ARTICLE

A GENERAL CLAUSE OF PUNITIVE DAMAGES SHOULD BE ESTABLISHED IN CHINA’S FUTURE CIVIL CODE

BAI Jiang∗

Abstract  Punitive damages have several functions that are worthy of serious research. For instance, punitive damages could help to compensate victims for moral damages suffered and offer more sufficient ex-ante compensation in cases of wrongful death or bodily injury, thus compensating for the losses suffered by victims more completely; they could punish private wrongs more effectively and provide a means of personal revenge within the law, incidentally deterring and preventing future wrongs; they could be used to correct abuses of power or status by the rich, large corporations, or the government; and they could be used to complement criminal law, etc. In order to fully realize the advantages of this institution in the Chinese society, we should expand its application in China’s tort law and carefully design the scope of its application, including the subjects to which it would be applicable and the amounts that would be allowable. In the short term, the application of punitive damages could be expanded through specific individual legislation, increase of the amounts of compensation for mental damages in individual cases or local legislation. In the long term, a general clause on punitive damages should be established in tort law in China’s future Civil Code, stipulating that “punitive damages can be applied to those who have performed tortious acts that deserve severe moral condemnation, due to the actor’s malicious intent or indifference or disregard for others’ rights.”

Keywords  punitive damages, moral harm, retribution, civil code

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∗ (白江) Dr. iur., Humboldt University of Berlin, Berlin, Germany; Senior Prosecutor, No. 2 Branch of Shanghai People’s Procuratorate, Shanghai 200070, China. Contact: jbai@fudan.edu.cn

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INTRODUCTION

In recent years, special attention has been paid to the topic of punitive damages in academia and in legislation in China. The concept originated in common law countries such as the United Kingdom and was introduced into the Law on the Protection of Rights and Interests of Consumers in China for the first time in 1993. In the past several years, few scholars point out that the legal institution of punitive damages had already existed in ancient China based on the following reasons: (1) In the Han Dynasty, there was a regulation about increasing liability and going into the government (Jia Ze Ru Guan Zhi, “加责入官制”), which was recorded in the book 周礼·秋官·司历 (Zhouli • Qiuguan • Sili). It says that if the weapon, which is used to kill or injure other persons, is also a stolen one, the liability will be increased. (2) In the Tang and Song Dynasties, there was a rule of double liability (“Bei Bei” Zhi, “倍备制”). The 唐律 (Tang Code) says, “people who steal property from others will be double punished.” The interpretation and comment on the Tang Code explains, “criminals would get double punishment for their greed and they would be punished as per the following example: If they steal 1 chi, they would be asked to pay back 2 chi.” See YANG Lixin, 《消费者权益保护法》规定惩罚性赔偿责任的成功与不足及完善措施 (The Success and Deficiencies of the Regulation of Punitive Damages in the Consumers Protection Law and the Perfection Measures), 3 清华法学 (Tsinghua Law Journal), 7–26 (2010). However, this opinion is open for discussion. According to these ancient codes, it was the government — not the victim — that received the extra compensation. This is undoubtedly different from punitive damages in the private law system, where the extra compensation belongs to the victim. Therefore, what was mentioned above is actually a kind of criminal fine in criminal law. See LIU Zhubin, 中国古代盗窃罪的产生、成立及处罚 (The Occurrence, Establishment and Punishment of Larceny in Ancient China), 6 法学评论 (Law Review), 53–58 (1996).
provisions for punitive damages were incorporated in the Food Safety Law and the Tort Liability Law in addition to the newly amended Trademark Law and the newly amended Law on the Protection of Rights and Interests of Consumers. In spite of this, generally speaking, China’s acceptance of punitive damages was very prudential and limited. However, a more expansive application of punitive damages is crucial in light of China’s new legal, economic, and social developments, and a general clause of punitive damages should be established in tort law in China’s future Civil Code. This paper is an analysis of this proposition.

I. TORT LAW AND PUNITIVE DAMAGES IN CHINA

The General Principles of the Civil Law (GPCL), enacted in 1986, is the earliest law that prescribes tort liability by specifically setting up a chapter for civil liability and stipulating a general clause of tort liability in Paragraphs 2 and 3 of Article 106 in the first section (“General Stipulations”) of the chapter. There are no specific stipulations about the general principles of bearing civil liability (including tort liability) in the GPCL, but it is specially prescribed in Article 134 of Section 4 (“Methods of Bearing Civil Liability”) of the same chapter that states,

*The main methods of bearing civil liability shall be: (1) cessation of infringements; (2) removal of obstacles; (3) elimination of dangers; (4) return of property; (5) restoration of original condition; (6) repair, reworking or replacement; (7) compensation for losses; (8) payment of liquidated damages; (9) elimination of ill effects and rehabilitation of reputation; and (10) apology.*

*The above methods of bearing civil liability may be applied exclusively or concurrently.*

From these two paragraphs, it can be seen that the general principle of bearing civil liability (including tort liability) in the GPCL adopted the doctrine of compensatory damages that originated in traditional civil law countries. These compensatory remedies require totaling of the damages that have accrued as a result of a civil wrong and compensating the victims in order to put them back into the status or position they would have been in had no injury occurred. However, the above stipulations are not punitive. Additionally, this doctrine is also embodied in Article 112 regarding the liability for breach of contract and Articles 117 to 120 regarding the specific regulations on the liability for tortious acts in the GPCL. Theoretically, based on the strict method of legal

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dogmatics, the principle of “full compensation” could naturally be deduced from this doctrine. There is no doubt that the doctrines of “filling up damage” and “full compensation” (“Totalreparation” in German and “making the victim whole” in English) are basic principles of civil compensation damages in the traditional civil law system. Still, in theory and in practice, the interpretation and application of the doctrine of “full compensation” have been continuously controversial. For example, Paragraph 1 and the first sentence of Paragraph 2 of Article 249 in the German Civil Code separately stipulate that, “A person who is liable for damages must restore the position that would exist if the circumstance obliging him or her to pay damages had not occurred (Naturalrestitution),” and “When it needs the compensation for damages because of the injury to a person or an object, the obligee may demand the required monetary amount for the substitution of the restoration.” The French Civil Code also includes similar articles. Moreover, by only listing the “main methods” for compensating a victim in Paragraph 1 of Article 134 of the GPCL, the available methods are open for adaptation. Undoubtedly, this provides a foothold for legal interpretation, or legal dogmatics, for the creation of new methods of bearing civil liability in China’s civil law.

In addition, Paragraph 3 of Article 134 of the GPCL prescribes that;

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3 By nature, this method of dogmatics of law (Rechtsdogmatik) derives from a special legal construction method and environment in civil law countries, which lay emphasis on conception, norms, rules, and further systematization and codification. For relevant discussions, please see Josef Esser, Moeglichkeiten und Grenzen des dogmatischen Denkens im modernen Zivilrecht (Possibility and Limit of the Thinking Method of Legal Dogmatics), 172 Archive of Civil Practice (AcP), 97 (1972); XU Defeng, 法教义学的应用 (The Application of Legal Dogmatics), 5 中外法学 (Peking University Law Journal), 937–973 (2013). However, in my opinion, the article of XU overvalues the status of the method of dogmatics of law in the German civil and commercial law. In fact, Germany puts special emphasis on the innovation and increase of its international competitiveness (Internationale Konkurrenzfaehigkeit). Germany has heavily modified its civil and commercial laws during the past several decades in order to achieve modernization. In this process, the methods, including the empirical analysis of law, sociology of law, comparative jurisprudence (especially comparison with American law), and law and economics have played important roles, making German civil and commercial laws more flexible, more efficient, and simpler. This trend is embodied in its modernization of the obligation law in the Civil Code, condominium law, corporation law, and accounting law in the Commercial Code, namely, the regulations related to the trade book, and the insurance contract law. See BAI Jiang, 传统与发展: 德国建筑物区分所有权法的现代化 (Tradition and Development: The Modernization of German Law of Condominium), 7 法学 (Legal Science), (2008); GAO Xujun & BAI Jiang, 论德国民法有限责任公司法改革法 (Reform of Limited Liability Law in Germany), 1 环球法律评论 (Global Law Review), 119–129 (2009); BAI Jiang, 论德国环境责任保险制度: 传统、创新与发展 (Discussion on Legal Institutions of Environmental Liability Insurance in Germany: Tradition, Innovation and Development), 2 东方法学 (Oriental Law), 131–149 (2015).


5 Art. 1382 of the French Civil Code reads, “A person shall be liable for damages suffered by others due to his or her behaviors,” and Art. 1383 reads, “Everyone is responsible not only for his or her actions, but also for the damages caused by his or her negligence or imprudence.”
When hearing civil cases, the courts, in addition to applying the above stipulations, may admonish, order the offender to sign a pledge of repentance, and confiscate the property used in carrying out illegal activities and the illegal income obtained therefrom. It may also impose fines or detentions as stipulated by law.

This clause stipulates civil sanctions. Later, the Opinions of the Supreme People’s Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People’s Republic of China (Trial Implementation) further elucidate details regarding civil sanctions, for example, in Paragraph 2 of Article 163, Article 61, and Article 62 of the Opinions. Although there is persistent criticism from academia in China regarding civil sanctions, especially because the three mandatory measures, namely, confiscation, fines, and detention, arguably embody the characteristics of liability in administrative law and criminal law, this clause of the GPCL indicates that civil liability could also warrant punitive sanctions (in German legal literature: Sanktionscharakter). This is especially true for the most serious violations of civil laws. From a legal dogmatic perspective, these clauses create the possibility of developing some sanctionative and punitive civil liabilities in China’s future civil law.

In December 2009, China formulated and promulgated the first comparatively comprehensive tort law — Tort Liability Law. Article 15 of Chapter II (“Constituents of Liability and Methods of Assuming Liability”) regulates the methods of applying tort liability. It basically adopted the wording of the GPCL and the most important method is still compensation for losses. There are many rules about how to determine the range and amount of compensation in that chapter, for example, Article 16, Article 19, and Article 20, and these rules are also embodiments of the doctrines of “filling up damage” and “full compensation” from the traditional civil law system. However, Article 47 of Chapter V (“Product Liability”) of the Tort Liability Law lays out the rule regarding punitive damages. A spin-off of the doctrine of “filling up damage,” this article’s language has been persistently sought by legislators in tort liability since the enactment of the GPCL. Legislators acted in response to their personal observations of a number of malicious, atrocious, and abhorrent violations of laws, such as the selling of counterfeit medicine, which caused the death of many patients, or the selling of inferior milk powder, which caused the death of many children. Punitive damages will help to constrain these atrocious infringements. Punitive damages should be prescribed in tort law in order to embody the functions of punishment and deterrence of tortious acts. However, the legislators also believe that punitive damages should be carefully restricted in the scope of their applications and conditions. Therefore, punitive damages were only adopted for certain product liability violations.

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6 ZHONG Xinlian, 民事制裁若干问题探讨 (A Few Discussions about the Civil Sanctions), 5 现代法学 (Modern Law Science), 75–76 (1995); YE Yanxi, 民事制裁存废论 (Reserving or Abolishing the Civil Sanction), 3 湖北行政学院学报 (Journal of Hubei Administration Institute), 126–127 (2007).

7 WANG Shengming, 中华人民共和国侵权责任法释义 (The Interpretation of the Tort Liability Law of the People’s Republic of China), Law Press (Beijing), at 244 (2010).
Generally speaking, this legislation in tort law has been a marked advancement in civil law and the theory of civil law. It does not break the existing system of China’s civil law, but it is a significant new development with respect to Article 134 of the GPCL regarding the methods of bearing civil liability based on the actual needs of China’s society.

Moreover, Paragraph 2 of Article 96 of China’s Food Safety Law, enacted in February 2009, stipulates that, “When food not meeting the food safety standards is produced or knowingly sold, the consumer may demand the producer or seller to pay punitive damages in the amount of 10 times the paid price, in addition to compensatory damages.” Sentence 2 in Paragraph 1 of Article 63 of China’s Trademark Law, which was revised in August 2013, stipulates that, “If there is malicious infringement upon trademark and other aggravating circumstances, the amount of compensation may be one to three times of the amount determined by the use of the aforesaid method.” These two stipulations apply punitive damages for special infringements in the individual laws in addition to the tort law. Paragraph 2 of Article 55 of the newly amended Law on the Protection of Rights and Interests of Consumers enacted in October 2013 is based on Article 49 of the Tort Liability Law, and it expands the regulated objects from product to service. More importantly, it limits the monetary amount of punitive damages, prescribing that if an operator knows about the defect of a commodity or service and still provides the commodity or service to consumers, thus causing death or serious damage to the health of the consumers or a third party, the victims shall have the right to claim punitive damages, which are no more than twice the suffered damages (including mental damages). Most scholars argue that the regulation of punitive damages for proprietors who perform deceptive behaviors while providing commodities or services in Paragraph 1 of Article 55

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8 Before the revision of the consumer protection law, some scholars had put forward a suggestion for this revision. See YANG, fn. 1. Additionally, some scholars speak highly of Para. 2 of Art. 55 of the newly amended consumer protection law, because they believe it achieves a balance between several regulations on punitive damages, which were significantly imbalanced before the revision, and unprecedentedly builds a fairly typical and very normative system of punitive damages. It also reveals the rejection by the legislators towards the legislation proposals about expanding the scope of punitive damages by strictly applying punitive damages on serious infringing acts such as causing death or severe damage to health. See ZHU Guangxin, 惩罚性赔偿制度的演进与适用 (The Evolution and Applying of the System of Punitive Damages), 3 中国社会科学 (Social Sciences in China), (2014). However, I think these views are worth discussing because there is no problem with a loss of balance among several regulations regarding punitive damages before the revision, and it is just a problem of the relationship between the general law and the special law; the old law and the newly enacted law. This relationship is very clear and unconfused. The new clauses of punitive damages in China’s new consumer protection law are just extensions and restrictions of Art. 47 of China’s Tort Liability Law. This revision does not deserve such high praise. Furthermore, it is very natural that the scope of application is limited to serious violations because these clauses are based on Art. 47 of China’s Tort Liability Law. However, this does not mean that the legislature will not expand the application of punitive damages by enacting some individual laws or through other means in the future. After all, the legislature is advancing with the times in China.
A GENERAL CLAUSE OF PUNITIVE DAMAGES SHOULD BE ESTABLISHED IN CHINA’S FUTURE CIVIL CODE

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A general clause of punitive damages should be established in China’s Future Civil Code

The revised version of Article 49 of the previous Law on the Protection of Rights and Interests of Consumers of the new consumer protection law is a kind of liability for breach of contract, rather than a liability for a tort. The regulations regarding punitive damages in the Interpretation of the Supreme People’s Court on Certain Issues concerning the Application of Law in Trying Cases involving Disputes over Contracts on the Purchase and Sale of Commercial Apartments should be an application of Article 49 of the previous consumer protection law.

