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The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages

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THE SPLIT AWARD STATUTE: A MOVE TOWARD EFFECTUATING THE TRUE PURPOSE OF PUNITIVE DAMAGES

I. INTRODUCTION

The overriding goal of the American tort system is to compensate individuals who have been injured by the acts of others.[1] Logically flowing from this goal is the award of compensatory damages. Essentially, compensatory damages are awarded with the intent to put plaintiffs back in the position they would have been in had they not been injured.[2] Upon award of compensatory damages, the plaintiff is considered to be whole.[3]

Also in keeping with the intent of our tort system is the award of nominal damages. Typically, nominal damages entail a trivial sum.[4] Nominal damage awards are generally small because they are meant only to represent the fact finder's recognition that a plaintiff's legal right has been violated.[5]

Understanding the goals that underpin our tort system makes it difficult to comprehend the concept of punitive damages.[6] Unlike compensatory or nominal

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1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1 at 5-6 (5th ed. 1984); CHARLES T. MCCORMICK, *Handbook on the Law of Damages*, DAMAGES § 77 at 275 (1935) [hereinafter MCCORMICK].

2. Hughett v. Caldwell County, 230 S.W.2d 92 (Ky. Ct. App. 1950). "Compensation is always the aim of the law. It is the bottom principle of the law of damages. To restore the party injured, as near as may be, to his former position is the purpose of allowing a money equivalent of his property which has been taken, injured, or destroyed." *Id.* at 96.

3. Topmiller v. Cain, 657 P.2d 638, 641 (N.M. Ct. App. 1983).

4. Carey v. Piphus, 435 U.S. 247, 266-67 (1978). In this decision, the Supreme Court set forth that nominal damages are awardable "without proof of actual injury." *Id.* Specifically, the Court held that school children who were suspended without procedural due process were entitled to the award of nominal damages, not to exceed one dollar. *Id.*

"Nominal damages are assessed in some trifling or trivial amount, such as six cents or one dollar, an amount selected simply for the purpose of declaring an infraction of the plaintiff's rights and the commission of a wrong." Guthridge v. Pen-Mod, Inc., 239 A.2d 709, 714 (Del. 1967).

5. McClellan v. Highland Sales & Investment Co., 484 S.W.2d 239 (Mo. 1972). "The general theory of nominal damages is that they should be allowed where a legal right has been invaded but no actual damages were suffered or proved." *Id.* at 241.

6. Historically, punitive damages have also been referred to as "smart money." Fay v. Parker, 53 N.H. 342, 354 (1872). Initially, this term was meant to connotate that plaintiffs were entitled to damage awards for the "smarts" they received from their injury. *Id.* at 354. Over time, however, the term was redefined to refer to awarding damages to make defendants "smart." *Id.* at 355. Additionally, the terms "exemplary damages" or "vindictive damages" have been used interchangeably by courts to describe punitive damages. Throughout this note, the term "punitive

damages, which focus primarily on compensating the plaintiff, punitive damages are awarded against defendants based on their outrageous conduct.[7] Also unlike the award of compensatory or nominal damages, punitive damages are not awarded as a matter of right.[8] The purposes behind the award of punitive damages are to punish defendants for their egregious conduct against society[9] and to deter others from engaging in similar conduct in the future.[10] Given these objectives, society is intended to be the ultimate beneficiary of awarding punitive damages because in the process of carrying out these purposes, social order is restored and subsequently maintained.[11]

Because punitive damages focus on defendants' conduct and are intended as punishment, their use in our civil system has been the subject of considerable controversy.[12] Historically, punitive damages have not been favored in the

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damages" will be used.

7. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). "[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Id.* at 350. *See generally* 22 AM. JUR. 2D *Damages* § 733 (1988).

8. *See, e.g.*, Allstate Ins. Co. v. A.M. Pugh Assoc., 604 F. Supp. 85 (M.D. Pa. 1984).

9. Smith v. Hill, 147 N.E.2d 321 (Ill. 1958). "[Punitive] damages [are] allowed in the interest of society, and not to recompense solely the individual, to deny [punitive damages] cannot be said to deny any constitutional right or to encroach upon any judicial function . . . " *Id.* at 327. *See also* Stroud v. Denny's Restaurant, Inc., 532 P.2d 790, 794 (Or. 1975); Exxon Corp. v. Yarema, 516 A.2d 990, 1013 (Md. Ct. Spec. App. 1986).

10. RESTATEMENT (SECOND) OF TORTS § 908(1) (1979).

11. Eshelman v. Rawalt, 131 N.E. 675 (Ill. 1921). The court stated:

> [W]here [punitive] damages may be assessed they are allowed in the interest of society in the nature of punishment, and as a warning and example to deter the defendant and others from committing like offenses in the future, and a frequent objection to the doctrine is in allowing an individual to recover and appropriate damages for an offense against the social order and in the interest of society. This consideration enforces the injunction of this court for watchfulness to see that the right is not abused.

Id. at 677.

12. Fay v. Parker, 53 N.H. 342 (1872). "The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law." *Id.* at 382. What the court is referring to in the above quote is the award of punitive damages. Many courts and opponents of punitive damages have since reiterated the views of the New Hampshire Supreme Court in supporting the contention that the award of punitive damages is not a desirable institution in the legal system. For a contemporary case advancing the views espoused in *Fay*, see, e.g., Town of Hookset School Dist. v. W.R. Grace & Co., 617 F. Supp. 126 (D.N.H. 1984).

But see Luther v. Shaw, 147 N.W. 18 (Wis. 1914):

> The law giving [punitive] damages is an outgrowth of the English love of liberty regulated by the law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential and unscrupulous, vindicates the rights of the weak, and encourages recourse to, and confidence in the courts of the law by those wronged or oppressed by acts or practices not cognizable in, or not sufficiently punished by the criminal law.

Id. at 20.

law.[13] In fact, some courts and commentators argue that punitive damages are criminal fines in disguise.[14] Essentially, these critics assert that penalties are being assessed against defendants without the requisite procedural safeguards of a typical criminal proceeding.[15] Further, opponents of punitive damages argue that plaintiffs, who have presumably been made whole by compensatory damages, receive a "windfall" when defendants are required to remit their punishment to plaintiffs.[16]

For a more contemporary discussion of the debate, compare J. Ghirardi, *Should Punitive Damages Be Abolished?—A Statement for the Affirmative*, ABA INS., NEGL. & COMP. LAW § 282 (1965) with P. Corboy, *Should Punitive Damages Be Abolished?—A Statement for the Negative*, ABA INS., NEGL. & COMP. LAW § 282 (1965).

13. Alguire v. Walker, 506 N.E.2d 1334 (Ill. App. Ct. 1987). "Since punitive damages are penal in nature, they are not favored in the law, and courts must exercise caution to see that punitive damages are not improperly or unwisely awarded." *Id.* at 1342. *See also* First Nat'l Bank of Des Plaines v. Amco Engineer Co., 335 N.E.2d 591 (Ill App. Ct. 1975). In *First National*, the court did not deny the plaintiff the opportunity to seek punitive damages. *Id.* at 594. However, the court did feel the need to express that punitive damages were not a favorite of the law. *Id.* The court went on to explain that punitive damages are awarded in the interest of society and to punish the defendant. *Id.* The plaintiff has no vested right to such an award. *Id.*

14. David L. Walther and Thomas A. Plein, *Punitive Damages: A Critical Analysis:* Kink v. Combs, 49 MARQ. L. REV. 369 (1965). This article contains an excellent summation of the history of punitive damages and the debate concerning their use. Walther and Plein put forth the two classic positions of the debate as represented by Sedgwick, who favored the use of punitive damages, and Greenleaf, who was opposed to the doctrine. *Id.* at 379.

The authors then discuss their views on punitive damages. They assert that punitive damages are inconsistent with the goals of our civil system which strives to indemnify tortfeasors. *Id.* at 382. The article also addresses the private attorney general theory as a justification for awarding civil penalties and rejects its validity. *Id.* Walther and Plein assert that any deficiencies in the criminal system should not be remedied by putting more money in the plaintiff's pocket; instead, reform of the criminal system should occur internally wherein prosecutors are allowed the time to "[protect] society from wrongdoers" and administer any necessary punishment. *Id.*

15. For example, defendants who possibly face the imposition of punitive damage judgments are not guaranteed the right to confront adverse witnesses; are not entitled to the protection against self-incrimination; are not guaranteed to a "beyond a reasonable doubt" standard of proof despite being subject to punishment; and are not guaranteed to a trial by jury. Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 412-30 (1967). *See also* Smith v. Wade, 461 U.S. 56 (1983) (Rehnquist, J., dissenting). Interestingly, Justice Rehnquist, in his dissent, also acknowledged the viability of the split award statute concept as a means to eliminate the plaintiff's windfall. Justice Rehnquist stated: "Even assuming that a punitive damage 'fine' should be imposed after a civil trial, the penalty should go to the state, not to the plaintiff—who by hypothesis is fully compensated." *Id.* at 59. *See also infra* note 26.

16. The plaintiff's windfall was identified as early as 1877 in Bass v. Chicago & N.W. Ry., 42 Wis. 654 (1877). The court noted that "[i]t is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by [punitive] damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished." *Id.* at 672.

