IEL PAPER IN COMPARATIVE ANALYSIS OF
INSTITUTIONS, ECONOMICS AND LAW NO. 1

The Costs of Class Actions:
Allocation and Collective Redress in the U.S. Experience

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March, 2011

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ABSTRACT

Once a preserve of the American legal landscape, the class action device today transcends geographic boundaries. In the past decade, efforts have intensified to establish collective litigation instruments in diverse legal terrains outside the United States — including Europe — often with the common goal of allowing some form of collective legal redress while avoiding perceived disadvantages of class actions in the American experience. Today more than ever, from legislators to litigants to scholars, European reformers face the challenge — and the opportunity — of making fundamental choices about the scope and shape of the collective legal remedies they wish to make available. Choices about the shape of the class action device reflect foundational judgments about the proper allocation of costs, and there is much from the U.S. experience that can inform Europe's prospective reformers. This article describes the history and current status of class action rules in the U.S., and then compares class actions and another form of extra-compensatory damages — one type of punitive damages — as means of doing the same thing. Although neither punitive damages of this sort nor class actions generally have traditionally existed in civil law systems, they both — and especially this particular form of punitive damages — can, from an economic view, be made to vindicate the same kind of social cost accounting goals. By considering these legal devices together, we hope to shed light on crucial choices facing Europe as it grapples with how best to provide collective legal redress in light of the lessons of the U.S. experience with class actions.

KEYWORDS: Class actions, Collective legal redress, Punitive damages, Extra-compensatory damages, Allocation of costs, Deterrence

Jel Codes: K00

Once a preserve of the American legal landscape, the class action device today transcends geographic boundaries. In the past decade, efforts have intensified to establish collective litigation instruments in diverse legal terrains outside the United States — including Europe — often with the common goal of allowing some form of collective legal redress while avoiding the perceived disadvantages of class actions in the American experience. The prospect of a European class action device, at least in some areas such as competition and consumer law, has never been more palpable.[1] Nearly half of the European Union's Member States have adopted some form of collective litigation, albeit materially different from the American class action in everything from their legal landscapes[2] to their procedural forms. Thus, some Member States recognize only representative actions by authorized associations or public entities; some exclusively embrace group actions, others accept only test actions, or "model suits"; some exclusively allow opt-in systems, others allow only opt-out; still others have designed devices reflecting a mix of these conditions.[3]

One issue that is very much alive in Europe concerns the difference between lawyer-driven, representative type class action, in which someone assembles a group of people who otherwise might well not have done anything, and aggregation type class

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1 In a 2008 White Paper, the European Commission recognized "a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements" and, accordingly, proposed "a combination of two complementary mechanisms of collective redress to address effectively those issues in the field of antitrust: representative actions, which are brought by qualified entities," such as consumer organisations or state bodies on behalf of a group of victims, and "opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action." COMMISSION OF THE EUROPEAN COMMUNITIES (2008). Some form of collective redress in the enforcement of EC competition law appears likely in the near future, *see* European Parliament Resolution of 26 Mar. 2009 (welcoming White Paper but calling for specification of "legal basis for its proposed measures" and protections against abuses that have occured "in other legal systems, in paritcular in the United States"); COMMISSION OF THE EUROPEAN COMMUNITIES (2009) (endorsing "collective actions" but requesting measures to ground them "in European legal culture and traditions" and to "safeguard[] against the introduction of features that in other jurisdictions have demonstrated to be more likely to be abused"). *See also* COMMISSION OF THE EUROPEAN COMMUNITIES (2007) (enumerating potential remedies to the inadequate "consumer redress situation in the EU," including option of a single EU-wide colletive mechanism for consumer redress).

2 Any number of conditions in the U.S. legal landscape distinguish its class actions from those of the EU, from the powers of the judiciary and its relationship to the legislature, to jury trials, to discovery rules, to attorneys' fee structure.

3 *See generally* Russell (2010); Issacharoff and Miller (2008); Baumgartner (2007); Stuyck. et al (2007); Harbour and Shelley (2006).

action, in which many torts suits that are already underway are put together into a combined action, uniting suits that would have been there anyway but can be brought a lot more cheaply through aggregation.[4] Another key American issue is now also finding European expression in light of suggestions that there be an EU-wide right of class action.[5] This is whether the class that brings the suit should be permitted to select the Member State forum in which to sue based on whatever law is most favorable, or, instead, whether at least to some extent the class action should have to be brought under some universal European law, perhaps even in European courts. In the United States, an essential feature of class actions is the extent to which some can be brought locally in state courts as against nationwide class actions that must be filed in federal courts.

