

Furthering Society’s Interests: The Importance of Using (and Mitigating) Classwide Punitive Damages

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helping me develop this paper.

As for class actions, I am favorable to them in general... I am not in favor of... the importation into French law of punitive damages...

—Nicolas Sarkozy¹

INTRODUCTION

While the class action is viewed as a characteristically “American” legal device,² its use is not limited to the United States. Since 2000, when the only countries with some form of the class action were the United States, Canada, and Australia, dozens of countries have adopted class action or group litigation rules.³ The qualities of the class actions in these countries vary, but while all the countries agree that they should not mimic the “American-style” class action, “the emerging model includes many of the features of a Rule 23 class action.”⁴

One feature of American lawsuits that does seem to have been broadly rejected overseas, however, is the imposition of punitive damages.⁵ According to one commentator, punitive damages, whether in the context of class or individual suits, “contradict the

1. Nicolas SARKOZY, *Réponses de Nicolas Sarkozy au questionnaire Candidats.fr*, *Candidats.fr* (Apr. 20, 2007, 6:27 PM), online: <<http://candidats.fr/post/2007/04/20/71-reponses-de-nicolas-sarkozy-au-questionnaire-candidatsfr>>, translated in Laurel HARBOUR *et al.*, “Representative Actions and Proposed Reforms in the European Union”, in *World Class Actions: A Guide to Group and Representative Actions Around the Globe*, Paul G. KARLSGODT (ed.), Oxford University Press, 2012, pp. 144, 160.

2. See, e.g., Edward F. SHERMAN, “Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions”, (2002) 52 *DePaul L. Rev.* 401, 401: “The class action is a uniquely American procedural device.”

3. See Deborah R. HENSLER, “The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding”, (2012) 79 *Geo. Wash. L. Rev.* 306, 306-07.

4. *Ibid.* at 307-308.

5. See Matthew PARKER, “Changing Tides: The Introduction of Punitive Damages into the French Legal System”, (2013) 41 *Ga. J. Int’l & Comp. L.* 389, 391; John Y.

ordre public” in their imposition of punishment in the arena of private law.⁶ Although some countries have begun to accept punitive damages in limited circumstances, and although many common-law jurisdictions already allow punitive damages in some circumstances, “American awards dwarf what is allowable in those countries.”⁷ The resistance to punitive damages is even clearer in the context of class actions.⁸

This essay rejects the consensus against punitive damages, instead calling for the acceptance of punitive damages as a vital part of any class-action regime. Part I discusses the rationales for class actions and punitive damages, and explains why both of these mechanisms serve the goals of economic deterrence and access to justice for plaintiffs. Part II acknowledges concerns that commentators have voiced concerning the punitive nature of class actions and suggests steps that jurisdictions can take to ensure that such worries do not come to pass. In particular, this Part suggests that countries enact split-recovery schemes that would allow the balance of punitive damages to go towards entities other than the plaintiff class, as well as individualized multipliers to protect against over-deterrence concerns.

I- THE TWIN GOALS OF CLASS ACTIONS AND PUNITIVE DAMAGES

The expansion of class actions does not occur randomly; rather, countries that seek to expand private access to aggregation have specific objectives in mind that they believe will be best served by the class mechanism. At a general level, the introduction of the

GOTANDA, “Charting Developments Concerning Punitive Damages: Is the Tide Changing?”, (2007) 45 *Colum. J. Transnat'l L.* 507, 508.

6. Helmut KOZIOL, “Punitive Damages—A European Perspective”, (2008) 68 *La. L. Rev.* 741, 751.
7. See GOTANDA, *supra*, note 5, at 508; see also Jessica J. BERCH, “The Need for Enforcement of U.S. Punitive Damages Awards by the European Union”, (2010) 19 *Minn. J. Int'l L.* 55, 83: “[M]any E.U. Member States, which previously prohibited punitive damages and even looked with suspicion at non-compensatory damages, are now trending toward permitting some awards with extra-compensatory aspects.”
8. See *Report on “Towards a Coherent European Approach to Collective Redress”*, at 26, A7-0012/2012, Jan. 12, 2012, [hereinafter *Towards a Coherent European Approach*] (declaring punitive damages to be one of the features that “encourage a litigation culture” that is “not compatible with the European legal tradition and should be forbidden”).

class action aids the values of “access to justice, proportionality & efficiency, [and] fairness.”⁹ At a more specific level, the expansion of class actions comes down to two main factors: a desire to deter violations, mostly of consumer and competition laws; and the need to lower the barriers to court access by potential plaintiffs.¹⁰

A. Why Class Actions?

One of the most obvious rationales for formal aggregation is the deterrent effect that comes from permitting plaintiffs to enforce violations of public law. If there is any objection to introducing class actions as a way to deter bad actions by corporations and other defendants, it is the potential redundancy of coupling private enforcement with existing public enforcement mechanisms.

