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# THE BP OIL SPILL SETTLEMENTS, CLASSWIDE PUNITIVE DAMAGES, AND SOCIETAL DETERRENCE

Catherine M. Sharkey\*

## INTRODUCTION

In late 2012, BP p.l.c. (BP) funded the Court Supervised Settlement Program as part of a class action settlement of the consolidated multidistrict litigation arising from the Deepwater Horizon oil spill in the Gulf of Mexico. The BP settlement provided solely for compensatory damages to claimants. It left open the possibility that claimants eligible for punitive damages could be certified as a class for litigation or settlement purposes against BP's codefendants (but not BP) in the future. In 2014, Halliburton Company (Halliburton) (one of BP's codefendants) reached such a classwide punitive damages settlement.

Consistent with prior work,<sup>1</sup> in this Article I argue that, notwithstanding formidable barriers to the certification of classwide punitive damages, the Gulf Coast claimants should prevail, particularly if they can articulate the *societal* element of punitive damages. That element focuses on the holistic harm to society caused by the defendant's conduct as distinct from the individualistic element, which focuses on the harms each particular plaintiff has suffered. More specifically, classwide punitive damages based on a nonretributive societal rationale—such as economic deterrence—should pass legal muster.

The BP litigation and subsequent settlements provide an opportunity to explore this as-yet largely untested rationale for classwide

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\* Crystal Eastman Professor of Law, New York University School of Law. For insightful comments, I am grateful to participants at the Clifford Symposium at DePaul College of Law, the Private Law Workshop at Harvard Law School, and especially Nora Engstrom, John Goldberg, Sam Issacharoff, Robert Rabin, Teddy Rave, and Henry Smith. Zachary Kolodin (NYU 2014) and Jack Millman (NYU 2016) provided excellent research assistance.

1. See Catherine M. Sharkey, *The Future of Classwide Punitive Damages*, 46 U. MICH. J.L. REFORM 1127, 1148 (2013) [hereinafter Sharkey, *Classwide Punitive Damages*] (“My central claim is that, to the extent that any prospects exist for punitive damages classes, . . . the fate of these classes’ certifications rises or falls on whether courts conceptualize punitive damages as societal or individualistic.”); Catherine M. Sharkey, *The Exxon Valdez Litigation Marathon: A Window on Punitive Damages*, 7 U. ST. THOMAS L.J. 25, 50 (2009) [hereinafter Sharkey, *Exxon*] (“The ability to certify a punitive damages class going forward rests upon a distinctly societal notion of punitive damages.”).

supra-compensatory damages. I have previously suggested possible reforms based on theories of societal economic deterrence aimed to increase the likelihood that punitive damages classes will be certified and upheld. One reform was directed to state legislatures: “State legislatures could affirmatively defend punitive damages based on under-enforcement and under-deterrence rationales. For example, states could enact a statutory multiplier for certain torts based on the likelihood of under-detection . . . .”<sup>2</sup>

Now I consider the extent to which private litigants might adopt the same approach in negotiating class action settlements. Class action settlements can readily accommodate the “public law” dimension of societal damages,<sup>3</sup> as demonstrated by the Halliburton class settlement and its explicit focus on punitive damages claims. Indeed, on closer inspection, even the BP compensatory damages settlement has an aura of societal damages that surrounds it. For even that ostensibly purely compensatory arrangement included an unusual (and mostly overlooked) feature: a provision for supra-compensatory multipliers applicable to certain claimants. I view these supra-compensatory multipliers as a form of classwide societal damages embedded within the settlement.

The conception of an inherent *public* interest in punitive damages that is distinct from the private individual’s interest in compensatory damages is an especially powerful idea with striking implications.<sup>4</sup> Judge Jack Weinstein, of the United States District Court for the Eastern District of New York, was an early champion of this novel role for punitive damages. With the certification of a “punitive damages only” class action in the multijurisdictional mass tort tobacco litigation case, *In re Simon II*,<sup>5</sup> Judge Weinstein implemented the notion that “the punitive award can be said to constitute a punishment on behalf of

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2. Sharkey, *Classwide Punitive Damages*, *supra* note 1, at 1148 (footnote omitted).

3. See Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 401 (2014) (“These mass harms [such as the Deepwater Horizon oil spill] take on the quality of public law litigation, even if played out in thousands of claims for private recompense.” (footnote omitted)); see also Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 205.

4. See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 350 (2003) [hereinafter Sharkey, *Societal Damages*].

5. 211 F.R.D. 86, 107–11 (E.D.N.Y. 2002), *rev’d sub nom.* *Simon II Litig. v. Philip Morris USA Inc. (In re Simon II Litig.)*, 407 F.3d 125 (2d Cir. 2005). Judge Weinstein certified the “punitive damages only” class action as a mandatory (non-opt-out) limited fund Rule 23(b)(1)(B) class. *Id.* True to his principles, he emphasized the need for definitive resolution for all parties. *Id.* at 107 (“A viable trial and disposition of potentially millions of claims is desirable, appropriate and proper.”). Indeed, Judge Weinstein encouraged the parties to consolidate further; he entertained the idea of certifying an opt-out compensatory damages class as well. Plaintiffs sought to certify only a punitive damages class, although, in Judge Weinstein’s opinion, it

society.”<sup>6</sup> Judge Weinstein recognized the widespread, and often diffuse, harms inflicted by tobacco companies: “Punitive damages, in addition to punishing wrongful behavior, serve to compensate society for the major civil injuries to society at large which often accompany particular heinous acts.”<sup>7</sup> He also recognized that compensatory damages might not fully reflect the extent of the harms inflicted on society and that punitive damages might appropriately fill the gap.<sup>8</sup> The Second Circuit Court of Appeals rejected Judge Weinstein’s innovative approach to certifying a punitive damages only class. The court vacated Judge Weinstein’s certification order, stopping the *In re Simon II* class action in its tracks.<sup>9</sup>

But the notion of societal damages lives on. It may be especially relevant in resolving claims stemming from mass disasters, such as oil spills, where the widespread harms cannot be fully remedied by individual (or even classwide) compensatory damages awards.<sup>10</sup>

Part II of this Article explores the normative justifications for classwide punitive damages. Using Judge Weinstein’s innovations in *In re Simon II* as an analytical lens, the Article then evaluates the future prospects for classwide punitive damages claims and concludes that while aggregation based on the limited fund theory used by Judge Weinstein in *In re Simon II* is in peril, aggregation based on an alternative societal deterrence rationale remains viable.

Part III probes how the specter of punitive damages has influenced Gulf Coast claimants’ actions, from foregoing payments from BP’s private compensation fund, to the claims asserted in the BP litigation and the settlements eventually reached. Under the Oil Pollution Act and the court rulings of Judge Carl Barbier of the Eastern District of Louisiana (to whom the *Deepwater Horizon* multidistrict litigation

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would have been “preferable to have the jury decide both compensatory (opt-out) and punitive (non-opt-out) damages for the class.” *Id.* at 108.

6. *Id.* at 104; see also Sharkey, *Classwide Punitive Damages*, *supra* note 1, at 1132, 1139–40 (citing *In re Simon II* as an example where “punitive damages have been awarded . . . as punishment on behalf of the entire society . . . for particularly egregious behavior with wide-ranging effects”).

7. *In re Simon II*, 211 F.R.D. at 160 (citing *In re The Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir. 2001), *vacated sub nom.* *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008)).

8. *Id.* at 159 (“[Punitive damages] compensate for social damages not likely to be fully reflected in compensatory damages to individuals.”).

9. *In re Simon II*, 407 F.3d at 128.

10. President Barack Obama, remarking on the damages inflicted on states in the Gulf region by the BP oil spill, highlighted the widespread societal aspect of that damage, emphasizing that “[t]he sadness and the anger they feel is not just about the money they’ve lost. It’s about a wrenching anxiety that their way of life may be lost.” President Barack Obama, Oval Office Address on the BP Oil Spill (June 15, 2010), *available at* [http://www.nytimes.com/2010/06/16/us/politics/16obama-text.html?pagewanted=2&sq=obama%20speech&st=cse&scp=4&\\_r=0](http://www.nytimes.com/2010/06/16/us/politics/16obama-text.html?pagewanted=2&sq=obama%20speech&st=cse&scp=4&_r=0).

was assigned), two categories of claimants—those with physical damage to person or property, and commercial fishermen—were eligible to receive punitive damages.

Part IV analyzes the relevance of societal damages to the compensatory class action settlement reached with BP and the classwide punitive settlement with Halliburton. First, it characterizes the supra-compensatory multiplier deployed in the BP settlement as a form of embedded societal damages. Incredibly, it turns out that almost every settling claimant will receive more than a 1:1 ratio of supra-compensatory damages to compensatory damages.<sup>11</sup> This significant finding is surprising, in light of the 1:1 limit for the ratio of punitive to compensatory damages in maritime law cases involving reckless misconduct established by the Supreme Court in *Exxon Shipping Co.*<sup>12</sup> Next, this Part evaluates the Halliburton classwide punitive damages settlement as a means of achieving further societal deterrence.

## II. CLASSWIDE PUNITIVE DAMAGES

Judge Weinstein was a pioneer in exploring the prospects of certifying punitive damages classes. In *In re Simon II*, he certified a nationwide punitive-damages-only class in a multijurisdiction, multidefendant tobacco lawsuit, over the vehement objection of the tobacco manufacturer-defendants.<sup>13</sup>

Judge Weinstein embraced two justifications for classwide certification of punitive damages: (1) the “limited punishment” rationale for a “limited fund” mandatory non-opt-out Rule 23(b)(1)(B) class action; and (2) a societal benefit rationale for punitive damages.<sup>14</sup> The limited punishment rationale was based on the idea that the constitutional due process limits the Supreme Court had established for the amount of punitive damages allowable against a particular defendant imposed a theoretical outer limit, or cap, on the total potential punitive damages award against the tobacco companies. This cap created, de facto, a limited fund from which all plaintiffs would have to collect. Judge Weinstein reasoned that if a nationwide plaintiff class were not certified, the first plaintiffs to recover against the tobacco companies would have a far better chance of recovering all of the punitive dam-

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11. See *Deepwater Horizon Economic & Property Damages Settlement Agreement* as Amended on May 2, 2012, Exhibit 15 (RTP Chart), *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on Apr. 20, 2010*, 910 F. Supp. 2d 891 (E.D. La. 2012) [hereinafter *Economic Fund Settlement Agreement*] (MDL No. 2179), Doc. 6430-33, available at <http://www.laed.uscourts.gov/oilspill/5.pdf>.

12. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008).

13. *In re Simon II*, 211 F.R.D. at 96.

