

CHANGING TIDES: THE INTRODUCTION OF PUNITIVE DAMAGES INTO THE FRENCH LEGAL SYSTEM

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I. INTRODUCTION: THE CAUTIOUS EMBRACE OF PUNITIVE DAMAGES IN FRENCH TORT LAW?

When Americans Peter Schlenzka and Julie Langhorne purchased a French Fountaine Pajot catamaran in 1999, they probably did not expect that their purchase would lead to a groundbreaking decision from the French Court of Cassation, the highest court in France.¹ At the time of the sale, Schlenzka and Langhorne were unaware that their new family boat had suffered serious structural damage during a storm only a few weeks earlier while still in France. Shortly after delivery, however, they discovered the defect and demanded a refund from the catamaran's French manufacturer. When settlement negotiations broke down, they brought suit against Fountaine Pajot in California. In February 2003, the Superior Court of California ordered Fountaine Pajot pay Schlenzka and Langhorne more than \$3 million, including nearly \$1.5 million in punitive damages.² After a long battle to try and enforce the judgment in France, the Court of Cassation handed down its final decision in late 2010.³ Although the Court refused to enforce the California court's judgment, the decision was nonetheless remarkable in its recognition of the potential legality of punitive damage awards.⁴ Holding that "an award of punitive damages is not per se contrary to public policy," the Court added that such principle did not apply in the *Fountaine Pajot* case "when the amount awarded is disproportionate with regard to the damage sustained . . ."⁵ Though the decision signaled the death knell for Schlenzka and Langhorne's claim, it has since sparked renewed debate about the proper role of punitive damages in the French tort system where courts have consistently held—at least until the *Fountaine*

¹ Cour de cassation [Cass.][supreme court for judicial matters] 1e civ., Dec. 1, 2010, Bull. civ. II, No. 248 [hereinafter *Fountaine Pajot* case]; see also Véronique Wester-Ouisse & Thomas Thiede, *Punitive Damages in France: A New Deal?*, 3 J. EUR. TORT L. 115 (2012) (discussing the case and its potential impact on punitive damages in French law); Nathalie Meyer Fabre, *Enforcement of US Punitive Damages Award in France: First Ruling of the French Court of Cassation in X. v. Fountaine Pajot, December 1, 2010*, 26 MEALEY'S INT'L ARB. REP. 15 (2011) (discussing the potential impact of the judgment in international arbitrations); François-Xavier Licari, *Prendre les Punitive Damages au sérieux: critiques sur un refus d'accorder l'exequatur à une décision californienne ayant alloué des dommages-intérêts punitifs*, 137 J. DU DROIT INT'L 1230, 1237 (2010) (discussing the French trial and appellate court decisions in the *Fountaine Pajot* case). The final decision from the Superior Court of California was not published.

² The final judgment was for \$3,253,734.45, including \$1,391,650.12 for the refurbishment of the boat, \$402,084.33 for attorney's fees and \$1,460,000.00 in punitive damages. *Fountaine Pajot* case, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

Pajot case—that punitive damage awards were inconsistent with the principles underlying French tort law.⁶

While punitive damages are an integral part of the common law legal systems of countries such as the United States,⁷ most civil law countries such as France usually disapprove of their award.⁸ Understood most generally, punitive damages are damages awarded in excess of the harm the plaintiff suffered in order to punish a tortfeasor and deter him or her and others from pursuing similar conduct.⁹ Guided by the principle of *réparation intégrale* (full reparation),¹⁰ the Court of Cassation has consistently held that tort victims should be compensated for the harm they suffer, but nothing more.¹¹ Punitive damages have thus largely been absent—at least formally—from French law.

When asked in 2004 whether French law permitted punitive damages, Professor Georges Durry, a prominent French academic gave a simple response: “No, three times, no.”¹² The next year, however, Durry was part of

⁶ See Meyer Fabre, *supra* note 1 (discussing the *Fontaine Pajot* case and the ambiguity regarding the proportionality principle applied by the Court of Cassation).

⁷ See, e.g., Michael L. Wells, *A Common Lawyer's Perspective on the European Perspective on Punitive Damages*, 70 LA. L. REV. 557 (2010) (arguing that the different perspectives on punitive damages in common law and civil law jurisdictions is a result of path dependency and cultural factors); DAN DOBBS, *THE LAW OF TORTS* § 381 (2000) (discussing the role of punitive damages in American tort law).

⁸ See, e.g., Jean-Sébastien Borghetti, *Punitive Damages in France*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 55 (Helmut Koziol & Vanessa Wilcox eds., 2009) (tracing the evolution of the punitive damages doctrine in French law); Helmut Koziol, *Punitive Damages—A European Perspective*, 68 LA. L. REV. 741 (2008) (arguing that punitive damages are fundamentally at odds with the principles underlying tort law in civil law jurisdictions).

⁹ Vanessa Wilcox, *Punitive Damages in England*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, *supra* note 8, at 7; Borghetti, *supra* note 8, at 55.

¹⁰ See, e.g., Borghetti, *supra* note 8, at 55 (noting that French courts have “constantly stuck” to the full reparation principle, requiring a victim be compensated for the harm suffered without getting any richer or poorer from it); Christian Lapoyade Deschamps, *La réparation du préjudice économique pur en droit français*, in CIVIL LIABILITY FOR PURE ECONOMIC LOSS 89, 90 (Efsthathios Banakas ed., 1996) (noting that the full reparation principle is part of the “dogma” of French law). Part II of this Article includes a more detailed discussion of the full reparation principle.

¹¹ See, e.g., Cour de cassation [Cass.][supreme court for judicial matters] 2e civ., July 5, 2001, Bull. civ. II, No. 135 (stating that “the award must compensate for the damages sustained without resulting in loss or profit for the victim”); Cour de cassation [Cass.][supreme court for judicial matters] 2e civ., May 8, 1964, Bull. civ., No. 358 (holding that “[t]he indemnity required to compensate the damage incurred shall be calculated based on the amount of the damage, without any influence of the seriousness of the misconduct on the amount of said indemnity”).

¹² Although Durry maintained that French law was governed by the full reparation principle, he did not deny that in some cases a party could recover more than his or her actual damages. Nevertheless, Durry did not consider these damages to be punitive because the idea of punishment was absent. Marie-France Steinlé-Feuerbach, *Cour de Cassation: “Les punitives damages,”* J. DES ACCIDENTS ET DES CATASTROPHES, Mar. 25, 2004, <http://www.lutcolmar.uha>.

a team of legal academics and practitioners that authored the *Avant-Projet de réforme du droit des obligations et du droit de la prescription (Proposals for Reform of the Law of Obligations and the Law of Prescriptions)*.¹³ More commonly known as the *Avant-Projet Catala (Avant-Projet)*, the project proposes the most extensive reform of the French *Code civil* (Civil Code) since it was written in 1804. Notably, the *Avant-Projet* explicitly recognizes for the first time the award of punitive damages for the commission of certain torts under French law.¹⁴ While many French scholars and politicians have been quick to dismiss the proposal as contrary to existing French law¹⁵—inapposite with explicit principles of corrective justice and victim reparation that lay at the foundation of French tort law¹⁶—there has been a lack of critical engagement with the idea of awarding punitive damages in French tort cases. This has caused some to question what led the authors to include the proposal in the *Avant-Projet*.¹⁷ In comparison with other parts of

fr/internet/recherche/Jcerdacc.nsf/0/72d84e1da263f747c1256e6e0029410b?OpenDocument.

¹³ *Avant-Projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil)*, (Report to Pascal Clement, Minister of Justice), art. 1371 (Sept. 22, 2005) [hereinafter *Avant-Projet de réforme du droit des obligations et du droit de la prescription*], available at http://www.justice.gouv.fr/art_pix/RAPPORTCATALESEPTEMBRE2005.pdf.

¹⁴ *Id.* art. 1371, which will be discussed later in this Article, provides for the possibility of judges awarding punitive damages where a person commits a manifestly deliberate fault, especially if done for a lucrative purpose.

¹⁵ See, e.g., Alain Anziani & Laurent Bétaille, *Responsabilité civile: des évolutions nécessaires*, III. C. Les dommages et intérêts punitifs: une innovation pertinente pour certains contentieux de la responsabilité, Senate Report (2009), <http://www.senat.fr/rap/r08-558/r08-558.html> (discussing how victim compensation should result in neither a win nor a loss to the victim); David Corbé-Chalon & Martin A. Ragoff, *Tort Reform à la Française: Jurisprudential and Policy Perspectives on Damages for Bodily Injury in France*, 13 COLUM. J. EUR. L. 231, 294 (2007) (stating that “[t]he principles of total reparation as it is understood in France, with its requirements of adequacy and equivalence, excludes the possibility of [punitive] damages as the award of punitive . . . damages would not only unjustly enrich the victim but also confuse the civil nature of the action with the criminal nature of the award”); Jean-François Kriegk, *L’américanisation de la justice, marque d’un mouvement de privatisation du droit et de la justice civile?*, 95 LA GAZETTE DU PALAIS, Apr. 5, 2005, at 2, 8–9 (examining how French law has evolved as a result of its interaction with American law).

¹⁶ See sources cited *supra* note 15. For a discussion of the principles underlying French tort law see, for example, NOOMAN GOMAA, THÉORIE DES SOURCES DE L’OBLIGATION 129 (1968) (noting that tort law should never be about the “prospering of one person at the expense of another,” but rather reestablishing “the equilibrium between members of society”).

¹⁷ See, e.g., Pierre Wessner, *Les effets de la responsabilité civile dans la perspective d’une révision d’un Code civil français: quelques observations débridées d’un juriste suisse*, 1 REVUE DES CONTRATS 171 (2006) (arguing that punitive damages are not consistent with the principles underlying French tort law); Stéphane Piedelièvre, *Les dommages et intérêts punitifs: une solution d’avenir*, RESPONSABILITÉ CIVILE ET ASSURANCES 68, 72 (special issue) (2001) (critiquing proposals for the introduction of punitive damages into French tort law).

the *Avant-Projet*, however, the proposal to award punitive damages has received surprisingly limited attention from academics, especially outside France.¹⁸ This Article begins to fill the gap in the existing debate, placing the *Avant-Projet* and more specifically the practice of awarding punitive damages in their historical and comparative context.

In this Article, I argue that punitive damages are not fundamentally at odds with the principles underlying French tort law and that they may in fact support and further its policies. Punitive damages provide a form of social redress, vindicating victim's rights and publicly affirming society's respect for the existence of these rights and its interest in ensuring its laws are respected.¹⁹ Punitive damages have the potential to restore the moral balance and provide compensation for the victim,²⁰ consistent with French principles of corrective justice and victim reparation.²¹

At the same time, however, punitive damages can also serve retributive and deterrent functions.²² This has led many scholars to sharply criticize their proposed introduction, arguing that these functions threaten to undermine the existing principles of French tort law.²³ Nevertheless, this critique fails to recognize the implicit function retribution and deterrence already play in French tort law, and how a more explicit recognition of this function will strengthen the French tort system and better support its goals of victim reparation and restorative justice.²⁴

Situating my analysis and assessment in a comparative perspective, I begin in Part II of this Article by tracing the history of French tort law and its treatment of punitive damages. In Part III, I contrast the French experience with that of other countries, especially the United States, looking at the rationales underlying punitive damages and their critiques. Drawing on this analysis, in Part IV, I explore the *Avant-Projet*'s current draft proposal and make recommendations for how it can better respond to critics' claims that it fails to reflect the policies guiding French tort law. Against the backdrop of

¹⁸ Paula Giliker, *Codifying Tort Law: Lessons From the Proposals for Reform of the French Civil Code*, 57 INT'L & COMP. L. Q. 561, 561 (2008).

¹⁹ Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 57 (1993).

²⁰ See Neil Vidmar & Matthew Wolfe, *Punitive Damages*, 5 ANN. REV. L. & SOC. SCI. 179, 199 (2009) (stating that one study of punitive damages found that "punitive damages serve a restorative function, ameliorating the breach caused by the defendant's reprehensible actions").

²¹ See *supra* note 16 and accompanying text.

²² Cass Sunstein et al., *Assessing Punitive Damages*, 107 YALE L.J. 2071, 2075 (1998).

²³ See, e.g., MIREILLE BACACHE-GIBEILLI, LES OBLIGATIONS—LA RESPONSABILITÉ CIVILE EXTRA-CONTRACTUELLE 486–87 (2007) (examining the functions of civil responsibility and arguing that punitive damages are not consistent with these functions in France); Piedelièvre, *supra* note 17, at 72 (suggesting that punitive damages are not well-suited for the French context).

²⁴ See generally Borghetti, *supra* note 8, at 68–69 (describing punitive damages in France).

French legal history and the comparative experiences of other countries, I ultimately contend that punitive damages have the potential to become a useful tool in French tort law.

II. FRENCH TORT LAW AND PUNITIVE DAMAGES: AN HISTORICAL AND THEORETICAL OVERVIEW

To understand the recent push to reform the French tort system, knowledge of current French tort law and its development is essential. Before the French Revolution in 1789, there was no single, official French legal system.²⁵ Rather, French law was a mixture of Roman law, canon law, and local laws, commonly referred to by legal historians as *l'ancien droit* (the old law).²⁶ Shortly after coming to power in the aftermath of the French Revolution, Napoleon Bonaparte set out to create a new legal order in France.²⁷ The Civil Code was adopted in 1804, and is still regarded as “the cement of [French] society.”²⁸ The cornerstone of the French legal system, the Code incorporates many of the main ideas of the Revolution as well as several aspects of *l'ancien droit*.²⁹ As a testament to its strength and continuity, the Code has been modified little in the more than two hundred years since its adoption, with most changes coming in the form of additions rather than amendments.³⁰ Tort law provides a striking illustration of this durability, with four of the five articles currently governing torts having been included in the original Code.³¹

The primary reason for such continuity is the simplicity and breadth of tort law under the Code.³² The general nature of the formulas employed in the Code has marked the French legal system and allowed judges to imbue them with meaning.³³ At the most general level, the principle of fault most directly influences the French tort system.³⁴ According to the Code, any person whose faulty conduct causes harm to another person has a duty to repair the damages he or she has caused.³⁵ Guided by the “natural objective”

²⁵ CATHERINE ELLIOT & CATHERINE VERNON, *FRENCH LEGAL SYSTEM* 1 (2006).

²⁶ *Id.*; CEES VAN DAM, *EUROPEAN TORT LAW* 41 (2006).

²⁷ ELLIOT & VERNON, *supra* note 25, at 5.

²⁸ Yves Lequette, *Quelques remarques à propos du projet de code civil européen de M. von Bar*, 28 *RECUEIL DALLOZ* 2202 (2002).