Although the legitimacy of overlapping public-private enforcement regimes is not universally accepted,¹¹ many commentators and government bodies have sought to find ways to expand the use of class actions to deter bad actors. For example, one American commentator recently challenged the idea that redundancy is an absolute evil, instead arguing that “redundant enforcement may serve valuable legislative goals” though policy-makers need to be concerned with the design of the enforcement regime.¹² Similarly, some European government bodies and officials have committed to the general acknowledgment that the EU’s regulatory framework is insufficient,

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9. See CIVIL JUSTICE CTR., *Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions* 51, John SORABI *et al.* (eds.), 2008, online: <https://www.ucl.ac.uk/laws/judicial-institute/files/Improving_Access_to_Justice_through_Collective_Actions_-_final_report.pdf>.
 10. Although judicial economy could be considered an additional factor supporting the twin application of these doctrines, the lowering of transaction costs such that cases are easier to prosecute and resolve fits within my discussion of the latter rationale, sometimes referred to as the “access to justice” rationale.
 11. See, *e.g.*, Howard M. ERICHSON, “Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation”, (2000) 34 *U.C. Davis L. Rev.* 1, 3 (discussing some observers’ objections to “the easy ride that plaintiffs and their lawyers get by piggybacking on government actions”).
 12. See Zachary D. CLOPTON, “Redundant Public-Private Enforcement”, (2016) 69 *Vand. L. Rev.* 285, 306; see also Samuel ISSACHAROFF, “Governance and Legitimacy in the Law of Class Actions”, (1999) *Sup. Ct. Rev.* 337, 338 (describing the class action as “a centralizing device designed to accomplish some of the same functions as performed by the state, particularly in those situations in which the state has not or cannot perform its regulatory function, or it would be inefficient for the state to undertake such regulation directly”).

standing alone, to redress and deter violations of consumer laws.¹³ In order to fix the problem by which substantive laws have “little meaning” because they are “little enforced” by the public authorities, countries have found aggregate litigation to be a satisfying solution.¹⁴

Meanwhile, the “access to justice” rationale for class actions stems from what President of France Jacques Chirac referred to as the need to permit redress when “each individual injury suffered is not big enough to cover the cost of legal action.”¹⁵ Although allowing plaintiffs to pool their resources is most useful in the context of so-called “negative value claims,” this rationale applies to all class litigation, where defendants’ resources often dwarf those of plaintiffs unless the latter can aggregate their claims.¹⁶ By “lowering the transaction costs” for bringing no- or low-value claims, class actions permit individuals to redress their harms.¹⁷

B. Why Punitive Damages?

Punitive damages similarly serve both of these public goals. Although the United States Supreme Court has traditionally connected punitive damages with the idea of “punishment,” recent scholarly analysis has focused on the additional “deterrence” rationale. Under this analysis, punitive damages both punish defendants for outrageous behaviour,¹⁸ and deter future injuries by causing defendants fully to internalize the cost of their harms to society.¹⁹ Cather-

13. See Mario MONTI, *Private Litigation As a Key Complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the New Merger Regulation*, European Commissioner for Competition Matters, Sept. 17, 2004; *Towards a Coherent European Approach*, *supra*, note 8, at 25; see also *infra*, notes 30-34 and accompanying text (discussing the overreliance on the European regulatory framework as a counter-argument to punitive damages).

14. See Edward H. COOPER, “Class Action Advice in the Form of Questions”, (2001) 11 *Duke J. Comp. & Int’l L.* 215, 219.

15. See Emmanuelle LUTFALLA and Veronica MAGNIER, “French Legal Reform: What Is at Stake If Class Actions Are Introduced in France?”, (2006) 73 *Def. Couns. J.* 301, 301.

16. See Michael D. HAUSFELD and Brian A. RATNER, “Prosecuting Class Actions and Group Litigation”, in *World Class Actions*, *supra*, note 1, pp. 533, 544.

17. See Symposium, “Litigation Funding as a Tool for Collective Actions and Arbitrations”, (2016) 12 *N.Y.U. J.L. & Bus.* 569.