Today more than ever, from legislators to litigants to scholars, European reformers face the challenge — and the opportunity — of making fundamental choices about the scope and shape of the collective legal remedies they wish to make available. Class actions understandably spark varied, fervent reactions, for they implicate difficult questions about the functional objectives and fundamental values which we choose to vindicate in our legal system. There is, for example, a crucial difference in class actions between the goal of deterrence — achieved through a social accounting designed to force individuals to be aware in their decisionmaking of the costs they cause — and the goal of compensation that seeks to redress the losses of those who have been injured. Thus, who gets the amount recovered in the class action may be highly important if we are concerned with compensation and redress. But it may be relatively unimportant if we are primarily concerned with social cost accounting for deterrence.

Choices about the shape of the class action device hence reflect foundational judgments about the proper allocation of costs, and there is much from the United States experience that can inform Europe's prospective reformers. This article describes the

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4 In the United States, some scholars have asserted, the class action device has evolved with a shift in courts' focus — at least in the area of mass torts — away from a primary concern with the interests of the individual litigant in favor of class certification in response to advocates of "aggregative techniques." Coffee (1995). *See also* Resnik (1991).

5 *See, e.g.*, *supra* note 1.

history and current status of class action rules in the U.S., and then compares class actions and another form of extra-compensatory damages — punitive damages — as means of doing the same thing. Interestingly, neither punitive damages of this sort nor class actions generally have traditionally existed in civil law systems. Yet they both — and especially one particular form of punitive damages — can, from an economic view, be made to vindicate the same kind of social cost accounting goals. By considering these legal devices together, we hope to shed some light on the crucial choices facing Europe as it grapples with how best to provide collective legal redress in light of the lessons — good and bad — of the U.S. experience with class actions.

Historical Backdrop

What is the history of major developments in class action law in the United States? The history goes back a long way. Class actions seem to have been permitted at common law, but they were, in any event, codified in 1849 with the Field codes of New York and California.[6] Class actions were thus authorized in these two major states, though in the most simplistic of ways: Where there was a common interest in law or fact, a class action could be brought.[7] Very simple, no details, not much used. The first key moment in class action history came in 1938 when class actions became part of the Federal Rules of Civil Procedure. These Rules completely revised civil procedure in the United States and created a whole new system which, because of the influence of the people who wrote the Federal Rules of Civil Procedure, came to be adopted as the rules of procedure of many states.[8] The father of that was Charles E. Clark, a celebrated professor, dean at Yale, and then judge on the United States Court of Appeals for the Second Circuit. The Federal Rules of Civil Procedure, adopted in 1938, included Rule

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6 See Subrin and Dudley (1988) (explicating the history of the Field Code).

7 The New York Field Code of 1848, for example, as amended in 1849, provided: "When the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."; Conte and Newberg, (2002) at 399-400.

8 *See* Surbin (1989) (providing historical examination of the development of the Rules on the fiftieth anniversary of the development of the FRCP).

23, which specified that class actions could be brought. This rule was generally adopted by the many states that enacted the Federal Rules of Civil Procedure. But it did not follow that the states gave the same meaning to that rule as the federal government did. And this was very important in the history of class actions in the United States, as each state — while adopting the same generalised statute — was free to interpret it in its own way.

The federal rule came to bear its full meaning only 40 years ago in 1966, and it did so in the context of civil rights. 1966 was the great moment of the civil rights movement, and the movement was faced by a powerfully important question: How does one avoid having to bring multiple suits for integration, suits for redress against discrimination, especially in the South? The answer was found in class actions; and the need for this answer became the locomotive force for giving new meaning to the class action.[9] Interestingly, the changes that were made to Rule 23 in 1966 were not enacted in order to further the suits that make class actions so important today.[10]

Under the revised Rule 23, there was a functional test for when multiple possible actions could be certified as a class — there had to be: a) numerosity (that is, enough people so that the class action was worthwhile); b) common questions of law and fact; c) representatives who had an interest or claims typical of the class; and d) representatives who would fairly and adequately protect the interests of the class.[11] These were rules that defined the need for, and the feasibility of, a class action. But in addition there were policy requirements. That is, class actions were deemed appropriate

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9 As Professor John P. Frank, a member of the 1966 Advisory Committee on Civil Rules that proposed amending Rule 23 to its current form, explained: "If there was a single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation." Prepared Statement of John P. Frank, Hearings on S. 353 Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. of the Judiciary, 106th Cong. (1999).

