Marco Cappelletti, 'Comparative Reflections on Punishment in Tort Law' in Jean-Sébastien Borghetti and Simon Whittaker (eds), *French Civil Liability in Comparative Perspective* (Hart Publishing 2019) 329

16

Comparative Reflections on Punishment in Tort Law

MARCO CAPPELLETTI

I. Introduction

While it is generally accepted that punishment constitutes one of the fundamental functions of the criminal law, its role is far more controversial in private law and, more particularly, in the law of torts.[1] Common law systems have traditionally included punitive remedies for defendants who have adopted particularly reprehensible courses of action; most notably in the form of punitive damages in the United States, and exemplary damages in England. Despite receiving formal recognition in the nineteenth century in both jurisdictions, these remedies remain controversial. Points of disagreement relate to several issues, including the functions which should or should not be assigned to tort law, its relationship with the criminal law, the perceived need to preserve tort law's coherence and, ultimately, the question of what tort law is for.[2] Similar concerns also characterise discussions which have taken place on continental Europe over the past few decades on the role of punishment in tort law.[3] The traditional position, which sees compensation as the exclusive concern of tort law and punishment as a goal alien to it, has been called into question and important developments are taking place. In this respect, particularly significant is the current French *Projet de réforme de la responsabilité civile*. While this reform project is mostly conservative, for it essentially seeks to restate and put into legislation the law as developed by national courts over the

[1] The term 'punishment' is often used to encompass *both* 'retribution' and 'deterrence', where retribution is concerned with ensuring that wrongdoers get their just desert while deterrence refers to the goal of influencing future conduct by providing appropriate incentives. At other times, punishment is used as a synonym for retribution and thus as distinct from deterrence. Unless stated otherwise, in this chapter the term 'punishment' includes both retribution and deterrence.

[2] See sections II and III below.

[3] For a comparative overview see H Koziol and V Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives*, Tort and Insurance Law Series (Wien/New York, Springer, 2009) vol 25.

last century, one of the main innovations it proposes is the introduction in the *Code civil* of a form of civil punishment (*amende civile*) targeted at wrongs committed with a view to profit (*faute lucrative*). Whether or not it will eventually receive legislative approval, this attempt to equip French law with an overtly punitive weapon marks an important development in the French attitude towards the role of punishment in tort law.[4]

Against this backdrop, this chapter explores and compares the different treatment of the idea of punishing civil wrongs in the US, English, and French laws of torts. This inquiry shows that punishment can be understood in two different ways. One approach sees it instrumentally as a device geared towards the achievement of societal goals such as deterrence or retribution in the interests of society. On a second approach, punishment is seen as rooted in ideas of interpersonal justice in that it promotes private interests by, for example, empowering the victim of a wrong to take her revenge against the tortfeasor. While both the instrumental and interpersonal conceptions of punishment appear in each of the three tort systems considered, they do so to differing extents and they are seen more or less favourably depending on the way in which tort law is conceived of. Consequently, the treatment reserved to punitive measures varies depending on which conception of punishment, instrumental or interpersonal, is embraced and on how this conception relates to broader ways of seeing tort law.

Finally, a word on the scope of this chapter. Tort law can react to wrongdoings in a variety of ways. Depending on the type of tort involved, different remedies may be available, including compensatory, disgorgement, punitive (or exemplary) damages and other civil penalties. This chapter does not focus on either compensatory or disgorgement damages, for it is disputed whether or not, and the extent to which, they fulfil punitive functions. I rather focus on remedies or other measures whose punitive nature cannot be called into question, for their gist can be safely identified in retribution, deterrence, or both. Consequently, I consider US punitive damages, English exemplary damages, and the French *amende civile* as envisaged by article 1266-1 of the *Projet de réforme*.

II. Punitive Damages in the United States: Instrumentalism and Interpersonal Justice as Conflicting Approaches to Punishment and Tort Law

One of the most distinctive features of the law of torts in the United States is the availability of punitive damages. In most states the courts or juries have the power

[4] A wide variety of terms have been and are used to refer to the same area of French law, namely 'delictual liability', 'Aquilian liability', 'civil liability', and 'extra-contractual liability'. For reasons of convenience, however, I use the term 'tort law'.

to award punitive damages whenever the defendant has harmed the claimant by acting in a particularly reprehensible way. The defendant may have caused harm maliciously or intentionally, or he may have shown such a reckless or wanton disregard for the claimant's interests that a punitive measure seems appropriate.

While punitive damages are a well-established tort remedy and their desirability is rarely called into question in the US context, their purpose is controversial, and contrasting theories suggest very different ways of understanding them. This theoretical uncertainty is due to a polarisation between 'instrumentalist' and 'non-instrumentalist' approaches to tort law that characterises contemporary legal thought in the United States.[5] Instrumentalists typically see tort law as a tool for the realisation of socio-economic objectives, such as deterrence, loss-spreading, or wealth maximisation. This vision of the tort system assesses rules and doctrines by measuring how good they are in achieving these goals and by considering the effects they produce. By contrast, non-instrumentalists maintain that tort law is concerned with notions of interpersonal justice between private parties and that their reciprocal rights and duties should be the primary, if not the exclusive, focus of tort rules and doctrines. This diversity of approaches leads to different views in relation to virtually every aspect of tort law and punitive damages are no exception.[6]

As I will explain, instrumentalist and non-instrumentalist approaches attribute different meanings to the notion of punishment and they consequently ascribe different functions to punitive damages. These differences find expression also in the practical life of punitive damages which, in most states, present a combination of features that reflect both the instrumental and interpersonal conception of punishment (and of tort law more generally).[7]

A. Punitive Damages as an Instrument of Social Policy

Several features of the positive law as well as the majority view among courts and scholars suggest that punitive damages constitute a valuable instrument in the pursuit of a variety of goals such as criminal-like punishment, efficient deterrence, or societal compensation.

The criminal-like function of punitive damages is emphasised in several judicial decisions. For example, the US Supreme Court has stated that punitive damages 'serve the same purposes as criminal penalties'[8] and that they 'may be properly

[5] RA Posner, 'Instrumental and Noninstrumental Theories of Tort Law' (2013) 88 Ind LJ 469.

[6] M Cappelletti, 'Punitive Damages and the Public/Private Distinction: A Comparison between the United States and Italy' (2015) 32 Ariz J Int'l & Comp L 799.

[7] See BC Zipursky, 'Palsgraf, Punitive Damages, and Preemption' (2012) 125 Harv L Rev 1757, 1777ff; Cappelletti (n 6) 803–21.

[8] *State Farm Mut Auto Ins Co v Campbell*, 538 US 408, 417 (2003).

imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition'.[9] This criminal-like conception of punitive damages explains well why defendants who face claims for punitive damages are afforded procedural protections which are unavailable in claims for compensatory damages. For example, when seeking an award of punitive damages, the claimant must prove the seriousness of the defendant's conduct according to a standard of proof that, in many states, is more burdensome than the 'preponderance of evidence' standard of civil trials: more than 30 states require 'clear and convincing' evidence, and one state (Colorado) requires proof 'beyond a[ny] reasonable doubt'.[10] Moreover, several states now require that the evidence necessary to trigger punitive damages and/or the quantification of the punitive award be dealt with in separate phases of trial.[11] In this way, the defendant's wealth and other potentially aggravating circumstances relevant to the award of punitive damages do not contaminate the compensatory phase of the trial and thus the risk of inflated compensatory damages is avoided.[12] A criminal-like understanding of punitive damages can be also identified in academic theories that emphasise the retributive rationale of this tort remedy. For example, one view argues that punitive damages are particularly desirable in relation to powerful economic actors.[13] Large corporations frequently manage to escape criminal sanctions both because egregious wrongdoings are often difficult to detect and prosecute and because of certain features and rigidities of the criminal process which are 'friendly' to white-collar wrongdoers.[14] Punitive damages cure the inadequacies of the criminal law by providing private parties and their attorneys with a powerful incentive to do the investigative work and bring the wrongdoer to justice. In this respect, private parties act as private attorney generals and 'assume … law enforcement functions'.[15] As a result, wrongdoers are publicly punished for their conduct and deterred from treating legal norms and the cost of liability as mere taxes on their activities.[16]

Punitive damages are also seen instrumentally in theories committed to economic efficiency. A variety of models of punitive damages have been elaborated to suggest how deterrence of antisocial behaviour may be best achieved.[17]

[9] *BMW of N Am, Inc v Gore* 517 US 559, 568 (1996). See also § 908 of the Restatement (Second) of Torts (1979).