²⁹ ELLIOT & VERNON, *supra* note 25, at 5.

³⁰ ARTHUR VON MEHREN & JAMES GORDLEY, *THE CIVIL LAW SYSTEM* 53 (1977).

³¹ RENÉ DAVID, *ENGLISH LAW AND FRENCH LAW: A COMPARISON IN SUBSTANCE* 151 (1980).

³² Geneviève Viney, *Tort Liability*, in *INTRODUCTION TO FRENCH LAW* 237, 237 (George Bermann & Etienne Picard eds., 2008); Richard Azarnia, *Tort Law in France: A Cultural and Comparative Overview*, 13 *WIS. INT'L L.J.* 471, 473 (1995).

³³ Viney, *supra* note 32, at 237.

³⁴ DAVID, *supra* note 31, at 150.

³⁵ CODE CIVIL [C. CIV.] art. 1382 states: “Any act of a person which causes damage to another

of fully compensating victims for the harms they suffer, the French tort system is notable for its broad orientation towards liability.³⁶ This is reflected, for example, in the way courts have increasingly softened the definition of fault over time and introduced presumptions of strict liability in certain cases.³⁷ French courts have thus taken significant liberty in interpreting the provisions of the Code in different ways in light of changing times and circumstances despite the relatively static nature of the provisions themselves since their adoption more than two hundred years ago.³⁸

Growing out of increasing recognition of the Code's inadequacy in modern times, however, an ambitious reform project was launched under the

is liable for repairing the damage." CODE CIVIL [C. CIV.] art. 1383 states: "Everyone is liable for the damage caused not only by his or her acts, but also by his or her negligence or imprudence."

³⁶ Viney, *supra* note 32, at 237–38, notes that damages are assessed regardless of the seriousness of the fault and without regard to the foreseeability of the nature or scale of the damage caused. Moreover, by rejecting the distinctions and restrictions that other judicial traditions have developed through their case-based analysis of factual situations (as in the United States), and through the creation of a hierarchy of interests to be protected (as in Germany), French tort law necessarily gives civil liability a broader scope.

³⁷ See, e.g., Cour de cassation [Cass.][supreme court for judicial matters] ch. réuns., Feb. 13, 1930, D.P. I 1930, 57 (transforming the liability regime for a rebuttable fault for the damage caused by a thing into a strict liability regime). For a full discussion of the historical development of French understandings of fault and strict liability, see CEES VAN DAM, *supra* note 26, at 41, 46–60. As van Dam notes, French judges have interpreted some provisions of the Civil Code over the past 125 years to impose strict liability in certain cases. According to CODE CIVIL [C. CIV.] art. 1384:

[A] person is liable for the damage caused by the acts of persons for whom he or she is responsible or of objects that are in his or her custody. . . . The father and the mother, in the exercise of their parental authority, are liable for the damage caused by their minor children who live with them[;] masters and principals, for the damage caused by their servants and employees in the exercise of the functions for which they have been employed; [and] teachers and artisans, for the damage caused by pupils and apprentices during the time they were under their supervision. The aforesaid liability attaches unless the father and mother, the teachers and the artisans can prove that they could not have prevented the act that gives rise to the liability.

According to CODE CIVIL [C. CIV.] art. 1385: "The owner of an animal, or the person using the animal at the time it causes damage, is liable for the damage the animal causes, whether the animal remained under the owner's guard, or whether it strayed or escaped." According to CODE CIVIL [C. CIV.] art. 1383: "The owner of a building is responsible for the damage caused by its collapse, when this occurs as a result of the building's poor maintenance or of its defective construction." Judges have increasingly read these provisions of the Civil Code to broaden the scope of the tortfeasor's liability. See, e.g., CEES VAN DAM, *supra* note 26, at 48–50 (discussing how, over time, the Court of Cassation has expanded France's strict liability regime).

³⁸ See generally Azarnia, *supra* note 32, at 475 (noting that the Code was intended to be a guideline and not a comprehensive description of tortious liability); DAVID, *supra* note 31, at 151 (noting that the French Parliament has made few changes to the Code since adopted while the French courts have reinterpreted provisions of the Code to be consistent with current circumstances).

direction of Professor Pierre Catala and endorsed by the French Ministry of Justice in the wake of the Code's two hundredth anniversary.³⁹ The *Avant-Projet*—the product of this reform movement—was written with the purpose of “giv[ing] France a civil law adapted to its time”⁴⁰ Although its authors contend it was written in a spirit of continuity, not of revolution, its proposals are both widespread and significant.⁴¹

The part of the *Avant-Projet* concerning tort liability was drafted by a group of scholars under the guidance of none other than Professor Georges Durry—the same French professor who three times affirmed that French tort law did not allow for the award of punitive damages—and his compatriot Professor Geneviève Viney.⁴² Beyond simply expanding upon existing notions of tort liability,⁴³ the *Avant-Projet* provides significantly more guidance for courts when awarding tort damages.⁴⁴

Broadly speaking, the French tort system is dedicated to the principle that damages should serve to make the victim whole.⁴⁵ The notion that damage must be repaired in full (known as *réparation intégrale* or “full reparation”) is absolute.⁴⁶ According to the Court of Cassation, “the essence of civil responsibility is to reestablish as closely as possible the balance destroyed by the damage and to put the victim back in the place he or she would have been if the injurious act had not occurred.”⁴⁷ Consequently, as Christian

³⁹ Stefan Vogenauer, *The Avant-Projet de Réforme: An Overview*, in REFORMING THE FRENCH LAW OF OBLIGATIONS 3, 3 (John Cartwright, Stefan Vogenauer & Simon Whittaker eds., 2009).

⁴⁰ *Avant-Projet de réforme du droit des obligations et du droit de la prescription*, *supra* note 13, Présentation générale de l'Avant-Projet, s. 5.

⁴¹ Vogenauer, *supra* note 39, at 11.

⁴² Borghetti, *supra* note 8, at 69.

⁴³ Vogenauer, *supra* note 39, at 12 (noting that the *Avant-Projet* increases the number of provisions concerning civil liability from six to sixty-four, partly because of the sparse style of the Civil Code's current tort provisions and partly because it addresses both contractual and tort liability together).

⁴⁴ See *Avant-Projet de réforme du droit des obligations et du droit de la prescription*, *supra* note 13, Livre Troisième, Titre III, Sous-Titre III (outlining, for example, principles for determining when a damage award is appropriate).

⁴⁵ Azarnia, *supra* note 32, at 488; see also Viney, *supra* note 32, at 260 (noting that there must be “equivalence between harm and compensation”); Michael Faure, *Tort Liability in France: An Introductory Economic Analysis*, in LAW AND ECONOMICS IN CIVIL LAW COUNTRIES 169, 169 (Bruno Deffains & Thierry Kirat eds., 2001) (arguing that “although it is recognised that tort law can serve a variety of goals, the purpose which is mostly stressed [in the French legal system] is the victim compensation argument”).

⁴⁶ Cour de cassation [Cass.][supreme court for judicial matters] 2e civ., June 19, 2003, Bull. civ. II, No. 203 (holding that “the person responsible for an accident must repair *all* injurious consequences” (emphasis added)).

⁴⁷ Cour de cassation [Cass.][supreme court for judicial matters] 2e civ., July 9, 1981, Bull. civ. II, No. 156.

Lapoyade Deschamps notes, the French tort system requires taking into account “all the consequences caused by the tort to the victim’s detriment” and results in the victim receiving compensation for “everything or almost everything.”⁴⁸ Not surprisingly, given this understanding of full reparation, both economic and non-economic harms are normally compensable.⁴⁹ In practice, French judges have adopted a broad conception of the full reparation principle to ensure that victims are made whole.⁵⁰

At the same time, driven by a strong commitment to corrective justice, French judges have sought to reestablish the status quo and maintain parity between members of society through findings of liability and damage awards.⁵¹ From this perspective, tort law serves as an engine for restoring the moral balance, recognizing rights and wrongs and requiring tortfeasors recompense their victims as a way to reestablish this moral balance.⁵² Corrective justice aims to bring about change through the reward of damages by achieving a just state of affairs between a tortfeasor and his or her victim

⁴⁸ Lapoyade Deschamps, *supra* note 10, at 89–90 (emphasis added) (noting that the “golden rule” of equivalency means that damage awards, at least in principle, do not make any sort of distinction between different kinds of harm); *see, e.g.*, Cour de cassation [Cass.][supreme court for judicial matters] 2e civ., Jan. 22, 2009, Bull. civ. II, No. 26 (reaffirming that “the person causing an accident must repair the integrality of the injurious consequences” and overruling a decision of a court of appeal that refused to award the victim of an assault for the economic loss he suffered after being forced to sell his shares in his business at below market value because he was no longer able to run the business after the assault).

⁴⁹ Yvonne Lambert-Faivre, *L’indemnisation des victimes de préjudices non économiques*, 39 LES CAHIERS DE DROIT 537, 540 (1998). According to Lambert-Faivre, the full reparation principle requires that the tortfeasor repair *all* harms suffered by the victim. For economic harms, this poses no theoretical challenge. For non-economic harms, however, the full reparation principle is more difficult to apply. She notes that even if money doesn’t ‘repair’ anything, it is the only way to give the victim satisfactory compensation: it above all serves to recognize the dignity of the person, . . . his or her suffering, and the fact that he or she is a *person*, body and soul, with his or her own identity and indomitable individuality

Id.

⁵⁰ *Id.* *See, e.g.*, Cour de cassation [Cass.][supreme court for judicial matters] 2e civ., Jan. 22, 2009, Bull. civ. II, No. 26 (requiring a victim be compensated the full value of his shares after being forced to sell them at below market value because he had been assaulted and could no longer run the business).

⁵¹ *See, e.g.*, Cour de cassation [Cass.][supreme court for judicial matters] 2e civ., Dec. 7, 1978, Bull. civ. II, No. 269 (noting that damages should aim to put the victim in the place he or she would have been if the injurious act had never happened); *see also* CAROLINE LACROIX, *LA RÉPARATION DES DOMMAGES EN CASE DE CATASTROPHES* 4 (2008) (arguing that “the reparation society must be able to offer its members is . . . found in the need for justice and the affirmation of responsibility”); GOMAA, *supra* note 16, at 129 (arguing that tort law should seek to reestablish the equilibrium between members of society).

⁵² *See* Radin, *supra* note 19, at 60 (discussing tort law and corrective justice).

and by affirming public respect for the existence of certain rights.⁵³ Restoration of the moral balance through victim compensation is thus generally recognized, at least explicitly among most judges and academics, as being a main priority of tort law.⁵⁴

As a result of this commitment to victim reparation, judicial practice in France has been more strongly influenced by questions of social good and fairness, particularly when contrasted with judicial practice in other countries such as the United States.⁵⁵ As Richard Azarnia notes, however, it would be erroneous to say that French tort law is “fairer” than American tort law; rather, French tort law is simply more likely to be directed toward restoring the moral balance and promoting the principle of equivalence.⁵⁶ This helps to explain, at least in part, why French law formally rejects the notion of punitive damages.⁵⁷

Nevertheless, as the principle of full reparation has come under increasing attacks for being undercompensatory at times, some French scholars have posited that courts—influenced by practices in many common law jurisdictions such as the United States—have responded by covertly awarding damages based not only on the harm suffered by victims, but also taking into consideration the behavior of tortfeasors who deliberately violate their victims’ interests.⁵⁸ While French law does not explicitly recognize

⁵³ Borghetti, *supra* note 8, at 71–72.

⁵⁴ *Id.*

⁵⁵ French scholars often frame judicial decisions in terms of the social good and fairness they promote. *See, e.g.*, FRANÇOIS TERRÉ, INTRODUCTION GÉNÉRALE AU DROIT (2009) (arguing through a corrective justice lens that the law is a collection of rules of conduct that govern the relationship between people in society). Although difficult to make comparisons without oversimplifying the complexities of the law, particularly given the lack of detailed studies on the amount of damage awards in French tort law, it is more common for French tort victims to receive larger damage awards when they have experienced moral suffering as opposed to only economic harm. *See* Borghetti, *supra* note 8, at 66–67 (attempting to explain why French courts may award greater damages when there is moral harm); *see, e.g.*, Tribunaux de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 1^e ch., Jan. 16, 2008 (cited in Borghetti, *supra* note 8, at 65) (awarding €100,000 to the *Ligue de protection des oiseaux* (Bird Protection League) in order to compensate the moral harm the organization suffered as a result of an oil spill killing seabirds and destroying their habitat). Nevertheless, the award of substantial damages for moral harms is also common in the United States. *See, e.g.*, *Robinson v. Wroblewski*, 704 N.E.2d 467, 472 (Ind. 1998) (awarding damages for the loss of a child’s love and companionship).

⁵⁶ Azarnia, *supra* note 32, at 490.

⁵⁷ *See, e.g.*, BACACHE-GIBELLI, *supra* note 23, at 486 (critiquing punitive damages and arguing that they are inconsistent with principles of French tort law).

⁵⁸ Borghetti, *supra* note 8, at 56; *but see* Sophie Schiller, *Hypothèse de l’américanisation du droit de la responsabilité*, 45 ARCHIVES DE PHILOSOPHIE DU DROIT 177 (2001) (arguing that although American law has influenced French tort law generally, French damage awards have not been subject to the same American influence because of procedural and sociological

these so-called “covert punitive damages,” these scholars have argued that tortfeasors may sometimes find themselves bound to pay damages exceeding the monetary harm they have caused.⁵⁹

Claims that French courts are awarding covert punitive damages, however, are difficult to assess. Among the challenges faced in evaluating these claims is the fact that French judges rarely have to provide detailed explanations or justifications when they set damages.⁶⁰ Nonetheless, one study found that damages awarded to compensate moral harm flowing from the death of a relative were on average higher when the defendant’s fault caused the death than in cases where it did not.⁶¹ Studies like these have led at least one scholar to conclude that courts may already be awarding damages of a punitive character—even if only covertly.⁶²

As the body of literature on damage awards in the French tort system continues to grow, a small but increasing number of French scholars have begun to reexamine assumptions about the underlying principles guiding the French tort system.⁶³ While French tort law remains steadfast in its explicit commitment to victim reparation and corrective justice, some of these scholars have argued that this narrow conception of the purposes of tort law fails to fully capture implicit principles that also drive the law, such as punishment and deterrence.⁶⁴

differences between the two countries).