China’s General Provisions of the Civil Law was enacted in 2017. Its Article 179 is based on Article 134 of the GPCL enacted in 1986. However, this new article abandons Paragraph 3 of Article 134 of the GPCL regarding civil sanctions, and provides a new prescription as Paragraph 2, which is “Where any law provides for punitive damages, such a law will apply.”

In summary, the scope of application of punitive damages in tort law is very narrow currently in China. However, from the perspective of empirical observations and legal dogmatics, this legal institution is deeply rooted in the general tort law as well as the special tort law in China, and it also indicates the potential for expansion.

II. REASONS FOR EXPANDING APPLICATION

Article 1 of China’s Tort Liability Law clearly prescribes the legislative objective of the law, which states that “In order to protect the legal rights and interests of civil subjects, establish tort liability clearly, deter and punish delicts, and promote social harmony and stability, the law is enacted.” To fully and effectively achieve this legislative objective, punitive damages in tort law should be established in China’s Future Civil Code.

9 Some scholars believe that it is a special kind of liability out of breach of contract, namely, Culpa in contrahendo. See ZHU, Id. In my opinion, these differing views may all be right since “fraud” (Täuschung in German) can have several different legal consequences. For example, in Germany, with respect to Art. 123 of the German Civil Code about the voidability of intent expression on the grounds of deceit or duress, “fraud” may have different legal consequences and may result in the concurrence of the following claim rights: (1) A person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid his declaration and ask for restitution in accordance with the rules for unjust enrichment of Art. 812 of the German Civil Code; (2) based on Para. 2 of Art. 823 of the German Civil Code, Art. 263 of the German Criminal Code, and Art. 826 of the German Civil Code, it may result in the claim of right of compensation for damages based on tort law; (3) it may cause the liability out of breach of contract, namely, Culpa in contrahendo. The victim is entitled to demand a restoration of status and appropriate compensation from the liable party. Compensation here usually means compensation for reliance damages (Vertrauensschaden), but it also includes the compensation for performance damages (Erfüllungsinteresse); and (4) it may cause liability for breach of contract and defective performance under Art. 437 of the German Civil Code. See Palandt, fn. 4 at 102; Jauernig, Kommentar Zum BGB (Jauernig Commentary to German Civil Code) (15th edition), C.H. Beck (Munich), at 70–71 (2014). However, in order to ensure systematic uniformity of all stipulations regarding punitive damages in China’s present legal system while also remaining aligned with the historical theories of the scope of application of punitive damages in America, this clause should be defined as tort liability through judicial interpretations. This will avoid a situation where punitive damages are applied to general liability for breach of contract. The detailed reasons for this can be found in Part IV.A of this paper.
the application scope of punitive damages in China’s Tort Liability Law should be enlarged. This legal institution has several functions including compensation, sanction, deterrence and prevention, social control, and correction. By bringing these functions fully into play, the legislative objective of China’s Tort Liability Law can be achieved more effectively. Also, the purpose sought by the Tort Liability Law, the GPCL, and the General Provisions of the Civil Law, which are to (1) strictly protect the legitimate rights and interests of civil subjects, (2) fill up the damages really, and (3) fully compensate victims, can be achieved as well.

A. The Losses Suffered by Victims Can Be Compensated for More Fully

Punitive damages are a very effective tool for remedying and protecting the rights of victims, and it can compensate for the losses suffered by the victims more fully and adequately, thus allowing victims’ full compensation and total reparation. From the perspective of the dogmatics of law, this is also the goal pursued by China's GPCL, General Provisions of the Civil Law, and the Tort Liability Law. However, how to allow victims to obtain full compensation is a question that demands continuous reflection and contemplation. Therefore, the legal values that the victims could obtain complete reparation, namely, full compensation brought by punitive damages, should be reconsidered. Currently, Chinese scholars generally discuss the compensation function of punitive damages from the following perspectives. First, punitive damages can play the role of relief and compensation for the victims when the victims do not get mental compensation damages, when they get inadequate compensation, or when the loss or personal injury suffered is hard to prove. In addition, punitive damages can also compensate for the litigation costs paid by the victims. Based on the latest development of punitive damages in foreign judicial practices and theoretical research, this paper provides a deep analysis on this special compensation function of punitive damages from two new perspectives.

1. Punitive Damages Can Compensate Moral Harm Suffered by Victims.

According to the famous theory of equality proposed by the philosopher, Kant, since we are human beings, we have our own values and each person is an “end-in-himself.” From this perspective, all of us are equal in value. Each of us has the duty to respect every other person as our fellow creature equally, since each of us is an independent and rational person. Kant’s theory regarding human equality and human values has a far-reaching impact on modern society and is widely acknowledged by society. On the basis of Kant’s theory, American philosopher Hampton further proposes that, since each of us has

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inherent value as an end-in-ourselves, morality requires that each of us shall respect other persons; respect their and our esteem as human beings. However, the conduct of each person is generally expressive in daily life, and some expressive conduct may lead to “diminishment” of human values and trigger some kind of “appearance of degradation,” thus contributing to some kind of “moral injury.”\(^\text{11}\) For example, when we infringe on others in an intentional, malicious, and wanton way, our conduct carries some meaning. The meanings expressed by such injurious acts reflect a judgment that some people do not have the right to be respected that should have been owed to human beings. These intentional, malicious, and wanton infringing acts reflect contempt for the victim’s human value by the infringer, carry the meaning of self-superiority and self-importance, and deny human values such as moral equality among people, independence, and autonomy enjoyed by each person. Therefore, intentional, malicious, and wanton infringers cause some kind of moral injury to the victims and infringe on the moral interest enjoyed by victims under tort law.\(^\text{12}\) To compensate for the moral harm suffered by the victims, laws should compel infringers to bear the obligation of punitive damages, and force the infringers to pay for moral debts owed to the victims. Only through these obvious and publicly visible punitive damages can the self-superiority expressed through infringing acts by the intentional and malicious infringers be defeated thoroughly and the imbalance among the parties caused by intentional and malicious acts be eliminated thoroughly, leading to some kind of “expressive defeat.” At the same time, it can accomplish full compensation for the victims and restore the victims to the situation they were in before the harm occurred, thus creating an actual balance between the parties. This reflects the poetic justice similar to “an eye for an eye, a tooth for a tooth.”\(^\text{13}\)

For reckless infringing acts that totally disregard others’ rights, the problem of moral injury and compensation for such moral injury may also occur, since such serious infringing conducts are also some kinds of very obvious “expressive conducts,” expressing contempt for, and the denial of others’ dignity, value, and equality. Therefore, punitive damages should also be used to compensate for the moral harm suffered by victims.

Punitive damages targeted at moral loss are different from common compensatory damages targeted at general wrongful loss under traditional tort law. General wrongful


\(^{12}\) American scholar, Amir Nezar, raises the concept of “moral accounting interest” in tort law and argues that this concept should be constructed to coordinate and resolve the conflicts and contradictions in explaining punitive damages by using the traditional correction theory and the new theory of law and finance. For details, please see Amir Nezar, *Reconciling Punitive Damages with Torts Law’s Normative Framework*, 121 Yale Law Journal, 678–723 (2011).

loss includes physical and economic loss caused by general infringing acts. Such wrongful acts, usually, can be verified physically and are concrete. While the moral loss in punitive damages is a degradation of moral status suffered when the infringer infringes on others in a wanton or reckless way. Such degradation is closely connected with the contents expressed by such serious infringing conduct. It can be said that wrongful loss results from infringing acts, while moral loss results from the condemned, humiliating, and disparaging expressive ways of specific infringing acts.

In tort law in the US, when the actor infringes on others in a wanton, malicious, or reckless way, the judge has the power to impose punitive damages on the actor. The theory that the actors of the aforesaid malicious or reckless infringing acts causing moral loss to the victims shall bear additional punitive damages is no doubt a further illustration of the extra compensation function of punitive damages in tort law in the US. This can also provide a theoretical basis for punitive damages to be referred to as extra compensatory damages sometimes.

Such extra compensatory damages for moral injury caused by malicious or reckless infringing conduct deserving of moral reprehensibility are obviously different from traditional mental compensation, which remedies the pure infringement of personality rights in the traditional civil law system. Although there are no concepts and theories such as moral injury or extra compensatory damages for moral injury realized by retaliatory punishment and retribution in the traditional civil law system, they are obviously in accordance with “the protection of human beings” — the core basic legal value pursued by the modern science of civil law and the civil code, the higher understanding of human values of freedom and equality, and the realization of “the protection of human beings” from a higher level, both reflectively and actively. In fact, the concept of “harm” in the European civil law countries is always in the change too. Its scope becomes wider and wider with social development. For example, commercial devaluation and ecological harm are the new type of harm. In the same light, moral harm is just another new type of harm. Then, extra compensatory damages for this new kind of harm appear normal and are accepted easily.

Therefore, the traditional countries with a civil law system, including China, should understand and accept these new concepts and theories with an open mind. The modern science of the civil law and the civil code should be an open system that can be

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16 LI Hao, 损害概念的变迁及类型建构 (The Evolution of Concept of “Harm” and the Building of Its Types), 2 法学 (Law Science), 72–82 (2019).
2. Punitive Damages Can Provide More Adequate Ex-Ante Compensation in Cases of Severe Body Injury or Loss of Life. — Traditional tort law always prescribes compensation for damages from the perspective of *ex-post* compensation. For example, Article 16 of China’s Tort Liability Law prescribes that,

> In the event of a tort resulting in another’s bodily injury, the compensation for, inter alia, the medical, nursing and transportation expenses shall be made as reasonable payments for the treatment and rehabilitation expenses and for the income loss from work delays. In the event of tort resulting in disability, the compensation for the expense of auxiliary tools for disability living and also the disability compensation money shall be made further. In the event of a tort resulting in death, the compensation for the funeral expenses and the death compensation money shall be made additionally.

However, the compensation for victims under such consideration is not adequate in cases of serious bodily injury or death caused by malicious or gross negligent infringing acts. According to the principle of pure *ex-post* compensation, some large enterprises can treat the compensation for severe bodily injury or loss of life as a type of cost in the enterprises’ operation. When the cost for reducing casualty accidents highly exceeds the amount of paying normal compensation for casualties, according to the cost-benefit analysis, these corporations will not take measures to exclude or reduce the occurrence of such casualty accidents. For example, in the case of *Grimshaw v. Ford Motor Company* in the US, Ford Motor Company was aware of the design problem of the fuel tanks of its Pinto-type motors. However, it did not implement recall measures after using the cost–benefit analysis, since the cost to be paid if such type of cars were recalled for repair would highly exceed the compensation for the casualties normally paid if such cars were not recalled for repair. This particular Ford motor car, driven by Mrs. Grimshaw, caught fire after a rear-end collision, and Mrs. Grimshaw was burnt to death and her child suffered serious bodily injury and burns. In such cases, using traditional ways to calculate injury damages from an *ex-post* perspective is not enough.

Some American scholars propose that in such seriously condemnable infringing cases where the infringers are indifferent to or recklessly disregard others’ rights, the compensation should be made for victims by using the model of willing-to-assume-risk

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18 The court finally ruled that the burnt child Grimshaw should get US$2,516,000 as compensatory damages and US$125,000,000 as punitive damages. The sum of punitive damages determined by the trial court of first instance was US$3,500,000. The heir at law of Mrs. Grimshaw would get US$559,860 as compensatory damages. See *Grimshaw v. Ford Motor Company*, 174 Cal. Rptr. 348, 390–391 (Ct. App. 1981).
measure from the perspective of *ex-ante* compensation.\(^{19}\) Such a model is a way to calculate life values in economics. In the United States, some government departments (such as environment department and food and drug administration bureau) use this as a way to estimate the value to reduce some fatal risks related with the government rules and regulations. Suppose a worker is faced with a piece of risky work with one in ten thousand probability of death in an accident and is willing to do this work for at least US$900 annually. Then, for that worker, the acceptance of the salary of US$900 is the same as the expected accident cost, that is, \(900 = \frac{1}{10,000} \times \text{monetary value of the loss}\). Then, the value to be lost when death accidents occur is US$9 million. When the risk of death rises, the salary required by workers will also rise. When the occurrence rate of accidents is 100%, normally, no worker is willing to accept the job, regardless of how much they will be paid. This illustrates the invaluableness of life. The amount of death compensation calculated by this method is known as “value of statistical life.”\(^{20}\) It reflects the exchange and calculation between the money and the low risk of death. It comes out on the basis of the statistical analyses and calculation of the work of the various risks in the labor market. In this way, the amount of monetary compensation resulting from the occurrence of death accidents can be calculated or estimated more precisely in advance, thus providing the important reference for punitive damages, and finally offering more adequate compensation to the victims. Certainly, this method is based on numerous statistical data and is currently mainly taken into account in the risk liability field of food, drugs, general products, and environment.

The traditional method of the *ex-post* compensation actually implies that the laws allow the infringers to conduct the mandatory transactions with the victims after the occurrence of accidents, which means that the infringers only need to provide compensation for the loss caused by infringing acts and pay traditional compensatory damages after committing the infringing acts. This violates the private autonomy of the victims, obviously. While the mode of calculating the compensation for the casualties in advance, namely, “value of statistical life,” reflects respect for the free choice and private autonomy of the victims and accords with the essence of the spirit of private law, in the serious infringing cases where the infringers maliciously infringe on or totally disregard others’ rights, it no doubt can provide adequate and full compensation for the victims. Further, it forces the infringers to actively take measures to really reduce or eliminate the risks of their behaviors, thus actually enforcing the principle of bearing the risks and liabilities of their conduct by themselves. From this point, a more reasonable explanation of these legal issues is that when some larger enterprises in the United States promote

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some condemnable business models for profits only and on the basis of the cost–benefit analyses regardless of others’ rights, the courts may rule that these enterprises must pay huge punitive damages to the victims. A typical case is Philip Morris USA v. Williams.\(^{21}\) In this case, the tobacco company, Philip Morris, tempted Mr. Williams to continuously smoke its cigarettes in a fraudulent way, which eventually led to his death due to lung cancer. The jury ruled that his wife should be paid US$821,485 as compensatory damages and US$79,500,000 as punitive damages.\(^{22}\)

In seriously reprehensible tort cases where the perpetrators disregarded others’ rights recklessly and caused severe bodily injuries or death of the victims, it is worthwhile that China recognizes and accepts the theory and model of making full compensation for the victims by punitive damages from the perspective of ex-ante compensation in its tort law.

From the two above new perspectives, punitive damages can compensate the losses suffered by the victims more fully and adequately, thus allowing victims full compensation and total reparation. In this sense, it is a spin-off of the traditional doctrine of “filling up damage” in civil law. However, in another sense, it is a new development of tort law and an independent legal institution. After all, it is a breakthrough in the traditional concept of compensation in the civil law system.