[10] AJ Sebok, 'Punitive Damages in the United States' in Koziol and Wilcox (n 3) 155, [74]. See Colo Rev Stat § 13-25-127(2) (2001).

[11] ML Rustad, 'The Closing of Punitive Damages' Iron Cage' (2005) 38 Loy LA L Rev 1297, 1321–24.

[12] ibid.

[13] M Galanter and D Luban, 'Poetic Justice: Punitive Damages and Legal Pluralism' (1993) 42 Am U L Rev 1393.

[14] ibid 1440–45.

[15] ibid 1445–46. The authors add that, since punitive damages are sought by private parties rather than by the state and since the personal liberty of the defendant is not at stake in tort litigation, punitive damages can be awarded without the safeguards of the criminal process (at 1454–58).

[16] ibid 1425–28, 1430–35.

[17] eg D Haddock et al, 'An Ordinary Economic Rationale for Extraordinary Legal Sanctions' (1990) 78 Cal L Rev 1; AM Polinsky and S Shavell, 'Punitive Damages: An Economic Analysis' (1998) 111 Harv L Rev 869; KN Hylton, 'Punitive Damages and the Economic Theory of Penalties' (1998) 87 Geo LJ 421.

What drives these theories is not the goal of retribution for blameworthy wrongdoings, but rather the adoption of legal rules that provide appropriate incentives to achieve the desired level of deterrence. For example, the 'multiplier model' suggests that punitive measures are desirable in situations where the wrongdoer has a chance of escaping liability; in this situation, achieving optimal deterrence requires that the defendant is ordered to pay a sum calculated by multiplying compensatory damages 'by the reciprocal of the probability that the injurer will be found liable when he ought to be'.[18] By contrast, the gain-elimination model suggests that, in situations where the defendant's gain is less than or equal to the claimant's loss, punitive damages should not seek optimal deterrence, but rather the complete deterrence of harmful conduct.[19] This means that the defendant's gain must be divided by the probability of liability; the resulting figure constitutes the minimum punitive award.[20]

Finally, a further expression of the instrumental conception of punitive damages sees this tort remedy as pursuing, in limited circumstances, 'societal compensation'.[21] This theory pays attention to the existence, in several states, of split-recovery schemes under which part of the punitive award accrues to the claimant and the remainder is instead allocated to some state- or court-administered funds.[22] In situations where the wrongdoer harms multiple victims, most of whom will not bring an action in tort, split-recovery schemes can turn punitive damages into socially compensatory damages, for they compensate society as a whole for the widespread harm that the defendant caused through his misconduct.[23] Furthermore, understood in this way, punitive damages do not pursue retribution but they rather promote optimal deterrence by forcing the defendant to internalise in full the social costs of his harmful conduct.[24]

The picture which emerges so far suggests that elements in the positive law as well as the views of many leading legal scholars reflect a markedly instrumental understanding of punitive damages geared towards the pursuit of societal goals. This way of seeing punitive damages is part of a broader effort to interpret tort law as an instrument of social regulation and to turn tort rules and doctrines primarily

[18] Polinsky and Shavell (n 17) 889. This approach assumes that the benefits of the harmful activity to the wrongdoer are to be 'included in the calculation of social welfare' (at 875). If this is not the case, as it happens when the wrongdoer derives pleasure from the sufferings of the victim, punitive damages are appropriate even if the wrongdoer had no chance of escaping liability (at 918ff). For a judicial iteration of this multiplier model see *Mathias v Accor Economy Lodging* 347 F 3d 672, 677 (7th Cir 2003) (Judge Posner).

[19] Hylton (n 17).

[20] ibid 423. For a judicial application of this model, see *Jacque v Steenberg Homes, Inc* 563 NW 2d 154, 165 (Wis 1997).

[21] CM Sharkey, 'Punitive Damages as Societal Damages' (2003) 113 Yale LJ 347, 351.

[22] ibid 372ff.

[23] ibid 389ff. The author does not exclude that punitive damages may be grounded on retributive rationales in cases involving malice (at 387).

[24] Sharkey (n 21) 354. See also *Ciraolo v City of New York* 216 F 3d 236, 245 (2nd Cir 2000) (Judge Calabresi); G Calabresi, 'The Complexity of Torts – The Case of Punitive Damages' in SM Madden (ed), *Exploring Tort Law* (Cambridge, Cambridge University Press, 2005) 333, 339–40.

into mechanisms for the achievement of policy goals rather than for the accomplishment of some sort of interpersonal justice between claimant and defendant.[25] In an intellectual climate where instrumentalism is predominant, the tendency to attribute societal goals to punitive damages appears as a natural development.

B. Punitive Damages as Private Retribution (or Revenge)

As a reaction to instrumentalism, a movement has emerged which prioritises considerations of interpersonal justice and marginalises or rejects policy concerns as valid justifications for the imposition of liability in tort.[26] For example, a defendant may legitimately be held liable because she negligently breached a duty of care owed to the claimant, for such an obligation to repair would be readily justifiable on grounds of interpersonal morality.[27] By contrast, a defendant should not be held liable simply because, if compared to the claimant, she is the cheapest cost-avoider according to some efficiency-based reasoning.[28] Since theories of interpersonal justice are reluctant to accept policy considerations as legitimate reasons for imposing tort liability, the instrumental conception of punitive damages is problematic in that it grounds this tort remedy on collective goals such as criminal-like punishment, efficient deterrence, or societal compensation. Thus, if the tort system is seen as based on notions of interpersonal justice, punitive damages must be either rejected full stop, or reconceptualised in interpersonal terms.

In most of its variants, the theory of corrective justice denies any role to punishment in tort law and thus rejects punitive damages.[29] Based on notions of correlativity, corrective justice seeks to restore the balance between two parties after a transactional injustice has taken place. This result must be achieved while complying with two guiding principles. First, the injustice must be reversed only for reasons which are internal to the relationship between claimant and defendant (structural correlativity). Secondly, in terms of the remedies made available by the law, corrective justice requires that the claimant be put in the position in which she would have been but for the harmful event (content-related correlativity), thus not allowing more-than-compensatory damages.[30] Neither structural correlativity

[25] The literature showing this attitude is immense and in continuous expansion. Among the most influential and illustrative contributions, see R Coase, 'The Problem of Social Cost' (1960) JL & Econ 1; G Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven, Yale University Press, 1970); RA Posner, 'A Theory of Negligence' (1972) 1 J Legal Stud 29.

[26] eg GP Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harv L Rev 537; RA Epstein, 'A Theory of Strict Liability' (1973) 2 J Leg Stud 151.

[27] J Coleman, 'The Practice of Corrective Justice' in DG Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Clarendon Press, 1995) 53, 70.

[28] For the concept of cheapest cost-avoider, see Calabresi (n 25).

[29] eg EJ Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 U Toronto LJ 349. *Cf* RW Wright, 'Right, Justice and Tort Law' in DG Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Clarendon Press, 1995) 159, 174–76.