14. *Id.* at 159–63.

ages they sought, whereas those who followed might run up against the constitutionally proscribed limit on total allowable punitive damages.<sup>15</sup>

Judge Weinstein's equally enthusiastic embrace of the second justification, the societal benefit rationale for punitive damages, is in some tension with the limited punishment rationale. The societal benefit argument, namely that the class will ensure punishment on behalf of society, conflicts with the limited fund argument's concern that first-in-time plaintiffs will recover at the expense of later, deserving plaintiffs. For, if punitive damages further a societal goal—in Judge Weinstein's mind, primarily that of retributive punishment on behalf of society—then there should be no concern about individual entitlement as such.

In any event, neither the Second Circuit nor the Supreme Court was inclined to adopt either rationale. The Second Circuit reversed Judge Weinstein with an attack on the limited fund theory, dashing future prospects for the limited punishment-based Rule 23(b)(1)(B) class action.<sup>16</sup> And the Supreme Court, in *Philip Morris USA v. Williams*,<sup>17</sup> all but foreclosed the limited punishment-based Rule 23(b)(1)(B) limited fund class action by emphasizing that punitive damages would be controlled by strict constitutional limits in each individual case.<sup>18</sup> Moreover, *Williams* held that punishing defendants directly for harms to nonparties violated the defendants' due process rights,<sup>19</sup> and thus, in essence, discredited a societal retributive punishment rationale for punitive damages.

But it is far too soon to sound the death knell for classwide punitive damages across the board. Judge Weinstein's innovation may have been defeated in *In re Simon II*, but his embrace of a societal rationale

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15. See *id.* at 183–85 (discussing the fear that later claimants may be precluded from recovering punitive damages because of substantive due process issues).

16. *Simon II Litig. v. Philip Morris USA Inc. (In re Simon II Litig.)*, 407 F.3d 125, 128 (2d Cir. 2005).

17. 549 U.S. 346 (2007).

18. See Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of Philip Morris v. Williams*, 46 WILLAMETTE L. REV. 449, 453–54 (2010). Richard Nagareda went further and argued that, in *Williams*, the Supreme Court “constitutionalizes a kind of divisible characterization for [punitive damages]” by “casting punitive damages ultimately as punishment vis-à-vis the plaintiff.” Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1138 (2010).

19. *Williams*, 549 U.S. at 353–55. Overturning Judge Weinstein's certification in *In re Simon II*, the Second Circuit (in dicta) presaged this holding by making a similar point, relying on the Supreme Court's prior ruling in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). “*State Farm* made clear that conduct relevant to the reprehensibility analysis must have a nexus to the specific harm suffered by the plaintiff, and that it could not be independent of or dissimilar to the conduct that harms the plaintiff.” *In re Simon II*, 407 F.3d at 128, 139.

for punitive damages endures—even in the face of the Supreme Court's seeming hostility. In particular, classwide punitive damages based on a nonretributive societal rationale—namely economic deterrence—emerge unscathed.

### A. Judge Weinstein's Pioneering Vision

Judge Weinstein's "limited punishment" theory was an innovative outgrowth of constitutional due process limits on total punitive damages.<sup>20</sup> To Judge Weinstein, function trumped form as to the question of the existence of a so-called limited fund, whose prototype was the bankruptcy situation, in which all available assets are pooled for eventual pro rata distribution to creditors. While recognizing that the Supreme Court in *Ortiz v. Fibreboard*<sup>21</sup> had sharply circumscribed the use of limited funds beyond the insolvency situation, Judge Weinstein nonetheless found an opening for this innovative use, given the Court's recognition of Rule 23's equitable roots which, in Judge Weinstein's eyes, was an invitation for innovation.<sup>22</sup> Judge Weinstein was further emboldened by the Court's concession in *Ortiz* that it had "not ruled out the possibility under the present Rule of a mandatory class to deal with mass tort litigation on a limited fund rationale."<sup>23</sup>

Judge Weinstein positioned *In re Simon II* within a line of cases, most prominently *In re Exxon Valdez*, that supported the fledgling limited punishment/limited fund approach.<sup>24</sup> Defendant Exxon had successfully sought certification of a mandatory non-opt-out punitive

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20. See *In re Simon II*, 211 F.R.D. at 185 (basing the Rule 23(b)(1)(B) class on a theory that, in addition to the practical limits on recovery defined by the extent of a defendant's assets, "[s]ubstantive due process also limits punitive damages by placing reasonable limits on punishment" (quoting at *In re The Exxon Valdez*, No A89-0095-CV (HRH), slip op. at 8 (D. Alaska Mar. 8, 1994) [hereinafter Order No. 180 Supplement] ("Order No. 180 Supplement (Decision Regarding Certification of Mandatory Punitive Damages Class)"), *vacated as to amount of punitive award*, *In re The Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001)).

21. 527 U.S. 815 (1999).

22. *In re Simon II*, 211 F.R.D. at 105; see also *id.* at 191 (stating that equity exists to address new and socially important problems).

23. *Ortiz*, 527 U.S. at 862; see also *id.* at 844 ("We do not . . . decide the ultimate question whether Rule 23(b)(1)(B) may ever be used to aggregate individual tort claims."). Judge Weinstein also distinguished *In re Simon II* from *Ortiz* on the ground that, in the case before him, the court, the jury, and the nature of the issues eliminated the class conflict problems that were rife in *Ortiz*. *In re Simon II*, 211 F.R.D. at 181 ("The *Ortiz* court's rejection of the class action was based in large part on findings that 'the legal rights of absent class members' had not been adequately protected." (quoting *Ortiz*, 527 U.S. at 847)).

24. See *In re Simon II*, 211 F.R.D. at 185 (relying on Order No. 180 Supplement, *supra* note 20, at 8-9); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied sub nom. In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir. 1984).

damages class.<sup>25</sup> As in *In re Exxon Valdez*, the parties in *In re Simon II* did not face the prospect of a traditional limited fund created by the bankruptcy rules. But, following the federal district court's reasoning in *In re Exxon Valdez*, Judge Weinstein identified the limited fund that emerged as a necessary result of the de facto aggregate cap on excessive punitive damages, articulated in *BMW v. Gore* and its progeny.<sup>26</sup>

Drawing on a line of reasoning first developed in *In re Agent Orange*, Judge Weinstein found that these constitutional due process limits on punitive damages created "a substantial probability that 'adjudication with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of other members not parties to the adjudication.'" <sup>27</sup> He posited the limited fund class action as a solution to the "potential first-in-time problem where the first plaintiffs may recover vast sums while others who arrive later are left with a depleted fund against which they cannot recover."<sup>28</sup>

In rejecting this reasoning wholesale, the Second Circuit hewed to traditional conceptions of a limited fund, as delineated by the Supreme Court in *Ortiz*.<sup>29</sup> The most significant stumbling block to Judge Weinstein's innovative approach, according to the Second Circuit, was

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25. According to H. Russel Holland, the district court judge overseeing *Exxon*, the "singular nature of the spill" created a "unique and compelling" case for certification. Sharkey, *Exxon*, *supra* note 1, at 48 (quoting Order No. 180 Supplement, *supra* note 20, at 10 (describing the unusual nature of the oil spill case)).

26. *In re Simon II*, 211 F.R.D. at 184; *see also* *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996) (holding that the punitive damages award against BMW was grossly excessive and unconstitutional); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

27. *In re Simon II*, 211 F.R.D. at 185–86 (quoting *In re Agent Orange*, 100 F.R.D. at 725). Judge Weinstein also relied on "concerns about the efficient use of court resources" to justify the Rule 23(b)(1)(B) certification. *Id.* at 191 (quoting *Amchem Prods. v. Windsor*, 521 U.S. 591, 618 (1997)).

28. *Id.* at 190. Judge Weinstein drew liberally from the academic literature, including an article co-authored by plaintiffs' counsel, Elizabeth Cabraser. *See* Elizabeth J. Cabraser & Thomas M. Sobol, *Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damages Claims*, 74 TUL. L. REV. 2005, 2021 (2000) ("'[L]imited generosity' (or 'punitive damages overkill,' as some class members call it) is the functional equivalent of the limited fund in that, by operation of the limited generosity principle, only a limited amount of punitive damage funds will be available, regardless of the ability of the defendants to pay. Since the purpose of a 23(b)(1)(B) class is to avoid a judgment that 'while not technically concluding the other members, might do so as a practical matter,' all persons with claims upon the 'limited fund' should be included in the 23(b)(1)(B) class.").

29. *See* *Simon II Litig. v. Philip Morris USA Inc. (In re Simon II Litig.)*, 407 F.3d 125, 127–28 (2d Cir. 2005) ("[P]unitive damages class must be vacated because there is no evidence by which the district court could ascertain the limits of either the fund or the aggregate value of punitive claims against it, such that the postulated fund could be deemed inadequate to pay all legitimate claims," thereby failing the *Ortiz* test.).



the requirement that the fund have a “definitely ascertained limit.”<sup>30</sup> The Second Circuit characterized the “constitutional cap,” by contrast, as “theoretical,” “postulated,” “not easily susceptible to . . . even estimation,” and “therefore fundamentally unlike the classic limited funds of the historical antecedents of Rule 23.”<sup>31</sup> Moreover, “[w]ithout evidence indicating either the upper limit or the insufficiency of the posited fund, class plaintiffs cannot demonstrate that individual plaintiffs would be prejudiced if left to pursue separate actions without having their interests represented in this suit.”<sup>32</sup>

The Second Circuit was equally skeptical of what the tobacco defendants termed “putting the cart before the horse,” namely, that a punitive damages class could be certified absent an underlying compensatory damages class.<sup>33</sup> The court was concerned that

certifying a class that seeks an assessment of punitive damages prior to an actual determination and award of compensatory damages . . . would fail to ensure that a jury will be able to assess an award that, in the first instance, will bear a sufficient nexus to the actual and potential harm to the plaintiff class.<sup>34</sup>

If *In re Simon II* signaled uneasiness with the certification of a Rule 23(b)(1)(B) limited fund class action based on the limited punishment rationale, as I (and others) have argued, the Supreme Court’s *Philip Morris USA v. Williams* decision effectively shuts it down. Still, as I (but not others) have also gone on to argue, *Williams* should not be read to foreclose classwide punitive damages across the board. These can survive in either Rule 23(b)(2) equitable relief or Rule 23(b)(3) monetary damages class actions,<sup>35</sup> where such damages could be justified by nonretributive societal rationales.

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30. *Id.* at 137 (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841 (1999)).

31. *Id.* at 138.

