Do Punitive Damages Compensate Society?

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As a retributive device, punitive damages are problematic. Retribution usually is a function of the criminal law, where criminal procedure offers defendants considerable safeguards against unjust punishment. By moving punishment into the realm of civil actions, punitive damages circumvent those safeguards.[1]

The uneasy case for civil punishment may explain the quest to justify punitive damages on bases other than retribution. The origin of punitive damages may in fact be compensatory rather than punitive. Judges crafted the category of exemplary damages as a justification for

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1. This Article does not contend that the circumvention violates the law. The Supreme Court has held that the Excessive Fines Clause of the Eighth Amendment does not limit the power of state courts to award punitive damages in actions between private parties, where the state neither prosecutes the claim nor has any right to receive a portion of the proceeds. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 260, 264 (1989). Still, the Supreme Court has shared the uneasiness that results when sanctions traditionally imposed by criminal law find their way into civil actions. *See* United States v. Halper, 490 U.S. 435, 446–49 (1989) (holding that a civil action brought by federal government following criminal prosecution was limited by the Fifth Amendment double jeopardy clause), *overruled by* 522 U.S. 93 (1997). Some state supreme courts share uneasiness about circumventing limitations on punishment. "Thus, the focus of the clause is on the impact of the punishment to the individual. We do not believe the State can make an end run around the Excessive Fines Clause by simply making a punishment payable to a victim." State v. Izzolena, 609 N.W.2d 541, 547–51 (Iowa 2000) (ruling that the Eighth Amendment Excessive Fines Clause does limit victim restitution award of $150,000 imposed as part of a criminal sentence, but affirming the award as not excessive) (internal citation omitted).

affirming jury awards that exceeded the tangible losses when the award seemed appropriate given other losses not then compensable under the law.[2] Once the law began to compensate for insult, indignity, and distress, the need to circumvent the restrictions on recovery disappeared. But the doctrine, originally explained as a punishment to deter, remained.

Today, efforts to justify punitive damages as compensatory—or at least to avoid describing them as retributive—continue. One of the most intriguing is a work by Catherine M. Sharkey entitled *Punitive Damages as Societal Damages*.[3] Professor Sharkey suggests that punitive damages, to some degree in some cases, actually assess damages incurred by members of society who are not parties to any legal action to recover them. The assessment of damages in excess of the plaintiff's own losses may serve as compensation for the losses others suffer but that otherwise will not be recovered from the defendant.

Professor Sharkey reads this purpose in two related changes in punitive damages. From a theoretical standpoint, she draws on deterrence theories. In suggesting that defendants never compensate victims for many of the harms defendants cause, these articles identify a shortfall in the traditional compensatory damages defendants pay.[4] To the extent that this shortfall helps justify punitive damages, the assessment takes on a less retributive flavor, even if not exactly a compensatory flavor. Because punitive damages may not be directed toward the victims who suffered the uncompensated losses, that compensatory note may sound a bit hollow. Professor Sharkey's second insight responds, at least in part. From a practical standpoint, she notes a number of jurisdictions that require a substantial portion of punitive damages to be paid to the state.[5] Diverting funds to the public puts them to use for the benefit of society, not the individual plaintiff. To the extent that punitive damages do represent losses caused to but not recovered by people other than this

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2. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 10–19 (1982).

3. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003).

4. Sharkey, *supra* note 3, at 366–67. Deterrence theory urges that defendants should internalize all the costs their misconduct causes. That will create an incentive to prevent those losses if the harms exceed the cost of preventing them, but will not encourage inefficient prevention (when the cost of prevention exceeds the harm to be prevented). *See, e.g.*, Robert D. Cooter, *Economic Theories of Legal Liability*, 5 J. ECON. PERSP. 11, 11–15 (1991). If, however, defendants escape paying the full cost of the harms they cause, they will internalize too little of the cost, and their incentive to prevent the harms will be too small. David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 271–72 (1989).

5. Sharkey, *supra* note 3, at 375–80; *see, e.g.*, FLA. STAT. ANN. § 768.73(2) (West 1997); IOWA CODE ANN. § 668A.1(2) (West 1998); Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121, 145–46 (Ohio 2002).

plaintiff, the state serves as a surrogate for the members of the public who were not adequately compensated. This portion of the punitive award, then, compensates the public for harms done to the public.