[30] EJ Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 Fla St U L Rev 273, 290.

nor content-related correlativity make any room for retribution or deterrence, and thus for punitive damages, in tort law. The demands of structural correlativity are violated because both retribution and deterrence represent 'one-sided' justifications that 'focus not relationally on the parties … but unilaterally on the defendant' for the imposition of liability; equally frustrated is content-related correlativity, for '[p]unitive damages do not restore to plaintiffs what is rightfully theirs, but instead give them a windfall'.[31]

Other theories of interpersonal justice have a broader, more flexible structure which makes room for punishment in tort law by reconceptualising punitive damages in interpersonal terms. The most influential theory of this sort is that of civil recourse.[32] According to this theory, victims of wrongs are empowered by the state to recover in tort from the wrongdoer.[33] Unlike corrective justice, which sees more-than-compensatory damages as an aberration, the theory of civil recourse makes room for punitive damages. Wrongs that are committed with malice or reckless disregard for the claimant's rights may justify a remedy that entitles the victim to be punitive,[34] or to seek revenge.[35] In this respect, punitive damages simply constitute an additional avenue of civil recourse that the state provides to the victims of wrongs. Agreeing with the conclusion that punitive awards constitute 'a form of legally sanctioned private revenge',[36] another well-known interpersonal theory of punitive damages justifies punishment in tort on the basis of the distinction between wrongs to society and wrongs to private parties.[37] Wrongs done to society are the target of criminal punishment, whereas wrongs done to private parties are the target of private punishment (and hence of punitive damages). These two types of punishment have distinct goals: criminal punishment pursues the state's interest in retribution and deterrence whereas punitive damages pursue the individual's interest in obtaining revenge.[38]

[31] ibid. See also D Braun, 'The Risky Interplay of Tort and Criminal Law: Punitive Damages' (2013) 11 Cardozo Pub Law, Policy & Ethics J 449, 467–69.

[32] BC Zipursky, 'A Theory of Punitive Damages' (2005) 84 Tex L Rev 105. The author admits that the need to account for punitive damages is one of the 'considerations motivating the development of [his] civil recourse view' (at 156, fn 245).

[33] ibid 151. See also JCP Goldberg, 'Tort Law for Federalists (and the Rest of Us): Private Law in Disguise' (2004) 28 Harv JL & Pub Pol'y 3, 7.

[34] ibid 157.

[35] AJ Sebok, 'Punitive Damages: From Myth to Theory' (2006) 92 Iowa L Rev 957. See also *Clark v Cantrell*, 332 SC 433, 442, 504 SE 2d 605, 610 (SC App 1998), where the Court of Appeals of South Carolina observed that, in addition to advancing the state's interest in punishment and deterrence, punitive damages also vindicate private rights and that '[v]indication denotes punishment and *revenge*' (added emphasis). On the minor differences between Sebok's and Zipursky's theories, both rooted in the theory of civil recourse, see Sebok, ibid 1025–29; Zipursky (n 32) 147.

[36] T Colby, 'Clearing the Smoke from *Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages' (2008) 118 Yale LJ 392, 422, fn 125. Colby makes clear, however, that while his vision of punitive damages is close to theories of interpersonal justice, he is also 'open to the proposition that tort law can sometimes be employed to serve solely public, regulatory aims' (ibid 423, fn 125).

[37] ibid 424–27.

[38] ibid 436–40.

In presenting punitive damages as essentially interpersonal and private, these theories are consonant with several features of the law of punitive damages:[39] first, in US law, judges or juries cannot award punitive damages unless the claimant specifically requests them; secondly, in several states the punitive award still accrues to the claimant and not to some public fund; thirdly, there can be no punitive damages if the claimant does not get compensatory damages (even if only nominal), which means that there must have been some sort of violation of the claimant's rights; fourthly, judges and juries have broad discretion in deciding whether or not to award punitive damages, even if the defendant's conduct was in fact particularly reprehensible. Finally, the US Supreme Court has established that punitive damages cannot be awarded to punish a defendant for harm to individuals not involved in the litigation.[40] Although state courts might not follow this rule,[41] the Supreme Court's holding emphasises that punitive damages should punish the wrongful infliction of harm on a particular private party, the claimant, and not on other members of society (no matter how numerous or how badly harmed). An interpersonal understanding of punishment fits all these features of the positive law better than criminal-like or other instrumental understandings of punitive damages and thus it strengthens those theories of tort law which seek to account for this legal domain in terms of interpersonal justice.

In conclusion, in the United States there are two distinct and incompatible ways of dealing with the idea of punishing civil wrongs. On the one hand, the instrumental conception of punishment sees punitive damages as pursuing societal goals such as criminal-like punishment, efficient deterrence, or societal compensation. On the other hand, the interpersonal conception of punishment considers punitive damages as pertaining to the interaction between claimant and defendant and as empowering the former to seek private retribution or revenge against the latter. This conflict of approaches does not remain at an abstract level, for the law of punitive damages itself reflects this tension by including features that are consistent with the instrumental approach to punishment and features that are instead consistent with the interpersonal approach. Ultimately, the contrast between the instrumental and interpersonal conceptions of punishment and of punitive damages can be traced back to a wider clash between different ways of theorising tort law. The instrumental conception must be placed in the context of a more general conception, still prevalent today, of tort law as an instrument of social policy. The interpersonal conception of punishment, by contrast, is consistent with broader theories that see tort law as focusing on the reciprocal rights and duties of the parties.

[39] Zipursky (n 7) 1784–85.

[40] *Philip Morris US v Williams* 549 US 346 (2007).

[41] In *Philip Morris US v Williams*, the US Supreme Court remanded the case to the Oregon Supreme Court to ascertain whether jury instructions made clear to the jurors that punishment had not to be inflicted for harm to non-parties. The Oregon Supreme Court, however, affirmed its prior decision. Philip Morris again petitioned the US Supreme Court, which eventually decided to dismiss the petition and thus in effect allowed the initial punitive award to stand.

III. Exemplary Damages in English Tort Law … Or when Instrumentalism Clashes with Interpersonal Justice

While in the United States punitive damages constitute a general remedy available whenever the defendant's conduct is judged to possess a certain degree of reprehensibility, English exemplary (or punitive) damages are far more limited in their scope of application. Since the 1964 decision of the House of Lords in *Rookes v Barnard*, exemplary damages can be awarded in only three categories of cases: when there is an 'oppressive, arbitrary, or unconstitutional action by the servants of the government' (first category); when the 'defendant's conduct has been calculated by him to make a profit' (second category); and whenever there is express statutory authorisation (third category).[42]

Lord Devlin's categorical approach has been widely criticised by later courts and scholars on the ground that it constitutes an unprincipled confinement of a tort remedy.[43] For example, defendants who seek to make a profit out of their wrongdoings are liable for exemplary damages under the second category, whereas defendants whose conduct is driven by malicious motives are not. Such a difference of treatment between gain-seeking and malicious conduct does not seem based on any rational justification.[44] The reason why the law of exemplary damages lies in this peculiar state is that, on the one hand, both the courts and the legislator do not intend to expand this remedy's scope of application and that, on the other hand, its abolition would amount to a 'complete disregard' of judicial and legislative authorities.[45]

As the ensuing discussion seeks to show, the reasons for the circumspection surrounding exemplary damages and for their failure to flourish relate to the tension between the perceived nature of exemplary damages and the prevalent way of theorising about English tort law. On the one hand, exemplary damages are widely seen as a form of criminal-like punishment, and the very few efforts to reconstruct them as a form of private retribution have so far failed to attract any meaningful support. On the other hand, English tort law is largely seen as a system of interpersonal justice which focuses on the binary relationship between claimant and defendant. This is a poor fit, for the instrumental conception of exemplary damages has the effect of importing into tort law societal considerations and concerns that are difficult to reconcile with an interpersonal vision of tort law.