10 For example, at the time "[t]he Advisory Committee . . . had suggested that a 'mass accident . . . is ordinarily not appropriate for a class action' because of the presence in such cases of significant issues (including causation and possible defenses) that would impact upon the individual class members differently." Coffee, *supra* note 4, at 1356-57 (internal quotation marks omitted); *see also* Resnik, *supra* note 4, at 9-11.

11 FED. R. CIV. PRO. 23(a).

when separate actions would risk inconsistent adjudication and hurt nonparties or when the defendant had acted against the interest of a class.[12] If a defendant had acted badly, then there was a reason to have a class action in order to punish the defendant. But class actions were also justified when separate actions would hurt nonparties.

Think of the civil rights movement. The class could be certified because the targets were segregationists who had acted against the interest of a class, or because common issues prevailed so that it was better, more efficient, to try them all out together. And Rule 23 provided that the class suit would be binding on everyone, although it did preserve a right to opt out. Again this was a right to opt out, not a need to opt in. You are part of the class, but could opt out. According to John Frank — an old Yale professor, great lawyer in Arizona, former clerk of Justice Hugo Black, and member of the committee that gave rise to the class action lawsuit — the aim of this innovation was to vindicate civil rights claims and to combat segregation.[13] The Committee did not think at the time, insofar as class actions might spread beyond civil rights, that there would ever be a class of more than a hundred.[14] At most, they were thinking of a contemporaneous circus fire,[15] and airplane crashes.[16] There was no mention, whatever, of business suits. That was not in the antechamber of their minds. And rarely, if ever, was the concept of mass torts or modern products liability articulated in 1966 when Rule 23 was developed.[17]

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12 FED. R. CIV. PRO. 23(b).

13 *See supra* note 9.

14 For instance, Committee member Judge Charles Wyzanski stressed the notice obligation as a barrier to an excessively large number of claims for a class action. In evaluating the 1966 changes to Rule 23, Judge Wyzanski observed: "I think you would have to make a finding that the form of notice to be used would in all probability reach all persons in the proposed class. And I think it quite clear that in [an enormous case involving thousands] you could not make any such finding. I don't think that case is a class action except for those people who can be reached." *See* Hearings Before Sen. Subcomm., Prepared Statement of John P. Frank, at 270; *see also id.* at 269 ("The concept of thousands of notices going ceremonially to persons with such small interests that they could not conceivably bring their own action was still in the future.").

15 Professor J.W. Moore, a member of the Committee, contended that class actions should not reach a mass tort like the contemporaneous fire in the Ringling Bros. tent in Hartford. *See id.* at 268.

16 *See id.* at 266 ("The basic idea of a big case with plaintiffs unified as to liability but disparate as to damages was the Grand Canyon airplane crash.).

17 Resnik, *supra* note 4, at 9-11 (showing, based on comprehensive historical study, that Advisory Committee members "did not see the class action as responsive to the problems of mass torts"); Coffee,

In the 1970s and 1980s, a series of Supreme Court decisions came down, one after the other, favoring class actions, and aiding their spread. These decisions allowed trial courts to take an active role in creating the class; they encouraged trial courts to bring classes together and to certify a class action whenever such courts thought a class action was worthwhile.[18] They said that class actions saved resources and, therefore, nationwide class actions — even if brought in particular states — were desirable.[19] They stated that avoiding multiplicity of actions was desirable both in view of the interests of the absentees and in order to spread the costs of litigation.[20] The Supreme Court said, and this is extraordinarily interesting, that the fact that the massiveness of these suits would encourage settlements was a good thing. The very fact that the defendants would settle quickly to avoid the suit was discussed as desirable. Thus, in the decisions of the Supreme Court in the 1970s and 1980s, class actions were favored because they allowed people to bring suits that otherwise would not be economically feasible, because they enabled individuals, who otherwise lacked effective strength or large enough economic damages, to bring such suits, and because they often would bring about settlements.

Not surprisingly, given an an open-ended statute and this kind of encouragement from the Supreme Court, a huge expansion followed. Mass torts, asbestos, general product liability, shareholder derivative suits, corporate misbehaviours, breaches of fiduciary and credit duties, labour, and employment civil rights cases — involving people who were discriminated against on the job on the basis of race, sex, disability,

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supra note 4, at 1357.

18 *See, e.g.*, Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974) ("The purpose of Rule 23 is to provide flexibility in the management of class actions, with the trial court taking an active role in the conduct of the litigation.").