### B. The Function of Punishment Can Be Achieved More Effectively

Punitive damages can punish the perpetrator who infringes upon the victim’s rights seriously. This is a punishment directed against the violation of the rights in private law, namely, a private wrong; thus, it can realize the function of the special punishment and revenge in private law. This is a new important theory that has gradually developed from the discussions of some American scholars on several cases related to punitive damages and ruled on by the Supreme Court of the United States.\(^{23}\) This new theory reflects a

\(^{21}\) Philip Morris USA v. Williams, 127 Supreme Court, 1057 (2007).

\(^{22}\) When Mark A. Geistfeld explained the rationality for such high compensation, in addition to value of statistical life, he also considered the odds that the infringing acts would be discovered (which was 1/20 used by him) and other reprehensible factors. For details, please see Geistfeld, fn. 19 at 264–295.

\(^{23}\) In America, in the last few decades, more and more punitive damages have been applied to punish defendants in cases where the defendants’ infringing acts caused damage to the whole society instead of mere victims. With respect to this trend of expansion, in the case of BMW of North America, Inc. v. Gore in 1996, the Supreme Court of the United States, based on the consideration of federalism, excluded the application of punitive damages by a court of a state for the purpose of punishing the defendant for damages caused outside of such state, especially when the defendant’s behavior was legal in other states. In the case of State Farm Mutual Automobile Insurance Co. v. Campbell in 2003, the Supreme Court further expanded this viewpoint and held that even if the defendant’s behavior was illegal in other states a state should not punish the defendant for his or her illegal behavior in such other states. In the case of Philip Morris USA v. Williams in 2007, the Supreme Court further clarified that the due process clause in the Constitution prohibits a state from using punitive damages to punish the defendant for damages not suffered by the parties.
somewhat new understanding of punitive damages’ function of punishment.24

As U.S. Justice Richard Posner said, crime and tort are often intertwined.25 However, even though the crime and the tort may come from the same illegal act, they are different illegal acts in the law and they invade the rights of different objects. The tort is a delinquency in private law, namely, a private wrong against individuals, while crime is a delinquency in public law, namely, public wrong against the whole society and country.26 For example, if A assaults B maliciously, this act constitutes a private wrong against B (A caused B’s pain, shame, and fear) and it constitutes a public wrong against the society at the same time (A jeopardized public order and disturbed the peace of the society). A public wrong is usually remedied through public prosecution initiated by a public prosecutor, while a private wrong is remedied through civil action initiated by the victim or his or her close relatives.27 Generally speaking, criminal law aims to protect and defend the whole society’s interests by punishment, while tort law, as a private law, aims to compensate for the damages suffered by victims. However, in the cases where serious infringing acts exist that deserve moral reprehension because of their maliciousness or recklessness, punitive damages can provide the victims with a powerful weapon that can be used to punish and exact revenge within the limit of the law in order to defend his or her own private rights.28 In these serious torts (such as assault, fraud, or sale of toxic and harmful food), the infringer encroaches on the victim’s dignity by the infringement and the tort expresses the infringer’s despise and disrespect to the victim. Compensatory damages are not enough for such humiliating infringing acts against others’ dignity. It is natural that a victim as a normal person with dignity would desire to punish and seek revenge on the infringer, which is the natural human instinct. Only in this way can the victim feel content and that justice has been upheld and defended, and the previous balance and peace can be restored.29

It may be said that the revenge contains a primitiveness in civilization, and injustice since it aims to obtain pleasure and satisfaction by seeing others suffering pain; however, revenge is, in fact, a natural instinct. When revenge is controlled by the law and the urge


25 *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999).

26 This viewpoint can be traced back to Beccaria who suggests that the essence of crime is the damage to the whole society. See Richard Bellamy ed., Richard Davies & Virginia Cox trs. *Beccaria: On Crimes and Punishments and Other Writings*, Cambridge University Press (Cambridge), (1995).

27 See Goldberg, Sebok & Zipursky, fn. 14 at 31–33.

28 See Sebok, fn. 24 at 999.

and pursuit of the revenge is limited within a certain legal framework, these doubts and worries can be resolved. In fact, permitting controlled revenge can realize justice better. Since a normal person holds the strong and natural instinct to take revenge, granting a legitimate way for such instinct can prevent victims from taking revenge outside the legal framework. As Justice Oliver Wendell Holmes, who is also a famous scholar, said, if the law does not help people to take revenge, people will pursue revenge outside the law to satisfy their enthusiasm for revenge. Therefore, the law has no choice but to satisfy this enthusiasm in order to avoid the greater evil — private revenge.  

In the early judgments in the United States and the United Kingdom, an important argument to support punitive damages is that it can prevent humiliated victims from pursuing private revenge outside the law.  

Besides, permitting punitive damages to punish private wrongs can defend the victims’ dignity. American scholar Anthony J. Sebok explains that when a perpetrator commits a serious tort humiliating the dignity of the victim, the perpetrator has invaded at least two kinds of rights — the basic private right (including the rights of personal safety and property), and the right to be treated as a person whose basic private rights deserve others’ respect. Compensatory damages can relieve the first kind of right, while punitive damages can relieve the second kind of right, since it can make the victim’s moral status and the infringer’s moral status equal again, thus helping the two parties to get truly even after the event. Therefore, punitive damages are a kind of “expressive defeat” for the infringer as they deny the infringer’s superiority and are a public proclamation of the equality of the moral status of both sides. In addition, primitive damages can achieve the effect of moral education on society. Morals and moral education are crucial and significant for a country that strives to transit into a modern country under the rule of law. They are also the vital issues that private law must be concerned about. Only in a country whose people have high morals and abide by high moral standards can the trust among its citizens and between the citizens and the state be built. This will result in the willingness to make investments, especially long investments. These investments will foster the development and success of enterprises. Then, this will result in the prosperity of the country and the happiness of its people. In one sense, the

32 See Sebok, fn. 24 at 999.
33 See Hampton, fn. 11 at 1686–1687.
34 See Galanter & Luban, fn. 13 at 1406.
scale of the acceptance of punitive damages in one country signifies its standard of social morality and social justice.

In other words, punitive damages, through punishment and retribution, can better express the enthusiasm that people have for freedom and dignity, and promote and maintain the peace of the whole society. In the view of the strict dogmatics of law, punishing infringing acts to promote the peace of the society is also one of the goals pursued by China’s Tort Liability Law. At the same time, giving the sanctions in civil law to those serious illegal acts is also the goal pursued by Paragraph 3 of Article 134 of the GPCL of China. Punitive damages offer an effective way to realize retribution against serious torts successfully.

C. The Function of Deterrence Can Be Achieved More Effectively

Another important function of punitive damages is that they can play a role in effective deterrence and prevention. As has been proposed by the courts of the United States for a long time, punitive damages can be properly used to strengthen the legitimate interests of a state in punishing illegal acts and preventing reoccurrences. To be more accurate, punitive damages can realize the double functions of retribution and deterrence by punishing illegal acts. Retribution and deterrence are two sides of the same coin, namely, punishment. Punitive damages can achieve the goal of punishing serious torts by punishing private wrongs, and such retribution can also generate the effect of deterrence and prevention. Such effects include preventing the infringer from conducting the infringing act again (special deterrence) and preventing a third party in society from committing this kind of tort (general deterrence). By punishing private wrongs, private revenge can be achieved and the effect of warning the whole society and protecting public interest can be produced incidentally. It can show the diversity of the functions carried by punitive damages from this point. However, such a function of public deterrence of warning third parties in society should not become the major impetus and goal of punitive damages. Otherwise, it would blur the basic distinction between punitive damages in private law and criminal sanctions in public law.

Furthermore, punitive damages can achieve optimal deterrence that is advocated by some scholars of law and economics. In other words, it can be used to ensure that the infringer can internalize the whole social cost of his or her conduct. Traditional compensatory damages always fail to realize this goal sufficiently and effectively because the infringer always escapes from bearing the legal liability for damages caused by his or her infringing conduct, particularly when the infringer performs decentralized and slight infringing acts to a vast number of lives. A rational person or organization may engage in

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38 See Colby, fn. 24 at 423.
these inefficient behaviors that would bring much more cost than profit to society because the perpetrator knows that he or she can obtain the whole profit of his or her conduct by possibly being forced to assume a small portion of costs. However, punitive damages can ensure that those potential infringers understand that they have to internalize all the costs of their conduct. In this way, the appropriate incentive effect can be generated, and it encourages them to only perform economically efficient conduct and spend the necessary resources on avoiding damages. This optimal deterrence is different from general deterrence in criminal law. The latter is a complete and absolute deterrence and its goal is all for public interest, while the former is still a kind of deterrence in private law, meaning that if the perpetrator is willing to pay the cost of his or her conduct, he or she can still continue performing such conduct.

Deterring the delicts is one of the legislative goals stated in Article 1 of China’s Tort Liability Law. The question about how to deter the delicts effectively demands in-depth research. The theory of China’s tort law in the past always emphasizes that the social effect of retribution and deterrence can be achieved by forcing the infringer to assume the damages, but it is clear that the effect of strong retribution and deterrence can hardly be generated by forcing the infringer merely to assume compensatory damages. In the cases of severe torts that are malicious and reckless and deserve moral reprehensibility, there is no doubt that punitive damages offer a weapon to achieve a better effect of retribution and deterrence.

D. Other Various Social Regulating Functions Can Be Achieved

U.S. Justice Guido Calabresi, who is also a famous scholar in tort law, believes that tort law bears multiple functions in the society of the United States. Punitive damages in the tort law also perform multiple functions in order to meet the need to solve the problems caused by the changes in society and technologies. During the development of more than 250 years, which started with the first two cases of punitive damages in the United Kingdom in 1763, it reflects a history with continuous enrichment and development when facing and responding to the emerging social problems. Those functions shall have equally significant meanings to a country such as China, which is in the process of transition and rapid development and has the urgent need to innovate in social governance.

1. Correcting the Abuse of Status and Power: — Punitive damages originated from the two cases, Wilkes v. Wood and Huckle v. Money, in the United Kingdom in 1763. In these

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two cases, punitive damages were used as a way of punishing the abuse of governmental power. The two cases resulted from the government prosecution of a publisher and a printer of a newspaper, which criticized the government frequently. In the Wilkes Case, Mr. Wilkes, who was the publisher of such newspaper as well as a member of parliament, sued the Secretary of State for trespassing, because the Secretary of State issued a warrant to search the house of Mr. Wilkes. In the Huckle Case, an employee of the newspaper was arrested and held in custody according to the search warrant. Lord Justice Camden came up with the term “exemplary damages,” i.e. punitive damages, to describe the extra huge damages separately awarded when the actual damages were small. He chose the word “exemplary” to demonstrate the function of punitive damages in correcting the abuse of power. The existence of punitive damages in the cases similar to the above two strongly contributes to the establishment of such a meaningful principle in the United Kingdom, that is, no one can rise above the law, regardless of how powerful he or she is.

Then, punitive damages gradually developed to be used to punish the influential rich who abuse their status and power. For example, in some defamation cases, a judge or jury may think that the persons who are rich and of high social status have more influence on society and thus their defamations toward the average person cause more serious harm to society. Only the imposition of punitive damages on the rich could make them careful with their words more effectively.

Later, with the advancement of industrialization and technicalization, punitive damages also become a social regulatory tool directed at serious infringing acts, including endangering public security by gross negligence and cheating clients maliciously, which was committed by large corporations such as railway corporations, automobile passenger transportation corporations, coal mine enterprises, petroleum corporations, and financial corporations. Such cases are too numerous to be counted. In the United States, in recent decades, financial torts have become the second largest category of the cases where punitive damages are awarded, ranking only second to the general intentional torts. This indicates that punitive damages respond promptly to the changes and needs of society. Imposing punitive damages on financial corporations for their malicious fraud of consumers or disregarding consumers’ rights recklessly helps to strengthen the protection of the average financial consumers.

Such function of social correction of punitive damages is very important to China. Presently, China has become the second largest economic entity in the world and is striving to be one of the high-income countries. However, the gap between the rich and

44 Such as the case in the United States: Barkly v. Copeland, 15 P. 307, 310 (Cal. 1887); Bennett v. Hyde, 6 Conn. 24, 25 (1825).
45 See Sebok, fn. 24 at 968.
the poor is also enlarged, which triggers social concerns. Furthermore, the interests of average consumers are often injured by big enterprises in marketplace. In capital market, many investors suffer losses due to securities fraud, such as false statement, insider trading and market manipulation. Also, rights of citizens are often jeopardized by public authorities through conducting illegal searches, detention and so on. When facing these social problems, China should use punitive damages bravely as a powerful tool to correct the social unfairness, fight for social justice, while at the same time promoting a national sense and spirit of justice.

2. The Function of Complementing the Criminal Law. — There is an intertwined grey zone between criminal law and tort law. In that zone, it may be hard to pursue criminal liability for some severe torts, but not to impose relatively severe legal liability on such misdeeds would indulge these misdeeds and fail to sufficiently punish and deter the tortfeasor. In this intertwined grey zone, civil sanction shall be prior to criminal sanction because the result of criminal liability is so severe that it will have a heavy impact on the wrongdoer.46 The application of criminal law should be rigidly controlled and limited in any country where individual freedom is highly respected, deeply cherished, and rigorously guaranteed.

Moreover, when the implementation of criminal law is not in place, punitive damages could also have the function of complementing the criminal law. In practice, some accidents are caused by peculiar and morally appalling unlawful civil acts. However, it is hard to determine the legal causality and thus it is hard to pursue criminal liability. For example, the case of the design defect of the fuel tank of Pinto-type of American’s Ford automobiles stated earlier (Part II.A.2). In this case, the only facts were the collision of the cars and the subsequent fire. Only after careful investigation and serious statistical analysis on many similar accidents could the fact that the fire was caused by the defective design of the fuel tank be found. Otherwise, such accidents would only be considered as normal car collisions. Generally, the police would not spend so much money and effort conducting an investigation and statistical analysis. Nevertheless, punitive damages offer the economic incentive to push the victims and their lawyers to complete such tasks, eventually leading to the punishment of these outrageous misdeeds. This is particularly meaningful for the investigation and prosecution of white-collar crimes because the offenses are more professional and complicated and the offenders could afford to employ better lawyers, and they may even use their wealth and social status to influence the investigation and prosecution.47 In addition, the law on white-collar crimes is usually

vague and blurry. It can be said that the criminal law is more effective at striking street crimes committed by the low-class and the poor, but not so against the crimes committed by the high-class and the rich. Punitive damages could just complement it and correct such dysfunction.