⁵⁹ For a full discussion of such so-called “covert punitive damages,” see Borghetti, *supra* note 8, at 56–66. See, e.g., Cour d’appel [CA] [regional court of appeal] Bastia, Nov. 15, 2006, *Revue Lamy droit de l’immatériel* 2006, No. 685, note L. Grynbaum (cited in Borghetti, *supra* note 8, at 66) (requiring a defendant who engaged in business practices that constituted unfair competition to pay damages that exceeded the harm suffered by the plaintiff and took into account the profits which he reaped from his culpable behavior). For a good doctrinal review of punitive damages in France, see CLOTHILDE GRARE, *RECHERCHES SUR LA COHÉRENCE DE LA RESPONSABILITÉ DÉLICTEUELLE: L’INFLUENCE DES FONDEMENTS DE LA RESPONSABILITÉ SUR LA RÉPARATION* (2005); SUZANNE CARVAL, *LA RESPONSABILITÉ CIVILE DANS SA FONCTION DE PEINE PRIVÉE* (1995); BORIS STARCK, *ESSAI D’UNE THÉORIE GÉNÉRALE DE LA RESPONSABILITÉ CIVILE CONSIDÉRÉE EN SA DOUBLE FONCTION DE GARANTIE ET DE PEINE PRIVÉE* (1947).

⁶⁰ CARVAL, *supra* note 59, at 360.

⁶¹ Borghetti, *supra* note 8, at 63 (citing Martine Bourrié-Quenillet, *L’indemnisation des proches d’une victime décédée accidentellement: Étude d’informatique judiciaire* (1983) (unpublished thesis, Montpellier 1)).

⁶² *Id.*

⁶³ See, e.g., Patrice Jourdain, *Rapport introductif*, in *FAUT-IL MORALISER LE DROIT FRANÇAIS DE LA RÉPARATION DU DOMMAGE?* 3 (Emmanuelle Filiberti et al. eds., 2002) (questioning whether tort law’s purposes are too narrowly construed in the French legal system); CARVAL, *supra* note 59, at 13 (arguing that civil liability acts as a form of “*peine privée*” (private punishment), beyond simply serving a compensatory mechanism).

⁶⁴ See sources cited *supra* note 63; see also MURIEL FABRE-MAGNAN, *DROIT DES OBLIGATIONS, 2—RESPONSABILITÉ CIVILE ET QUASI-CONTRATS* 13 (2010) (discussing some of

Punitive damages are often associated with punishment and deterrence.⁶⁵ These functions are often overlooked in French tort law, however, given the priority for full reparation to restore the moral balance.⁶⁶ Nevertheless, while often characterized as serving their own distinct functions, punishment and deterrence are not necessarily inconsistent with the principles of victim compensation and the reestablishment of parity between members of society. This is particularly true, for example, in cases where tortfeasors know that their voluntary violation of a legal rule will subject them to less liability than the profit they stand to gain if regular compensatory damages are low.⁶⁷ In such cases, the prospect of punitive damages and the potential of being held liable for a greater damage award act to deter such behavior, helping to maintain the moral balance.⁶⁸ Similarly, where a tortfeasor nonetheless chooses to commit the tort, the retributive effect of punitive damages can provide more just compensation for damages that escape accountability as well as better recognize rights and wrongs, bringing about a more just state of affairs.⁶⁹ In light of these considerations, some French scholars have suggested that deterrence and retribution may already be operating covertly in French tort law, not only as independent functions for tort liability, but also as mechanisms supporting the more explicit French tort functions of full reparation and the return to a more just state of affairs.⁷⁰

the principles underlying French tort law).

⁶⁵ E.g., RESTATEMENT (SECOND) OF TORTS § 908 (1979).

⁶⁶ See, e.g., Daniel Fasquelle & Rodolphe Mesa, *Les fautes lucratives et les assurances de dommages*, 10 REVUE GÉNÉRALE DU DROIT DES ASSURANCES 351, 360 (2005) (discussing moral balance in the context of torts where the tortfeasor profits even after compensating the victim).

⁶⁷ Borghetti, *supra* note 8, at 68.

⁶⁸ See, e.g., Suzanne Carval, *Vers l'introduction en droit français de dommages-intérêts punitifs?*, 1 REVUE DES CONTRATS 822, 826 (2006) (arguing that punitive damages are especially apt in cases where the tortfeasor may profit because compensatory damages are low).

⁶⁹ See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1662–63 (1992) (stating that the purpose of retributive justice is “to right the wrong”); see also Jourdain, *supra* note 63, at 3 (discussing the role of morality in damage awards).

⁷⁰ See Carval, *supra* note 68, at 822 (noting that despite the insistence of the full reparation principle, in setting damages, French courts may covertly go beyond simply looking at the harm suffered by the victim, taking into account the culpable behavior of the tortfeasors and awarding damages of a retributive and deterrence dimension); see, e.g., Cour de cassation [Cass.][supreme court for judicial matters] 1e civ., Nov. 5, 1996, Bull. civ. I, No. 378 (holding that the mere infringement of the right to privacy entitles the victim to compensation, even if he or she has suffered no monetary harm); see also Cour de cassation [Cass.][supreme court for judicial matters] com., Jun. 16, 1992, Bull. civ. IV, No. 241 (upholding a decision requiring a restaurant company pay F800,000 to a restaurant owner for copying the name of his restaurant, arguably as a way to both punish the company and help restore the disrupted moral balance).

Although there is little doubt the drafters of the *Avant-Projet* recognized this emerging debate about the proper functions of tort law, they remained steadfastly committed to the explicit French goal of equivalency between harm and compensation. The *Avant-Projet*, like the Civil Code, thus begins by affirming the full reparation principle.⁷¹ This is immediately followed, however, by an exception to the equivalency principle allowing for payment of punitive damages under certain circumstances:

A person who commits a manifestly deliberate fault, and notably a fault with a view to gain, can be condemned in addition to compensatory damages to pay punitive damages, part of which the judge may in his or her discretion allocate to the Public Treasury. A judge's decision to order payment of damages of this kind must be supported with specific reasons and their amount distinguished from any other damages awarded to the victim. Punitive damages may not be the object of insurance.⁷²

The *Avant-Projet's* proposal thus draws a clear link between punitive damages and fault, especially fault with a view to gain. Moreover, unlike most other forms of damages in France,⁷³ punitive damages are to be uninsurable, forbidding tortfeasors from simply passing on this penalty to their insurer.⁷⁴ In a further break from the French tradition of judges not customarily providing explanation for their damage awards,⁷⁵ the *Avant-Projet* would require judges to give a reasoned opinion explaining why punitive damages are being imposed and distinguishing them from other damages awarded to the victim.⁷⁶

Long guided by an explicit commitment to the principle of full reparation, the official recognition of punitive damages arguably represents a significant departure from current French practice. Many French scholars and

⁷¹ *Avant-Projet de réforme du droit des obligations et du droit de la prescription*, *supra* note 13, art. 1370 states:

Subject to special regulation or agreement to the contrary, the aim of an award of damages is to put the victim as far as possible in the position in which he or she would have been if the harmful circumstances had not taken place. He or she must neither gain nor lose from it.

⁷² *Id.* art. 1371.

⁷³ Viney, *supra* note 32, at 238.

⁷⁴ Borghetti, *supra* note 8, at 70; Corbé-Chalon & Ragoff, *supra* note 15, at 295.

⁷⁵ Borghetti, *supra* note 8, at 62.

⁷⁶ *Avant-Projet de réforme du droit des obligations et du droit de la prescription*, *supra* note 13, art. 1371.

politicians contend that the principle of full reparation, with its requirements of equivalence and adequacy, should prohibit the award of such damages because they often unjustly enrich the victim and disrupt the moral balance.⁷⁷ Given this tradition and the exceptional nature of punitive damages, their inclusion in the *Avant-Projet* begs the question of what led the drafters to propose their recognition in French tort law. In these circumstances, insight into the rationales underlying punitive damages and the objections most often raised to their application may be gained by placing the French experience in a comparative perspective.

III. A COMPARATIVE PERSPECTIVE: THE JUSTIFICATIONS AND CRITIQUES

A. *Background: Understanding the Rationales for Punitive Damages and Juxtaposing the French and American Experiences*

Although punitive damages are well-entrenched in most common law legal systems, they play a much smaller role in the civil law tradition.⁷⁸ Comparisons between the ways different legal systems address substantive policy issues like punitive damages are helpful not only for understanding how legal norms are created, but also for identifying alternative and sometimes better ways for dealing with difficult policy questions.⁷⁹ When viewing different legal systems, however, it is important to remember that few are so diametrically opposed that they face each other from completely opposing black and white sides; rather, it is better to conceptualize divergent policy choices as different shades of grey on a spectrum of possibilities.⁸⁰

One of these grey areas of the law is the issue of punitive damages. Tracing its origins to eighteenth century England,⁸¹ the modern doctrine of punitive damages has been both embraced and attacked by judges, lawyers, legislators and academics alike.⁸² A closer examination of the rationales and

⁷⁷ See, e.g., Anziani & Bétaille, *supra* note 15, III. C. Les dommages et intérêts punitifs: une innovation pertinente pour certains contentieux de la responsabilité (“The jurisprudence thus attributes a simple reparative function to civil responsibility—sometimes said to be ‘compensatory,’ ‘restorative’ or ‘satisfactory’—and disavows a private punishment function.”).

⁷⁸ Wells, *supra* note 7, at 557; Koziol, *supra* note 8, at 748.

⁷⁹ See, e.g., KONRAD ZWEIGERT & HEIN KOETZ, AN INTRODUCTION TO COMPARATIVE LAW 15 (Tony Weir trans., 1977) (noting that comparative lawyers often propose that their own legal system adopt a solution to a particular problem which has been adopted in a different legal system).

⁸⁰ Koziol, *supra* note 8, at 742.

⁸¹ For a good overview of the history of punitive damages, see David Partlett, *Punitive Damages: Legal Hot Zones*, 56 LA. L. REV. 781, 784–85 (1996).

⁸² Sir Henry Brook, *A Brief Introduction: The Origins of Punitive Damages*, in PUNITIVE

critiques for punitive damages, with a particular focus on the debates that have unfolded in the United States, helps to inform the possible reasons why the *Avant-Projet*'s drafters proposed the French legal system officially recognize punitive damages for the first time.

The conventional view is that punitive damages serve both retributive and deterrent goals.⁸³ Nonetheless, it is interesting to note that punitive damages' origins lie in English common law where the concept of "exemplary damages" developed in part as a way for juries to express their outrage at tortfeasors' conduct⁸⁴ and recognize the loss of dignity suffered by tort victims.⁸⁵ As Martin Redish and Andrew Mathews explain, English courts began awarding exemplary damages in cases where plaintiffs established that they had experienced some sort of dignitary harm that remained otherwise uncompensated.⁸⁶ Through a series of cases involving abuses of power by English governmental officials in the 1760s,⁸⁷ exemplary damages emerged as a doctrine not only to compensate victims more fully and to punish and deter malicious conduct, but also to vindicate the public interest in the respect of its laws and recognize the dignitary harm the victim had suffered.⁸⁸

Early American tort law followed the English example,⁸⁹ gradually referring to exemplary damages as punitive damages to emphasize the goal of penalizing tortfeasors for their wrongdoing.⁹⁰ Today in the United States, punitive damages are defined as "damages, other than compensatory or nominal damages, awarded against a person to *punish* him for his outrageous conduct and to *deter* him and others like him from similar conduct in the future."⁹¹ There is no shortage of literature on the retributive and deterrent purposes of punitive damages by scholars in the country.⁹²

DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, *supra* note 8, at 1, 2.

⁸³ Sunstein et al., *supra* note 22, at 2075.

⁸⁴ A. (T.W.N.) v. Clarke, [2004] 22 B.C.L.R. 4th 1 (Can.) (discussing the origins of punitive damages in English common law).

⁸⁵ Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages are Unconstitutional*, 53 EMORY L.J. 1, 14 (2004).

⁸⁶ *Id.*

⁸⁷ The earliest cases were *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (K.B.) and *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (C.P.).

⁸⁸ See Vidmar & Wolfe, *supra* note 20, at 181–82 (describing the origins and development of exemplary damages).

⁸⁹ See *Genay v. Norris*, 1 S.C.L. 6, 7 (S.C. 1784) (holding that a doctor who deliberately poisoned the drink of an adversary was liable for "exemplary damages" to the victim).

⁹⁰ Vidmar & Wolfe, *supra* note 20, at 181–82.

⁹¹ RESTATEMENT (SECOND) OF TORTS § 908 (1977) (emphasis added).

⁹² See, e.g., Joni Hersch & W. Kip Viscusi, *Saving Lives Through Punitive Damages*, 83 S. CAL. L. REV. 229, 238–42 (2010) (arguing that punitive damages can be used to deter wrongful deaths); Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The*

Some scholars, however, have begun to question whether the focus on retribution and deterrence is warranted.⁹³ Margaret Jane Radin, for example, argues that punitive damages serve as a way to provide redress for the victim while forcing the wrongdoer to recognize that what he or she did was wrong.⁹⁴ Because redress is not necessarily about monetary restitution but rather affirming public recognition of certain rights and wrongs, Radin argues that there is a certain incommensurability between the harm caused by a tort and the corresponding damage award.⁹⁵ Drawing in part on Radin's analysis, David Owen similarly contends that the purpose of punitive damages is not simply to punish or deter.⁹⁶ He suggests that punitive damages help to "restore" victims and "redress" wrongs.⁹⁷

The Supreme Court of the United States, at least implicitly, also seems to have endorsed a view that punitive damages can serve a redressive function. For example, although the Court in *BMW of North America v. Gore* purported to adopt deterrent and punishment rationales in its decision to award punitive damages and made no explicit mention of tort law's redressive function,⁹⁸ its three "guideposts" for assessing the constitutionality of a punitive damages award—the degree of reprehensibility of the tortfeasor's conduct, the ratio between the award and the harm inflicted on the victim, and the civil and criminal sanctions for comparable misconduct⁹⁹—suggest that redress may have been a motivating factor. If Radin is correct that redress seeks to "symbolize public respect for the

Past, Present, and Future of Punitive Damages, 118 YALE L.J. 392, 421–67 (2007) (suggesting that punitive damages are properly conceived of as a form of punishment for private wrongs).

⁹³ See, e.g., David G. Owen, *Aggravating Punitive Damages*, 158 U. PA. L. REV. 181, 182 (2010) (arguing that punitive damages "offer[] victims of aggravated wrongdoing robust redress for the panoply of losses aggravated by the flagrancy of a wrong"); John Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 530 (2005) (stating that "notwithstanding the dominant tendency among modern scholars to treat tort law as an instrument for attaining public goals such as loss-spreading or efficient precaution-taking, it is still best understood as a law of redress"); Catherine Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 351–52 (2003) (noting that "punitive damages have been used to pursue not only the goals of retribution and deterrence, but also to accomplish, however crudely, a societal compensation goal: the redress of harms caused by defendants who injure persons beyond the individual plaintiffs in a particular case"); Radin, *supra* note 19, at 61 (suggesting that a focus on redress provides a more useful framework for understanding punitive damages).