19 *See, e.g.*, Califano v. Yamasaki, 442 U.S. 682, 701-702 (1979) ("[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [potential class member] . . . to be litigated in an economic fashion under Rule 23 . . . ."); *see also id*. ("[A] nationwide class [was not] inconsistent with the principles of equity jurisprudence.").

20 United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-03 (1980) ("[J]ustifications that led to the development of the class action include . . . the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigations with similar claims.").

and age — all became subjects of class action suits. All of these were very different cases from the desegregation civil rights cases that the framers of the class action had in mind when the modern Rule 23 was created in 1966.[21]

But while we know that the mix of cases today is very different from what was foreseen in 1966, we do not know what the actual current mix is. Reliable figures, amazingly, are not available in the United States for the proportion of kinds of cases that have been brought. That is, there are figures available but they are not consistent. The Administrative Office of the Courts gives one set of figures of the proportion,[22] the Rand Corporation gives a very different set of figures,[23] and a third source, the Advisory Committee of the Civil Rules, gives a third set.[24]

Critiques

All of these developments led to a variety of criticisms. Many of these criticisms focused on the interest of the poor plaintiff who, assertedly, was not being adequately protected.[25] But the reformers advancing the criticisms were not typically plaintiff's groups. Indeed, in the legislatures, the sponsors of reform were often legislators who were hardly known as protectors of the poor and injured plaintiff.[26] Nevertheless, critics asserted that there was inadequate protection of plaintiffs because the settlements were of limited benefit to the plaintiffs (typically yielding small returns on an individual

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21 *See, e.g.*, Resnik, *supra* note 4, at 6-22.

22 *See* 26 CLASS ACTION REP. 3 (2004).

23 *See* Hensler et al. (2000).

24 *See* Willing and Lee III (2006).

25 *See, e.g.*, 151 Cong. Rec. H726 (statement of Rep. Sensenbrenner) (asserting the class action system produces "outrageous settlements that benefit only lawyers and trample the rights of class members," and that today's class actions "are too often used to efficiently transfer the large fees to a small number of trial lawyers, with little benefit to the plaintiffs"); 151 Cong. Rec. H735 (2005) (statement of Rep. Keller) ("In a nutshell, these out-of-control class action lawsuits are killing jobs, they are hurting small business people who cannot afford to defend themselves, they are hurting consumers who end up paying higher prices for goods and services."); 151 Cong. Rec. H748 (2005) (statement of Rep. Blunt) ("In addition to unclogging certain overused courts, this bill ends the harassment of local businesses through forum shopping.").

26 *See* 151 Cong. Rec. H726 (statement of Rep. Sensenbrenner) ("The race to settle produces outcomes that favor expediency and profits for lawyers over justice and fairness for consumers. The losers in this race are the victims who often gain little or nothing through the settlement, yet are bound by it in perpetuity.").

basis) and covered a very small portion of the harm originally done to the plaintiffs.[27] They cited confusion as to how one could opt out.[28] They exposed actions that were certified where the individual interest was not clear. Most of all, critics underscored that class actions benefited the lawyers who brought these cases, who found a "class representative," and who did not truly help the members of the class.[29]

The problems of the *defendant* were rarely discussed in the political criticism. These could be found primarily in the academic literature and in federal case law — in the writings of Henry Friendly, Richard Posner, Frank Easterbrook, and others.[30] But that criticism was primarily a criticism of "blackmail settlements," settlements which defendants would pay because they could not afford to risk the very large loss that a class action suit might entail.[31]

There were also some broader policy criticisms that focused primarily on the federal-state question.[32] Multiple cases were brought on identical issues in different states, and that was undesirable because the same issue would be litigated several times.[33] Nationwide issues were decided locally.[34] A class could be established in a particular

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27 H.R. REP. NO. 109-14, pt. 1, at 14-20 (2005) (identifying a variety of examples of abusive settlements in which attorneys receive excessive fees "with little or no recovery for the class members themselves"); *see, e.g.*, Kamilewicz v. Bank of Boston, 92 F.3d 506 (7th Cir. 1996).

28 *Id.* at 4 ("Often, the settlement notices . . . are so confusing that the plaintiff class members do not understand what — if anything — the settlement offers or how they can opt out of it."); *id.* at 21-22 (illustrating dangers of "drive-by class certifications").

29 Macey and Miller (1991).

30 *See*, *e*.g., Friendly (1973); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299-1300 (7th Cir. 1995) (Posner, C.J.); West v. Prudential Sec., Inc., 282 F.3d 935, 937 (7th Cir. 2002) (Easterbrook, J.); Posner (1973); see also Posner (2001).