[42] *Rookes v Barnard* [1964] AC 1129, 1226–27 (Lord Devlin).

[43] eg A Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn (Oxford, Oxford University Press, 2004) 411, 424; J Goudkamp, 'Exemplary Damages' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge, Cambridge University Press, 2017) 318, 330–31.

[44] *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122 [67] (Lord Nicholls).

[45] *Rookes* (n 42) 1226. See also Burrows (n 43) 424.

A. Exemplary Damages, An Example of Overt Instrumentalism

Several elements in the positive law of exemplary damages as well as most academic and judicial discussions on this tort remedy are premised on the notion that exemplary damages constitute a sanction imposed in the furtherance of societal goals.

The most commonly rehearsed justification for allowing exemplary damages is that the criminal law is sometimes unable to achieve fully its punitive goals.[46] Exemplary damages can remedy the deficiencies of the criminal law by punishing wrongdoings which would otherwise go scot-free.[47] On this view, tort law and criminal law play complementary roles in promoting the community's interest in punishing antisocial behaviour.[48] For example, exemplary damages are useful in relation to gain-seeking torts (Lord Devlin's second category) because '[i]t is only if there is a prospect that the damages may exceed the defendant's gain that the *social purpose* of this category is achieved – to teach a wrong-doer that tort does not pay'.[49] Or, in relation to oppressive, arbitrary, or unconstitutional actions by the servants of government (Lord Devlin's first category), exemplary damages are valuable in that they 'uphold and vindicate the rule of law' and 'deter such actions in future'.[50] This instrumental conception of exemplary damages is also reflected in numerous elements of the positive law. First, exemplary damages must be assessed by considering the defendant's wealth, for '[i]f you make an award which might badly hurt the ordinary man in the street it might be laughable to a large company with very great means'.[51] Secondly, the jury should award exemplary damages only if 'compensation is inadequate to punish [the defendant] for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it'.[52] Thirdly, if the defendant has already been punished by a criminal or other sanction, exemplary damages should not, in principle, be available.[53] Fourthly, if multiple claimants are involved, the penalty imposed on the defendant must be divided equally among the claimants.[54]

[46] Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) [1.15].

[47] NJ McBride, 'Punitive Damages' in P Birks (ed), *Wrongs and Remedies in the Twenty-first Century* (Oxford, Clarendon Press, 1996) 175, 192–93; A Reed, 'Exemplary damages: A Persuasive Argument for their Retention as a Mechanism of Retributive Justice' (1996) CJQ 130; Burrows (n 43) 427–28.

[48] *Broome v Cassell & Co* [1972] AC 1027, 1114 (Lord Wilberforce).

[49] ibid 1130 (Lord Diplock) (emphasis added).

[50] *Kuddus* (n 44) [79] (Lord Hutton).

[51] *John v MGN* [1997] QB 586, 625.

[52] *Rookes* (n 42) 1228 (Lord Devlin).

[53] *Archer v Brown* [1985] QB 401, 402. For an overview of this issue, see J Edelman, *McGregor on Damages*, 20th edn (London, Sweet & Maxwell, 2018) [13–042]. Besides this double jeopardy (or *non bis in idem*) guarantee, it is noteworthy that, despite not officially embracing a heightened standard of proof and thus formally sticking to the 'preponderance of evidence' rule, there seems to be no case where an English court awarded exemplary damages when there was any doubt as to the defendant's reprehensible conduct: see NJ McBride and R Bagshaw, *Tort Law*, 6th edn (Harlow, Pearson Education, 2018) 766.

[54] *Riches v News Group Newspapers* [1986] QB 256, 288.

While most English legal actors entertain a profoundly instrumental view of exemplary damages, it is also possible to identify a private, interpersonal conception of this remedy. On this account, exemplary damages must not seek to achieve 'deterrence of future wrongdoing'.[55] Rather, exemplary damages can only pursue retribution, but in a very specific and narrow sense. Retribution must be understood as *private* retribution, ie as giving the defendant his just desert for violating a duty owed to the claimant.[56] Similarly, other English scholars justify exemplary damages partly on the basis of the US theory of civil recourse, arguing that through exemplary damages the claimant is provided with an avenue of redress to satisfy 'his natural desire to see the defendant pay for treating her [sic] in such an outrageous fashion'.[57] This interpersonal approach can comfortably explain several features of the positive law: it is only the claimant who, upon infringement of his rights, can request exemplary damages; if these are granted, it is only he who can receive the award; if multiple defendants are involved, the claimant can request only one punitive sum and thus he cannot bring cumulative claims against all the defendants; insurance for exemplary damages is permissible; finally, a defendant can be ordered to pay exemplary damages in relation to a tort for which he is held vicariously liable.[58]

Nevertheless, contrary to the situation in the United States where theories of punitive damages based on ideas of interpersonal justice have become very influential, similar approaches to punishment and exemplary damages have not gained general acceptance in England. The reason for this may well lie in the uncompromising assumption that 'punishment demands a state-individual relationship: it is not something for one individual to exact from another'.[59] Conceiving of punishment as private retribution, or revenge between private parties, is a move that the vast majority of English legal actors is not (yet?) prepared to make. The intimate connection between punishment and the criminal law seems so entrenched in the minds of judges and legal scholars that any idea of making room for private revenge in tort law struggles to receive support.

B. Tort Law as Interpersonal Justice: The Poor Fit with Exemplary Damages

Understanding exemplary damages instrumentally does not in itself mean that their existence should be considered an anomalous feature of the law of torts.

[55] R Stevens, *Tort and Rights* (Oxford, Oxford University Press, 2007) 85.

[56] ibid.

[57] McBride and Bagshaw (n 53) 767 and fn 57. Significantly, the authors also mantain, in an instrumentalist fashion, that exemplary damages are desirable in that they vindicate the rule of law and thus provide incentives to obey the law itself (ibid). See also *A v Bottrill* [2003] UKPC 44, [2003] 1 AC 449 at [29]: besides retribution and deterrence, exemplary damages 'also serve as an emphatic vindication of the plaintiff's rights' (Lord Nicholls).

[58] Stevens (n 55) 86–87.

[59] A Burrows, 'The Scope of Exemplary Damages' (1993) 109 LQR 358, 361.

In this respect, the situation characterising the United States is instructive. As noted above, American punitive damages are widely understood as an instrument aimed at punishing antisocial behaviour in the interest of society, and yet they are not considered an incongruous feature of the tort system. This is due to the overwhelmingly instrumental approach that characterises contemporary tort law and theory in the United States. Since tort rules and doctrines are seen as pursuing a variety of societal goals, there is nothing inappropriate in having a corner of tort law that seeks to regulate conduct through a punitive remedy.