18. See *In re Simon II Litig.*, 211 F.R.D. 86, 160 (E.D.N.Y. 2002) (expressing the opinion that punitive damages could “compensate society for the major civil injuries to society at large which often accompany particularly heinous acts”), *rev’d on other grounds*, 407 F.3d 125 (2d Cir. 2005).

19. See Catherine M. SHARKEY, “Punitive Damages as Societal Damages”, (2003) 113 *Yale L.J.* 347, 365 [hereinafter SHARKEY, *Societal Damages*].

ine Sharkey, a leading proponent of the deterrence rationale for punitive damages, acknowledges that compensatory damages also contribute to the deterrent function, but that such remedy may not be sufficient if there is a possibility that the harms will be systemically under-litigated.²⁰

Much like the class-action device is intended to give *society* a way to deter diffuse harms,²¹ so too are punitive damages. While the Supreme Court has rejected a broad conceptualization of punitive damages,²² its holdings are not in tension with Sharkey's contention that "assessment of [punitive] damages to compensate for widespread harm may be appropriate—or at least constitutional—so long as it occurs within the confines of a single state."²³ Under Sharkey's understanding of the doctrine, the Court has sanctioned a "non-retributive societal deterrence" rationale for punitive damages, while rejecting their use as a way to force societal "punishment."²⁴ This analysis accords with the Court's own statement in *Philip Morris USA v. Williams* that punitive damages may be used to "further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."²⁵ It is therefore not surprising that Sharkey found, even in the wake of *Williams*, no "meaningful obstruct[ion]" of the certification of punitive damages class actions "based on a societal, deterrent conceptualization of punitive damages."²⁶

The availability of punitive damages in a class action also makes it more likely that plaintiffs—and their attorneys—will seek to vindicate their rights. As David Luban recognized two decades ago, the inducement-to-litigation rationale is not entirely satisfactory because punitive damages are "rarely awarded and the median

20. *Ibid.* at 366-37. Sharkey's three categories of underdeterrence are cases in which the victims do not bring suit (due to the nature of the tort or its negative litigation value), cases in which the tortfeasor escapes liability because the injuries or the identity of the defendant are difficult to detect, and "diffuse" social harms. *Ibid.*

21. See *supra*, notes 11-14 and accompanying text.

22. See *Philip Morris USA v. Williams* (2007), 549 U.S. 346, 353: "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon ... those who are, essentially, strangers to the litigation."; see also *State Farm Mut. Aut. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 417: "[Punitive damages] serve the same purposes as criminal penalties...".

23. See SHARKEY, *Societal Damages*, *supra*, note 19, at 350.

24. Catherine M. SHARKEY, "The Future of Classwide Punitive Damages", (2013) 46 *U. Mich. J.L. Reform* 1127, 1139 [hereinafter SHARKEY, *The Future*].

25. *Williams*, 549 U.S. at 352 (emphasis added) (quoting *BMW of N. Am. v. Gore* (1996), 517 U.S. 559, 568).

26. SHARKEY, *The Future*, *supra*, note 24, at 1148.

award is modest.”²⁷ Still, though, the *possibility* of a large punitive damages award can serve as a worthwhile incentive for both plaintiffs and attorneys: as to the former, the threat of punitive damages can lead the defendant to settle the case at favorable terms to the plaintiffs; as to the latter, punitive damages can compensate attorneys for necessary legal and investigatory work without cutting into the plaintiffs’ compensatory recovery.²⁸ While not a panacea in and of themselves, punitive damages can therefore serve as an important tool in ensuring that plaintiffs who might not otherwise have been able to bring suit have access to the courtroom.

The international consensus has remained firm against punitive damages, even as class actions continue to propagate in civil-law countries that had previously rejected such group litigation devices. In a recent essay, Cedric Vanleenhove and Jan De Bruyne cautioned European Union member states against this consensus, arguing that countries should not reject international punitive damages awards from the United States on public policy grounds when such awards would be condoned if adjudicated under domestic law.²⁹ As countries continue to grapple with how to integrate a method of class adjudication into their legal systems, they should take care not to rule out punitive damages, but rather consider how to incorporate them.