For a more recent discussion of the plaintiff's windfall, see Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). The Court was concerned that punitive damages afford the plaintiff with a

Conversely, defenders of punitive damages assert that these damages are needed to provide a remedy for conduct that is technically punishable in the criminal courts, yet often is not considered serious enough to be pursued by formal prosecution.[17] The wrongs committed by the defendant against society must be compensated; therefore, punitive damages are awardable.[18] To provide an incentive for plaintiffs to pursue punishment of this conduct, proponents assert that punitive damages should be awarded under the "private attorney general" doctrine.[19] In essence, the doctrine suggests that citizens are encouraged to alert courts to conduct that violates public policy. Therefore, punitive damages are awarded to plaintiffs as a civil reward.[20]

While the debate about punitive damages has existed for many years, for the last twenty years such awards have been particularly scrutinized. In the

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windfall that may be "unpredictable and, at times, substantial." *Id.* at 270-71. In addition, the Court contended that such a windfall would have the potential of burdening local treasuries. *Id.* at 271. The Court projected that such a strain would reduce services to the public at large. *Id.* This concern, however, would be amply addressed through the implementation of a split award statute (*see infra* note 26) because a portion of the punitive damage monies would be put toward improving services within society. *See also* Missouri Pac. R.R. Co. v. Arkansas Sheriff's Boys' Ranch, 655 S.W.2d 389, 391-92 (Ark. 1983) (holding that the plaintiff received a windfall because the plaintiff was made whole upon the award of compensatory damages).

17. Hon. Shirley S. Abrahamson, *Report of the ABA Action Commission to Improve the Tort Liability System*, A.B.A. 1987 MIDYEAR MEETING, February 16-17, 1987 at 16 [hereinafter *ABA Report*]; *see also* MCCORMICK, *supra* note 1, § 77 at 276.

18. Stroud v. Denny's Restaurant, Inc., 532 P.2d 790 (Or. 1975). "[P]unitive damages are justified as a deterrent to prevent the violation of societal interests." *Id.* at 794.

19. In Kink v. Combs, 135 N.W.2d 789 (Wis. 1965), the Wisconsin Supreme Court established that the award of punitive damages was necessary to insure that intolerable conduct would not go unpunished. The court stated that the district attorney was not obligated to prosecute every case of misconduct. *Id.* at 798. Thus, the court found that this left a void in criminal enforcement and, therefore, plaintiffs were left to pursue the claims on their own. *Id.* The court further found that the benefit of awarding punitive damages was twofold. First, the plaintiff had incentive to pursue the claim. *Id.* Second, society was served by the plaintiff's pursuit of the claim because the defendant's undesirable conduct was now going to be punished and a message of deterrence would be sent. *Id.*

Some 25 years later, the Wisconsin Supreme Court reaffirmed its views in Wagen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980). In *Wagen*, the court placed more emphasis on the punitive damage award working as an incentive to the plaintiff. The court stated that Ford's suggestion of paying punitive damages to the state treasury was not feasible. *Id.* at 454. The court rejected this suggestion because the plaintiff would have no incentive to expend time, money, and effort to bring the wrongdoer before the court because the plaintiff alone would have to incur the costs of suit. *Id.* However, the court did concede that Ford's plan was an equitable solution to the "race to the courthouse door" problem. *Id.* The Court recognized that plaintiffs suing at a later date would have less opportunity to receive punitive damage awards, or compensatory for that matter, from a defendant who already paid large punitive damages to previously victorious plaintiffs. *Id.*

20. For a more complete discussion of the private attorney general theory, see *infra* notes 45-48 and accompanying text.

wake of various state tort reform movements,[21] the alleged "crisis" in the liability insurance industry because of run-away jury awards,[22] and the recent adjudication of various punitive damages issues before the Supreme Court,[23] some states have attempted to modify the plaintiff's recovery of punitive damages.[24] The modification has taken the form of statutory provisions that

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21. *Compare* Andrew F. Popper, *Point*, 25 MD. B. J., March/April 1992, at 31 *with* Frank F. Daily, *Counterpoint*, 25 MD. B. J., March/April 1992, at 34. The Popper article discusses why the tort reform movement began and has subsequently gathered momentum. Popper also summarizes the major goals of the movement and concludes that the Federal Tort Reform movement is not needed nor is it desirable. On the other hand, the Daily article addresses Popper's "antagonism" towards the tort reform movement and concludes that tort reform is necessary to "level the playing field" for all participants.

22. For identification of what constitutes the alleged crisis and the debate over its existence, see *infra* notes 68 and 73 and accompanying text in Section III.

23. Within the last six years, the Supreme Court has granted certiorari to four cases that address the issue of punitive damages: Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991); and TXO Production Corp. v. Alliance Resources, Inc., 113 S. Ct. 2711 (1993). In *Crenshaw*, the Court had the opportunity to deal with the constitutionality of punitive damages with respect to the Due Process, Contract, and Excessive Fines Clauses. However, the Court would not rule on any of the issues because "those claims were not raised and passed upon in [the] state court." *Crenshaw*, 486 U.S. at 71.

In the next session, the Court did reach the question of whether punitive damages violated the Excessive Fines Clause of the Eighth Amendment. In *Browning-Ferris*, the Court held that the Excessive Fines Clause did not apply to the award of punitive damages in a civil action that involved private parties. *Browning-Ferris*, 492 U.S. at 262. The Court reasoned that the Excessive Fines Clause was intended to limit government's abuse of exacting fines. *Id.* at 267. Specifically, the Court stated, "[T]he history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government." *Id.* The Court seemed to imply that as long as the government is not directly a party to the action and in no way directly imposing the fine, the Excessive Fines Clause will not apply to punitive damage awards.

In 1991, the Court addressed the general question of the constitutionality of punitive damages. *Haslip*, 111 S. Ct. at 1032. The Court held that the award of punitive damages by juries was constitutional against a Fourteenth Amendment Due Process challenge. *Id.* at 1035. Finally, this past term the Court rejected a bright-line mathematical formula for measuring the constitutionality of punitive damages. *TXO*, 113 S. Ct. at 2712. In *TXO*, the Court upheld the constitutionality of a $100 million punitive damage award that exceeded the compensatory award by more than 500 times. *Id.* While the Court admitted that "reasonableness" should be given proper consideration, the Court would not confine juries to a mechanical arithmetic test to compute a punitive damage award. *Id.*

Taken together, these four cases represent the Supreme Court's acknowledgement that punitive damages are, within certain limits, constitutionally viable and a "hot" legal topic in need of analysis and reform.

24. To date, nine states have enacted a "split award" statute. *See* Colorado, COLO. REV. STAT. § 13-21-102 (West 1986); Florida, FLA. STAT. ANN. § 768.73 (2)-(4) (West 1986); Georgia, GA. CODE ANN. § 51-12-5.1(e)(1)-(2) (1987); Illinois, ILL. REV. STAT. ch. 110, para. 2-1207 (1986); Iowa, IOWA CODE ANN. § 668A.1(1)-(2) (West 1987); Kansas, KAN. STAT. ANN. § 60-3402(e) (1988); Missouri, MO. REV. STAT. § 537.675 (1987); Oregon, OR. REV. STAT. § 18.540 (1987); and Utah, UTAH CODE ANN. § 78-18-1(3) (1989). Additionally, three states are attempting to join

award the plaintiff only a percentage of the punitive damage judgment, thereby reducing the plaintiff's "windfall," while awarding the remaining percentage either to a specific governmental agency or to a general state fund.[25]

The fundamental purpose behind these statutes, to compensate society for the injury inflicted by the defendant, is sound. However, certain constitutional problems are presented. Specifically, the split award statute[26] has been found to be inconsistent with both the Takings Clause[27] and the Excessive Fines Clause.[28] In addition to constitutional concerns, the problem of appropriate jury instruction has arisen.[29]

This Note will argue that split award statutes are desirable because they carry out the true purpose of punitive damages, specifically, compensation of the public for the wrongs inflicted by defendants' conduct and the maintenance of social order. First, an overview of punitive damages and the historical development of the doctrine will be presented.[30] Section II will conclude by setting forth the current status of punitive damages. In Section III, this Note will then outline the various factors that led to a need for the award of punitive damages to be reformed.[31] In Section IV, this Note will examine the nine split award statutes currently in existence.[32] This Note will then analyze the cases that challenge these statutes in Section V.[33] Section VI will conclude with a proposed model statute that cures the perceived problems with split award statutes and offers a novel disbursement scheme to further the purpose of benefitting society with the award of punitive damages.[34]

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the trend by enacting legislation to create a split award statute. Texas, Indiana, and New Jersey all have bills pending.

25. For a specific analysis of the split award statute construction, see *infra* section IV of this note.

26. This note defines a "split award statute" as a legislative enactment that mandates, upon entry of judgment against a defendant for punitive damages, that the monies collected are to be split, in varying percentages, between the state and the plaintiff. For a specific analysis of the nine currently enacted split award statutes, see *infra* notes 95-122 and accompanying text.

27. In relevant part, the Fifth Amendment of the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

28. The Eighth Amendment provides: "Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII (emphasis added).

29. *See, e.g.*, Honeywell v. Sterling Furniture Co., 797 P.2d 1019 (Or. 1990).