By contrast, in England there is little willingness to see tort liability in instrumental terms and considerable emphasis is instead placed on ideas of interpersonal justice. On this approach, exclusive or primary relevance should be accorded to the reciprocal rights and duties of the parties whereas policy concerns such as loss spreading, wealth maximisation or, more significantly for present purposes, criminal-like retribution and deterrence should be irrelevant or, at most, marginal.[60] In this framework, tort law is largely treated as either 'structurally' inadequate to host an instrumental conception of exemplary damages or as 'functionally' incompatible with them.[61]

The 'structural' critique of exemplary damages is premised on the idea that tort law possesses a correlative structure which allows liability to be imposed only for reasons relating to the binary relationship between the parties.[62] This means that pursuing the community's interest in punishing antisocial behaviour frustrates tort law's structural correlativity by breaking the claimant/defendant nexus:[63] deterrence and criminal-like retribution are one-sided justifications of liability, for they both focus on the defendant alone while ignoring the particular claimant's position; at the same time, to the extent that the defendant receives his just desert in the interest of society and that he and other members of society are deterred from adopting the same conduct in the future, exemplary damages achieve societal goals rather than interpersonal justice. A significant and related aspect is the clash between exemplary damages and content-related correlativity which, as seen above, expresses the idea that damages should restore the claimant to her status quo ante.[64] As is well known, compensatory damages represent the most important example of this equivalence. Since compensatory damages are supposed to cure in full the injustice that took place between defendant and claimant, there is no interpersonal justification for deviating from the ordinary measure of damages.[65] By contrast, exemplary damages enrich the claimant for reasons that

[60] For an overview of the interpersonal approach to private law, see D Nolan and A Robertson (eds), *Rights and Private Law* (Oxford, Hart Publishing, 2012).
[61] See P Cane, *The Anatomy of Tort Law* (Oxford, Hart Publishing, 1997) 116ff; McBride (n 47).
[62] A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007) 46.
[63] A Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 OJLS 87, 105ff.
[64] *Livingstone v Rawyards Coal Co* (1880) 5 App Case 25, 39 (Lord Blackburn).
[65] Beever (n 63) 106–08.

are independent of her interaction with the defendant and that, as such, are at odds with the interpersonal nature of the tort system.[66] In the light of all this, 'punishment is foreign to the structure of private law' and exemplary damages ought to be abolished to preserve tort law's internal coherence.[67]

By contrast, the 'functional' critique of exemplary damages focuses on the distinct roles of tort law and criminal law.[68] This critique, supported by several writers and judges, suggests that exemplary damages are anomalous because, through them, what should belong to the criminal law, namely retribution and deterrence, spills over into tort law, and an unacceptable blurring of functions ensues.[69] On this view, the fundamental function of tort liability and damages is 'to compensate the claimant for a wrong done to him',[70] which means 'to place the claimant as nearly as possible in the same position as he would have been in if the tort had not been committed'.[71] Without more, these statements do not reveal the goals of tort law; they simply point out what tort law does (it compensates) and what it should not pursue (punishment).[72] Significantly, a commitment to compensation can derive from a variety of approaches and can be reconciled with several different objectives. For example, in economic theory compensation is generally appropriate to achieve optimal deterrence; imposing a greater or lower level of liability would result in over- and under-deterrence, respectively.[73] Still different is the significance of compensation in a tort system inspired by the value of social solidarity, where it is the goal of loss spreading that fuels the imposition of liability.[74] Both approaches are forward-looking and instrumental, in that they pursue societal goals such as optimal deterrence or loss-spreading and see tort liability and compensation as means to those ends. By contrast, English tort law

[66] ibid 107.

[67] ibid 105.

[68] *Rookes* (n 42) 1221 (Lord Devlin); *Broome* (n 48) 1086 (Lord Reid); *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962 at [17]–[18] (Lord Scott), [76] (Lord Carswell); Burrows (n 59) 361; A Burrows 'Reforming Exemplary Damages: Expansion or Abolition?' in Birks (n 47) 153, 158–59; H McGregor, *McGregor on Damages*, 19th edn (London, Sweet & Maxwell, 2014) 454, 455, 458; Department of Constitutional Affairs, *The Law of Damages*, Consultation Paper, CP 9/07 of 4 May 1997, [198].

[69] This position has been increasingly challenged. See eg *Broome* (n 48) 1114 (Lord Wilberforce); *Kuddus* (n 44) [63] (Lord Nicholls), [75] (Lord Hutton); GS Pipe, 'Exemplary Damages after Camelford' (1994) 57 MLR 91, 96; McBride (n 47) 195; Cane (n 61) 118; Burrows (n 43) 426; J Edelman, 'In Defence of Exemplary Damages' in CEF Rickett (ed), *Justifying Private Law Remedies* (Oxford, Hart Publishing, 2008) 225, 234–35; JNE Varuhas, 'Exemplary damages: "public law" functions, mens rea and quantum' (2011) 70 CLJ 284.

[70] *Kuddus* (n 44) [95] (Lord Scott). See also *AG v Blake* [2001] 1 AC 268, 278 (Lord Nicholls).

[71] *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2018] 2WLR 1353 at [25], [31] (Lord Reed).

[72] See the remarks of D Nolan, 'Causation and the Goals of Tort Law' in A Robertson and HW Tang (eds), *The Goals of Private Law* (Oxford, Hart Publishing, 2009) 165, 166 on the meaning of compensation.

[73] Polinsky and Shavell (n 17) 873. See also R Cooter and T Ulen, *Law & Economics*, 6th edn (Pearson, 2012) 253.

[74] See text to nn 79 and 99 below.

is widely portrayed as 'essentially backward-looking'[75] and 'driven, primarily or exclusively,'[76] by the reciprocal rights and duties that the claimant and defendant hold against each other, with the consequence that policy considerations should be either rejected or treated as ancillary to interpersonal morality in determining tort liability.[77] In this framework, instrumental concerns such as optimal deterrence or loss spreading are not valid justifications for compensation; it is instead the purpose of doing justice *between* the particular claimant and the particular defendant that should drive both the decision to impose an obligation to pay damages and the *quantum* of that obligation.[78] Characterised in this way, the functional critique of exemplary damages collapses into, or at least becomes very similar to, the structural critique and thus conflicts with any approach that considers punishment a legitimate goal, and exemplary damages an appropriate remedy, of the tort system.

It will be seen, therefore, that the English position as to the role of punishment in tort law is similar in one respect but markedly different in others to what was observed in relation to the United States. Like American punitive damages, English exemplary damages are widely understood in instrumental terms and administered in a way that turns them into devices for the attainment of goals such as retribution and deterrence of antisocial behaviour. However, while in the United States several sustained efforts have been made to conceptualise punishment and punitive damages in interpersonal terms, the same does not hold true as far as English law is concerned. The vertical, state/individual understanding of punishment greatly reduces the possibility of transforming exemplary damages into a form of interpersonal justice in which the victim of an egregious wrong can, if so she elects, exact private retribution or revenge from the tortfeasor. Furthermore, the polarisation in legal thought that characterises tort law in the United States cannot be detected in England. English tort law is predominantly seen as a system of interpersonal justice where tort obligations should depend first and foremost on interpersonal justifications and only limited, if any, relevance should be accorded to policy concerns such as retribution or deterrence. As a result, the treatment reserved to the idea of punishing civil wrongs is characterised by a poor fit between the instrumental conception of punishment and the tendency to theorise tort law in interpersonal terms. This tension is reflected in the infelicitous state of the law of exemplary damages and in the perception that they constitute an anomalous or exceptional feature of English tort law.

[75] P Cane, 'Justice and Justifications for Tort Liability' (1982) OJLS 30, 44.

[76] D Nolan and A Robertson, 'Rights and Private law' in D Nolan and A Robertson (eds), *Rights and Private Law* (Oxford, Hart Publishing, 2012) 1.

[77] Nolan and Robertson (n 76) 1–2, 7, 21–23. To be sure, instrumentalist approaches may well rely on terms such as rights and duties, but these are used as mere '[fictions or] devices "for signifying a condition for a claim to arise and the person in whose favor it arises"': ibid 3, quoting P Jaffey, 'Liabilities in Private Law' (2008) 14 Legal Theory 233, 244.

[78] See Burrows (n 68) 156–57, who, in criticising exemplary damages, wrote that while '[t]he case for compensation rests on the uncontroversial idea of corrective justice: of restoring the plaintiff to his or her status quo ante … [t]he difficult problem revolves around finding a justification for pure punishment'.