II- MITIGATING PUNITIVE DAMAGES

Some authors have already examined the possibility of introducing punitive damages into class-action regimes, concluding that the two would not work together. One commentator rejects the deterrence rationale for punitive damages altogether, claiming that “public penalties ... are much better suited to act as a deter-

27. David LUBAN, “A Flawed Case Against Punitive Damages”, (1998) 87 *Geo. L.J.* 359, 367.

28. See *ibid.*; see also Marc GALANTER and David LUBAN, “Poetic Justice: Punitive Damages and Legal Pluralism”, (1993) 42 *Am. U. L. Rev.* 1393, 1451-54 (discussing how caps on punitive damages can lower the probability of enforcement); Margaret LEMOS, “Special Incentives to Sue”, (2011) 95 *Minn. L. Rev.* 782, 796 n. 61: “[E]ven a relatively small probability of recovering punitive damages will increase the expected value of litigation over the traditional actual-damages model, and hence will increase the likelihood of suit.”

29. See Cedric VANLEENHOVE and Jan DE BRUYNE, “EU Member States’ Courts Versus U.S. Punitive Damages Awards for Physical Harm in Football: An Attempt at Defining Best Practice”, (2017) 3 *Dundee Student L. Rev.* 1, 9.

rent.”³⁰ The solution to any perceived inadequacy in deterrence is to “enhance[e] public enforcement,” not shift the burden to private litigants.³¹ However, her assertion that, “[i]n the EU, there is no deterrence or enforcement gap” is seemingly untrue given the European government’s uneasy embrace of class actions.³² Her reliance on the assumption that “the sole function of damages is to compensate for injury actually suffered,”³³ an opinion that other observers share,³⁴ ignores the valuable deterrent effects of such damages, as well as the modern conceptualization of a societal component that would not otherwise be reflected in a straight compensatory regime.

A. Unjust Enrichment

The foremost critique of punitive damages is that they lead to an unjust windfall for plaintiffs at the expense of defendants.³⁵ Under this telling, punitive damages are contrary to public policy because they do not aim to compensate aggrieved parties.³⁶ A solution to this problem is not to prohibit punitive damages, which can serve a valuable deterrent function by incorporating a societal damages component,³⁷ but to reallocate their dispersal. In the United States, a number of states have so-called “split-recovery” schemes by which a portion of punitive damages in a given case is awarded to the state or another entity.³⁸ For example, in Iowa, if the jury finds that punitive damages are warranted but the conduct was not specifically directed at the claimant, the judge may order payment of no less than 75% of the punitive damages “into a civil reparations trust

30. Monique HAZELHORST, “Private Enforcement of EU Competition Law: Why Punitive Damages Are a Step Too Far”, (2010) 4 *Eur. Rev. Priv. L.* 757, 768.

31. *Ibid.*

32. *Ibid.* at 769; see also *supra*, notes 11-14 and accompanying text.

33. *Ibid.* at 767.

34. See, e.g., *Towards a Coherent European Approach*, *supra*, note 8, at 8: “[T]he horizontal framework should cover compensation only for the actual damage caused, and punitive damages must be prohibited ...”.

35. See PARKER, *supra*, note 5, at 402.

36. See Thomas ROUHETTE, “The Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept?”, (2007) 74 *Def. Couns. J.* 320, 333.

37. See *supra*, notes 21-26 and accompanying text.

38. See, e.g., Mo. Rev. Stat. § 537.675(3) (2016) (mandating the allocation of punitive damages to the state-run “tort victims’ compensation fund”); Or. Rev. Stat. § 31.735(1) (2015) (allocating 30% of any punitive damages recovery to the prevailing party, 60% “for deposit in the Criminal Injuries Compensation Account of the Department of Justice Crime Victims’ Assistance Section,” and 10% “for deposit in the State Court Facilities and Security Account”).

fund administered by the state court administrator.”³⁹ Even in the absence of statutory authorization, state courts have taken it upon themselves to shape the punitive damages remedy to effect broader societal deterrence.⁴⁰

While it may be difficult to calculate the most economically efficient way to allocate punitive damages, it is clear that innovative options—even outside of formal split-recovery schemes that return damages to government coffers—do exist.⁴¹ For example, a judge in California recently awarded \$45,000,000 in punitive damages in an individual bankruptcy proceeding, but ordered the plaintiffs to distribute all but \$5,000,000 of that total to five California law schools as well as the National Consumer Law Center and the National Consumer Bankruptcy Rights Center.⁴² The amount of punitive damages imposed was intended to have a deterrent effect on Bank of America;⁴³ the actual dispersal of punitive damages was “to be used only for education in consumer law and delivery of legal services in matters of consumer law.”⁴⁴ There is no reason why such an ingenious result could not attach to a class proceeding.