30. *See infra* notes 35-64 and accompanying text.

31. *See infra* notes 65-94 and accompanying text.

32. *See infra* notes 95-122 and accompanying text.

33. *See infra* notes 123-91 and accompanying text.

34. *See infra* notes 192-223 and accompanying text.

II. DEVELOPMENT OF PUNITIVE DAMAGES

A. *The Historical Roots*

The award of punitive damages was a concept developed from the English common law[35] and was grounded in public policy.[36] At common law, punitive damages were primarily awarded only upon a showing of malice, oppressive conduct or gross fraud.[37] Having found that the defendant's conduct exceeded ordinary negligence, the fact finder justified the award of punitive damages based on one of three rationales. First, the fact finder wanted to punish defendants for their outrageous conduct.[38] Therefore, the award of punitive damages was used as a vehicle for expressing outrage at the defendants' conduct.[39] Second, the award of punitive damages was meant to make an

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35. Actually, the doctrine of punitive damages was developed some four thousand years ago in the Sumerian, Arkadian, and Babylonian civilizations. Steven J. Sensibar, *Punitive Damages: A Look at Origins and Legitimacy*, 41 FED. OF INS. & CORP. COUNSEL QUARTERLY 375, 378 (1991). However, to remain within the scope of this note, only an examination of the English common law doctrine of punitive damages and its origins will be made.

Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763), is acknowledged as one of the earliest cases in English common law to allow the award of punitive damages. The plaintiff brought actions of trespass, assault, and imprisonment against the defendant. The jury awarded the plaintiff 300 pounds for an injury usually awarded only 20 pounds. The court, in allowing the jury award of punitive damages, held that the jury was not confined to awarding only compensatory damages. *Id.* at 768-69. The court reasoned that it was within the province of the jury to assess damages against the defendant for outrageous conduct. *Id.*

36. The primary public policy was to render punishment against the defendant and to prevent similar conduct in the future for the benefit of society. In Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763), a case decided the same year as *Huckle*, 95 Eng. Rep. at 768, the court specifically set forth this policy: "Damages are designed not only as a satisfaction to the injured person, but likewise as punishment to the guilty, to deter from any such proceeding for the future and as a proof of the detestation of the jury to the action itself." *Wilkes*, 98 Eng. Rep. at 498-99. Notice, additionally, that punitive damages were intended to be an outlet for society to express outrage at the defendant's conduct.

37. Wiggins v. Coffin, 3 Story 1 (1836), *cited in* KENNETH REDDEN & LINDA L. SCHULUETER, PUNITIVE DAMAGES § 1.4(A) at 16 (2d ed. 1989) [hereinafter PUNITIVE DAMAGES], set forth that punitive damages were not awardable when a defendant was merely negligent. *See generally* Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES §§ 363-370 (8th ed. 1891). This common law practice has continued in current American jurisprudence. *See* David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1265-66 (1976).

38. Tullidge v. Wade, 3 Wils. K.B. 18 (C.P. 1769), *cited in* PUNITIVE DAMAGES, *supra* note 37, § 1.3(D) at 10. In fact, the court expressed that the level of the fact finder's outrage should correlate to the amount of the punitive damage award: "[T]he circumstances of time and place, when and where the insult is given requires different damages, as it is a greater insult to be beaten upon the Royal Exchange than in a private room." *Id.*; *see also* McNamara v. King, 7 Ill. 432 (1845) (holding that punitive damages are awardable to punish the defendant and that the amount of the award must be determined on a case by case basis). *Id.* at 436.

39. Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 7 (1990) [hereinafter, Daniels, *Myth & Reality*].

example of the defendant and to deter others from engaging in similar conduct in the future.[40] Finally, punitive damages were intended to prevent individuals from taking matters into their own hands[41] by providing money to plaintiffs for nonpecuniary, intangible losses.[42] Underlying each one of these justifications was the ultimate goal of restoring and preserving social order.[43]

Historically, the justification for awarding punitive damages directly to the plaintiff was to create a bounty for citizens to bring forth minor criminal offenses that were not likely to be prosecuted, yet nonetheless were offensive to social mores and in need of punishment.[44] This bounty system is now known as the "private attorney general" doctrine.[45] In theory, the bounty was intended to be a public reward to plaintiffs for fulfilling their civic duty.[46]

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40. Coryell v. Colbough, 1 NJ (Coxe) 77 (1791), *cited in* PUNITIVE DAMAGES, *supra* note 37, § 1.4(A) at 15, is credited with being the first American case to allow the award of punitive damages. *Id.* In *Coryell,* the plaintiff brought suit for breach of a promise to marry. The jury was instructed to assess damages not based solely on suffering or actual loss. *Id.* Instead, the jury was told to award damages "for example's sake, to prevent such offences in the future." *Id.*

41. Merst v. Harvey, 5 Taunt 422 (C.P. 1814), *cited in* PUNITIVE DAMAGES, *supra* note 37, § 1.3(E) at 11. "I remember a case where the jury gave 500 pounds, for merely knocking a man's hat off; and the courts refused a new trial . . . [The award of punitive damages] goes to prevent the practice of duelling, if the jury are permitted to punish insult by exemplary damages." *Id.*

A more recent case setting forth the same principle was Campus Sweater & Sportswear Co. v. M.B. Kahn Const. Co., 515 F. Supp. 64, 105 (D.S.C. 1979), *aff'd* 644 F.2d 877 (4th Cir. 1981) (stating that under South Carolina law, punitive damages served as a "private revenge carried out in courts rather than duels or in back alleys").

See also MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS, at § 40.13 (1992) (discussing more recent cases that also subscribe to the notion that punitive damages are necessary to prevent revenge).

42. Punitive damages were viewed as a supplement when the plaintiff's actual damages would be relatively small. For example, punitive damages have been awarded for the indignity of being spat on in a courthouse, being defamed by an adversary and being the subject of a beating. *ABA Report, supra* note 17, at 16.

See, e.g., Benson v. Frederick, 3 Burr 1845 (K.B. 1776), *cited in* PUNITIVE DAMAGES, *supra* note 37, § 1.3(D) at 10. The court held that punitive damages were awardable because the plaintiff was wrongfully flogged. *Id.* The result was scandal and disgrace to the plaintiff. *Id.*

43. Winkler v. Hartford Acc. & Indem. Co., 168 A.2d 418 (N.J. Super. 1961). "[Punitive] damages are allowed to punish the wrongdoer for a wilful act and to vindicate the rights of a party in substitution for personal revenge, thus safeguarding the public peace." *Id.* at 422.

44. MCCORMICK, *supra* note 1, § 77 at 276. *See, e.g.*, Electrical Workers v. Foust, 442 U.S. 42, 48 (1979) (holding that punitive damages encourage plaintiffs to assert their legal rights by providing a bounty to bring the lawsuit).

45. *See supra* note 19 and accompanying text.

46. Tideway Oil Programs v. Serio, 431 So. 2d 454 (Miss. 1983). In *Tideway*, the Mississippi Supreme Court specified that the award of punitive damages to a plaintiff should be reserved for only those cases where the plaintiff has endured "great trouble and personal expense." *Id.* at 461. In particular, the court believed that punitive damages were only appropriate when the plaintiff had rendered a service to the community by bringing forth the defendant's egregious conduct. *Id.*

See also Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985). The Maine Supreme Court hailed

In practice the private attorney general doctrine has been distorted and abused. As Harvard Law Professor Clarence Morris noted many years ago, plaintiffs are often not inspired by the goal of identifying outrageous conduct for the public benefit.[47] Instead, plaintiffs seem to be induced into presenting inflammatory evidence against a defendant with the hope of increasing the plaintiff's own award.[48] Such a practice hardly seems in keeping with the goals of punitive damages. Rather, this practice adds credence to the public perception that punitive damages are nothing but a windfall to plaintiffs. This abuse of the private attorney general doctrine is a contributing factor as to why reform of punitive damages is necessary.

Another common law rationale for awarding punitive damages directly to the plaintiff, related to the private attorney general doctrine, was to fill certain voids in the legal system.[49] In the early days of the common law, the primary gap-filling function served by punitive damages was providing monetary awards for nonpecuniary losses like mental anguish, insult, or humiliation.[50] However,

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the private attorney general theory as an excellent supplement to the enforcement of criminal laws because the award of punitive damages encouraged private individuals to enforce society's rules. *Id.* at 1358. The court used the private attorney general theory as a specific tool to ward off the defendant's contention that the plaintiff received a windfall. *Id.*

47. Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931). Professor Morris contended that plaintiffs are not driven by the same goals as public prosecutors. *Id.* at 1178. It is true, as Morris conceded, that both plaintiffs and prosecutors benefit when defendants are punished for the wrongful conduct brought by them before the court. *Id.* Specifically, plaintiffs receive an award of punitive damages while prosecutors are permitted to keep their salaried job. *Id.* However, as Morris noted, there is a crucial difference between the motivations driving each of these actors. *Id.* The prosecutor's motivation is to obtain convictions regardless of how gentle or severe the punishment may be. *Id.* Meanwhile, the plaintiff, although acting as a "private attorney general," is extremely interested in the degree of punishment the defendant receives because the greater the degree of punishment, the larger the plaintiff's punitive damage award will be. *Id.* It has been the chronic abuse of this theory by plaintiffs that has focused so much attention on the plaintiff's "windfall" when punitive damages are awarded. *Id.*

48. *Id.* Morris admitted that it is conceivable that the evidence the plaintiff introduces will have marginal probative value toward assessing the punishment against the defendant. However, it is more likely, Morris predicted, that the nature of the evidence, offered by the plaintiff with the express intention of stirring the emotions of the jury, would create so much prejudice as to outweigh any remote probative value the evidence might have. *Id.*

49. *See infra* notes 50-55 and accompanying text.

