as a societal remedy designed to compensate for widespread harms and thereby force tortfeasors to internalise the full costs of the harms inflicted on people, property and publicly held resources.[70] I detailed a handful of states with 'split-recovery' statutory regimes for diverting punitive damages

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[66] J H Arlen, 'Should Defendants' Wealth Matter?' (1992) 21 *Journal of Legal Studies* 413, 428.

[67] K N Hylton, 'A Theory of Wealth and Punitive Damages' (2008) 17 *Widener Law Journal* 927, 930.

[68] *Metcoff v NCT Group Inc* 50 A3d 1004, 1017 (Conn. Super. 2011) ("General Statutes § 42-110g (a) provides in relevant part that '[t]he court may, in its discretion, award punitive damages…' As a general rule, the aims of punitive damages are punishment, deterrence and profit disgorgement.").

[69] *See, eg* Sharkey, 'BP Oil Spill' (n 6) 704:

> [T]he societal economic deterrence rationale for classwide punitive damages may be blunted once one takes into account the full picture of the regulatory (and even criminal) fines and penalties that are typically assessed in widespread harm scenarios such as oil spills. But this simply means that the strength of the case for societal damages based on economic deterrence will depend heavily on how aggressively alternative cost-internalization mechanisms have been pursued and enforced; and where there is no such aggressive pursuit and enforcement, the justification has special force.

See also Bant & Paterson (n 1) 14:

> The Australian Law Reform Commission has now proposed that ["adverse publicity orders"] be supplemented by other options such as disclosure orders, community service orders, probation or corrective orders which could be awarded by the court of its own motion as part of the suite of deterrent orders, including penalties.

[70] Sharkey, 'Societal Damages' (n 6).

either to the state or a public fund. Apart from the split-recovery statutes, one of the innovative developments I highlighted was the diversion of punitive damages by a common law court, absent any authorizing statute. I had one prime example: in *Dardinger v. Anthem Blue Cross & Blue Shield*, the Ohio Supreme Court, in order to address the 'philosophical void between the reasons we award punitive damages and how the damages are distributed',[71] directed - on its own initiative - $20 million of a $30 million punitive award to a cancer research fund at Ohio State University.[72] The judge specifically chose a state institution as recipient because of the 'societal stake' in punitive damage awards and chose a cancer research fund as a proxy for ameliorating the type of harm in the individual case, which involved an insurance company's mishandled request for coverage for chemotherapy treatment.[73]

Taking a page from the same playbook some 15 years later,[74] in *Sundquist v. Bank of America*, a California bankruptcy judge awarded an eye-catching $45 million in punitive damages against Bank of America for egregious misconduct directed at a couple in foreclosure proceedings, but, after awarding $5 million to the couple, directed the remainder of the punitive award to entities that fight financial abuse and champion vulnerable victims.[75]

Most recently, in *Oklahoma ex rel Hunter v Purdue Pharma, LP*, the state of Oklahoma sued opioid manufacturer Purdue, seeking punitive damages for acting 'with reckless disregard for the rights of others' and penalties under Oklahoma's consumer protection statute.[76] Purdue entered into a settlement in March 2019 pursuant to which it created a fund in recognition a broader societal remedial goal: 'to improve the lives of individuals in Oklahoma and across the nation that are affected by pain and substance use disorders'.[77]

In each of these three high-profile cases, the courts and/or parties explicitly recognised that the defendant had inflicted widespread harm beyond the parties before the court and created a fund, either from diverted punitive damages or settlement proceeds, to acknowledge the societal harm. Punitive damages were thereby transformed into a societal remedy that simultaneously addressed the "windfall" gains or unjust enrichment of the plaintiff and remediated the societal harm.

A. Addressing 'Windfall' Gains or Unjust Enrichment of Plaintiff

The moment that the societal (as opposed to individual) interest in punitive damages is invoked, the windfall concern rears its head with a vengeance - namely if punitive damages are awarded on

[71] *Dardinger v Anthem Blue Cross & Blue Shield* 781 NE2d 121, 145 (Ohio 2002).
[72] ibid.
[73] ibid.
[74] In the interim, a few courts have discussed the idea, motivated, at least in part, to address the 'windfall gains' to a plaintiff receiving a large punitive damages award. Eg *Payne v Jones* 711 F3d 85, 95 n 6 (2d Circuit 2012) (discussing the fact that 'states give courts discretion to apportion awards between the plaintiff and the state'.).
[75] *Sundquist v Bank of America* 566 BR 563 (Bankruptcy ED Cal 2017), vacated in part by *In re Sundquist* 580 BR 536 (Bankruptcy ED Cal 2018).
[76] Before the settlement, the Oklahoma Attorney General dropped all claims except those for equitable relief under a public nuisance theory cause of action.
[77] *Oklahoma ex rel Hunter v Purdue Pharmaceuticals LP and others* No CJ-2017-816 (Okla Dist Ct 2019) Settlement Agreement, ¶ I(7).