IV. Punishment in French Tort Law: Is Instrumentalism the Whole Story?

Contrary to the American and English laws of torts, French tort law has not yet recognised a general remedy serving retributive or deterrent functions. Inspired by the value of social solidarity, the paramount goal of French tort law since the late nineteenth century has consisted of compensating the victims of accidents while diluting the costs of liability through a variety of spreading mechanisms.[79] This focus on compensation and loss-spreading as the key concerns of tort law has monopolised the attention of French legal actors for most of the twentieth century, with little consideration given to the idea of punishing civil wrongs.[80] However, since the mid-1990s the debate as to whether tort law should make some room for retribution and deterrence has greatly intensified, with several French academics discussing at length the role of punishment and the possible implications of its explicit recognition in the tort system.[81]

This debate has paved the way towards important reform projects that, in different ways, have sought to develop the punitive ambitions of French tort law. Most notably, in the context of a broader attempt to reform the law of obligations, in 2005 the *Avant-projet Catala* proposed the introduction of punitive damages for situations where the wrongdoer committed 'a manifestly deliberate fault'.[82] The solution envisaged also provided for a split-recovery scheme according to which the punitive award would accrue to the claimant but, at the court's discretion, a portion of it may be allocated to the Public Treasury.[83] Met with broad scepticism, this reform project failed to gain governmental support and it was never submitted

[79] J-S Borghetti, 'The Culture of Tort Law in France' (2012) 3 JETL 158.

[80] *cf* B Starck, *Essai d'une théorie générale de la responsabilité civile considérée en sa double fonction de garantie et de peine privée* (Paris, L Rodstein, 1947) 396, who suggested that tort law may be usefully employed as a punitive weapon auxiliary to the criminal law.

[81] See eg S Carval, *La responsabilité civile dans sa fonction de peine privée* (Paris, LGDJ, 1995); G Viney (ed), 'Faut-il moraliser le droit français de la réparation du dommage?' LPA 2002, 232; A Jault, *La notion de peine privée* (Paris, LGDJ, 2005); R Saint-Esteben, 'Pour ou contre les dommages et intérêts punitifs' LPA 2005, no 14, 53; S Carval, 'Vers l'introduction en droit français de dommages-intérêts punitifs?' RDC 2006, 822; M Chagny, 'La notion de dommages et intérêts punitifs et ses répercussions sur le droit de la concurrence' JCP 2006, I, 149, no 11; Y-M Laithier, 'Le prononcé de dommages-intérêts punitifs en cas de faute lucrative' in N Ferrier and A Pélissier (eds), *L'entreprise face aux évolutions de la responsabilité civile* (Paris, Economica, 2012) 117; S Carval, 'L'amende civile' in *Avant-projet de loi portant réforme de la responsabilité civile. Observations et propositions de modifications*, JCP G supplément au no 30-35 25 juillet 2016, 42; E Dreyer, 'L'amende civile concurrente de l'amende pénale?' JCP E 2017, no 25, 1344.

[82] Draft art 1371 of the *Code civil*, as envisaged by the *Avant-projet Catala*. For a comparative discussion of this draft provision, see S Rowan, 'Comparative Observations on the Introduction of Punitive Damages in French Law' in J Cartwright, S Vogenauer, and S Whittaker (eds), *Reforming the French Law of Obligations*, 325.

[83] This type of split-recovery scheme has been adopted in some US jurisdictions such as Alaska (ALASKA STAT §09.17.020(j)), Georgia (GA CODE ANN §1-12-5.1(e)(2)), and Utah (UTAH CODE ANN §78-18-1(3)).

to Parliament for approval.[84] A new attempt to provide French tort law with an overtly punitive measure is currently being made. Abandoned the idea of adopting punitive damages, the drafters of the *Projet de réforme* propose to introduce in article 1266-1 a form of punishment (*amende civile*) that aims to counteract the commission of *fautes lucratives*.[85]

As will be seen, the French conception of punishment is markedly instrumental in that it sees punitive measures as serving societal goals such as deterrence of antisocial behaviour. This approach is consistent with the profoundly instrumental way in which French legal actors understand tort law, that is as a socialised system for the allocation and spreading of losses. By contrast, theories of interpersonal justice do not play a significant role in the discussions on the structure and functions of tort law. Nevertheless, it is submitted that ideas linked to interpersonal justice can be identified in the debate on the role of punishment in tort and that these ideas considerably reduce the types of punitive measures that can be adopted without creating intolerable frictions with important principles of French law.

To illustrate these points, the discussion will mainly focus on article 1266-1 of the *Projet de réforme*, as this provision reflects the most recent developments of French thinking in relation to the idea of punishing civil wrongs, as well as on the wider debate on the role of punishment in French tort law.

A. The *Amende Civile* (and Other Punitive Measures) as Instruments of Social Policy

Despite the abundant use of the term *peine privée* (which may be translated as 'private penalty'), the French understanding of punishment in tort law could hardly be more public. If punishment were understood in private, interpersonal terms, punitive measures should protect the claimant's interests vis-à-vis the defendant's conduct, rather than seek to pursue the interest of society in deterring antisocial conduct. This would entail a series of corollaries at the level of the positive law: for example, the punitive order should only be granted at the specific request of the claimant and the award should accrue in its entirety to her.[86] However, if proper consideration is given to the debate on the role of punitive measures in tort law as well as to the rationale and content of article 1266-1 of the *Projet de réforme*, the 'publicness' (ie the instrumental character) of the French conception of punishment emerges in several respects.

[84] J-S Borghetti, 'La réforme du droit de la responsabilité civile en France' LPA 2014, no 52, 16.

[85] The *amende civile* is not a new concept, for it is already available in French law by way of piecemeal legislative measures. An example is art L 442-4 of the *Code de commerce*, which punishes unfair practices by providing that a public prosecutor or the Ministry of Economy can request that the wrongdoer be condemned to pay a civil penalty which may amount to millions of euros.

[86] Jault (n 81) [358]–[412], esp [400].

To begin with, the adoption of punitive measures is supported on the ground that they are needed to supplement the criminal law or to fill the gaps created by a process of depenalisation which demotes certain wrongs from crimes to torts.[87] The inadequacies and limits of the criminal law have been more acutely felt in relation to the *fautes lucratives*, ie deliberate gain-seeking torts, which may be committed in contexts such as unfair competition, environmental law, or the violation of personality rights.[88] The choice itself to limit the scope of punitive measures to certain categories of wrongdoings rather than making them available whenever the defendant's conduct infringed the claimant's right is consistent with an instrumental approach to punishment. Furthermore, in assessing the different types of punitive measures, leading scholars have often argued that punitive damages may well be the best solution because the claimant would receive at least part of the punitive award. This would be desirable because the claimant is provided with an incentive to sue and is properly remunerated for the 'service rendered to the community' by bringing the defendant to justice.[89] This sort of reasoning reflects a profoundly instrumental way of understanding punishment and punitive measures, for claimants are viewed as private attorney generals and tort law itself as a suitable instrument for punishing antisocial behaviour.

Similarly, those who oppose the adoption of punitive remedies in tort calibrate their arguments based on the assumption of a criminal-like understanding of punishment. For example, it is often argued that tort law is only about compensation and that it should leave retribution and deterrence to the criminal law.[90] Relatedly, if tort law were to perform punitive functions, it would undesirably expose defendants to criminal-like sanctions without affording them the protections of the criminal process.[91] Again, there is a strong inclination to see punishment as a tool for regulating conduct and advancing societal interests.

But there is probably no better illustration of this than article 1266-1 of the current *Projet de réforme*. In proposing the introduction of the *amende civile*, article 1266-1 first provides that

> In extra-contractual matters, where the author of the harm has deliberately committed a fault with the view to making a gain or to saving money, a court may, at the request of

[87] Carval (n 81) [215]; G Viney, 'Rapport de sinthèse' in *La responsabilité civile à l'aube du XXIe siècle, Bilan prospectif*, RCA no 6-bis, juin 2001, Hors-série, 82, 86; M Chagny, *Droit de la concurrence et droit commun des obligations* (Paris, LGDJ, 2004) [692].