50. For example, in Stuart v. Western Union Tel. Co., 18 S.W. 351 (Tex. 1885), punitive damages were awardable for the mental anguish suffered by the plaintiff. In *Stuart*, the defendant failed to deliver a telegram to the plaintiff concerning a sick relative who later died. The court allowed the award of punitive damages for the mental distress suffered by the plaintiff because although the harm suffered could not be computed with precision, the pain suffered was proximately caused by the defendant's wilful conduct. *Id.* at 352-53. Punitive damages were often awarded when the plaintiff suffered a similar type of non-pecuniary loss. *See generally* PUNITIVE DAMAGES, *supra* note 37, § 1.3(D) at 10.

Both Connecticut and Michigan still subscribe to the notion that punitive damages are

the need for this function has waned with the onset of the award of damages for pain and suffering,[51] mental distress,[52] and most recently, hedonic damages.[53]

A second gap-filling function served by the award of punitive damages was to address the void in the legal system for payment of the plaintiff's attorney's fees. Essentially, commentators began to question how a plaintiff could be considered "whole" following a lawsuit when the plaintiff was still obligated to pay attorney's fees.[54] The award of punitive damages was therefore further justified as a method to defray the plaintiff's legal costs and to keep the plaintiff's compensatory award intact.[55]

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awardable as additional compensation to the plaintiff. *See* Peisner v. Detroit Free Press, 364 N.W.2d 600 (Mich. 1984). In *Peisner*, an attorney sought compensatory and punitive damages in a defamation suit against a newspaper. The court held that the jury could award both compensatory and punitive damages for injured feelings without being duplicative. *Id.* at 604. The court reasoned that punitive damages awarded for injured feelings "pick up where [compensatory] damages leave off." *Id.* at 605. The court did, however, explicitly condition the award of these punitive damages, above and beyond compensatory damages, to being a reflection of the outrage at the defendant's conduct. *Id.* *See also* Markey v. Santangelo, 485 A.2d 1305, 1308 (Conn. 1985) (holding that punitive damages are intended to help a plaintiff defray reasonable expenses incurred in the litigation).

These two states represent a severe minority in viewing punitive damages as compensatory. However, it should be noted that both states, like all other states, emphasize the egregious nature of the defendant's conduct when calculating the punitive damage award.

51. Cartwright v. Atlas Chem. Indust., Inc., 593 P.2d 104 (Okla. Ct. App. 1978). The court held that pain and suffering compensation was within "the sound discretion of the jury because there is no market where pain and suffering are bought and sold, nor any standard by which compensation for it can be definitely ascertained, or the amount actually endured determined." *Id.* at 118.

52. Horan v. Klein's Sheridan, Inc., 211 N.E.2d 116, 118 (Ill. App. Ct. 1965) (holding that the plaintiff could recover damages for the embarrassment and mental anguish associated with the disfigurement caused by the defendant's conduct).

53. Hedonic damages are awarded for the loss of enjoyment of life or depreciation of the quality of life because of the injury suffered by the plaintiff. BLACK'S LAW DICTIONARY 391 (6th ed. 1990). For a discussion of what hedonic damages encompass and their current usage in various state jurisdictions, see Kyle R. Crowe, *The Semantical Bifurcation of Noneconomic Loss: Should Hedonic Damage Be Recognized Independently of Pain and Suffering Damage?*, 75 IOWA L. REV. 1275 (1990).

54. MCCORMICK, *supra* note 1, § 77 at 278. *See also* Central Armature Works v. Am. Motorist Ins. Co., 520 F. Supp. 283, 296 (D.D.C. 1980) (holding that reimbursing the plaintiff for attorney fees and associated costs were to be a factor in the determination of punitive damages awards).

55. For an additional case citing this principle, see Kelsey v. Conn. State Employees Assoc., 427 A.2d 420, 425 (Conn. 1980) (holding that the award of punitive damages was to be determined based on the extent of the plaintiff's litigation expenses). *See generally* MINZER ET AL., *supra* note 41, at § 40.14.

B. Current Status

Awards of punitive damages are in a period of transition. However, the English common law themes of deterrence and punishment for the benefit of society remain constant.[56] One current trend among the states is to make the award of punitive damages more difficult to obtain by raising the standard of proof.[57] Implementing such a reform addresses the concern that punitive damages lack procedural safeguards for the defendant.[58]

Other states have placed an absolute cap on the dollar figure awardable for punitive damages.[59] This measure is an overt attempt by state legislatures to curtail the "excessive" jury award. However, certain risks are associated with this reform, such as infringing on the jury's province to determine the award

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56. Dorsey Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982). After studying judicial opinions and additional commentary, Professor Ellis, a leading commentator on punitive damages, found that punitive damages in their "modern" use are meant to: punish the defendant; act as a deterrent to that specific defendant from repeating the punished conduct in the future; act as a general deterrent to society that such conduct was not acceptable; preserve societal peace; induce citizens to aid in enforcing the law; compensate victims for typically uncompensable losses; and pay the plaintiff's attorney's fees. Based on these apparent generalized goals, each individual state has developed methods to implement the purposes most important to them. *Id.* at 3.

57. As of 1992, 28 states had enacted a "clear and convincing" standard of proof. *Tennessee Supreme Court Raises Evidence Standard for Punitive Damages and Requires Trial Bifurcation*, PUNITIVE DAMAGE UPDATE (ATRA, Washington, D.C.), May 6, 1992 at 3 (on file with the *Valparaiso University Law Review*). *See, e.g.*, Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992). The Tennessee Supreme Court held that punitive damages could only be awarded upon showing with clear and convincing evidence that the defendant acted intentionally, fraudulently, maliciously, or recklessly. *Id.* at 901.

Implementing an even stricter standard, Colorado currently requires proving a punitive damage claim beyond a reasonable doubt before any judgment will be entered. *See* Boulder Valley School Dist. R-2 v. Price, 805 P.2d 1085 (Colo. 1991).

58. Bruce Fein and William Bradford Reynolds, *Nothing Civil about Punitive Damages*, 11 LEGAL TIMES 16, Feb. 27, 1989, *available in* LEXIS, Nexis Library, Lglnew File. This article presents various case law where the award of punitive damages has exceeded the maximum criminal fine that could have been imposed had criminal action been taken. Fein also presents all the procedural safeguards that he believes a defendant should be entitled to in the face of such punishment. He reports that such measures are necessary to remove the "blatant discrimination against successful businesses" who have become the victim of the deep pockets syndrome.

59. At least eighteen states currently have some version of a "cap" on the amount of punitive damages that can be obtained. *Arizona and Nevada State Legislatures Enact Punitive Damages Reform Legislation*, PUNITIVE DAMAGES UPDATE (ATRA, Washington, D.C.), June 12, 1989 at 2. The success of the caps has been mixed. *See* Fein v. Permanente Medical Group, 695 P.2d 665 (Cal. 1985), *appeal dismissed*, 474 U.S. 892 (1985) (upholding a $250,000 cap on the award of noneconomic damages such as punitive damages). *But see* Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991) (holding that a $200,000 cap on noneconomic damages violated due process rights); Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987) (holding that the right of access to the courts was violated by a $450,000 cap on noneconomic damages).

and removing some "desirable" uncertainty as to the amount of the award.[60] Still other states, like Michigan and Connecticut, have placed a limit on the award of punitive damages by confining the award to the payment of the plaintiff's attorney's fees, or in some instances, to the recovery for indignity and humiliation.[61] The most extreme anti-punitive damage award measure, currently adopted by five states, has been to absolutely bar the recovery of punitive damages in the absence of a statute specifically permitting their award.[62] Although extreme, this measure passes constitutional muster because

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60. Uncertainty as to the amount of the punitive damage award is desirable because it prevents defendants, particularly corporations, from engaging in cost-benefit analyses that affect their conduct. This concern is especially salient in products liability cases where defendants are faced with safety precaution decisions. *See generally* Owen, *supra* note 37. Owen asserts that in the last twenty years the award of punitive damages has been on the rise in product liability cases because of defendant corporations' disregard for public safety. *Id.* at 1258. This article contains excellent sources and examples of cases where defendant corporations have put products into the market despite having knowledge that adequate tests have not been conducted on the products. *Id.* at 1261. It seems that corporations have no difficulty conducting business in flagrant disregard for the public welfare. *Id.*

One particular example offered by Owen indicates the cost-benefit analysis engaged in by defendant corporations. In Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976), *as cited in* Owen, *supra* note 37, at 1355, a 75-year-old woman was severely burned when her television caught fire. The defendant-manufacturer was shown to have known that a high voltage transformer included in each set was prone to catch fire. The evidence further illustrated that the cost to eliminate the hazard, per unit, was one dollar. The court found that, because the defendant manufacturer failed to warn consumers of the hazard and neglected to recall the units, the award of punitive damages was valid. *Id.* at 109. Owen asserts that defendants do not take these precautionary measures because of the high costs associated with conducting a recall and subsequently redressing the defect. Owen, *supra* note 37, at 1361.