⁹⁴ Radin, *supra* note 19, at 85.

⁹⁵ *Id.*

⁹⁶ Owen, *supra* note 93, at 192.

⁹⁷ *Id.* at 192–93.

⁹⁸ *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996).

⁹⁹ *Id.* at 574–85.

existence of certain rights and public recognition of the transgressor's fault in disrespecting those rights,"¹⁰⁰ the Court's focus on the degree of reprehensibility in particular is strong evidence that redress is at least implicitly guiding the Court's decision and its understanding of punitive damages.

Thus, it is interesting to juxtapose the American and French approaches to punitive damages. While the American tort system explicitly embraces principles of retribution and deterrence in its award of damages,¹⁰¹ motivations of social redress also seem to be operating as a background principle.¹⁰² In contrast, as previously discussed, the French tort system, with its strong and explicit commitment to full reparation and moral balance, draws significantly on principles of social redress,¹⁰³ but arguably embraces principles of retribution and deterrence implicitly in some cases as well.¹⁰⁴

In this section of the Article, I examine more closely these rationales as they apply to punitive damages in the French tort system. More specifically, I show that punitive damages are consistent with the principle of social redress, both as a way to vindicate victims' rights and to express the community's and legal system's disapproval of the tortfeasor's misconduct. They also serve important retributive and deterrent functions, which some scholars have dismissed as incompatible with the principles of the French tort system, but I suggest are not necessarily so.

B. Social Redress: Vindication of Victims' Rights

Punitive damages are a valuable weapon where social policy is frustrated, providing vindication for the victim by recognizing that his or her rights have been violated. John Goldberg, for example, has argued that "tort law is a law for the redress of private wrongs . . . , empower[ing] a victim to seek redress from a wrongdoer because that other has acted wrongfully toward him" ¹⁰⁵ Accordingly, punitive damages can be understood in one sense as a sort of damage payment for victims who have suffered particularly egregious wrongs, triggering an entitlement to redress that would not be

¹⁰⁰ Radin, *supra* note 19, at 61.

¹⁰¹ E.g., RESTATEMENT (SECOND) OF TORTS § 908 (1979); Sunstein et al., *supra* note 22, at 2074.

¹⁰² See *supra* note 93 and accompanying text.

¹⁰³ See *supra* note 45 and accompanying text.

¹⁰⁴ See, e.g., Borghetti, *supra* note 8, at 68; see also Fasquelle & Mesa, *supra* note 66, at 360 (arguing that requiring tortfeasors to pay damages amounting to the profit they make, and not just the loss they cause, can serve to deter certain tortious behavior).

¹⁰⁵ Goldberg, *supra* note 93, at 599.

otherwise fulfilled.¹⁰⁶ While Goldberg notes that “making whole” may not always be the appropriate measure of redress, he acknowledges that in many cases it is.¹⁰⁷ Other scholars, too, have noted that the recognition of punitive damages’ redressive function can help to meet the goal of providing full compensation to victims.¹⁰⁸ Under this view, compensation moves beyond the market rhetoric, focusing more on core concepts of rights and wrongs.¹⁰⁹ As a result, requiring tortfeasors to pay damages to their victims does more than simply compensate the victim for the monetary “costs” he or she has suffered, but also forces the tortfeasor to recognize that he or she has committed a wrong and consequently must make redress to the victim.¹¹⁰

Punitive damages can thus serve an important redressive function by affirming the rights of the victim and recognizing the difficulty and incommensurability of equating harm with money.¹¹¹ This is particularly true in the French context where, as previously discussed, courts have rejected a narrow and formalistic understanding of the full reparation principle and instead embraced the notion that all damages should be compensated.¹¹² Tort actions are grounded on the legal conclusion that a tortfeasor has breached a civil duty, and the remedy for the resulting tortious loss is compensation through damages.¹¹³ The circumstances of the tort, however, may be such that regular damages do not adequately compensate the victim for his or her actual loss.¹¹⁴ Moreover, torts often result in intangible losses that escape easy accounting.¹¹⁵ Punitive damages may

¹⁰⁶ *Id.* at 604.

¹⁰⁷ *Id.* at 604–05.

¹⁰⁸ See, e.g., Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1574 (2009) (stating that redress “is not simply monetary compensation to make the victim ‘whole,’ but the right to have the ‘wrong’ acknowledged and, if the victim chooses, to seek an appropriate amount of damages to act as satisfaction”).

¹⁰⁹ Radin, *supra* note 19, at 60.

¹¹⁰ *Id.* at 61.

¹¹¹ *Id.* at 56, 60–61.

¹¹² See, e.g., Cour de cassation [Cass.][supreme court for judicial matters] 2e civ., June 19, 2003, Bull. civ. II, No. 203 (holding that the person responsible for an accident must repair all injurious consequences).

¹¹³ Anthony Sebok, *Punitive Damages in the United States*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 155, 169 (Helmut Koziol & Vanessa Wilcox eds., 2009).

¹¹⁴ Partlett, *supra* note 81, at 793. For example, tort victims in countries like the United States and, as will be discussed later, France, generally have to pay their own legal fees and often face significant costs in bringing their claims. As the court notes in *Kemezy v. Peters*, 79 F.3d 33, 34 (7th Cir. 1996), punitive damages can incentivize victims to bring tort claims (relieving the burden on the criminal justice system) by helping to shoulder the costs of enforcement.

¹¹⁵ See generally Richard Wise, *Quantification of Economic Damages* 10–12 (Faculty of Law, McGill University, Working Paper, 1996) (categorizing tortious conduct and losses, and explaining how damages are calculated), available at <http://www.wiseblackman.com/english/>

potentially fill this void by providing a more nuanced approach which better supports the rights of the victim and ensures that he or she receives adequate compensation for losses incurred.¹¹⁶

Vindication of victims' rights underscored many of the decisions in early English cases involving so-called "exemplary damages." English courts began awarding exemplary damages in cases where victims established that they had suffered a dignitary harm that was difficult to quantify monetarily and thus risked going uncompensated.¹¹⁷ This same sort of private redress rationale similarly underscored many early United States Supreme Court decisions, such as *Day v. Woodworth*, decided by the Court in 1851.¹¹⁸ In *Day*, although there was no colorable claim for personal injury, the Court imposed punitive damages where "the wrong done to the plaintiff [was] incapable of being measured by a money standard," but nonetheless warranted recognition.¹¹⁹

More recent United States Supreme Court decisions, however, have tended to de-emphasize—at least formally—the redressive function of tort law, instead focusing on its deterrent and retributive dimensions.¹²⁰ Nonetheless, some scholars have suggested that the principle of redress may still be guiding the Court.¹²¹ Jessica Berch, for example, notes that American

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¹¹⁶ *Id.*

¹¹⁷ See, e.g., *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (C.P.) (awarding exemplary damages where government officials entered the plaintiff's home with a nameless warrant in an attempt to procure evidence, and calling the action "worse than the Spanish Inquisition" and "a most daring public attack . . . upon the liberty of [an Englishman]").

¹¹⁸ *Day v. Woodworth*, 54 U.S. 363 (1851).

¹¹⁹ Sebok, *supra* note 113, at 174 (discussing and quoting *Day*, 54 U.S. at 363).

¹²⁰ See, e.g., *Philip Morris USA v. Williams ex rel. Williams*, 549 U.S. 346, 359 (2007) (Stevens, J., dissenting) (noting that "a punitive damages award, instead of serving a compensatory purpose, serves the entirely different purposes of retribution and deterrence"); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (noting that punitive damages "are aimed at deterrence and retribution"); *Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 432 (2001) (noting that punitive damages are "intended to punish the defendant and to deter future wrongdoing").

¹²¹ See, e.g., Jessica Berch, *The Need for Enforcement of U.S. Punitive Damages Awards by the European Union*, 19 MINN. J. INT'L L. 55, 75–76 (2010) (noting that some states have adopted multiplier statutes as a way to strike a balance between giving juries unfettered discretion and allowing for damages that will deter "certain aberrant antisocial conduct"); Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1394–95 (2009) (suggesting that punitive damages can serve as a mechanism to "vindicate a victim's dignity and autonomy interests"); Mark Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263, 269–74 (2008) (acknowledging that allowing plaintiffs a right to seek "stylized revenge" functions in a way that permits victims to assert their equal moral worth); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 106 (2005) (arguing that punitive damages are intended not only to punish a tortfeasor, but to recognize

punitive damages are perhaps taking on an increasingly moral character to redress particularly offensive conduct.¹²² Similarly, Mark Geistfeld argues that recent Supreme Court decisions, like *Philip Morris USA v. Williams*,¹²³ are consistent with the view that punitive damages can serve as a form of individual victim vindication.¹²⁴ For example, in *BMW of North America v. Gore*, the Court purported to adopt deterrence and retribution as rationales in awarding punitive damages.¹²⁵ Nonetheless, the decision arguably also endorsed a redressive rationale, as reflected, for example, in its inclusion of the degree of reprehensibility of the tortfeasor's conduct in assessing the amount of the punitive damage award.¹²⁶ Principles of social redress, with their focus on affirming victims' rights and their recognition that monetary compensation cannot necessarily always equate damages with harm, thus seem to be implicitly influencing the Court.

Critics of punitive damages, however, charge that the rationale that punitive damages vindicate personal rights undermines social policy. Among the critiques leveled by opponents is that punitive damages lead to overcompensation.¹²⁷ Drawing on cases like *Philip Morris USA*, critics suggest that overcompensation undermines the rights-based rationale for punitive damages and conflates tort law and criminal law.¹²⁸ This is especially problematic in countries such as France where the purpose behind damage awards is restoring the moral balance because the victim receives the

that a victim "has a right to *be punitive*").

¹²² Berch, *supra* note 121, at 75 n.102.

¹²³ *Philip Morris USA*, 549 U.S. at 346.

¹²⁴ Geistfeld, *supra* note 121, at 284–92 (using the *Philip Morris USA* case to illustrate how punishment is equated into monetary damages and how the vindictive nature of such awards may be subject to judicial review).

¹²⁵ *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996).

¹²⁶ *Id.*

¹²⁷ See, e.g., Koziol, *supra* note 8, at 761–62 (questioning whether punitive damages are necessary to compensate for emotional or immaterial loss); Luke Ledbetter, "It's the [Tort System], Stupid": *Consumer Deductibles: How to More Equitably Distribute the Risks of Medical Malpractice and Adequately Compensate Victims Without Statutory Damages Caps*, 6 APPALACHIAN J.L. 51, 54 (2006) (arguing that the American tort system overcompensates plaintiffs with minimal injuries, but undercompensates those with catastrophic injuries); Robert Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 96 (1982) (arguing that "when punitive damages are awarded in addition to compensatory damages, victims are usually overcompensated").

¹²⁸ Koziol, *supra* note 32, at 751–59. In *Philip Morris USA*, 549 U.S. at 349, the Supreme Court held that punitive damages were awarded based in part on the jury's desire to punish a defendant for harming nonparties to the lawsuit violated due process. On remand, the Oregon Supreme Court in *Williams v. Philip Morris, Inc.*, 176 P.3d 1255, 1257–58 (Or. 2008), upheld the constitutionality of a \$79.5 million punitive damages award to the widow of a man who died of lung cancer after smoking as many as three packs of cigarettes each day believing media representations that the dangers of smoking were overstated.

windfall from the judgment,¹²⁹ violating fundamental principles of private law.¹³⁰ Similarly, critics also question whether a more expansive and sensitive understanding of extra-patrimonial damages (such as emotional distress or pain and suffering) would be a better approach for vindicating personal rights than embracing punitive damages.¹³¹

While persuasive, these critiques do not undercut the potential compatibility between punitive damages and the French tort system. The idea that damages should vindicate personal rights is in fact strongly consistent with the principles underlying French tort law. The vindication of personal rights promotes corrective justice by helping to restore the moral balance and by recognizing that the rights of victims may not be fully acknowledged through traditional damage awards. Punitive damages may in fact help tort law to meet its goals of providing full reparation¹³² and of restoring the social equilibrium.¹³³ Because of the incommensurability between harm and monetary damages, and the difficulty of accounting for both the tangible and intangible losses,¹³⁴ victims in tort actions are often grossly undercompensated, undermining the corrective justice rationale in French tort law.¹³⁵ As Judge Richard Posner notes, victim undercompensation is especially likely in cases where the injury is of an elusive or intangible character.¹³⁶ Undercompensating victims in a case where the injury suffered is difficult to quantify clearly violates the full reparation principle.

Even if damages are easily quantifiable, however, the goal of full reparation is often undermined. For example, French tort victims are generally barred from recovering attorneys' fees.¹³⁷ This means that, in

¹²⁹ Several American states require victims pay a portion of their punitive damages to the state. *See, e.g.*, GA. CODE ANN. § 51-12-5.1(e)(2) (2010); IND. CODE § 34-51-3-6(c) (2007); OR. REV. STAT. § 31.735(1) (2011).

¹³⁰ Koziol, *supra* note 8, at 762; James Sales & Kenneth Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1165 (1984).

¹³¹ *See, e.g.*, Erica Shultz, Note, *Ignoring Distress Signals: Why Courts Should Recognize Emotional Distress Damages in Wrongful Adoption Claims*, 52 FLA. L. REV. 1073, 1096–99 (2000) (arguing that juries in wrongful adoption cases may resort to punitive damage awards because they have no other effective mechanism to compensate a victim's emotional suffering and instead advocating for a more nuanced and comprehensive understanding of emotional distress).

¹³² *See supra* note 36 and accompanying text.

¹³³ *See supra* note 56 and accompanying text.

¹³⁴ Sebok, *supra* note 113, at 172–76.

¹³⁵ *See* Richard Abel, *Big Lies and Small Steps: A Critique of Deborah Rhode's Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 1019, 1023 (1998) (noting that reputable studies all show “gross underclaiming and gross undercompensation of the largest claims”).

¹³⁶ *Kemezy v. Peters*, 79 F.3d 33, 35 (7th Cir. 1996).

¹³⁷ Cour de cassation [Cass.][supreme court for judicial matters] 2e civ., Jul. 8, 2004, Bull.

practice, damage awards are reduced by fees the victim owes to his or her attorney. This leads to undercompensation, a violation of the full reparation principle.

Critics conversely argue that the gross overcompensation likely to result from the recognition of punitive damages threatens to instead further upset the moral balance.¹³⁸ This concern should be tempered in the French context, however, where the French Court of Cassation is known for overturning or refusing to enforce judgments where judges clearly depart from the principles governing French tort law.¹³⁹ For example, the Court of Cassation frequently sets aside judgments purporting to award damages “in equity” or of a purely symbolic amount when lower courts do not provide sufficient justification for the award.¹⁴⁰ By requiring judges to give an accounting of and reasons for the punitive damages they award, the *Avant-Projet* provides a further safeguard against excessive compensation while better ensuring that tort victims are fully compensated for their losses than under the current French tort system. The proposal to recognize punitive damages in French tort law thus offers courts another avenue to achieve full reparation for victims, while providing mechanisms to regulate the awards in a manner that does not upset the equitable balance.

