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CROSSING THE PUNITIVE-COMPENSATORY DIVIDE

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INTRODUCTION

Received judicial and academic wisdom holds that “in our judicial system, compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes.”¹ Compensatory damages “are intended to redress the concrete loss that the plaintiff has suffered,” while punitive damages “are aimed at deterrence and retribution.”² This functional account of damages—and the sharp delineation between compensatory and punitive damages that it draws—corresponds to the fact-law distinction that has weighed heavily in state constitutional analysis of limitations upon compensatory and punitive damages,³ and has been recognized as critical to the federal constitutional analysis of the different standards for appellate review of compensatory and punitive damages.⁴ Likewise, the notion of a punitive-compensatory divide, or the alleged rigidity of these doctrinal categories of damages, drives the approach to tort policy in many realms, including the highly-charged debate surrounding “tort reform”—perhaps most controversially, proposals for caps on damages.

At the same time, there is acknowledgement that, for example, damages for emotional distress span (or transcend) this punitive-compensatory divide. According to the Restatement (Second) of Torts, “In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant’s act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.”⁵ This same theme was echoed by the U.S. Supreme Court in a recent punitive damages case, when it remarked that, although “it is a major role of punitive damages” to condemn conduct leading to

¹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

² *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

³ In assessing the constitutionality of various caps on compensatory and punitive damages, state courts are divided on the issue of whether the imposition of caps on damages is an issue of “fact” or “law.” At the root of this question is the issue of whether the fact-finding province of the jury is distinct from the “legal” remedy granted by the court after operation of the cap. *See infra* Section III.B.1.

⁴ In *Cooper Industries*, the Supreme Court held that punitive damages are subject to de novo appellate review when challenged on federal constitutional grounds. This holding was based, in significant part, on the fact that punitive damages, as “moral” assessments, are not purely “factual” determinations. 532 U.S. at 439-40. This has potential far-reaching implications in terms of characterizing the “nature” of punitive damages as a remedy different in kind from compensatory damages. *See infra* Section III.B.2.a.

⁵ RESTATEMENT (SECOND) OF TORTS. This might be particularly so in certain types of cases. The formal doctrinal (and statutory) divisions for these categories of damages would seem, for example, to be particularly illusory in the realm of sexual harassment, where noneconomic pain and suffering damages are awarded to “compensate” for the very outrage, humiliation, and indignity that are likewise covered by punitive damages. *See* CATHERINE M. SHARKEY, *DISSECTING DAMAGES: AN EMPIRICAL EXPLORATION OF SEXUAL HARASSMENT AWARDS* (working paper October, 2004) (suggesting that noneconomic and punitive damages are likely “jointly determined” in sexual harassment cases, which has important implications for empirical models of damages awards, which instead generally track conventional doctrinal categories, and attempt to measure the effect of compensatory damages upon punitive damages).

“outrage and humiliation,” “[c]ompensatory damages [may]. . . already contain this *punitive* element.”⁶

What is the import of this blurred distinction between emotional distress damages and punitive damages? Does it become significant, for example, when punitive damages are not an available avenue? Over two decades ago, the Wisconsin Supreme Court speculated that “if punitive damages are not allowed, juries [will] give vent to their desire to punish the wrongdoer under the guise of increasing the compensatory damages, particularly those for pain and suffering.”⁷ More recently, in examining modern statutory and judicial constraints upon punitive damages, Victor Schwartz and Leah Lorber have resurrected this theme, claiming that “plaintiffs’ lawyers . . . have poured new wine of punishment evidence, once used to obtain punitive damages, into old bottles of pain and suffering awards.”⁸ Tom Baker’s interviews with plaintiffs’ attorneys lend a modicum of support: “as the plaintiffs’ lawyers report, in practice there is no clear dividing line between compensatory and punitive damages. Compensatory damages can punish, just as punitive damages can compensate.”⁹

Academics are uncovering a parallel phenomenon at work in jury decisionmaking. As Cass Sunstein reports, “[a]lthough pain-and-suffering awards are essentially compensatory, there can be little doubt that such awards sometimes reflect jury judgments about the egregiousness of the defendant’s behavior. Hence, such judgments are likely to have a punitive component.”¹⁰ With even greater conviction, Michelle Anderson and Robert MacCoun pronounce that “[t]he dynamic relationship between the two awards might resemble a water-filled balloon; if one pushes down on one end, the other pops up.”¹¹

⁶ *State Farm*, 538 U.S. at 426.

⁷ *Wangen v. Ford* (Wis. 1980), at 277.

⁸ Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into “Punishment”*, 54 S.C.L. REV. 47, 49 (2002).

⁹ Tom Baker, *Transforming Punishment into Compensation: In the Shadow of Punitive Damages*, 1998 WIS. L. REV. 211, 212.

¹⁰ Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2133 (1998). As I have commented elsewhere, Sunstein and several collaborators, in a more recent book, *Punitive Damages: Should Juries Decide?*, seemingly switch gears in order to “single out punitive damages as an anomalous doctrine in tort, and thus focus their efforts on impugning the jury’s ability to operate consistently and predictably in its assessment of punitive damages, as opposed to money damages more generally.” Catherine M. Sharkey, *Punitive Damages: Should Juries Decide?*, 82 TEX. L. REV. 381, 384 (2003) (reviewing CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* (2002)). As I mention, this represents somewhat of a disconnect with Sunstein’s (and others’) previous work. See *id.* at 398 n.81 (noting that Sunstein and his collaborators have consistently emphasized the close link between jurors’ assessments of “pain and suffering” damages and punitive damages).

¹¹ Michelle Chernikoff Anderson & Robert J. MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 LAW & HUM. BEHAV. 313 (1999).

This “hydraulic” effect of selective regulation or restrictions imposed by law has been remarked upon in numerous contexts. See, e.g., Pam Karlan & Samuel Issacharoff [CITE] (campaign finance context); William Stuntz, [CITE YLJ c.1999] (incomplete regulatory system point in criminal law context).

Hence, we see that there may be pressure—in particular from lawyers and jurors—upon the lines separating compensatory and punitive damages. With evidence filtering in from researchers’ studies of jury behavior and of trial attorneys’ strategies, the time is ripe to connect these findings to a broader pattern of category dismantling—albeit implicit and not well understood—on the part of legislatures and courts. Moreover, as academics, lawmakers and courts have begun (implicitly at least) to question the categorical divide between compensatory and punitive damages, the issue cries out for further empirical investigation.

In this paper, I ask what civil litigation (and torts in particular) would look like if we accepted the malleability of damages categories as a reality. In Part I, I begin the process by exploring the forces within civil practice that undercut the categorical distinctions between compensatory and punitive damages. I consider a wide range of contexts where the distinctions are undermined, including previously-recognized explicit manipulations by jurors and lawyers, as well as hitherto unacknowledged implicit category dismantling set in motion by legislatures and courts.

On the legislative front, I highlight two states—Connecticut and Michigan—that have held firm in defending an exclusive “compensatory” purpose of punitive damages. The ongoing debate across states on the question of whether punitive damages should be insurable provides additional evidence of the dismantling of damages categories: in particular, states that permit indemnification of punitive damages might be viewed as states that blur damages categories.¹² There is reason to believe that the U.S. Supreme Court’s intervention into the realm of punitive damages, establishing a constitutional overlay of federal excessiveness review upon state law punitive damages awards—characterized by some as “federal tort reform”—will prompt states to articulate more precisely the underlying multi-faceted purposes of hitherto “undifferentiated” punitive damages.¹³ On the judicial front, there seems to be at

¹² See Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. __ (forthcoming 2005).

¹³ In Supreme Court majority in *State Farm* proclaimed that punitive damages “serve the same purposes as criminal penalties.” 538 U.S. at 417. My rejoinder in a previous article was as follows:

But what if—as is certainly the case—not all states share this view of the purpose of punitive damages? After all, in *BMW v. Gore*, the U.S. Supreme Court made it clear that “the federal excessiveness inquiry [into the magnitude of punitive damages] appropriately begins with an *identification of the state interests* that a punitive award is designed to serve.”

Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 350 (2003) (emphasis added). A recent punitive damages decision by Judge Posner—involving two plaintiffs who were bitten by bedbugs at a Motel 6 in Chicago—lends some additional support. According to Posner, review of a punitive damages award consists of two separate inquiries: “We must consider why punitive damages are awarded and why the Court has decided that due process requires that such awards be limited. The second question is easier to answer than the first.” *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003). See also Mark Geistfeld.

least some recognition of the fact that juries may award “compensatory” punitive damages and/or “punitive” compensatory damages.

Tort theory and doctrine has lagged behind these developments; indeed, at the extreme, there may be reason to think that the time has come to dismiss the well-trod categories of damages (at least as we know them) as doctrinally formalistic and, ultimately, more obfuscatory than revelatory. Before making this move, however, it seems wise to marshal further evidence in support of the (impending) collapse of the punitive-compensatory divide. Part I includes an interpretive review of the existing empirical evidence, gathered exclusively from mock juror experiments, which suggests that jurors may think of damages holistically; thus, for example, if they are told of caps on punitive damages—contrary to the nondisclosure provisions in most jurisdictions—they may inflate compensatory damages. These experimental studies, taken together, provide mixed evidence in support of such a substitution effect, which I will call the “crossover” hypothesis.¹⁴ To date, this hypothesis, although widely presumed in certain circles, has not been tested empirically in the real world.

Part II begins such an empirical investigation, aimed at probing the existence of a “punitive” component of compensatory damages. My endeavor involves a multivariate regression analysis of panel data, collected from courthouses in the largest counties across the United States at three separate time periods (1992, 1996, and 2001), which is designed to measure the effect of caps or limitations on punitive damages upon plaintiffs’ recovery of damages. First, I test a wide array of jury trial verdicts. To the extent that, as punitive damages are capped, noneconomic compensatory damages increase (as a result of jurors’ sensibilities and/or plaintiffs’ attorneys’ strategic presentation of their cases), there should be a positive effect upon the amount of compensatory damages awarded and little effect upon plaintiffs’ overall recovery of damages. My empirical results are generally consistent with these predictions, lending support to the crossover hypothesis.

Next, I test the crossover hypothesis in the separate category of bench trials, derived from the same data set (but limited to the two time periods in which it was collected, 1996 and 2001). Absent the presence of the jury, the crossover effect disappears. The absence of a statistically significant effect of the existence of punitive damages caps upon plaintiffs’ recoveries in fact bolsters the finding of a significant finding in the jury trial cases.

¹⁴ An analogous “substitution” effect has been explored in the criminal law context. See, e.g., Ian Ayres & Steven D. Levitt, *Measuring Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of Lojack*, 113 Q.J. ECON. 43 (1998); Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1135 (2002) (“Law enforcement can create substitution effects with respect to different offenses: If police begin a crackdown on heroin, for example, that may simply induce individuals to use other drugs for which penalties are not as strongly enforced.”); John R. Lott, Jr., *Right-to-Carry Laws and Violent Crime Revisited: Clustering, Measurement Error, and State-by-State Breakdowns* (Feb. 4, 2004) (describing the “possible substitution effect between crimes to obtain money: such as robbery and property crimes” as right-to-carry laws are introduced).

My survey of current developments in research and practice in Part I, and my synthesis of these trends with preliminary empirical analysis in Part II, is with a wider purpose in mind. To the extent that tort practice, as evidenced both by courts' reasoning and validated by empirical testing of actual jury verdicts, substantiates the existence of "punitive" compensatory damages (and "compensatory" punitive damages), the categorical distinctions between compensatory and punitive damages become dubious, and the consequent effect upon tort policy, which I explore in Part III, would be profound.

At this juncture, two very different courses might be followed. One would devote efforts to shoring up the boundary line between punitive and compensatory damages, either through careful (and perhaps emphatic) instruction of jurors or else relying upon the supervisory role of courts in policing aggressive plaintiffs' attorneys. The second alternative approach would let loose the dam dividing the categories of damages. Were this crutch of the punitive-compensatory divide taken away, we would be forced to revisit the efficacy of selective damages caps, at the root of most tort reform proposals.¹⁵ We might also recognize that courts, by exercising discretion in determining on which side of the fact-law divide various components of damages fall, are serving a role akin to that of statutory caps; judicial decisionmaking might thus be viewed as instituting a form of post-hoc "judicial cap" upon various categories of awards that might, in turn, set in motion a crossover effect.

In Part IV, I take up the challenge of identifying the larger implications, for tort law and theory, of the disappearing line between traditional damages categories. Damages play a key role in torts, not merely in providing parties with incentives to sue, but more broadly in illuminating the purposes and goals of the tort system as a whole. Thus, I think there may be much to be gained by looking closely at the practice of damages, especially the elision of the categorical divide between the constitutive components of damages. Turning tort law on its head—focusing on damages and, in particular, the shaping of damages remedies—may be the most profitable way to harmonize the many facets of a seemingly discordant tort system, one that simultaneously strives to serve the overlapping and (sometimes) conflicting goals of compensation, deterrence, and punishment.

¹⁵ The malleability of damages categories, moreover, may extend even beyond the punitive-compensatory divide to challenge the distinction, for example, between noneconomic and economic damages in certain realms, such as medical malpractice cases. Indeed, in a recent paper, I examine critically the effects—both intended and unintended—of the oft-touted medical malpractice damages caps. See Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. ____ (forthcoming May 2005). I suggest (and provide a limited empirical test for) a "crossover" hypothesis: where noneconomic damages are capped in medical malpractice cases, some portion of these damages might spill over into the unlimited economic damages category. What is relevant to my purposes here is the suggestion that the subcategory of economic compensatory damages in medical malpractice cases might be much more malleable than its conventional depiction.

I. BLURRING CATEGORIES OF DAMAGES

A well-developed torts literature explicates the three-fold purposes of damages: compensation, deterrence, and (more controversially) punishment.¹⁶ Tort damages are divided into compensatory damages, including economic and noneconomic components, and punitive damages. For some time, academics have suggested that “the legal line between punitive damages and compensatory damages does not accurately demarcate the presence of motives or perceptions of punishment.”¹⁷ But only more recently have some academics begun to probe more deeply the explicit category shifting that seems to be taking place within the juror’s assessment of damages and the lawyer’s strategic manipulation of claims. This Part begins with an examination of two disparate bodies of evidence concerning these respective phenomena. I then widen the scope of inquiry to include the parallel dismantling of categories—in this case implicit, and hitherto largely unrecognized—engaged in by legislatures and courts.

This Part is motivated by a sense that tort theory should strive to understand evolving changes in how the tort system is operating, in particular when such changes are embraced by the courts. I explore the blurring of the line between compensatory and punitive damages taking place explicitly by juries and lawyers and implicitly by legislatures and courts; by bringing together these seemingly disparate examples of blurred categories, we see a trend that may belie a greater force at work.

A. *Explicit Category Shifting*

This Section explores ranges of actions by actors within the tort system, including jurors, lawyers, (and in the following Section) legislatures, and courts. Juries play a vital role as decisionmakers in our torts system, as do lawyers who, after all, shape the claims that are brought. Academics have begun to unearth evidence of explicit (and self-conscious) category shifting engaged in by jurors and lawyers from punitive into compensatory damages, particularly in those circumstances when the availability of punitive damages is circumscribed. However, because the evidence pertaining to these two actors has not been examined in tandem, the potential synergies in jurors’ and lawyers’ common pursuit of holistic damages have not been explored.

1. *Jurors*

a. *“Equifinality”: The Pursuit of Multiple Goals*

The overarching theme of a fairly recent body of research, mostly in the realm of behavioral psychology, is that “[t]he task of assessing damages involves multiple and seemingly conflicting goals.”¹⁸ In particular, “defendant-focused

¹⁶ Tort law theory has increasingly focused upon regulating or deterring conduct that creates risks of injuries, albeit within a tort system that is also aimed at determining individual responsibility for personal injuries.

¹⁷ Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1406 (1993).

¹⁸ CITE.

concerns can cross over into the assessment of compensatory damages and plaintiff-focused concerns can cross over into the assessment of punitive damages.”¹⁹

This emerging body of academic work therefore attempts to debunk the traditional punitive-compensatory divide whereby:

Decision makers are presumed to pursue different goals through each decision. Specifically, decision makers are expected to be driven . . . by the plaintiff-focused motive of compensation in making compensatory damages determinations, and by the defendant-focused motivations of retribution and deterrence in making punitive damages determinations.²⁰

By contrast, the alternative conception of juror decisionmaking insists that “legal decision makers attempt to employ the available verdict options to satisfy numerous goals simultaneously.”²¹ This idea, which Michelle Anderson and Robert MacCoun have termed “equifinality,” is based upon the common sense proposition that “actors can pursue goals through multiple pathways; if one pathway is thwarted, another is used.”²² Applied to the juror’s task of assessing damages, equifinality posits that “[j]urors can use punitive damage judgments to provide further compensation for needy plaintiffs, and they can use compensatory judgments to seek retribution or promote specific deterrence or general deterrence.”²³

¹⁹ Edith Greene, David Coon & Brian Bornstein, *The Effects of Limiting Punitive Damage Awards*, 25 LAW & HUM. BEHAV. 217, 219, 220 (2001).