The function of administrative law should not be neglected when considering the function of punitive damages — complementing the criminal law. However, the penalties in administrative law are in essence the civil compensations for the costs of the execution of the government, because a violator against administration law actually breaches an implicit contract between every social member and the government. According to this contract, every social member has the duty to conform to the rules stipulated by the government. When a violation against administration law happens, the victim is the government rather than the society as a whole. Therefore, the courts view the civil penalties as compensation to the government in their judgments in the United States.\footnote{Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485–486 (1977); United States ex rel. Marcus v. Hess, 317 U.S. 537, 549 (1943); Stockwell v. United States, 80 U.S. 531, 547 (1871).} From this perspective, the function of punitive damages — complementing the criminal law, should not be replaced by the application of the administrative law.

This special function of punitive damages — complementing the criminal law, is very meaningful to China. For historical reasons, among others, China always tends to use criminal law as a tool for social control. However, along with civilization and modernization, it is inevitable to hold back such tendency or, in other words, to keep the modest character of the criminal law.\footnote{LI Zhen & ZHANG Yucheng, 刑罚轻缓化的社会因素分析 (Analysis on the Social Factors of Lightening of Criminal Punishment), 4 法学论坛 (Legal Forum), 43–49 (2009).} Thus, punitive damages in private law are an alternative. Although there is a criminal fine in criminal law, it is still a criminal penalty, which has a heavy impact on the wrongdoers. However, punitive damages in private law are much less severe in their nature; therefore, there is no doubt that they have a particular function in social control. Furthermore, with the development of the economy and society, the white-collar crimes in the economic field are spreading in China. However, because of the specialization and technicality of these crimes and also the vagueness of the law, to investigate and prosecute such crimes is a big challenge in China.\footnote{MA Pinyi & LIU Bin, 论白领犯罪的成因及控制 (Analysis on the Causation and Control of White-Collar Crimes), 3 燕山大学学报(哲学社会科学版) (Journal of Yanshan University (Philosophy and Social Sciences Edition)), 76–78 (2006).} Nevertheless, punitive damages could offer a new solution to punish and deter these defendants from the perspective of private law.

3. Promoting the Private Enforcement of the Law. — Punitive damages could encourage the plaintiffs and their lawyers to investigate the case and bring the suits
against the infringers by awarding the plaintiffs extra compensation. This will make the plaintiffs themselves private prosecutors and thus promote the private enforcement of the law. The reason for endorsing the power of such private enforcement is that the government is not omnipotent and cannot administrate every aspect of society. It is necessary for the government to grant some administrative and executive power to non-government organizations or individuals. Such idea of separation of powers is similar to that between the central and the local government, whereby the central government spares the power of legislation and execution of the law to the local governments to arouse the enthusiasm of the local participation. Private enforcement promotes legal pluralism and reduces legal monism and centralism, and finally promotes the democratization and scientification of the law. It has a special practical meaning for China because China has always heavily leaned toward legal monism and centralism and also persistently pursues the big and omnipotent government.

III. The Responses to the Possible Counterviews and Doubts

Before and during the legislation of China’s Tort Liability Law, there were some views against the acceptance of punitive damages, or there were some views supporting the introduction of punitive damages but with doubts. It is likely that these counterviews and doubts will still exist after the promulgation of the Tort Liability Law and they will continue resisting and impacting the expansion of the application and development of punitive damages in China. On this account, it is necessary to respond to and analyze those counterviews and doubts.

51 ZHANG Hui, 美国公民诉讼之“私人检察总长理论”解析 (Analysis on the Theory of Private General Attorney in American Citizens’ Suit), 1 环球法律评论 (Global Law Review), 164–175 (2014). ZHANG points out that this system has become the theoretical basis for a kind of suits that protects both private interests and public interests, but in my opinion, in the system of punitive damages, the objective that the citizens are allowed to make themselves the private attorney is to protect their private interests, and during such period, it produces the social effects of deterrence and prevention naturally and incidentally. However, this social effect is not the starting point of punitive damages. Otherwise, the difference between tort law as private law and criminal law as public law would be blurred.

52 According to the studies of scholars around the world, it is generally believed that legal centralism is a standard idealism with defects and problems since it does not take into account and demonstrate the functions of the local and native laws in the social lives. See Mariano Croce, A Practice Theory of Legal Pluralism: Hart’s (Inadvertent) Defense of the Indistinctiveness of Law, 27 Canadian Journal of Law and Jurisprudence, 27–47 (2014); Brian Z. Tamanaha, Understanding Legal Pluralism: Past to Present, Local to Global, 30 Sydney Law Review, 375–411 (2008).


54 See WANG , fn. 10; ZHANG Yun, 产品责任的惩罚性损害赔偿制度研究 (Research on Punitive Damages in Product Liability), 5 当代法学 (Contemporary Legal Science), 120–125 (2005).
A. Excessive Controversies and Doubts about the Institution in the Common Law System

One of the possible objections is that there are too many controversies and doubts about punitive damages in the common law system, thus it is not suitable to expand its application and establish a general clause in China’s tort law. Indeed, such a problem exists in the common law system, especially in American law. However, these controversies and doubts do not undermine the stable existence of this legal institution in a common law system. On the contrary, through the discussion of these controversies and doubts, this legal institution has been enriched and has developed continually, and its social and legal functions in a common law system have been found and highlighted gradually. There follows an analysis of several important controversies.

First is the debate on the abolishment and reservation of the institution. In the nineteenth century, two American scholars, Sedgwick and Greenleaf, started an academic debate on whether punitive damages should be allowed. Different state supreme courts also expressed their different opinions on this issue at that time. Most states supported such an institution due to its multiple positive social functions. As was said in one judgment made by the Wisconsin Supreme Court, a law admitting exemplary damages is the natural outgrowth of the English people’s love of freedom regulated by law. It tends to lift the jury as an accountable government tool, to reduce private revenge, to repress the powerful, influential, and unscrupulous persons, to protect the rights of the weak, and to encourage people’s confidence in the law, which has already been damaged by the illegal acts that have not been identified by criminal law or that have not been punished yet. Courts that criticized punitive damages usually said that this institution was undesirable in law. For example, in the judgment of the case of Lyons v. Jordan, the judge held that punitive damages were unwelcome, but were permitted according to the facts of the case. However, as claimed by some scholars, these criticisms do not have substantial legal content, and they reflect only the personal opinions of some judges. At present, only Nebraska totally prohibits this institution and four states, Louisiana, Massachusetts, Washington, and New Hampshire, allow it only when the law explicitly permits so. Thus, it can be seen that this institution has been rooted in most states of the US and the so-called debate on abolishment and reservation is only a historical phenomenon.

Second is the debate that punitive damages are out of control and unpredictable. In the past twenty years and more, many people criticized that punitive damages in America

56 Luther v. Shaw, 147 N.W. 17, 20 (Wis. 1914) (This case imposed punitive damages on the defendant who violated the marriage promise).
58 See Owen, fn. 46 at 371.
were so high that they were out of control and unpredictable.\textsuperscript{59} This led the Supreme Court of the United States to use the due process principle\textsuperscript{60} in the U.S. Constitution to control punitive damages.\textsuperscript{61} For example, in the case of \textit{BMW of North America, Inc. v. Gore}, the court holds that the amount of punitive damages, which is 500 times compensatory damages, is excessively high, to the extent that it violates substantive due process.\textsuperscript{62} In the case of \textit{State Farm Mutual Automobile Insurance Co. v. Campbell}, the court holds that a single-digit multiple is more likely to satisfy the due process.\textsuperscript{63} However, the court adopts the statistics of an academic empirical study in its recent judgment and clarifies that the amount of punitive damages in most of the American punitive damages cases is not out of control. The judgment points out that a review of literature shows that the discretionary power of awarding punitive damages does not lead to many abnormal judgments. Although some studies indicate that the amount of punitive damages is increasing, the median ratio between punitive damages and compensatory damages is still below 1:1. A study shows that, in the judgments of states courts, the median ratio between punitive damages and compensatory damages is 0.62: 1, the average ratio is 2.90: 1 and the standard deviation is 13.8.\textsuperscript{64} Therefore, most judgments are without problems, and excessive punitive damages have been imposed only in a small fraction of the judgments. However, for this small fraction of the judgments, the excessive amount can be controlled through rigid legislation on the adjudication procedure, through the rational legislation limit on the top amount or through the scrutiny of higher courts. Therefore, it is unnecessary to worry too much about the loss of control or the unpredictability of punitive damages.

Third is the debate on constitutionality. Punitive damages have the character of punishment, but the civil procedure law rather than the criminal procedure law is applicable to its award. Thus, the defendant is unable to enjoy the protection of special procedures offered to criminal defendants by the criminal procedure law, such as the burden of proof beyond reasonable doubt, right against self-incrimination, prohibition of double jeopardy, and so on. Therefore, there exists controversy about the constitutionality of punitive damages, which is called the “constitutional puzzle.”\textsuperscript{65} Scholars have

\textsuperscript{59} Such as in \textit{Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.}, 492 U.S. 257, 282 (1989). In this case, the Supreme Court Justice O’Connor pointed out in her dissent opinion that the punitive damages were high above the sky.

\textsuperscript{60} The Fourteenth Amendment to the United States Constitution forbids states from denying any person “life, liberty, or property, without due process of law.”

\textsuperscript{61} DONG Chunhua, 论美国惩罚性赔偿与正当法律程序 (Discussion on American Punitive Damages and Due Process), 11 兰州学刊 (Lanzhou Academic Journal), 136–140 (2010).


\textsuperscript{63} \textit{State Farm Mutual Automobile Insurance Co. v. Campbell}, 538 U.S. 408 (2003).


\textsuperscript{65} See Zipursky, fn. 24 at 106.
different explanations for this problem, among which the most convincing opinion is put forward by American scholar Thomas B. Colby. Colby points out that what punitive damages aim at is the private wrong rather than the public wrong and that what it aims to protect primarily is the private interests of the victims rather than the public or the state interests. Thus, it does not need the higher standard of criminal procedures required by the constitution.\footnote{See Colby, fn. 24 at 444.} This viewpoint is very meaningful. Indeed, it is far from easy to delineate the boundary between civil law and criminal law precisely, and there are too many different opinions on this issue. However, in the case of \textit{Huntington v. Attrill}, the U.S. Supreme Court put forward an opinion that is relatively acceptable to both the academic and the judicial circles. It held that the standard of testing whether a law is of the nature of criminal law is to see whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual.\footnote{\textit{Huntington v. Attrill}, 146 U.S. 657, 668 (1892).} The fundamental task of the criminal law, which is different from that of tort law, is to punish the criminal acts that have social harmfulness and have damaged public and state interests, and then to protect the public and state interests. The drafters of the Bill of Rights, namely, the first to the tenth amendments to the U.S. Constitution, prescribed the special protection principle and mechanism in a criminal proceeding because they were afraid of the forcing and suppressing the power of the state. They were afraid that the state might use the power to eliminate their political enemies or harm the members of politically unpopular groups, which has been done by almost every country in human history.\footnote{Donald Dripps, \textit{The Exclusivity of the Criminal Law: Toward a “Regulatory Model” of, or “Pathological Perspective” on, the Civil–Criminal Distinction}, 7 Journal of Contemporary Legal Issues, 199–221 (1996).} In criminal procedures, the state interests are directly involved, so the state may abuse its power to punish the defendants. Because of this, the Bill of Rights lifts the special requirements on criminal procedures. If punitive damages were used to protect the state and social interests, it would also cause such problems and concerns. But if punitive damages were merely used to protect private interests, it would not cause such problems and worries.\footnote{Similarly, according to the Huntington Rule, civil penalties are not criminal sanctions, but civil compensations. Therefore, the special protection procedures in criminal cases are not applicable to civil penalties either.} From the perspective of the development history and present situation of punitive damages, it is mainly used to punish private wrongs and to protect the private interests of the victims. Certainly, when it is helping the victims to realize their private interests, it also benefits the society indirectly, for example, producing the effect of general deterrence just as the compensatory damage in tort law does. But this does not affect its nature of private law. Therefore, punitive damages are not a constitutional puzzle.
Another possible reason for the objection to enlarging the application of punitive damages in China’s tort law is the conflict between punitive damages and the civil law theory that has been established in China. Since the Qing Dynasty attempted to make constitutional reform and drafted a civil code, China’s civil law started to follow the European continental civil law system and this tradition continues till today. In the current civil law theory in China, some theories in the traditional civil law system, such as the strict distinction between public law and private law and the principle of damage compensation in civil law, have already been widely accepted and even entrenched. This is why some scholars in China expressly hold that the purpose, nature, and function of punitive damages are inconsistent with those of civil law. The main purpose of punitive damages is to secure social public interests while the fundamental purpose of civil law is to protect individual interests. The main function of punitive damages is to punish and deter illegal acts, while the basic function of civil law is the compensation of and relief for the victims. Punitive damages are a kind of legal liability with the nature of public law, while civil law is a typical private law. Some scholars further propose that punitive damages would almost totally subvert the structure and principle of the legal institutions of damage compensation and unjustified enrichment in private law. Permitting punitive damages, which are enforced by private persons, would be totally beyond the state’s exclusive power of punishment and break the routine that punishment is governed by public law. Even though some countries using the civil law system have partially accepted punitive damages, such acceptance is based on the reason of legal technique. Based on these theories, it seems that punitive damages should certainly not be included in civil law or the future Civil Code of China, and should not be widely or totally accepted by China’s tort law either. However, due to the following reasons, these viewpoints cannot stand.

First, as mentioned above, punitive damages are still aiming at private wrongs rather than public wrongs infringing on the interests of the public and the state, and their basic task is still to protect private interests rather than the interests of the whole public and state. Punitive damages only offer a special method for the victims to seek revenge and punish within the legal framework and then strengthen their own private rights. This is why the nature of punitive damages is still private law rather than public law (such as criminal law), and punitive damages are also not the so-called product of the transition of private law into public law. Punitive damages do have the function of punishing and

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70 After the founding of the People’s Republic of China, China’s civil law mainly draws lessons from Soviet Union, while in fact the civil law of Soviet Union is influenced by the civil law in Europe heavily, especially the German civil law. Being geopolitically close to Germany, Soviet Union has much contact with Germany in history. After the reform and opening up, China draws lessons more directly from the civil law system, especially from Germany.

71 See JIN, fn. 53.

72 See ZHU, fn. 8.
deterring illegal actions, but it also has the special compensation function as stated in Part II of this article. This legal institution has already existed and played an important role in the U.S. tort law for a long time. However, it does not change the fact that tort law is still one part of the private law in the United States. In fact, the U.S. private law has no substantial difference with the private law of civil law countries. The core parts of private law in the United States are also constituted by the contract law, tort law, and property law. They just have broader content.73 Many U.S. scholars of tort law also analyze punitive damages from the perspective of the nature of private law. For example, Benjamin C. Zipursky, a famous professor of tort law in the US, proposed that the basic theory of tort law should be the “recourse theory”74 from the perspective of the nature of private law, which adjusts the civil and commercial legal relationship between equal private subjects, and this theory should be used to explain the nature of punitive damages.75 Therefore, punitive damages do not necessarily conflict with the civil law theory in nature, but it only demands the scholars in the civil law countries to treat and evaluate it from a new and more open perspective.