32. *Id.*

33. *Id.* The tobacco defendants argued:

A claim for punitive damages is not a separate and distinct cause of action: rather it is auxiliary to, and dependent upon, the existing of an underlying claim. As such, any award of punitive damages can only be entered after awarding damages in conjunction with an underlying and successful claim for actual damages.

Brief for Defendant–Appellant at 94–95, *In re Simon II*, 407 F.3d 125 (Nos. 03-7140, 03-7141) (quoting *Liggett Grp. Inc. v. Engle*, 853 So. 2d 434, 456 (Fla. Dist. Ct. App. 2003)). The tobacco defendants relied on the Florida appellate court’s reasoning in *Engle*, 853 So. 2d at 456 (“The trial plan in the instant case required the defendants to pay punitive damages for supposed injuries to thousands of class members without the necessary prerequisite findings of liability and compensatory damages. Since the class-wide punitive damages award improperly places the proverbial ‘cart before the horse,’ it must be reversed.”), *aff’d in part, rev’d in part*, 945 So. 2d 1246 (Fla. 2006).

34. *In re Simon II*, 407 F.3d at 138.

35. The *Halliburton Settlement* is a Rule 23(b)(3) punitive damages class action. See *infra* Part IV.B.

*B. Societal Rationales*

Punitive damages are typically justified by courts and commentators as a means of retributive punishment or economic deterrence.<sup>36</sup> In individual cases, punitive damages may be deemed the essential way to achieve retribution for particularly reprehensible conduct. Alternatively, the economic justification for punitive damages is to force a defendant to internalize the total societal costs of its misconduct, costs that inevitably exceed compensatory damages.<sup>37</sup> Indeed, large punitive damages awards in single-plaintiff cases might be aptly characterized as a version of the “poor man’s class action.”<sup>38</sup> This is because class actions involving solely compensatory damages are considered an alternative, and superior, mechanism to force a defendant to internalize the total costs of widespread harms.

In light of this striking similarity between class actions and punitive damages on the economic deterrence account, it is fitting to ask: Does the prospect of class action lawsuits, as opposed to lawsuits by individual plaintiffs, alter the conventional rationales for punitive damages? More specifically, what (if any) is the best justification for awarding punitive damages on a classwide basis?

In the class action setting, punitive damages can be justified by *societal* retributive punishment or economic deterrence rationales, so long as the class stands as a proxy for the wider society, i.e., a broader population than the certified class. Under the societal retributive punishment rationale, punitive damages “stand as a civil penalty for the transgression of the social compact,”<sup>39</sup> and the class “stand[s] as [a] proxy for society, [vindicating] society’s interest in punishment.”<sup>40</sup>

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36. See, e.g., *Kemezy v. Peters*, 79 F.3d 33, 34–35 (7th Cir. 1996) (discussing various justifications for punitive damages, such as preventing underdeterrence, deterring behavior that has no redeemable social value, and expressing the moral outrage of the community); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008) (“[T]he consensus today is that [punitive damages] are aimed not at compensation but principally at retribution and deterring harmful conduct.”); Sharkey, *Societal Damages*, *supra* note 4, at 400 (discussing how punitive damages could deal with diffuse harms by forcing defendant to internalize the full cost of their actions).

37. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 889–90 (1998) (“[T]he optimal level of punitive damages from the perspective of deterrence is the level of total damages determined by the formula, less compensatory damages. If an injurer has a one-in-four chance of being found liable for causing a \$100,000 harm, the formula implies that total damages should be \$400,000. Because \$100,000 of this total represents compensatory damages, the \$300,000 remainder is the optimal amount of punitive damages.”).

38. Sharkey, *Societal Damages*, *supra* note 4, at 404.

39. Cabraser & Sobol, *supra* note 28, at 2006.

40. Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST L. REV. 979, 1008 (2001).

Because *Williams* effectively forecloses this punishment-based societal rationale,<sup>41</sup> an economic deterrence (i.e., nonretributive) societal rationale gains greater potential significance. Indeed, as I have argued, to the extent that punitive damages embody a nonretributive societal *deterrence* objective, a punitive damages class should be *more*, not less, prone to certification than any compensatory damages class, which is more likely to encompass individuals who have suffered idiosyncratic injuries.<sup>42</sup>

To be sure, the societal economic deterrence rationale may be weaker in the class action context as compared with individual actions, because the very premise of a class action is that “all claimants are (or will be) before the court.”<sup>43</sup> If one defines the entirety of societal damages as equal to the sum of compensatory damages, then a punitive damages award would be superfluous from a cost-internalization perspective. But, I argue, that definition is incomplete, as “underdeterrence arising from defendants’ ability to evade liability for wrongdoing” may persist, even in a class action case.<sup>44</sup> Class actions are an effective way to address “negative value claims” that are not economically viable to bring as individual claims, but they are less effective antidotes to other sources of underdeterrence, such as torts that are elusive or difficult to prove, or more diffuse societal harms.

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41. While the Supreme Court has held that a defendant cannot be *punished* for harms to others not before the court, evidence of those harms can nonetheless be considered when it comes to how “reprehensible” the defendant’s conduct was. See *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007) (“Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . .”).

42. Sharkey, *Classwide Punitive Damages*, *supra* note 1, at 1133 (providing case law support for this theory that how the court conceptualizes punitive damages affects the likelihood of class certification). The notion of societal damages, nonetheless, raises a host of formidable procedural concerns that are beyond the scope of this Article. First and foremost, who has standing to bring such a claim? Who is bound by the determination? Is there *res judicata* from a plaintiff’s victory? From a plaintiff’s loss? How is the money distributed? Is it a stand-alone action or does it depend on prior consolidation either through a class action or centralizing multidistrict litigation?

43. Sharkey, *Societal Damages*, *supra* note 4, at 410–11.

44. *Id.* at 366. *Exxon Valdez* is a case in point. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). Congress enacted the Oil Pollution Act in part in response to *Exxon*’s having avoided paying damages to many parties clearly harmed by the spill. See *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on Apr. 20, 2010*, 808 F. Supp. 2d 943, 959 (E.D. La. 2011), *aff’d sub nom. In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014). Disasters such as the Exxon-Valdez oil spill can also cause unanticipated long-term harm that takes years to surface. See Doug Struck, *Twenty Years Later, Impacts of the Exxon Valdez Linger*, YALE E’NVT 360 (Mar. 24, 2009), [http://e360.yale.edu/feature/twenty\\_years\\_later\\_impacts\\_of\\_the\\_exxon\\_valdez\\_linger/2133/](http://e360.yale.edu/feature/twenty_years_later_impacts_of_the_exxon_valdez_linger/2133/).

### III. ROLE OF PUNITIVE DAMAGES IN THE BP OIL SPILL

The specter of punitive damages has hung over the BP oil spill from the moment of the April 20, 2010 catastrophe. The prospect of punitive damages was a major factor in the plaintiffs' decisions to forego payment from BP's alternative private dispute resolution compensation fund, known as the Gulf Coast Claims Facility (GCCF), and instead to sue BP and its codefendants. In a series of complaints, the plaintiffs asserted claims for punitive damages based implicitly on theories of societal punishment and economic deterrence.

In the course of the multidistrict litigation, Judge Barbier made a key ruling that a significant portion of the oil spill victims would be able to pursue punitive damages claims against BP and its codefendants. Thus, even after the comprehensive class action settlement with BP, many victims retained punitive damages claims against codefendants Halliburton and Transocean Ltd. (Transocean)—including BP's own punitive damages claims against its codefendants (which it assigned to the plaintiff class in the settlement), as well as a portion of the class's reserved direct punitive damages claims against the codefendants. Differences among subgroups of plaintiffs in terms of their eligibility for punitive damages likely influenced the settlement negotiations between the parties.

#### A. Gulf Coast Claims Facility

In the wake of the BP oil spill, negotiations between high-level BP officials and President Obama resulted in the prompt creation of the \$20 billion Gulf Coast Claims Facility (GCCF), funded by BP to satisfy BP's obligations to injured parties under the Oil Pollution Act.<sup>45</sup> Kenneth Feinberg was appointed as special master to oversee and administer the fund.<sup>46</sup>

Over a two-year period, the GCCF paid more than \$6.5 billion to over 220,000 claimants.<sup>47</sup> Its mission was to compensate claimants for

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45. See Byron G. Stier, *The Gulf Coast Claims Facility as Quasi-Public Fund: Transparency and Independence in Claim Administrator Compensation*, 30 Miss. C. L. Rev. 255, 261 (2011) (describing how after the President and his staff negotiated with BP to create the \$20 billion fund, he used his first nationwide Oval Office address to announce its creation).

46. *Id.*

47. JONATHAN L. RAMSEUR & CURRY L. HAGERTY, CONG. RESEARCH SERV., R42942, DEEP-WATER HORIZON OIL SPILL: RECENT ACTIVITIES AND ONGOING DEVELOPMENTS 7 (2014), available at <http://www.fas.org/sgp/crs/misc/R42942.pdf> (finding that the GCCF had paid \$6.67 billion as of June 4, 2012); see also BDO CONSULTING, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY: EXECUTIVE SUMMARY 3 (2012), available at <http://www.justice.gov/iso/opa/resources/697201241917226179477.pdf> (finding that the GCCF made payments "to over 220,000 individual and business claimants").

lost earnings or profits, removal and clean-up costs, damage to real or personal property, loss of subsistence use of natural resources, and physical injury or death.<sup>48</sup>

The GCCF did not award punitive damages.<sup>49</sup> Feinberg's explanation for this zeroed in on but one of the two central purposes that punitive damages serve: "I'm not begrudging anybody who wants punitive damages. If you want punitive damages, don't take anything from the fund. Punitive damages is a judicial concept. I have no idea whether punitive damages are even credible here. This is a fund designed to compensate for loss, not *punish* BP."<sup>50</sup> The prospect of punitive damages may have motivated many of the victims to choose litigation over accepting final payments from the GCCF.<sup>51</sup>

### B. BP Class Action Litigation

Dissatisfied with the GCCF, many potential claimants—including commercial fishermen, oyster farmers, business owners and their employees, and coastal property owners—opted to forgo GCCF final payments and instead filed lawsuits in courts throughout the Gulf Coast states.<sup>52</sup>

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48. According to an independent audit conducted by BDO Consulting:

In Phase I [the Emergency Advanced Payment claims process], . . . the GCCF implemented an interim claims process by which eligible claimants would receive compensation for [losses] caused by the Spill by submitting a lesser level of documentation than would be required in Phase II of the GCCF. During Phase II [the Interim Payment/Final Payment claims process], the GCCF received claims for both interim payments designed to compensate claimants for past losses and final payments designed to compensate claimants for past and future losses.