Having identified the theory, Professor Sharkey goes further to suggest that the funds could be directed to the individual victims of the defendant's wrongdoing. She suggests two ways to achieve this. She suggests a new damages-only class certification, at which other people's claims could be proven. This procedure would allow the uncompensated losses to provide the measure of defendant's additional damage liability, in addition to serving as a conduit to the persons whose need for compensation justifies the assessment. Alternatively, funds could be directed to a program that serves the needs of people most likely to be victims. For instance, punitive damages for sexual harassment might be used to train defendant's supervisors on harassment issues. Punitive damages in an insurance case might be directed to the state insurance commissioner for use in monitoring and prosecuting inappropriate insurance business practices. These suggestions for redirecting punitive damages away from the plaintiff are interesting, but comment on them would considerably lengthen this Article. Instead, I want to focus on the theory itself, the concept that punitive damages can be justified as a substitute for compensatory damages for harms caused by the defendant to persons other than the plaintiff.

This paper concludes that punitive damages are a poor device for redressing harms caused to persons not a party to the action. Punitive damages certainly have a role to play in deterring pure malice.[6] How far beyond malice punitive damages should go—and whether they should be imposed by civil rather than criminal procedure—are open to debate. But once punitive damages seek to address concerns beyond the plaintiff and the defendant, they raise a series of problems that defy rationalization. Considering the harm to society may justify larger awards by circumventing limitations inherent in redressing the wrong to only one plaintiff. But no sound justification exists for using punitive damages in this way.[7]

6. No matter what else punitive damages may do, they should offset any malicious glee a defendant takes from causing harm to another. While malicious glee may be a benefit to the defendant, society should afford that benefit no weight in determining the costs and benefits of misconduct.

7. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003) ("In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm *to the plaintiff* and to the general damages recovered.") (emphasis added).

Let me distinguish two other theories that, though related, are not the subject of this Article. One holds that punitive damages compensate the plaintiff for losses that damage rules do not satisfy. The American rule on attorneys' fees leaves plaintiff undercompensated if she recovers exactly the amount of her loss.[8] Rules on certainty and foreseeability may preclude recovery of some losses caused by the breach. Rules that limit plaintiff to the market value of property may underestimate the true loss to the plaintiff.[9] The problems with this argument are well known. These factors are not limited to cases in which defendant acted intentionally or recklessly. Thus, punitive damages will correct these shortcomings in only a small percentage of cases. In addition, punitive damages are not measured by the amount of the shortcoming, but by the amount necessary to deter similar misconduct in the future. Thus, punitive damages may exceed these uncompensated losses (or, in some cases, may not cover the uncompensated losses).[10] Finally, and perhaps most important, to the extent that these limitations serve legitimate purposes, circumventing them via punitive damages undermines those purposes. Whatever may be said against these doctrines, it seems preferable to address them directly and amend or eliminate them as appropriate. In any event, my comments below have no import to efforts to compensate the plaintiff in the case for losses that she suffered. This Article addresses only the implication that punitive damages can be justified as a means of assessing defendant with damages suffered by persons who were not party to the action.

A second related theory notes that punitive damages may resemble restitution. In some cases, juries appear to determine the extent of the benefit that defendant reaped by its wrongful conduct and to assess that

8. Whether the plaintiff's attorney is paid a portion of the award on a contingency or recovers an hourly fee, the plaintiff's net recovery is less than her full loss.

9. Arguably, any owner who was not trying to sell the property probably valued it more highly than prospective buyers. There are many qualifications on this insight. The owner might misperceive prospective buyers' willingness to pay. The owner might value the property less than others, but the expected cost of sale might exceed the gains from the trade. An owner who might value the property relatively little might not advert to the possibility of sale. Still, limiting owners to objective value often will undercompensate them, even though allowing subjective value risks overcompensating them.