Second, this legal method, which is based on the strict and clear definition and the ongoing construction of legal rules and systems, is the typical embodiment of the concept of jurisprudence, strict legal formalism and legal dogmatics of the traditional civil law system. Under this method, public law and private law are divided rigidly, the legal liability of private law is strictly limited to repaying the damages and cannot be a sanction; punishment is only the task and character of public law, such as criminal law, and cannot remain in private law. However, this rigid legal method ignores the practical reality and diversity of the law and does not take practical legal policies into account. It is not healthy for the dynamic development and reform of the law and for the achievement of the optical judgment of real cases.76 To deny or restrict punitive damages according to this method reflects a kind of “path dependence” phenomenon of comparative law,77 as

73 For example, there is a famous research center of civil law named the Foundations of Private Law, in the Harvard Law School. The two directors of the center are served by Professor Henry E. Smith, an expert in property law, and Professor John C.P. Goldberg, an expert in tort law. For more research contents, see http://blogs.harvard.edu/privatelaw/ (last visited Jul. 9, 2019).


75 See Zipursky, fn. 24 at 131.


77 Richard A. Posner, Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship, 67 University of Chicago Law Review, 573–606 (2000). In this article, Judge Posner proposes that it is for sure that path dependence is an important phenomenon in law. He supports this point by putting forward some examples and making a comparison. He then says, “some evidence reflects that the convergence of different legal systems is slower than that of technology and economic systems.”
well as an excessive pursuit of legal formalism and ignorance of the substance. Therefore, facing punitive damages, the traditional civil law system should change its course, put more emphasis on reform and development, and enrich its own content rather than exclude or restrict punitive damages simply based on the concept and system. In addition, from the perspective of the legal methodology, simply and stubbornly defending or enlarging the analysis model of legal formalism and dogmatics may lead to the ignorance of real complicated and changing societies behind the law and hinder legal innovation and development. Based on these drawbacks of the civil law system, many famous scholars like Hayek put forward the internationally famous judgment and theory that the common law system is better than a civil law system.

Third, the civil codes and civil law theory in the civil law countries are also in the status of continuous reform and development, and their attitudes towards whether it is permitted that private persons could execute punishment and punitive rules could be prescribed in private laws are also in gradual change. For example, through the modernization reform of obligation law in 2002, Germany stipulated the rules having “punitive features of civil law (zivilrechtlicher Sanktionscharakter)” under Articles 241a and 661a of its Civil Code. Paragraph 1 of Article 241a stipulates that “when an enterprise delivers commodities or other services that have not been ordered previously by a consumer, the claim right against the consumer shall not be established.” This regulation totally excludes any statutory claim right and contractual claim right of the enterprise against the consumer under the condition that the enterprise has delivered unordered commodities or services. According to the majority opinions of German scholars, this includes the claim right resulting from the return of the original property and the claim right resulting from unjust enrichment under Article 985 and Article 812 of the German Civil Code. The consumers could use, drop, or destroy the delivered

78 German professor, Thomas Raiser, analyzed this restriction and the drawbacks of the legal dogmatics from the perspective of legal sociology. See Thomas Raiser, Grundlagen der Rechtssozioologie (Introduction to Legal Sociology), Mohr Siebeck (Tuebingen), at 14–15 (2007). Chinese scholar, SU Li, also criticized this thinking model heavily and points out that the model simply follows legal formalism. See SU Li, 法律人思维 (Thinking Like a Lawyer), 14 北大法律评论 (Peking University Law Review), 429–469 (2013). In addition, Chinese professor, SUN Xiaoxia, has made great combination and integration of the thinking model of legal dogmatics and legal realism from the dual approaches of the thinking model of the jurists. See SUN Xiaoxia, 法律人思维的二元论—兼与苏力商榷 (The Dualism of Thinking like a Lawyer: A Discussion with SU Li), 25 中外法学 (Peking University Law Journal), 1105–1136 (2013).


commodities without bearing any obligation.\textsuperscript{81} Article 661a reads, “if the enterprise delivers the winning notice or other similar notice to a consumer and such delivery creates an impression that the consumer has already won the prize, the enterprise must give the consumer such prize.” This article recognizes the protection of the consumer and the normal competition order through the establishment of the mandatory abidance on the award notice. This constitutes a statutory debtor–creditor relationship having a punitive feature of general civil law.\textsuperscript{82} According to the judgments of the German Federal Supreme Court and German Constitutional Court, this regulation is not in violation of the constitution and it is not a punishment similar to criminal penalty under Article 103(3)\textsuperscript{83} of the German Basic Law.\textsuperscript{84} In addition, although punitive damage is not included in the part of tort law in the German Civil Code, in order to punish and deter some serious and malicious infringing acts, the German Federal Supreme Court has made use of an indirect method and substantially raised the compensation amount for mental damage in the judicial cases of tort law during the last ten years.\textsuperscript{85} Based on that, some German scholars claim that the difference on the issue of punitive damages between Germany and the United States is gradually narrowing.\textsuperscript{86} Besides, in France, in 2005 a team composed of scholars and practical experts on the amendment and draft of the Civil Code submitted a proposal named “Proposal for the Reform of the Law of

\textsuperscript{81} C. Berger, Der Ausschluss gesetzlicher Rueckgewaehransprueche bei der Erbringung unbestellter Leistungen nach § 241a BGB (The Exclusion of the Legal Return Claim in Cases of the Bringing of the Commodities or Service That Are Not Booked according to the Article 241a of German Civil Code), JuS, 649, 653, (2001).

\textsuperscript{82} Schaefer, Gewinnzusage nach § 661a BGB im System des Buergerlichen Rechts (Promise to Grant Awards according the Article 661a of German Civil Code in the System of the Civil Law), JZ, 981, 981ff (2005).

\textsuperscript{83} Art. 3 of the German Basic Law stipulates that “No one shall suffer several punishments according to the general criminal law due to the same behavior.”

\textsuperscript{84} BGH (German Federal Supreme Court), NJW 2003, 3620; BVerfG (German Federal Constitution Court), NJW 2004, 762, quoted from Jauernig, fn. 9 at 1042.

\textsuperscript{85} In the past, the German Federal Supreme Court usually limited the compensation for mental damage in cases of infringement of personality right to around DM 10,000, for example, in the following cases: BGHZ 26, 349 (351) (DM 10,000); BGHZ 35, 363 (365) (DM 8,000); BGHZ 39, 124(127) (DM 10,000). However, in the case of Caroline I in 1994, the Supreme Court overturned the judgment, in which the amount of mental compensation was DM 30,000, and ruled that the compensation was too low. Then the appeal court issued a DM 180,000 ruling (BGHZ 128, 1(1)). In the following several famous Caroline cases, the court also significantly increased the amount of mental compensation: BGH, 15 NJW 984 (1996) (“Caroline II,” 1995); BGHZ 131, 332 (“Caroline III,” 1995); 15 NJW 985 (1996) (“Caroline’s son,” 1995). The court ruled that only such high compensation amount could deprive all the illegal profits earned by the infringer and restrain the occurrence of similar infringement behaviors in the future. See Tilman Ulrich Amelung, Damage Awards for Infringement of Privacy: The German Approach, 14 Tulane European and Civil Law Forum, 15, 19 (1999).

A General Clause of Punitive Damages Should Be Established in China’s Future Civil Code

Obligation and the Law of Prescription" to the French Ministry of Justice. Article 1371 of this draft proposal prescribed that the judge could make a judgment that the tortfeasor who conducted serious intentional infringement acts and especially aimed to earn profits at the same time must bear punitive damages in addition to compensatory damages. This regulation opens a door for the introduction of punitive damages into the French civil law. In addition, there are growing indications in several other continental European legal systems that damages awards do not refuse the extra-compensatory, punitive features entirely. This is especially for moral damages and the “compensation” for the violation of privacy rights and of intellectual property rights. The national legislatures in some European countries begin to adopt the statutory civil sanctions increasingly in order to deter anti-social behavior. Also, the extra-compensatory damages are often applied by national judges in a secretive manner.

Finally, from the new trend of global legal transplant, with the gradually strengthened globalization and the development, deepening, and convergence of the market economy in many countries, the convergence of the legal systems suitable for a market economy is also strengthened gradually. In the process of the convergence, many other countries often actively learn from the laws in the United States to improve their own competitiveness. The United States has the bread, unified and free market. Its economy is dynamic, innovative and prosperous often. Then it has also the leading position in the creation and experiment of the laws often. This results in the trend that many common law rules and regulations of the United States have been transplanted to the traditional civil law countries and some other common law countries. Through this, the traditional civil law countries are modernizing and globalizing their laws and theories. For example, Germany’s private law, such as contract law, product liability law, company law, and so on, have been influenced by the American law.


88 This article stipulates that “if a person conducts significantly intentional infringement act and especially aims to earn profit at the same time, he or she shall be condemned to bear punitive damages in addition to compensatory damages. Also the judge could make the judgment that part of the punitive damages shall be submitted to the national treasury at his or her discretion. Such compensation order made by the judge shall be supported by the special reasons and the amount shall be different from other compensation paid for the victims. Punitive damages shall not become the object of the insurance.”


insurance law, bank law, securities law, and other special private laws, has accepted many legal institutions of the U.S. common law during the past several decades in order to adapt to the market economy and modern society better and more efficiently. Moreover, as a legal institution with multiple positive functions in U.S. tort law, punitive damages are learned and accepted by more and more civil law countries. This transplantation of punitive damages has promoted the innovation and reform of the legislation, judiciary and theory of tort law in the traditional civil law countries significantly.

To sum up, punitive damages, by nature, do not conflict with the civil law theory of the civil law countries, including China, and need only to be treated with a more open view. Only in this way can the civil law of civil law countries, including China, better meet the requirement of modern social development and take on the responsibility to regulate and control modern society actively.

C. The Infringed Party Obtains Unexpected Profit

The third possible reason against the expansion of the application of punitive damages is that the infringed party may obtain unexpected profit therefrom. This has been a concern of many scholars in civil law countries.

This paper argues that punitive damages are aimed at the torts under private law, namely, the private wrongs, in which the tortfeasors injure the private interests of the victims severely. These serious torts, in which the tortfeasors are malicious or disregard others’ rights recklessly, have the expression of humiliating or despising the other persons and should be morally condemned. They not only lead to the general wrongful loss of victims under traditional tort law but also lead to some kinds of moral loss for victims. Punitive damages are exactly a special compensation for such moral loss with the effects of retribution and deterrence. By nature, punitive damages differ from lottery winning in ordinary society, and thus do not constitute a sort of unjust enrichment of the victims. Instead, the victims deserve such compensation due to legal justice and deep respect for freedom and equality.

In addition, in order to improve private enforcement of the law and realize the various functions of punitive damages actively, it is necessary to provide some economic

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incentives for the victims and their lawyers who initiate this procedure. If the law is not
enforced in practice and no one protects the law and rights actively, the mission to build a
state governed under the rule of law will not be accomplished. As the German scholar,
Rudolf von Jhering, said, every citizen should fight for rights. In order to encourage
and promote the righteous acts that have far-reaching social significance, it is reasonable
to provide economic support and reward for the injured parties and their lawyers.

The reward here is not different from the multifold compensation that WANG Hai
strives to obtain, especially through buying the fake goods intentionally according to the
Law on the Protection of Rights and Interests of Consumers of China. WANG Hai is a
controversial early professional fake-goods fighter in China. He still bears the injury that
might be the result of a breach of contract or a fraudulent tortious act, after he buys the
fake goods intentionally. It becomes noncontroversial any more, if he buys the fake food
or medicine that has the quality issue intentionally today and just wants to obtain the
multifold compensation based on the Law on the Protection of Rights and Interests of
Consumers of China, because China’s Supreme People’s Court recognized the multifold
compensation in this kind of cases through judicial interpretation in 2013. Instead, it is
just the amount obtained through the lawsuit after the rights of the injured party are
infringed on passively in the most cases, unlike the case of WANG Hai, who is harmed
resulting from the breach of the sale contract or the fraudulent tortious act by the seller
with his or her intention of the purchase. Therefore, it is unnecessary to worry much
about the recurrence of the controversial WANG Hai phenomenon in China.

Finally, in addition to punitive damages, class action is another sword used to protect
the socially vulnerable group, such as the consumers, in the United States. Currently,
many European countries have partially transplanted class action. These countries,

94 Rudolf von Jhering, Der Kampf ums Recht (The Fighting for Rights), 33(11/12) Die Friedens-Warte
(Journal of International Peace and Organization), 302–327 (1933).
95 China’s Supreme People’s Court released “The Stipulations about Several Issues in the Application
of Law in the Trial of Cases of Food and Medicine Disputes” in 2013. Art. 3 of the judicial interpretation
prescribes: “The people’s court will not support the counterplead of the producer and seller that the buyer
knows the quality issue of the food or medicine, when the buyer claims the right against the producer and
seller because of the quality issue of the food or medicine.”
96 Mass torts occur in the modern society often. The legal institution of class action, which emerged and
is thriving in the United States, is more or less used for reference and transplanted by many other countries,
because it can protect victims efficiently and conveniently. See Deborah R. Hensler, The Globalization of
Class Actions: An Overview, 622 Annals of the American Academy of Political and Social Science, 7–27
(2009). The Typical Litigation Law of Investors enacted by Germany in 2005 has to a certain degree drawn
upon and transplanted the class action of the United States. See Gesetz über Musterverfahren in
capitalmarktrechtlichen Streitigkeiten (Kapitalanleger-Musterverfahrensgesetz-KapMuG), available at http://
Wusheng & ZHANG Dahai, 论德国《投资者典型诉讼法》 (On Germany’s Typical Litigation Law of Investors),
3 Global Law Review, (2008); WU Zeyong, 集团诉讼在德国: “异类”抑或“蓝本”? (Class Action in Germany:
Freak or Blueprint?), 6 法学家 (Jurist), (2009).
however, have imposed strict restrictions on the awards of the plaintiff’s attorney in the
design of this legal institution. Some American scholars argue that this difference
between the European countries and the United States in their attitude toward the
attorney’s award may result in the failure to initiate and enforce class action introduced
into these European countries in practice. It is as if these countries have the trains and
rails, but lack the drivers of the trains97; thus, these European countries and China
encounter the same problem when designing the legal institution of punitive damages.
Therefore, the practice requires that the broader concepts, which are more consistent with
human nature and economic theory, should be used to enact the law and provide legal
products for society.