31 *See, e.g.*, Friendly, *supra* note 30, at 120 (citing Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*—The Twenty-Third Annual Antitrust Review, 71 COLUM. L. REV. 1, 9 (1971)); *In re Rhone-Poulenc Rorer*, 51 F.3d at 1298 ("[Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.").

32 H.R. REP. NO. 109-14, pt. 1, at 22 (2005) (describing the practice of some magnet state courts that too premissively certify national class actions).

33 *Id.* at 23 (describing the filing of "copy cat" class actions across state courts).

34 *Id.* at 24 ("The effect of class action abuses in state courts is being exacerbated by the trend toward 'nationwide' class actions, which invite one state court to dictate to 40 others what their laws should be on a particular issue, thereby undermining basic federalism principles."); *see also id.* ("A recent study found that 77 percent of class actions brought in 2001 in a rural Illinois county known for its heavy class action docket sought to certify nationwide classes.") (Beisner and Davidson Miller, (2003)).

state that was especially favorable, both for easy certification and easy substantive law. And the results in that "favorable" state decided questions affecting the whole nation.

In any event, all of this led to a turnaround in the approach to class actions in the United States, and specifically to the CAFA, the Class Action Fairness Act of 2005.[35] CAFA changed the rules of diversity jurisdiction, so that while previously almost no class action suit could be removed from the state courts into federal courts, now almost any major class action suit can. Before there had to be total diversity. That is, if, among all the victims, there was a single plaintiff who resided in the same state as the defendant, this was enough to keep a case out of the federal courts. Under CAFA, by contrast, if the amount in controversy is more than five million dollars and there are at least 100 class members, then, so long as there is a single party who is not of the same jurisdiction as the defendant, there is federal jurisdiction.[36] Significantly, CAFA was limited to the *large* class action suit; despite the sponsors' professed interest in protecting all plaintiffs, apparently their interest did not include all small plaintiffs.

There certainly were problems in state brought cases. Some states, perhaps in complicity with lawyers and class representatives, did allow class action suits in which individual class members were not protected. And there was the suggestion that *elected* state judges responded in this area to large electoral contributions by class action suers. Some states may very well have become homes for class action lawyers who knew these states had a legal culture which allowed lawyers to keep most of the money from class action settlements. But despite the rhetoric of CAFA advocates proclaiming an interest in targeting magnet state courts, that question was not really the one addressed in CAFA. A real reason for CAFA might be discerned in the judicial backdrop to its passage — the Supreme Court and the federal courts by the year 2000 had turned around and had become unfavorable to class actions. Increasingly, the federal courts

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35 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

36 28 U.S.C. § 1332(d)(2).

interpreted Rule 23 against certification, while the state courts were still interpreting Rule 23 in favour of certification.[37]

Of course class actions have not gone away since CAFA, but they have been significantly reduced. In part, this is not due to CAFA itself, but is because the lower federal courts have become unsympathetic to class actions. In the past several years, federal appellate courts across the country have put the burden on the plaintiff to show, before the district court may certify a class, that every single one of the Rule 23 requirements has been met.[38] This is a significant burden. And, some federal courts have said there isn't similarity of interests in, for example, cases like tobacco cases, because there are long-term smokers, short-term smokers, and across these smokers a range of injuries; therefore, the commonality of interest isn't as great as the difference and a class may not be certified.[39] There is some truth in all this. But the question

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37 *See e.g.*, H.R. REP. NO. 109-14, pt. 1, at 22 (2005) (observing that "[s]ome state courts with [a] permissive attitude have even certified classes that federal courts had already found uncertifiable").

38 McLaughlin, (2009) ("Consensus is rapidly emerging among the United States Courts of Appeal. The First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits have expressly adopted certification standards that require rigorous factual eview and preliminary factual and legal determinations with respect to the requirements of Rule 23 even if those determinations overlap with the merits."). *See, e.g.*, Miles v. Merrill Lynch (In re Initial Public Offering Securities Litigation), 471 F.3d 24, 41 (2d Cir. 2006); *id*. at 40 ("It would seem to be beyond dispute that a district court may not grant class certification without making a determination that all of the Rule 23 requirements are met."); Unger v. Amedisys, Inc., 401 F.3d 316, 321-22 (5th Cir. 2005) (holding courts must find facts favoring class certificiation through the use of "rigorous, though preliminary, standards of proof"); Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001) ("party seeking class certificiation . . . bears the burden of demonstrating that she has met each" of the Rule 23 requirements), *amended on diff't ground by* 273 F.3d 1266; Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004) ("factors spelled out in Rule 23 . . . [must] be addressed through findings"); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675-76 (7th Cir. 2001) (requiring "whatever factual and legal inquiries are necessary under Rule 23" to "resolve the disputes before deciding whether to certify the class"); In re Constar International Inc. Securities Litigation, 585 F.3d 774, 780 (3d Cir. 2009) ("we require that each Rule 23 component be satisfied"). *See also* Blades v. Monsanto Co. et al., 400 F.3d 562, 567, 575 (8th Cir. 2005) (holding that, although district court "findings" may not be required, preliminary resolution of disputes sometimes is necessary in order to determine that certification requirements have been met); Brown v. Am. Honda (In re New Motor Vehicles Candian Exp. Antitrust Litig.), 522 F.3d 6, 25-26 (1st Cir. 2008) (avoiding resolution of whether "findings" are necessary, but requiring "searching inquiry" into whether class certification criteria are satisfied by novel or complex theory of injury).