10. In *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the total damages were $33,350, including punitive damages. *Id*. at 564–65. Neither the opinions nor the briefs in the case reveal the ratio of compensatory to punitive damages. Perhaps the punitive damages would have covered the attorney's 33% contingency fee. Still, there is room to suspect that the punitive award was a relatively modest portion of the recovery, perhaps too little to cover the attorney's contingency. Because the case involved a fee shifting statute, plaintiffs recovered over $245,000 in attorney's fees, *id*. at 565, surely a more direct way to address undercompensation.

amount as punitive damages.[11] While not compensatory, the recovery also is not exactly punitive. It applies restitution principles to remove defendant's gain. In a proper case, a jury might be instructed to do just that. Typically, however, one would not award restitution on top of an award of compensatory damages. Nor is disgorgement of benefits always the measure of restitution. Finally, when restitution is large enough to be punitive, it may involve aggregating the restitution claims of many persons.[12] To the extent that the restitution approach seeks recovery on behalf of persons not represented in the suit, some of the comments below may apply equally to it. But my comments continue to focus on plaintiff's losses, not defendant's gains.

Assessing punitive damages in the amount of compensation to nonparties may seem too obvious a target. Merely stating that the award includes amounts allegedly lost by persons not party to the action will impeach the idea for some. But respectable authorities urge that damage awards can and should exceed the amount needed to compensate the plaintiff's losses in order to make up for the inability of some victims to recover.[13] That position stems from a criticism that compensatory damages underdeter—not because the plaintiff's own losses are undercompensated, but because many of the losses a defendant may cause never mature into damage judgments. If some persons do not recover from the defendant for the harms defendant caused, defendant has too little incentive to invest in prevention.[14] That is particularly true when defendant can anticipate that some of the claims either will fail or will never be brought. In order to achieve optimal deterrence, then, persons who do recover should be awarded more than their actual losses—by just enough to cover the losses to people whose claims defendant otherwise might escape.

As an economic theory, the point is relatively sound. Indeed, the criticism often comes from the other direction—from people who

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11. *See, e.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 358 (Ct. App. 1981) (discussing the jury's punitive award of $125 million (arguably based on the amount Ford saved by not making fuel tank safer) which was remitted to $3.5 million).

12. In *Grimshaw*, for example, the $125 million punitive damage award represents a relatively small savings per car on millions of cars sold. Presumably, the benefit to Ford from the plaintiff was only a small portion of the total benefit. The total accumulates the restitution claims of all buyers, not just the plaintiff.

13. *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887–96 (1998).

14. *See* Leebron, *supra* note 4.

believe the theory unduly limits punitive damages, rather than from people who believe the theory unduly justifies them.[15] But when reduced to practice, the theory threatens to trammel due process. The theory, for instance, has a counterpart in criminal law, where it suggests imposing really large punishments on criminals we catch easily in order to achieve greater deterrence for the least amount of law enforcement resources.[16] Whatever the societal benefits by way of deterrence, it seems a bit odd to treat criminal defendants as fungible, such that punishing one more than she deserves offsets punishing another less than she deserves. Or perhaps economic models of criminal law simply do not appeal.

As applied to punitive damages, the theory may not treat defendants as fungible. Societal compensatory damages rest on the assumption that the defendant's conduct has more than one victim. In cases of products liability, that commonly will be true. In cases where the misconduct arises from a policy—a discriminatory hiring policy, a policy of denying insurance claims regardless of the merits—the policy often will affect more than one person. The goal is to assess defendant for the harms it caused to others, not for harms others caused by similar misconduct. To that extent, at least, the theory maintains credibility.

Nonetheless, due process problems arise. Three deserve discussion: (1) ascertaining the merits of the absent person's claim, (2) ascertaining the proper recipient of the absent person's claim, and (3) protecting the rights of the absent person's potential future claims.

The first problem—identifying the merits of the absent person's claim—is the greatest. Defendants often harm multiple individuals. Some of those harmed may not prevail, even if their claims are meritorious.[17] But the problems that prevent persons from recovering on their own claim also make it very difficult to include their claims in the plaintiff's quest for punitive (or societal) damages. Whether one seeks to estimate the other losses in the aggregate (as by formula)[18] or

15. *See, e.g.*, Gregory C. Keating, *Pressing Precaution Beyond the Point of Cost-Justification*, 56 VAND. L. REV. 653 (2003).

16. *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

17. The victim may never discover some claims. The victim may elect not to bring some claims even if known. The victim may lose some filed claims on technicalities unrelated to the merits (such as the statute of limitations). The victim may lose other filed claims on the merits, despite the need to include those losses in order to achieve optimal deterrence (economic loss doctrine).

18. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 415 (2003), the Utah Supreme Court reinstated an award of $145 million in punitive damages (over a trial court's remittitur to $25 million) in part because "State Farm will only be punished in one out of every 50,000 cases as a matter of statistical probability." *Id*. at 426. For deterrence purposes, the rate at which State Farm would be compelled to pay compensatory damages would be more important than the rate at which it will be

individually (Professor Sharkey's damages-only class), the problem remains determining how many of the uncompensated claims there are and how many actually deserve compensation.

State Farm Mutual Automobile Insurance Co. v. Campbell[19] offers an interesting case study. On its face, it seems to present an appealing case for increasing plaintiff's recovery in light of other claims. State Farm denied Campbell's insurance claim in part due to its Performance, Planning & Review (PP&R) program, a policy aimed at increasing profits by reducing the cost of paying claims.[20] By aiming the policy at "the weakest of the herd," State Farm tried to exploit the possibility that some victims would not sue by singling out exactly those least likely to bring a claim.[21] The case virtually calls out for augmenting damages to make up for the inability of compensatory damages to deter adequately.

The minute one attempts to put a number on the claims, however, problems emerge. While State Farm's policy seems to call for rejection of meritorious claims, it undoubtedly calls for rejection of meritless claims. The damages to society, thus, include only a subset of the claims State Farm rejected. State Farm is unlikely to keep records revealing which claims were denied on the merits and which were denied despite the merits. Indeed, all such claims will be denied on the merits; some denials are bad decisions on the merits, but all will masquerade as legitimate denials. One might resolve any uncertainty against State Farm. Having formulated a policy that encouraged denying meritorious claims, State Farm created uncertainty as to the merits of all claims it rejected. Resolving uncertainty by presumption, however, usually follows efforts to resolve uncertainty by evidence. Only when evidence fails to establish an issue with sufficient certainty is it necessary to resort to a presumption.[22] Thus, before assessing State Farm with damages designed to compensate other victims, it deserves some opportunity to show that the other alleged victims were not damaged by a legal wrong.

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punished. Nonetheless, an estimate of the rate of unsuccessful claims was used to justify a larger recovery in this successful claim. The U.S. Supreme Court found $145 million in punitive damages to be excessive and suggested to the Utah courts an amount at or near the $1 million compensatory award. *Id*. at 429.

19. *State Farm*, 538 U.S. at 408.

20. *Id*. at 431 (Ginsburg, J., dissenting).

21. *Id*. at 433 (Ginsburg, J., dissenting).

22. This applies to any rebuttable presumption. Regardless of where the burden of persuasion ultimately falls, evidence on the issue may be admitted by either party.

Even once the number of improper rejections is known, the amount of harm caused by each rejection must be calculated. While some claims may involve set amounts (the death benefit in a life insurance policy, for example), other claims will involve disputed amounts (the value of property destroyed by a fire), and still others will involve nonpecuniary amounts (the distress suffered as a result of denying the claim). In *Campbell*, the entire claim was for distress. Although State Farm refused a settlement and initially refused to cover the excess judgment against its insured, it eventually paid all pecuniary losses before suit. The bad faith claim involved only the distress suffered because of these initial refusals to pay. The jury assessed that distress at $2.6 million.[23] But a jury will have considerably more difficulty assessing the distress of persons not before the court. Even if the conduct that allegedly caused the distress can be presented without the victim's testimony, the severity of the effect upon each victim cannot be ascertained with any confidence.

My objection is only partially practical. To a large degree, my concern is with due process. While a formula might be devised to estimate the extent of harm wrongfully caused by State Farm's misconduct, that formula engages in presumptions about the merits of other potential cases. Some of these potential cases have not been brought to court and, thus, never proven to the satisfaction of the legal system. Worse, some of the cases have been brought to court and have been resolved by the legal system, but resolved against the plaintiffs for reasons that do not alter the desire to deter defendants. The decision to include other people's claims (whether unsuccessful or unbrought) in the plaintiff's claim circumvents all the requirements of bringing and proving an action. In effect, due process for defendant simply falls from the equation.[24]

Perhaps insurance bad faith claims are too easy a target. Consider, then, a product liability case, in which all claims involve an identical design defect. The Ford Pinto cases make a good illustration.[25] The design defect made the Pinto more prone than most similar cars to leak fuel or burn when hit from behind. We may assume (*arguendo*) that the issue of whether the Pinto was defective should be resolved the same way in every case.[26] But that will not necessarily mean that every

23. *See State Farm*, 538 U.S. at 412–16. The trial court subsequently reduced this compensatory damage award to $1 million. Unlike the trial court's reduction of the punitive award, the compensatory reduction was upheld by the Utah Supreme Court. *Id.* at 415.