D. Using Mental Compensation to Replace Punitive Damages

Based on the discussion on the relationship between punitive damages and mental
compensation, some Chinese scholars claim that in terms of non-pecuniary damages,
priority should be given to mental compensation in China’s present stage, and punitive
damages should be introduced only into some specific types of torts within a limit.98

In common law countries, some scholars insist that punitive damages were originally
intended to compensate for the intangible mental loss because the damages were defined
in a narrow sense and there was a lack of clear mental compensation at that time.99
Nevertheless, based on the new study on many early cases of punitive damages and the
academic theory about punitive damages in the United States and the United Kingdom,
some scholars maintain that punitive damages were not originally intended to compensate
for the currently defined spiritual pains of victims arising from torts, such as depression,
anxiety, fright, or despair. Instead, punitive damages were aimed at the affront, disregard,
and dignity loss that victims face as a result of the malicious and evil torts, namely, a
higher-level of moral loss. As a matter of fact, such infringement shall be avenged by dint
of fighting, whereas to prevent the endless bloody revenge and maintain social peace,
judges claimed punitive damages from the infringers to fulfill the functions, such as
punishment, deterrence, and meeting the victim’s desire for revenge.100 However,
regardless of the relationship between punitive damages and mental compensation in
terms of their origins, the compensation scope expanded over time and mental
compensation was established in the common law system later, and punitive damages still
remain and are clearly different from mental compensation. Some scholars argue that

97 Samuel Issacharoff & Geoffrey P. Miller, Will Aggregate Litigation Come to Europe?, 62 Vanderbilt
98 See ZHANG & LI, fn. 10.
100 Anthony J. Sebok, What Did Punitive Damages Do? Why Misunderstanding the History of Punitive
during the several decades after the 1830s, the compensation function that punitive damages possibly had in the beginning was almost lost, and the mission of punitive damages became the punishment and deterrence against the malicious, evil, outrageous, and immoral torts, but not the compensation for damages in the general meaning.\textsuperscript{101} In today’s common law system, punitive damages are completely different from mental compensation in nature and function. As a result, these two legal institutions are not mutually replaceable.

Today, China has no need for substitution between punitive damages and mental compensation while making efforts to develop its own tort law. After decades of development, China has established a clear and sound legal institution of mental compensation.\textsuperscript{102} The establishment of punitive damages in tort law, however, is just beginning. The reason China should accept punitive damages is mainly determined by the powerful functions of social adjustment of punitive damages as well as the corresponding need of the Chinese society.\textsuperscript{103} The institution of mental compensation, however, does not have these functions. Surely, China may also punish and deter some particularly severe malicious torts by substantially increasing the amount of mental compensation when punitive damages have not been introduced or have been introduced only partially, just as some European countries like Germany do. However, this method can only be expedient. From a long-term perspective, such a method should be avoided because it is likely to distort the legal institution of mental compensation, deviate from the basic idea that mental compensation is to compensate the spiritual pains of victims arising from torts and make it uncertain to determine the amount of mental compensation in judicial


\textsuperscript{102} ZHAO Xinbao, \textit{精神损害赔偿制度在中国大陆的发展与展望} (\textit{Development and Prospect of Compensation System for Mental Damage in China’s Mainland}), \textit{9 月旦民商法杂志} (Yuedan Civil and Commercial Law Journal), (2013).

\textsuperscript{103} As indicated by some scholars, punitive damages appeared in China at the right time. In recent years, cases of defective foods or drugs causing severe personal injuries have frequently occurred. The extensive media coverage, deep concern of social public, and strong measures by public authorities have attracted the attention of legislative bodies and scholars to punitive damages. They support high punitive damages, which the defendants of product liability cases shall pay, in order to deter such malicious events. See ZHANG & LI, fn. 10. However, in my opinion, modern society faces much great risk often. To expand the punitive and deterrent functions of tort law by the application of punitive damages is an inevitable choice to cope with and adapt to the high-risk society rather than a simple coincidence.
E. Better or More Administrative Regulations and Less Punitive Damages

One scholar claims that the introduction and development of punitive damages in China is largely a response to the failure of administrative regulation. However, administrative law is also developing the institutions that will encourage the government to enforce the law strictly in order to resolve the failure. These institutions include the expansion of the application of the lawsuit through which the victim can request the administration to perform the duties to investigate the illegal acts. The introduction of punitive damages requires a subtle design to ensure that punitive damages are coordinated with the functions of the administrative regulation system, owing to the already existing complicated administrative regulation. Punitive damages should complement, but not overlap with, the corresponding administrative penalties, particularly. Just like the increase of the lawsuits claiming for punitive damages, the expansion of the lawsuit requesting the administration to perform duties also expands the role of private individuals in public regulation. This new circumstance is important. Therefore, these two institutions should be treated equally in the gradual development of the law in China.\(^{105}\)

As indicated in the preceding Part II.D.2, there is an implicit contract between every social member and the government, and a violator against administration law breaches this contract in fact. The violator pays the administrative penalties just for the civil compensations for the costs of the execution of the government. However, punitive damages are in essence extra compensatory damages to the victim due to a private wrong. At the same time, punitive damages can achieve the two functions of retribution and deterrence through punishing the malicious or reckless tortious acts. The effect of

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\(^{104}\) On Nov. 26, 2007, the First Intermediate People’s Court of Beijing made a final judgment for the case that a female conductor selling tickets of a public bus company strangled the daughter of a professor of Tsinghua University on the public bus. The judgment broke through the previous mode of the written judgment and amount of compensation. The court expressed sympathy to this Professor YAN under the name of the court and revoked the first-instance judgment, which required the compensation for mental damages in the amount of RMB100,000. This amount is the ordinary amount of the compensation for mental damages in the case of death arising from a tort. The court amended the judgment and demanded that the damages in amount of RMB750,000 should be paid to Professor YAN and his wife. The amount included the common damages of RMB300,000 paid by the public bus company and the conductor, and the economic damages of RMB450,000, which consists of medical charges, funeral expenses, and death indemnity as included in the judgment of first instance. The reasons for the amendment are as follows: (1) they gave birth to the child at old age; (2) they witnessed the process where their daughter was strangled; and (3) the killer hurt public confidence. In my view, this is a typical case of serious tort, in which the tortfeasor is indifferent to others’ lives and deserved serious moral reprehension. The obvious application of punitive damages can provide higher damages, make the judgment more convincing and influential in the society, and produce a better effect of deterrence and moral education.

deterrence and prevention include not only special deterrence but also general deterrence, namely preventing a third party in society from committing this kind of tort, warning the whole society and protecting the public interest. However, this kind of general deterrence is only an incidental and unintentional effect, not a primary and central effect. In essence, punitive damages are still a legal institution in private law and operate within the scope of private law, just like the compensation for breach of contract, which also has the minor general deterrence, namely warning the whole society that contract must be kept and performed, otherwise the price — monetary compensation must be paid. However, this kind of public effect does not change the nature of the compensation for breach of contract. In fact, the other legal institutions in private law regulate the private relationship and interest, but can also realize the effect of public regulation through the enforcement in the individual cases. So punitive damages can play a role in public regulation just like administrative law, but it cannot replace administrative law. On the contrary, the same is true. Therefore, administrative law and the legal institution of punitive damages have different functions, goals, and nature. They can be applied at the same time in a case and achieve different effects and missions. Therefore, punitive damages can overlap with administrative penalties and even further with criminal sanctions. However, a judge should consider this factor and decrease the amount of punitive damages when administrative sanctions or criminal sanctions have been imposed on the tortfeasor.

It is true that China has relied heavily on administrative regulation systems to correct misconducts in economic and social life traditionally. Private law has remained undeveloped. However, nowadays, China is striving to realize the modernization and build up the market economic system and a democratic state, which is under the rule of law and not the rule of man. It is necessary and crucial to develop and enrich private law. It can be said that punitive damages are introduced and accepted at this great time in China. In fact, it is not largely a response to the failure of administrative regulation. Obviously, China’s administrative law needs new development and modernization at the same time. Against this background, the lawsuit requesting the administration to perform duties as a new legal institution in administrative law has been introduced and accepted in China. This legal institution will empower private persons to defend their wide-ranging rights and interests. However, it is not necessary to use it to replace punitive damages, even in some hard cases that need sophisticated knowledge and technology to discover and evaluate. We should give the average persons the chance to fight for their rights. It is a historical trend, and no one can change it, although it can be delayed and postponed sometimes.

There is a worry that punitive damages could bring about excessive and inefficient litigation, which leads to the exploitation of the irrationality, inconsistency, and ambiguity in the legal system in China. Therefore, it is suggested that China should develop a more professional and dynamic judicial system, which can develop and improve the skills and
capabilities for regulating private actions. This suggestion is meaningful and worthwhile. However, this worry should not be overstated. Private lawsuits are normal and necessary in a free market economy. Sometimes the incentives to the initiation of private lawsuits, such as generous claim aggregation through class action and treble damages in the American antitrust law, which provide the best opportunity for a suit to be brought and monies recovered, are also indispensable. Otherwise, a country that strives to protect the private rights and interests of private persons and solve the un-remedied systemic problems sincerely would create an impotent private enforcement regime unintentionally, just like some European countries that have accepted class action litigation bravely, but do not establish the fine incentive structure that drives litigation, and in the end have only “beautiful cars without engines.” Therefore, through the private lawsuits, sometimes initiated under the incentives such as generous claim aggregation in class action or punitive damages, the private rights and interests will be defended more effectively, the social conflicts will be resolved peacefully in time, and the un-remedied systemic problem, which is often faced in the countries using the European civil law system and the socialism law system, will be solved partially or even completely. This kind of social control mechanism is more efficient and economical than the traditional command-and-control regulation. But this change needs a long time because it involves the history, culture, and politics of one country.

IV. HOW TO EXPAND APPLICATION

A. Range of Application

Before the enactment of China’s Tort Liability Law, the academic community has raised numerous different proposals to the application range of punitive damages under the Chinese tort law. For instance, some propose that it should only be applied to product liability, while some insist that it is applicable to circumstances in which another person’s life, body, personal freedom, health, or property, which contains emotive meaning, is deliberately infringed. Moreover, some even believe that it is applicable as

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106 Id.
long as intention or gross negligence exists. Viewed from the fact that mass tort cases happen frequently in modern risks of society and the new tort law should make systematic adjustment correspondingly, some scholars hold the view that tort law should include a general clause about punitive damages for serious mass tort. However, in the end, China’s Tort Liability Law makes the stipulation of punitive damages only in product liability, showing an extremely cautious attitude.

The range of application of punitive damages in China, in my opinion, should be further expanded along with the gradual recognition and acceptance by legislators, courts, scholars, and the commons. In the short term, this legal institution can be introduced for special torts that have serious social impact and need to be restrained immediately, such as intellectual property rights infringement, tort caused by unfair competition or monopoly, state organ’s tort, infringing acts against financial consumers by security companies, insurance companies, or fund management companies, and environmental tort, by modifying special single laws correspondingly, namely intellectual property rights law, anti-unfair competition law, antitrust law, state compensation law, security law,


113 To introduce punitive damages in the tort cases of the injuries of intellectual property right has aroused continuous hot debate in recent years in China. Para. 3 of Art. 65 of the Draft Revisions to the Patent Law of the People’s Republic of China (Draft for Comments), published by the National Intellectual Property Administration in Aug. 2012, regulates that “As regards an act of deliberate infringement upon the patent right, a department of administration of patent-related work or a corresponding people’s court may, according to the circumstances, extent, resulting damage, etc. of the infringement act, raise the amount of compensation determined pursuant to the preceding two paragraphs to a maximum of three times.” According to Para. 3 of Art. 72 of the Copyright Law of the People’s Republic of China (Revised Draft), published in Mar. 2012, “If a person has intentionally committed infringement upon copyright or related rights twice or more times, the amount of compensation shall be two to three times the amount of compensation calculated according to the preceding two paragraphs.” Para. 1 of Art. 63 of Trademark Law, modified in Aug. 2013, regulates that where an infringer maliciously infringes upon another party’s exclusive right to use a trademark and falls under grave circumstances, the amount of damages may be determined as not less than one time but not more than three times the amount determined according to the foregoing methods.

114 The legal system, under which private enforcement of the anti-trust law through private lawsuit, generated from and boomed in America at first, and it was borrowed and transplanted by many civil law countries like Germany. See Till Schreiber, Private Antitrust Litigation in the European Union, 44 International Lawyer, 1157 (2010); Jochen Gloeckner, Verfassungrechtliche Fragen um das Verhältnis staatlicher und privater Kartellrechtsdurchsetzung (The Questions of Constitution Law and the Relationship between Public Enforcement and Private Enforcement of Anti-Trust Law). This latter article was submitted at the “Tongji Sino–Germany Economic Law Comparison Forum” in October 2013. Punitive damages play an important role in promoting private law enforcement. See WANG Jian, 反垄断法私人执行的优越性及其实现——兼论中国反垄断法引入私人执行制度的必要性和立法建议 (Superiority and Realization of Private Enforcement of Anti-Trust Law: Concurrently Discussing Necessity and Legislation Suggestion to Introduce Private Enforcement System into China's Anti-Trust Law), 4 法律科学 (Science of Law), (2007). This is certainly a new discovery and new understanding of private rights in the anti-trust field of tort law, and it is also the new recognition and new development of private rights (Privaterecht).
insurance law, security investment fund law, environmental protection law, etc.

In the long term, however, China should modify its Tort Liability Law and establish a general clause of punitive damages in the second chapter “Liability Composition and Liability Manner” of that law, or formulate this general clause in the torts part of China’s future Civil Code, stipulating that “Punitive damages can be applied to those who have performed a rude infringement act, which deserves severe moral condemnation, out of their malicious intention or indifference or disregard for others’ rights.” Then, the application of punitive damages will be expanded to the whole field of torts. This means that a judge is entitled to consider and decide to apply punitive damages to an infringer as long as the infringement act contains two special elements besides the general elements of tort: (1) subjectively, an infringer is malicious or indifferent or disregardful to others’ rights; (2) the infringement act deserves severe moral condemnation. After the establishment of such a general clause, China should modify its present punitive damages rules, which are dispersed in single laws such as the Law on the Protection of Rights and Interests of Consumers, the Food Safety Law, and the Trademark Law, and make them consistent with such a general clause, unless it needs a different regulation on the special conditions in some individual laws.

There are four reasons the application of such a legal institution should be expanded in China. First of all, its multiple social adjustment functions, as mentioned under Part III above, can satisfy numerous objective requirements in the social and economic development in China. Second, the different social functions of tort law can be fully performed. The major function of traditional tort law in China is to recover compensation, but the expansion of application of punitive damages in China’s tort law can enrich the social adjustment function of tort law, guaranteeing that tort law can answer or adapt to social development dynamically or actively, and, meanwhile, judges can better fulfill the duty of safeguarding social justice. Third, the consistency and balance of tort liability in

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115 In the United States, if the insurer refuses or delays the insured’s claim without any reasonable basis or has other bad faith, courts of most states will consider that the insurer performs malicious tort and should bear the tort liability, the scope of which includes not only the compensation for property or mental damage but also punitive damages. See BAI Jiang, 从侵权的角度看保险人的恶意拒赔——以美国保险法中的恶意侵权为例 (Analyzing Insurer’s Malicious Delay or Rejection of Indemnification Claim from the Perspective of Tort Law: Taking Malicious Tort in American Insurance Law for Example), 3 北方法学 (Northern Legal Science), (2014). Only when a country under the rule of law strictly protects financial investors and consumers can its finance be deepened and developed, and sustainable economic growth, which also has high quality, can thus be promoted. See also BAI, fn. 79.