²⁰ Jennifer K. Robbennolt *et al.*, *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, __ BROOK. L. REV. __ (2003).

²¹ *Id.* at __.

²² Anderson & MacCoun, *supra* note 11, at 315. *See also* Robbennolt, *supra* note 20, at __ (“some goals may be alternately satisfied through multiple pathways”). In some sense, the “equifinality” principle might be seen as a particularized example of Neal Feigenson’s account of jurors’ pursuit of “total justice,” namely “striv[ing] to square all accounts between parties [and] reach a decision that is correct as a whole,” even if in disregard of technical legal standards. NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* 5 (2000).

When considered more broadly, there are many contexts in which a particular damages avenue is closed off to the jury. For example, sexual harassment damages, which are limited by a federal statutory cap, may be unlimited under state law. As the Fourth Circuit decided in *Sasaki v. Class*, 92 F.3d 232 (4th Cir. 1996), a harassment case alleging both state-law and federal claims, the jury was improperly influenced by plaintiff’s counsel’s mention of the federal cap. The Fourth Circuit reversed and remanded for a new trial on damages on the ground that “there [was] strong reason to believe that the jury . . . adjust[ed] its award to account for the federal damages cap.” *Id.* For further discussion of this crossover effect in sexual harassment cases, see SHARKEY, *supra* note 5.

David Leebron posited an analogous effect in the realm of wrongful death damages. He found support for the view that “juries intuitively feel that wrongful death awards, constrained as they are primarily to reflect lost income, systematically understate the appropriate measure of damages. [As a result] . . . juries are presumed to add an extra amount to an award by assessing substantial damages for pain and suffering prior to death.” David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 305 (1989).

²³ Anderson & MacCoun, *supra* note 11, at 315. *See also* Robbennolt, *supra* note 20, at __ (“[j]urors . . . can compensate the plaintiff most straightforwardly through a compensatory

b. *Mock Juror Experiments*

Behavioral psychologists have designed experiments to test the process by which juries assess damages. Several experimental studies have produced findings consistent with the “equifinality” theory that posits that “decision makers who are blocked from expressing punitive intent through punitive damages find other mechanisms through which to satisfy their goals.”²⁴ Two of the studies confirmed (and none rejected) the hypothesis that jurors will inflate their compensatory damages awards when they are precluded altogether from awarding punitive damages. But, as one of the studies demonstrated, this crossover effect disappeared in the situation where the punitive damages were capped, as opposed to prohibited.²⁵ Because these studies comprise the extant body of empirical evidence of the crossover effect—which has yet to be incorporated into tort reform debates—they warrant comprehensive discussion.

In 1999, Anderson and MacCoun conducted an experiment with mock jurors who were given a written summary of a case based loosely upon an actual nail-gun personal injury, product liability case.²⁶ In the case, the plaintiff, a 31-year old male carpenter, had been injured when the nail-gun that his coworker was operating misfired a nail, piercing the plaintiff carpenter’s skull, severely injuring, but not killing him. The mock jurors were instructed that they had previously found the corporate defendant liable for defective design of the nail-gun, and that their sole task was to assess damages. One group of the mock jurors was allowed to assess both compensatory and punitive damages; a second group was instructed to award compensatory damages only. Anderson and MacCoun found that the mock jurors who were denied the opportunity to award punitive damages altogether awarded more in pain-and-suffering as compared with the mock jurors who were permitted to award both compensatory and punitive damages. The researchers concluded that the mock jurors “[c]ompensated for [the] constraint of not being able to award punitive damages” by inflating their compensatory damages.²⁷

damages award, but can also award punitive damages to achieve this goal”; conversely, “decision makers who are blocked from expressing their punitive intent through punitive damages find other mechanisms through which to satisfy their goals”).

²⁴ Robbennolt, *supra* note 20, at ___. There are, nonetheless, experimental studies that seem to confirm the traditional compensatory-punitive divide. For example, in a 1996 study, Cather *et al.* found evidence that the reprehensibility of defendant’s conduct influenced jurors’ punitive awards, but not compensatory damages awards. CITE.

²⁵ Finally, two studies reached somewhat conflicting conclusions regarding differences in the variability in compensatory damages as a function of a cap on punitive damages: in one, the cap seemed to reduce overall variability in the compensatory damages awards; in another, both the size and variability of compensatory damages increased as the level of the punitive damages cap increased. CITES.

²⁶ Anderson & MacCoun, *supra* note 11. The mock jurors in the study were 91 university graduate students, each of whom was given an eight to ten page booklet containing a factual summary of the lawsuit, followed by jury instructions, and a questionnaire.

²⁷ Anderson & MacCoun, *supra* note 11, at 321.

Greene, Coon, and Bornstein conducted a more extensive set of experimental studies, leading to more equivocal results.²⁸ In their study, the mock jurors were divided into four different groups: (i) the first group was told that punitive damages were capped at \$200,000; (ii) the second group was told that punitive damages could not exceed compensatory damages; (iii) the third group was given no restriction on the amount of punitive damages they could award; and (iv) the fourth group was told that they could not award punitive damages. The researchers manipulated the reprehensibility of the defendant's conduct, alternating between "low" and "high." They also examined the effects of limiting punitive damages across three different case types: personal injury; products liability; and insurance bad faith.²⁹ Finally, the researchers asked the jurors whether they intended each award—considering separately the compensatory damages component and (where applicable) punitive damages component—to (i) make up for plaintiffs' losses; (ii) punish the defendant; and/or (iii) deter the defendant and others from similar behavior.

Greene *et al.* had predicted "higher and more variable compensatory damages in situations in which the punitive damage award is artificially limited."³⁰ Their actual results were somewhat mixed. First, they found that, as compared with the scenario in which punitive damages were unlimited, caps on punitive damages did not result in mock jurors' inflation of compensatory damages. Second, however, they did find that mock jurors who were precluded from awarding any punitive damages at all assessed greater compensatory damages than did the mock jurors who were allowed to make unrestricted punitive damages awards. There was no significant difference, however, between the total damages awarded by these latter two groups. Given these results, the researchers posited that "jurors may not make the distinction between compensatory and punitive damages that the law intends but rather, that they may reason more holistically and award amounts that they believe constitute a sufficient *total* award."³¹ They also concluded, however, that "as long as jurors are given the opportunity to award some money for purposes of punishment and deterrence, they do not feel the need to increase their compensatory award to meet those objectives."³²

A third study, conducted by Jennifer Robbennolt and Christina Studebaker, explored the effects of differing levels of punitive damages caps: a

²⁸ Greene *et al.*, *supra* note 19. The 320 participants in their study were undergraduates at the University of Colorado. The participants' mean age was 24, and twelve percent had previously served on juries (half in criminal cases, half in civil). *Id.* at 222.

²⁹ Mock jurors were given case summaries of approximately 1200 words, which included opening statements, direct examination and cross examination of witnesses, closing arguments, and jury instructions. Each of the case summaries was loosely based on an actual case.

³⁰ Greene *et al.*, *supra* note 19, at 219.

³¹ Greene *et al.*, *supra* note 19, at 227.

³² *Id.* at 231. In addition, they found that capping the punitive damages award (which, as mentioned did not affect the size of compensatory damages), generally reduced the variability in compensatory damages awards.

low level (\$100,000); moderate level (\$5 million); and high level (\$50 million).³³ Mock jurors were given a case summary of a personal injury lawsuit. They were free to award both compensatory and punitive damages, although the latter was capped at one of the specified limits, which was disclosed to the mock jurors. The researchers' main finding was that the level of the cap acted as an anchor for the size of the compensatory damages award (as well as for the punitive award).³⁴ In other words, as the level of the cap on punitive damages increased, so did the size (and variability) of the compensatory damages award.

It is highly relevant here that the mock jurors were explicitly told of the punitive damages cap.³⁵ This is at odds with the law in most jurisdictions, which expressly prohibits such disclosure, either by statute or common law.³⁶ Moreover, the experimental framework inherent in mock juror studies casts additional doubt on the transferability of these results into the real world.³⁷ For these reasons, there appears to be a critical need for empirical testing of the crossover effect in the context of the actual jury trial setting.

The experimental studies do seem to confirm, however, that jurors (at least under certain conditions) might be receptive to arguments encouraging them to engage in damage category shifting. It is therefore particularly surprising that this body of research concerning jurors' propensity for equifinality has, until now, not been connected with recent work focusing on lawyers as the active agents in this process.

2. Attorneys

Recent studies of lawyerly tactics in manipulating juries to shift damages between categories implicitly assume a ready and "willing" jury of the sort

³³ Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353 (1999). The cap amounts were based upon a pretesting of their case. They by no means reflect punitive damages caps actually in place. See *infra* Table 1. State Punitive Damages Limitations (Appendix I).

³⁴ For a discussion of anchoring, "the judgmental process of selecting an initial value, or 'anchor,' as a starting point from which to arrive at an award by a process of adjustment," as well as the body of behavioral research that has uncovered its potential distorting influence in juror and legal decisionmaking, see Sharkey, *supra* note 10, at 408-10 & n.130 (listing studies presenting empirical results substantiating the claim that salient numbers, such as a plaintiff's request for a specific dollar amount, have a dramatic impact on jurors' awards, both compensatory and punitive).

³⁵ Researchers defend such disclosure—even in the face of prohibitions in almost every state—on the basis of their suspicion that "even if jurors are not directly instructed that punitive damages are capped at a certain level, they may nonetheless have this expectation from information available in the media, conversations with others, or from general knowledge of tort reform legislation." Greene *et al.*, *supra* note 19, at 224. It would be interesting to test this claim empirically. I am not aware of any existing studies that attempt to do so.

³⁶ CITES. These prohibitions against disclosure to the jury might be seen as statutory attempts to reinforce the categories of damages. As Colleen Murphy has argued, state law proscriptions here might well be guided by anchoring concerns. Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 347 n.8 (1995).

³⁷ CITE (Vidmar piece discussing concerns: internal and external validity; ecological concerns).

posited above by the behavioral psychologists. In the words of one plaintiff's attorney:

Our opinion is that in most instances a jury has a figure in mind, and when you have a figure in mind, it can come in the guise of compensatory damages or in the guise of punitive damages. If they have that amount to award in punitive damages, most likely it's going to be reduced from compensatories³⁸

And the prevailing view is that "every good trial lawyer knows that punitive damages, you really build them into your compensatory damages anyway, by showing just short of intentional misconduct."³⁹ In other words, lawyers shape their claims in order to shift damages that would otherwise fall within the rubric of "punitive" into the category of "compensatory." Victor Schwartz and Leah Lorber have speculated that this is the result of increased punitive damages restrictions, including caps.⁴⁰

Tom Baker, instead, ascribes the result to "insurance law in action [which] transforms punishment into compensation."⁴¹ He too has predicted that "efforts to reduce the impact of punitive damages will have less effect on the out-of-pocket cost of the tort system than expected. Instead, what is likely to happen is that 'punishment' will come increasingly in the guise of compensation."⁴² The reason, according to Baker, is that plaintiffs' attorneys shape their cases in order to maximize the possibility for recovery of insurance proceeds. Baker discovered that "[t]he most common obstacle plaintiffs' lawyers seek to avoid in potential punitive damages situations is the intentional harm exclusion."⁴³ Moreover, "[t]he defendant helps the plaintiff because the defendant wants to preserve insurance coverage."⁴⁴ The plaintiffs' attorney's goal, then, becomes to litigate cases "so that aggravated fault produces higher compensatory damages."⁴⁵

Baker also suggests that, against the liability insurance norm, tort damages paid by "real people" (as distinct from insurers) are regarded primarily as

³⁸ Baker, *supra* note 9, at 227 (quoting unnamed plaintiff's attorney).

³⁹ *Id.* at 211 (quoting unnamed plaintiff's attorney).

⁴⁰ See Schwartz & Lorber, *supra* note 8.

⁴¹ Baker, *supra* note 9, at 214.

⁴² *Id.*

⁴³ *Id.* at 223. Baker reports that punitive damages claims (and intentional harm claims more generally) are used by attorneys primarily as leverage in settlement negotiations.

⁴⁴ *Id.* at 225.

⁴⁵ *Id.* at 226. According to Baker, "the lawyers agreed on the goal, but reported different approaches to achieving that goal." *Id.*

A similar phenomenon is at work in the federal securities law context: "where officer and director's insurance covers violations of the duty of care, but not violations of the duty of loyalty, parties have an incentive to settle all claims as 'duty of care' violations, which are fully insurable." Sharkey, *supra* note 12, at __ (citing John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 716 n.128 (1986)).

punishment, and only secondarily as compensation.⁴⁶ To this end, lawyers try to persuade juries to maximize the compensatory damages awards to their plaintiff clients by introducing evidence on issues seemingly far afield from the harm done to the plaintiff—issues typically associated with the assessment of punitive damages: the wrongfulness of the defendant’s conduct and the defendant’s net worth.⁴⁷ Thus lawyers themselves—the very individuals who determine which kinds of damages to pursue on their clients’ behalf and frame their arguments and present their witnesses to the jury accordingly—are, with increasing frequency, deliberately blurring the divide between categories of damages. I turn now to an attempt to connect this evidence of explicit category shifting by jurors and lawyers with what I term “implicit category dismantling” that is simultaneously taking place in various contexts by legislatures and state and federal courts.

B. *Implicit Category Dismantling*

If jurors and attorneys might be characterized as explicit or self-conscious actors in this line-blurring process, legislatures and state and federal courts might be deemed “implicit” or indirect participants in the enterprise. As we shall see, there is less of a sense of pursuit of a strategic plan (be it motivated by self-interest or public interest) as in the case of jurors and lawyers, and more of an as-yet unconnected configuration of policies and practices.

1. *Legislatures*

Legislatures’ articulations of the purposes of punitive damages would, at first glance, seem to be an odd place to seek evidence of erosion of the punitive-compensatory divide. After all, most states hold fast to the retributive punishment view of punitive damages, and expressly reject the possibility that punitive damages might be even partially compensatory in nature.⁴⁸

a. *Compensatory Purpose of Punitive Damages*

Two states, however, adopt an entirely different approach. In Michigan and Connecticut, the legislatures (and courts) have recognized punitive (or exemplary) damages to be compensatory in purpose. Michigan allows exemplary damages solely to compensate for the humiliation and indignities a plaintiff has suffered in excess of his more readily compensable damages.⁴⁹ As this rule is a

⁴⁶ Based upon interviews with plaintiffs’ attorneys in Connecticut and Florida, Baker has provided anecdotal evidence that compensatory damages include a retributive component, at least so far as the defendant himself (as opposed to the insurer) has to pay so-called “blood money.” Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC. REV. 275 (2001). See also Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1397 (2003) (“Common experience suggests that the pursuit of compensation can be vindictive.”); Roselle L. Wissler *et al.*, __ 314 (2001).

⁴⁷ See Baker, *supra* note __.

⁴⁸ See, e.g., 402 N.Y.S.2d 815 (1978). CITES.

⁴⁹ See *Kewin v. Massachusetts Mut. Life Ins. Co.*, 295 N.W.2d 50 (Mich. 1980) (stating that the purpose of exemplary damages is to compensate the plaintiff for its humiliation, outrage, and indignity resulting from the defendant’s willful, malicious, or wanton conduct); *Eide v. Kelsey-Hayes Co.*, 427 N.W.2d 488, 498 (Mich. 1988) (allowing punitive damages for compensation, not punishment, purposes).

common law tradition that dates back to the nineteenth century, the legislature has had numerous opportunities to reaffirm the exclusive compensatory role for exemplary damages.⁵⁰ Connecticut likewise has emphasized the compensatory purpose of punitive damages.⁵¹ Moreover, Connecticut prohibits punitive damages altogether in suits for intentional infliction of emotional distress, on the ground that actual damages sufficiently compensate for the outrageous conduct.⁵²

This recognition of the compensatory purpose of punitive damages may be no more than a nod to early American (and English) punitive damages jurisprudence as described by the U.S. Supreme Court:

Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time.⁵³

Nonetheless, underlying these states' damages rules—at least in part—is the idea that ostensibly different categories of damages can, at least in some circumstances, serve the same purpose. The logical extension of their approach is that such damages are, in fact, interchangeable and, if awarded in tandem, impermissibly redundant.

b. *Insurability of Punitive Damages*

A traditional position espoused by theorists is that deliberate wrongdoers should not be allowed to shift the costs of liability to other parties through insurance or other form of indemnification.⁵⁴ In the torts realm, this morphed into the view that compensatory damages, but not punitive damages, should be insurable, as a matter of public policy. This view, moreover, comports with the traditional functional account of tort damages, whereby the purpose of compensatory damages is remedial, as distinct from the deterrence or punishment purposes of punitive damages.

Several overlapping arguments support this traditional view. First, personal payment of the award satisfies the deterrence objective and also ensures

⁵⁰ See, e.g., *Peisner v. Detroit Free Press*, 421 Mich. 125, 132 (1984) (Brennan, J., concurring) ('Because the Legislature, cognizant of this long-standing judicial gloss limiting exemplary and punitive damages to a compensatory role, has on several occasions through the years reenacted the libel statute without change, we conclude the Legislature intended that any award of 'exemplary and punitive' damages comport with the established common-law gloss on those terms.').