Beyond simply closing the compensation gap, punitive damages can also simultaneously support the corrective justice thrust in French tort law by precipitating a change required to correct the unjustified state of affairs

civ. II, No. 365 (denying recovery of attorneys’ fees); see François-Xavier Licari, *Les frais d’avocat comme dommage réparable – quelques réflexions sur le concours d’actions entre les mêmes parties et sur la relativité aquilienne à la lumière du droit comparé et de l’économie du droit*, 31 REVUE LAMY DROIT CIVIL 66 (2006) (arguing that recovery of attorneys’ fees could be consistent with the full reparation principle).

¹³⁸ See generally Koziol, *supra* note 8, at 757 (noting that punitive damages—as far as compensation for a loss suffered by the victim is concerned—must fit into the whole system of compensation under tort law which, at least until recently, was not the case in the United States).

¹³⁹ Viney, *supra* note 32, at 261. More specifically, the Court will set aside judgments that have not followed the full reparation principle or that have set an amount of damages with the intention of punishing the tortfeasor. See, e.g., Cour de cassation [Cass.][supreme court for judicial matters] 2e civ., Nov. 28, 1962, Bull. civ. II, No. 756 (overturning a lower court verdict awarding F3,000 for the moral harm stemming from the death of the plaintiff’s husband and stating that “moral harm lends itself poorly to pecuniary compensation which, to be just, can only be of principle”); but see Cour de cassation [Cass.][supreme court for judicial matters] ch. mixte, Sept. 6, 2002, Mix. bull., No. 4 (noting that a court of appeal has sovereign power to set the amount of a damage award so long as it is justified by the court’s evaluation, “without having to specify its constitutive elements”).

¹⁴⁰ Viney, *supra* note 32, at 261; see, e.g., Cour de cassation [Cass.][supreme court for judicial matters] crim., Jan. 15, 1997, Bull. crim., No. 11 (overturning a lower court verdict awarding a “quasi-symbolic” sum of F10,000 to the plaintiff for the loss of the pleasure of the view from his villa after the defendants constructed an edifice without the proper permit).

between the tortfeasor and his or her victim caused by the tort.¹⁴¹ Punitive damages can bring about a just state of affairs by encouraging a return to the status quo ante through the recognition of the harm and compensation to the victim.¹⁴² Given French tort law's broad corrective justice-oriented goal of reestablishing parity between members of society through damage awards,¹⁴³ punitive damages offer yet another tool for achieving this objective.

Punitive damages are also a better alternative to either the increasing reliance on the French judiciary's covert increase of damage awards in cases where the moral balance has been disrupted or to the adoption of a more expansive understanding of extra-patrimonial damages. By explicitly adopting punitive damages as a tool for achieving the objectives of the French tort system, judges would be better positioned to develop a more coherent framework for filling gaps in the existing tort system without creating unnecessary confusion about the proper role of extra-patrimonial damages such as emotional distress or pain and suffering in the tort system. As Thomas Colby notes, "[p]unitive damages vindicate the dignity of an individual victim by allowing her to punish the defendant for committing a humiliating or insulting tort upon her."¹⁴⁴ This allows the victim "to equalize her moral status with that of her aggressor."¹⁴⁵ Given their redressive functions, punitive damages offer a robust method for restoring the moral balance and closing the compensation gap, consistent with principles underlying French tort law.

C. Social Redress: Vindication of Society's Rights

As a corollary to the redressive functions that punitive damages play in the personal realm, punitive damages are also awarded to vindicate the insult to society that the tortfeasor committed through his or her tortious conduct. A sort of "hybrid between a display of ethical indignation and the imposition of a criminal fine,"¹⁴⁶ punitive damages are recognized as not only vindicating private wrongs, but also public rights.¹⁴⁷ Because the tortfeasor has acted in a way that is inconsistent with the laws that govern society and

¹⁴¹ Radin, *supra* note 19, at 60.

¹⁴² *Id.*

¹⁴³ See LACROIX, *supra* note 51, at 4–5 (suggesting that "justice" and the "affirmation of responsibility" motivate the approach to damages taken in French tort law).

¹⁴⁴ Colby, *supra* note 92, at 434.

¹⁴⁵ *Id.* at 442.

¹⁴⁶ *Haines v. Schultz*, 14 A. 488, 484–85 (N.J. 1888).

¹⁴⁷ *E.g.*, *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387 (Tex. 1997); *Condict v. Hewitt*, 369 P.2d 278, 280 (Wyo. 1962); *Trudeau v. Cooke*, 769 N.Y.S.2d 322, 322 (N.Y. App. Div. 2003).

has consequently harmed another person, “the injury partakes more or less of a public character, and extends beyond the mere pecuniary damage sustained by the party against whom it has been committed.”¹⁴⁸ In response, punitive damages may serve to vindicate public rights and frame a community norm.¹⁴⁹ Moreover, they may help to maintain social harmony by providing a judicial remedy for the vindication of social violations instead of the violent self-help to which victims might otherwise resort if their complaints to criminal justice authorities are ignored and no other legal remedies are available.¹⁵⁰ By vindicating the public interest in the respect of its laws, punitive damages offer a valuable tool for addressing social harms and frustrated social policy.

Social redress through vindication of public rights is thus closely aligned with notions of corrective justice. As Radin notes, compensation is a “contested concept.”¹⁵¹ While commodified conceptions of compensation may restore a victim financially by equating harm to the individual victim with a money value, “such conceptions do not necessarily restore moral balance.”¹⁵² Rather, a noncommodified conception of compensation, where harm and money are not easily commensurable, provides a more useful framework for assessing damages.¹⁵³ From this point of view, redress, as expressed through a payment from the tortfeasor to the victim, not only makes up for certain social disadvantages the tortfeasor has caused, but serves to symbolize public respect for the existence of certain rights, thereby vindicating the public interest.¹⁵⁴ As Posner has suggested, punitive damages express “the community’s abhorrence” of the tortfeasor’s act.¹⁵⁵

Although the Supreme Court in *State Farm Mutual Auto Insurance v. Campbell* purports to reject the idea that punitive damages should be used to compensate for harms to society more generally,¹⁵⁶ Catherine Sharkey argues

¹⁴⁸ Anthony J. Sebok, *Private Law, Punishment and Disgorgement: What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 201 (2003) (discussing *Turner v. North Beach & Mission R.R. Co.*, 34 Cal. 594 (1868)).

¹⁴⁹ *Id.* at 203; see also Sharkey, *supra* note 93, at 359 (discussing the normative power of punitive damages to redress and compensate for societal harms).

¹⁵⁰ *Kemezy v. Peters*, 79 F.3d 33, 35 (7th Cir. 1996).

¹⁵¹ Radin, *supra* note 19, at 56.

¹⁵² Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1137 (2000).

¹⁵³ Radin, *supra* note 19, at 56.

¹⁵⁴ See *id.* at 61–62 (describing the tort system as one aspect of a social insurance regime in which society makes payments to those in need).

¹⁵⁵ *Kemezy*, 79 F.3d at 35.

¹⁵⁶ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (stating that compensatory damages “are intended to redress the concrete loss that the plaintiff has suffered

that a more nuanced reading of the decision suggests that the Court is not necessarily opposed to awarding damages for harms to people other than the individual plaintiffs before the Court.¹⁵⁷ For example, in determining the degree of reprehensibility of State Farm's conduct, the Court assessed whether the company engaged in repeated misconduct against others of the sort that injured the plaintiffs.¹⁵⁸ Although the Court ultimately concluded that there was insufficient evidence to establish that State Farm had harmed others,¹⁵⁹ the fact that it nonetheless considered State Farm's conduct towards others suggests that it might take into account the harm to victims other than the individually named plaintiff in assessing damage awards in some cases.¹⁶⁰ As Colby notes, punitive damages can provide a form of social redress for society more broadly, "vindicating society's collective interest in restoring and reinforcing the social order."¹⁶¹

Nevertheless, critics are concerned about placing tort law beyond the market rhetoric and using it as an avenue for redress of transgressions against society more generally.¹⁶² The Court of Cassation has consistently held that civil liability should not have a penal function.¹⁶³ Because punitive damages serve as a form of criminal-like sanction, critics maintain that they should be abandoned, and proper recourse for the vindication of public rights should be in a criminal court.¹⁶⁴ For example, Jeffrey Grass argues that without recourse to the procedural safeguards afforded by the criminal process,

by reason of the defendant's wrongful conduct" while punitive damages "are aimed at deterrence and retribution" (internal citations omitted).

¹⁵⁷ Sharkey, *supra* note 93, at 390.

¹⁵⁸ *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 424.

¹⁵⁹ *Id.*

¹⁶⁰ See Sharkey, *supra* note 93, at 391 (noting that "the concept of societal damages expands the boundaries of a single lawsuit's ability to achieve the tort system's varied goals by allowing a jury to assess damages against a defendant whose conduct has had harmful effects radiating far beyond the particular plaintiff who has initiated suit").

¹⁶¹ Colby, *supra* note 92, at 437.

¹⁶² See generally Dan Quayle, *United States Court of Appeals for the Federal Circuit Tenth Anniversary Commemorative Issue: Civil Justice Reform*, 41 AM. U. L. REV. 559, 565 (1992) (noting that, because punitive damages have taken on a quasi-criminal character, limitations are needed to restrict the measure of punitive damages).

¹⁶³ See, e.g., Cour de cassation [Cass.][supreme court for judicial matters] crim., Feb. 8, 1977, Bull. crim., No. 52 (recognizing that in the allocation of a damages award, a civil court may only compensate a party for the damages caused directly to him or her).

¹⁶⁴ See Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 602 (2003) (discussing Edward C. Eliot, *Exemplary Damages*, 29 AM. L. REG. 570, 571 (1881), which argues that "the mingling of the criminal principles with the civil, which the doctrine necessitates, is altogether wrong"); see also Richard Adelstein, *Victims as Cost Bearers*, 3 BUFF. CRIM. L. REV. 131, 160 (1999) (stating that a tort judgment "endows the civil wrong with many of the attributes of a crime").

tortfeasors are subject to a sort of anomalous, privately-enforced form of criminal law in the civil tort law context.¹⁶⁵ As Owen notes, given the lower burden of proof and the possibility of multiple lawsuits with punitive damage awards from a single tort incident with multiple victims, the civil context may be ill-equipped as a forum to provide social redress for the vindication of social rights.¹⁶⁶ Instead, punitive damages increase the possibility of further upsetting the moral balance by over-penalizing tortfeasors for their wrongdoing.¹⁶⁷

Despite these criticisms, awarding punitive damages to vindicate the public's interest in the respect of its laws is consistent with French tort law. Supporters of punitive damages have attacked the assumption that tort law's focus on victim reparation necessarily means tort law cannot also "participate in the normative work of [the French] legal system."¹⁶⁸ Tort law, by its very nature, has the aptitude to define rules of behavior and sanction those who transgress them.¹⁶⁹ As former American Supreme Court Justice Sandra Day O'Connor wrote, punitive damages are a "powerful weapon"—when imposed wisely, they can advance legitimate public interests.¹⁷⁰

From the perspective of providing redress for the vindication of public rights, punitive damages have the potential to advance the French commitment to corrective justice. Corrective justice requires restoring the equilibrium between members of society.¹⁷¹ While critics of the introduction of punitive damages into the French tort law argue that punitive damages would frustrate the system's goal of maintenance of parity between members of society by prospering one person at the expense of another,¹⁷² this argument relies on the erroneous assumption that, absent the reward of punitive damages, society is already at equilibrium. In cases where this is not true, punitive damages serve as a way for society to express its outrage

¹⁶⁵ Jeffrey Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, 242 (1985).

¹⁶⁶ David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 VILL. L. REV. 363, 382–83 (1994); see also Sebok, *supra* note 113, at 174–75 (stating that under the theory that punitive damages vindicate public rights, the damages take on a "quasi criminal form").

¹⁶⁷ See generally Vidmar & Wolfe, *supra* note 20, at 192 (noting that punitive damages are most likely to be awarded in cases where the harm or potential harm is very serious or the tortfeasor's behavior is reprehensible).

¹⁶⁸ CARVAL, *supra* note 59, at 13.

¹⁶⁹ *Id.* at 13–16. Carval argues that the "hegemonic hold" of fault and reparation in the French tort system needs to be reevaluated in light of the moral roots of the discipline.

¹⁷⁰ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting).

¹⁷¹ GOMAA, *supra* note 16, at 129.

¹⁷² Azarnia, *supra* note 32, at 489.

and mark its disapproval of the tortfeasor's tortious conduct.¹⁷³ Moreover, by allowing judges to allocate a portion of any punitive damage award to the Public Treasury, the *Avant-Projet's* proposal both aims to ensure the victim is not overcompensated and that society receives a form of redress for the more general harm committed against it. The award of punitive damages thus helps to restore the moral balance while reinforcing public norms against insults to society.

Critics nonetheless argue that punitive damages threaten to over-penalize a tortfeasor, particularly since they conflate notions of tort law and criminal law, and that this threatens to further disrupt the social balance.¹⁷⁴ This concern, while certainly legitimate, should be tempered in the French context for two reasons. First, there is a much stronger link between criminal law and tort law in the French legal system than in the American system.¹⁷⁵ As will be discussed later in this Article, there is a more fluid boundary between criminal and tort law in the French context, even allowing tort victims to bring their tort claims in criminal courts in some cases.¹⁷⁶ Second, the concern of over-penalization through the award of exorbitant punitive damages is less likely to occur in France where the French Court of Cassation has a well-established practice of overturning excessive damage judgments that lack justification.¹⁷⁷ Since the *Avant-Projet's* proposal requires judges to provide an explanation for their punitive damage awards, there is an additional safeguard to better ensure that the damages awarded provide full reparation for the victim and society while being commensurable with restoring the moral balance.

Given the potential for punitive damages to advance social policy and provide redress for the public at large, their introduction into the French legal system is consistent with the principles underlying existing French tort law.

¹⁷³ Wilcox, *supra* note 9, at 26.

¹⁷⁴ See, e.g., Grass, *supra* note 165, at 242–43.

¹⁷⁵ Viney, *supra* note 32, at 239; see, e.g., Cour de cassation [Cass.][supreme court for judicial matters] crim., Dec. 8, 1906, rapport Laurent-Atthalin, note Demogue (holding that the public prosecutor is compelled to launch a public action when a victim brings a civil action arising from harm caused by a criminal infraction).