behalf of a societal, shared interest, then why should it be that the entirety of a sometimes very large award should go to an individual plaintiff?[78] One potential response is to defend such a windfall as a kind of 'bounty', compensating the plaintiff for acting as a private attorney-general.[79] But courts have not been persuaded to adopt this rationale for punitive damages. Instead, courts have used the spectre of a plaintiff's windfall gains to reduce or avoid altogether awarding punitive damages.[80]

To mitigate this concern, in prior work I canvassed developments in a handful of states that had hitherto under-appreciated 'split-recovery' statutes directing some portion of a punitive damages award either to the state treasury or to a specified fund.[81]

B. Remediating the Societal Harm

Whereas split-recovery statutes in the United States direct a portion of punitive damages to the state or else a general fund, the normative ideal would be to create a fund whose purpose is tied to the remediation of the societal harm. This is so for three reasons. First, the establishment of such a specific fund will constrain self-dealing impulses of the state. Second, it should lend itself more readily to objectively measurable factors relevant to remedying the societal harm. Third, in addition to satisfying a general deterrence purpose, such a fund directed at remediation of societal harm would simultaneously satisfy broader corrective justice and fairness dictates.

The recent French reform proposal (Article 1266-1 of the Projet de reforme) to divert civil fines either to the state or else to a compensation fund suggests the potential wider embrace of societal damages (albeit under the guise of civil fines).[82] The reversion of fines to the state is more consistent with a retributive punishment rationale;[83] whereas their diversion to a compensation fund is more consistent with achieving non-retributive societal deterrence.[84]

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[78] The Court of Appeals for the Second Circuit grappled with this windfall concern in *Payne v Jones*, a case in which the court vacated a punitive award as constitutionally excessive, discussing how awarding the plaintiff 100% of the award was a windfall that might be mitigated for example by split-recovery schemes as evoked in 'Punitive Damages as Societal Damages'. ibid 94–95 (citing Sharkey, 'Societal Damages' (n 6)).

[79] See *Sundquist* (n 75) vacated in part by *In re Sundquist* (n 75); see also M Rustad and T Koenig, 'The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers' (1993) 42 *American University Law Review* 1269, 1323 (arguing that punitive damages serve as a kind of 'bounty' for plaintiffs who choose to bring the case).

[80] See, eg *Jones* (n 74) 94–95 (noting that punitive damages are 'burdens on society' that cannot be justified by benefitting the already compensated plaintiff); *In re Collins* 233 F3d 809, 812 (3rd Circuit 2000) (holding that, due to the depleting funds available for plaintiffs in asbestos-related actions, priority should be given to compensatory claims over 'exemplary punitive damage windfalls'.).

[81] See Sharkey, 'Societal Damages' (n 6) 375–80 (discussing in detail the split-recovery statutes in these states).

[82] Rowan (n 1). See also M Cappelletti, 'Comparative Reflections on Punishment in Tort Law' in J-S Borghetti and S Whittaker (eds), *French Civil Liability in Comparative Perspective* (Oxford, Hart Publishing, 2019) 329 ('The French conception of punishment is markedly instrumental in that it sees punitive measures as serving *societal goals* such as deterrence of antisocial behavior'.) (emphasis added).

[83] Cappelletti (n 82) 346 ('Given the ministere public's functions in criminal trials, most notably prosecuting crimes and punishing their authors in the interest of society, it is natural to consider his involvement in the operation of article 1266-1 as a strong indicator of an instrumental understanding of punishment'.).

[84] ibid 347 ('[B]y financing funds that shelter otherwise unprotected victims of accidents, article 1266-1 of the Projet de reforme further reinforces the ethos of social solidarity that imbues French tort law and brings tort liability one step further away from any theory of interpersonal justice'.).

(i) Diverting Punitive Damages in Individual Litigation

The *Dardinger* case involved a woman whose cancer death was accelerated by her insurance company's 'pervasive' corporate policy of bad faith denial of authorisation for chemotherapy treatments. The Ohio Supreme Court upheld a $30 million punitive damages award against the defendant insurance company, but conditioned its approval on the plaintiff's (spouse of the decedent) acceptance of only one-third ($10 million) of the punitive award, with the remainder (after payment of the plaintiff's attorneys) directed to a cancer research fund established by the court.[85] 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'. Moreover, the court was cognizant of the fact that defendants' health insurance industry 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. The 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 '[a]t the punitive-damages level, it is the societal element that is most important'. The court reasoned that the bulk of the punitive 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'.[86] *Dardinger* caused a bit of a momentary stir, but then remained largely an infrequently noted outlier.[87] That is, until *In re Sundquist*.