BDO CONSULTING, *supra* note 47, at 3.

49. Although the GCCF did not award punitive damages, it did provide "future recovery factors," multipliers to demonstrated past economic losses. Issacharoff & Rave, *supra* note 3, at 406. For further discussion of the GCCF multipliers and a comparison with the multipliers deployed in the BP class action settlement, see *infra* Part III.A.1.

50. Stier, *supra* note 45, at 263 n.70 (emphasis added) (quoting Laura Parker, *A Conversation with BP's Pay Czar, Kenneth Feinberg*, AOL NEWS (Jan. 10, 2011), <http://www.aolnews.com/2011/01/10/a-conversation-with-bps-pay-czar-kenneth-feinberg/>).

51. See, e.g., Rebecca Mowbray, *Judge Allows Some Punitive Damages in BP Oil Spill Lawsuits*, TIMES-PICAYUNE (Aug. 29, 2011, 6:11 PM), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/08/judge\\_dismisses\\_bp\\_oil\\_spill\\_c.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/08/judge_dismisses_bp_oil_spill_c.html) ("[Judge] Barbier's allowance of punitive damages could be highly influential on whether commercial fishers, oyster harvesters and coastal property owners choose to stay in the litigation or take a settlement from the Gulf Coast Claims Facility.").

52. See Issacharoff & Rave, *supra* note 3, at 401 (discussing how the GCCF failed to prevent a large influx of litigation); see also *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Feb. 2, 2011), Doc. 1098 (order granting in part the plaintiffs' Motion to Supervise Ex Parte Communications with Putative Class), available at <http://www.laed.uscourts.gov/OilSpill/Orders/222011OrderonRecDoc912.pdf> (finding that the GCCF is not truly independent from BP, leading to confusion and misunderstandings for claim-

In the consolidated BP oil spill lawsuits, the plaintiffs sued BP (which leased the rig and operated the oil and gas prospect), Transocean (which owned the rig), and Halliburton (which worked the rig and poured concrete).<sup>53</sup> Most of the litigation was consolidated into Multidistrict Litigation 2179 and assigned to Judge Barbier.<sup>54</sup> A court-appointed plaintiffs' steering committee began negotiating with the defendants while simultaneously preparing for trial.<sup>55</sup>

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ants; citing Feinberg's statements that claimants would be better off "accepting what he offers rather than going to court" as an example of a problematic statement).

53. B1 Bundle First Amended Master Complaint at paras. 210, 223, 226, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, 808 F. Supp. 2d 943 (E.D. La. 2011) [hereinafter B1 Bundle] (MDL No. 2179), Doc. 1128. The plaintiffs also sued Anadarko Petroleum Corporation (Anadarko) (owner of a minority stake of the prospect), Cameron International Corporation (Cameron) (manufacturer of the blowout preventer), Mitsui Oil Exploration Co., Ltd. (MOECO) (owner of MOEX USA Corporation (MOEX), which owned a minority stake of the prospect), and Weatherford International (Weatherford) (manufacturer of the oil field equipment). *Id.* paras. 233, 230, 235–37, 231. BP entered into settlement agreements with these parties, released all claims against them, and agreed to indemnify them from any third-party civil liability in exchange for monetary payments. See Press Release, MOECO, Settlement of Claims Arising from Gulf Oil Spill (May 20, 2011), <http://www.moeco.com/en/news/2011/05/settlement-of-claims-arising-from-gulf-oil-spill.html> (stating that MOECO is paying \$1.065 billion to BP); Press Release, John Christiansen, Anadarko, Anadarko Announces Settlement with BP (Oct. 17, 2011), <http://www.anadarko.com/Investor/Pages/NewsReleases/NewsReleases.aspx?release-id=1617533> (stating that Anadarko is paying \$4 billion to BP); Tom Fowler, *Weatherford Settles with BP over Spill Claims*, HOUS. CHRON. (June 21, 2011), <http://www.chron.com/business/energy/article/Weatherford-settles-with-BP-over-spill-claims-2082056.php> (stating that Weatherford is paying \$75 million to BP); Alison Sider, *Cameron Won't Face Punitive Damages in Deepwater Horizon Spill Trial*, EUROINVESTOR (Mar. 20, 2013), <http://www.euroinvestor.com/news/2013/03/21/cameron-wonapost-face-punitive-damages-in-deepwater-horizon-spill-trial/12257498> (stating that Cameron is paying BP \$250 million). Judge Barbier subsequently granted Cameron's motion for judgment denying the plaintiffs' claims for punitive damages. Sider, *supra*. He also found that MOEX and Anadarko cannot be sued under maritime law. Margaret Cronin Fisk & Jef Feeley, *BP Seeks To Prove Gulf Spill Errors Weren't Negligence*, BLOOMBERG (Feb. 25, 2013), <http://www.bloomberg.com/news/2013-02-25/bp-seeks-to-prove-gulf-spill-errors-weren-t-grossly-negligent.html>. In addition, he found M-I SWACO (M-I), a provider of drilling-fluid that was sued by the plaintiffs, not liable and dismissed it from the lawsuit. Sider, *supra*.

54. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, MDL No. 2179, at 1, 5 (J.P.M.L. Aug. 10, 2010) (order transferring actions to the Eastern District of Louisiana), available at [http://www.laed.uscourts.gov/oilspill/Orders/MDL\\_Transfer\\_Order.pdf](http://www.laed.uscourts.gov/oilspill/Orders/MDL_Transfer_Order.pdf).

55. See *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, MDL No. 2179 (E.D. La. Oct. 8, 2010) (order appointing the Plaintiffs' Steering Committee and the Plaintiff Executive Committee), available at <http://www.laed.uscourts.gov/OilSpill/Orders/PTO8.pdf>.

### 1. *Punitive Damages Claims*

The plaintiffs asserted claims for punitive damages based on the egregiousness of the defendants' conduct as well as the widespread nature of the destruction and devastation wrought by their conduct.<sup>56</sup>

In their complaints, the plaintiffs emphasized the need for punishment given the reprehensibility of the defendants' conduct:

Defendants engaged in conduct so *reckless, willful, wanton* and in such utter and flagrant disregard for the safety and health of the public and the environment in their activities leading up to and/or during the Deepwater Horizon Incident . . . that an award of punitive damages against them at the highest possible level is warranted and necessary to impose effective and optimal *punishment* . . .<sup>57</sup>

But the plaintiffs also asserted a societal economic deterrence rationale for punitive damages: “[P]iecemeal adjudications may under-deter Defendants’ misconduct by failing to account for the full scope or *total social costs*, thereby frustrating the purpose of punitive damages—the vindication of society’s interests in deterrence . . . that is fully and fairly proportionate to . . . its *harm to society* as a whole.”<sup>58</sup>

In the wake of the large-scale devastation to the affected communities, the environment, and society at large, the plaintiffs pressed societal justifications for punitive damages based on both punishment and economic deterrence theories.<sup>59</sup>

### 2. *Claimants’ Eligibility for Punitive Damages*

Before the enactment of the Oil Pollution Act<sup>60</sup> (Act or OPA) in 1990, persons who suffered purely economic losses (unaccompanied by physical damage to land or other proprietary interest) resulting from an oil spill were barred from recovery by a longstanding admi-

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56. Amended Class Action Complaint for Private Economic Losses & Property Damages at 131–36, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on Apr. 20, 2010, 910 F. Supp. 2d 891 (E.D. La. 2012) [hereinafter Amended Class Action Complaint] (MDL No. 2179), Doc. 6412, available at [http://www.laed.uscourts.gov/oilspill/Orders/05032012\(AmendedEconomicClassComplaint\).pdf](http://www.laed.uscourts.gov/oilspill/Orders/05032012(AmendedEconomicClassComplaint).pdf). The plaintiffs’ causes of action included federal common law general maritime claims for negligence, gross negligence, and willful misconduct, as well as state common law claims for nuisance, trespass, and fraudulent concealment. *Id.* at 113–31. Judge Barbier held that the state law nuisance, trespass, and fraudulent concealment claims were preempted by federal maritime law. *In re Oil Spill*, 808 F. Supp. 2d at 968 (“State law, both statutory and common, is preempted by maritime law . . .”).

57. Amended Class Action Complaint, *supra* note 56, at 132, Doc. 6412 (emphasis added).

58. B1 Bundle, *supra* note 53, at 154, Doc. 1128 (emphasis added).

59. See B3 Bundle First Amended Master Complaint at 74, *In re Oil Spill*, 808 F. Supp. 2d 943 (MDL No. 2179), Doc. 1805-1 (“[A]n award of punitive damages against them at the highest possible level is warranted and necessary to impose effective and optimal punishment and deterrence.”).

60. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484.

ralty law rule, dating from the 1927 Supreme Court case *Robins Dry Dock & Repair Co. v. Flint*.<sup>61</sup> A narrow exception to this rule was carved out for commercial fishermen, who could assert general maritime and punitive damages claims.<sup>62</sup>

The 1989 Exxon Valdez oil spill prompted Congress to address the legal barriers to recovery to anyone other than commercial fishermen by enacting a comprehensive scheme for economic damages recovery in the wake of an oil spill. The Oil Pollution Act altered the common law landscape by allowing any claimant who suffered economic losses to pursue a claim against what it termed a “responsible party.”<sup>63</sup> The Act also streamlined recovery by holding any such responsible party strictly liable for “clean up costs and resulting economic damages.”<sup>64</sup> The Act limited a responsible party’s liability for damages relating to an incident involving a mobile offshore drilling unit to removal costs plus approximately \$75 million, but the limit did not apply if “the incident was proximately caused by gross negligence or willful misconduct.”<sup>65</sup>

Jurisdictions are divided over whether the OPA displaces general maritime law and bars recovery of punitive damages.<sup>66</sup> Punitive dam-

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61. 275 U.S. 303, 308–09 (1927) (barring recovery for pure economic losses unaccompanied by physical damage to a proprietary interest).

62. *Louisiana v. M/V Testbank*, 524 F. Supp. 1170, 1173–74 (E.D. La. 1981) (allowing purely economic claims for an oil spill to proceed because commercial fishermen raise unique considerations), *aff’d*, 752 F.2d 1019 (5th Cir. 1985) (en banc); *see also* *Union Oil Co. v. Oppen*, 501 F.2d 558, 568 (9th Cir. 1974); *Burgess v. M/V Tamano*, 370 F. Supp. 247, 250 (D. Me. 1973).