¹⁷⁶ Viney, *supra* note 32, at 239; see, e.g., Cour de cassation [Cass.][supreme court for judicial matters] crim., Feb. 8, 1983, Bull. crim., No. 46 (ruling on civil damages stemming from criminal action in a criminal case).

¹⁷⁷ Viney, *supra* note 32, at 261; see, e.g., Cour de cassation [Cass.][supreme court for judicial matters] 2e civ., Nov. 28, 1962, Bull. civ., No. 756 (overturning a lower court verdict that lacked sufficient justification of the damages awarded for moral harm); see also CODE CIVIL [C. civ.] art. 1152 (allowing judges to invalidate liquidated damages clauses in contracts when the amount is “manifestly excessive or inadequate”).

D. Retribution

Although retribution is not explicitly recognized as a guiding principle in French tort law, as previously noted, a growing number of scholars have suggested that French courts may implicitly be looking beyond principles of full reparation and corrective justice, and awarding damages of a retributive nature.¹⁷⁸ While retribution is often associated with punishing the tortfeasor for the wrong he or she committed, retribution has a strong moral dimension.¹⁷⁹ As Owen notes, though at first it may seem strange that a legal system would be based on a sort of “private revenge,” retribution is appropriate because it protects two of the most fundamental values that support the law—freedom and equality.¹⁸⁰

Punitive damages serve an expressive purpose, conveying the community’s outrage resulting from the tortfeasor’s misconduct. Deriving from the social roots of the law, they promote what society believes ought to be the correct relationship between its members by censuring behaviors that invade the rights of others.¹⁸¹ In the recent United States Supreme Court case of *Exxon Shipping Co. v. Baker*, for example, the Court held that the consensus today that punitive damages can serve a retributive purpose informs the modern doctrine and provides a partial answer for why most American jurisdictions support their award.¹⁸² The Court thus noted that punitive damages may be especially appropriate in cases where there is a high degree of blameworthiness.¹⁸³

Critics, however, charge that assigning tort law a retributive function conflates tort law and criminal law.¹⁸⁴ Whereas criminal law is supposed to be about retribution and punishment, tort law’s aim should be compensation.¹⁸⁵ In light of the French commitment to full reparation,¹⁸⁶ punitive damages thus may seem incompatible with the underlying rationale of French tort law. This erroneous conclusion, however, fails to consider the

¹⁷⁸ Carval, *supra* note 68, at 822; *see, e.g.*, Cour de cassation [Cass.][supreme court for judicial matters] 1e civ., Nov. 5, 1996, Bull. civ. I, No. 378 (awarding damages arguably as a way to punish the tortfeasor who infringed on the victim’s right to privacy even though the victim suffered no palpable monetary harm).

¹⁷⁹ Owen, *supra* note 166, at 375.

¹⁸⁰ *Id.*

¹⁸¹ Partlett, *supra* note 81, at 800.

¹⁸² *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492–93 (2008).

¹⁸³ *Id.* at 493.

¹⁸⁴ Koziol, *supra* note 8, at 755–56.

¹⁸⁵ *See* Zipursky, *supra* note 121, at 106 (questioning the proper role of punitive damages in a compensation-based and corrective justice-oriented understanding of tort law).

¹⁸⁶ *See supra* note 11 and accompanying text.

more nuanced relationship between criminal law enforcement and tort liability, especially in the French context.

Although in principle criminal and tort law are two distinct institutions, a strong link has been made between the two institutions in the French legal system. For example, the victim of a criminal infraction in France has the option of bringing his or her claim for compensation in an individual capacity in a civil court or as a subsidiary party in a criminal proceeding, initiated either by the public prosecutor or the victim himself or herself.¹⁸⁷ Even if the victim opts to bring his or her claim in the civil court, the criminal character of the source of the harm may still affect his or her redress and the court's final judgment.¹⁸⁸ Given the fluid nature of the boundary between criminal and tort law in the French legal system, awarding tort damages with a retributive purpose does not necessarily offend the principles underlying the French legal system.

Moreover, punitive damages can address issues of under-punishment in criminal law and relieve pressures on the criminal justice system, helping to restore equilibrium between the tortfeasor, the victim, and society.¹⁸⁹ Criminal law sometimes falls short in adequately encompassing those situations where retribution would promote restoring the moral balance.¹⁹⁰ As Owen notes, when a tortfeasor violates the rights of his or her victim, he or she in a sense "steals" the victim's autonomy, reflecting an assertion that the tortfeasor is worthier than the victim.¹⁹¹ Where such "thefts" of autonomy are not subject to penalties beyond the restoration of the "stolen goods" through sufficient compensatory damages, the rectification of the transaction is incomplete because the tortfeasor still holds the extra worth stolen from the victim.¹⁹² Punishment, through punitive damages, helps to restore the equality of the victim in relation to the thief by reaffirming the equal worth of all individuals in society and the duty of each person to respect and give equal worth to the rights of others.¹⁹³

¹⁸⁷ Viney, *supra* note 32, at 239.

¹⁸⁸ *See id.* at 240. Until the end of the twentieth century, civil courts were bound by the findings of criminal courts such that a civil judge was essentially barred from compensating a victim on the basis of fault where an alleged tortfeasor was acquitted of criminal charges of homicide or involuntary injury. Although admittedly this rule has been largely abandoned, there are still certain areas (such as criminal infractions by the press) where the victim is prevented from bringing a civil action when the alleged tortfeasor is found not guilty of criminal charges. *Id.*

¹⁸⁹ *Kemezy v. Peters*, 79 F.3d 33, 34–35 (7th Cir. 1996).

¹⁹⁰ Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1440–41 (1993).

¹⁹¹ Owen, *supra* note 166, at 376.

¹⁹² *Id.*

¹⁹³ *Id.*

More concretely, there are numerous instances in French law where courts appear to have already implicitly adopted a retributive dimension in assessing tort damages in order to punish the tortfeasor and restore the social equilibrium. For example, Jean-Sébastien Borghetti notes that judges have a certain amount of discretion in their reward of extra-patrimonial damages given the difficulty of measuring the moral harm caused by a tort.¹⁹⁴ As a result, courts have taken a very liberal stance when assessing extra-patrimonial damages, suggesting that perhaps judges not only take into account the injury to the victim, but also the immeasurable harm the victim suffered, the culpable behavior of the tortfeasor, and any illicit profits the tortfeasor received.¹⁹⁵ This covert form of punishment arguably goes beyond according equality to the victim, satisfying an implicit push for retribution that appears to be influencing French courts.¹⁹⁶

While damage awards may help to restore the moral balance—an explicit goal of the French tort system—they may also serve as a way to punish a tortfeasor—a more implicit goal that some scholars argue is also driving the system.¹⁹⁷ Rather than continue to rely on implicit mechanisms for ensuring victim reparation, reestablishment of the social equilibrium, and punishment of the tortfeasor, French tort law could use punitive damages to design a more coherent and explicit framework for filling existing gaps in the tort system. By providing a form of compensation that accounts for the blameworthiness of the tortfeasor's actions and moral harm to the victim, punitive damages not only serve to punish the tortfeasor, but also promote the explicit goals of the French tort system, namely full reparation and social fairness.

E. Deterrence

In contrast to retribution, which looks back at the actions of the wrongdoer and aims to punish him or her for his or her misconduct, deterrence aims to influence the future behavior of the wrongdoer and society at large. Proponents of the deterrence model generally emphasize an economic perspective of tort law, arguing that accurate judgments about the

¹⁹⁴ Borghetti, *supra* note 8, at 63; *see, e.g.*, Cour de cassation [Cass.][supreme court for judicial matters] 2e civ., Dec. 16, 2011, pourvoi No. 10-15947 (unpublished) (rejecting an appeal to overturn a court of appeal's award of €19,500 in extra-patrimonial damages to an employee exposed to asbestos).

¹⁹⁵ Borghetti, *supra* note 8, at 63–64.

¹⁹⁶ *Id.* at 64. For sources examining the influence of retribution in awarding punitive damages, *see* Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1006–07 (2007) and Partlett, *supra* note 81, at 801.

¹⁹⁷ Borghetti, *supra* note 8, at 63.

costs and utility of conduct will produce an economically efficient social system of conduct.¹⁹⁸ The deterrence model is thus often juxtaposed against the corrective justice model, which emphasizes the wrongfulness of tortious conduct and seeks to remedy disparities between parties caused by culpable and injurious conduct.¹⁹⁹ In light of the seeming incompatibility between these two models, many critics of punitive damages in France contend that if deterrence is the underlying rationale for punitive damages, these damages clash with the French commitment to corrective justice.²⁰⁰

Numerous scholars, however, have argued that deterrence and corrective justice are not necessarily mutually exclusive models.²⁰¹ Drawing on similar debates in the criminal law context, Gary Schwartz describes how a more nuanced understanding of the interactions between deterrence and corrective justice can provide a fuller explanation for the doctrines.²⁰² In fact, Schwartz ultimately concludes that the two models may actually provide support for one another rather than opposition.²⁰³ Extrapolating this conclusion beyond the criminal law context, tort law can also arguably be an instrument with goals of both deterrence and corrective justice.²⁰⁴ In the French context, for example, deterrence can serve to support the explicit French commitment to corrective justice. Moreover, deterrence may serve as an independent rationale for awarding damages that, while not explicitly embraced by the French legal system, has at least implicitly guided courts in some cases.²⁰⁵

More specifically, deterrence is often aimed at ensuring tortfeasors internalize the full social costs of their behavior so that they are dissuaded from engaging in “economically inefficient behavior,” defined as behavior

¹⁹⁸ Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33–34 (1972).

¹⁹⁹ Christopher J. Robinette, *Can There be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369, 370 (2005).

²⁰⁰ E.g., BACACHE-GIBEILI, *supra* note 23, at 486–87.

²⁰¹ See, e.g., Brian L. Church, *Balancing Corrective Justice and Deterrence: Injury Requirements and the Negligent Infliction of Emotional Distress*, 60 ALA. L. REV. 697, 703 (2009) (“Ultimately, no one theory of tort can be used in all circumstances to the exclusion of others. While an ideological world may desire a contrary result, some scholars recognize that each theory can coexist with the others.”); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1815–16 (1997) (“Given the evident similarities in the sets of rationales available in criminal law and in tort law, the discussions of mixed theories by criminal law scholars should certainly be of interest to tort scholars.”).

²⁰² Schwartz, *supra* note 201, at 1801–02, 1824–25.

²⁰³ See *id.* at 1824 (arguing that a mixed theory of tort law would “impose[] or assign[] liability for proper deterrence reasons—unless this result [was] not compatible with the criterion of corrective justice”).

²⁰⁴ *Id.* at 1801.

²⁰⁵ Borghetti, *supra* note 8, at 63, 66–68.

that imposes more costs than benefits on society.²⁰⁶ Whereas specific deterrence is targeted at dissuading the individual tortfeasor from committing the same wrongful act again in the future,²⁰⁷ general deterrence extends to society at large.²⁰⁸ In both cases, the imposition of punitive damages derives from the concern that tortfeasors often escape liability for the full social costs of their wrongs because victims frequently face challenges in identifying the tortfeasor, bringing suit, and collecting full damages.²⁰⁹ Punitive damages can thus help achieve optimal deterrence by ensuring tortfeasors are held liable for the full damages they cause and by offsetting certain subjective gains to the tortfeasor that are not ordinarily counted in the utility calculus.²¹⁰

At the same time, however, critics charge that punitive damages do little to restore the moral balance and both over- and under-deter, making them grossly unfair.²¹¹ Critics point to cases like *State Farm Mutual Auto Insurance* as evidence that punitive damages are often “arbitrary” and “grossly excessive.”²¹² They argue that if punitive damages are really meant to promote optimal deterrence by, for example, disgorging tortfeasors of ill-gotten gains, the French legal system and the law of unjust enrichment already achieve this goal.²¹³

²⁰⁶ Colby, *supra* note 92, at 468.

²⁰⁷ See, e.g., *Seltzer v. Morgan*, 154 P.3d 561, 597 (Mon. 2007) (finding that the deterrent effect of a punitive damage award against a tortfeasor will depend on the individual's financial means).

²⁰⁸ See, e.g., *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996) (noting that a state may impose punitive damages “to further its legitimate interests in punishing unlawful conduct and deterring its repetition”).

²⁰⁹ Sunstein et al., *supra* note 22, at 2082.

²¹⁰ A. Mitchell Polinsky & Steven Shavell, *Punitive Damages*, in *TORT LAW AND ECONOMICS* 228, 229–31 (Michael Faure ed., 2009).

²¹¹ Koziol, *supra* note 8, at 754; see also Dan B. Dobbs, *Ending Punishment in “Punitive” Damages: Deterrence-Measured Remedies*, 40 *ALA. L. REV.* 831, 839 (1988) (“Punitive damages, partly because of the lack of structure . . . may overdeter or underdeter bad conduct, and in any event, for some of the same reasons, may be grossly unfair in many particular cases”).

²¹² *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (holding that a \$145 million punitive damages award was arbitrary and grossly excessive when compared to only \$1 million in compensatory damages, thus violating the due process clause); Koziol, *supra* note 8, at 754–57.

²¹³ Koziol, *supra* note 8, at 760; see Ana Vohryzek, *Unjust Enrichment Unjustly Ignored: Opportunities and Pitfalls in Bringing Unjust Enrichment Claims Under ICSID*, 31 *LOY. L.A. INT'L & COMP. L. REV.* 501, 508–09 (2009) (discussing the law of disgorgement in France and explaining how the French legal system caps the plaintiff's award for unjust enrichment at the amount of the plaintiff's loss, not the defendant's gain). It should be noted that, while the theory of unjust enrichment has been accepted in various areas of French law, it has not received wholesale acceptance across the legal system. Brice Dickson, *Unjust Enrichment Claims: A Comparative Overview*, 54 *CAMBRIDGE L.J.* 100, 113 (1995).