24. Yes, defendant does get due process in the claim brought by this one plaintiff. But if one plaintiff could establish the rights of all others, without evidence relating to the claims of others, class actions would be unnecessary. The circumvention here is significant.

25. *See, e.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981).

26. Juries might disagree on the issue of defect for any number of idiosyncratic

person injured by fire in a rear end collision should recover from Ford. Causation remains an issue: some fires might have occurred even if the Pinto had a state-of-the-art design (as when the accident occurs at speeds that even the best tank cannot withstand). Contributory negligence (or a similar defense) might play a part either in liability or in damages (if the rear-end collision was caused by the Pinto driver's negligence).[27] Finally, even if liability is clear, the amount to include as damages for other victims may be unclear. The severity of injuries may vary among the accidents. Even within the most severe cases, damages for death and total disability vary greatly with the earning capacity of the victim.

Perhaps the example is, again, poorly chosen. With injuries this severe and a defect this well publicized, perhaps everyone will bring an individual suit, leaving no hole for societal compensatory damages to fill.[28] If so, then societal compensation offers no justification for punitive damages in these cases. Perhaps a less severe injury, such as the damaged paint in *BMW of North America, Inc. v. Gore*,[29] leaves more room for societal compensation. But the problems of assessing how many others to include in compensation remain. *BMW* raised the difficulty of conduct that was not wrongful in most states.[30] It also raises the second issue for discussion: determining the proper beneficiary of the absent person's claim.

Societal damages seek to protect claims that others could have brought even if they did not bring them. Where the harms to the plaintiff are relatively modest, there are many reasons that people might choose not

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reasons. Variations among the states in the definition of defect might lead an identical jury hearing identical evidence to produce different results. Differences in rules on admissibility might compound the variations. Still, each car had an identical design; it seems odd to contend that one was defective while an identical car was not. For purposes of discussion, therefore, this Article assumes uniform results on this aspect of the cases.

27. Indeed, Ford won at least one of the claims brought alleging injuries from burn after a rear-end collision. *See* Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1030 n.66 (1991) (citing a report by the National Highway Traffic Safety Association (NHTSA)).

28. Gary Schwartz reported data gathered by the NHTSA. A total of thirty-eight accidents involved fuel leakage or fire after a Pinto suffered a rear end collision. These produced twenty-seven deaths and twenty-four nonfatal burns, resulting in twenty-nine lawsuits. *Id*. at 1030 & n.66. Some of the cases involved more than one victim; *Grimshaw*, for example, involved two people. *Id*. at 1016. Thus, twenty-nine lawsuits might include all fifty-one victims.

29. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 563–64 (1996).

30. *Id*. at 569 n.13.

to pursue their own claim. Some of these reasons suggest the victim's intent to allow the defendant to keep any unpaid portion of the claim. That is clearest with settlements, where the plaintiff waives any claim to a greater amount in return for immediate (and undisputed) entitlement to a lesser amount. Settlements may not comport with the economist's desire for full internalization. Yet it is difficult to assert that the remainder of the loss should be recovered in a different plaintiff's suit. Whatever amount plaintiff left on the table, defendant bargained for it and plaintiff accepted the bargain. It belongs to defendant, not some third party.

Another reason involves forgiveness. Some victims believe in forgiving those who sin against them. That forgiveness is a gift to the defendant. It is not a gift to a subsequent plaintiff, to the state, to a charitable organization, or to any other person who might receive the proceeds of societal compensatory damages. To redirect it undermines the plaintiff's act of forgiveness.

Arguably, even victims who want to sue but find the cost prohibitive intend a gift to the defendant.[31] These victims weigh the cost to themselves against the prospect of letting the defendant keep whatever they might recover in a suit. In deciding not to sue, these victims know to a substantial certainty that the defendant retains the potential damages. No matter how much society might wish that these plaintiffs had instead aggregated their claim with the claims of other plaintiffs, setting aside the decision not to proceed arguably alters the allocation of rights and benefits the victim created.