The opening of the California bankruptcy decision - 'Franz Kafka lives…he works at Bank of America' - foreshadowed the contents of a 107-page opinion detailing not only the abuse a couple suffered at the behest of Bank of America during a foreclosure proceeding, but also the egregiousness of the misconduct, which was characterised as illustrative of a wider pattern and practice of abuse and deceit on the part of the mega-bank directed at vulnerable and out-classed victims including but reaching far beyond the one couple who sued. Judge Klein did not mince words when describing the misconduct on the part of the Bank of America associated with its illegal foreclosure on the Sundquists' home in Lincoln, California, nor the 'battle-fatigued demoralization' it inflicted upon the couple.[88] As reported in one news outlet: 'The couple had been in the trenches for more than eight years doing battle with the same Mega-Bank that had led

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[85] *Dardinger v Anthem Blue Cross & Blue Shield* 781 NE2d 121 (Ohio 2002). The Ohio Supreme Court reviewed the jury's award of $2.5 million in compensatory damages and $49 million in punitive damages. The court remitted the punitive award to $30 million on the grounds that it was excessive under Ohio (but not federal) law. The divided (4-3) court's decision was "historic" in that it effected a split-recovery type allocation of a punitive damages award, absent a statute directing it to do so.

[86] The court further 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'. More specifically, the court explained: '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'.
>
> There may be much to commend this societal 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.

[87] See, eg *Wischer v Mitsubishi Heavy Indus Am Inc* 673 NW2d 303, 322 fn 6 (Wis Ct App 2003) (Fine, J concurring) (discussing *Dardinger* but taking no stance as to whether the outcome was correct).

[88] *Sundquist* (n 75) 589 vacated in part by *In re Sundquist* (n 75).

thousands of homeowners down a primrose path to foreclosure'.[89] Reviewing the Kafka-esque features of the case, Judge Klein noted that the stream of loan modification applications proffered by the Sundquists 'routinely were either "lost" or declared insufficient, or incomplete, or stale and in need of resubmission, or denied without comprehensible explanation'.[90]

Judge Klein framed his discussion of punitive damages by invoking the 'governmental and societal interests' in punishing and deterring unlawful conduct.[91] But opening punitive damages to this societal lens risks bestowing a windfall on individual plaintiffs. In response, as discussed above, many courts have sharply curtailed (or even foreclosed) punitive damages. Judge Klein, however, had a different resolution in mind. Given the need for punitive damages to 'vindicate the societal interests', he rejected the idea that a defendant should avoid paying punitive damages so as to avoid bestowing a windfall upon the plaintiffs.[92] Judge Klein nonetheless recognised the existence of an asymmetry between the punitive damages the defendant ought to pay and the damages the plaintiff ought to receive.[93] To resolve this dilemma, Judge Klein proposed a punitive damages scheme whereby plaintiffs were awarded $45 million in punitive damages, with a remittitur of the damages to $5 million if, and only if, Bank of America contributed $7.5 million to the National Consumer Law Center, $7.5 million to the National Consumer Bankruptcy Rights Center, and $3 million to each University of California law school to be used for education in consumer law.[94] Judge Klein was motivated to take the total amount of legitimate punitive damages exceeding the amount that the individual plaintiffs should retain and direct those damages to a public purpose in order to serve the societal interest.[95]

Judge Klein's punitive damages scheme not only satisfied the societal purpose of punitive damages, it also simultaneously raised the stakes of the case by adding interested parties who would be motivated to defend the punitive damages award on appeal. After Judge Klein's ruling, the National Consumer Law Center, National Consumer Bankruptcy Rights Center, Regents of the University of California, and University of California Hastings College of Law (collectively, 'Intervenors') filed a motion to intervene in the case. Judge Klein ruled that the Intervenors acquired standing 'concurrent with entry of the injunction that made them third-party beneficiaries of the punitive damages award'.[96]

Judge Klein's decision in *Sundquist* made a splash. As with *Dardinger*, whose reasoning it carried forward, the question arose: would this be just a blip, or could it be said that the momentum is building in the United States for punitive damages as a societal remedy? Thus far, it seems Sundquist's influence has been largely confined to the realm of bankruptcy. In *In Re*

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[89] J Sucher, 'A Comeuppance for Bank of America?', *Huffpost* (5 October 2018) www.huffpost.com/entry/a-comeuppance-for-bank-of-america_b_597d2675e4b0c69ef70528c5.
[90] *Sundquist* (n 75) 572–73.
[91] ibid 613-14.
[92] ibid 616.
[93] ibid ('Appellate jurisprudence regarding 'excessive' punitive damages tends to conflate the distinct concepts of the appropriate amount of the punitive damages award that the defendant's conduct justifies…and of the amount that the plaintiffs ought to be allowed to receive…'.).
[94] ibid 618–19.
[95] ibid 616.
[96] *In re Sundquist* 570 BR 92, 96 (Bankruptcy ED Cal 2017).