Allowing punitive damages to accrue to entities apart from the class plaintiffs is perhaps most attractive if one believes that the plaintiffs are properly compensated as a result of the class action.⁴⁵

39. Iowa Code § 668A.1(2)(b); see also SHARKEY, *Societal Damages*, *supra*, note 19, at 416-20 (discussing the Iowa split-recovery scheme as “a suitable model—or at least a starting point—for exploration of the societal damages theory as applied to the specific harms category”).

40. See, e.g., *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 146 (Ohio 2002) (awarding \$30 million in punitive damages, of which the final net amount was directed to go to a cancer research fund).

41. See *Sundquist v. Bank of Am., N.A.*, No. 14-02278, 2017 WL 1102964 (Bankr. E.D. Cal. Mar. 23, 2017).

42. *Ibid.* at *45. The court alternatively ordered a remittitur of the punitive damages to \$5,000,000 if defendant Bank of America independently contributes \$30,000,000 to those same institutions and organizations. *Ibid.*

43. *Ibid.* at *39-40.

44. *Ibid.* at *45.

45. Recent research shows that this may never be the case, if one believes that a plaintiff actually claiming his or her distribution is necessary for stating that compensation was properly awarded. See Catherine PICHÉ, “Le recouvrement et l’indemnisation des membres dans l’action collective”, (2017) 94 *Canadian B. Rev.* 171, 183. If absent class plaintiffs are difficult to find or are not claiming their award, it stands to reason that principles of *cy pres* could result in the leftover money being distributed to entities other than the defendant—but, of course, that would not negate the central point of this paragraph, which is that the deterrent benefit of punitive damages is not outweighed by the possibility of

In other words, the utility of awarding classwide punitive damages in recognition of societal harm is particularly high when the harm to each individual plaintiff is of a low value: although the goal of the class action is ostensibly to compensate the members of the class, the true value in aggregation of negative-value claims comes from the overall deterrence function.⁴⁶ This claim may even be bolstered by the relatively low take-up rate in such actions—in order to avoid concerns of unjust enrichment for *defendants*, we need some way to address the full measure of harm done, even if a plaintiff's putatively unredressed harm is, on an individual level, relatively modest.⁴⁷ While there would be due process concerns with denying class members the compensatory damages which they are legally due, there is no such problem when it comes to reallocating punitive damages. This solution therefore allows jurisdictions to capture all the benefits of punitive damages without the perceived negative concern of unjust enrichment on the part of plaintiffs.⁴⁸

B. Over-deterrence

The other main concern about punitive damages is that they over-deter by imposing unnecessary sanctions on defendants. Under this argument, punitive damages are redundant given the fact that “a properly certified class will obtain compensatory damages that reflect the total harm of the defendant's wrongful conduct.”⁴⁹ While these arguments should give some pause about imposing punitive damages in the class context, there are ways to structure punitive damages such that they do not lead to an unreasonable or redundant outcome.

unjust enrichment to class plaintiffs when the claims are widely spread and of a low value.

46. See, e.g., Emery G. LEE III, “How Valuable Are Negative Value Claims?”, (2012) 5 *J. Tort L.* 137, 138 n. 6 (stating that, without the deterrence rationale, “there is little (positive) value (or legitimacy) left in negative value claims”).
47. See PICHÉ, *supra*, note 45, at 183.
48. While the access-to-justice rationale for classwide punitive damages turns on the availability of attorney fees to compensate plaintiffs' counsel for work done to achieve the additional deterrence, some states provide that the recovery is to be split *after* attorney fees have been deducted. See Ga. Code Ann. § 51-12-5.1(e)(2) (West 2010).
49. Sheila B. SCHEUERMAN, “Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions”, (2008) 60 *Baylor L. Rev.* 880, 934. This viewpoint is also reflected in Sharkey's assumption that “the societal damages theory, as it pertains to specific harms to other individuals, might be considered a doctrinal substitute for class action litigation in certain types of cases.” SHARKEY, *Societal Damages*, *supra*, note 19, at 414.