The point is that imposing definite "cap" limitations upon the amount of punishment the defendant will receive for outrageous conduct similar to that found in *Gillham* seems to encourage the use of a cost-benefit analysis. In a "cap" state, a corporation has the ability to estimate how many potential lawsuits will be brought in connection with the defect, then can calculate with precision what the cost of not fixing the defect will be. Essentially this allows the corporation to reduce the concern for societal safety to an issue of economics.

61. *See, e.g.*, Kelsey v. Conn. State Employees Assoc., 427 A.2d 420 (Conn. 1980) (holding that the award of punitive damages was to be determined based on the extent of the plaintiff's litigation expenses); Riggs v. Fremont Mutual Ins. Co., 270 N.W.2d 654, 655 (Mich. Ct. App. 1978) (holding that punitive damages were awardable as compensation for the humiliation and indignity inflicted by the defendant's egregious conduct).

62. *See* Killebrew v. Abbott Laboratories, 359 So. 2d 1275, 1278 (La. 1978) (stating that punitive damages are not recoverable in Louisiana unless a statute expressly authorizes such an award for "some particular wrong"); Lowell v. Mass. Bonding & Ins. Co., 47 N.E.2d 265, 271 (Mass. 1943) (holding that punitive damages are not awardable unless authorized by statute); Miller v. Kingsley, 230 N.W.2d 472, 474 (Neb. 1975) (holding that Nebraska law does not allow for the recovery of punitive damages); Vratsenes v. N.H. Auto, Inc., 289 A.2d 66, 68 (N.H. 1972) (holding that no damages to deter or punish were awardable, rather only compensatory damages could be recovered); Maki v. Aluminum Bldg. Products, 436 P.2d 186, 187 (Wash. 1968) (holding that the doctrine of punitive damages was unsound and that absent a statutory provision, punitive damages could not be recovered).

plaintiffs are not entitled to the award of punitive damages as a matter of right.[63]

Rather than allowing outrageous conduct to go unpunished, implementation of a split award statute is the solution to the problem with which many state legislators are currently grappling. At a very minimum, the split award statute comes closest to carrying out the goals of punitive damages as set forth by Professor Ellis.[64] Specifically, the split award statute compels the defendant to repay society for the harms inflicted by the defendant's conduct while still allowing the plaintiff to receive a share of the award for payment of attorney fees and receipt of a civic reward.

III. WHY PUNITIVE DAMAGES HAVE BECOME THE EYE OF THE STORM

Convincing the courts and legal scholars of the benefits the split award statute offers may be a difficult task because punitive damages have never been completely accepted or well-received within the legal community.[65] However, the task may be especially arduous because within the last fifteen years punitive damages have become the subject of heightened judicial scrutiny and heated debate.[66] One commentator, Professor Stephen Daniels,[67] suggests that this recent phenomena is attributable to the rhetoric of an "insurance crisis" of the mid-1980s[68] and the reality of various tort reform movements[69] taking place

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63. *See supra* note 8 and accompanying text.

64. *See supra* note 56 and accompanying text.

65. *See supra* notes 12-16 and accompanying text for a discussion of the criticisms that have been raised about punitive damage awards.

66. For a general discussion of this phenomena, see Brian L. Lahargoue, *The Need for Federal Legislative Reforms of Punitive Damages*, 20 SW. U. L. REV. 103 (1991); Neil K. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23 (1990); Melvin M. Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present Day Society*, 49 UMKC L. REV. 1 (1980).

67. Professor Daniels has been involved with a number of empirical studies concerning jury verdicts where punitive damages have been awarded. For a more in-depth appreciation of his studies, see Stephen Daniels & Joanne Martin, *Empirical Patterns in Punitive Damage Cases: A Description of Incidence Rates & Awards*, 1 AMER. BAR FOUNDATION WORKING PAPER SERIES NO. 8705 (1988); Stephen Daniels & Joanne Martin, *Jury Verdicts and the "Crisis" in Civil Justice*, 11 JUST. SY. J. 321 (1986); Stephen Daniels & Joanne Martin, *The Punitive Damage Dilemma in Products Liability Cases: Fact or Fiction*, PRODS. LIA. COMMENTARY & CASES, Aug. 1986 at 14.

68. Meanwhile, other special interest groups like the American Tort Reform Association, contend that the insurance liability crisis is not a myth. Additionally, the Florida Bar Journal cited the insurance crisis as a specific reason for the enactment of the Florida split award statute. *See* Lawrence King, *Enforcement of Florida's Punitive Damage Sharing Statute—Is it Constitutional?*, FLA. BAR J., Nov. 1991 at 62. *See infra* note 73 for a discussion of the many facets of the insurance crisis debate.

in the states.[70]

As with any controversial topic, two distinct views of punitive damages have emerged. On the one hand, supporters of punitive damages, like Professor Daniels, claim that punitive damages are not detrimental to the United States' economic stability[71] and are the victim of "politicization" of the issue.[72] On the other hand, opponents of punitive damages, advocating reform of the tort system, contend that punitive damage awards are the cause of the liability insurance crisis,[73] encourage "runaway" jury verdicts,[74] and impede the

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69. *See Record on 'Reform' Mixed in the Courts*, NAT'L L.J., Nov. 9, 1992 at 34-37. This article offers an excellent state-by-state analysis of tort reform measures that have undergone judicial scrutiny. The list is quite exhaustive, providing the outcome of: damage cap decisions, attempts to restrict the collateral source rule, and implementation of mandatory periodic payments.

70. Daniels, *Myth & Reality*, *supra* note 39, at 3. Daniels also suggests that these two factors have changed the nature of the debate from one previously centering on a doctrinal discussion of punitive damages to a debate concerning the negative impact that high punitive damage awards have on society. *Id.*

71. *Id.* Daniels claims that reformers attempt to create this perception through the use of "horror stories." Id. at 16-17. One such "horror story" occurred in Kemner v. Monsanto Co., 576 N.E.2d 1146 (Ill. App. Ct. 1991). In *Kemner*, a jury awarded 63 plaintiffs one dollar in nominal damages for personal damages caused by a wood preservative. The jury then awarded a substantial $16.5 million in punitive damages to the plaintiff. *Id.*

72. Daniels contends that political action committees and other various interest groups who were greatly effected by the award of punitive damage awards came together in the 1980s to mobilize their efforts for change in state legislatures. Daniels, *Myth & Reality*, *supra* note 39, at 10. The reformers created a mentality that drastic change was necessary in the civil justice system by manipulating the public and tactically stirring their emotions. *Id.* at 12. In essence, Daniels explained, the reformers created a smoke screen of the true issues by convincing the public to use "feeling rather than thought." *Id.* at 13. Such a technique is typically used by propagandists to accomplish their ends. As one author notes, "public policies rest on the beliefs and perceptions of those who help make them whether or not those cognitions are accurate." MURRAY EDELMAN, POLITICAL LANGUAGE: WORDS THAT SUCCEED AND POLICIES THAT FAIL 9 (1977).

73. The debate concerning the existence of an insurance liability crisis is a topic so vast that it reaches far beyond the scope of this note. Although the list is in no way comprehensive, a sampling of the different viewpoints concerning the controversy follows.

See Dominick Vetri, *The Integration of Tort Law Reforms and Liability Insurance Ratemaking in the New Age*, 66 OR. L. REV. 277 (1987). Vetri argues that an insurance crisis has in fact developed. The article asserts that fast paced changes have occurred in tort law without accommodating the insurance industry with a satisfactory time period to make rate adjustments. Although he specifically cites increased claims and excessive jury awards as contributing factors of the crisis, Vetri also allots a portion of the blame to insurance companies for being somewhat clandestine about actual losses incurred. *Id.* at 291. In turn, the article contends, it is difficult for the industry to set fair rates for consumers. *Id.* at 295. Vetri's solution to the problem is to have mandatory disclosure by insurance companies and comprehensive studies examining the effects that substantive changes in tort law would have on the insurance industry. *Id.* at 295-96.

See also Stephen Wermiel, *Costs of Lawsuits Growing, Blamed for Rising Insurance Rates*, 132 CHI. DAILY L. BULL. 1, June 9, 1986, *available in* LEXIS, Nexis Library, Omni File. This article represents the epitome of the parade of horribles theory. Wermiel offers various statistics to illustrate the hardships experienced by insurance companies faced with rising costs because of

research and development process of "big business."[75] An additional interesting point raised by opponents of punitive damages is that plaintiffs use the filing of a punitive damage claim as a "bargaining chip" during settlement discussions.[76]

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lawsuits. For example, the article cites a study, conducted by Tillinghast, Nelson, & Warren, indicating that insurers and large corporations paid $66.5 billion in 1984, or 1.76% of the gross national product, in attorneys fees and damages. Wermiel also suggests that a change in legal attitude and theory have contributed to the crisis. Finally, the article acknowledges that consumers are the ultimate losers in the wake of the crisis because they are forced to pay higher prices.