Charity, a bankruptcy court in the Eastern District of Virginia dealt with three similar cases regarding the wilful violation of an automatic stay by NetCredit.[97] As in *Sundquist*, the court found that NetCredit's actions were egregious enough to warrant significant punitive damages due to its reckless disregard for the rights of the plaintiffs and the size of the award in similar cases (citing *Sundquist*).[98] As for the actual harm suffered, the court acknowledged that the plaintiff's actual damages were minimal, but noted that the Fourth Circuit Court of Appeals allows punitive damages to exceed single-digit ratios when the compensatory damages are nominal or minimal.[99] Further, the court discussed the need for punitive damages in order to deter future misconduct, and after mentioning that NetCredit's net worth was $233 million dollars, concluded that the company's wealth would be considered as one factor in awarding punitive damages.[100] The court awarded three of the five plaintiffs $100,000 in punitive damages.[101] Of this $100,000, the plaintiffs were ordered to deliver $37,500.00 to the National Consumer Law Center and $37,500.00 to the Legal Services Corporation of Virginia.[102] However, the court indicated that there would be a remittitur of the punitive damages award to $15,000 to each plaintiff if NetCredit delivered the money to the third parties itself.[103]

The court in *Charity* relied extensively on *Sundquist* when it determined that the award should be allocated to third parties. The court echoed the concern of plaintiff windfall gains.[104] The court reasoned that the power to allocate a portion of the award was within its common law power, as was demonstrated by a Fourth Circuit case that held that Georgia's split-recovery statute was not unconstitutional under the Takings Clause because the plaintiff did not have a constitutionally protected property interest in punitive damages.[105] Finally, the court referred to Judge Klein's decision to allocate resources in a way that would address the underlying misconduct, and, highlighted that, as in *Sundquist*, the plaintiffs in this case would have benefitted from better legal representation and education.[106]

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[97] *In Re Charity* 2017 WL 3580173, 9 (Bankruptcy ED Va 15 August 2017).
[98] ibid 19–20.
[99] ibid 19 (citing *Saunders v Equifax Info Servs* 469 F Supp 2d 343, 348 (ED Va 2007), *affirmed sub nom. Saunders v Branch Banking & Trust Co of Va* 526 F3d 142 (4th Circuit 2008)).
[100] ibid 20.
[101] ibid 23.
[102] ibid.
[103] ibid.
[104] ibid 22 ('The dilemma involved in achieving the goal of awarding sufficient punitive damages for automatic stay violations without simultaneously providing an individual windfall was recently confronted by Judge Klein…').
[105] ibid (citing *Cisson v CR Bard* 810 F3d 913, 931 (4th Circuit 2016)).
[106] ibid 23 ('NetCredit's conduct in these cases reflects the need to direct additional resources to financially distressed consumers who have limited means to defend themselves against aggressive creditors'.). Aside from the actual award of societal damages, there was another interesting similarity between *Sundquist* and *Charity*. In *Sundquist*, the defendant was ordered to pay a portion of the punitive award to the National Consumer Law Center and National Consumer Bankruptcy Center. As Intervenors, these two parties were represented by prominent plaintiffs' law firm Lieff Cabraser. The National Consumer Law Center was also one of the parties to which the defendant in *Charity* could deliver damages in order to reduce the plaintiff's award. It does not seem that the defendant challenged the award in *Charity*, and so the National Consumer Law Center has not needed to intervene or hire attorneys to defend its stake.

(ii) Classwide Punitive Damages

What happens when the notion of punitive damages as societal damages is implicated in the context of a class action? In one sense the existence of a class action would seem to be a substitute or alternative response to the societal notion of punitive damages. But, there might still be limited justifications for the pursuit of a societal remedy even in the class action context.

In 2013, I published 'The Future of Classwide Punitive Damages'.[107] In that article, I discussed several high-profile cases in which courts certified punitive damages classes by focusing on the defendant's conduct. I argued that in order for a court to embrace a classwide determination of punitive damages, it must shift the focus from the plaintiff's individualised harm (or interest) to the defendant's conduct leading to widespread harm, thus highlighting the societal function of punitive damages.[108] For example, in *Palmer v Combined Insurance*, the judge concluded that individualised proof of a plaintiff's harm is not necessarily required when the focus is on the defendant's conduct.[109] Nor, I argued, should *Philip Morris USA, Inc . Williams* stand in the way of certifying a punitive damages class. At the time, only a couple cases had explored this issue: *Iorio v Allianz Life Ins Co of N Am*, for example, which held that *Williams* did not foreclose punitive damages on the basis of unnamed class-members, who are not equivalent to non-parties.[110]