116 The Fourth Plenary Session of the 18th Central Committee of the Communist Party of China (CPC), convened on Oct. 20–23, 2014, examined and passed Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law. The Decision proposes to strengthen the construction of the legal system for the market economy and to compile the Civil Code. This means that the Civil Code will be compiled gradually in China. It is very necessary and important, under this circumstance, to consider how to position and regulate punitive damages in China’s future Civil Code.
China’s tort law can be achieved. Since the legal institution of punitive damages uses the infringer’s subjective state and degree of moral condemnation of infringement acts as criteria, and it is applied to torts in product liability currently in China, why can it not be applied to the same reckless or even malicious torts in other fields? Obviously, this is contrary to the consistency and balance of legal liability. Lastly, the expansion of the application of the legal institution meets new trends of modern legal transplantation and will promote the modernization process of tort law in China. Nowadays China is striving to build up a modern market economy and a rule of law country, which are characterized by more equality, more freedom, and more respect to others’ dignity and rights, and this creates the condition and need for the transplantation of such an institution to a greater extent in China. Legal theory and practice in China should strive to adapt and answer to this new economic and social development actively.

The breakthrough of the legal reception of punitive damages first took place in food safety and product liability in China. The ongoing legal innovation and legal change, namely, the full reception of punitive damages in China’s tort law for the better protection of the rights and interests of private individual persons such as private property rights, personality rights, rights of freedom of speech, etc., are needed strongly in today’s new era of reform and opening up. This society is calling for more social morality, more social responsibility, and more social justice.

In addition, three points regarding the general clause of punitive damages mentioned above need to be explained. First, despite the fact that punitive damages play an important role in preventing the rich, big companies or the government in a powerful position from abusing their position and power, they shall not be applied only to these kinds of subjects. The core of this institution is to punish and deter those who have maliciously or recklessly committed serious infringement acts, which deserve severe moral appraisal; thus, punitive damages can also be applied to the common social subjects who have committed such acts. Therefore, the general clause of punitive damages shall be applied to all civil and commercial subjects. In practice, however, this legal institution has a better effect on rectifying such serious torts of the rich, big companies, and the government, otherwise, such subjects will continue to behave unscrupulously and take advantage of their strong financial resources just to pay the compensatory damages, which are relatively very low for them.


118 Such consideration existed in the ancient Roman law. For example, a Roman citizen always liked to look for fun in such a way, namely, slapping people he met on the street in the face and providing legal compensation for them. The slave behind him brought a purse specially used for the payment. According to the Roman law, such infringer must pay the higher compensation to victims than the normal compensation set up previously. See Vindictive Damages, 11 American Law Journal, 75 (1851).
Second, according to this general clause, not all torts, by intention or due to gross negligence, lead to punitive damages. A judge is only entitled to apply punitive damages to those who have committed outrageous torts, which are so seriously malicious, vicious, or indifferent to others’ rights that they deserve severe moral appraisal. It is necessary for judges, after the setting up of this principal institution, to establish the typical cases to which punitive damages can be applied, through court decisions in practice. For example, we can learn from the American experience and apply punitive damages to the following typical cases: vicious assault, slander or insult of other persons; maliciously or unscrupulously infringing on or destroying others’ property; committing spiteful or deceptive acts, such as deceptively selling old cars; staff of railway companies or other passenger transport companies rudely abusing passengers; financial enterprises deceiving customers maliciously; insurance companies treating applicants maliciously or deceptively;119 drunk driving causing others’ death;120 product liability caused by seriously infringing consumers’ rights,121 etc. To apply punitive damages to these vicious and rude torts, which deserve severe moral condemnation, will never influence people’s freedom to act rationally or restrain the due vitality of society. It will, on the contrary, safeguard and stimulate people’s sense of justice and morality and encourage people to build a modern civilized society, in which justice and morality are admired and respected. Is it not just the final goal to promote the socialist core values at the moment in China?

Third, the application of punitive damages shall be expanded only in tort law, and shall not be expanded in contract law. This is because efficient breach of contract should be allowed in contract law based on mainstream opinions of modern contract law, i.e. one party to the contract has the “right” to violate the contract as long as that party is prepared to compensate for the loss of the other party. According to this theory, under certain circumstances, if one party breaks the contract and makes a contract with a third party (gaining profit higher than the compensation he or she should pay to the other party due to breach of contract), the breach of contract is beneficial to the party, and, meanwhile,  

121 Para. 2 of Art. 55 of the new consumer protection law in China regulates that punitive damages of up to twice the losses shall be applied to the liability of defective goods or services, and this actually greatly restricts its development in product liability in China. In the United States, punitive damages and class action provide two sharp swords for the protection of the consumers. The strong deterrent function of these two methods is incomparable and irreplaceable with other legal institutions that protect the consumers, such as consumer’s withdrawal right. See BAI Jiang, 反思 (Reflection on Legislative Mode of Consumer’s Withdrawal Right), 5 法学 (Law Science), (2014). The situation of these two systems in China is that the latter does not exist and the former is strictly restricted. The protection of consumers in China, therefore, is still weak and needs to be strengthened, and there is a long way to go.
the other party bears no loss in the end. From the perspective of social welfare, this final result realizes better distribution and utilization of social resources. Therefore, punitive damages shall not be allowed in contract law; otherwise efficient breach of contract would be impeded. The Restatement (Second) of Contracts of America and most scholars and judges are opposed to applying punitive damages to a breach of contract.\textsuperscript{122} China should also accept this principle.

In practice, there exists a controversy question — whether the purchaser who knows in advance that the goods or services are fake, or the professional fake-goods fighter who knows in advance that the goods or services are fake and still purchases them so as to obtain the punitive damages, and this becomes the purchaser’s method of earning a living, should obtain punitive damages prescribed in the Law on the Protection of Rights and Interests of Consumers and the Food Safety Law in China.\textsuperscript{123} In my view, a claim of this kind of purchaser should be supported bravely with open minds. Punitive damages in the Law on the Protection of Rights and Interests of Consumers and the Food Safety Law in China are stipulated through the individual specific law. Therefore, it has a priority in the application rather than the Tort Liability Law. Punitive damages in these two laws might be the result of a breach of contract or the torts. However, this kind of prescription should not change the principle that punitive damages are not applied in breach of contract generally.

The multifold compensation should not be abandoned only because of the possibility


A new case is that of WANG Xiuping \textit{v. Beijing Yongfeng Business Corporation}. WANG Xiuping is a typical professional fake-goods fighter of China’s famous Maotai liquor. He brought about ten lawsuits for the claim of punitive damages because of his purchase of the fake Maotai liquor from 2014 to 2017. The People’s Court of Shunyi District in Beijing denied his standing qualification of the lawsuit in the first instance based on the reason that only the real consumer has the right to claim the tenfold compensation of the price of the food according to the second paragraph of Art. 148 of the Food Safety Law in China, and WANG Xiuping did not buy the Maotai liquor for the consumption, but for the tenfold compensation of the price of the liquor. The Third Intermediate People’s Court of Beijing sustained the verdict of the district court of Shunyi, but its reason for the denial of WANG’s standing qualification for the lawsuit was that the first paragraph of Art. 148 of the Food Safety Law in China establishes a tort liability and the stipulation of the tenfold compensation in the second paragraph of Art. 148 of the Food Safety Law should be a deepening and expansion of the tort liability in the first paragraph. The fake Maotai liquor did not cause injury to the body of WANG. Therefore, he could not claim the tenfold compensation according to the Food Safety Law. He could only claim the normal compensation for the breach of contract by the seller. This new reason also avoids the direct conflict with the judicial interpretation of China’s Supreme People’s Court, which released “The Stipulations about Several Issues in the Application of the Law in the Try of the Cases of the Food or Medicine Safety” in 2013. This judicial interpretation recognizes the standing qualification of the lawsuit of the professional fake-goods fighter for the multifold compensation in the cases of the food or medicine safety.
that the professional fake-goods fighter can obtain a profit. In fact, this kind of multifold compensation exists also in other countries. For example, the False Claims Act enacted in 1863 in the United States stipulates the *qui tam* action, which offers a special method and encourages the average citizens to enforce the federal law. In this action, the citizen launches a lawsuit in the representation of himself and the state in order to obtain compensation or punish the legally forbidden acts, and the citizen and the state will share the monetary compensation. The plaintiff in this action is often called “informant.” This kind of institution has also existed for several hundred years in the United Kingdom.\(^{124}\) In the same light, the fake-goods fighter should not be condemned morally and his or her claim for the multifold compensation should not be repressed and denied.

\section*{B. Amount}

A further question is how to ascertain and restrain the amount of punitive damages. China’s Food Safety Law regulates that the amount of punitive damages should be ten times the food price. China’s Tort Liability Law only regulates, in the part of product liability, that the infringed is entitled to ask for corresponding punitive damages. Meanwhile, the newly enacted Law on the Protection of Rights and Interests of Consumers regulates that where business operators knowingly provide defective goods or services to consumers, causing the death of or serious health damage to the consumers or other victims, the victims shall be entitled to ask the business operators to pay for punitive damages of up to twice the losses (including mental damages) suffered. In addition, this law also regulates that business operators that practice fraud in providing goods or services shall pay punitive damages amounting to three times the payment made by the consumers for the goods purchased or services received.\(^{125}\)

The determination and restriction of the amount of punitive damages, indeed, involves many factors that need to be considered. In my opinion, China should borrow the


\(^{125}\) There is indeed a concurrence of the clauses among Art. 96(2) of the Food Safety Law, Art. 47 of the Tort Law, and Paras. 1 and 2 of Art. 55 of the new Consumer Protection Law. Some scholars hold the view that this will cause unbalance of normative system, so Art. 96(2) of the Food Safety Law and Art. 47 of the Tort Law should be modified. See ZHU, fn. 8; ZHOU Jianghong, *惩罚性赔偿责任的竞合及其适用—《侵权责任法》第 47 条与《食品安全法》第 96 条第 2 款之适用关系 (Concurrence and Application of the Liability of Punitive Damages: The Application Relationship between Art. 47 of the Tort Liability Law and Art. 96(2) of the Food Safety Law)*, 4 法学 (Law Science), 108–115 (2010). In my opinion, however, the concurrence here will not bring much trouble in practice or cause the so-called unbalance of system, because of the distinct hierarchy of these laws. For instance, when Art. 47 of the Tort Law is concurrent with Art. 55(2) of the new Consumer Protection Law, the latter shall govern due to the fact that the latter is the new law and it is a new restriction to the former. Under other concurrent situations, the infringed or consumer can choose freely, because these clauses are made for the purpose of better protection of the infringed or consumer.
American model when determining the amount of punitive damages. First of all, for the purpose of meeting specific requirements of individual cases and the realistic need of different economies, cultures, and legal policies in different places, China should stipulate several consideration factors for judges, while giving them a certain level of discretion at the same time. China should not set up rigid rules about the times of punitive damages; otherwise, its functions will be affected negatively. In terms of determining the amount of punitive damages, therefore, China could borrow from the experience of the Supreme Court of the United States, regulating that a judge should determine the appropriate amount of punitive damages that an infringer should bear by considering the following factors comprehensively: (1) whether punitive damages are reasonably related to the potential or accrued harm resulting from the defendant’s conduct; (2) the degree of reprehensibility of the defendant’s conduct; the duration period of the defendant’s conduct; whether the defendant knows or conceals any wrongful conduct; the existence and frequency of similar conduct in the past; (3) the possibility that the defendant could get profit from wrongful conduct, whether such profit should be removed, and whether the defendant should bear the responsibility; (4) the financial position of the defendant; (5) all the costs of litigation; (6) whether criminal sanctions have been imposed on the defendant for his or her conduct (if yes, compensation should be mitigated); and (7) whether the defendant should bear other civil compensatory liabilities for such wrongful conduct (if yes, compensation should be mitigated). Furthermore, in order to prevent a judge from abusing this discretion, we can set a limitation to the amount of punitive damages by reference to the judicial decisions of the Supreme Court of the United States, regulating “the amount of punitive damages shall not be more than ten times of compensatory damages usually.” The judge should explain any special reasons in the judicial decision regarding the amount of punitive damages. If the amount of punitive damages is more than ten times of compensatory damages, the judge should give special explanations on the appropriateness and reasonableness of the amount. The higher people’s court,

126 According to Art. 47 of the Tort Law, in the event of death or serious damage to health arising from a product that is manufactured or sold when it is known to be defective, the infringed shall be entitled to claim corresponding punitive damages. It leaves discretion for judges rather than making a stiff rule on times of punitive damages, which makes it very good legislation. Judges should have certain discretion and self-motility rather than become a “machine” that simply enforces laws, because they are always in the forefront field of judicial practice and at the cutting edge of judicial activities. This is exactly what civil law countries like Germany, which have tried to strengthen judges’ discretion and status of case law through reform in the past nearly ten years, have to reform and rectify. However, the unfortunate part is that the new Consumer Protection Law, as a special law, sets limitations to Art. 47 of the Tort Law, which is a basic civil law, by regulating that punitive damages should be up to two times of loss in product liability. It deserves reflection on whether this is an improvement of the legislation.

127 See the judgment made by the U.S. Supreme Court in the case of Pacific Mutual Life Insurance Co. v. Haslip (499 U.S. at 7, 18, 23–24 (1991)).

128 See the judgment made by the U.S. Supreme Court in the case of State Farm Mutual Automobile Insurance Co. v. Campbell (538 U.S. at 425 (2003)).
based on the request of parties, can properly reduce the amount of punitive damages when it considers the amount too high in the judicial decision of the lower people’s court. The major factors to consider when the higher people’s court measures whether the punitive damages decided by the lower people’s court are too high include: (1) the degree of reprehensibility of the tort; (2) the proper proportion between punitive damages and compensatory damages; and (3) the difference of the amounts of punitive damages and administrative penalty or criminal penalty caused by other similar unlawful acts.129

C. Subject to Determine

In the United States, the seventh amendment of the federal Constitution endows each party with the right to ask for a jury in certain lawsuit cases heard by federal courts including tort cases. The constitutions of most states also give parties such a right in cases heard by state courts. Therefore, when tort cases are on trial, judicial decisions will be made by the jury. When both parties agree to give up this right, the judicial decision will be made by the judge.130 In American lawsuit practice, punitive damages are usually decided by a jury. The legal institution of the jury can ensure that the acts of parties can be measured and evaluated by people just like them, thus enabling the law to be consistent with common citizens’ concept of right and wrong and promoting the public’s participation in the law. This American experience, in my opinion, could be partly borrowed when China designs the subject making the judicial decisions related to punitive damages.