But compare Group says Insurance Premiums a 'Hoax', 132 CHI. DAILY L. BULL. 1, April 7, 1986, *available in* LEXIS, Nexis Library, Omni File. At the other extreme of the debate, this article explains that the insurance liability crisis was the creation of the insurance industry because of low interest rates and slower markets. Robert Creamer, executive director of Illinois Public Action Counsel, warned Illinois taxpayers that insurance premiums were not rising because of runaway jury verdicts, but because the insurance industry was trying to achieve the "biggest con of the decade." *Id.*

Offering a middle ground on this debate are David J. Nye & Donald G. Gifford, *The Myth of the Liability Insurance Claims Explosion: An Empirical Rebuttle*, 31 CORP. PRACTICE COMMENTATOR 201 (1989-1990). This article offers an excellent synopsis of the perceived crisis. The authors present empirical evidence to support the insurance industry's complaint of increased claims being filed in recent years. *Id.* at 214. However, they assert that the problems in the industry are more attributable to an unhealthy tenacity on the part of insurance companies in refusing to settle claims thereby forcing litigation and increasing their own costs. *Id.*

74. "Hardly a day goes by that we do not hear or read of the dramatic increase in the number of lawsuits filed, or of the latest multimillion dollar verdict, or of another small business, child care center, or municipal corporation that has had its insurance canceled out from under it." 132 CONG. REC. S948 (daily ed. Feb. 4, 1986). The above quote was made by Senator Mitch McConnell, of Kentucky, who was laying the ground work for the introduction of the Litigation Abuse Reform Act of 1986. Senator McConnell continued by relaying various "horror stories" associated with excessive jury awards and eagerly litigious individuals that had helped to create the liability crisis. *Id.*

But see Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (challenging the assertion that America is a litigious society and encouraging a rational look at the societal benefits served by litigation).

75. Richard J. Mahoney & Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 SCIENCE 1395 (December 15, 1989). Mahoney and Littlejohn assert that strict liability and inflated jury awards have had a severely adverse impact on the research and development of new products. *Id.* at 1395. The authors report that "seven figure jury awards on claims without merit are enough to send shivers down anyone's spine." *Id.* Mahoney and Littlejohn further contend that health care, aviation, and basic research are the areas suffering the greatest harm by the uncertainty of the punitive damage awards. *Id.* at 1397. In particular, they report that the development of "future" drugs is deteriorating because of "the extremely high cost of vaccine-related injuries." *Id.* For this reason, the National Academy of Science has found that little derivation from traditional vaccines will be used to cure AIDS. *Id.* Additionally, Mahoney and Littlejohn conclude that a similar trend of "conservatism" has developed in the medical equipment industry, the general aviation industry, and the "basic research" industry. *Id.*

76. *See generally* Mahoney & Littlejohn, *supra* note 75. Mahoney reports that plaintiffs who had sought punitive damages were 150% more likely to obtain a settlement agreement than those cases where no punitive damages were claimed. *Id.* at 1396. Additionally, Mahoney found that in conjunction with a higher likelihood to obtain a settlement, plaintiffs seeking punitive damages

Both groups offer statistics to support their claim as to what the fate of punitive damage awards should be. The reformers offer a study conducted by the RAND Corporation Institute for Civil Justice in 1987.[77] The report was a compilation of statistics on jury verdicts where punitive damages were awarded in Cook County, Illinois, and San Francisco, California, from 1960 to 1984. The RAND report found that the award of punitive damages and the amount of the average award had significantly increased in recent years.[78] For example, the RAND report found that Cook County, Illinois, experienced an 800 percent increase in the award of punitive damages in the 1980s.[79] The report also found that the high frequency of awarding punitive damages occurred primarily in business and contract cases.[80] The other main observation made in the RAND report was that a severe increase in the size of the punitive damage award had occurred.[81]

While some may find the statistics produced by RAND and other reform advocates to be persuasive, others may find that the studies conducted by punitive damage supporters are equally persuasive despite the great disparity between the two views. For example, Professor Daniels has been involved with a number of studies[82] finding that punitive damages do not represent a serious problem in the judicial system.[83] His most recent findings indicate that, contrary to what the reformers reported, juries were not always inclined to award punitive damages, and when such awards were made, no consistent increases took place.[84] In specific response to the contentions of the reformers, Daniels noted that juries were least likely to award punitive damages in personal injury cases, "even if [the] case involved medical malpractice or products

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tended to receive 60% more from the settlement. *Id.*

77. MARK PETERSON ET AL., PUNITIVE DAMAGES: EMPIRICAL FINDINGS, 1987 [hereinafter RAND].

78. RAND, *supra* note 77, at iii.

79. *Id.* at 14. In fact, the report found that the award of punitive damages was six times as much as, in the span of four years, than it was during the past twenty years combined. *Id.*

80. *Id.* at 13. Interestingly, however, the RAND report conceded that the award of punitive damages in personal injury cases did not increase in frequency or dollar amount. *Id.* at 65.

81. *Id.* Specifically, RAND reported that Cook County experienced an inflation-adjusted increase in the average punitive damage award from $43,000 in 1965-69 to $729,000 in 1980-84. *Relevant Studies on Tort Reform/Punitive Damages*, PUNITIVE DAMAGE UPDATE (ATRA, Washington, D.C.(n.d.)). This amounts to a 1500% increase. *Id.* The report did, however, concede that punitive damage awards in products liability claims did not experience an increase over the last 25 years. RAND, *supra* note 77, at 12. In fact, punitive damage awards were only awarded in four San Francisco product liability cases and only in two Cook County cases. *Id.* at 12.

82. *See supra* note 39 and accompanying text for the citation of these studies.

83. Daniels, *Myth & Reality*, *supra* note 39, at 2.

84. *Id.* at 61. Daniels' data was based on 25,627 civil jury verdicts from state trial courts in 27 counties of 11 states over a period of four years. *Id.* at 28.

liability."[85]

Two additional groups have come forward with studies that support the award of punitive damages. The Association of American Trial Lawyers asserts that the award of punitive damages has been relatively rare.[86] In fact, the Association reported that as of 1989, only 110 punitive damage awards exceeded $100,000 within the last thirty years.[87] Additionally, the General Accounting Office (GAO), at the direction of the House Subcommittee on Commerce, Consumer Protection and Competitiveness, conducted a study examining the size, cost, and frequency of damage awards.[88] The GAO found that of the 305 cases studied, only twelve punitive damage awards were appealed and all were subsequently reversed or remanded.[89] Further, the GAO reported that seventy-one percent of the cases involving an award of punitive damages in excess of $1 million were reduced on appeal.[90]

The debate between these two groups and the production of statistics will probably continue well into the future. However, the position eventually found to be more meritorious concerning this debate is irrelevant to the viability of split award statutes.[91] The debate between the two groups focuses primarily

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85. *Id.* at 43.

86. Elizabeth Grillo Olsen, *Punitive Damages: How Much is Too Much?*, BUSINESS WEEK, March 27, 1989, at 18.

87. *Id.*

88. Marcia Coyle & Marianne Lavelle, *Study Says Punitive Awards Aren't Excessive*, NAT'L LAW JOURNAL, November 27, 1989, at 5. The study consisted of 305 cases in five states where a jury verdict was returned between 1983-85. *Id.* The study presented other findings concerning compensatory damage awards that are beyond the scope of this note.

89. *Id.*

90. *Id.*

91. Stuart M. Gerson, *Both Sides are Wrong on Tort Reform, So What's Right?*, 131 N.J. L.J. 15, May 18, 1992, *available in* LEXIS, Nexis Library, Omni File. This article comes to much the same conclusion drawn in this Note. The debate concerning the existence of a crisis will continue to rage. Although the article does not specifically address the split award statute, this Note concurs with Gerson that the general public is not currently benefitting from the in-fighting between the two camps. He further argues that individuals must encourage state reforms of "the system" to make it work more effectively for the benefit of the public.

Gerson cites a specific example as to how the American public is the one truly suffering in the midst of the debate. He reports that in the area of obstetric care, over $20 billion have been paid out in costs and in defense of medical malpractice claims. Because of this problem, obstetric and gynecologist professionals are faced with increased insurance premiums.

Consequently, there has been a significant drop in services since 1987. In particular, 12.4% of the American College of Obstetrics and Gynecologists physicians stopped practicing altogether, while up to half of the remaining Ob-Gyn professions reduced services to women that were categorized as "high risk." Another startling fact offered by Gerson is that in 67 counties of Georgia, women do not have access to "a single Ob-Gyn." *Id.*

Therefore, the women most in need of the services are the individuals who are really suffering from the perception that an "insurance crisis" exists. Hypothetically, if the states that reported high

on whether punitive damages have become overused in our legal system and whether the awards have become astronomical.

The split award statute is not a measure created to support one view or the other.[92] Rather, the split award statute is an attempt to actualize the true purpose of punitive damages: specifically, to improve the quality of life in society by punishing and deterring the egregious conduct of defendants. Therefore, the split award statute maintains the punishment function of punitive damages that ultimately benefits society, while disgorging plaintiffs of any potential windfall.[93] The only real connection the split award statutes have to the tort reform movement is that attention became focused on the award of punitive damages because a belief emerged that punitive damage awards had become large and frequent.[94] For this reason, states began experimenting and tinkering with the award of punitive damages to reduce the plaintiff's windfall and improve the perception of punitive damage awards.