The Restatement (Third) of Torts has attempted to clarify the justification for the widely acknowledged “fishermen’s exception” to the economic loss rule:

A public nuisance involving harm to a natural resource most often arises from contamination of waterways, as when a defendant spills toxic chemicals into the sea and thus causes economic injury to those who depend on it for commercial or recreational purposes. Courts typically recognize fishermen as a class of plaintiffs who suffer special injury in those circumstances and allow them to recover in tort.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 cmt. d (Tentative Draft No. 2, 2014); *see also* RESTATEMENT (SECOND) OF TORTS § 821C cmt. h, ex. 11 (1979) (“A pollutes public waters, killing all of the fish. B, who has been operating a commercial fishery in these waters, suffers pecuniary loss as a result. B can recover for the public nuisance.”).

63. Oil Pollution Act of 1990, Pub. L. No. 101-380, § 1002(a), (b)(2)(E), 104 Stat. 484, 489–90, 33 U.S.C. § 2702(a), (b)(2)(E) (2012). The OPA defines a “Responsible Party” as “any person owning, operating, or demise chartering the vessel.” *Id.* § 1001(32)(A), 33 U.S.C. § 2701(32)(A). All Responsible Parties are strictly liable, as well as jointly and severally liable for removal costs plus damages in connection with a discharge of oil into covered waters.

64. *In re Oil Spill*, 808 F. Supp. 2d at 959.

65. OPA § 1004(a)(3), (c)(1)(A), 33 U.S.C. § 2704(a)(3), (c)(1)(A).

66. *Compare In re Oil Spill*, 808 F. Supp. 2d at 962 (holding that punitive damages are available under the OPA for claimants who would have had general maritime claims pre-OPA), *with* *S. Port Marine, LLC v. Gulf Oil Ltd. P’ship*, 234 F.3d 58, 64–66 (1st Cir. 2000) (holding that punitive damages are not available under the OPA).



ages are not listed in the Act's "comprehensive list" of recoverable damages.<sup>67</sup> Despite this, Judge Barbier ruled that the Act does not preclude parties from seeking punitive damages if those parties would have been able to seek punitive damages under general maritime law prior to the OPA's enactment.<sup>68</sup> Judge Barbier's ruling that punitive damages are not barred as a matter of law in federal maritime cases relied on two key Supreme Court decisions: the ruling in *Exxon Valdez*,<sup>69</sup> which held that the Clean Water Act did not displace the general maritime remedy for punitive damages,<sup>70</sup> and *Atlantic Sound-ing Co. v. Townsend*,<sup>71</sup> which held that the Jones Act did not displace the availability of punitive damages for a seaman's claim.<sup>72</sup>

Pursuant to Judge Barbier's ruling, punitive damages are thus available in limited circumstances under general maritime law governed by *Robins Dry Dock*: to (1) those with physical damage to person or property; or (2) commercial fishermen.

#### IV. SOCIETAL DAMAGES IN CLASS SETTLEMENTS

After months of negotiation, on March 2, 2012, plaintiffs and BP agreed to a classwide settlement, which concedes class certification for the purpose of settlement only.<sup>73</sup> Both sides claimed victory in the press. BP proclaimed a final resolution to all "legitimate economic loss and medical claims."<sup>74</sup> Two leading plaintiffs' negotiators described the settlement in glowing terms, stating that it secured "the greatest amount of good for the greatest number of people."<sup>75</sup> Judge Barbier certified the settlement class under Rule 23(b)(3), holding

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67. *S. Port Marine*, 234 F.3d at 64 (citing 33 U.S.C. § 2702(b)).

68. *In re Oil Spill*, 808 F. Supp. 2d at 962 ("Plaintiffs who could assert general maritime claims pre-OPA enactment may plausibly allege punitive damages under general maritime [law]."). Note that the question whether the Act preempts *state* law punitive damages claims remains open. The BP and codefendants' litigation and settlements are governed by federal maritime law and thus do not raise such state law questions.

69. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

70. *Id.* at 488–89.

71. 557 U.S. 404 (2009).

72. *Id.* at 424–25; see also Lauren E. Hume, Note, *Are We Sailing in Occupied Waters?: Rethinking the Availability of Punitive Damages Under the Oil Pollution Act of 1990*, 86 N.Y.U. L. REV. 1444, 1464–69 (2011) (foreshadowing Judge Barbier's holding based on an analysis of *Exxon Shipping* and *Atlantic*).

73. Economic Fund Settlement Agreement, *supra* note 11, § 7.2, at 62, Doc. 6430-1. The settlement's effective date was April 18, 2012. Economic Fund Settlement Agreement, *supra* note 11, at 1, Doc. 6430-1.

74. Steven Mufson, *BP, Plaintiffs Reach Gulf of Mexico Oil Spill Settlement*, WASH. POST (Mar. 3, 2012), [http://www.washingtonpost.com/business/economy/bp-plaintiffs-reach-gulf-of-mexico-oil-spill-settlement/2012/03/02/gIQUAL9OwnR\\_story.html](http://www.washingtonpost.com/business/economy/bp-plaintiffs-reach-gulf-of-mexico-oil-spill-settlement/2012/03/02/gIQUAL9OwnR_story.html).

75. See *id.*

that it satisfied all of the class action requirements.<sup>76</sup> Two and one-half years later, on September 2, 2014, one of BP's codefendants, Halliburton, tentatively settled with the combined class of claimants holding punitive damages claims against it.<sup>77</sup>

This Part considers the extent to which these class settlements accommodate what I have termed societal damages, whether or not explicitly termed punitive damages.

#### A. *Embedded Societal Damages in the BP Settlement*

The inclusion of damage multipliers, which are termed "risk transfer premiums" or RTPs, in the BP class action settlement mimics a complex multiple damages statute, providing various supra-compensatory multipliers for different types of claims. I argue that these RTPs incorporate an embedded societal punitive damages award, which is confirmed by the fact that the RTPs for punitive damages-eligible claimants (primarily those in commercial fishermen categories) are much higher than those for other claimant categories. My argument is bolstered by the parties' own recognition that the RTPs were, in significant part, a surrogate or stand-in for punitive damages—which were not included as a separate component of the settlement.<sup>78</sup> Moreover, juxtaposing the supra-compensatory multipliers included in the class action settlement with the much lower effective multipliers offered under the GCCF (deemed "future recovery factors") strength-

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76. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, 910 F. Supp. 2d 891, 913–64 (E.D. La. 2012), *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014). The agreement was amended and preliminarily approved by the Court on May 2, 2012. See Notice of Filing of the Economic & Property Damages Settlement Agreement as Amended on May 2, 2012 & as Preliminarily Approved by the Court on May 2, 2012, at 1, *In re Oil Spill*, 910 F. Supp. 2d 891 (MDL No. 2179), Doc. 6430. Judge Barbier's order contains a comprehensive review of the evidence (over ninety-two pages) to demonstrate that the class satisfied all of the necessary legal requirements. *In re Oil Spill*, 910 F. Supp. 2d at 913–41. Judge Barbier likewise devotes ample attention (over forty pages) to refute specific objections raised. *Id.* at 941–64.

77. HESI Punitive Damages and Assigned Claims Settlement Agreement at 1, *In re Oil Spill*, 910 F. Supp. 2d 891 [hereinafter Halliburton Settlement] (MDL No. 2179), Doc. 13346:1, available at <http://www.laed.uscourts.gov/oilspill/9022014HESISettlement.pdf>.

78. See, e.g., BP Defendants' Memorandum in Support of Motion for Final Approval of *Deepwater Horizon* Economic & Property Damages Settlement Agreement as Amended on May 2, 2012, at 68–69, *In re Oil Spill*, 910 F. Supp. 2d 891 (MDL No. 2179), Doc. 7114-1 ("[E]ven apart from BP's position that punitive damages are unavailable, the contemplated RTP payments plainly serve as a surrogate for any benefits that punitive damages might otherwise provide (as well as a liquidation of any claimed rights to punitive damages)."); Plaintiff's Memo in Support of Motion for Final Approval of Economic & Property Damages Settlement Agreement at 25, *In re Oil Spill*, 910 F. Supp. 2d 891 (MDL No. 2179), Doc. 7104-1 ("[T]he higher RTPs are generally afforded to industries and locations which face the greatest risk of ongoing loss and/or are most likely to have claims for punitive damages.").

ens the case that the RTPs represent a form of societal damages given to the classes of claimants eligible to receive punitive damages.

### 1. RTPs or Damage Multipliers

The BP Settlement Class consists of private individuals and businesses defined by geographic location and the nature of their losses.<sup>79</sup> As is typical in mass tort settlements, the parties' lawyers negotiated a claims grid that compensates class members based on the relative strength of their claims.<sup>80</sup> The settlement contains compensation formulas for different categories of damages, such as economic losses or property damage.<sup>81</sup> In one category, the Seafood Compensation Program, the parties agreed to a guaranteed \$2.3 billion payment.<sup>82</sup> BP's total payout is not, however, capped.<sup>83</sup>

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79. See *In re Oil Spill*, 910 F. Supp. 2d at 903 (defining a qualifying claimant as one who falls within the geographic region of "Louisiana, Mississippi, Alabama, and certain coastal counties in eastern Texas and western Florida, as well as specified adjacent Gulf waters and bays"). Furthermore, claimants must have "lived, worked, or owned or leased property in the area between April 20, 2010 and April [16], 2012, and businesses must have conducted activities in the area during that same time frame." *Id.*

80. The parties set up a special master allocation process in which various representatives of the various affected groups made presentations on the strength of their claims. *Id.* at 918 (describing the process "using a Court-appointed neutral . . . to determine the initial and subsequent allocations [of the Seafood Compensation Program]"); *Special Master*, PERRY, ATKINSON, BALHOFF, MENGIS, BURNS & ELLIS, L.L.C., <http://www.pabmb.com/practice-areas/special-master> (last visited Sept. 4, 2014) (discussing firm attorneys' role as special master in developing methodology for allocating BP's Seafood Compensation Program settlement fund).

81. *In re Oil Spill*, 910 F. Supp. 2d at 903–04. The six categories are: "(1) specified types of economic loss for businesses and individuals, (2) specified types of real property damage (coastal, wetlands, and real property sales damage), (3) Vessel of Opportunity Charter Payment, (4) Vessel Physical Damage, (5) Subsistence Damage, and (6) the Seafood Compensation Program." *Id.* at 903. Each category contains a different formula laid out in the Economic Fund Settlement Agreement. See Economic Fund Settlement Agreement, *supra* note 11, Exhibits 1A–27, Docs. 6430-3 to 6430-46 (detailing various requirements and formulae to recover damages under the six categories).