Perhaps none of these is insurmountable. With a less costly procedure (such as the damages-only class proposed by Professor Sharkey), some people might press their claims rather than let defendant off the hook. More globally, perhaps society should be allowed to use other people's potential claims to achieve its deterrence goals, even if that involves overriding those people's wishes, express or implied. Trumping individual wishes seems problematic. To my knowledge, no one has proposed that waivers, gifts, settlements, or other techniques whereby defendants are released from liability violate public policy.[32] One imagines a practical difficulty of persuading people to testify about their claims if they have

31. Cost here is not limited to pecuniary costs. The cost in time and emotional stress of engaging in litigation may dissuade some persons from bringing suits.

32. Contract law once could have justified that position. The preexisting duty rule could be deployed to argue that a release given in exchange for a settlement lacked consideration if the defendant was liable to the plaintiff for more than the settlement amount. Modern weakening of the rule makes clear that a release can be valid even if defendant would have been held liable for a greater sum had the case proceeded to trial. *See* RESTATEMENT (SECOND) OF CONTRACTS § 74 (1981).

decided not to undertake the cost (whether due to settlement contract, inertia, or forgiveness). The decision to assess the damages incurred by one victim and incorporate them into another victim's suit seems to require some consent (at least a failure to opt out) from the first victim. Societal damages, either as an assessment technique or as a rationale for punitive damages, make no effort to take these wishes into account.

A third due process problem is that societal damages risk endangering other victims' potential future claims. Societal damages change over time. Each time a new case is decided, the uncompensated portion of societal damages decreases.[33] Thus, the amount of uncompensated societal compensatory damages depends on the number of claims that have already been concluded. More importantly, however, the amount also depends on the number of claims that will be concluded. If individual claims will be concluded in the future, the assessment of societal compensatory damages should not include the amounts at issue in those future claims. Even more problematic, the amount of societal damages assessed in one case should vary with the amount of societal damages collected in other cases, both past and future.

Perhaps claims already brought can be identified and excluded from consideration when calculating societal damages.[34] Future claims are much more difficult to anticipate and evaluate. Including the losses these future cases might claim in today's action forces one of two undesirable results: the future plaintiff may be denied recovery on the ground that defendant has already paid that loss; or the defendant will be compelled to pay the damages twice, once in the societal damage award in the earlier action and again to the future plaintiff. Paying twice produces overdeterrence. Denying the future claim works a hardship, if not an injustice, on the victim whose claim is denied.[35]

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33. If plaintiff wins, the damages are compensated, bringing defendant closer to full internalization of costs. If plaintiff loses on the merits, the damages are not attributable to defendant's wrong, thus forming no part of the loss to society that defendant should internalize. The assertion in the text may be slightly overstated, given the possibility that plaintiff might lose despite presenting a meritorious claim.

34. There is room to suspect that some claims will escape notice. Perhaps defendants will reveal claims already made in an effort to limit the amount of societal damages for which it might be held liable. That flies in the face of common practice, seeking to prevent the jury from knowing about other similar claims. *Cf.* FED. R. EVID. 403, 404(b).

35. This problem can arise in any class action. The limitations on recognizing class actions seek to minimize any injustice that might result. Professor Sharkey, in proposing damages-only classes, seeks to include these mechanisms in her proposal.

One last point deserves note. The problem of underdeterrence due to unsuccessful claims is not limited to cases where punitive damages might be available. Even when no intentional or reckless misconduct can be proven, victims who do not bring claims or who do not prevail on them may prevent internalization of all of the costs of defendant's misconduct. The theory of societal damages, thus, proves too much. Rather than justifying punitive damages, it justifies group compensatory damages in a broad array of settings.[36]

That idea has emerged in some cases. Class representatives sometimes ask a court to assess the entire amount that the defendant owes for losses, then let the class distribute it appropriately among the members.[37] Courts have been reluctant to take that approach.[38] Sometimes a classwide *settlement* may produce a fund that exceeds the claims made by the identifiable members of the class, producing a residual amount that the court may administer. But a court assessing damages in a class action rarely assesses the total losses in the abstract. Rather, when damages are individual, a class judgment of liability engenders individual claims for specific amounts, which must be proven as with any other claim for damages in court.[39] Courts are reluctant to create remedies that might be distributed to persons who were not the victims of the original wrong.[40] Indeed, even when the parties are before the

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The issue addressed here, however, is whether a compensatory rationale can explain punitive damages, not whether a new form of class action might evolve to take care of the same problem.