⁵¹ See *Berry v. Loiseau*, 614 A.2d 414, 435 (Conn. 1992) ('[P]unitive damages serve primarily to compensate the plaintiff for his injuries and, thus, are properly limited to the plaintiff's litigation expenses less taxable costs.').

⁵² *Whelan v. Whelan*, 41 Conn. Sup. 519 (1991). In similar fashion, Georgia does not allow for punitive damages in situations where the entire injury is ostensibly noneconomic. GA. CODE ANN. § 51-12-6. See also 256 F.3d 1241 (11th Cir. 2001); 356 Ga. 838.

⁵³ *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 n.11 (2001). But see Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163 (2003) (disputing the Court's compensatory conception of early punitive damages cases).

⁵⁴ CITES.

that the wrongdoer suffers punishment. Analogies from criminal law can be invoked: just as it is against public policy to enable an individual to insure himself against criminal liability, it is equally repugnant to allow him to purchase insurance against punitive damages. Second, insurance would shift the burden to the public at large in the form of higher premiums. Third, an award paid by an insurer is an undeserved gift to the plaintiff who has already received compensatory damages. In this realm, it is evident that legislatures and courts have relied heavily on arguments developed, in part, by tort theorists.

At the same time, there is dramatic evidence in the insurability debate—which began in earnest in the 1960s, and continues to present day—of the breakdown of the compensatory-punitive divide. Indeed, this may in fact be an additional force pushing in the direction of expanded insurability, increasingly espoused by states. Of the forty-five states that permit common law punitive damages,⁵⁵ thirty-four states have conclusively resolved the insurability issue, either by statute or by a ruling of the highest state court. Nine states have conclusively determined that insuring punitive damages would contravene public policy, whereas insurability of punitive damages has been assured in twenty-five states.⁵⁶ Four of these states—Hawaii, Montana, Nevada, and Virginia—permit that coverage by statute.⁵⁷

If the jurisdictions were evenly divided on the insurability issue in the 1960s and 1970s, the legislative and judicial trend in the past several decades has been squarely in the direction of expanded insurability. It is no longer tenable for courts and state legislatures to make sweeping public policy declarations regarding insuring punitive damages without unpacking further, and in a more nuanced fashion, the underlying role and purposes of punitive damages. And, as punitive damages are more frequently awarded outside the confines of malicious conduct, the force of public policy prohibitions based upon criminal penalty analogs is reduced. States that permit indemnification of punitive damages, whether by statute or common law, might be viewed as states that blur damages categories.

⁵⁵ Nebraska does not allow punitive damages in any circumstance, either by common law or statute. Punitive damages are allowed in Washington (where they are insurable), Massachusetts (insurability undetermined), and New Hampshire (insurable if assessed against municipalities) only if expressly authorized by statute; and exemplary damages are permissible in Louisiana in even more limited contexts, under the uninsured motorist statute (where they are insurable) or under federal civil rights statutes (insurable).

⁵⁶ See Sharkey, *supra* note 12.

⁵⁷ Two of the statutes declare that no public policy prohibition exists against insuring punitive damages. See NEV. REV. STAT. ANN. § 681A.095 (Michie 2004); VA. CODE ANN. §§ 38.2-227, 38.1-42.2 (1999). See also DEL. CODE ANN. tit. 21, § 2902 (1995) (authorizing coverage in automobile cases). By contrast, two of the statutes prohibit construction of an insurance policy to provide coverage for punitive damages unless specifically included in the policy. See HAW. REV. STAT. § 431:10-240 (2002); MONT. CODE ANN. § 33-15-317 (2003).

2. *Courts*

Finally, there seems to be at least some judicial recognition of the fact that juries may award “compensatory” punitive damages and/or “punitive” compensatory damages.⁵⁸

a. *Compensatory Punitive Damages*

In appellate review of jury damages verdicts, acknowledgement of this potential overlap has led courts, when invalidating the punitive damages portion, to remand in order to allow a jury to reassess compensatory damages, this time without the availability of the punitive damages avenue. It is difficult to assess the frequency of this practice; nonetheless, it is a development that warrants attention. Here, I describe the examples that I have uncovered to date; when examined together, they appear consistent with a wider trend.

In *Chestnut v. City of Lowell*, the jury had awarded \$210,000 in compensatory damages and \$500,000 in punitive damages in a §1983 action involving alleged police brutality in making an arrest.⁵⁹ The First Circuit invalidated the punitive damages award on the ground that municipalities are immune from punitive damages. The court nonetheless remanded the case for a new trial on compensatory damages, on the ground that the jury may have included some “compensatory” damages within its punitive damages assessment.⁶⁰ In other words, the court seemed to anticipate that, absent an opportunity to award punitive damages, the jury might well increase its award of compensatory damages. In doing so, the court echoed the sentiments of a Fifth Circuit case from two decades earlier, *Webster v. City of Houston*.⁶¹ There, the jury had awarded punitive damages, but no compensatory damages, to the decedent’s parents for the loss of their child’s companionship. The court reversed not only the punitive damages award as impermissible against a municipality, but also remanded for a new trial on compensatory damages on the ground that “the jury, in awarding punitive damages, [may have erroneously] thought it had covered all bases.”⁶²

A similar (albeit more nuanced) acknowledgement of the potentially fungible nature of compensatory and punitive damages may have motivated the

⁵⁸ In a previous article, I argued that punitive damages—particularly when assessed on a statewide or nationwide scale and awarded as “classwide” damages in a single or multi-plaintiff case—“have been used to pursue not only the goals of retribution and deterrence, but also to accomplish, however crudely, a *societal compensation* goal: the redress of harms caused by defendants who injure persons beyond the individual plaintiffs in a particular case.” Sharkey, *supra* note 13, at 351-52. In the examples that follow in the text, I refer instead to the individual compensatory goal; in other words, where punitive damages serve as a substitute for individual compensatory damages. This latter compensatory role is the more traditional historical role, and has been more readily acknowledged by courts.

⁵⁹ 1st Cir. 2002. Cite.

⁶⁰ Cite.

⁶¹ 689 F.2d 1220 (5th Cir. 1982), *rev’d on other grounds on reh’g*, 735 F.2d 838 (5th Cir. 1984) (*en banc*).

⁶² *Id.* at 1229-30.

U.S. Supreme Court’s “ratio” analysis, or consideration of the ratio of punitive damages to compensatory damages (or, more precisely, the measure of harm caused by the wrongdoer’s conduct)—one of three “guideposts” the Court established for appellate review of excessive punitive damages awards. In *BMW v. Gore*, the Court conceded that a higher punitive to compensatory damages ratio might be tolerated in those instances where the monetary value of noneconomic harm may have been difficult for the jury to determine.⁶³ In other words, in such cases, the jury might well have awarded punitive damages to compensate the plaintiff for intangible harms not fully incorporated into the noneconomic portion of compensatory damages.⁶⁴

b. *Punitive Compensatory Damages*

The Supreme Court recognized the converse of this principle in its most recent punitive damages case, *State Farm v. Campbell*: namely, that a large noneconomic damages award already likely contains a significant punitive component, so that the award of punitive damages in addition would constitute impermissible double-counting.⁶⁵ In that case, the plaintiffs were awarded one million dollars for eighteen months of emotional distress (which the Court characterized as “minor economic injuries”). Not only did the Court find that this amount was “complete compensation,” but it explained further:

The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the [plaintiffs] suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. *Compensatory damages, however, already contain this punitive element.*⁶⁶

Lower federal courts have picked up on this added nuance to the ratio analysis.⁶⁷ For example, in the latest round of the Exxon Valdez case on remand after *State Farm*, the Alaska federal district court elaborated:

In *State Farm*, the Court indicated that where compensatory damages already contain a punitive component, a lower ratio may be appropriate. In *State Farm*, the compensatory damages awarded to the Campbells contained such a punitive component. The same is not true here. The compensatory damages that the plaintiffs received were solely for economic losses and had no punitive component. Unlike the Campbells,

⁶³ *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996) (suggesting that a high ratio might be necessary where “the injury is hard to detect or the monetary value of the noneconomic harm might have been difficult to determine”).

⁶⁴ Similar in other civil rights cases. CITES

⁶⁵ *State Farm*, 538 U.S. at 425 (“When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”).

⁶⁶ *Id.* at 426 (emphasis added).

⁶⁷ See, e.g., *In re the Exxon Valdez*, 296 F. Supp.2d 1071 (D. Alaska 2004) (“Under this [ratio] guidepost, the court may also consider whether the compensatory damages award contained a punitive component . . .”).

who pursued an intentional infliction of emotional distress claim against *State Farm*, the plaintiffs here never pursued such claims against Exxon. Therefore, unlike the Campbells who were compensated for the emotional distress *State Farm* caused, the plaintiffs here have never been compensated for the emotional distress (the disruption of their lives . . .) that resulted from oil spill which was caused by Exxon's reckless behavior. Because the plaintiffs' compensatory damages did not already contain a punitive component, a higher, single-digit ratio is appropriate in this case.⁶⁸

A recent Third Circuit decision in the mass torts settlement of the phen-fen diet drug litigation draws attention to the ways in which noneconomic damages for mental anguish, pain and suffering and the like can substitute for punitive damages.⁶⁹ At issue in the case was the scope of a release that restricted those who opted out of the settlement from pursuing punitive damages.⁷⁰ The opt-out plaintiffs were charged with undermining the settlement by "evading or circumventing" the punitive damages restriction.⁷¹ The court was cognizant of the fact that "mental anguish, pain, or loss of consortium" could serve as "vehicles for sub rosa punitive awards."⁷² Moreover, according to the court, "the actual conduct of the litigation raised justifiable fear in the District Court, and among the counsel for defendant and the class, that the plaintiffs were seeking to obtain through the back door what they were barred from receiving through the front."⁷³ At the same time, the court, constrained by due process and federalism to construe the settlement agreement narrowly, determined that the drafters of the agreement "meant only to block the *specified type of damages* award" and thus did not reach evidence submitted in support of permissible types of damages—namely noneconomic compensatory damages.⁷⁴

These examples where courts recognize an implicit dismantling of the punitive-compensatory divide strike me as an important, if overlooked, indicator

⁶⁸ *Id.* at ____.

⁶⁹ In re: Diet Drugs (Phentermine/ Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig., CITE (3rd Cir. 2004). The court focused upon the strategic manipulation by lawyers, referring to "efforts by creative counsel on both sides to interpret and apply settlement terms so as to gain advantage in the individual lawsuits brought by intermediate opt-outs in various state courts." *Id.* at _____. In less diplomatic terms, the court referred to "guerrilla warfare from the opt-out lawyers." *Id.* at ____.

⁷⁰ Specifically, the case addressed the plight of "intermediate opt-outs," who did not exercise their right to opt out at the beginning, but rather, at a later period (but before the settlement was concluded). These intermediate opt-outs could pursue their claims individually, but were precluded, under the settlement agreement, from pursuing punitive, exemplary, or multiple damages. The punitive damages release was described as "a central pillar of the settlement agreement." *Id.* at ____.

⁷¹ *Id.* at ____.

⁷² *Id.* at ____.

⁷³ *Id.* at ____.

⁷⁴ *Id.* at _____. The court nonetheless made it clear that "the District Court is not without recourse in the event that a verdict is rendered that appears to grant punitive damages under the guise of some other damage category." *Id.* at _____. While "[t]he precise circumstances that might arise" were too speculative, the court advised that "post-trial remedies should not be categorically rejected." *Id.*

of the pressure that has been brought to bear upon our traditional categories of damages.

II. AN EMPIRICAL TEST OF CROSSOVER: “PUNITIVE” COMPENSATORY DAMAGES

In this Part, I take a significant first step toward the larger project of gauging how pronounced, and how widespread, the crossover effect between punitive and compensatory damages may be. Empirical investigation of the crossover phenomenon should shed some light on whether it makes sense to continue to use these categorical distinctions in the traditional ways espoused by tort theorists and policymakers. My primary interest here is testing whether or not a discernible crossover effect can be detected in jury verdicts, as compared with bench verdicts.

This empirical study tests the existence of the crossover effect in actual jury and bench trials, using a unique database I constructed using county-level data from the National Center for State Courts that I recoded by state, and to which I added several unique variables, including, most relevantly, state law variables such as the existence of caps on noneconomic compensatory and/or punitive damages and a variable indicating whether or not punitive damages are insurable. Using panel data across three separate time periods: 1992, 1996, and 2001, I use the “fixed effects” regression technique, which eliminates the influence of unobservable factors that do not vary over time (i.e., time invariant). In essence, the technique allows for comparison of the changes in, rather than the levels of, outcomes between cap and noncap states (or, in other words, to control for differences across states that do not vary over time).

The hypothesis I am testing here is that as punitive damages are capped noneconomic compensatory damages will rise (as a result of jurors’ sensibilities and/or plaintiffs’ attorneys’ strategic presentation of their cases), with the result that there should be little effect upon plaintiffs’ overall recovery of damages, and a *positive* effect upon the amount of compensatory damages received.⁷⁵ The crossover hypothesis comports with conventional understandings, but is difficult to demonstrate. We have also seen various pieces of evidence marshaled in support of this hypothesis, including the experimental mock juror studies and the survey evidence from interviews with plaintiffs’ attorneys described in the

⁷⁵ Whether due to jurors who act pursuant to an “equifinality” principle, or at the behest of strategic manipulation by plaintiffs’ attorneys, the end result should be the same. I am less concerned (for the time being) with the mechanism by which this allegedly takes place. The mock juror studies (described in the next Section) select jurors as the agents responsible for discriminatingly apportioning damages on the basis of available avenues for compensatory and/or punitive damages. By contrast, Tom Baker’s study and Victor Schwartz and Leah Lorber’s work (discussed in the previous Part) focus upon lawyers and their strategic shaping and presentation of their cases in order to evade damages restrictions. It is important to keep in mind these mechanisms, as well as the interplay between them, as each might shed light upon various policy reforms’ like likelihood of success. Nonetheless, for present purposes, we will be concerned not with how such a crossover effect might occur, but the threshold question of whether such an effect exists --- or at least can be discerned in a large data set of jury trial verdicts.

previous Part. What is new here is the attempt to test the hypothesis empirically using a large data set of actual jury and bench trial verdicts. My preliminary regression results seem generally consistent with these predictions, thus potentially substantiating empirically a crossover effect.

A. *Data*

1. *Civil Justice Survey Data*

The data used in this study are from three separate Civil Justice Surveys, conducted by the National Center for State Courts, under the auspices of the Bureau of Justice Statistics.⁷⁶ The surveys include fairly detailed information from tort, contract, and real property cases from state courts of general jurisdiction from a random sample of 45-46 of the 75 most populous counties in the nation.⁷⁷ The data were collected at three separate time intervals, corresponding to cases that were disposed of in 1992, 1996, and 2001.

The 2001 data set includes 8,038 cases; the 1996 data set contains 9,025 cases; and the 1992 data set covers 6,504 cases. Fairly detailed information is recorded for each individual case, including the subject matter or case type, number and type of plaintiffs and defendants, whether bodily injury results, the prevailing party, the amount of compensatory and punitive damages, and final award amount.⁷⁸ The 2001 and 1996 data sets are more comprehensive than the 1992 data set because they cover bench trials as well as jury trials.⁷⁹

As with any data set, there are certain advantages as well as competing disadvantages. On the positive side, the data represents the most comprehensive, random sample of jury and bench verdicts from state courts across the nation. It is thus free of the biases associated with data that has been collected and coded by interested parties, such as insurance company data, or the data compiled by Jury Verdict Reporters, which relies in large part on self-reporting by parties. The 1992 and 1996 data have been used extensively by researchers, most prominently

⁷⁶ See U.S. Dept. of Justice, Bureau of Justice Statistics, Civil Justice Survey of State Courts, 2001, conducted by National Center for State Courts, ICPSR ed. (#3957), 2004; U.S. Dept. of Justice, Bureau of Justice Statistics, Civil Justice Survey of State Courts, 1996, conducted by National Center for State Courts, 3^d ICPSR ed. (#2883), 2004; U.S. Dept. of Justice, Bureau of Justice Statistics, Civil Justice Survey of State Courts, 1992, conducted by National Center for State Courts, 4th ICPSR ed. (#6587), 2004.

⁷⁷ The 2001 data are drawn from 46 counties, whereas the 1992 and 1996 data include 45 counties. Due to fluctuations in population (and thus the definition of the 75 most populous counties), in 2001 one county (Norfolk County, Massachusetts) was dropped and two were added (El Paso, - randomly drawn constitute roughly 37% of the United States population and about 50% of all civil trials. For a discussion of the stratified sampling technique employed, see the Codebooks, *supra* note ____.

⁷⁸ The final award amount differs from the total damages (i.e., compensatory plus punitive damages), in that it takes into account various reductions of the jury's award, including, for example, reductions for comparative negligence or statutory limitations, which are reflected in the final award entered by the trial judge.

⁷⁹ Moreover, they include additional variables for the seriousness, permanency, and body part of injury (if any), as well as information on whether wrongful death was claimed. These are especially salient variables for medical malpractice cases. See Sharkey, *supra* note 15.