To further explore this topic here, I examine a recent case filing that sought to certify a punitive damages class in a lawsuit filed by New Haven civil rights attorney David Rosen representing tenants of Church Street South housing complex against Northland Investment Corp of Massachusetts, the owners of the crumbling housing complex. In *Noble v Northland Investment*, Rosen filed a motion to certify the complaint as a class action, seeking damages on behalf of all present and former Church Street South tenants for damages arising from the neglected damp, moldy conditions at the complex.[111] The putative class members are all 'low-income families or individuals who signed identical leases, resided in the same complex, and have been or will soon be relocated as a result of pervasive conditions that affected all of the residents of Church Street South'. And 'the defendants' conduct affecting each class member arose from a

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[107] Sharkey (n 4).
[108] ibid 1134.
[109] *Palmer v Combined Insurance* 217 FRD 430, 438 (ND Ill 2003). And in *EEOC v Dial Corp* 259 F Supp 2d 710, 712, 715 (ND Ill 2003) the court reasoned that a defendant's conduct is the most important factor in determining punitive damages awards. Moreover, a jury awarding compensatory damages for an individual or small group cannot adequately determine the awards needed to deter a pattern or practice. Sharkey (n 4) 1137 (citing *Palmer*, 438 (ND Ill 2003)).
[110] *Iorio v Allianz Life Ins Co of North Am*erica 2009 WL 3415703, 5 (SD Cal 21 October 2009) ('[P]unitive damages will be awarded based on the injury inflicted upon all class members, not individual class members…[and the] [p]unitive damages award will be based largely on the misconduct of the Defendant'); see also *Tawney v Columbia Natural Resources, LLC*, 2007 WL 5539870 (Cir Ct W Va 27 June 2007).
[111] *Personna Noble v Northland Invest Corp* No X10-UWY-CV-16-6033559-S, Plaintiffs' Corrected Memorandum in Support of Motion for Class Certification 38. The court held an all-day hearing on class certification, after which the parties engaged in a year-long mediation, culminating in a settlement. See www.davidrosenlaw.com/_assets/images/First-Amended-Stipulation-of-Settlement-Doc-292.pdf; www.davidrosenlaw.com/church-street-south-settlement.

common motivation, the desire of Northland Investment Corporation and its affiliated entities to demolish the complex and build upscale housing in its place'.

The facts of the case do not lend themselves to the typical justifications for punitive damages as a societal remedy. To begin, given the framing of the case as a class action, there is not a significant risk of absent plaintiffs who might have been similarly affected by the alleged widespread harms inflicted by the defendant. Nor is concealment of wrongdoing an issue in the case. But the case nonetheless highlights two additional dimensions that might justify punitive damages as a societal remedy: the repeated history or pattern of wrongdoing on the part of the developer and the fact that the claim arises under a statute that defines specific wrongdoing as an affront to the public interest.

In order to convince the court to certify a punitive damages class, the plaintiffs' attorneys attempted to disabuse the court of the conventional individualised notion of punitive damages. The plaintiffs' attorneys did this in part by shifting the focus away from the plaintiffs' losses and onto the common nature of the defendant's conduct leading to widespread harm. In particular, the plaintiffs highlighted their engineer's findings that the widespread harms all stem from similar defective conditions in each building owned by the defendant.[112] Thus, when assessing punitive damages, a single defendant's behavior, common to the plaintiffs, could be scrutinised.

But the plaintiffs could have bolstered their case by emphasizing the societal purpose of punitive damages. *Hilao v Estate of Marcos* could be helpful support for a money damages class action centred on the societal element of punitive damages.[113] Two added dimensions (each discussed above in Section II.B) implicated by the *Northland* case further strengthen the case for punitive damages as societal damages. First, given a long history of housing code violations at this property, the case might be illustrative of the need for punitive damages where there is a continued pattern of misconduct. Second, the case for punitive damages is strengthened given the relationship between the societal rationale for punitive damages and the asserted public interest under Connecticut's Unfair Trade Practices Act.

C. Settlement

Equally if not more significant than the litigation arena is the extent to which private litigants might adopt a societal damages approach in negotiating settlements.[114]

(i) In Recognition of Societal Damages

The May 2019 Purdue settlement provides a template that may prove to have staying power in resolving mass tort cases in the public interest, transforming a significant portion of the recovery into a form of societal damages. To settle a public nuisance lawsuit brought by the state of Oklahoma, Purdue agreed to pay $102.5 million to fund the National Center for Addiction Studies

[112] ibid 7-9 (citing *Palmer* (n 109) 438.
[113] *Hilao v Estate of Marcos* 103 F3d 767, 780 (9th Circuit 1996).
[114] For a broader discussion of 'how the specter of punitive damages…influenced Gulf Coast claimants' actions, from foregoing payments from BP's private compensation fund, to the claims asserted in the BP litigation and the settlements eventually reached', see Sharkey, 'BP Oil Spill' (n 6) 691-96. It is worth noting, too, that the *Northland* case settled in the shadow of the court's hearing on the class certification motion: see n 112.