82. The terms of the agreement state, "The SCP is expected to pay out an initial \$1.9 billion in compensation to class members, leaving a \$400 million reserve to be distributed in a second round." *In re Oil Spill*, 910 F. Supp. 2d at 908–09. The settlement was based on objective losses of the seafood industry and category multipliers; the number of claimants was not relevant to the calculus. See *id.* at 909 ("The guaranteed total of \$2.3 billion allocated to the SCP represents approximately five times the annual average industry gross revenue for 2007 to 2009 . . . . \$2.3 billion also represents 19.2 times lost industry revenue in 2010 . . . .").

83. *Id.* at 904 ("With the exception of the Seafood Compensation Program, there is no cap on the amounts that may be paid under the Settlement Agreement."). BP may have feared that capping the total payout would have raised potential intraclass conflicts (of the sort warned against by the Supreme Court in *Amchem* and *Ortiz*) that could threaten certification of the class. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626–28 (1997) (holding that conflicts of interest between class members require the class to be decertified); see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 863–65 (1999) (holding that the requirement of intraclass equity per Rule 23(a) cannot be lowered because of time constraints, and decertifying the class accordingly). In this vein, the parties highlighted that the settlement was not a "zero-sum game." *In re Oil Spill*,

The most interesting feature of the compensation grid is the RTPs. Where applicable, these multipliers are applied to the base compensation amount, and the product is then added to the base compensation awarded. As the Settlement document explains:

To the extent that an RTP is to be paid to a Claimant, it shall be a factor which is multiplied with those Compensation Amounts which the Exhibits to this Agreement specify are eligible for an RTP to calculate a sum which is added to the Compensation Amount paid to the Claimant. For example, if the Compensation Amount is \$1, and the RTP is 2.5, then \$1 is multiplied by 2.5, which product is then added to the \$1 to reach the total amount of compensation (\$1 + \$2.50 = \$3.50 in total compensation).<sup>84</sup>

The compensation grid provides for varying RTPs based on the relative strength of claims, including eligibility for punitive damages.<sup>85</sup> Specifically, the RTP compensates class members for “potential future loss, as well as pre-judgment interest, any risk of oil returning, any claims for consequential damages, inconvenience, aggravation, the lost value of money, compensation for emotional distress, liquidation of legal disputes about punitive damages, and other factors.”<sup>86</sup> In other words, the RTP is designed not only to compensate class members for future injuries (potential future loss and any risk of oil returning), claims with a low likelihood of success (consequential damages), damages based on the temporal nature of the litigation (lost value of money, prejudgment interest), and noneconomic damages (inconvenience, aggravation, and compensation for emotional distress), but also to encompass some measure of expected punitive damages.

While entitlement to punitive damages is just one factor among many included in the RTP, a close analysis of the relevant tables reveals it to be a highly significant factor. Commercial fishermen are eligible for punitive damages under the *Robins Dry Dock* exception, whereas other claimants, such as seafood processors, are not.<sup>87</sup> Under the settlement terms, the vast majority of subgroups eligible for puni-

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910 F. Supp. 2d at 918 (“[T]he claims frameworks offering generally uncapped compensation ensure that a benefit paid to one member of the class will in no way reduce or interfere with a benefit obtained by another member.”).

84. Economic Fund Settlement Agreement, *supra* note 11, § 38.126, at 107–08, Doc. 6430-1.

85. *Id.*

86. *In re Oil Spill*, 910 F. Supp. 2d at 904; *see also* Economic Fund Settlement Agreement, *supra* note 11, Exhibit 15 (RTP Chart), at 1, Doc. 6430-33 (“[A]n RTP (risk transfer premium) shall mean the amount paid to a Claimant for any and all alleged damage . . . including claims for punitive damages.”).

87. *In re Oil Spill*, 910 F. Supp. 2d at 957 (noting that “commercial fishermen fall within an arguable exception to *Robins Dry Dock* and thus conceivably could be eligible for punitive damages while processors are not”).

tive damages are included within the “Seafood Compensation Program,” which “shall cover and compensate Commercial Fishermen, Seafood Boat Captains, all other Seafood Crew, Oyster Leaseholders, and Seafood Vessel Owners for economic loss claims relating to Seafood.”<sup>88</sup> The RTPs for the Seafood Compensation Program claims are significantly higher than the RTPs for even the most highly compensated claims outside the Seafood Compensation Program. The commercial fishermen’s (and other boat captains’, crews’, and ship owners’) eligibility for punitive damages likely explains the higher RTPs for the Seafood Compensation Program. I argue that the RTP is essentially fulfilling the purpose that punitive damages would fill if the litigation were to proceed.

Table 1 illustrates how the RTP may be aptly characterized as incorporating an embedded punitive award. Compare, for example, the highest RTP for Seafood Compensation claimants—an RTP of 8.75 for oyster vessel owners or lessees<sup>89</sup>—with the highest RTP outside of the Seafood Compensation Program—an RTP of 3.0 for shrimp, crab, and oyster processors (included within the “business economic loss claims” category).<sup>90</sup> This disparity implies that punitive damages eligibility played a significant role in increasing the RTPs for claimants within the Seafood Compensation Program, potentially increasing damages by up to 5.75 over the 3.0 baseline [ $8.75:1 - 3.00:1 = 5.75:1$ ].<sup>91</sup> Moreover, the de facto multiplier for the Seafood Compensation Program (which includes the claims eligible for punitive damages) is likely to be even higher, given the \$2.3 billion guaranteed payment.<sup>92</sup>

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88. Economic Fund Settlement Agreement, *supra* note 11, Exhibit 10, at 3, Doc. 6430-22. All of the categories included in the Seafood Compensation Program qualify under the *Robins Dry Dock* commercial fishermen’s exception.

89. *Id.* at 35–36.

90. Economic Fund Settlement Agreement, *supra* note 11, Exhibit 15 (RTP Chart), at 1, Doc. 6430-33. Shrimp, crab, and oyster processors receive an RTP of 3.0, giving them the highest RTP for non-Seafood Compensation Program Claimants. *See id.* at 1–4.

91. This “kicker” to punitive damages-eligible claims might also have factored into the negotiations leading up to the \$2.3 billion guaranteed payment to the Seafood Compensation Program. *See supra* note 82 and accompanying text.

92. The settlement agreement contemplates an initial \$1.9 billion compensatory payment, with \$400 million in reserve, to be distributed in a subsequent round. *In re Oil Spill*, 910 F. Supp. 2d at 908–09.

TABLE 1: BP CLASS SETTLEMENT RTP CATEGORIES  
 [SHADED DENOTES PUNITIVE-DAMAGES ELIGIBLE CLAIMS]

Type of Claim	RTP Range
Business Economic Loss Claims	0.25–3.00 (depending on zone and industry)
Employee Claims	0.25–3.00 (depending on zone and industry)
Individual Periodic Vendors	1.00
Subsistence Claims	2.25
Coastal Real Property Claims	2.50 (excluding physical damage compensation from the denominator)
Wetlands Real Property Claims	2.50 (excluding physical damage compensation from the denominator)
Seafood Compensation Program: Ship Captain Claims	4.50–7.75 (depending on industry)
Seafood Compensation Program: Ship Owner/Lessee Claims (except Oyster Ship Owner/Lessee Claims)	5.50–8.25 (depending on industry)
Seafood Compensation Program: Oyster Ship Owner/Lessee Claims	8.75

The case for characterizing the RTPs as an embedded societal damages stand-in for punitive damages is, moreover, strengthened by a comparison with the effective multiplier included in the GCCF for “future recovery factors.”<sup>93</sup> The effective supra-compensatory multipliers diverge primarily with respect to the classes of claimants eligible for punitive damages. Recall that the GCCF did not include punitive damages. Thus, if one were to “net out” the GCCF “future recovery factor” multiplier from the RTP multiplier, the residual plausibly might be considered punitive damages. To take an example, shrimp ship owners received an RTP of 8.25 under the Class Settlement, whereas the maximum effective GCCF multiplier for that class of claimants was 3.00.

93. The GCCF “future recovery factor” multipliers are listed in Issacharoff & Rave, *supra* note 3, at 406. In order to make the comparison, the effective GCCF multipliers in Table 2 have been reduced by 1 because the GCCF multipliers include base damages—whereas the RTPs are, in effect, a multiplier add-on to base damages. See *supra* note 86 and accompanying text.

TABLE 2: CLASS SETTLEMENT RTPs COMPARED TO GCCF

Type of Claim	BP Class Settlement RTP Multiplier	GCCF "Future Recovery Factor" Multiplier
Business Economic Loss Claims	0.25–3.00	1.00
Employee Claims	0.25–3.00	1.00
Individual Periodic Vendors	1.00	1.00
Subsistence Claims	2.25	1.00
Coastal Real Property Claims	2.50	N/A (not compensated)
Wetlands Real Property Claims	2.50	N/A (not compensated)
Seafood Compensation Program: Ship Captain Claims	4.50–7.75	1.00–3.00
Seafood Compensation Program: Ship Owner/Lessee Claims (except Oyster Ship Owner/Lessee Claims)	5.50–8.25	1.00–3.00
Seafood Compensation Program: Oyster Ship Owner/Lessee Claims	8.75	6.00

## 2. *Are Societal Damages Justified?*

A striking feature that emerges from Table 1 is that *most* categories of settlement claimants receive an RTP multiplier greater than 1. This is significant in light of the fact that the Supreme Court limited punitive damages in the admiralty context in *Exxon Shipping Co.* to a 1:1 punitive to compensatory ratio.<sup>94</sup> In other words, the settlement contemplates supra-compensatory multipliers on a grander scale than that contemplated in *Exxon Shipping Co.* and, in any event, does not consider the 1:1 ratio an outer limit. Indeed, the median RTP in the settlement is 2.25. Twelve out of forty-two categories of claimants received RTPs of 4.5:1 or greater; only five categories of claimants receiving an RTP received RTPs of 1:1 or smaller. Perhaps most significantly, the minimum RTP for a punitive damages eligible subclass was 5:1.

What, if anything, does this suggest? Parties perhaps recognize that *Exxon Shipping's* 1:1 ratio may not extend to all oil spills.<sup>95</sup> There

94. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008).

95. Recidivism may be an important factor here. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577 (1996) ("Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance."). BP had an extensive history of past civil and criminal violations, which may have justified the imposition of harsher punitive damages awards. Jad Mouawad, *For BP, a*

may also be other factors that increase the value of settling now rather than continuing to litigate the issue, even if the 1:1 ratio would extend to all oil spills.<sup>96</sup>

But, to the extent that the RTPs reflect an embedded punitive damages component, are such damages justified by a societal economic deterrence rationale in this case? While the damage to society caused by the BP oil spill is difficult to measure, a possible relevant, if imperfect,<sup>97</sup> benchmark is the Exxon Valdez oil spill.<sup>98</sup> The Exxon Valdez oil spill cost Exxon roughly \$7.2 billion in 2012 dollars.<sup>99</sup> BP has paid more than that in cleanup costs alone (\$14 billion)<sup>100</sup> and faces

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*History of Spills and Safety Lapses*, N.Y. TIMES, May 9, 2009, at A22, available at <http://www.nytimes.com/2010/05/09/business/09bp.html?pagewanted=all>.