Ted Eisenberg and Kip Viscusi, who have used the underlying data to fuel their debate over the relative predictability and consistency of punitive damages.⁸⁰ As of yet, however, the data has not been used to investigate state-by-state variations in awards, particularly variations that might be due, at least in part, to differences in state law legal regimes.⁸¹ Twenty-two states are represented in the sample of 47 counties.⁸²

At the same time, some critical limitations of the data persist (which will be explored further below). First, the 1996 and 2001 NCSC data sets do not contain information on settlements. Second, the compensatory damages amounts are not disaggregated into economic and noneconomic components.

2. *Sample: Size & Description*

The combined jury trial data set (using NCSC data from 1992, 1996, and 2001) I use in my empirical study consists of 8,859 civil cases in which plaintiffs have been awarded positive compensatory damages awards. The combined 1996 and 2001 bench trial data set I my study includes 2,519 cases. These consist of all plaintiff-winner cases, for which coding information is complete.⁸³

B. *Methodology*

This study uses multivariate regression techniques to analyze the effects of punitive damages caps upon the size of plaintiffs' recovery of compensatory damages and total damages. The goal of such multivariate analysis is to attempt to adjust for the simultaneous impact of multiple factors—including a variety of independent factors such as the existence of caps on punitive damages and caps on noneconomic damages, whether punitive damages are insurable, whether judges are elected via partisan elections, the case type, existence of bodily injury, litigation factors, and several county demographic characteristics—on the dependent variables (here, compensatory damages or final award).

The coefficients for these independent variables are first estimated using OLS.⁸⁴ Analysis of pooled cross-sectional data from separate time periods (here,

⁸⁰ See *id.* (citing numerous studies using the NCSC data).

⁸¹ In fact, the 1996 data set does not even include a variable for "State." The variable of course can be constructed readily from the "County" variable, but the point is that while county-wide differences have been explored, statewide differences have not. My study of medical malpractice damages caps is, I believe, the first study to use the NCSC data to investigate statewide differences. See *id.*

⁸² The 22 states include: Arizona, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas, Virginia, Washington, and Wisconsin.

⁸³ The 2001 data include 1,873 bench trial cases. In 1,242 cases, plaintiffs were awarded some positive amount of compensatory damages. After dropping entries with incomplete information (either casetype or litigation pair is missing), 1,157 cases remain. The 1996 data include 2,312 bench trial cases. Of these, 1,467 are plaintiff-winner cases with some positive amount of compensatory damages. After cases with missing information are dropped, 1,362 cases remain. (1,157 2001 cases plus 1,352 1996 cases = 2,519 combined cases)

⁸⁴ OLS is ordinary least squares. This means that the estimated coefficients are obtained so that they result in the lowest sums of squares of differences between the actual and estimated value of

1992, 1996, and 2001) can, however, be misleading.⁸⁵ For this reason, I employ the fixed effects regression technique, which eliminates the influence of unobservable state characteristics that do not vary over time (i.e., time invariant) in panel data sets. In essence, fixed effects allows one to compare the changes in, rather than the levels of, outcomes between states that cap punitive damages and states that do not using panel data across three time periods; 1992, 1996, and 2001.⁸⁶ In other words, I aim to identify changes in cap laws within a given state (before and after reform) and across states (comparing caps states to noncap states). Five states in my data set enacted cap legislation during the time period of the study: Illinois (cap in effect from 3/09/95-12/18/97); Indiana (cap effective 7/01/95); New Jersey (cap effective 10/27/1995); North Carolina (cap effective 1/01/96); and Ohio (cap in effect from 1/27/97-8/16/99).

1. *Model Specification*

Damages awards are modeled as functions of case characteristics, state legal characteristics, and state and time fixed effects:

$$\text{LogAdjComp} = a_i + \text{PCap}_{i,t}\beta_1 + \text{NCap}_{i,t}\beta_2 + \text{?CaseTypes}_{i,t}\beta_{3-11} + \text{?ViscusiCoding}_{i,t}\beta_{12-14} + \text{Pun}_{i,t}\beta_{15} + \text{PCapPun}_{i,t}\beta_{16} + Y_{1,t}\beta_{17} + Y_{2,t}\beta_{18} + \text{error term}$$

The models use log-linear specifications, with the logged dollar amounts of either compensatory damages or final awards as dependent variables. The log-linear specification is fairly standard and has advantages in terms of the significance testing of the models.⁸⁷

2. *Dependent Variables*

The dependent variables used in my study are fairly straightforward: compensatory damages (awarded by either jury or judge) and final total damages (awarded by either jury or judge). Final total damages include both compensatory

dependent variables. The standard assumptions of this regression technique are that the relationship between the dependent and independent variables is linear and the error term is normally distributed.

⁸⁵ While dummy State variables may be included in the OLS regression, several problems remain if pooled cross-sectional (as opposed to panel) data is used. These include: degrees of freedom, the fact that the intercepts may be picking up on a lot of random error and thus be quite inconsistent; and multicollinearity.

⁸⁶ Fixed effects models are N parallel regression lines. Observations across time in each State vary around a baseline level specific to that State. Any substantive explanatory variables that do not vary across time in each State will be perfectly collinear with the fixed effects, and thus cannot be included in the model.

⁸⁷ It is customary to use the natural log of payment amounts (whether verdict amount or else indemnity payment in insurers' closed claims) in empirical studies of medical malpractice cases. See, e.g., Sharkey, *supra* note 15. In my combined data set, the distribution of the logs is symmetric and approximates the normal distribution, whereas the distribution of compensatory damages amounts is highly right-skewed. While normal distribution is not a requirement of OLS estimation, it does ensure more reliable significance testing.

The log-linear specification is not, however, without critics. Some researchers—Viscusi most prominently—argue that it is more meaningful to use the level of compensatory damages (i.e., non-logged amount) as the dependent variable.

and punitive damages; moreover, the final award is what is entered in the judgment, which may differ from the jury verdict, if, for example, there is a reduction due to the imposition of a cap on damages

3. *Independent Variables*

a. *Litigation variables*

The NCSC data include several litigation variables, which I have incorporated into my empirical study: case type, litigant pairs, and a severity measure indicating whether or not there was bodily injury.

b. *State law variables*

i. *Punitive Damages Caps*

As previously indicated, five states in my data set—Illinois, Indiana, New Jersey, North Carolina, and Ohio—enacted caps on punitive damages during the time period of the study. Five additional states—Connecticut, Florida, Georgia,⁸⁸ Texas, and Virginia—capped punitive damages during the entirety of the period. Pennsylvania has enacted a punitive damages cap specific only to medical malpractice cases (effective 1/25/97); and Illinois and Massachusetts preclude awards for punitive damages in medical malpractice cases. The intended effect of caps on punitive damages is to reduced punitive damages awards, which would manifest itself in my regression analysis as a decrease in final total damages. The crossover hypothesis, by contrast, would predict that the cap on punitive damages would increase compensatory damages (and leave total damages unaffected).

ii. *Insurability of Punitive Damages*

States in my data set that allow insurance for punitive damages include: Arizona, Connecticut, Georgia, Hawaii, Kentucky, Michigan, North Carolina, Texas, Virginia, Washington, and Wisconsin.⁸⁹ In the remaining states—California, Florida, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New Jersey, New York, Ohio, and Pennsylvania—punitive damages are not insurable. Where punitive damages are not insurable, one would expect that compensatory damages might be higher, if, as found by Baker, plaintiffs' attorneys shape their cases in order to maximize the possibility for recovery of insurance proceeds.⁹⁰ Conversely, where punitive damages are insurable, one might expect a negative impact upon compensatory damages. In the context of the crossover hypothesis, the insurability of punitive damages may play an important role, in effect dampening its role.

c. *County demographic variables*

Because the NCSC jury trial case information was collected at the county level, I have collected county-level (as opposed to state-level) data on various

⁸⁸ The punitive damages cap in Georgia does not apply either to intentional torts or products liability cases, so these case types were coded as PCap=0 in my data set.

⁸⁹ See Table 3, Appendix 1. In each of these states, however, intentional tort cases have been coded as non-insurable, given that intentional act exclusions are ubiquitous in insurance contracts.

⁹⁰ See *supra* ____.

demographic characteristics from the 1990 and 2000 Census.⁹¹ This also makes sense, given that jurors are selected for state trials at the county level; thus, I am thereby controlling for juror demographics (at least to the extent that juror demographics reflect county demographics).⁹² Guided by the findings of previous empirical studies, I control for county-level variations in median household income, poverty rate, percentage of population over 65 years of age, and number of lawyers per 100,000 residents. I briefly describe the predicted impact of median household income and poverty rate.

i. *Median Income*

I include a variable (Log Med Income) for the log of median household income by county (in 1999 dollars).⁹³ A rise in award amount is to be expected with increases in mean household income, if compensatory damages increase with increases in wages.⁹⁴ And previous empirical studies have indeed found that median household income is positively associated with claim amounts.⁹⁵

ii. *Poverty*

I include a measure for Poverty, defined as the percentage of individuals with incomes under the poverty line of the total population in each county.⁹⁶ Given the positive association of income and tort awards, one might likewise expect awards to fall as poverty rates increase, given that wages are lower in high-poverty counties. Helland and Tabarrok have found instead that trial awards increase with county poverty rates—an effect they ascribe to an increase in poverty among jurors drawn from the county jury pool.⁹⁷ The strong and positive

⁹¹ Information for median income, poverty rate, and percentage of the population over 65 years in age is available from the 1990 and 2000 Censuses. Information regarding the numbers of lawyers per 100,000 residents is available from the EEO files of the 1990 Census.

⁹² Cf. Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. LEG. STUD. 27, 52 (2003) (“[W]e do not have data on the composition of the jury, and we must therefore infer jury characteristics from county characteristics.”) [hereinafter *Race, Poverty*].

⁹³ This information was obtained from the 1990 and 2000 Census data available at www.census.gov.

⁹⁴ See also Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 172 (1999) [hereinafter *Court Politics*] (“Compensation for injury will also tend to increase with per capita income to the extent that safety (noninjury) is a normal good.”).

⁹⁵ Cf. *id.* at 177 (reporting positive, and highly statistically significant, coefficient on per capita income in regression on total awards).

⁹⁶ The 1990 and 2000 Censuses include the number of individuals living below the poverty line, by county. These numbers were divided by the total population of each county, in order to get the percentage figures.

⁹⁷ Helland & Tabarrok, *Race, Poverty*, *supra* note 92, at 34-35 (reporting multivariate regression result that “a 1-percentage-point increase in poverty rates increases awards by approximately \$35,300 in the JVR data set and by \$33,700 in the state court data set [the NCSC 1992 Civil Justice Survey data]”). Helland and Tabarrok find further evidence that suggests that “poverty alone is picking up results more properly ascribed to some combination of poverty, black, and Hispanic.” *Id.* at 39. See also Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341 (2002); Tabarrok & Helland, *Court Politics*, *supra* note 94.

relationship between poverty rates and torts awards validates the “wealth redistribution” hypothesis.⁹⁸

C. *Limitations*

The two principal concerns in any multiple regression analysis are (1) endogeneity; and (2) selection bias, each of which may plague my models. I will address each in turn. Perhaps the greatest difficulty in multivariate regression analysis is distinguishing between treatment effects—here, the existence of caps on punitive damages—and secular trends. The endogeneity concern here refers to the possibility that the existence of legislation imposing caps on punitive damages is an endogenous (as opposed to exogenous) variable of the model. In other words, coding for the enactment of cap legislation might instead pick up the effects of underlying preexisting conditions in the state in which legislation is enacted, which actually caused the legislation to be enacted in the first place. If that is so, then any variable measuring the impact of the cap variable (if endogenous) is jointly determined and is thus not independent of the error terms in the model—violating one of the fundamental assumptions of multivariate linear regression models.

One methodology used in the face of endogeneity concerns is to approximate “natural experiments,” whereby the same treatment group may be studied before and after an exogenous change in policy.⁹⁹ As mentioned above, the punitive cap status changed in five states in my study over the relevant time period: Illinois, Indiana, New Jersey, North Carolina, and Ohio. Preliminary testing of the before/after effects in these states has not yielded promising results.¹⁰⁰

⁹⁸ According to Frank McClellan, “the only institutions in America where people of color have the power to make immediate wealth redistribution decisions are urban governments and juries.” Frank McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761 (1996), *quoted in* Helland & Tabarrok, *Race, Poverty*, *supra* note 92, at 28. See also Helland & Tabarrok, *Court Politics*, *supra* note 94, at 172-73 (“Plaintiffs in tort cases are typically poor relative to defendants, and plaintiffs’ lawyers will often argue that ‘greedy’ corporations need to be taught lessons. We expect that juries will respond to these arguments more favorably the greater the local poverty rate.”).

⁹⁹ Even here, there is still the possibility that the policy is an endogenous (as opposed to exogenous) variable of the model.

¹⁰⁰ The breakdown of before/after cases are as follows: Indiana (39 cases before cap/ 44 cases after); New Jersey (340 before/ 178 after). The numbers are too low in Indiana for reliable testing. Mean and median tests do not indicate a significant difference by cap status in New Jersey; nor is the impact of PCap significant in the regression.

In Illinois and Ohio, there are three relevant time periods, before the cap, after the enactment of cap, followed by repeal of the cap. If there were sufficient observations in all three time periods, these states would prevent fertile ground for an empirical test of the effect of the cap. For Illinois, there are 338 cases before the cap, 126 during the cap period, and 88 cases after the repeal of the cap. Mean and median tests show that the impact of PCap is significant and positive; however, controlling for other factors in the regression, the impact of PCap becomes insignificant. In Ohio, there are 342 cases before the cap, 39 cases during the cap period, and 123 cases after the repeal of the cap. Mean and median tests show that the impact of PCap is significant and positive; moreover, the regression also indicates that the impact of PCap is positive and significant ($t=3.32$).

Nor have my attempts (thus far) to find a suitable instrument to sort out endogeneity bias been successful. My idea was to construct an instrumental variable based upon the dominant political party affiliation of the state legislature, which plausibly might affect whether cap legislation is passed in a particular state, but would not have an independent impact upon damages award amounts.¹⁰¹ However, dominant political party affiliation of the state legislature was not strongly correlated with enactment of caps (at least during the relevant time period of my study), which precluded its use as an instrument.¹⁰² As it turns out, Republican-dominated legislatures have enacted the more recent punitive damages caps in the 1990s; whereas the earlier caps in the 1980s were the product of Democrat-dominated legislatures.¹⁰³ I also tested whether a variable for partisan-elected judges might be employed as an instrument. Again, the correlation between this variable and cap (8%) was too low. Thus, endogeneity remains a serious concern.¹⁰⁴

The second major concern with multivariate regression analysis is selection bias. The model implicitly assumes that caps on punitive damages do not affect the probability of litigation. In fact, the existence of caps may affect the likelihood that attorneys settle cases, as well as the types of cases they are likely to bring forward. This selection bias is potentially critical: depending on how caps affect the selection process, the model may generate either spurious findings or no effect of caps, or else exaggerated effects. Ted Eisenberg (and collaborators) attempted to minimize this problem by suggesting that because punitive damages are not a significant factor in cases that go to trial, they also are not a significant factor in the settlement process.¹⁰⁵ Mitchell Polinsky has criticized this reasoning, however, on the ground that “the observed impact of

However, as indicated, there are relatively few cap observations. All of the observations for North Carolina post-cap, which was effective as of January 1, 1996. (This is because a county from North Carolina was included only in the third round of data collection in 2001.)

¹⁰¹ My intuition here was that a political measure, such as dominant party affiliation of the legislature that enacted the caps, might be a promising instrument if we posit that it reflects the preferences of the “median voter” in the state, but may not be significantly correlated with the characteristics that influence damages awards. This might be particularly plausible in my data set, which represents urban juror awards (since the data was collected from a sample of the largest counties across the United States), which may not be especially correlated with measures capturing the preference of the “median voters” in the state.

¹⁰² I constructed two separate measures of party affiliation of the legislature. The first was a categorical variable for dominant political party: 0=Democrat; 1=Divided; 2=Republican. The correlation of this categorical variable with PCap was very low (11/3%). The second was a variable representing the percentage of Republicans in the state legislature. Here, too, the correlation was low (12.8%).

¹⁰³ Thus, Republicans dominated the state legislatures when punitive damages caps were enacted in Illinois (1995), Indiana (1995), New Jersey (1995), Ohio (1997), and Pennsylvania (1997, caps in medical malpractice only). North Carolina is the one exception: the legislature was divided in 1996, when caps were enacted. By contrast, Democrats dominated in state legislatures when punitive damages caps were enacted in Florida (1986), Georgia (1987), Texas (1987), and Virginia (1988).

¹⁰⁴ Some researchers have suggested that endogeneity is less of a concern when the fixed effects technique is employed. I do not, however, see why this should be the case.

¹⁰⁵ CITE.

punitive damages on trial outcomes may substantially understate the impact of punitive damages on settlements.”¹⁰⁶ Given the limitations of my data set (namely, it does not include and separately identify settlements from verdicts), it is difficult to get traction on the possible bias.