36. One might argue that underdeterrence, while suboptimal in any case, is intolerable in cases involving intentional or reckless misconduct. The greater importance of deterring these greater wrongs justifies a more aggressive stance, despite the due process concerns. This position seems to move the justification back toward retribution, letting state of mind, not undercompensation, differentiate the cases where additional deterrence is needed. At the very least, the argument raises questions about the true role underdeterrence plays in the mix.

37. *See, e.g.*, Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248, 1256–57 (11th Cir. 2003) (holding that the trial court correctly refused to award class-wide judgment after finding liability), *cert. granted in part*, 2004 U.S. LEXIS 6696.

38. The court in *Allapattah* noted several obstacles to calculating damages on a class-wide basis:

> These obstacles include (1) accounting for those [plaintiffs] who either have opted out of the class or not submitted claims; (2) accounting for those [plaintiffs] whose claims were barred by the Ohio statute of limitations; (3) the difficulty of awarding prejudgment interest on a class-wide basis when the applicable amount of interest varies from state to state; and (4) determining whether the dealers' claims are subject to further reduction by set-off claims asserted by Exxon.

Id. at 1257.

39. *Id*.

40. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973) (rejecting a fluid recovery concept to bypass the manageability requirement for class actions), *vacated and remanded*, 417 U.S. 156 (1974).

court, efforts to assess damages on a general or group basis are subject to criticism.[41] These doctrines stand in the way of any effort to reconceptualize punitive damages as a form of class compensation. When proposed directly, this form of class compensation has been rejected. Using punitive damages as a way to circumvent the procedural restrictions on this form of compensation should raise a red flag.

That red flag may be the central point of this Article. As the core theories of punitive damages face more criticism and more restrictions, theorists reach farther afield to find new justifications for the continued existence of this recovery. Each new justification seems to be an effort to circumvent or distort civil procedure. Punitive damages may dodge the American rule on attorneys' fees, the difficulty of certifying class actions, the technicalities of the statute of limitations, the transaction costs of litigation, and other components of the litigation process. Yet punitive damages do nothing to confront the problems created by (or solved by) these rules. Rather, punitive damages undermine efforts to correct these problems. They serve as a safety valve, releasing the steam that otherwise might propel changes to these rules—or that otherwise might dissipate in the face of the value of these rules. By diverting attention from the source of the problems, punitive damages don't solve anything (or don't solve enough).

These arguments, of course, do not have implications for other justifications of punitive damages. That is a work for other articles or, perhaps, for the Supreme Court. One senses a relationship between recent developments in the Supreme Court and the efforts to find new justifications for punitive damages. When confined to rationales like retribution, punitive damages may be more limited than they have been in the recent past.[42] That may concern persons who believe the threat of

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41. *See, e.g.*, United States v. Hatahley, 257 F.2d 920, 922 (10th Cir. 1958) (awarding each plaintiff identical amounts for distress).

> Apparently the court found a total amount which should be awarded to all plaintiffs for pain and suffering, and divided it equally among them. There was no more justification for such division than there would have been in using the total value of the seized animals and dividing it equally among the plaintiffs. Pain and suffering is a personal and individual matter, not a common injury, and must be so treated.

Id. at 925.

42. Justice Ginsburg's prediction that the Supreme Court's pronouncements may be difficult to administer suggests that the limits may be wishful thinking more than actual change. If state courts search for ways to do exactly what they would have done anyway, the Supreme Court may not be able to review enough cases to enforce its

nearly unlimited punitive damages is essential to coerce good conduct by large corporations. Thus, the effort to circumvent the limitations imposed by the Supreme Court may begin by expanding the underlying rationale for punitive damages.

This Article urges that we not take punitive damages as so great a good that we run roughshod over due process in our zeal to preserve them. Compensation to society, in order to be administered fairly, requires more than a judgment in an individual suit followed by an expression of outrage, no matter how well disguised in the cloak of compensation to nonparties.

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approach. If, however, state courts take the new promulgations seriously, some reduction in the size of punitive awards may result.