and Treatment, 'dedicated to addiction studies, treatment and education, including education to eliminate the stigma associated with addiction and treatment', housed at Oklahoma State University's Center for Health Sciences.[115] Purdue also agreed to 'use reasonable efforts to encourage the provision of additional funds for the National Center in any other settlements it may enter into regarding the sales and promotion of Purdue Opioids'.[116]

Purdue's settlement fits a pattern of what I have termed embedded societal punitive damages (even if not named as such) in the context of class action settlements. The consolidated BP oil spill lawsuits, in which plaintiffs sued BP (which leased the rig and operated the oil and gas prospect), Transocean (which owned the rig), and Halliburton (which worked the rig and poured concrete), are a case in point. In the wake of large-scale devastation to the affected communities, the environment, and society at large, the plaintiffs pressed societal justifications for punitive damages based on both punishment and societal economic deterrence rationales:

> [P]iecemeal adjudications may under-deter Defendants' misconduct by failing to account for the full scope or total social costs, thereby frustrating the purpose of punitive damages - the vindication of society's interests in deterrence…that is fully and fairly proportionate to…its harm to society as a whole.[117]

After months of negotiation, plaintiffs and BP agreed to a classwide settlement. Although the high-profile BP oil spill settlement provided in strict terms only for compensatory damages to claimants, it incorporated 'risk transfer premiums' (RTPs), or supra-compensatory multipliers applicable to certain claimants, that (I have argued previously) incorporated an embedded societal punitive damages award.[118] As is typical in mass tort settlements, the parties' attorneys negotiated a claims grid that compensated class members based on the relative strength of their claims. The RTPs are a striking feature of the compensation grid; they essentially mimic a complex multiple damages statute, providing various supra-compensatory multipliers for different types of claims. The compensation grid provides for varying RTPs based on the relative strength of claims, including eligibility for punitive damages. As my prior analysis demonstrates, the RTPs for punitive damages-eligible claimants (primarily those in commercial fishermen categories) are much higher than those for other claimant categories.[119] Moreover, the parties themselves recognised that RTPs were, in significant part, a surrogate or stand-in for punitive damages - which were not included as a separate component of the settlement. RTPs thus represent a form of societal damages given to classes of claimants eligible to receive punitive damages.

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[115] *Oklahoma* (n 77) Settlement Agreement at ¶ B(1)-(2). The National Center will be part of the OSU Center for Wellness and Recovery. The State created a foundation to receive and manage the funding directed to the National Center. Purdue agreed to supply medically assisted treatment drugs over a five-year period with retail market value of $20 million. Purdue also agreed to pay $59.5 million in attorneys' fees to the state's outside counsel; $500,000 to the Attorney General; and $12.5 million to political subdivisions. In addition, the Sackler families agreed to contribute $75 million to the foundation over a four-year period.

[116] ibid ¶ I(7).

[117] *3G Fishing Charters LLC and others v Kirby Inland Marine LP and others,* No 3:14CV00107 Class Action Complaint, 9.

[118] Sharkey, 'BP Oil Spill' (n 6) 697.

[119] See ibid 699-702.

Class action settlements might readily accommodate the societal component of such punitive awards - but the possibility of settlement might just as readily thwart a court's pursuit of a societal remedy.[120]

(ii) As Threat to Societal Damages

Settlement potentially threatens the viability of using punitive damages as societal damages. In 'Punitive Damages as Societal Damages', I explained that '[s]plit-recovery schemes have been criticised on the ground that they simply force more plaintiffs to settle meritorious punitive damages claims'.[121] Plaintiffs and defendants would have an added incentive to settle to cut out the state's portion of a punitive damages recovery. Courts in split-recovery regimes, moreover, have more or less sanctioned this effect. The Oregon Supreme Court has held that, although the state was made a 'judgment creditor', the split-recovery statute did not 'provide that the state's consent to a settlement is required'.[122] The court reasoned that, in order for the state to prevent a settlement, the statute would have to explicitly give the state this power.[123] Similarly, although Missouri gets a 'lien for deposit into the tort victims' compensation fund to the extent of fifty percent of the punitive damages final judgment', this does not apply to cases resolved by 'compromise settlement prior to a punitive damages final judgment'.[124] Indeed, the Missouri Supreme Court reasoned that the 'legislature may have sought to encourage settlement so as to avoid the burden litigation imposes on the parties and the judicial system'.[125]