[88] See G Viney, P Jourdain and S Carval, *Traité de droit civil, Les effets de la responsabilité*, 4th edn (Paris, LGDJ, 2017) [13]; P Jourdain, 'Rapport introductif' in Viney (n 81) 3, [10]; D Fasquelle, 'L'existence de fautes lucratives en droit français' in Viney (n 81) 27, 28–29.

[89] Carval (n 81) [319]–[323]; Chagny (n 87) [692].

[90] See eg Y Lambert-Faivre, 'L'éthique de la responsabilité' RTD civ 1998, 1, 19; M Behar-Touchais, 'L'amende civile est-elle un substitut satisfaisant à l'absence de dommages et intérêts punitifs?' LPA 2002, no 232, 36 who, while in principle not against the *amende civile*, argues that with it French law would have 'le droit penal sans le droit penal' ([34]).

[91] C Jauffret-Spinosi, 'Les dommages-intérêts punitifs dans les systèmes de droit étrangers' in Viney (n 81) 8; Behar-Touchais (n 90).

> the victim or the *ministère public* and by specially justified decision, condemn him to the payment of a civil penalty.[92]

The draft provision then specifies the criteria for assessing the *amende civile*, which must be 'proportionate to the seriousness of the fault committed, to the ability to pay of the author of the harm, and to any profits which he may have made from it'. Next, article 1266-1 sets a cap that the *amende civile* cannot exceed and it then provides that the *amende* 'is allocated to the financing of a compensation fund related to the nature of the harm suffered or, if not, to the public Treasury'. It is finally established that the *amende* is not insurable.

Both the rationale and content of article 1266-1 show the remarkable extent to which French legal actors are wedded to an instrumental understanding of punishment in tort law. To begin with, the French Ministry of Justice has identified the rationale of the *amende civile* in the deterrence of deliberate wrongdoings that qualify as gain-seeking torts.[93] In this respect, article 1266-1 reflects the legal system's condemnation for a cost/benefit analysis that treats potential harms to third parties and the subsequent costs of liability in tort as a cost of operation of one's own activity. Such a blameworthy course of action requires the 'moralising' intervention of the law and, since gain-seeking torts may well not qualify as crimes, tort law can step in and fill the gap. But given that compensatory damages are likely to under-deter this type of conduct, a more-than-compensatory sanction is in order to induce potential defendants to refrain from exposing others to the risk of harm for reasons of mere financial convenience.[94]

The content of article 1266-1 also reflects in full an instrumental approach to punishment. As noted above, an interpersonal understanding of punishment would accord a central role to the claimant by providing that the punitive award can be granted only at her request,[95] and that it must accrue in its entirety to her.[96] By contrast, article 1266-1 marginalises the role of the claimant vis-à-vis the *amende civile*. It is true that the claimant is given the power to request that the defendant is condemned to pay a civil penalty, but it is unlikely that she would do so. Providing the necessary evidence to trigger the *amende civile* entails an effort and an increase in the attorney's fees that are not cost-justified by what

[92] As noted in n 19 of the translation provided in the appendix of this book, '[t]he *ministère public* … is a particular category of *magistrat* (broadly, a member of the judiciary) whose role in civil matters is to join proceedings (and sometimes initiate them) and submit oral or written arguments to the 'sitting' judges … as a matter of the public interest'.

[93] See the statement of Jean-Jacques Urvoas, Minister of Justice, concerning the reform project on 13 March 2017, http://discours.vie-publique.fr/notices/173000657.html. It is noteworthy that the scope of application of art 1266-1 of the *Projet de réforme* is essentially the same as that of Lord Devlin's second category. By contrast, art 1371 of the *Avant-projet Catala* was much wider in its scope of application, as it referred to any 'manifestly deliberate fault'.

[94] The same need for a tort punitive response to *fautes lucratives* is echoed in the writings of French scholars. See eg G Viney, 'Rapport de sinthèse' in Viney (n 81) 66.

[95] Jault (n 81) [275]–[277].

[96] ibid [311]–[316].

the claimant can get, which is nothing. The practical result of this is that in most cases it would be for the *ministère public* to join the tort dispute and ask the judge to order the payment of a civil penalty. Given the *ministère public*'s functions in criminal trials, most notably prosecuting crimes and punishing their authors in the interest of society, it is natural to consider his involvement in the operation of article 1266-1 as a strong indicator of an instrumental understanding of punishment. It may even be argued that the *ministère public*'s role in the tort process is the mirror image of the *partie civile*'s position in criminal trials: as the latter, in her capacity as victim of a crime, joins and 'exploits' the criminal process to promote her interest in receiving compensation, under article 1266-1 the *ministère public* joins and 'exploits' the civil process to promote the state's interest in punishing wrongs committed with a view to profit. Furthermore, including the defendant's wealth among the criteria for assessing the *amende civile* shows a commitment to deterrence which is clearly consonant with instrumentalism.

The already conspicuous societal gradient of article 1266-1 is further increased by the choice of the beneficiaries of the *amende*. By allocating the civil penalty to compensation funds, article 1266-1 promotes the value of social solidarity. Together with mechanisms of social security, direct private insurance, and the tort system, compensation funds represent one of the pillars of the French system of social protection against the risks of harm associated with the machine age. More particularly, compensation funds constitute the collective sources of compensation which protect the victims of accidents in situations where compensation through the tort process or other separate insurance mechanisms is unavailable.[97] In this respect, by financing funds that shelter otherwise unprotected victims of accidents, article 1266-1 of the *Projet de réforme* further reinforces the ethos of social solidarity that imbues French tort law and brings tort liability one step further away from any theory of interpersonal justice.[98]

B. The Impact of the Principle of Full Compensation: A Legacy of Corrective Justice

The French conception of punishment as well as the societal character of article 1266-1 of the *Projet de réforme* are fully consistent with the broader instrumental approach that permeates the theory and practice of French tort law. The increase in the number and severity of accidents in the second half of the nineteenth century,

[97] A Favre Rochex and G Courtieu, *Fonds d'indemnisation et de garantie* (Paris, LGDJ, 2003).

[98] On the emergence of the principle of social solidarity see J-L Halperin, *Histoire du droit privé depuis 1804* (Paris, PUF, 2001) [124]–[129]. For a brief overview of the interplay among social security, direct private insurance, the tort system, and compensation funds see G Viney, *Traité de droit civil, Introduction à la responsabilité*, 3rd edn (Paris, LGDJ, 2008) [27]–[32].

coupled with a thriving insurance market, turned French tort law from a system of individual responsibility into a socialised system for the allocation of the costs of accidents, based on the assumption that a loss hurts less if it is spread across many than if it is left concentrated on the unlucky victim.[99] This pro-victim culture has weakened the claimant/defendant nexus by making tort liability depend on societal goals such as the spreading of losses, rather than on justifications pertaining to the interaction between claimant and defendant. Furthermore, insistence on the goal of protecting the victims of accidents has translated into a heavy reliance on strict liability, with the consequence that the role of fault as one of the conditions for the imposition of liability has been marginalised.[100] As the fault paradigm lost importance, the deterrent effects of tort liability shrank. This decline of the 'moralising' function of tort law against blameworthy conduct has been judged negatively by several academics since the mid-1990s and, as a reaction to it, powerful voices have been raised in support of a restoration of the punitive dimension of French tort law.[101] As discussed in the previous section, the effort to enhance the punitive potential of extra-contractual liability is infused with instrumentalism and it focuses on the attainment of societal goals such as deterrence of antisocial behaviour.