39 *See, e.g.*, Castano v. American Tobacco Co., 84 F.3d 734, 743 (5th Cir. 1996) ("The class members were exposed to nicotine through different products, for different amounts of time, and over different time periods. Each class member's knowledge about the effects of smoking differs, and each plaintiff began smoking for different reasons. Each of these factual differences impacts the application of legal rules such as causation, reliance, comparative fault, and other affirmative defenses."). *Cf.* Barnes v. American Tobacco Co., 161 F.3d 127, 131 (3d Cir. 1998) ("Although there may be individual variations with respect to each class members relationship with the defendants, the common questions of defendants' liability, which are intimately connected with their concerted conduct, support a finding that defendants have acted on grounds generally applicable to all members of the proposed class.").

remains whether this ends up meaning that the requisite commonality of interest can only very rarely be established, and class actions will be severely limited.

CAFA also had another important effect. By sending major class action cases to the federal courts, it created enormous problems of choice of law: Which law will govern? There is no such thing as federal law for many of these things. Yes, in the securities cases there is, but in many of the others — in tort cases, and so on — it is supposed to be local law that governs. But whose local law? When there are many plaintiffs in the class, is it the local law of the class representatives/certifiers, or of someone else?

As a result of all this there is very much uncertainty now in the United States. Class actions had, over the years, expanded enormously. They are still very important.[40] We see them all the time, particularly in business situations and in mass torts/products liability contexts. The business cases are almost entirely lawyer-driven, that is, someone puts together the class and then brings the suit.[41] The percentage of payment to lawyers in these cases ranges from 30% of the recovery to as low as 14%. The amounts range from as low as $600,000 in a case where the fee was 30%, to a $117 million in an antitrust case where the fee was 25%.[42] Certainly the lawyers do very well. On the other hand, some defend these results by emphasizing that the primary objective must be the allocation of proper costs to the defendants, and not individual victims' compensation, because, they note, without class actions the victims likely would not get anything at all.

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40 *See, e.g.*, Dukes v. Wal-Mart Stores, Inc., Nos. 04-16688, 04-16720 (9th Cir. Apr. 26, 2010) (*en banc*) (affirming certification of nationwide class encompassing all women employed by Wal-Mart since December 1998 — in 3,400 stores and 41 regions — based on claims of sex discrimination under Title VII of the 1964 Civil Rights Act).

41 *See* Coffee (1983a).

42 It remains to be seen how the Supreme Court's recent interpretation of "reasonable" attorney fees for prevailing parties in civil rights actions, under 42 U. S. C. §1988, will affect the reasonableness inquiry in other subjects of class actions. *See* Perdue v. Kenny A., No. 08-970 (U.S. Apr. 21, 2010) (endorsing lodestar calculation of "reasonable" attorney fee but limiting to "extraordinary circumstances" the possibility of above-lodestar fee for superior attorney performance).

There were abuses. Reforms have not really focused on the abuses but on reducing both good and bad class actions. The interest of class members in securing damages, as against the social interest in placing appropriate costs on the defendant — that is, the compensation and the deterrence goals — have not been sorted out. People haven't focused on the differences in these goals. The difference between aggregated and representative class actions also has not been sorted out much in the United States. And the federal-state problems persist.[43] Europeans now have the opportunity to deal with all of these challenges on a clean slate.

Reforms and the Obligations of Scholars

All of this background suggests there are problems that class actions do address. The problems are: a) the failure of the defendant — the cost causer — to bear his or her full cost when individual victims may not know that they have a right to sue or may not have been damaged enough to make such a suit worthwhile because of the administrative costs of an individual suit; b) the failure of the victims to receive compensation in such situations; and c) even when individual suits are worthwhile, the existence of unnecessary administrative costs as a result of a multiplicity of suits. The first two support representative or lawyer-driven class actions, while the third perhaps justifies only aggregated types of class actions. (The abuses of each of these have been hotly debated.)