In *Weinberger v Estate of Barnes*, the Indiana Court of Appeals concluded that the state's split-recovery statute did not grant the state the right to intervene, and thus the state was unable to prevent the parties from settling in a way that cut out the state's portion of the punitive damages.[126] In its petition for direct transfer to the Supreme Court, the state of Indiana made multiple arguments as to why this outcome was incorrect. Citing 'Punitive Damages as Societal Damages', the state argued that the split-recovery statute is beneficial for achieving deterrence and simultaneously mitigating windfall gains.[127] It also noted that permitting the state to intervene would provide an incentive to settle before trial.[128] If the state cannot intervene, then the plaintiff has a diminished incentive to settle before the judgment is announced, because the plaintiff can wait until the punitive damages are awarded and then settle to cut out the state's portion. Nevertheless, the Indiana Supreme Court denied the transfer, and the government was not permitted to intervene.

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[120] ibid 682 ('Class action settlements can readily accommodate the 'public law' dimension of societal damages, as demonstrated by the Halliburton class settlement and its explicit focus on punitive damages claims'.).
[121] Sharkey, 'Societal Damages' (n 6) 444.
[122] *Patton v Target Corp* 242 P3d 611, 619 (Or 2010) (citing Oregon Revised Statutes Annotated § 31.735).
[123] ibid ('The court is not at liberty to give effect to any supposed intention or meaning in the legislature, unless the words to be imported into the statute are, in substance at least, contained in it'.) (internal quotation marks omitted).
[124] Missouri Annotated Statutes § 537.675(3) (West 2020).
[125] *Fust v AG* 947 SW2d 424, 432 (Mo 1997).
[126] *Weinberger v Estate of Barnes* 2 NE3d 43, 50 (Ind 2013) (citing Sharkey, 'Punitive Damages as Societal Damages' (n 6)).
[127] State of Indiana's Petition for Transfer, *Weinberger v Estate of Barnes*, 2014 IN S Ct Briefs LEXIS 22 *18 (Ind 17 January 2014) (No 45A04-1107-CT-369).
[128] ibid *19.

But in 'Punitive Damages as Societal Damages', I maintained that:

> [T]he 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.[129]

All of this, however, hinges on a court's approach to standing, intervention and, if relevant, judicial approval of settlement. Georgia's split-recovery statute, for example, is unique in that it provides that the state has an interest in the litigation as soon as the judgment is rendered.[130]

Sundquist shines a light on the role of judicial approval of settlements. Bank of America eventually settled with the Sundquists, who received more than the share of punitive damages originally allocated to them. The Sundquists voluntarily gave $300,000 post-tax to the intervening organisations.[131] Judge Klein was given the opportunity to review the settlement per the federal bankruptcy rules.[132] This process of review seems crucial for protecting societal interests. If Judge Klein did not need to sign off on the settlement, then it is possible that the parties could have entirely cut out the Intervenors.

In the class action context, societal damages may be even easier to administer through settlement. Judges must approve all settlements under Federal Rule of Civil Procedure 23(e), eliminating worries of backroom settlements that cut out third parties.

But there is no similar rule for judicial review of settlements in litigation.[133] Nonetheless, once a judgment is entered, the parties must move to vacate the judgment, as was the case in *Sundquist*, where Judge Klein agreed to vacate the damages award.[134] Judge Klein also indicated that the Intervenors could appeal the vacatur, but they had agreed not to do so. Thus, even if the

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[129] Sharkey, 'Societal Damages' (n 6) 445.

[130] See Georgia Code Annotated § 51-12-5.1(e)(2) (West 2020) ('Upon issuance of judgment in such a case, the state shall have all rights due a judgment creditor until such judgment is satisfied and shall stand on equal footing with the plaintiff of the original case in securing a recovery after payment to the plaintiff of damages awarded other than as punitive damages'.).

[131] *See Sundquist v Bank of Am, NA (In re Sundquist)*, 580 BR 536, 543 (Bankr ED Cal 2018).

[132] Fed R Bank P 9019(a) states, in relevant part: 'On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement'. Despite the fact that this language appears to be permissible, a majority of courts have held that 'compliance with the Rule is mandatory'. R A Valencia, 'The Sanctity of Settlements and the Significance of Court Approval: Discerning Clarity from Bankruptcy Rule 9019' (1999) 78 *Oregon Law Review* 425, 439. Judge Klein further noted that the court could retain jurisdiction over the settlement agreement. *In re Sundquist*, 580 BR 536, 553 (Bankruptcy ED Cal 2018) (citing *Kokkonen v Guardian Life Ins Co of Am* 511 US 375, 381 (1994)).

[133] See, eg *Times Mirror Magazines, Inc v Field & Stream Licenses Co* 103 F Supp 2d 711, 741 (SDNY 2000) ('[J]udicial review of trademark settlement agreements would undermine the policy of giving deference to the contractual agreements of business people who are in a better position than the court "to determine whether their self-interest is better served by making such contracts or not"'.).