IV. ANALYSIS OF THE CONSTRUCTION OF A SPLIT AWARD STATUTE

The split award statute, and its enactment in nine states, is the product of the public's perception that reform of the award of punitive damages is

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jury awards had a split award statute, the problem of reduced services could be resolvable. Specifically, if a portion of the $20 billion was awarded to a state fund pursuant to a split award statute, then the "higher-risk" women would be able to obtain the services required to insure quality obstetrics care. For example, when a "high risk" woman required a Caesarian section procedure, the split award fund would be available to pay the higher costs charged by the profession before her case would be accepted. Additionally, when a woman in Georgia would be in need of Ob-Gyn services, she could obtain money from the split award fund for travel expenses that would allow her travel to a county that would provide these essential services. For an additional illustration of how the split award statute benefits all of society, see *infra* note 222 and accompanying text.

92. Admittedly, at least one state legislature has cited in its legislative history that a motivating factor contributing to the enactment of the split award statute was an attempt to deter plaintiffs from seeking punitive damage awards. *House of Representatives Committee on Health Care and Insurance Staff Analysis: Tort Reform and Insurance*, Fla. ch. 86-160, SB465 at § 70. However, regardless of the motivation, attention must be focused on what the split award statute actually does. In Honeywell v. Sterling Furniture Co., 797 P.2d 1019 (Or. 1990), the Oregon Supreme Court specifically noted that the split award statute was meant only to affect the distribution of a punitive damage award, not whether or how much of an award should be made. *Id.* at 1021.

93. Note, *An Economic Analysis of the Plaintiff's Windfall From Punitive Damage Litigation*, 105 HARV. L. REV. 1900 (1992) (as funded by the John M. Olin foundation). This article engages in an extremely technical economical analysis of how the split award statute effectively alleviates the plaintiff's windfall problem associated with the award of punitive damages. *Id.* at 1911. Essentially, the note sets forth an economic formula wherein the plaintiff receives compensatory and litigation costs while the state receives the defendant's punitive damage award minus litigation costs. *Id.* In addition, the article presents the tax ramifications of punitive damage awards. *Id.* at 1917.

94. *See supra* notes 77-90 and accompanying text discussing the two perspectives as to the validity of this perception.

needed.[95] The split award statute is also an attempt at effectuating the true purpose of maintaining societal order through the award of punitive damages. The nine states that have enacted split award statutes include: Colorado, Florida, Georgia, Illinois, Iowa, Kansas, Missouri, Oregon, and Utah.[96]

A primary benefit of the split award statute is to create a disincentive for seeking punitive damages unless the claim is truly meritorious.[97] The specific disincentive is to remove the temptation of the plaintiff seeking a windfall. Additionally, the split award statute tends to return the award of punitive damages to its original intended purpose by "visiting financial distress on wickedness [that] serves a public purpose."[98] This objective is achieved by awarding a set percentage of all punitive damage awards to the state. Such a "funnelling" process also allows the public to receive some compensation for the losses it suffered as a result of the defendant's outrageous conduct.[99]

A. The Distribution Question

The question of how much of the award should be "funnelled" to the public has been answered differently by the states that have enacted split award statutes. In fact, a spectrum has emerged among these states. The far left of the spectrum provides that the majority of the punitive damage award should be made to the state.[100] For example, both the Georgia and Iowa statutes require that seventy-five percent of the award must be remitted to the state, while Florida receives a sixty percent share of all punitive damages awarded in the state.

At the other extreme, the most conservative split award statute entitles the state to a one-third share of the punitive damage judgment. Only the Colorado legislature has enacted this conservative approach. Finally, the middle of the road is occupied by those states that make an even fifty-fifty split of the award.[101]

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95. *See supra* section III.

96. *See supra* note 24 for the statutory citation of each state. The legislative history materials concerning why these states have enacted the split award statute, for the most part, are not available. Therefore, what follows is an analysis of what can be gleaned from reading the statutory language and related articles offering possible rationales.

97. *See* MINZER ET AL., *supra* note 41, at § 40.06.

98. ILL. REV. STAT. ch. 110, para. 2-1207 (1986). The quoted material comes from the historical and practice notes following the statutory language.

99. *See* MINZER ET AL., *supra* note 41, at § 40.06.

100. Florida, Georgia, and Iowa occupy this end of the spectrum. For specific statutory cites of each particular states, see *supra* note 24.

101. A slight plurality of the states fall into this category that include: Kansas, Missouri, Oregon, and Utah.

Only one state, Illinois, does not fit neatly into a particular category on the spectrum. The reason for this peculiarity is that Illinois' split award statute provides no specified percentage breakdown of the judgment.[102] Instead, the statute affords the trial court judge discretion to determine what, if any, special distribution scheme should take place among the plaintiff, the state, and the plaintiff's attorney, with regard to the punitive damage award.[103] Although this construction creates the potential for uncertainty as to where on the spectrum the distribution will fall, Illinois' statute is still useful in achieving the goals behind the split award statutes.[104] Specifically, the plaintiff must still consider whether the time, money, and effort associated with seeking a punitive damage award is worthwhile.[105]

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102. ILL. REV. STAT. ch. 110, ¶ 2-1207 (1986).

103. *Id.*

104. Justice Janie L. Shores, an Alabama Supreme Court Justice, suggests that it is within the court's "inherent authority to allocate punitive damage awards without legislation directing such allocation." Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 90 (1992). In particular, Justice Shores asserts that the courts have broad powers to "shape and effectuate remedies [that are] deeply rooted in the common law system." *Id.* at 91. She further contends that punitive damage awards are subject to the exercise of this inherent authority. *Id.* Justice Shores finds that the punitive damage award distribution plan must be restructured so that the defendant's harm against society is redressed through the award of punitive damages. *Id.* at 91-92. Essentially, Justice Shores encourages courts to exercise their inherent authority to split the award of punitive damages between the plaintiff and the state when the judge finds that the facts of the case mandate such a distribution. *Id.* at 93. Justice Shores also establishes a specific procedural analysis a court should implement when a punitive damage award has been made to determine if a special distribution of the award is appropriate. *Id.* at 92-94.

Justice Shores contends that neither the plaintiff nor the defendant could set forth a valid complaint because of the realignment of the punitive damage award that allows the state to receive a portion. *Id.* at 91. She notes that the plaintiff has no basis for argument because the plaintiff has no vested constitutional right to receive the entire punitive damage award. *Id.* Meanwhile, as Justice Shores notes, the defendant has no complaint because regardless of who receives the award, the defendant is still obligated to pay. *Id.* Therefore, although Justice Shores suggests a different source of authority to implement the split award scheme, she and this Note reach the same conclusion. The split award system is necessary to allow society to receive compensation for the losses suffered because of the defendant's conduct. *Id.* at 93.

This article is a natural follow-up to her concurring opinion in Fuller v. Preferred Risk Life Ins. Co., 577 So. 2d 878, 886-87 (Ala. 1991) (Shores, J., concurring), wherein she suggested that a split of the punitive damage award should be made between the plaintiff and the state. Recently, in Smith v. States General Life Ins. Co., 592 So. 2d 1021 (Ala. 1992), the court implemented Justice Shores' approach. The court divided the punitive damage award equally between the plaintiff and the American Heart Association. *Id.* at 1024.

105. ILL. REV. STAT. ch. 110, ¶ 2-1207 (1986). The legislative history following the statute indicates that the Illinois legislature's intent behind the split award statute was to create this cost-benefit analysis. *Id.*

B. *Attorneys Fees Computation*

A factor to consider when determining whether a punitive damage award is worth pursuing under the split award statute concerns when and how the computation of attorneys fees takes place.[106] A clear majority of the states provides that before any division of the punitive damage award is made between the plaintiff and the state, reasonable attorney fees should be deducted from the judgment. These states include: Georgia, Illinois, Iowa, Missouri, Oregon, and Utah. Only Florida's split award statute requires that the attorney fees be paid out of the claimant's own share of the judgment.[107]

C. *The Recipient of the Funds*

In addition to the difficulties posed by the percentage distribution questions, a consensus has not been reached among the states with respect to which entity within the state should be the recipient of the state's share of the bounty. For example, the most generic distribution scheme, as implemented by Colorado, Georgia, and Utah, simply places the state's percentage in a general state fund.[108] Other state statutes dictate that the award be used on particular programs. For instance, Kansas requires that the monies be put towards health care stabilization;[109] the Oregon statute provides that a Criminal Injuries Compensation Account receive the state's share;[110] and Missouri's split award statute creates a special fund, the Tort Victims' Compensation Fund, to be the recipient of the state's monies.[111]

Two of the states have particularly unique disbursement schemes. The Iowa split award statute, classified earlier in this Note as "far left," leaves open the opportunity that the plaintiff may receive the entire punitive damage award.[112] However, if the jury finds that the plaintiff is not entitled to the full punitive damage judgment, then a civil reparation trust fund receives the state's

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106. Typically, the plaintiff has previously agreed to pay the attorney a fixed percentage of the award. *Honeywell*, 797 P.2d at 1022.