D. *Results*

Recall that the hypothesis I am testing here is that, as punitive damages are capped, noneconomic compensatory damages will increase (as a result of jurors’ sensibilities and/or plaintiffs’ attorneys’ strategic presentation of their cases).

1. *Jury Trial Verdicts*

a. *Combined Data*

If crossover from punitive into compensatory damages were rife in the face of punitive damages, I would expect a positive (and significant) effect of PCap upon jury compensatory damages awards, and an insubstantial effect of PCap upon overall final awards. Table 7 reports the results of the regressions, using the full combined jury trial data set (i.e., 1992, 1996, and 2001 combined jury trial data set), with jury compensatory damages awards and total damages awards (i.e., final compensatory plus punitive damages) as dependent variables.

Regression (1) reports results from the OLS regression, which includes the full set of independent variables. Of particular note, PCap, true to prediction, does have a positive (and statistically significant) impact upon jury compensatory damages awards. The coefficient translates to a rough dollar equivalent of \$7,004.¹⁰⁷ The variable for insurance for punitive damages also conforms to its predicted effect (and likewise is statistically significant): if punitive damages are insurable, the compensatory damages are, on average, \$19,292 lower than if punitive damages are not insurable. Most of the case type variables are positive and statistically significant (which makes sense given that the omitted category, auto, is associated with lower damages awards); and all of the litigant pair variables are positive and statistically significant (which, again, makes sense in light of the fact that the omitted category, individual vs. individual, tends to be associated with lower awards). With respect to the county demographics

¹⁰⁶ See A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. LEG. STUD. 663, 668-69 (1997). In attempting to assess possible selection bias in a subsequent article, Eisenberg et al. raise the issue of whether state punitive damages caps might have an impact on the frequency and level of punitive damages. In other words, the existence of a cap on punitive damages might lessen defendant’s incentive to settle (by lessening defendant’s fear of losing a huge award at trial), leading to more jury trials, and thereby increasing the percentage of positive punitive jury awards. The authors, however, did not find that statutory punitive damages caps were correlated positively with the frequency of punitive awards and thus rejected (at least preliminarily) the existence of such a settlement selection effect. The authors called for further study and acknowledged that there might be a more intricate relationship between caps and punitive award frequency. See Theodore Eisenberg *et al.*, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002).

¹⁰⁷ I have computed rough dollar equivalents for the regression coefficients by measuring its effect, while holding each of the other independent variables at their respective means, and then taking the antilog of the difference in log values (since the dependent variable is in logs).

variables, the median income and poverty variables are both positive and statistically significant, in line with their predicted effects.¹⁰⁸ The regression explains roughly 22% of the variation in the dependent variable ($R^2=0.22$).

Regression (2) uses the fixed effects technique, and thus drops any time-invariant variables, such as the variables for whether punitive damages are insurable and whether judges are elected by partisan elections. (The effects of these variables are included as state-specific time-invariant unobserved effects, which are cancelled out in the model.) Most of the county demographic variables remain, because they could be coded at two different time periods.¹⁰⁹ The effect of PCap on jury compensatory damages awards is now even more pronounced (and remains statistically significant). The existence of the cap on punitive damages is associated with, on average, an increase in compensatory awards of approximately \$28,808.¹¹⁰ The effect of poverty also remains positive and statistically significant.¹¹¹ The regression explains roughly 19% of the overall variation in compensatory damages.¹¹²

Regressions (3) and (4) introduce two significant interactive terms. Given that (as the previous regressions demonstrate) PCap has a positive impact on compensatory damages overall, the effect of PCap should be even greater where the jury actually awarded punitive damages. I therefore generated a dummy variable, Pun Award, which is equal to 0 where there were no punitive damages and 1 where punitive damages were awarded. Regression (3) includes the interaction term for Pun*PCap. Cases in which punitive damages were awarded are associated with, on average, an increase of \$23,074 in compensatory damages.¹¹³ Moreover, as predicted, of those cases in which punitive damages were awarded, the additional effect of PCap is not only positive and statistically significant, but of considerable magnitude: Pun*PCap is associated with, on average, an increase of \$137,552 in compensatory damages.

Regression (4) tests a similar interaction, but, instead of singling out cases in which punitive damages were actually awarded, it isolates fraud, a case type category in which punitive damages are especially prevalent. Cases involving

¹⁰⁸ A one standard deviation increase in the median household income is associated with, on average, a \$7,576 increase in compensatory damages. A one standard deviation increase in the poverty rate is associated with, on average, an increase of \$15,547.

¹⁰⁹ The variable for lawyers per 100 thousand residents, however, drops out because it is only available at one point in time.

¹¹⁰ The cap on noneconomic compensatory damages (NCap) is negative, as would be predicted, but it is not statistically significant. The existence of NCap is associated with, on average, a decrease of \$7,806 in compensatory awards.

¹¹¹ A one standard deviation increase in the poverty rate is associated with, on average, an increase of \$11,720 in compensatory awards.

¹¹² The “between” R^2 corresponds to the amount of the variation in the dependent variable that is explained by the coefficients of the independent variables. This measure does not take into account variations within States. The “within” R^2 , by contrast, estimates the explanatory power in the dependent variable as a result of changes within the units (here, States). The overall R^2 is a matrix-weighted average of within and between R^2 s.

¹¹³ The coefficient on Pun Award in Regression (3) is positive and statistically significant.

fraud are associated with, on average, \$46,639 more in compensatory damages awards than auto cases. Moreover, fraud cases in states that have a cap on punitive damages are associated with, on average, a \$175,643 increase in compensatory damages. (The coefficient of Fraud*PCap in Regression (4) is not only positive and statistically significant, but is also of considerable magnitude.)

Finally, Regression (5) replicates the basic fixed effects model (i.e., Regression (2)), substituting final total damages (for compensatory damages) as the dependent variable. Consistent with the crossover hypothesis, my prediction was that PCap should have little to no effect upon the final total damages award, as higher compensatory damages substituted in effect for restricted punitive damages. In Regression (5), however, the effect of PCap remains positive and statistically significant. The magnitude of the effect is somewhat lower: the existence of PCap is associated with, on average, a \$22,580 increase in total damages (as compared to a range from \$26,776 to \$28,553 increase in compensatory damages, as reported in Regressions (2)-(4)). This is a surprising result, for it suggests that, if crossover from punitive to compensatory damages could explain the increase in compensatory awards, more than a mere substitution from punitive into compensatory damages is taking place (since total damages also increase).

b. *Auto versus Non-Auto Cases*

While the above results are generally consistent with the crossover effect, it might be that PCap is simply picking up the influence of some other factor(s), especially in light of the potentially serious endogeneity problem discussed above.¹¹⁴ I therefore constructed a further test of the impact of punitive damages cap by separating the data into two categories: auto cases and non-auto (all other) cases. Auto cases comprise nearly half of the jury cases; moreover, they are the category of case in which punitive damages are least likely. I would therefore not expect the existence of PCap to have a discernible effect upon either compensatory damages awards or final awards. By contrast, by operation of the crossover effect in the non-auto cases, I would expect PCap to have a positive effect upon compensatory damages (and again, a negligible effect upon final awards).

Table 8 presents the results for separate fixed effects regressions run on the disaggregated categories of auto and non-auto cases.¹¹⁵ Regression (1), which presents the results for non-auto cases, confirms the previous finding (in the combined jury data) of a positive and statistically significant impact of PCap upon compensatory damages. Moreover, the magnitude of the effect is greater than in

¹¹⁴ Moreover, the fact that, in Regression (5) above, PCap has a positive and statistically significant impact upon final award amounts (in addition to compensatory damages awards) casts additional suspicion on whether PCap is in fact picking up some other unobserved factor (or preexisting factors that vary across states).

¹¹⁵ I have included the jury trial data from 1996 and 2001, and have (for the moment) excluded the 1992 data. The 1992 auto data is curious, in that the median jury awards are more than two times those of 2001; my discussions thus far with the research designers at NCSC have not uncovered what might possibly explain the sharp changes in auto (as distinct from overall) awards in 1992.

the combined data set. Restricting the data to non-auto cases, the existence of a cap on punitive damages is associated with, on average, an increase of \$61,073 in compensatory damages awards. (Recall that, in the combined jury regressions discussed above, PCap was associated with an average increase in compensatory awards on the order of \$28,000.)

In sharp contrast, there is no discernible effect of PCap on compensatory awards in Regression (2), which is limited to auto cases. The coefficient on PCap is positive; however, it is statistically insignificant, as well as relatively small in magnitude.¹¹⁶

2. *Bench Trial Verdicts*

I was able to run a further test of the crossover hypothesis by investigating separately the bench trial verdicts. If the crossover phenomenon is the result of jurors' predilection towards holistic total damages amounts and/or strategic manipulation by plaintiffs' attorneys, one would expect to pick up the effect in jury trials, but not in bench trials (which lack the critical jury component). To be sure judges may be "enablers" of crossover (as in fact we saw in examples in Part I), but absent the jury, judges are far more constrained in this realm. Indeed, the judge might be seen to be evading or nullifying the law, if, in the face caps, he or she were simply to award higher compensatory damages.

Table 9 reports the fixed effects regression results for jury trials (Regressions (1)-(2)) as compared with bench trials (Regressions (3)-(4)), using alternatively compensatory damages and final damages as dependent variables.¹¹⁷ Consistent with my prediction, PCap has a positive and significant impact upon compensatory damages awards in jury trials, but not in bench trials. Moreover, while PCap continues to have a positive (and significant) impact upon final jury awards, PCap has a negative (albeit not statistically significant) impact upon final bench awards: the existence of a cap on punitive damages is associated with, on average, a decrease of \$3,720 in final bench awards. This result, too, is consistent with the prediction that judges would be inclined to implement caps on punitive damages in the way intended by the law, as opposed to substituting higher compensatory damages in the wake of caps.¹¹⁸

E. *Interpretations & Implications*

In sum, my preliminary results are consistent with the crossover hypothesis. Caps on punitive damages have a positive and significant impact on juror compensatory damages awards, controlling for a host of independent variables, as well as year and state fixed effects. When the jury cases are divided

¹¹⁶ In the auto cases, PCap is associated with, on average, an increase of \$7,315 in compensatory damages.

¹¹⁷ Because the bench trial data is available only from the 1996 and 2001 NCSC data sets, I have similarly limited the jury trial data to those data sets. (Of course, Table 7 presents similar findings for jury awards from the combined data set.)

¹¹⁸ The impact of the poverty rate variable on bench trial awards is, however, a bit puzzling. The percentage of the population below the poverty line has a positive, and statistically significant, impact upon bench awards.

into auto and non-auto cases, the impact of PCap persists (indeed, it is of even greater magnitude) in the non-auto cases, and disappears in the auto cases—where punitive damages are most infrequent, and thus any crossover effect would be implausible. Finally, whereas the effect of PCap is positive and significant in jury trial awards (both taken as a whole, and restricted to non-auto cases), there is no discernible impact in bench trial cases. With the major caveat that further testing is warranted—in particular to investigate potential selection and simultaneity bias—these preliminary results confirm the real-world intuition that, in jury cases, punitive damages and noneconomic compensatory damages are far more malleable than is seemingly recognized by tort doctrine (and possibly theory).

III. CONFRONTING THE ERADICATION OF THE PUNITIVE-COMPENSATORY DIVIDE

The results from my empirical study in Part II, if further substantiated, have potentially dramatic implications for tort policy and theory. This Part confronts the dilemma posed by the eradication of the dividing line between punitive and compensatory damages. In terms of response, two divergent paths present themselves. First, measures might be taken to shore up the boundary line. Efforts might be directed either at more thorough (or insistent) instructing of jurors, or else, at judicial efforts to rein in overzealous plaintiffs' attorneys. Alternatively, we might move in the opposite direction, towards acceptance of the collapse of the separate categories. In this regard, I suggest the ways in which we would be forced to revisit the efficacy of selective damages caps in tort reform generally, rethink our approach to medical malpractice reform, as well as recognize that judicial decisionmaking may function akin to a post-hoc "judicial cap" upon various categories of awards that might in turn set in motion the crossover effect.

A. *Reinforcing the Categories: Shoring Up Boundaries*

1. *Instructing Jurors*

EEOC v. Dial,¹¹⁹ a sexual harassment class action, is illustrative of the "juror instruction approach" to maintaining the distinct boundary between punitive and compensatory damages. In that case, the district court fashioned three-phase trial plan: in phase one, the jury would determine classwide compensatory liability; in phase two, the jury would determine whether the defendant's conduct justified punitive damages; and in phase three, the jury would issue a classwide punitive damages award.¹²⁰ The court acknowledged the risk, however, that a punitive damages award in phase three might be inflated by the jury's inclusion of a compensatory component.¹²¹ To combat this risk, the court would instruct the jury to determine an amount solely for the purposes of punishment and deterrence. And, to give that instruction additional emphasis, the court would tell the jurors that they should assume that each plaintiff with a valid

¹¹⁹ 259 F. Supp.2d 710 (N.D. Ill. 2003).

¹²⁰ *Id.* at 713.

¹²¹ *Id.* at 714. The court cited *State Farm*, where the U.S. Supreme Court mentioned this risk of a compensatory component of punitive damages. *See supra* ____.

claim had been fully compensated (despite the fact that an actual award of compensatory damages would not in fact take place until a later stage).

A similar approach was taken by the district court in the *Exxon Valdez* litigation.¹²² Among other things, the jury was told that “punitive damages are not intended to provide compensation for plaintiffs’ losses and that they should assume that the plaintiffs had been fully compensated for the damages that they had suffered as a result of the oil spill.”¹²³

The efficacy of such jury instructions remains uncertain. As I have explored elsewhere, much work remains to be done on the role that jury instructions might play in providing guidance to jurors in their punitive damages decisionmaking process.¹²⁴

2. *Reining in Attorneys*

There are, as well, limits to courts’ tolerance of “sub rosa” punitive awards. A vivid example is provided by a recent decision of the Michigan Supreme Court, overturning a \$21 million jury award in a sexual harassment case—“the largest recorded compensatory award for a single-plaintiff sexual harassment suit in the history of the United States.”¹²⁵ Punitive damages were not authorized under Michigan law.¹²⁶ The compensatory award, however, was comprised of \$20 million for noneconomic damages—“mental anguish, physical pain and suffering, fright and shock, denial of social pleasures and enjoyments, embarrassment, humiliation, mortification, shame, anger, chagrin, disappointment, worry, outrage, [and] disability including the loss or impairment of plaintiff’s psychological well-being.”¹²⁷

In its appeal to the Michigan Supreme Court, DaimlerChrysler argued that the verdict was “a disguised punitive-damages award.”¹²⁸ And the court was persuaded that plaintiff’s attorney sought to “incite the jury to punish the

¹²² 296 F. Supp.2d 1071, 1080-81 (D. Alaska 2004). *See also supra* text accompanying note ____.

¹²³ *Id.* at 1081. *See also* White v. Ford Motor Co., 2003 WL 23353600, at *27 (D. Nev. 2003) (endorsing an instruction to a jury that they should assume that the plaintiffs had been fully compensated).

¹²⁴ *See* Sharkey, *supra* note 10, at 401-04 (discussing the role of jury instructions in providing guidance to jurors’ determination of punitive damages).

¹²⁵ Gilbert v. DaimlerChrysler, CITE (Mich. 2004). *Id.* at ____ (“To our knowledge, plaintiff’s \$21 million verdict is the largest amount ever awarded for a single-plaintiff sexual harassment claim in the United States. It is seventy times larger than the maximum award permitted under title VII, the federal civil rights act.”).

¹²⁶ Michigan is somewhat unique (as indicated above) in terms of allowing punitive damages only in specified contexts and for compensatory purposes only; and punitive damages were not authorized in this context. Gilbert CITE (“[P]unitive damages are available in Michigan *only* when expressly authorized by the Legislature. Here, the Civil Rights Act does not authorize punitive damages . . .”).

¹²⁷ Gilbert CITE.