According to Paragraph 1 of Article 15 of the Law on People’s Assessors, adopted by the Standing Committee of the National People’s Congress in China in April 2018, when trying criminal, civil, and administrative cases that involve group interests or public interests, get widespread attention of the masses, have relatively significant social impact, or have complicated facts or other circumstances, and then need to be tried through participation in the trial by people’s assessors, the people’s assessors and judges shall form a collegiate panel during the first-instance process. The people’s assessor system has important and profound significance in gradually promoting judicial democratization, maintaining judicial justice, strengthening judicial supervision, improving judicial credibility, etc.131 The legal institution of punitive damages is quite new in China, and its essence involves the evaluation of the degree of moral reprehensibility of the tort; therefore, the present people’s assessor system should, in my view, be applied to tort cases in which the defendant may bear punitive damages. Meanwhile, if the people’s

129 See the judgment made by the U.S. Supreme Court in the case of BMW of North America, Inc. v. Gore (517 U.S. at 418–428 (1996)).
130 See Goldberg, Sebok & Zipursky, fn. 14 at 23–25.
assessor disagrees with the collegial panel in terms of the application and the amount of punitive damages, the judicial decision shall have it noted, with reasons attached, so that justice and the reasonableness of judicial decisions involving punitive damages can be strengthened. This is also partly a transplant of the American jury system, under which, usually, the jury decides punitive damages in China’s special legal and cultural environment.

V. THE WAY OUT UNDER THE BACKGROUND OF PRESENT LAW

A. The Path in the Short Term

Under the systematic background of the present law of China, China should try the following methods to expand the application of punitive damages in the short term, besides the way of gradual expansion by enacting single individual laws as explained in the preceding Part IV.A.

First, use an indirect way of improving the amount of mental damages for serious torts that are out of malice or recklessness and indifference to others’ rights, deserve moral condemnation, and are suitable for mental damages. According to Paragraph 1 of Article 10 of the Interpretation of the Supreme People’s Court on Certain Issues concerning Determination of Liability for Compensation for Spiritual Damages Arising from Civil Torts, published by the Supreme People’s Court of China in 2001, the amount of compensation for mental damages shall be determined based on the following factors: the specific details concerning the degree of the infringer’s fault; the means of the infringement, the occasion, and the manner of the infringement, etc.; the consequence of the act of the tort; the benefits obtained by the infringer; the infringer’s financial ability to bear liability, etc. These should also be the basic consideration factors in determining the amount of punitive damages. Therefore, in some serious tort cases, in which mental damages will be adjudicated, the method of improving the amount of mental damages could indirectly cover the shortage, which is out of the lack of the law concerning punitive damages. This is also a method that German courts have found and used in cases in which personal rights are seriously infringed on and the German courts want to punish the infringer more harshly and achieve better deterrence. In these cases, German courts learned from the United States and accepted the legal institution of punitive damages partly and indirectly, although the German Civil Code denies punitive damages. In spite of its limitations, this method can be an indirect and eclectic way from the perspective of pragmatism and functionalism of law in the short term.

Second, expand the application of punitive damages, through local legislation, in local regulations involving civil and commercial issues. Of course, under the current institutional background in China, the local legislative power in the civil and commercial field of the provinces, autonomous regions and municipalities directly under the Central
Government is certainly limited. According to Article 8 of the Legislation Law of China, only the National People’s Congress and its Standing Committee have the power to make the laws concerning the basic civil system. Therefore, the Tort Liability Law, as a basic civil system, is made by the Standing Committee of the National People’s Congress. According to Paragraph 1 of Article 72 of the Legislation Law of China, however, the people’s congresses or their standing committees of the provinces, autonomous regions, and municipalities directly under the Central Government may, in light of the specific conditions and actual needs of their respective administrative areas, formulate local regulations, provided that such regulations do not contradict the Constitution, the laws, and the administrative regulations. Therefore, there still exists local legislative power in the civil and commercial fields. This provides the possibility for the expansion of the application of punitive damages through local legislation. Although China adopts a unitary system rather than the federal system, the distinction between the central and the local, or one locality and another locality, still exists really and objectively. As a kind of activity in private civil society, civil or commercial activity relates to local factors such as history, culture, and economic development level; therefore, it is characterized by locality to a certain degree, thus, deciding that the laws regulating such activity shall also be characterized by locality to a certain degree. On the basis of maintenance of unity of the socialist legal system, to take locality and diversity of law into account also meets the spirit of the Legislation Law of China. Different legal experimental areas can be formed through different local legislations, and this can lead to the competition of the different local legal systems. The adaptability and efficiency of the legal systems can be improved through competition. Furthermore, the prosperity of civil and commercial activity and economic, social, and cultural development can be promoted. In the United States, tort law and punitive damages belong to state laws, displaying the different circumstances of the history, culture, economy, and society in the different states. In recent years, the Supreme Court of the United States has intervened in the judicial decisions of state courts in several cases related to punitive damages through due process review, which is based on the fourteenth amendment of the Constitution. This leads to worries and criticism of some scholars. They think that punitive damages may become too federal and lose their locality and diversity.\textsuperscript{132} This kind of legal thought in America, focusing on the locality and diversity of punitive damages, deserves to be considered and accepted by China.

B. The Path in the Long Term

In the long term, however, China should establish a general clause of punitive damages on the part of torts of China’s future Civil Code, as stated in the preceding Part IV.A. This has great significance in actually achieving the multiple functions of tort law, 

such as compensation, punishment, deterrence, etc.

Although there is no such stipulation in the current draft of China’s Civil Code, there are still some new breakthroughs regarding punitive damages. First, Article 1008 of the first draft of China’s Civil Code, which was published by the Standing Committee of the National People’s Congress in China in September 2018, prescribes clearly: “The victim can claim the corresponding punitive damages, when the tortfeasor harms the ecological environment in violation of the regulations of the state intentionally and it causes the serious outcome.” The goal of the new prescription is to take advantage of the deterrence function of the law fully and strengthen the protection of the ecological environment. This is also in line with the new trend in the protection of the environment squarely in China.

Second, Article 982 of the first draft stipulates, “The victim can claim the corresponding punitive damages, when the tortfeasor produces or sells the product although he knows that it has the defector does not take the remedial measures according to the prescription of the preceding article, and it causes the death or serious injury of the health of the other persons.” In comparison with Article 47 of the Tort Liability Law in China, one circumstance, in which punitive damages are applied, is added, namely, that the tortfeasor does not take the remedial measures according to the prescription of the preceding article. This means that the victim can claim the corresponding punitive damages when the tortfeasor does not take such remedial measures as warning or recalling although he knows that the product has a defect, and it causes the death or serious injury of the health of the other persons. The goal of this new prescription is to strengthen the obligation of tracing and observing the product of the producers and sellers.

Third, Article 961, Section 1 of the second draft of China’s Civil Code, which was discussed by the Standing Committee of the National People’s Congress in China in December 2018, prescribes clearly, “The victim can claim the corresponding punitive damages, when intellectual property rights are injured intentionally and the circumstances of the injury are serious.” The new prescription comes from the suggestion of some members of the Standing Committee of the National People’s Congress and the public, who maintain that the strength of the protection of intellectual property rights should be improved. The Constitution and Law Committee of the National People’s Congress considered this suggestion seriously and concluded after further analysis that the law must increase the cost of the injury of intellectual property rights and bring the deterrence function of the law into play fully.133

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In the discussion about the second draft of China’s Civil Code by the Standing Committee of the National People’s Congress in China in December 2018, PENG Bo, member of the Standing Committee maintained that punitive damages increased the cost of the tort and had the deterrence effect. However, the current draft prescribed only three scenarios such as the injury of intellectual property rights, in which punitive damages were applied. Therefore, he suggested that the application of punitive damages should be expanded further in order to decrease the occurrence of the tortious acts. Another Standing Committee member thought that according to the prescription regarding the production and sale of the product having a defect, punitive damages were applied, only when the defect of the product caused death or serious injury. Therefore, he maintained that punitive damages should not be applied only when the rights and interests of the body are harmed, and they should also be applied when property is harmed. These discussions and suggestions of the members of the Standing Committee of the National People’s Congress in China are very meaningful. First, it means that democracy is growing in China. Second, it means that the importance of punitive damages is being recognized by more and more people. Last but not least, more and more people are eager to have better law and support the rule of law ardently in China. Therefore, it is the path of the law in China.

In this way, the legislator should reconsider the establishment of a general clause of punitive damages in China’s Civil Code. When it fails, there is still another way to achieve this goal, namely, through the later revision in future after the enactment and publishing of China’s Civil Code. After all, the road has twists and turns, but the prospects are bright.

VI. RETHINKING ABOUT THE CODIFICATION OF CIVIL LAW AND THE PATH OF LEGAL DEVELOPMENT IN CHINA

China has walked a long way in the construction of the law system that can be fit for and adapt to the market economy since the 1990s. China has enacted the different individual laws in the field of private law at the national level, such as the Corporation Law and the Law on the Protection of Rights and Interests of Consumers in 1993, the Security Law, the Negotiable Instruments Law, the Insurance Law and the Commercial Banking Law in 1995, the Partnership Enterprise Law in 1997, the Securities Law in 1998, the Contract Law in 1999, the Trust Law in 2001, the Securities Investment Fund Law in 2003, the Enterprise Bankruptcy Law in 2006, the Property Law in 2007, the Tort

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Liability Law in 2009, and so forth. Today, China’s legislator is spending huge resources on the codification of civil law, namely, the enactment of the Civil Code. In the course of the enactment of all these laws, China always adopts a unified top-down model of the legislation. This includes the introduction and application of the individual new legal institutions such as punitive damages. However, in this course, China neglects and lacks one crucial point, namely, that the legal system should also have the capability from the down to the top to produce the methods and mechanisms to solve the practical legal issues, when China is sincere in seeking to develop a legal system that is fit for and can adapt to the market economy completely. Until now, what China needs most might be to fill the leaks and amend the improper prescriptions in the already enacted laws and transform slowly and orderly to tackle the practical legal issues through a down-top model, which can produce the methods and mechanisms to resolve them through the market mechanism.\textsuperscript{135}

There are two models of developing a law system that is fit for and can adapt to the market economy. One is the model of state-driven development, and the other is the model of market-driven development. These two models have their own advantages and disadvantages, and both of them are not perfect. However, China mainly adopts the former model and hardly tries the latter. Under this model, China absorbs not only the legislative experience of the European continental civil law system but also the experience of the common law system actively, and not only listens to the suggestions of the judicial departments, the administrative departments, and the scholars but also the voices of the foreign experts. It should be realized that China has achieved great progress in the enactment of the laws. However, it should also be noted that government officials play a decisive and dominant role under this legislation model. However, they may lack direct experience in the operations and activities of the market economy. Then an issue comes, namely that in what extent these laws are fit for and can adapt to the real situations of the market economy?\textsuperscript{136}

Therefore, the problems and challenges that China is faced with might not be to

\textsuperscript{135} Professor Donald C. Clarke, a famous American scholar in the field of Chinese law, is among the first to advance this view. See Donald C. Clarke, Legislat ing for a Market Economy in China, 191 The China Quarterly, China’s Legal System: New Developments, New Challenges, 567–585 (2007). In the worldwide academic field, this bottom-up formation model of the institutions is also regarded as one vital reason the common law system is better than or superior to the European continental civil law system, whose model of the institutional formation is usually top-down. See Frank B. Cross, Identifying the Virtues of the Common Law, 15 Supreme Court Economic Review, 21–59 (2007).

simply determine which law China lacks and then to enact that law, but to set up the institutions and mechanisms and then let the market entities, which include individual persons, the enterprises, and the government as the supervisor, respond to the demands and requirements of the market economy flexibly. The market entities and their lawyers can also bring the initiative into full play to create the new institutions which are fit for themselves. Some of these new institutions can also become the enacted law by the legislator after the market entities and their lawyers lobby the legislator actively. In fact, these new created legal institutions are known as the lawyer-made law, which exists in the US already. For example, the new business organization — limited liability company (LLC) and the later accepted and enacted LLC-Act in many states in the United States belong to it.137

In other words, when needed, the legislator of the state can also recognize the institutions coming from the market and restate them through the statutory laws in order to extend and spread the practical application of these effective institutions. Obviously, this model of institutional formation is based on the rule of law and more freedom of contract. Therefore, many legal institutions should not be created by the state and be forced to exist and apply, but should be authorized and endorsed.138 In this bottom-up formation and creation of the institutions, the local legislators, the judges, and the lawyers will play an important role.

CONCLUSION

Punitive damages have several functions that are worthy of serious research. For instance, punitive damages could help to compensate victims for moral damages suffered and offer more sufficient ex-ante compensation in cases of wrongful death or bodily injury, thus compensating for the losses suffered by victims more completely; punish private wrongs more effectively and provide a means of personal revenge within the law, while at the same time deterring and preventing future wrongs; be used to correct abuses of power or status by the rich, large corporations or the government; be used to complement criminal law, among other functions. In order to fully realize the advantages of this institution for the Chinese society, China should expand its application in its tort law and carefully design the scope of its application, including the subjects to which it would be applicable and the amounts that would be allowable. In the short term, the application of punitive damages could be expanded through specific individual legislation and increasing the amounts of compensation for mental damages in individual cases or


138 See Clarke, fn. 135.
local legislation. In the long term, a general clause of punitive damages should be established on the part of tort law in China’s future Civil Code, stipulating that “Punitive damages can be applied to those who have committed tortious acts that deserve severe moral condemnation, due to the actor’s malicious intent or indifference or disregard for others’ rights.”

To rethink the path of legal development in China, what China needs most might be to fill the leaks and amend the improper prescriptions in the already enacted laws and transform slowly and in an orderly manner to tackle the practical legal issues using a bottom-up model that can inform the methods and mechanisms to address those issues through the market mechanism. In the bottom-up formation and creation of the institutions, the local legislators, the judges, and the lawyers will play an important role. In the long term, more legislative power should be given to the local governments in the field of private law. The different provinces are the different laboratories. The different institutions and approaches can be experimented on in the different laboratories. The different provinces can also compete with each other to create the most efficient and effective institutions. In this course, the specific individual civil laws might be better than the unified large civil code, which can easily ossify the private law, and the judge-made law might be better than the statutory law. The local judges should be given more discretion to try the different approaches and institutions such as punitive damages. China’s Supreme People’s Court can supervise the local experiments of the legal institutions including punitive damages according to China’s Constitution. This might be the best path for the development of private law.