Although critics are quick to suggest that the deterrence rationale for punitive damages is problematic and incompatible with French tort law, they fail to consider how deterrence may actually support the explicit corrective justice goals of the tort system. Like Schwartz notes, deterrence and corrective justice should be recognized as collaborators rather than competitors.²¹⁴ For example, under the deterrence rationale, because punitive damages may force tortfeasors to more fully internalize the costs of their actions,²¹⁵ tort law is better able to meet its goals of maintaining equilibrium between members of society and reestablishing the status quo disrupted by the tortious act.²¹⁶ This is especially true in the case of what academics call *fautes lucratives* (lucrative faults).²¹⁷ Because the tortfeasor of a lucrative fault knows that he or she will still benefit from the misconduct even if held liable and forced to compensate the victim, punitive damages can help ensure a more optimal level of deterrence, maintaining the moral balance.²¹⁸ Even Helmut Koziol, a staunch critic of punitive damages, admits that the law of unjust enrichment often fails to adequately account for these wrongful gains.²¹⁹ This is in part because the tortfeasor may not be caught and, even if caught, will sometimes be required to pay compensation that is less than his or her total gain.²²⁰ Similarly, as Posner suggests in *Kemezy*, because compensatory damages do not always fully compensate the victim, tortious conduct is often under-deterred unless the tortfeasor faces additional costs through the payment of something like punitive damages.²²¹

There is thus a close relationship between the compensatory and deterrent objectives of tort law.²²² Punitive damages can promote more optimal deterrence, ultimately supporting maintenance of the social equilibrium, an underlying goal of the French tort system.²²³ Furthermore, although achieving optimal levels of deterrence and ensuring fair awards is admittedly difficult, further legislation and guidance may help both to address the potential issues that arise in properly fashioning damage awards and to

²¹⁴ Schwartz, *supra* note 201, at 1834.

²¹⁵ Polinsky & Shavell, *supra* note 210, at 230–31.

²¹⁶ Azarnia, *supra* note 32, at 489.

²¹⁷ Fasquelle & Mesa, *supra* note 66, at 360. Lucrative faults are voluntary violations of legal rules or duties that are committed by an individual who knows he or she will be subject to less liability than the profit likely to be made by committing the violation. *Id.*

²¹⁸ Borghetti, *supra* note 8, at 68.

²¹⁹ Koziol, *supra* note 8, at 758–59.

²²⁰ *Id.*

²²¹ *Kemezy v. Peters*, 79 F.3d 33, 34 (7th Cir. 1996).

²²² *Id.*

²²³ See Azarnia, *supra* note 32, at 488–89 (noting that one of the goals of tort law is to “reestablish the status quo which was ruptured by the tortious act”).

ensure that punitive damages meet the French tort system's explicit corrective justice goals.²²⁴ As will be discussed later, certain changes to the *Avant-Projet's* current proposal may help to better ensure that punitive damages are awarded in a way that is consistent with goals of victim reparation and corrective justice.

Beyond simply supporting the corrective justice rationale, however, deterrence can also serve the independent goal of discouraging potential tortfeasors from engaging in tortious conduct.²²⁵ Although most scholars agree that deterrence is not an underlying goal of French tort law, others like Suzanne Carval forcefully argue that French judges may already be implicitly engaging in a sort of deterrence-motivated analysis in assessing damage awards in some cases.²²⁶ For example, Borghetti contends that French courts have implicitly adopted a deterrence-based rationale in tort cases where newspaper companies infringe on a person's right to privacy in order to sell more copies of their newspapers.²²⁷ Although in many of these cases the goal of full reparation could be achieved without disgorging the company of all illicit profits, it is widely believed that courts try to deprive the company of its illicit gains in hopes that it and other companies will be deterred from engaging in the same sort of tortious behavior again.²²⁸

Rather than continue to have courts covertly take into account deterrent considerations in fashioning their rewards, the *Avant-Projet's* proposal requires courts to be more explicit about when they are giving awards of a more deterrent nature. This frankness will bring more clarity to the law and better ensure that it meets its goals, including both explicit goals of victim reparation and corrective justice, and more implicit goals of retribution and deterrence. As the Court of Cassation itself has noted in numerous cases,²²⁹

²²⁴ For a summary of some of the legislative approaches adopted in the United States, see DOBBS, *supra* note 7, § 384.

²²⁵ Carval, *supra* note 68, at 822.

²²⁶ *Id.*; see, e.g., Cour d'appel [CA] [regional court of appeal] Versailles, 1e ch., May 4, 2000, pourvoi No. 98-21992 (unpublished) (awarding F50,000 to the plaintiff factory worker who was fired after she was no longer able to work for medical reasons in part because of her employer's "misuse of power").

²²⁷ Borghetti, *supra* note 8, at 67; see, e.g., Tribunaux de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 1e ch., Dec. 17, 1986, Gaz. Pal. 1987, 1, 238 (cited in Borghetti, *supra* note 8, at 64). In the case, the court awarded F200,000 to the heir of the French throne as compensation for the damages he suffered after a newspaper ran a story accusing him of squandering his family's fortune. According to Borghetti, such an amount "grossly overestimate[d]" any damage the victim suffered and could "only be explained as an attempt to deprive the tortfeasor of the profit he had made and to deter him from publishing any such articles in the future." Borghetti, *supra* note 8, at 67.

²²⁸ Borghetti, *supra* note 8, at 67.

²²⁹ See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Jan. 4, 2012, pourvoi No. 11-10239 (unpublished) (dismissing the defendant's appeal of a judgment

judges make “global assessments” of damage awards and are not required to break down awards between the different claims asserted.²³⁰ Combined with the large discretion given to judges in assessing damage awards, critics argue that this method is inherently arbitrary and fails to create any sort of check to determine whether the full reparation principle is being respected.²³¹

In adopting punitive damages, the *Avant-Projet*'s proposals would make more explicit the principles that should be guiding judicial decisions and allow courts and the legislature to create rules to better ensure fairness and transparency. Rather than continuing to operate in a system where courts seem to be guided implicitly by principles like deterrence, judges would have a clear understanding of the purposes for awarding damages and a set of tools and rules for better achieving those purposes. The formal introduction of punitive damages is thus an opportunity to make explicit when and how deterrence—which is arguably already at work in the French system²³²—should be considered in setting a damage award. While deterrence might at first seem inconsistent with more explicit principles of French tort law, it can both support principles of full reparation and corrective justice and serve as an independent rationale for awarding damages.

F. Understanding the Rationales and Moving Forward

Proponents and critics of punitive damages offer many justifications and critiques for their award. Punitive damages not only provide a form of redress for victims and society at large, but they also have retributive and deterrent purposes. In light of existing judicial practices and the various rationales for awarding punitive damages, it is perhaps not so surprising that the authors of the *Avant-Projet* sought to officially recognize and introduce

against it for €10,000 for the damages the plaintiffs sustained when they were delayed in moving to a new home because of the defendant's actions, despite the lower court granting a global award without specifying the amount awarded for each individual claim).

²³⁰ Anziani & Bétaille, *supra* note 15, at III. D. L'Évaluation du préjudice et la liquidation des dommages et intérêts. As Anziani and Bétaille note, global assessments of damage awards have come under increasing scrutiny. For example, Alain Bénabent, a lawyer at the Council of State and Court of Cassation, described the assessment of damages as the Achilles' heel of the law of civil responsibility. Similarly, Professor Fabrice Leduc criticized the disparate and sometimes arbitrary nature of judicial damage awards, arguing it leads to inequality.

²³¹ *Id.*

²³² Borghetti, *supra* note 8, at 56–66; *see, e.g.*, Tribunaux de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 1e ch., Jan. 16, 2008 (cited in Borghetti, *supra* note 8, at 65) (awarding damages to a non-profit environmental organization for extra-patrimonial harm suffered as a result of an environmental disaster). According to Borghetti, the damages in the case had a “clearly punitive function.”

punitive damage awards into French tort law as a “weapon” in the legal system’s arsenal for achieving its goals. Bearing in mind the reasons generally offered in favor of punitive damages and the potential for punitive damages to advance the French tort system’s purposes, further examination of the *Avant-Projet*’s draft provision for punitive damages is warranted.

IV. UNDERSTANDING ARTICLE 1371: APPLICATION AND REFINEMENT

Analysis of the scope of Article 1371 of the *Avant-Projet*, including a discussion of how the Article can be better tailored to fit within the French tort system, suggests that punitive damages may be a welcome addition to French tort law. As the drafters note, the provision “cautiously opens the way for the reward of punitive damages.”²³³ It states:

A person who commits a manifestly deliberate fault, and notably a fault with a view to gain, can be condemned in addition to compensatory damages to pay punitive damages, part of which the judge may in his or her discretion allocate to the Public Treasury. A judge’s decision to order payment of damages of this kind must be supported with specific reasons and their amount distinguished from any other damages awarded to the victim. Punitive damages may not be the object of insurance.²³⁴

Drawing again on a comparative approach, this section aims to further understand the essential components of the provision and to identify parts of the new law that may require further consideration.

A. *The Tortfeasor and Fault*

Article 1371 provides that punitive damages may be awarded to “[a] person who commits a manifestly deliberate fault, and notably a fault with a view to gain”²³⁵ As use of the term “manifestly deliberate” would seem to suggest, a central component of the Article is that the tortfeasor must intend to commit the fault. Consistent with the principle of full reparation, “fault with a view to gain,” defined as “a fault whose beneficial consequences for its perpetrator would not be counteracted by the simple

²³³ *Avant-Projet de réforme du droit des obligations et du droit de la prescription*, *supra* note 13, Sous-Titre III, Exposé des motifs, s. 6.

²³⁴ *Id.* art. 1371.

²³⁵ *Id.*

reparation of the harm caused,²³⁶ presents a particularly strong case for awarding punitive damages.²³⁷ Although Solène Rowan notes that there is some debate as to the precise meaning of this definition, consensus among French academics suggests that a tortfeasor must intend to make a profit, even after any potential liability to compensate the victim is taken into account.²³⁸ While this understanding may appear to narrow the scope of the instances where punitive damages may be awarded, it is important to note that “fault with a view to gain” is only a preponderant instance of “manifestly deliberate fault” and not an exclusive list of all possible actions that would fall under the Article.²³⁹ Thus, it seems possible that a court could award punitive damages where a tortfeasor was not acting with the motive of gain, but simply with deliberation.

In light of the current ambiguity about what constitutes “manifestly deliberate fault,” further explanation of whether punitive damages would be appropriate where a tortfeasor acts not for profit but in a malicious manner would be helpful.²⁴⁰ Given the French commitment to corrective justice and restoring the moral balance,²⁴¹ extending punitive damages to situations where a party acts with malice would appear to be a logical extension of the doctrine, even if the tortfeasor is not acting with the motive of gain. Awarding punitive damages in cases where a tortfeasor commits a manifestly

²³⁶ *Id.* Sous-Titre III, Exposé des motifs, s. 6.

²³⁷ *Id.* art. 1371.

²³⁸ Solène Rowan, *Comparative Observations on the Introduction of Punitive Damages in French Law*, in REFORMING THE FRENCH LAW OF OBLIGATIONS 325, 328–30 (John Cartwright, Stefan Vogenauer & Simon Whittaker eds., 2009).

²³⁹ *Id.*; *Avant-Projet de réforme du droit des obligations et du droit de la prescription*, *supra* note 13, art. 1371.

²⁴⁰ In the United States, for example, punitive damages may be awarded for conduct that is “outrageous,” whether the tortfeasor’s acts are done with an evil motive or reckless indifference to the rights of others. RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (1979). In contrast, English courts award punitive damages in three situations: (1) where there is “oppressive, arbitrary or unconstitutional action by the servants of the government”; (2) where “the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff”; and (3) where “expressly authorised by statute.” *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.). The second category is thus most closely analogous to the French formulation, although notably fails to provide for recovery where the tortfeasor’s conduct is malicious. It is important to note, however, that the English categorical approach has come under increasing attack, leading some commentators to argue for its replacement by a more general principle. *See, e.g.*, Anthony Sebok & Vanessa Wilcox, *Aggravated Damages*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, *supra* note 8. In contrast with English law, the *Avant-Projet* avoids announcing categories of conduct that would trigger punitive damages. This is unsurprising given the French tendency to impose broad, guiding rules instead of specific rules aimed at resolving specific situations. *See* Azarnia, *supra* note 32, at 475.

²⁴¹ Azarnia, *supra* note 32, at 488–90.

deliberate fault, whether for profit or with malice, is consistent with the underlying principles of French tort law because it helps to restore the social equilibrium and promotes full reparation by recognizing that a particularly egregious tort was committed and providing a form of compensation for the immeasurable moral harm the victim suffered.

B. Damages

Similarly, the allocation of damages under Article 1371 further advances the goals of French tort law by better providing for full compensation and social redress, but requires more clarification. According to Article 1371, a court's decision to award punitive damages "must be supported with specific reasons and their amount distinguished from any other damages awarded to the victim."²⁴² A positive implication of this component of the provision is the likely development of a body of case law, enabling a better understanding of when punitive damages are awarded and the amount of such awards.²⁴³ The resulting increase in transparency and monitoring may also alleviate concerns that punitive damages could be applied in an arbitrary and unpredictable manner.²⁴⁴ Nevertheless, at least initially, the requirement of distinguishing punitive damages from other damage awards may prove challenging for French judges who are largely unaccustomed to setting out their methods for quantifying damages.²⁴⁵ Requiring judges to explain their damage awards, however, provides a crucial mechanism for promoting consistency in decision-making and helps to maintain the social equilibrium, one of the goals of French tort law.²⁴⁶

In addition to the difficulties associated with requiring judges to provide an explanation for their damage awards, a major criticism leveled against the *Avant-Projet* proposal is that consistency in the award of punitive damages would be precarious because Article 1371 fails to articulate any criteria courts should take into account when awarding punitive damages.²⁴⁷ A

²⁴² *Avant-Projet de réforme du droit des obligations et du droit de la prescription*, *supra* note 13, art. 1371.

²⁴³ Rowan, *supra* note 238, at 333.

²⁴⁴ See, e.g., Yvonne Lambert-Faivre, *Les effets de la responsabilité (les articles 1367 à 1383 nouveaux du Code civil)*, 1 *REVUE DES CONTRATS* 163, 164 (2006) (suggesting that punitive damages should be rejected in France in part because they are of an inherently arbitrary nature); see also *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 63 (1991) (noting that a punitive damages scheme providing at best "skeletal guidance . . . invites—even requires—arbitrary results").

²⁴⁵ CARVAL, *supra* note 59, at 360.

²⁴⁶ Azarnia, *supra* note 32, at 488.

²⁴⁷ See generally CONSEIL NATIONAL DES BARREAUX, *PROJET DE RAPPORT DU GROUPE DE TRAVAIL CHARGÉ D'ÉTUDE L'AVANT-PROJET DE RÉFORME DU DROIT DES OBLIGATIONS ET DU DROIT DE LA PRESCRIPTION* (2006) ("The amount of punitive damages has no limits and its

closer examination of the principles applied by American courts when awarding punitive damages may be of guidance. Drawing on the American experience, French lawmakers may wish to provide criteria for judges in assessing punitive damages. This would provide courts with the flexibility needed to adhere to principles underlying French tort law such as full reparation and the promotion of corrective justice, while also promoting greater consistency across cases.