This does not mean, however, that ideas of interpersonal justice have completely disappeared from the law of extra-contractual liability or, more importantly for present purposes, that they do not bear at all on the relationship between punishment and tort law. In this respect, the enduring influence of the principle of full compensation (*principe de la réparation intégrale*), visible in most discussions on the role of punishment in tort, is revealing. This principle is so firmly entrenched in French civil liability that it is very often taken for granted and seen as not requiring any justification;[102] very importantly, however, several French scholars trace it back to the theory of corrective justice.[103]

As seen above, corrective justice is based on the notions of structural correlativity and content-related correlativity. By relying on the principle of full compensation as one of the fundamental tenets governing civil liability, French law adheres to content-related correlativity.[104] The principle of full compensation requires that

[99] See Viney (n 98) [18]–[26]; idem, 'De la responsabilité personnelle à la répartition des risques' Arch phil dr 1977, 5.

[100] Carval (n 81) [1]–[14], esp [7], [14].

[101] ibid [1]–[14]; Jourdain (n 88); M Fabre-Magnan, *Droit des obligations. 2*, *Responsabilité civile et quasi-contrats*, 3rd edn (Paris, PUF, 2015) 53–62, 424.

[102] Viney, Jourdain and Carval (n 88) [117].

[103] See eg C Coutant-Lapalus, *Le principe de la réparation intégrale en droit privée* (Paris, PUF, 2002) [79]–[86]; P Kayser, 'La Justice selon Aristote' RRJ 1996, [11]; Jourdain (n 88) [3]; P Malaurie, L Aynès and P Stoffel-Munck, *Droit des obligations*, 8th edn (Paris, LGDJ, 2016) [238].

[104] By contrast, it is difficult to reconcile structural correlativity with the way in which most French legal actors currently understand tort law. As seen above (text to nn 99–100), tort liability is often imposed

the victim of a tort must receive a sum that equals the loss suffered, nothing less (*tout le dommage*), but also nothing more (*rien que le dommage*).[105] Thus, it appears that, cloaked behind the principle of full compensation, content-related correlativity informs the remedial dimension of French tort law and impacts on the type of punitive measures that may be adopted in French law. Indeed, the principle of full compensation is probably the most significant reason why the *amende civile* has attracted wider support than punitive damages as the most appropriate response to torts committed with a view to profit. Punitive damages, the solution envisaged in article 1371 of the *Avant-projet Catala*, are deemed inadmissible because they accrue, in whole or in part, to the claimant and thus result in what is often described as an undeserved windfall.[106] This would constitute a patent violation of the principle of full compensation. To avoid this, it is often suggested that the punitive award should be allocated in its entirety to third parties and that, for this reason, the *amende civile* is to be preferred over punitive damages.[107] Article 1266-1 of the *Projet de réforme* is consistent with this approach because, as seen above, it provides that the *amende civile* must be paid to compensation funds related to the nature of the harm suffered or, if unavailable, to the Public Treasury. By doing so, the *amende civile* testifies to the continuing vitality of the principle of full compensation or, in other words, it perpetuates content-related correlativity as deriving from the theory of corrective justice.

To conclude, the way French legal actors treat the idea of punishing civil wrongs reflects a profoundly instrumental conception of punishment, which is fully consistent with their theorising about the functions of tort law. The French thinking on the role of punishment in tort law as well as the work of the drafters of the *Projet de réforme* highlight a willingness to deter certain types of intentional wrongdoing. Nevertheless, the principle of full compensation, which may be best seen as a legacy of the influential theory of corrective justice, reduces the options available when devising a punitive response against tortfeasors. In this respect, ideas of interpersonal justice still exert considerable influence on the tort system and affect the prospect of reforming the law.

not on the basis of backward-looking considerations pertaining to the interaction between defendant and claimant, but rather on the basis of broader, forward-looking justifications such as, most notably, loss-spreading.

[105] See eg Cass civ (1) 30 May 1995, JCP 1995 IV 1810; Cass civ (3) 8 July 2009, D 2009, 2036, note Y Rouquet. The principle of full compensation has been increasingly challenged in recent times; for an overview of the critiques levelled against it, see Viney, Jourdain, and Carval (n 88) [118].

[106] Y Lambert-Faivre (n 90) 18–19; Fasquelle (n 88) 34; R Saint-Esteben (n 81) 58; D Fasquelle, 'La sanction de la concurrence déloyale et du parasitisme économique et le Rapport Catala' D 2005, 2666; E Dreyer, 'La faute lucrative des médias, prétexte à une réflexion sur la peine privée' JCP G 2008, I, 22, 24–25; P Brun, *Responsabilité civile extracontractuelle*, 4th edn (Paris, LexisNexis, 2016) [12]–[14]. See also J-S Borghetti, 'L'avant-projet de réforme de la responsabilité civile. Vue d'ensemble de l'avant-projet' D 2016, 1386, [21].

[107] See eg Jourdain (n 88) [11]; Behar-Touchais (n 90) [15]–[23].

V. Conclusions

The treatment of the idea of punishing civil wrongs in the United States, England, and France varies depending on the conception of punishment that legal actors within each jurisdiction embrace and on how this conception relates to broader ways of seeing and theorising tort law. In the United States, the debate as to whether tort law should punish is characterised by a strong clash of views on the most appropriate conception of punishment and of punitive damages. This conflict is part of a broader contrast between instrumentalist and non-instrumentalist approaches in tort theory. Instrumentalism, still predominant today, sees punitive damages as a means to societal ends, whereas non-instrumentalism considers punitive damages a form of interpersonal justice that allows the victim of a reprehensible wrongdoing to be punitive against the tortfeasor. Preference for the instrumental or interpersonal conception of punitive damages generally reflects a wider view about the role and purposes of tort law. Given that punitive damages can be reconciled with both instrumentalism and non-instrumentalism, it is not surprising that discussions on punitive damages often focus on the best way of interpreting this remedy rather than on assessing its desirability. The treatment reserved to the idea of punishing civil wrongs is rather different in both England and France. In English law there seems to be a disconnection between the way in which most legal actors view the tort system and the dominant conception of punishment. On the one hand, tort law is widely seen as a system of interpersonal justice, in which tort obligations must be justified with reference to the relationship between claimant and defendant. In this context, it is somewhat surprising to see that very few attempts have been made to support an interpersonal conception of exemplary damages which could cohere with the predominant understanding of tort law and that such attempts have so far failed to attract meaningful support. Indeed, and on the other hand, punishment is mostly understood instrumentally, and exemplary damages are depicted as a device that, at times, may usefully attain societally desirable goals such as teaching wrongdoers that tort does not pay. Clashing with an interpersonal vision of English law, exemplary damages are treated as anomalous or as requiring careful confinement and instrumental justifications of liability such as deterrence or retribution struggle to establish themselves as fully legitimate and respectable goals of tort law. The view of French legal actors relating to the role of punishment in tort law differs again. The French approach to the issue of whether tort law should be equipped with a general punitive measure and how this measure should work reflects a markedly instrumental conception of punishment. Resembling the English position, punishment is overwhelmingly seen as serving societal goals. This approach is not surprising, considering that, similarly to what was observed in relation to the United States, tort law is conceived of in a markedly instrumental way (even though for very different purposes). Coherently with this picture, broader theories of interpersonal justice are largely absent from the debate on the nature and functions of French tort law. However, there

is an important qualification here, for a potent legacy of the theory of corrective justice – the principle of full compensation – still plays a key role in the French law of damages, and has the effect of limiting in a substantial way the options available when crafting tort punitive measures. As a result, French law naturally shuns the Anglo-American model of punitive (or exemplary) damages. Since the role of punishment and the characteristics of punitive measures depend to a large extent on the way of seeing tort law and its functions, the three legal systems discussed in this chapter are likely to keep treating the idea of punishing civil wrongs in markedly different ways and, should article 1266-1 of the *Projet de réforme* become part of the *Code civil*, they would move further apart.