¹²⁸ Adam Liptak, *Pain-and-Suffering Awards Let Juries Avoid New Limits*, N.Y. TIMES, Oct. 28, 2002.; *id.* (“As all sorts of limitations have recently been placed on punitive damages, creative lawyers have shifted their attention to pain and suffering, a little-scrutinized form of compensation for psychic harm.”).

defendant even while disclaiming that he was seeking punitive damages” by “repeatedly using language that call[ed] for punitive rather than compensatory damages.”¹²⁹ But perhaps the exception proves the rule: certainly trial counsel’s tactics were far from subtle.¹³⁰

Courts might nonetheless be particularly on guard in cases involving dignitary and constitutional harms. For example, in *Levka v. City of Chicago*, the jury awarded \$50,000 for “[e]motional trauma and distress, mental and physical suffering, anguish, fear, humiliation and embarrassment” to a woman who was subjected to an unwarranted strip search.¹³¹ The jury had rejected altogether the woman’s claim for lost earnings and loss or impairment of earning capacity. The Court of Appeals remitted the award to \$25,000; in so doing, the court explained: “We are left with the distinct impression from all the evidence that the jury was in fact assessing *punitive* rather than compensatory damages”¹³² Dignitary and constitutional harm cases present a fertile ground for crossover. In these cases, the defendant’s motives and the nature of its conduct—typically relevant for the determination of punitive damages—assume a relevance to compensatory damages: as a general matter, the more outrageous the defendant’s behavior, the more outraged and distressed the victim will be.¹³³

B. *Abandoning the Categories: Rethinking Tort Reform*

Damages caps—which occur most often in the context of punitive and noneconomic (primarily in medical malpractice) damages—are one of the most hotly debated areas of tort law today. The viewpoints of their advocates and detractors seem to stem from wholly irreconcilable perspectives of the most fundamental aspects of the tort system itself. But what is most relevant about the debate for present purposes is not what divides those on either side, but what unites them: advocates and critics of damages caps—as do the legislatures that enact them—accept, unquestioningly, the premise that punitive damages caps in general tort cases will in fact result in smaller total damages awards, and that noneconomic damages caps in medical malpractice cases will, similarly, translate

¹²⁹ Gilbert CITE. For example, plaintiff’s counsel exhorted the jury that its verdict should “reflect the enormity of the wrong, the intolerable nature of the injury, the extent of the humiliation, the torture, the extent of the outrage perpetrated upon” *Id.* at ___. Accordingly, the court determined that, “[i]nstead of awarding plaintiff an amount that fully and fairly compensated her, the jury returned a verdict that responded to plaintiff’s request that they ‘send a message’ to Chrysler.” *Id.* at ___.

¹³⁰ To give a flavor of plaintiff’s attorney’s argument:

Plaintiff’s counsel evoked images of physical abuse and torture, compared his client to survivors of the Holocaust, and argued that defendant DaimlerChrysler thought of itself as “God Almighty,” exempt from the legal norms that govern others.

Gilbert CITE. *Id.* at ___ (“By associating plaintiff with those who had endured inhuman treatment in concentration camps, counsel likened defendant DaimlerChrysler—which, as the jury was informed, was partially under German ownership—with the Nazis.”). In sum, the court is persuaded that “[o]verreaching, prejudice-baiting rhetoric appears to be a calculated, routine feature of counsel’s trial strategy.” *Id.* at ___.

¹³¹ 748 F.2d 421 (7th Cir. 1984).

¹³² *Id.* at ___ (emphasis added).

¹³³ See DOBBS, REMEDIES § 7.3(2) at 310.

into smaller compensatory damages awards. In other words, both sides take it somewhat for granted that selective damages caps will function as intended, leading neither side to question the underlying—and possibly illusory—categorical distinctions upon which they are based.¹³⁴

1. *Legislatures*

a. *Damages Caps*

Punitive damages are the bane of the vociferous tort reform lobby. It should come as no surprise to learn, then, that the overwhelming majority of states that have enacted caps in general civil or tort cases have focused their attention on caps or limitations on punitive damages.¹³⁵ Nineteen states currently impose a general cap or restriction on punitive damages awards; and two additional states impose more limited punitive damages caps.¹³⁶ (See Table 1 in Appendix I.) Of these twenty-one states, only four have imposed caps on noneconomic compensatory damages as well.¹³⁷ It is thus fair to say that, for the most part, reform efforts, directed at punitive damages alone, view these damages as a distinct category of damages that warrant external controls, unlike all other damages, which do not.

Medical malpractice reform has followed an ostensibly different path. In contrast to general tort reform, attempts to regulate medical malpractice damages awards have not focused on punitive damages per se. Although punitive damages are available in cases of gross negligence and outrageous conduct on the part of the health care provider, punitive damages are rarely awarded in medical malpractice cases.¹³⁸ The paucity of punitive damages awards may well explain the rarity of unique punitive damages restrictions in medical malpractice cases.

The focus, instead, has been, by and large, on noneconomic damages caps, treated as an entirely separate and distinct component of compensatory damages. Twenty-four states have, at some time since the 1970s, adopted specific limits on compensatory damages in medical malpractice awards; an additional nine states enacted more general compensatory damages limitations that apply to all cases (including medical malpractice). These compensatory damages caps remain in effect today in twenty-eight states.¹³⁹ The most common medical malpractice damages caps restrict noneconomic compensatory damages only, while leaving

¹³⁴ Kelso & Kelso, at 20 (“There is . . . no question [that] the MICRA [California’s noneconomic damages cap in medical malpractice cases] is systematically reducing compensation and substantially reducing the damages paid by culpable defendants.”). For a fuller discussion of the agreed-upon assumption in the context of medical malpractice, see Sharkey, *supra* note 15.

¹³⁵ The constitutionality of these caps on punitive damages is discussed *infra* Section III.A.2.b.

¹³⁶ See ME. REV. STAT. ANN. TIT. 18-A, § 2-804(b) (capping wrongful death cases at \$75 million); 40 PA. CONS. STAT. ANN. § 1303.505.

¹³⁷ Two states—Hawaii and Maryland—cap general tort noneconomic damages, but not punitive damages.

¹³⁸ See Sharkey, *supra* note 15.

¹³⁹ See *id.* at [Table listing caps]. The constitutionality of these caps on noneconomic compensatory damages is discussed *infra* Section III.A.2.a.

the jury free to award whatever economic compensatory damages it deems appropriate.¹⁴⁰

Thus, while the particular focus in the medical malpractice context differs, the underlying theory is the same as that which drives the punitive damages caps: the theory that there are, in fact, distinct categories of damages that can be separately capped without any collateral (unintended) effect on the other categories.

b. *Statutory Damages*

Another as-yet unexplored example of significant overlap between compensatory and punitive damages (with potential public or societal components as well) arises in the context of statutory damages. An increasing number of statutes and regulations specify penalties that are conceptually similar to punitive damages.¹⁴¹ In a recent case, the Second Circuit remarked that, although statutory damages amounts might be calculated in part to compensate for actual losses that are difficult to quantify, they are often also motivated in part by a pseudo-punitive intention to “address and deter overall public harm.”¹⁴² In recent times, legislatures have multiplied legislative prohibitions against individual conduct, as well as providing civil remedies in the form of statutorily imposed damages. Legislatures may feel increasing pressure to attempt to classify statutory damages as either remedial or else punitive.¹⁴³ But will such a distinction hold up? Like common law punitive damages, statutory multiple damages may inhabit both spheres.¹⁴⁴

¹⁴⁰ Currently, sixteen states have laws enacted specifically to rein in the noneconomic portion of medical malpractice damages. An additional six states have enacted caps on noneconomic damages that apply not only to medical malpractice cases, but more generally. *See id.* at ___. Only six states—Colorado, Indiana, Louisiana, Nebraska, New Mexico, and Virginia—have taken a wider approach to damages limitation in medical malpractice cases, capping total compensatory damages; in other words, they limit economic (i.e., medical expenses and lost wages) as well as noneconomic damages.

¹⁴¹ For a discussion of the relationship between statutory damages and punitive damages, see Sharkey, *supra* note 12, at ___.

¹⁴² *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13 (2nd Cir. 2003).

¹⁴³ *Compare, e.g., Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3rd Cir. 1991) (RICO’s treble damages are “punitive” in nature), *with, e.g., Convent of the Visitation School v. Continental Cas. Co.*, 707 F. Supp. 412 (D. Minn. 1989) (treble damages under Human Rights Act are “compensatory” in nature).

¹⁴⁴ The legislative characterization may likewise affect whether or not the entire apparatus of the Supreme Court’s punitive damages excessiveness jurisprudence applies. *Compare Parker v. Time Warner Entertainment Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (suggesting that the Supreme Court’s due process review might apply, where the combination of statutory damages with the class action mechanism “may expand the potential statutory damages so far beyond actual damages suffered that the statutory damages come to resemble punitive damages”), *with Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp.2d 455, 460 (D. Md. 2004) (“The *Gore* guideposts do not limit the statutory damages here because of the difficulties in assessing compensatory damages in this case. Statutory damages exist in part because of the difficulties in proving—and in providing compensation for—actual harm in copyright infringement actions.”).

2. *Courts*

It may well be that courts, by exercising their discretion to determine on which side of the fact-law divide various components of damages fall, are likewise serving a role akin to that of statutory caps; in this regard, judicial decisionmaking might be viewed as instituting a form of post-hoc “judicial cap” upon various categories of awards that might, in turn set in motion the crossover effect.

a. *Compensatory Damages: “Law/Fact” Debate Over Caps*

In assessing the constitutionality of various caps on compensatory damages—most often in the context of medical malpractice, but sometimes applicable more generally to all tort actions—state courts are divided on the issue of whether the fact-finding province of the jury is distinct from the legal remedy granted by the court after operation of the cap.

To some courts, damages are the sacrosanct province of the jury. Thus, the Alabama Supreme Court, relying upon the state’s well-documented historic practice of sending damages questions to the jury, especially in the case of noneconomic damages “not susceptible to precise measurement,” struck down a cap on noneconomic damages.¹⁴⁵ The Court seems to suggest that capping jury awards would truncate the jury trial right to such a degree that it would alter fundamentally the nature of that guarantee.¹⁴⁶ Moreover, these courts reject the argument made by other courts—pursued below—that the imposition of the cap is an issue of “law” that does not invade the province of jury decisionmaking. In the words of the Washington Supreme Court, “[s]uch an argument pays lip service to the form of the jury but robs the institution of its function.”¹⁴⁷

By contrast, other courts have determined that, while “it is the duty of the jury to find the facts[, it is] the duty and domain of the court to determine the legal rights of parties after the return of the verdict.”¹⁴⁸ Or, in the words of the Fourth Circuit, “once the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law.”¹⁴⁹ In upholding a \$100,000 cap on total compensatory damages in

¹⁴⁵ *Moore v. Mobile Infirmary Assoc.*, 592 So.2d 156, 160 (Ala. 1991). *See also id.* at 159 (“It is undisputed that juries were employed in Alabama in 1901 to assess ‘quality of life’ damages—damages for pain, suffering, and other noneconomic loss in actions alleging negligent personal injury.”); *Sofie v. Fireboard Corp.*, 771 P.2d 711, 716 (Wash. 1989) (“The determination of the amount of damages, particularly in actions of this nature [i.e., noneconomic damages] is primarily and peculiarly within the province of the jury . . .”).

¹⁴⁶ *See Moore*, 592 So.2d at 163-64. *See also Smith v. Department of Ins.*, 507 So.2d 1080, 1088-89 (Fla. 1987) (“Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right.”).

¹⁴⁷ *Sofie*, 771 P.2d at 721. *See also Lakin v. Senco Prods.*, 987 P.2d 463, 473 (Ore. 1999) (“We conclude that to permit the legislature to override the effect of the jury’s determination of noneconomic damages would ‘violate’ plaintiffs’ right to ‘trial by jury’ . . .”).

¹⁴⁸ *Guzman v. St. Francis Hosp.*, 623 N.W.2d 776, 784 (Wis. Ct. App. 2000).

¹⁴⁹ *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989). *See also Davis v. Omitowoju*, 883 F.2d 1155, 1161-62 (3d Cir. 1989).

medical malpractice cases, the Indiana Supreme Court held that “the statute does not withdraw the fixing of damages in excess of the \$100,000 limit from the jury at all.”¹⁵⁰ The court reasoned that the cap functioned, instead, as an exogenous legal restriction, which came into play once the jury was out of the picture.¹⁵¹

b. *Punitive Damages*

This same fact/law distinction plays out in the context of punitive damages caps. Thus, the Alabama Supreme Court, in holding that a cap on punitive damages interferes with the constitutional right to a jury trial, was guided by its previous similar ruling regarding noneconomic damages caps.¹⁵² In both cases, according to the Court, “a jury is empanelled and deliberates, with the expectation that its verdict will have efficacy, an issue of fact singularly within its authority.”¹⁵³ In sharp contrast, other courts have determined that the imposition of caps is an issue of law, not fact.¹⁵⁴ But more is at play than the same fact/law divide explored above in the context of compensatory damages caps.

An additional critical distinction emerges: the contested nature of punitive damages as an individual right. Take for example a recent ruling by the Oregon Supreme Court—a court that had previously struck down caps on noneconomic damages as impermissible interference with the jury’s factfinding mission—upholding a scheme whereby a portion of punitive damages (which would otherwise be part of plaintiff’s recovery) is given to a court-administered fund.¹⁵⁵ According to the Court, caps on noneconomic damages “interfere with the plaintiffs’ ‘right to receive an award that reflected the jury’s factual determination of the amount of the damages’ that would . . . fully compensate [plaintiffs] for all loss and injury to them.”¹⁵⁶ Punitive damages, by contrast, are inherently different: “[Plaintiffs have no underlying ‘right to receive an award’ that reflects

¹⁵⁰ Johnson v. St. Vincent Hosp., 404 N.E.2d 585, 602 (Ind. 1980).

¹⁵¹ *Id.* at 601 (“Appellants take the position that provisions of the Act violate the right of trial by jury by removing the determination of damages in excess of \$100,000 from the jury. . . . So considered the statute does not withdraw the fixing of damages in excess of the \$100,000 limitation from the jury at all.”). *See also* Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525 (Va. 1989).

¹⁵² Henderson v. Alabama Power Co., 627 So.2d 878, 887 (Ala. 1993).

¹⁵³ *Id.* at 885 (quoting *Moore*, 592 So. 2d at 163). The Court echoed the Washington Supreme Court’s ruling in *Sofie* that “for such a right [to a jury trial] to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guaranties.” *Id.* (quoting *Sofie*, 711 P.2d at 722).

The Ohio Supreme Court has also struck down punitive damages caps. *See* Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 401 (Ohio 1994) (“Although the constitutional right to a jury trial is not guaranteed in all cases, the right extends to those causes of action where the right existed at common law.”).

¹⁵⁴ *See, e.g.*, Weathers v. American Family Mut. Ins. Co., 793 F. Supp. 1002 (D. Kan. 1992); Bowden v. Caldor, Inc., 710 A.2d 267, 283 (Md. 1998); Evans v. State, 56 P.3d 1046 (Alaska 2002).

¹⁵⁵ *See* DeMendoza v. Huffman, 51 P.3d 1232 (Ore. 2002).

¹⁵⁶ *Id.* at 1244.

the jury's determination of the amount of punitive damages, nor are those damages necessary to 'compensate' plaintiffs for a 'loss or injury [to them].'¹⁵⁷

This "public purpose" of punitive damages—most ardently asserted in the realm of upholding statutes that give over a portion of punitive damages to the state or a state-administered fund¹⁵⁸—rears its head in a broader general context as well. Thus, the Texas Court of Appeals, rebuffing a challenge to punitive damages, explained: "The purpose of punitive damages is not to restore the plaintiff's property or compensate him for his loss. Punitive damages are levied for the public purpose of punishment and deterrence. . . . Because the statutory cap on punitive damages affects only public punishment interests, it does not infringe upon any constitutional right held by appellees."¹⁵⁹

Taken a step further, this "no private right" distinction may be reified in a property rights analysis. A North Carolina Appellate Court, for example, has reasoned:

The purpose of punitive damages, as its nomenclature indicates, is to punish. The person aggrieved has the right to compensation for, *inter alia*, actions for pain and suffering, emotional distress, lost wages, medical bills, disability, and loss of consortium. The right to punish, meanwhile, properly resides with the State. Thus, no individual possesses the right to punitive damages as being that person's property.¹⁶⁰

IV. CONCLUSION: SHAPING DAMAGES REMEDIES

Bringing the crossover phenomenon to light at first raises more questions than it answers. If juries and lawyers are no longer respecting the compensatory-punitive divide, then where does this leave us? At the end of our deconstruction of damages, we are left with the discovery that damages are perhaps constructed in tort law practice. They do not simply flow from the vindication of liability rights. We of course still must answer the question provocatively posed by Ken Simons, "Why should we care *why* litigants use the legal system?"¹⁶¹ "If our tort system is adequately justified by principles of efficiency, or corrective justice, or transactional or distributive justice, should it matter that litigants have their own

¹⁵⁷ *Id.*

¹⁵⁸ I have discussed the operation of such "split-recovery" schemes in detail in Sharkey, *supra* note 13, at ____.

¹⁵⁹ *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 758 (Tex. App. 1998); *id.* ("While the plaintiff may be motivated to pursue this public purpose in the hope of securing punitive damages, such proceeds are a windfall and not a matter of right.").

¹⁶⁰ *Rhyne v. K-Mart Corp.*, 562 S.E.2d 82 (N.C. Ct. App. 2002).

¹⁶¹ Kenneth W. Simons, *Compensation: Justice or Revenge?*, 40 SAN DIEGO L. REV. 1415, 1421 (2003).

distinct motives for using the system, even if the motives seem to be in tension with those principles?”¹⁶²

Next, are judges (and thus courts) simply subject to the same forces leading towards the crossover effect as are jurors and lawyers?¹⁶³ Or, in a similar vein, are they simply additional strategic manipulators, in this case enabling other actors—i.e., jurors and lawyers—to shift damages expediently on the basis of existing damages caps. Second, might it be that courts (in particular state courts with elected judges) are captured by special interests, in particular, plaintiffs’ attorneys represented by the trial bar who favor strategic manipulation of the system?