What is another way of dealing with these problems? Well, in the United States one can get punitive damages — extra-compensatory damages — in a variety of situations. There have been many reasons advanced for punitive damages. One reason is to make individuals into private attorneys-general, to go after people who have committed crimes as well as those who are so much at fault that they are like criminals. Punitive damages there serve as a bounty — an incentive for private law enforcement. There is also something of that in class actions.[44]

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43 *See, e.g.*, Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., No. 08-1008 (U.S. Mar. 31, 2010).

44 *See generally* Coffee (1983b).

Another reason for punitive damages is to prevent defendants from making certain defences that we don't want to hear. The Ford Pinto case is a classic example of what one of us has called "tragic choices punitive damages," where Ford defended the placing of a gas tank in a place where it could rarely explode rather than in a place where never could explode.[45] Perhaps tricked or forced by plaintiff, its defence seemed to become that the cost of burning babies is less than the cost of putting the gas tank in a place where it wouldn't ever explode.[46] Therefore, Ford seemed to claim, under the Learned Hand test for fault, that Ford's decision was not faulty and hence that Ford was not liable at all.[47] The court, in effect, said that it may look like a fault area, and you may be right to do a cost-benefit analysis and decide to put the tank where you did, but we will not have you telling us that burning babies is a socially desirable thing.[48] One hundred million dollars of punitive damages; next time, keep quiet and pay. Now that's a very different function of punitive damages from the private attorney-general function previously mentioned. It is to keep people from telling us things that are too costly for us to know.

There is yet another form of punitive damages. And this is the one on which the U.S. Supreme Court has focused — the right of individuals to vengeance.[49] *Vendetta*. A great American right. The first thing the Puritans did when they arrived was to start suing each other for "*my rights*." It is the reason the United States has so many good rights, constitutional rights. It probably is also the reason the United States has the death penalty, because the sense of *vendetta* is very much a part of American legal consciousness. "It's *my right*," not as a matter of deterrence but just as "*my right*" to see that you are punished when you do that prohibited action. The Supreme Court, which is

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45 *See generally* Calabresi and Bobbit (1978); Calabresi (1985).

46 Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348, 383 (1981).

47 *Cf.* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). The cost-benefit analysis was not Ford's primary defence in the Pinto case, but it eventually came to dominate the parties' litigation strategies. *See* Schwartz (1991).

48 *Grimshaw*, 119 Cal. App. 3d at 818-822.

49 *See, e.g.*, Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981); BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

much concerned with that kind of thing — constitutional rights and capital cases — but does not deal much with tort law, not surprisingly thought of punitive damages in those terms and said, "All right, but they cannot constitutionally be greater than a certain amount."[50]

In this circumscribed view of punitive damages, however, the Supreme Court ignored all the other functions of punitive damages. One of the most important of these is what has been called "the multiplier."[51] It is this function that is most closely related to class actions. If a defendant is sued by a plaintiff and the damages to that particular plaintiff are $10, but there are 50 other plaintiffs who are unlikely to sue (or who, if they sue, may not win), then, if only compensatory damages are awarded, the defendant will not bear the social costs of his activities. He will bear $10, instead of $500. In that situation, what have been called punitive damages — but really should be called socially compensatory damages — may be awarded.[52] Although they are extra-compensatory as far as the particular plaintiff suing is concerned, this theory of damages is meant not to punish but instead to assign costs.

The differences between this type of punitive damages and some of the others are notable. This type of punitive damages has been assessed even in the absence of any fault in the defendant, reasoning that there may be non-fault liability situations in which the defendant is held liable only 1-in-10 times, or even 1-in-50 times. In this conception of punitive damages, defendants need not have committed *willful* wrongdoing to be subject to extra-compensatory damages. And, in contradistinction with some other types of punitive damages, there is every reason to allow, indeed to encourage, defendants to insure against this type of damages, thereby making them a part of the ordinary costs of doing business.

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50 *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993).

51 *See generally, e.g.*, Becker (1968); Polinskys and Shavell (1998); Ciraolo v. City of New York, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring).