One method of protecting against over-deterrence is the use of a punitive damages multiplier, whereby damages in a particular case are “multiplied by the inverse of the probability that the injurer will be found liable.”⁵⁰ Although Sharkey has expressed concerns about the feasibility and constitutionality of a strict multiplier,⁵¹ she has most recently described such a feature as “a trademark of a societal damages conception of punitive damages.”⁵² According to Sharkey, these types of multipliers are most proper where “alternative cost-internalization mechanisms,” such as regulatory efforts or criminal prosecution, have not been adequately pursued or enforced.⁵³ By adjusting the damages recovery in proportion to the risk of under-detection for the wrong at issue, courts may ensure the damages do actually compensate and deter based on the full measure of harm, while avoiding charges that the court is overly punitive.

Concerns about the practicality of a punitive damages multiplier persist.⁵⁴ Nevertheless, punitive damages multipliers, in the way that Polinsky, Shavell, and Sharkey conceive of them, have been applied successfully in a number of cases.⁵⁵ This arena additionally seems to be one in which possibilities for creativity by plaintiffs and decision-makers abound. In a recent article, Sharkey discussed the class settlement of the Deepwater Horizon oil spill and how, despite not having a formal punitive-damages component, it contained an

50. Mitchell POLINSKY and Steven SHAVELL, “Punitive Damages: An Economic Analysis”, (1998) 111 *Harv. L. Rev.* 869, 874.

51. SHARKEY, *Societal Damages*, *supra*, note 19, at 368-70.

52. Catherine M. SHARKEY, “The BP Oil Spill Settlements, Classwide Punitive Damages, and Societal Deterrence”, (2015) 64 *DePaul L. Rev.* 681, 709 [hereinafter SHARKEY, *The BP Oil Spill Settlements*].

53. *Ibid.* at 704. Sharkey also points out that “the 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.” *Ibid.* Sharkey’s analysis suggests that an *ex post* approach may be needed for damages multipliers; that is, that they should only be applied once a court is able to assess the full measure of harm and damages, to both plaintiffs and defendants.

54. See, e.g., *Ciraolo v. City of New York*, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring) (expressing concern at the “haphazard[]” manner in which the multiplier function has been applied). Interestingly, Judge Calabresi also noted that, “in order to achieve the goal of social compensation, as well as the goal of optimal deterrence,” damages added as the result of a multiplier should be paid into a fund, similar to the discussion *supra* Section II(A). See *ibid.* at 247.

55. E.g., *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.) (“The award of punitive damages in this case thus serves the additional purpose of limiting the defendant’s ability to profit from its fraud by escaping detection and (private) prosecution.”).

“embedded societal punitive damages award.”⁵⁶ This was done through the use of “risk transfer premium” multipliers applied to the claims of plaintiffs in certain categories.⁵⁷ In many cases, the multiplier was greater than 1:1, with subclasses eligible for punitive damages in a civil action receiving a greater award.⁵⁸ While much of how the Deepwater Horizon settlement class was dealt with is unique to the facts of that case, Sharkey’s work shows how parties to an aggregate proceeding can use targeted multipliers to both mimic the award of punitive damages and account for the true measure of societal harm effected by the defendant.

CONCLUSION

Punitive damages should not be required in every class action. In his landmark opinion in *In re Simon II Litigation*, Judge Weinstein noted that punitive damages were particularly appropriate “in view of the massive fraud, huge numbers of claims, and extreme damages alleged.”⁵⁹ But, just as the class action is intended to deter harms that would otherwise go unlitigated, punitive damages ensure the measure of damages imposed by such action accords with the harm that the action is deterring. While hyperbole about the American justice system running amok with punitive damages will surely persist, this essay has endeavoured to explain why such concerns are not warranted. After all, it was not so long ago that Europeans viewed the American class action “like a Rube Goldberg artifact—a strange-looking melange of pushes and pulls and bells and baubles.”⁶⁰ Perhaps the foreign skepticism about punitive damages will seem like an artifact in a decade or two; perhaps punitive damages will fail to grow both without and within the United States, where they have been whittled down by a hostile Supreme Court. In either case, there is no reason for jurisdictions experimenting with the class action not to try their hand at punitive damages as well.

56. SHARKEY, *The BP Oil Spill Settlements*, *supra*, note 52, at 697.

57. *Ibid.* at 697-98.

58. *Ibid.* at 702.

59. *In re Simon II Litig.*, 211 F.R.D. 86, 160 (E.D.N.Y. 2002), *rev'd on other grounds*, 407 F.3d 125 (2d Cir. 2005).

60. Richard B. CAPPALLI and Claudio CONSOLO, “Class Actions for Continental Europe? A Preliminary Inquiry,” (1992) 6 *Temp. Int'l & Comp. L.J.* 217, 219.