[134] It is entirely possible that a judge could refuse to vacate the award. Fed R Civ P 60(b) does not mandate that a judge must relieve a party from a judgment - it simply permits them to vacate the judgment under certain circumstances. And in the case of a jury trial, Fed R Civ P 58(b) mandates that the clerk must enter a judgment when the jury enters a verdict, and thus the parties are prevented from settling in a gap between the verdict and judgment.

judge does allow the settlement that cuts out third parties,[135] if third parties are given the right to intervene, they could appeal the decision to vacate a judgment in order to allow a settlement.

Notwithstanding approval of the settlement, Judge Klein refused to vacate the judgment because he believed that the situation had become 'bigger than the Sundquists', due in part to the fact that the Intervenors had an interest in appealing the judgment and because the opinion 'appears to have struck a chord in the development of the law'.[136] Further, Judge Klein did not want the entire settlement to remain secret because he was 'reluctant to exercise [the court's] discretion to sweep the matter under the carpet because the parties in a secret compromise are agreeing not to appeal'.[137] Judge Klein believed that the public had an interest in the final outcome. Nevertheless, the court did not disclose the amount of the settlement award; it noted only that the Sundquists received a substantial premium over their $6,074,581.50 share of the initial judgment.[138]

Finally, because Judge Klein believed the public interest component was crucial to punitive damages, he seemed to have approved the settlement only because the Sundquists elected to voluntarily donate part of their award to the Intervenors, which Judge Klein described as their 'de facto recognizing the public-interest component' of the punitive damages.[139] Thus, the court approved the settlement, vacating the damages award without vacating the opinion or the judgment.

V. Conclusion: Far-reaching Implications of Societal Damages

Because the remedy of punitive damages lies squarely within the purview of state law, state legislatures and courts possess a degree of freedom to articulate state-based goals of punitive damages - such as economic deterrence - even in the face of heavy-handed federal constitutional review imposed by the US Supreme Court. Once societal deterrence is recognised as a legitimate state interest or goal for the award of supra-compensatory damages, state legislatures and common law courts face the challenge of setting forth relevant factors to measure deterrence, whether premised on loss internalisation or gain elimination.

Recognising situations where defendants (often corporations) have inflicted widespread harm, courts and litigants have created funds, either from diverted punitive damages or settlement proceeds, to acknowledge the societal harm. Punitive damages were thereby transformed into a societal remedy that simultaneously addressed the "windfall" gains or unjust enrichment of the plaintiff and remediated the societal harm.

In closing, I hint at three significant implications of the transformation of punitive damages into societal damages simply to indicate how far-reaching they may be. First, to the extent that societal damages are awarded for general deterrence purposes, they should not be subject to the US Supreme Court's constitutional excessiveness review, which, as mentioned above, is focused

[135] This seems unlikely when the judge is the one that ordered the societal damages. This might be more likely in a state with a split-recovery statute, however, when the judge may not approve of split-recovery.
[136] *In re Sundquist* (n 75).
[137] ibid 545.
[138] ibid 553.
[139] ibid 554.

on the need to constrain punishment in the civil context. This is especially critical in the context of statutory damage multipliers - to the extent these are compensatory/preventative as opposed to punitive, they should fall outside the gambit of constitutional excessiveness review.

Second, societal damages should be insurable. Indeed, the gradual acceptance of insurance for punitive damages over the last fifty years stems, in part, from the evolution of punitive damages themselves. We saw earlier that punitive damages were once awarded predominantly for acts that satisfied malice aforethought or intentional wrongdoing. By contrast, now many punitive awards arise from what was essentially accidental conduct, albeit committed recklessly. Understood as societal damages, punitive damages cannot be sequestered from other forms of compensatory damages that are legitimately the subject of litigation insurance.[140]

Third, there should be no bar for vicarious liability for societal damages. The same arguments raised against insuring punitive damages are applicable to the question whether the law should impose vicarious liability for punitive damages. That said, seen via a societal deterrence perspective, vicarious liability may, in certain contexts, serve as a substitute for punitive damages.[141] This would be the case where the risk of under-detection of harms provides the justification for an expansion of the scope of institutional or employer vicarious liability and would correspondingly reduce the need for imposition of punitive damages on that ground.

In sum, the reconceptualisation of punitive damages as a societal remedy could have far-reaching effects both in terms of the evolution of US doctrine but also influencing law reform efforts in various other countries.

[140] C M Sharkey, 'Revisiting the Noninsurable Costs of Accidents' (2005) 64 *Maryland Law Review* 409, 438–50.
[141] See C M Sharkey, 'Institutional Liability for Employees' Intentional Torts: Vicarious Liability as a Quasi-Substitute for Punitive Damages' (2019) 53 *Valparaiso University Law Review* 1.