96. Issacharoff and Rave emphasize the “peace premium” BP secures by ending most litigation and putting the issue to rest. See Issacharoff & Rave, *supra* note 3, at 414–16 (discussing how settling many claims at once is worth more to the defendant than settling each claim individually). Another related factor might be reputational interest. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 532 (1991) (discussing how reputational concerns motivate certain parties to settle and behave in a risk-averse fashion, while motivating other parties to litigate aggressively). Yet another factor may be a fear of damages being so large as to be fatal to the company. *Id.*

97. The total damages and fines paid out, respectively, by Exxon and BP are an unreliable measure of the comparative scope of the environmental and societal harm inflicted. Such a measure does not account for the particular litigation strategy pursued by each defendant. Moreover, an alternative explanation for the higher damages and penalties faced by BP is the existence of the Oil Pollution Act, which was enacted in the wake of *Exxon Valdez* for the express purpose of increasing the scope of recovery for claimants injured by oil spills. See *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on Apr. 20, 2010*, 808 F. Supp. 2d 943, 959 (E.D. La. 2011), *aff’d sub nom. In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014). The OPA dramatically altered the civil litigation landscape. See Oil Pollution Act of 1990, Pub. L. No. 101-380, sec. 4301, § 311(b)(7), 104 Stat. 484, 536–37, 33 U.S.C. § 1321(b)(7) (2012) (massively increasing the penalties for discharging oil in violation of the Act). The current penalties are \$2,100 per barrel for an illegal discharge, and \$5,300 per barrel for an illegal discharge involving gross negligence. 40 C.F.R. § 19.4 (2015).

98. The Exxon Valdez oil spill involved 11 million gallons of oil, whereas the BP oil spill was estimated to involve between 103 to 176 million gallons. See Michael Kunzelman, *BP Trial in New Orleans Marked by Conflicting Estimates of Gulf Spill Size*, HUFFINGTON POST (Oct. 7, 2013), [http://www.huffingtonpost.com/2013/10/07/bp-trial-new-orleans\\_n\\_4058111.html](http://www.huffingtonpost.com/2013/10/07/bp-trial-new-orleans_n_4058111.html).

99. Exxon paid \$1.015 billion (plus at least \$175 million in interest) in compensatory and punitive damages. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 515 (2008); see also *Exxon Valdez v. Exxon Mobil Corp.*, 568 F.3d 1077, 1081 (9th Cir. 2009) (holding that interest on the \$507.5 million punitive damages judgment should run from 1996). Exxon also paid \$925 million in civil and criminal fines, \$303 million in voluntary settlement payments, and approximately \$2.1 billion in cleanup efforts. *Exxon Shipping*, 554 U.S. at 479. If the nonjudgment costs are treated as 1990 dollars, the compensatory damages award are treated as 1996 dollars, and the punitive damages award are treated as 2008 dollars, then the Exxon Valdez spill cost Exxon roughly \$7.2 billion in 2012 dollars. See Morgan Friedman, *The Inflation Calculator*, WEST EGG, [www.westegg.com/inflation](http://www.westegg.com/inflation) (last visited Mar. 31, 2015) (using data from the United States Census Bureau). A recent government report found that Exxon paid about \$4.9 billion over twenty years pursuant to several different legal proceedings and voluntary settlements or agreements. RAMSEUR & HAGERTY, *supra* note 47, at 5.

100. RAMSEUR & HAGERTY, *supra* note 47, at 6.



roughly \$40 billion in additional civil and criminal liability and fines.<sup>101</sup>

While these astronomical monetary figures give a sense of the scope of the widespread damage inflicted, at the same time, the fact that claims were vigorously pursued by the federal government and state and local entities might obviate the need for further cost internalization. Indeed, the societal economic deterrence rationale for classwide punitive damages may be blunted once one takes into account the full picture of the regulatory (and even criminal) fines and penalties that are typically assessed in widespread harm scenarios such as oil spills. But this simply means that the strength of the case for societal damages based on economic deterrence will depend heavily on how aggressively alternative cost-internalization mechanisms have been pursued and enforced; and where there is no such aggressive pursuit and enforcement, the justification has special force.

### B. *Classwide Punitive Damages in the Halliburton Settlement*

On September 2, 2014, Halliburton reached a tentative global settlement with two classes of punitive damages claimants.<sup>102</sup> Halliburton has agreed to make an aggregate payment of \$1.028 billion in settlement of these combined class punitive damages claims.<sup>103</sup> As argued above, the strongest normative justification for classwide puni-

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101. BP has already paid out about \$12.5 billion in noncleanup-related claims and an additional \$4.5 billion in civil and criminal settlements. ERNST & YOUNG, GULF OF MEXICO OIL SPILL CLAIMS AND OTHER PAYMENTS PUBLIC REPORT—MARCH 31, 2015 (2015), available at [http://www.bp.com/content/dam/bp/pdf/gulf-of-mexico/Public\\_Report\\_March\\_2015.pdf](http://www.bp.com/content/dam/bp/pdf/gulf-of-mexico/Public_Report_March_2015.pdf); RAMSEUR & HAGERTY, *supra* note 47, at 8.

BP could face more than \$18 billion in Clean Water Act penalties, especially because Judge Barbier found it grossly negligent. See *Appeals Court Won't Rehear a BP Oil Spill Liability Argument*, N.Y. TIMES (Jan. 9, 2015), <http://www.nytimes.com/aponline/2015/01/09/us/ap-us-gulf-oil-spill-bp.html>. BP has estimated that it will pay out an additional \$5 billion or more in claims per the Court Supervised Settlement Program. Jennifer Larino, *The Year in Business: BP Found "Grossly Negligent" in Oil Spill, Loses Settlement Appeal*, TIMES-PICAYUNE (Dec. 31, 2014), [http://www.nola.com/business/index.ssf/2014/12/the\\_year\\_in\\_business\\_bp\\_found.html](http://www.nola.com/business/index.ssf/2014/12/the_year_in_business_bp_found.html). BP did recoup \$5.39 billion from other companies that settled with it. See *supra* note 53.

102. Notice of Filing of HESI Punitive Damages & Assigned Claims Settlement Agreement at 1, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, 910 F. Supp. 2d 891 (E.D. La. 2012) (MDL No. 2179), Doc. 13346, available at <http://www.laed.uscourts.gov/oilspill/9022014HESISettlement.pdf>.

103. Halliburton Settlement, *supra* note 77, § 6(a), at 17, Doc. 13346:1. A court-appointed "Allocation Special Master" will allocate the aggregate payment between the *Deepwater Horizon* Economic and Property Damages Settlement (DHEPDS) Class and the New Class. *Id.* § 7, at 18–19. After the money is allocated, members of the New Class will be able to pursue their claims through a court-supervised claims program. *Id.* § 8(a), at 20. The DHEPDS class money will be placed in a trust and subject to further order of the court, which has discretion as to how the money is allocated based on the DHEPDS. *Id.* § 9(b), at 25–26.

tive damages is a nonretributive societal rationale such as economic deterrence. Moreover, classwide punitive damages based on such a rationale should pass legal muster.

### 1. *Unique Features of the Halliburton Settlement*

Several unique features of the Halliburton classwide punitive damages settlement complicate its evaluation in this light. First, the BP settlement, while releasing all punitive damages claims against itself, not only specifically reserved the claimants' punitive damages claims against its codefendants, but also (more controversially) assigned BP's punitive damages claims against its codefendants to claimants. Second, two days after the Halliburton settlement, Judge Barbier ruled that Halliburton's conduct was merely negligent and thus not subject to punitive damages.

#### a. *Punitive Damages Assigned and Reserved Under the BP Settlement*

Under the BP Settlement, BP's codefendants Transocean and Halliburton remain subject to punitive damages claims from some victims of the BP oil spill. The settlement releases BP and all its codefendants from all but certain specific reserved claims in exchange for BP's creation of an extensive compensation program and settlement trust fund. Under the terms of the settlement, two main groups are eligible for punitive damages, as discussed below.<sup>104</sup>

#### i. *Economic Fund Class' assigned claims*

BP assigned many of its legal claims against Transocean and Halliburton, including its punitive damage claims,<sup>105</sup> to the Court Super-

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104. Economic Fund Settlement Agreement, *supra* note 11, at 12, Exhibit 21, at 5–7, Doc. 6430-39 (reserving the plaintiffs' punitive damages claims against Halliburton and Transocean and assigning BP's punitive damages claims to an assigned claims class). There is a third potential group of plaintiffs who are eligible for punitive damages: those who opted out or were never included in the settlement agreement but still meet the requirements under *Robins Dry Dock*. According to Issacharoff and Rave, only 1.2% of claimants opted out of the settlement. See Issacharoff & Rave, *supra* note 3, at 426.