The answer, I think, lies in according a certain deference to the momentum created by the actors within the system—who after all, include not only lawyers and jurors, but legislatures and courts as well—momentum that is placing pressure on a system whose operation is no longer sufficiently explained by existing theory. In other words, I am suggesting that the breakdown of categories cannot simply be dismissed as the work of masterful lawyerly tactics, nor as the blundering of confused jurors, if it is true that courts too are complicit in the endeavor. Moreover, the fact that the crossover effect seems to exist across a wide variety of subject matters (i.e., case types) might suggest that there is no one strong lobbying influence that could explain its existence and strength.¹⁶⁴ In any event, all of this is strong evidence that tort theorists can no longer afford to ignore.

Finally, it is time to elevate the status of damages within the law of torts. Corrective justice scholars have emphasized a singular role played by damages: “an award of damages is often intended to compensate for harm; if we do not know something about the nature of harm, we cannot fully understand the nature of at least this type of compensation.”¹⁶⁵ But damages may well serve a more nuanced and complex role than simply that of a remedial device. Damages may play a key role in torts in illuminating the purposes and goals of the tort system (not to mention their internecine clashes) as a whole.

¹⁶² *Id.* at 1421-22. Simons nonetheless concedes that “it is indeed plausible to believe that the underlying justifications for the legal system should pay some heed to the motivation of actors who use the system.” *Id.* at 1422.

¹⁶³ Anderson and MacCoun, for example, claim that “nothing in our analysis suggests that judges are less vulnerable [than juries] to these spillover effects.” Anderson & MacCoun, *supra* note 11, at 328.

¹⁶⁴ Moreover, the participation of federal judges (detailed in the anecdotal evidence amassed in Part I)—who would seem to be fairly well insulated from the political pressures faced by elected state judges—would also seem to cut in the opposite direction. One possible explanation is that, while the legislatures are lobbied by the “repeat” players, such as plaintiffs’ lawyers and insurance company defendants, the courts are the one forum in which the injured parties themselves have (at least putatively) a “voice.” It may be that the courts are stepping in to “recalibrate” damages especially in instances when they believe that jurors are unaware of the caps on damages, and wish to award more money in damages to the injured parties who, the argument goes, have not been represented before the legislature.

¹⁶⁵ Stephen Perry, *Harm, History, and Counterfactuals*. Perry adds the caveat that “harm is not the only thing that can be compensated by an award of compensatory damages.”

Thus, I think there may be much to be gained by looking closely at the practice of damages, especially the erosion of categorical divides between constitutive components of damages. Turning tort law on its head, so to speak—focusing on damages and the ways in which damages influence the shaping of theories of liability, rather than the other way around—may be the most profitable way to rethink how tort theory may account for what seems, in practice, to be a system serving the often conflicting and overlapping (but in any case, simultaneously pursued) goals of compensation, deterrence, and punishment. I have only begun to imagine the consequences if we were to see all of tort law through the lens of damages—damages, moreover, that transcended the bounds of the traditional divides.

APPENDIX I: TABLES

Table 1. State Punitive Damages Limitations¹⁶⁶

State	Effective Date	Punitive Damages Cap	Statutory Provision
Alabama	1999 ¹⁶⁷	3X Comp./ 500K	Ala. Code 6-11-21
Alaska	1997	3X Comp./ 500K	Alaska Stat. 09.17.020
Arkansas	2003	3X Comp./ 250K	Ark. Code 16-55-208
Colorado	1986	= Comp.	Colo. Rev. Stat. 13-21-102
Connecticut	1979; ¹⁶⁸ 1992	= Comp.; 2X Comp. (prod liab)	common law; Conn.Gen.Stat. § 52-240(b)
Florida	1986; ¹⁶⁹ 1999	3X Comp./ 500K	Fla. Stat. 768.73
Georgia	1987	250K (except prod liab)	Ga. Code Ann. 51-12-5.1
Idaho	2003	3X Comp./ 250K	Idaho Code 6-1604(3)
Indiana	7/1/1995	3X Comp./ 50K	Ind. Code 34-51-3-4
Kansas	1987 ¹⁷⁰	5M	Kan. Stat. Ann. 60-3702
Maine	1991	75K (wrongful death only)	Me.Rev.Stat. Ann. Tit. 18-A, 2-804(b)
Mississippi	2003	20M	Miss. Code Ann. 11-1-65
Montana	2003	10M	Mont. Code Ann. 27-1-220
Nevada	1989	3X Comp.	Nev. Rev. Stat. 42.005(1)
New Jersey	10/27/1995	5X Comp./ 350K	N.J. Rev. Stat. Ann. 2A:15-5.14
N. Carolina	1/1/1996	3X Comp./ 250K	N.C. Gen. Stat. 1D-25
N. Dakota	1993	2X Comp./ 250K	N.D. Cent. Code 32-03.2-11(4)
Oklahoma	1995	= Comp./ 100K	Okla. Stat. Tit. 23-9.1
Texas	1987, ¹⁷¹ 1995	2X econ dam + 750K/ 200K	Tex.Civ.Prac.&Rem.Code Ann. 41.008

¹⁶⁶ This table represents the current state of the law (with some mention of previous statutory limits held unconstitutional and other laws in footnotes).

¹⁶⁷ A previous \$250,000 cap on punitive damages, enacted in 1987, was declared unconstitutional in *Henderson v. Alabama Power Co.*, 627 So.2d 878 (Ala. 1993). See *supra* note ____.

¹⁶⁸ The products liability statute was enacted in 1979.

¹⁶⁹ The statutory limitation in effect from 1986 until October 1, 1999, was 3 times compensatory damages.

¹⁷⁰ From 1987-1988, punitive damages were limited pursuant to KAN. STAT. ANN. § 60-3701(f).

Virginia	1988	350K	Va. Code Ann. 8.01-38.1
PUNITIVE CAP HELD UNCONSTITUTIONAL			
Illinois	3/9/95-12/18/97	3X econ dam	735 Ill.Comp.Stat.Ann. 5/2-1115.05
Ohio	1/27/97-8/16/99	3X Comp./ 250K	Ohio Rev. Code Ann. 2315.21
PUNITIVE DAMAGES RESTRICTIONS IN MEDICAL MALPRACTICE CASES (FOR STATES IN STUDY ¹⁷²)			
Illinois		Punitive damages impermissible	
Massachusetts	1986	Punitive damages impermissible	
Pennsylvania	1997; ¹⁷³ 2002	2X Comp. (only in med mal vs. health care providers)	40 Pa. Stat. Ann.1303.505(d)

Table 2. State Noneconomic Compensatory Damages Limitations

State	Effective Date	Cap Amount	Statutory Provision
Alaska	1986	400K	Alaska Stat. § 09.17.010
Hawaii	1986	375K	Haw. Rev. Stat. §§ 663-8.7, 663-10.9(2)
Idaho	1987	250K	Idaho Code Ann. § 6-1603
Kansas	1987	250K	Kan. Stat. Ann. §§ 60-1902, 60-1903
Maryland	1986	500K	Md. Cts. & Jud. Pro. § 11-108
Ohio	2003 (1991, 1999) [cap 1/27/97-8/16/99]	350K	Ohio Rev. Code § 2323.43
N. Dakota	1995	500K	N.D. Cent. Code § 32-42-02.
NONECONOMIC DAMAGES CAP HELD UNCONSTITUTIONAL			
Illinois	capped 3/9/95-12/18/97	500K	735 Ill.Comp.Stat.Ann. § 5/2-1115.1
New Hampshire	1976-80; 1986-91	875K	N.H. Rev. Stat. Ann. § 508:4-d

¹⁷¹ From 1987 until September 1, 1995, Texas capped punitive damages at the lesser of 4 times compensatory damages or \$200,000. See TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (repealed).

¹⁷² For a fuller listing of state punitive damages caps in medical malpractice cases, see Sharkey, *supra* note 15, Appendix I, Table 1 (Medical Malpractice Damages Limitations).

¹⁷³ Punitive damages were capped from January 25, 1997, until March 20, 2002 under 40 PA. CONS. STAT. ANN. § 1301.812-A (g) (repealed). At that time, the cap was reinstated, in the same form, at PA. STAT. ANN. tit. 40, § 1303.505(d).

Minnesota	1986-1990	400K	Minn. Stat. Ann. § 549.23
Oregon	1987-1999	500K	Or. Rev. Stat. § 18.560
Washington	1986-1989	43% wage * life expectancy	Wash. Rev. Code Ann. § 4.56.250

Table 3. State -by-State Insurability of Punitive Damages

State	Common Law or Statutory Basis
INSURABLE	
Alabama	American Fidelity & Cas. Co. v. Werfel, 162 So. 103 (Ala. 1935)
Alaska	LeDoux v. Continental Ins. Co., 666 F. Supp. 178 (D. Alaska 1987) State Farm Mut. Auto. Ins. Co. v. Lawrence, 26 P.3d 1074 (Alaska 2001)
Arizona	Price v. Hartford Accident & Indem. Co., 502 P.2d 522 (Ariz. 1972)
Arkansas	Southern Farm Bureau Cas. Ins. Co. v. Daniel, 440 S.W.2d 582 (Ark. 1969)
Connecticut	St. Paul Fire & Marine Ins. Co. v. Shernow, 610 A.2d 1281 (Conn. 1992)
Delaware	Whalen v. On-Deck, Inc., 514 A.2d 1072 (Del. 1986)
Georgia	Greenwood Cemetary, Inc. v. Travelers Indem. Co., 232 S.E.2d 910 (Ga. 1977) Fed. Ins. Co. v. National Distributing Co., Inc. (Ga. Ct. App. 1992)
Hawaii	HAW. REV. STAT. § 431:10-240 (1998) (coverage must be specifically included) (effective 1987)
Idaho	Abbie Uriguen Oldsmobile Buick, Inc. v. U.S. Fire Ins. Co., 511 P.2d 783 (Idaho 1973)
Iowa	Skyline Harvestore Sys., Inc. v. Centennial Ins. Co., 331 N.W.2d 106 (Iowa 1983)
Kentucky	Continental Ins. Co. v. Hancock, 507 S.W.2d 146 (Ky. 1973)
Maryland	First Nat'l Bank of St. Mary's v. Fidelity & Dep. Co., 389 A.2d 359 (Md. 1978)
Michigan	Meijer, Inc. v. General Star Indem. Co., 826 F. Supp. 241 (W.D. Mich. 1993)
Mississippi	Anthony v. Frith, 394 So.2d 867 (Miss. 1981)
Montana	MONT. CODE ANN. § 33-15-317 (1999) (coverage must be specifically included) (effective 1987)
Nevada	NEV. REV. STAT. ANN. § 681A.095 (enacted 7/7/1995)
New Mexico	Baker v. Armstrong, 744 P.2d 170 (N.M. 1987)
North Carolina	Mazza v. Medical Mut. Ins. Co., 319 S.E.2d 217 (N.C. 1984)
Oregon	Harrell v. Travelers Indem. Co., 567 P.2d 1013 (Or. 1977)
South Carolina	South Carolina State Budget & Control Bd. v. Prince, 403 S.E.2d 643 (S.C. 1991)
Tennessee	Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1 (Tenn. 1964)
Texas	Westchester Fire Ins. Co. v. Admiral Ins. Co., 2003 WL 21475423 (Tex. App. 2003)
Vermont	American Protection Ins. Co. v. McMahan, 562 A.2d 462 (Vt. 1989)
Virginia	VA. CODE ANN. §§ 38.2-227, 38.1-42.2 (effective 1986)
West Virginia	Hensley v. Erie Ins. Co., 283 S.E.2d 227 (W. Va. 1981)
Wisconsin	Brown v. Maxey, 369 N.W.2d 677 (Wis. 1985)
Wyoming	Sinclair Oil Corp. v. Columbia Cas. Co., 682 P.2d 975 (Wyo. 1984)
NOT INSURABLE	
California	Peterson v. Superior Court, 642 P.2d 1305 (Cal. 1982)
Colorado	Lira v. Shelter Ins. Co., 903 P.2d 1149 (Ct. App.1994), aff'd, 913 P.2d 514 (Colo. 1996)
Florida	Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5 th Cir. 1962) (applying Fla. law)
Illinois	Beaver v. Country Mut. Ins. Co., 420 N.E.2d 1058 (Ill. App. Ct. 1981)
Indiana	Norfolk & W. Ry. v. Hartford Accident & Indem. Co., 420 F. Supp. 92 (N.D. Ind. 1976)
Kansas	Flint Hills Rural Elec. Ass'n v. Federated Rural Elec. Ins. Co., 941 P.2d 374 (Kan. 1997)
Minnesota	Wojciak v. Northern Package Corp., 310 N.W.2d 675 (Minn. 1982)
Missouri	Heartland Stores, Inc. v. Royal Inc. Co., 815 S.W.2d 39 (Mo. Ct. App. 1991)

	But see <i>Colson v. Lloyd's of London</i> , 435 S.W.2d 42 (Mo. Ct. App. 1968)
New Jersey	<i>Johnson & Johnson v. Aetna Cas. & Sur. Co.</i> , 667 A.2d 1087 (N.J.Super., Ct.App.Div.1995)
New York	<i>Soto v. State Farm Ins. Co.</i> , 635 N.E.2d 1222 (N.Y. 1994)
Ohio	<i>Casey v. Calhoun</i> , 531 N.E.2d 1348 (Ohio Ct. App. 1987); OHIO REV. CODE ANN. § 3937.18.2 (automobile, casualty, surety & guarantee insurance context) (effective 1988)
Oklahoma	<i>Dayton v. Hudson Corp. v. American Mut. Liab. Ins. Co.</i> , 621 P.2d 1155 (Okla. 1980)
Pennsylvania	<i>Esmond v. Liscio</i> , 224 A.2d 793 (Pa. Super. Ct. 1966)
Utah	UTAH CODE ANN. § 31A-20-101 (effective 1985)
UNDECIDED	
Maine	Not insurable – decided in UIM context only: <i>Braley v. Berkshire Mut. Ins. Co.</i> , 440 A.2d 359 (Me. 1982)
North Dakota	<i>Continental Cas. Co. v. Kinsey</i> , 499 N.W.2d 574 (N.D. 1993)
Rhode Island	Not insurable – decided in automobile context
South Dakota	<i>Dairyland Ins. Co. v. Wyant</i> , 474 N.W.2d 514 (S.D. 1991)
Wash. D.C.	<i>Hartford Life Ins. Co. v. Title Guar. Co.</i> , 520 F.2d 1170 (D.C. Cir. 1975)
NO COMMON LAW PUNITIVE DAMAGES	
Louisiana	Insurable – punitive damages permitted only in limited circumstances: UIM and federal civil rights statutes: <i>Sharp v. Daigre</i> , 555 So.2d 1361 (La. 1990); <i>Creech v. Aetna Cas. & Sur. Co.</i> , 516 So.2d 1168 (La. Ct. App. 1987)
Massachusetts	Undetermined – punitive damages permitted only by statute; Not insurable in UIM context: <i>Santos v. Lumbermens Mut. Cas. Co.</i> , 556 N.E.2d 983 (Mass. 1990)
Nebraska	Punitive damages prohibited by state constitution: <i>Distinctive Printing & Packaging Co. v. Cox</i> , 443 N.W.2d 566 (Neb. 1989)
New Hampshire	Insurable – punitive damages permitted only by statute; insurable if assessed against municipalities: <i>American Home Assurance Co. v. Fish</i> , 451 A.2d 358 (N.H. 1982)
Washington	Insurable – punitive damages permitted only by statute: <i>Fluke Corp. v. Hartford Accident & Indem. Co.</i> , 34 P.3d 809 (Wash. 2001)

Source: Adapted from JOHN J. KIRCHER & CHRISTINE M. WISEMAN, 1 PUNITIVE DAMAGES: LAW AND PRACTICE 2D § 7.28 (2003). In a few instances, more recent cases, or ones directly on point, were substituted or added. In rarer instances, corrections were made.