In assessing punitive damages in the American context, consideration is given to factors such as the character of the tortfeasor's act, the nature and extent of harm to the victim, the wealth of the tortfeasor, whether criminal penalties have been imposed, the extent of any profit made by the tortfeasor, and the relationship between compensatory and punitive damages.²⁴⁸ American judges, much like their French counterparts who generally oppose standardized damage formulas and tables,²⁴⁹ have largely resisted articulating a ratio between compensatory and punitive damages.²⁵⁰ Consistent with this practice, however, criteria could nonetheless still be provided to French courts to use when setting punitive damages.

Establishing criteria for the award of punitive damages would also help combat the potential for excessive damage awards, a criticism leveled against punitive damages in the American context.²⁵¹ Although the anxiety associated with excessive awards should be tempered in the French context where judges, not juries, set damages, the *Avant-Projet* attempts to address this concern by requiring judges to fully explicate their awards.²⁵² Providing

determination by the trial court is not subject to review by the Court of Cassation.”).

²⁴⁸ See, e.g., *BMW of N. Am. v. Gore*, 517 U.S. 559, 574–85 (1996) (laying out “guideposts” for courts when reviewing punitive damages awards); *Kemezy v. Peters*, 79 F.3d 33, 34–36 (7th Cir. 1996) (articulating seven factors to consider when awarding punitive damages); *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223–25 (Ala. 1989) (articulating a similar set of factors for determining an appropriate punitive damages award); RESTATEMENT (SECOND) OF TORTS § 908 (1979).

²⁴⁹ Borghetti, *supra* note 8, at 63.

²⁵⁰ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424–25 (2003) (“We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.”).

²⁵¹ See, e.g., Steve Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 GEO. WASH. L. REV. 774, 802 (2010) (“[S]ound economic analysis dictates that imposing punitive damages well beyond actual harm simply because a tortfeasor’s behavior was reprehensible can inadvertently lead to overdeterrence, price inflation beyond optimum, quality of good purchased below optimum, and a significant reduction in overall social welfare.”).

²⁵² See generally Neil Vidmar & Mirya Holman, *The Frequency, Predictability, and Proportionality of Jury Awards of Punitive Damages in State Courts in 2005: A New Audit*, 43 SUFFOLK U. L. REV. 855, 881 (suggesting that both judicial gate-keeping and reduction in jury awards can serve to constrain punitive damages); *Avant-Projet de réforme du droit des obligations et du droit de la prescription*, *supra* note 13, art. 1371.

judges with criteria for assessing when punitive damages should be awarded and in what amount provides an additional safeguard for ensuring that their award properly serves the goals of the French tort system.

Nevertheless, despite already existing and potential safeguards, critics continue to raise concerns that punitive damages may still risk compensating victims beyond full reparation, undermining the principle of equivalency that guides French tort law.²⁵³ Article 1371 attempts to combat this potential problem by allowing the judge “in his or her discretion [to] allocate [part of the punitive damages award] to the Public Treasury.”²⁵⁴ This achieves a compromise between two imperfect solutions while promoting the goals of French tort law. On the one hand, if the full award was diverted to the state, the victim would have no incentive to bring the claim, he or she may remain undercompensated, and the benefits of supporting punitive damages would be lost.²⁵⁵ On the other hand, if punitive damages were conferred solely to the victim, he or she would stand to receive a substantial windfall, potentially violating the principle of full reparation.²⁵⁶ Similar “split-recovery” schemes already exist in a number of American states,²⁵⁷ and seem consistent with French tort law principles, particularly in cases where the harm is suffered not only by the individual victim, but also the general public.²⁵⁸

Regrettably, the *Avant-Projet* fails to provide direction on when punitive damages should be directed to the state and in what amount or proportion.

²⁵³ See generally Lambert-Faivre, *supra* note 244, at 164 (“For clarity of the law, we advocate for the maintenance of the distinction between civil and criminal law: the intentionality of the offence is a matter for criminal law.”); Azarnia, *supra* note 32, at 488 (“The commitment of a country’s courts in keeping punitive damages out of civil tribunals is a reflection of that country’s dedication to the role of tort law as a dispenser of justice and as an instrument geared toward the maintenance of parity between members of society.”).

²⁵⁴ *Avant-Projet de réforme du droit des obligations et du droit de la prescription*, *supra* note 13, art. 1371.

²⁵⁵ Rowan, *supra* note 238, at 336.

²⁵⁶ *Id.*

²⁵⁷ See *supra* note 129 and accompanying text. In addition to denying windfall gains to plaintiffs, split-recovery statutes may also discourage frivolous litigation and raise revenue for the state. Moreover, some academics argue that if the purpose of punitive damages is to remedy a violation of a public right, the penalty ought to accrue to society rather than a third party beneficiary. John Long, *Punitive Damages: An Unsettled Doctrine*, 25 *DRAKE L. REV.* 870, 886–87 (1976).

²⁵⁸ Split-recovery schemes can provide a mechanism of full reparation for society. See generally Sharkey, *supra* note 93, at 391–92. Sharkey notes that social compensation schemes are consistent with both the corrective justice and deterrence rationales for tort damages. According to Sharkey, societal harms can be divided into two categories along a continuum: “specific harms” are harms that affect specific, identifiable individuals, whereas “diffuse harms” affect society more generally. Considerations of the type of harm and where it falls on the continuum are important for determining how damages should be apportioned under a split-recovery scheme.

Moreover, if the appropriateness for giving such awards to the state is premised in part on vindication of a public harm, the award should perhaps be directed into a designated fund with the purpose of counteracting such harm.²⁵⁹ Further guidance is thus needed as to when and in what proportion punitive damage awards should be directed toward the state in order to better advance the purposes of French tort law.

Equally important to considerations of who receives punitive damages awards is the question of who bears the burden of paying them. Article 1371 expressly states that “[p]unitive damages may not be the object of insurance.”²⁶⁰ According to the *Avant-Projet*’s authors, this rule ensures that punitive damages have their intended deterrent and retributive impact.²⁶¹ Although there is some debate whether insuring against punitive damages would actually undermine their purpose, the question may be more theoretical than practical as it would likely be difficult if not impossible to find an insurance company willing to sell liability insurance for punitive damages.²⁶² The French Insurance Code bars all insurers from answering for “losses and damages caused by the intentional or fraudulent fault of the insured.”²⁶³ Nevertheless, because the types of fault covered in the *Avant-Projet* are broader than the Court of Cassation’s interpretation of uninsurable “intentional fault” under the Insurance Code,²⁶⁴ the question of whether punitive damages should not be insurable is important.

The prohibition on insuring against punitive damages seems consistent with the purposes for introducing these damages into French tort law. If insurance were available, it could undermine some of the principles guiding French tort law such as the restoration of the moral balance by maintaining the state of disequilibrium between victims and insured tortfeasors who

²⁵⁹ Although not completely analogous, many such funds already exist in other contexts. For example, in Canada, the Environmental Damages Fund provides a mechanism for directing funds received as a result of fines, court orders, and voluntary payments towards environmental rehabilitation projects. Those who cause environmental damage pay into the fund and the moneys are distributed to environmental projects in the geographic region where the original incident occurred. Harry J. Wruck, *The Federal Environmental Damages Fund*, 5 CANADIAN ENV’T L. REP. 120 (2004).

²⁶⁰ *Avant-Projet de réforme du droit des obligations et du droit de la prescription*, *supra* note 13, art. 1371.

²⁶¹ *Id.* Sous-Titre III, Exposé des motifs, s. 6.

²⁶² Rowan, *supra* note 238, at 338–39.

²⁶³ CE. ASS., Art. L113-1, Law No. 81-5 of Jan. 7, 1981.

²⁶⁴ The Court of Cassation has narrowly defined the kinds of fault that are “intentional,” thus making them uninsurable. According to the Court, the wrongdoer must intend to commit the fault and the fault must be realized. Cour de cassation [Cass.][supreme court for judicial matters] 3e civ., Oct. 7, 2008, pourvoi No. 07-17969 (unpublished).

escape personal liability for their actions.²⁶⁵ Nevertheless, it is interesting to note that the non-insurability of punitive damages represents the minority view in the United States.²⁶⁶ Although the insurance of punitive damages is prohibited in several states on public policy grounds, most states permit their coverage either as a matter of public policy, contract interpretation, or both.²⁶⁷ In states that prohibit insurance, courts and legislatures stress that insurance undermines the legal and social purposes of punitive damages.²⁶⁸ As one court explained, “a person has no right to expect the law to allow him to place responsibility for his reckless and wanton acts on someone else.”²⁶⁹ In France, similar rationales could likely be offered for barring insurance of punitive damages. By requiring tortfeasors pay the cost of their tortious conduct out of their own pockets, the *Avant-Projet* would prevent tortfeasors from shifting responsibility to others, thus helping to restore the moral balance. Similarly, by forcing tortfeasors to fully internalize the costs of their actions instead of passing them on to third party insurers, tort law could better achieve its goal of equilibrium between members of society.²⁷⁰ The provision barring insurance thus seems consistent with the principles underlying the French tort system and existing French law.

C. Summary of Article 1371 and Suggestions for Improvement

In summary, Article 1371 attempts to lay out rules and principles for when punitive damages should be awarded, focusing on the relationship between the tort and the tortfeasor, and addressing issues of how damages should be determined. Although generally consistent with the principles of French tort law in its current form, the Article could be improved with increased precision. For example, greater clarification of what constitutes a “manifestly deliberate fault” and a clear elaboration of the criteria judges should use in assessing punitive damage awards and apportioning awards between the victim and the state is needed. This would help alleviate some of the concerns critics raise regarding punitive damages and better ensure their compatibility with the goals of French tort law.

²⁶⁵ Corbé-Chalon & Ragoff, *supra* note 15, at 295.

²⁶⁶ Catherine M. Sharkey, *Calabresi's The Cost of Accidents: A Generation of Impact on Law and Scholarship: Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 427 (2005).

²⁶⁷ *Id.*

²⁶⁸ See, e.g., *Lira v. Shelter Ins. Co.*, 903 P.2d 1147, 1149 (Colo. App. 1994) (“[P]ublic policy prohibits insurers from assuming any obligations for indemnity of punitive damages. Otherwise, the legal and social purposes for punitive damages would be defeated.”).

²⁶⁹ *Nicholson v. Am. Fire & Cas. Ins. Co.*, 177 So. 2d 52, 54 (Fla. Dist. Ct. App. 1965).

²⁷⁰ *Azarnia*, *supra* note 32, at 489.

V. CONCLUSIONS: CAN THE FRENCH LEGAL SYSTEM GET “ON BOARD” WITH PUNITIVE DAMAGES?

Whether legislators will choose to adopt Article 1371 in either its current or an amended form still remains a matter of speculation.²⁷¹ By placing the Article in its historical and comparative context, however, one thing is clear: punitive damages are not fundamentally at odds with the French tort system. In fact, Article 1371 has the potential to advance many of French tort law’s underlying goals, both explicit and implicit, particularly if it is refined before adoption.

In the more than two hundred years since the promulgation of the Civil Code, the French legal system has continued to evolve and adapt to changing circumstances, maintaining its strong commitment to the principles of corrective justice and full reparation of the victim in the tort law context. Punitive damages offer a useful tool for the further promotion of these explicit goals. At the same time, punitive damages can also serve to punish and deter reprehensible conduct, goals that may already be implicitly guiding French tort law both independently and as a way to ensure the social and moral balance is restored and victims are made whole.

The potential utility of punitive damages, however, may be weakened by Article 1371’s failure to provide sufficient guidance on how punitive damages should operate in practice. This lack of direction threatens to create a disconnect between punitive damages and the fundamental principles in the French tort system, undermining their use and creating unnecessary controversy.

While punitive damages have faced significant critique in France and most other civil law jurisdictions, there are indications that the tides may be changing. A recent study from Germany, for example, reveals that, like in France, Germany’s steadfast opposition to punitive damages may be eroding.²⁷² Similarly, a Spanish court recently enforced an American

²⁷¹ Rowan, *supra* note 238, at 343. A bill strongly influenced by the *Avant-Projet* that supported punitive damages was introduced into the upper chamber of Parliament (*le Sénat*) in 2010. *Proposition de loi n° 657 portant réforme de la responsabilité civile*, Sénat, July 9, 2010, available at <http://www.senat.fr/leg/pp109-657.html>. Although Article 1386-25 of that bill would have allowed judges to award punitive damages for lucrative faults in certain circumstances, the bill was not discussed before a new Parliament was elected. The idea of awarding damages of a punitive nature for lucrative faults was, however, also endorsed in another reform project in 2011 supported by the Ministry of Justice. FRANÇOIS TERRÉ, *POUR UNE RÉFORME DU DROIT DE LA RESPONSABILITÉ CIVILE* (2011). While the project does not endorse punitive damages, Article 54 would allow a judge to give illicit profits to the victim in cases of lucrative faults.

²⁷² Volker Behr, *Punitive Damages in American and German Law—Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI.-KENT L. REV. 105, 126 (2003)

judgment for punitive damages, noting that, like in France, Spanish law permits some overlap between civil and criminal law such that punitive damages were not completely contrary to Spanish public policy.²⁷³ Furthermore, Quebec's *Code civil* (Civil Code) formally incorporates punitive damages into the province's civil law system in some cases, suggesting punitive damages may be reconcilable with the principles of the civil law tradition in certain circumstances.²⁷⁴

In France, no legislator has sought to submit the *Avant-Projet's* proposals to the French Parliament in the eight years since the document was first published. New legislation, reform projects, and the recent *Fontaine Pajot* decision, however, suggest that the debate concerning punitive damages is likely to continue.²⁷⁵ In light of the Court of Cassation's refusal to enforce the American judgment in the *Fontaine Pajot* case, the chance for Peter Schlenzka and Julie Langhorne to collect their judgment and punitive damages award appears to have set sail; but the future of punitive damages in the French legal system is certainly much less clear, particularly given the increasing recognition that punitive damages have the potential to support and further the principles of French tort law.

(noting that while German legislation does not officially endorse the idea of punitive damages, there is a growing body of jurisprudence in which courts have awarded damages of a punitive nature).

²⁷³ S.T.S., Nov. 13, 2001 (Exequatur No. 2039/1999) (Spain), translated in Scott Jablonski, *Translation and Comment: Enforcing U.S. Punitive Damages Awards in Foreign Courts—A Recent Case in the Supreme Court of Spain*, 24 J.L. & COM. 225, 242 (2005).

²⁷⁴ C. CIV. (Q.), Art. 1621. According to Article 1621, punitive damages may not exceed the value necessary to fulfill their preventive purpose. Punitive damages are assessed by taking into account

all the appropriate circumstances, notably the gravity of the debtor's fault, his or her patrimonial situation, the extent of the reparation for which he or she is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

Id.

²⁷⁵ See *supra* note 271 and accompanying text.