52 Catherine Sharkey (2003a); Sharkey (2003b); *see also Ciraolo*, 216 F.3d at 245 (Calabresi, J., concurring).

One could spend a great deal of time analysing what these "multiplier" types of punitive damages entail,[53] but in the end they are applied for reasons not very different from those Becker noted in his celebrated article that was in part the basis for his Nobel Memorial Prize in Economics.[54] Becker said that, in criminal law, if one simply charged the criminal with the amount of his theft there would be high incentive on the thief to keep stealing. But the same is true, and more dramatically, in the civil law area. To assign costs — the real social costs — to the defendants, extra-compensatory costs of just this sort are necessary. This has been written about in an opinion by Posner, in an opinion by one of us, and in a very long and thorough article by Shavell and Polinsky.[55]

Notice that what this form of punitive damages does is very similar to the class action in its social-allocation-of-cost function. One can take the place of the other. Both have problems, and the principal problem with both is: who gets the money? In the class action, it is the lawyers and class organizers, rather than the individual plaintiffs, who get the bulk of the money. In this form of punitive damages, it is the persons who sue first who get the money as against those who either do not bother to sue or do not know enough to sue. And why should these "early suers" get all of this extra money?

Catherine Sharkey suggests there ought to be enough of a bounty to encourage a person to bring such a suit, thereby getting socially compensatory punitive damages assigned to the defendant. Then, according to Sharkey, the rest of the damages — which are nominally punitive but actually socially compensatory — should be assigned by the court to serve functions that benefit the class of people who usually do not sue.[56] In this way, such awards could be used for making highways safer, they could be used for reducing pollution, they could be used for other such "socially compensatory"

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53 *See* Calabresi (2005) (discussing when and how such damages are appropriate).

54 Gary Becker (1968).

55 See Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996) (Posner, J.) ("When a tortious act is concealable, a judgment equal to the harm done by the act will underdeter" because the tortfeasor "will not be confronted by the full social cost of his activity"); *Ciraolo*, 216 F.3d at 245 (Calabresi, J., concurring); Polinsky and Shavell, *supra* note 51.

56 Sharkey *supra* note 52.

actions. That would be one way of structuring recoveries if a legal system decided to permit this kind of punitive damages instead of, or along with, class actions.

We leave for another article more detailed consideration of the particular difficulties with this approach in comparison to the class action approach. They both have their problems, and they both have their possibility of abuse. Do lawyers on contingent fees get more in the punitive damages case, or do they get more in the class action case in relation to either plaintiffs or the class as a whole? Are these suits to be brought in states, or are these to be brought in federal courts? All of the questions discussed earlier with respect to class actions are also serious questions as to this form of extra-compensatory damages.

Conclusion

Scholars of European law and institutions, think about the opportunity now before you. At the moment, Europe has scarcely embraced class actions and has no punitive damages, so it has a possibility of choosing. Thus, you need not even call this type of extra-compensatory damages "punitive damages," which is a bad name. You can call them something else and decide whether to have them instead of certain types of class action. If you endorse such extra-compensatory damages, you will have to decide what kinds of controls to put on them with respect to lawyers fees and with respect to where the money goes. You can focus on how to deal with the possibility of blackmail, which is not simply proper settlement costs being allocated but actual blackmail in the sense of suits that ought not win. All of these are things which, looking at the issues *de novo*, you can deal with in a way that is much more difficult for us because both class actions and "multiplier" damages are already part of our system of law and cannot be easily extricated from it. Extra-compensatory, socially compensatory damages are part of the whole punitive-damages pie and cannot readily be separated from it in the United States, but in Europe they could be. How would one do it? We are trying, some people are trying in the United States, but it does not come easy. Keep in mind, though, that

there will be here, as there is in the United States, fierce and diverse opposition from all interested parties.

In this circumstance, it is the role of scholars to come up with ways to ensure that socially compensatory damages — that is, these allocations of costs — are properly placed by instituting legal devices that allow it to happen. You have to do the work on it because you will not find this pursued either by those who are seeking to avoid paying for the costs they cause or, for that matter, by those on the other side (the lawyers for the plaintiffs) who are going to argue that what is most desirable is whatever system gives them the largest percentage of the cake, that is, has the highest administrative costs from which they can draw their percentage.

In this context, the victims themselves and the interest in properly allocating costs are not likely to be represented by anyone in the society, if not by scholars. The victims are both too small and always a minority at the moment that they are victims. And before they become victims they are not going to be very interested in law reform. So, since realistically they are not there to say, "I want the law to protect me in case I have an injury at some point in the future," the people who act as if they speak for victims are the plaintiffs' lawyers whose interests, instead, are very different. The people who speak on the injurer side have an interest that is very different too. The only ones who can speak for proper allocation in the costs of class actions, for both the compensatory and appropriate deterrent rights, are you.

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