APPENDIX II: VARIABLES

Table 4. Dependent Variables, Summary Statistics

Dependent Variables				
Variable	N	Mean	Median	sd.
Compensatory and Final Damages. Table 7 (<i>infra</i>)				
AdjComp	8854	550582.6	50173.1	3528384
AdjFin	8816	669479.9	47982.5	7552363

Compensatory Damages. Table 8 (<i>infra</i>)				
Non-Auto	3091	910391.5	104997	4858745
Auto	2856	234641	19559.36	1789621

Jury and Bench. Table 9 (<i>infra</i>)				
Jury (AdjComp)	5947	585867.6	45748.21	3730957
Jury (AdjFin)	5918	758443.2	44277	8951913
Bench (AdjComp)	2519	181785	26400	1314424
Bench (AdjFin)	2517	200164.8	28225	1656062

Table 5. Independent Variables in Jury Trials, Summary Statistics

Compensatory Damages in Jury Trials					
Variable	N	%	Mean	Median	sd
Case Type					
Inttort	320	0.036	488743.1	43919.5	1635638
Prodlia	215	0.024	1538035	406440	3725948
ProfMalp	94	0.011	1110941	147335	3531823
SlandLib	51	0.006	392723.8	28225	1023683
Fraud	372	0.042	1373015	83049.16	8032493
Employment	307	0.035	865672.5	155446.4	7141285
BuyPla	471	0.053	402709.1	56147	1339881
RentLease	113	0.013	1035229	62233.87	8855267
RealPro	38	0.004	211847.4	96027.14	301281.1
Auto	3958	0.447	234657.7	23159.5	1613419
Negligence	1711	0.193	587771.7	91205	3570606
MedMal	570	0.064	1765332	377400	6043738
SellPla	496	0.056	328653.4	56259.76	1084483
OtherCon	138	0.016	495590	60512.32	2277027
Litigation Pair					
Ind v. Ind	3353	0.379	171014.3	20322	1261706

Ind v. H/C/G	2216	0.250	676513.1	91548.92	4102908
NonInd v. H/C/G	2583	0.292	819281.9	100640	3657462
Ind/NonInd v. Ind/NonInd	702	0.079	977334.4	75159.89	6779629

Bodily Injury	6550	0.740	510350.7	43900.24	2973593
Year 1992	2907	0.328	478398	61828.18	3071991
Year 1996	2974	0.336	479954.2	51055.07	2111187
Year 2000	2973	0.336	691816.7	40916	4834085

Table 6. Independent Variables in Bench Trials, Summary Statistics

Compensatory Damages in Bench Trials					
Variable	N	%	Mean	Median	sd
Case Type					
Inttort	320	0.036	488743.1	43919.5	1635638
Prodlia	215	0.024	1538035	406440	3725948
ProfMalp	94	0.011	1110941	147335	3531823
SlandLib	51	0.006	392723.8	28225	1023683
Fraud	372	0.042	1373015	83049.16	8032493
Employment	307	0.035	865672.5	155446.4	7141285
BuyPla	471	0.053	402709.1	56147	1339881
RentLease	113	0.013	1035229	62233.87	8855267
RealPro	38	0.004	211847.4	96027.14	301281.1
Auto	3958	0.447	234657.7	23159.5	1613419
Negligence	1711	0.193	587771.7	91205	3570606
MedMal	570	0.064	1765332	377400	6043738
SellPla	496	0.056	328653.4	56259.76	1084483
OtherCon	138	0.016	495590	60512.32	2277027
Litigation Pair					
Ind v. Ind	3353	0.379	171014.3	20322	1261706
Ind v. H/C/G	2216	0.250	676513.1	91548.92	4102908
NonInd v. H/C/G	2583	0.292	819281.9	100640	3657462
Ind/NonInd v. Ind/NonInd	702	0.079	977334.4	75159.89	6779629
Bodily Injury	6550	0.740	510350.7	43900.24	2973593
Year 1992	2907	0.328	478398	61828.18	3071991
Year 1996	2974	0.336	479954.2	51055.07	2111187
Year 2000	2973	0.336	691816.7	40916	4834085

APPENDIX III: REGRESSIONS

Table 7. Jury Trial Regressions¹⁷⁴

		Log (Adjusted) COMPENSATORY DAMAGES AWARDS				Log(Adj)FINAL TOT DAMAGES AWARDS
		(1) OLS	(2) Fixed Effects ¹⁷⁵	(3) FE ¹⁷⁶	(4) FE ¹⁷⁷	(5) FE ¹⁷⁸
State Law Variables						
	PCap	0.139** (0.047)	0.479** (0.112)	0.447** (0.113)	0.473** (0.112)	0.395** (0.114)
	NCap	0.194 (0.117)	-0.153 (0.138)	-0.179 (0.138)	-0.161 (0.138)	-0.126 (0.140)
	Insurance for PD	-0.416** (0.047)				
Judicial Partisan Election						
	PJudge	0.043 (0.054)				
Case Type [Auto omitted]						
	Negligence	0.663** (0.070)	0.560** (0.066)	0.545** (0.066)	0.559** (0.066)	0.506** (0.067)
	Product Liability	1.806** (0.154)	1.792** (0.136)	1.774** (0.136)	1.791** (0.136)	1.823** (0.138)
	Med Malpractice	2.010** (0.091)	1.968** (0.091)	1.964** (0.091)	1.970** (0.091)	2.010** (0.092)
	Prof Malpractice	1.371** (0.222)	1.235** (0.214)	1.183** (0.213)	1.234** (0.214)	1.246** (0.217)
	Intentional Tort	0.153 (0.146)	0.182 (0.109)	0.055 (0.110)	0.180 (0.109)	0.437** (0.110)
	Slander/Libel	0.238 (0.328)	0.101 (0.280)	-0.063 (0.281)	0.102 (0.280)	0.347 (0.284)

¹⁷⁴ Robust standard errors in parentheses. Asterisks denote statistical significance (* significant at 5% level; ** significant at 1% level)

¹⁷⁵ Group variable (i) = State. Number of groups = 22. Obs. per group: min = 29; avg = 403; max = 1313.

¹⁷⁶ Group variable (i) = State. Number of groups = 22. Obs. per group: min = 29; avg = 402; max = 1313.

¹⁷⁷ Group variable (i) = State. Number of groups = 22. Obs. per group: min = 29; avg = 403; max = 1313.

¹⁷⁸ Group variable (i) = State. Number of groups = 22. Obs. per group: min = 29; avg = 401; max = 1313.

		Log (Adjusted) COMPENSATORY DAMAGES AWARDS				Log(Adj)FINAL TOT DAMAGES AWARDS
		(1) OLS	(2) Fixed Effects ¹⁷⁵	(3) FE ¹⁷⁶	(4) FE ¹⁷⁷	(5) FE ¹⁷⁸
	Fraud	0.920** (0.170)	0.788** (0.152)	0.747** (0.152)	0.626** (0.167)	0.894** (0.154)
	Employment	1.161** (0.161)	0.950** (0.162)	0.873** (0.162)	0.947** (0.162)	1.081** (0.164)
	Buyer Plaintiff	0.473** (0.154)	0.379** (0.147)	0.366* (0.147)	0.381** (0.147)	0.414** (0.149)
	Seller Plaintiff	0.390* (0.157)	0.300* (0.149)	0.318* (0.148)	0.309* (0.149)	0.301* (0.151)
	Other Contract	0.340 (0.229)	0.257 (0.196)	0.267 (0.195)	0.262 (0.196)	0.252 (0.198)
	Rental/ Lease	0.423* (0.208)	0.329 (0.210)	0.309 (0.209)	0.334 (0.210)	0.386 (0.212)
	Real Property	0.899** (0.266)	0.840** (0.317)	0.820** (0.316)	0.839** (0.317)	0.831** (0.321)
PCap Interactions						
	Pun Award			0.356** (0.117)		
	Pun*PCap			0.578** (0.185)		
	Fraud*PCap				0.479** (0.204)	
Litigant Pairs [Ind v Ind omitted]						
	Ind v H/C/G	0.869** (0.067)	0.863** (0.064)	0.868** (0.064)	0.863** (0.064)	0.810** (0.065)
	Nonind v H/C/G	0.988** (0.103)	1.005** (0.094)	1.015** (0.094)	0.992** (0.095)	0.944** (0.096)
	Ind/non v. Ind/non	1.107** (0.053)	1.125** (0.051)	1.124** (0.051)	1.124** (0.051)	1.105** (0.052)
	# Plaintiffs	0.003** (0.000)	0.003** (0.001)	0.003** (0.001)	0.003** (0.001)	0.003** (0.001)
	# Defendants	-0.001 (0.001)	-0.000 (0.001)	-0.000 (0.001)	-0.000 (0.001)	-0.000 (0.001)
Severity Measure						
	Bodily Injury	0.064 (0.125)	0.016 (0.115)	0.049 (0.115)	0.016 (0.115)	-0.140 (0.117)

		Log (Adjusted) COMPENSATORY DAMAGES AWARDS				Log(Adj)FINAL TOT DAMAGES AWARDS
		(1) OLS	(2) Fixed Effects ¹⁷⁵	(3) FE ¹⁷⁶	(4) FE ¹⁷⁷	(5) FE ¹⁷⁸
County Demographics						
	Log Med Income	0.683** (0.172)	-0.193 (0.220)	-0.168 (0.220)	-0.191 (0.220)	-0.233 (0.223)
	Poverty	5.728** (0.691)	4.041** (0.823)	4.041** (0.821)	4.034** (0.822)	3.846** (0.834)
	Pop >= 65 years	-0.014* (0.007)	0.009 (0.010)	0.010 (0.010)	0.010 (0.010)	0.007 (0.010)
	Lawyers per 100k	0.000** (0.000)				
Year Effects [Yr0 (1992) omitted]						
	Yr1 (1996)	-0.096 (0.063)	0.048 (0.067)	0.056 (0.067)	0.048 (0.067)	0.029 (0.068)
	Yr2 (2001)	-0.204** (0.064)	-0.044 (0.069)	-0.040 (0.069)	-0.046 (0.069)	0.024 (0.070)
Constant		1.955 (1.913)	11.213** (2.438)	10.898** (2.432)	11.188** (2.437)	11.797** (2.472)
# Obs		8854	8854	8848	8854	8816
R²		0.22	0.18 (w/in) 0.25 (b/t) 0.19 (overall)	0.19 (w/in) 0.23 (b/t) 0.19 (o/all)	0.18 (w/in) 0.24 (b/t) 0.19 (o/all)	0.18 (w/in) 0.29 (b/t) 0.19 (o/all)

Table 8. Jury Trial Regressions: Non-Auto vs. Auto (1996 & 2001 Data)¹⁷⁹

	Log (Adjusted) Compensatory Damages	
	NON-AUTO CASES	AUTO CASES
	(1) Fixed Effects ¹⁸⁰	(2) Fixed Effects ¹⁸¹
State Law Variables		
PCap	0.508** (0.167)	0.315 (0.234)
NCap	0.071 (0.196)	-0.447 (0.324)
Case Type [Negligence omitted]		
Product Liability	1.237** (0.186)	
Med Malpractice	1.337** (0.134)	
Prof Malpractice	0.396 (0.309)	
Intentional Tort	-0.579** (0.151)	
Slander/ Libel	-0.489 (0.358)	
Fraud	0.151 (0.203)	
Employment	0.381 (0.211)	
Buyer Plaintiff	-0.137 (0.198)	
Seller Plaintiff	-0.210 (0.212)	
Other Contract	-0.452 (0.278)	
Rental/ Lease	-0.254 (0.291)	

¹⁷⁹ Robust standard errors in parentheses. Asterisks denote statistical significance (* significant at 5% level; ** significant at 1% level)

¹⁸⁰ Group variable (i) = State. Number of groups = 22. Obs. per group: min = 9; avg = 141; max = 485.

¹⁸¹ Group variable (i) = State. Number of groups = 22. Obs. per group: min = 29; avg = 403; max = 1313.

	Log (Adjusted) Compensatory Damages	
	NON-AUTO CASES	AUTO CASES
	(1) Fixed Effects ¹⁸⁰	(2) Fixed Effects ¹⁸¹
Real Property	0.275 (0.518)	
Litigant Pairs [Ind v Ind omitted]		
Ind v H/C/G	0.440** (0.109)	1.313** (0.129)
Nonind v H/C/G	0.648** (0.142)	0.628 (0.525)
Ind/non v Ind/non	0.756** (0.107)	1.107** (0.086)
# Plaintiffs	0.003** (0.001)	0.280** (0.041)
# Defendants	0.003 (0.001)	0.152** (0.038)
Severity Measure		
Bodily Injury	0.116 (0.168)	0.768 (0.822)
County Demographics		
Log Med Income	0.164 (0.862)	0.386 (0.930)
Poverty	4.925 (3.491)	5.571 (3.769)
Pop >= 65 years	0.017 (0.021)	0.031 (0.017)
Year Effects [Yr1 (1996) omitted]		
Yr2 (2001)	-0.021 (0.073)	-0.089 (0.066)
Constant	8.096 (9.825)	2.961 (10.644)
# Observations	3091	2856
R²	0.12 (within) 0.10 (between) 0.13 (overall)	0.14 (within) 0.11 (between) 0.12 (overall)

Table 9. Jury Trial vs. Bench Trial Regressions (1996 & 2001 data)¹⁸²

	JURY TRIALS		BENCH TRIALS	
	Comp Damages	Final Total Damages	Comp Damages	Final Total Damages
	(1) Fixed Effects ¹⁸³	(2) FE ¹⁸⁴	(3) FE ¹⁸⁵	(4) FE ¹⁸⁶
State Law Variables				
PCap	0.395** (0.127)	0.312** (0.129)	-0.061 (0.241)	-0.147 (0.237)
NCap	-0.077 (0.159)	-0.054 (0.162)	0.323 (0.395)	0.423 (0.388)
Case Type [Auto omitted]				
Negligence	0.730** (0.083)	0.656** (0.084)	0.306 (0.184)	0.385* (0.181)
Product Liability	1.915** (0.180)	1.967** (0.183)	0.736 (0.441)	0.808 (0.433)
Med Malpractice	2.195** (0.109)	2.230** (0.110)	1.346** (0.419)	1.263** (0.411)
Prof Malpractice	1.192** (0.292)	1.158** (0.296)	0.969* (0.389)	0.823* (0.382)
Intentional Tort	0.275* (0.131)	0.540** (0.133)	0.111 (0.240)	0.348 (0.236)
Slander/Libel	0.331 (0.340)	0.606 (0.344)	-1.058 (0.624)	-0.836 (0.613)
Fraud	1.019** (0.194)	1.084** (0.197)	0.704 (0.266)	0.727** (0.262)
Employment	1.078** (0.207)	1.158** (0.211)	0.498 (0.300)	0.437 (0.295)

¹⁸² Robust standard errors in parentheses. Asterisks denote statistical significance (* significant at 5% level; ** significant at 1% level)

¹⁸³ Group variable (i) = State. Number of groups = 22. Obs. per group: min = 18; avg = 270; max = 797.

¹⁸⁴ Group variable (i) = State. Number of groups = 22. Obs. per group: min = 18; avg = 269; max = 797.

¹⁸⁵ Group variable (i) = State. Number of groups = 22. Obs. per group: min = 8; avg = 115; max = 558.

¹⁸⁶ Group variable (i) = State. Number of groups = 22. Obs. per group: min = 8; avg = 114; max = 557.

		JURY TRIALS		BENCH TRIALS	
		Comp Damages	Final Total Damages	Comp Damages	Final Total Damages
		(1) Fixed Effects ¹⁸³	(2) FE ¹⁸⁴	(3) FE ¹⁸⁵	(4) FE ¹⁸⁶
	Buyer Plaintiff	0.585** (0.194)	0.574** (0.197)	0.252 (0.262)	0.171 (0.257)
	Seller Plaintiff	0.625** (0.202)	0.589** (0.205)	0.607* (0.251)	0.500* (0.246)
	Other Contract	0.378 (0.263)	0.340 (0.267)	0.583* (0.297)	0.546 (0.292)
	Rental/ Lease	0.521 (0.279)	0.580* (0.283)	0.192 (0.268)	0.076 (0.264)
	Real Property	1.067** (0.494)	1.021* (0.500)	0.397 (0.347)	0.299 (0.341)
Litigant Pairs [Ind v Ind omitted]					
	Ind v H/C/G	0.842** (0.078)	0.776** (0.079)	0.405** (0.086)	0.395** (0.085)
	Nonind v H/C/G	0.899** (0.122)	0.829** (0.124)	0.502** (0.109)	0.489** (0.107)
	Ind/non v. Ind/non	1.135** (0.064)	1.092** (0.065)	0.162 (0.107)	0.178 (0.105)
	# Plaintiffs	0.003** (0.001)	0.003** (0.001)	-0.004 (0.016)	0.007 (0.015)
	# Defendants	0.009 (0.009)	0.011 (0.009)	0.167** (0.024)	0.165** (0.024)
Severity Measure					
	Bodily Injury	0.043 (0.157)	-0.173 (0.159)	0.764** (0.223)	0.590** (0.219)
County Demographics					
	Log Med Income	0.116 (0.638)	0.468 (0.647)	4.867** (0.835)	4.942** (0.820)
	Poverty	4.681 (2.585)	6.212* (2.620)	25.150** (3.391)	25.072** (3.330)
	Pop >= 65 years	0.023 (0.013)	0.012 (0.013)	-0.018 (0.022)	-0.020 (0.021)

	JURY TRIALS		BENCH TRIALS	
	Comp Damages	Final Total Damages	Comp Damages	Final Total Damages
	(1) Fixed Effects ¹⁸³	(2) FE ¹⁸⁴	(3) FE ¹⁸⁵	(4) FE ¹⁸⁶
Year Effects				
Yr2 (2001)	-0.074 (0.050)	0.011 (0.050)	0.004 (0.082)	0.115 (0.081)
Constant	7.500 (7.276)	3.760 (7.374)	-46.864** (9.535)	-47.544** (9.363)
# Obs	5947	5918	2519	2517
R²	0.21 (w/in) 0.35 (b/t) 0.23 (o/all)	0.21 (w/in) 0.42 (b/t) 0.23 (o/all)	0.10 (w/in) 0.09 (b/t) 0.13 (o/all)	0.09 (w/in) 0.19 (b/t) 0.14 (o/all)