105. Economic Fund Settlement Agreement, *supra* note 11, Exhibit 21, at 5–6, Doc. 6430-39 (assigning “punitive, exemplary, multiple, or non-compensatory damages”). The Economic Fund Settlement Agreement assigns six additional types of damages to the Economic Class. In addition to punitive damages, BP assigns its claims for (1) damages relating to the repair of the MC-252 Well; (2) “economic damages for the loss of the MC-252 Well”; (3) response costs incurred to contain the spill; (4) “[a]ll rights to indemnity, contribution, or subrogation for claims paid by BP and/or the GCCF on or before the entry of the Preliminary Approval Order”; (5) “indemnification, contribution, [and] subrogation” actions for reimbursement of Settlement Payments; and (6) “[a]ll claims and causes of action to recover the damages, losses, costs, fees, and [other] amounts.” *Id.*

vised Settlement Plan's Economic and Property Damages Settlement Agreement class (Assigned Claims Class).<sup>106</sup> While BP has indemnified Transocean and Halliburton for third-party compensatory damages claims, it has not done so for punitive damages claims or for its own assigned claims against Transocean and Halliburton.<sup>107</sup>

The Assigned Claims Class is unusual because the claims are assigned to the class as a separate entity from its individual members.<sup>108</sup> Specifically, BP assigned its punitive damages claims "to the Economic Class, only as a juridical entity and not to Economic Class Members individually."<sup>109</sup> Moreover, under the terms of the settlement, BP warrants that it "will not oppose the motion . . . seeking to certify a litigation class against Transocean or Halliburton," as long as the relief sought by the class is "limited to the recovery of punitive damages and/or assigned rights from the BP Parties."<sup>110</sup>

## ii. Commercial fishermen's reserved claims

As mentioned above, commercial fishermen—as well as individuals who suffered physical damage to a proprietary interest—fall outside the *Robins Dry Dock* limitation barring remedies for pure economic

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106. The Assigned Claims Class can seek compensatory damages from Transocean or Halliburton only for assigned claims (as BP would be liable for third-party claims under its indemnification arrangement with Transocean and Halliburton). Transocean and Halliburton cross-claimed against BP and asserted that BP was required to defend and indemnify them from all claims and liabilities stemming from the BP oil spill. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010*, 841 F. Supp. 2d 988, 992 (E.D. La. 2012) (regarding BP's contractual indemnification obligation to Transocean); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010*, MDL No. 2179, 2012 WL 273726, at \*1 (E.D. La. Jan. 31, 2012) (regarding Halliburton and indemnification). Judge Barbier has ruled that BP is required to indemnify Transocean and Halliburton from third-party compensatory damages claims, regardless of whether they are based on strict liability, negligence, or gross negligence. *In re Oil Spill*, 841 F. Supp. 2d at 1009; *In re Oil Spill*, 2012 WL 273726, at \*2.

107. In two decisions, Judge Barbier held that BP does not owe Transocean or Halliburton indemnity for any punitive damages or civil penalties incurred under the Clean Water Act. *In re Oil Spill*, 841 F. Supp. 2d at 1009; *In re Oil Spill*, 2012 WL 273726, at \*2–3.

108. The Assigned Claims Class is an atypical class. Given that the claims are only derived from one party (BP), then assigned to another single entity (the Economic Fund Class), there are not multiple parties making claims that would justify a class action. FED. R. CIV. P. 23(a)(1) ("[T]he class is so numerous that joinder of all members is impracticable . . ."). Rather, there is a single entity (albeit one constituting a preexisting certified class) making a single set of claims, just as if BP had retained the claims and sued Transocean and Halliburton. The assignment of such punitive damages claims remains untested. While much recent scholarship argues in favor of lifting restraints on the alienation of legal claims, much uncertainty in judicial practice remains. See generally Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 699 (2005).

109. Economic Fund Settlement Agreement, *supra* note 11, Exhibit 21, § 1.1.3.6, at 5–6, Doc. 6430-39.

110. *Id.* § 7.2, at 62, Doc. 6430-1.

losses.<sup>111</sup> Such claimants, therefore, can pursue punitive damages claims because they could have pursued these claims under general maritime law.<sup>112</sup>

Under the terms of the BP Settlement Agreement, the plaintiffs' claims for punitive damages against Transocean and Halliburton were specifically reserved.<sup>113</sup> Thus, a subclass of the Economic Fund Class (Reserved Claims Class)—comprised primarily of commercial fishermen—could bring a punitive damages class action lawsuit against Halliburton and Transocean.

The Halliburton Settlement is comprised of the Assigned Claims Class as well as the Reserved Claims Class.<sup>114</sup>

#### b. Judge Barbier's Punitive Damages Ruling

Halliburton's settlement eliminated the risk of an adverse ruling by Judge Barbier that would have exposed them to increased punitive damages liability.<sup>115</sup>

Two days after entry of the settlement, on September 4, 2014, Judge Barbier ruled on the allocation of responsibility between BP, Halliburton, and Transocean and whether their respective conduct warranted punitive damages.<sup>116</sup> Judge Barbier found BP primarily

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111. See *supra* note 62 and accompanying text.

112. See *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, 808 F. Supp. 2d 943, 962 (E.D. La. 2011), *aff'd sub nom. In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014).

113. See Economic Fund Settlement Agreement, *supra* note 11, at 12, Doc. 6430-1 ("Claims of the Economic Class, Plaintiffs, and Economic Class Members for punitive damages against HALLIBURTON and TRANSOCEAN are reserved." (emphasis added)); see also *id.* Exhibit 26, at 5, Doc. 6430-45 ("Expressly Reserved Claims' means [*inter alia*] . . . claims for punitive or exemplary damages against Halliburton and Transocean subject to the provisions of Section 11 of the Settlement Agreement."). Doc. 6430-45 is the Full and Final Release, Settlement, and Covenant Not to Sue. *Id.* at 3.

114. Halliburton Settlement, *supra* note 77, at 4–5, Doc. 13346:1. The Assigned Claims Class, named the "Deepwater Horizon Economic and Property Damages Settlement (DHEPDS) Agreement Class," includes all members of the BP Economic Fund Class in the BP settlement agreement. *Id.* § 5(d), at 8, 10. The Reserved Claims Class, which includes commercial fishermen and persons who suffered physical damage to a proprietary interest, is dubbed the "New Class." *Id.* § 4, at 5–6.

115. See Clifford Krauss, *Halliburton To Pay \$1.1 Billion To Settle Damages in Gulf Oil Spill*, N.Y. TIMES, Sept. 3, 2014, at B1, available at [http://www.nytimes.com/2014/09/03/business/energy-environment/halliburton-to-pay-1-1-billion-to-settle-damages-in-gulf-of-mexico-oil-spill.html?\\_r=0](http://www.nytimes.com/2014/09/03/business/energy-environment/halliburton-to-pay-1-1-billion-to-settle-damages-in-gulf-of-mexico-oil-spill.html?_r=0) ("Legal scholars following the case said that Halliburton was making a calculated judgment that it was preferable to agree to pay the relatively modest \$1.1 billion than face larger liabilities in the future. They said the settlement should resolve most of its remaining liability for the spill, even if the company is found to have been grossly negligent by Judge Carl J. Barbier . . .").

116. Findings of Fact and Conclusions of Law: Phase One Trial, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, 910 F. Supp. 2d 891 (E.D. La.

responsible (67%), followed by Transocean (30%), and, to a much lesser extent, Halliburton (3%).<sup>117</sup> With respect to punitive damages, Judge Barbier concluded that Transocean and Halliburton were merely negligent and thus should not be subject to punitive damages.<sup>118</sup> Conduct by BP's employees, by contrast, was deemed reckless, and thus, in theory, subject to punitive damages.<sup>119</sup> However, in light of Fifth Circuit precedent limiting vicarious liability of employers for punitive damages in the maritime context, Judge Barbier concluded that BP was, in fact, not liable for punitive damages.<sup>120</sup>

## 2. *Are Classwide Punitive Damages Justified?*

As a preliminary matter, we return to our discussion of Judge Jack Weinstein, who paved the way for the punitive damages class. In terms of doctrinal objections to classwide punitive damages, relative to the decertified punitive damages class in *In re Simon II*, the punitive damages class in the BP case is more attractive (or less problematic). The BP catastrophe (like the Exxon Valdez disaster) is a singular incident that caused ecological and societal damages on an unprecedented scale, rather than individual incidents of harm over many years (as in the tobacco context of *In re Simon II*). Given that the entire case is governed by federal law, there are no troublesome choice-of-law issues. Moreover, unlike the *In re Simon II* scenario, there was a preexisting certified class (Economic Fund Class) for settlement of compensatory damages,<sup>121</sup> which eliminates the “cart-before-the-horse” concern.

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2012) (MDL No. 2179), Doc. 13355, available at <http://www.uscourts.gov/courts/laed/9042014FindingsOfFactandConclusionsOfLaw.pdf>.

117. *Id.* ¶ 544, at 136.

118. *Id.* ¶ 543, at 135.

119. *Id.* ¶ 545, at 136.

120. *Id.* ¶¶ 561–67, at 140–42. Judge Barbier did conclude that under the Ninth Circuit or First Circuit rules governing punitive damages in these kinds of cases, BP would be liable. *Id.* ¶¶ 570–71, at 142.

121. The Reserved Claims Class (which is a subclass of the already-certified Economic Fund Class), however, sought punitive damages without seeking compensatory damages. *See supra* note 104 (explaining that only punitive damages claims against Transocean and Halliburton were reserved). Recall dicta from the Second Circuit in *In re Simon II* to the effect that “[i]n certifying a class that seeks an assessment of punitive damages prior to an actual determination and award of compensatory damages, the district court’s Certification Order would fail to ensure that a jury will be able to assess an award that, in the first instance, will bear a sufficient nexus to the actual and potential harm to the plaintiff class . . . .” *Simon II Litig. v. Philip Morris USA Inc. (In re Simon II Litig.)*, 407 F.3d 125, 138 (2d Cir. 2005). One key difference lies in the fact that the compensatory damages for the Reserved Claims Class was previously certified for settlement purposes, so there is a relevant baseline. Moreover, jurisdictions are split on whether (as the Second Circuit posited) compensatory damages are a prerequisite for the award of punitive damages. *Compare, e.g., Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1262 (Fla. 2006) (“[A]n

But I am more interested in the question that, hitherto, has not been asked: namely, how the existence of the embedded societal damages within the BP settlement impacts an evaluation of the necessity for (and size of) any further supra-compensatory damages, whether or not expressly termed punitive damages. The BP class action settlement, via the RTP multipliers, embedded a form of classwide societal damages. Moreover, by specifically reserving the claimants' claims for punitive damages, it opened up the possibility—eventually realized with the Halliburton settlement—that the claimants could receive further classwide supra-compensatory damages.

#### V. CONCLUSION: CLASS ACTION SETTLEMENTS AND SOCIETAL DETERRENCE

The BP oil spill litigation and ensuing class action settlements with BP and Halliburton provide an illuminating lens with which to explore the continuing vitality of a nonretributive societal rationale for classwide supra-compensatory damages. The Halliburton settlement expressly governs aggregated punitive damages claims, but the BP (ostensibly) compensatory class settlement likewise contains supra-compensatory multipliers that are a trademark of a societal damages conception of punitive damages.

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award of compensatory damages is not a prerequisite to a finding of entitlement to punitive damages. Compensatory and punitive damages serve distinct purposes.”), *with, e.g.*, *Sanderson v. Am. Family Mut. Ins. Co.*, 251 P.3d 1213, 1221 (Colo. Ct. App. 2010) (“[A] claim for exemplary damages is not ‘a separate and distinct cause of action,’ but rather ‘is auxiliary to an underlying claim for actual damages’ and thus can be entered only in conjunction with an underlying and successful claim for actual damages assessed against a wrongdoer . . . .” (quoting *Kirk v. Denver Publ’g Co.*, 818 P.2d 262, 265 (Colo. 1991))).