107. FLA. STAT. ANN. § 768.73(2)(a)(4) (West 1986).

108. For the specific language of the statutes, see: COLO REV. STAT. § 13-21-102(4) (West 1986); GA. CODE ANN. § 51-12-5.1(e)(2) (1987); and UTAH CODE ANN. § 78-18-1(3) (1989).

109. KAN. STAT. ANN. § 60-3402(e) (1988).

110. OR. REV. STAT. § 18.540(3) (1987).

111. MO. REV. STAT. § 537.675(1) (1987).

112. IOWA CODE ANN. § 668A.1(1)(b) (West 1987), requires that the jury answer a special interrogatory to determine whether the defendant's outrageous conduct was "directed specifically at the claimant . . . ." Finding in the affirmative, the jury must then award the plaintiff the full punitive damage judgment as provided for by § 2(a). In the event the jury finds that the defendant's egregious conduct was more a crime against the public welfare, then the state receives 75% of the award. *Id.*

seventy-five percent share of the award.[113] The Florida split award statute also offers a unique disbursement alternative. Under the Florida statute, the cause of action before the court is the determining factor as to where the state's share will eventually be awarded.[114]

D. State's Interest

One area in which most of the existing split award statutes agree is when the state's interest in the judgment attaches. Four out of the nine statutes contain specific language stating that the state's interest does not become active until judgment is entered for the plaintiff.[115] In essence, such language creates a judgment creditor status for the state, thus entitling the state to a percentage of the proceeds from the punitive damage award, yet prohibits the state from actually becoming a party to the suit or becoming actively involved in any of the judicial proceedings.[116] This type of statutory construction is necessary to avoid conflict with the Excessive Fines Clause of the Constitution.[117] By limiting the state's role to the status of judgment creditor, the applicability of the *Browning-Ferris*[118] decision acting as a barrier to the split award statute is questionable.[119]

Since the first split award statutes were enacted in 1986, in Colorado and Florida, quite a bit of tinkering has occurred within those states.[120] In 1987, the American Bar Association endorsed the concept of the split award statute; therefore, more statutes and variations can be expected.[121] Also, within the last five years, some of the statutes discussed above have undergone judicial

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113. IOWA CODE ANN. § 668A.1(2)(b) (West 1987).

114. If the claim pertains to personal injury or wrongful death, the state's share is placed in a Public Medical Assistance Trust Fund. All other claims are placed in a General Revenue Fund. FLA. STAT. ANN. § 768.73(2)(b) (West 1986).

115. For the specific language from the statute, see: COLO. REV. STAT. § 13-21-102(4) (West 1986); GA. CODE ANN. § 51-12-5.1(e)(2) (1987); MO. REV. STAT. § 537.675 (3) (1987); and OR. REV. STAT. § 18.540(1) (1987).

116. Eurlich v. Snap-On Tools Corp., 798 P.2d 715 (Or. Ct. App. 1990) (holding that the state had no right to interfere with the prosecution of the action for punitive damages because the state had no interest in the case until a fund capable of distribution was created by entry of judgment).

117. For a discussion of the Excessive Fines problem in relation to the split award statute, see *infra* section V.B. notes and accompanying text.

118. 492 U.S. 257 (1989).

119. For a discussion of the Excessive Fines problem in relation to the split award statute, see *infra* section V.B. notes and accompanying text.

120. The divergence of views emerging from only these nine states and their respective statutes illustrates the fact that a set formula for the split award statute has not been established. *See supra* notes 95-119 and accompanying text.

121. MINZER ET AL., *supra* note 41, at § 40.06.

scrutiny,[122] thus making the path to constructing a more effective split award statute attainable by correcting prior mistakes. In the section that follows, the major relevant case law will be analyzed.

V. RELEVANT CASE LAW EVALUATING SPLIT AWARD STATUTES

To date, five of the nine existing split award statutes have undergone judicial scrutiny. Two of the statutes have been struck down on constitutional grounds.[123] Interestingly, the three remaining statutes have been upheld despite similar constitutional challenges.[124] The other main issue concerning the split award statute addressed by the courts has been the jury instruction question.[125]

A. The Takings Clause

In 1991, the Supreme Court of Colorado struck down the state's conservative split award statute on the grounds that the state's share amounted to an unconstitutional taking. In *Kirk v. Denver Publishing Co.*,[126] the court examined Colorado's split award statute, which awarded one-third of any punitive damage award to the state.[127] The court, in striking the statute down, limited its discussion to the constitutional takings issue.[128]

The *Kirk* court conceded that no bright line test existed to determine what constituted a "taking" of property;[129] however, the court did consider a number of factors in making its decision.[130] First, the character of the governmental action was given consideration.[131] As to this factor, the court held that the split award statute was an unsuccessful attempt by the legislature

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122. *See infra* section V notes and accompanying text.

123. For a discussion of these cases, see *infra* notes 126-41, 160-71 and accompanying text.

124. *See infra* notes 142-56, 172-80 and accompanying text.

125. *See infra* notes 182-91 and accompanying text.

126. 818 P.2d 262 (Colo. 1991).

127. *Id.* at 266. In *Kirk*, the plaintiff received a punitive damage judgment against the defendant. While agreeing to accept a reduced punitive damage award in lieu of a new trial, the plaintiff was challenging the state's receipt of one-third of the bounty. *Id.* at 263.

128. *Id.* at 265. Other issues were raised on appeal; however, the court found that the Takings Clause provided sufficient grounds to invalidate the statute. *Id.*

129. *Id.* at 267.

130. *Id.* at 268. The court compiled these factors based on the decision in Ruckelshaus v. Monsanto Co., 467 U.S. 968, 1005 (1984).

131. *Kirk*, 818 P.2d at 268.

to impose a user fee on plaintiffs who had obtained a punitive damage award.[132] Second, the court determined the economic impact of the governmental action.[133] In the case of the split award statute, the court found that the economic impact was nothing "less than substantial."[134] And finally, the court was concerned with how the governmental action would interfere with the plaintiff's reasonable economic expectation with regard to the property affected.[135]

The court primarily concerned itself with the third factor. In assessing the plaintiff's reasonable economic expectation, the court rendered a literal interpretation of the statutory language.[136] The court found that the state never obtained an interest in the award prior to the judgment being entered and the monies being collected from the defendant.[137] Such a procedure, the court held, was an unconstitutional taking of the plaintiff's vested property right.[138]

The court also cited the state's disclaimer of any interest in the suit until after such events occurred as further support that the plaintiff's expectation to the full judgment was reasonable.[139] For these reasons, the court invalidated

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132. *Id.* at 271. The court noted that for a user fee to be valid, the charge must "bear some reasonable relationship to the overall cost of that service." *Id.* Here, the court held that the split award statute constituted an invalid user fee because of the "gross disproportion between the statutory forced contribution and any government service made available to the [plaintiff]." *Id.* at 273.

133. *Id.* at 268.

134. *Id.* at 272. The court reasoned that the plaintiff obtained a vested right to the entire punitive damage award under Colorado's split award statute. *Id.* Therefore, the court held that the subsequent requirement that the plaintiff surrender one-third of the judgment to the state entailed a severe economical impact. *Id.*

135. *Id.* at 268.

136. *Id.* at 266. In relevant part, the statute provides, "One-third of all reasonable damages collected pursuant to this section shall be paid into the general state fund. The remaining two-thirds of such damages collected shall be paid to the injured party. Nothing in this subsection (4) shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due." COLO. REV. STAT. ANN. 13-21-102(4) (West 1986).

137. *Kirk*, 818 P.2d at 266. Admittedly, applying the plain meaning rule to the Colorado statute, it appears that the state requires the plaintiff to spend the time, effort, and money in actually obtaining the judgment and payment, then is expected to surrender one-third of the bounty to the state. Under this analysis, the split award statute does violate the Takings Clause because the plaintiff is being required to actually collect payment from the defendant, thus having obtained legal title to the monies, and then must remit a one-third portion to the state.

138. *Id.*

139. *Id.* at 272. Here again, the wording of Colorado's statute creates the constitutional difficulties. The court noted that "the state's asserted interest is not in the judgment itself but in the monies collected on the judgment, and the interest arises only at the point in time after the judgment creditor's property in the judgment has vested by operation of law." *Id.*

the Colorado statute as an unconstitutional taking.[140] Following the *Kirk* decision, not all split award statutes fell prey to the Takings Clause. The Colorado split award statute was struck down because of the unique linguistic and procedural difficulties associated with how the state obtained its share of the award.[141]

The viability of split award statutes, despite the Takings Clause challenge, was evidenced by a Florida Appellate Court in *Gordon v. State*,[142] also decided in 1991, upholding the Florida split award statute.[143] The *Gordon* decision was subsequently affirmed, in late 1992, in a per curiam opinion issued by the Florida Supreme Court.[144] The court flatly rejected the plaintiff's Takings Clause argument.[145] The court reasoned that no property interest was being taken from the plaintiff because the plaintiff held no protectable right to the inchoate claim of a punitive damage award.[146] The court also noted that punitive damages, unlike compensatory damages that are awarded as of right, are not a matter of right; rather, punitive damages were awarded and justifiable because of public policy considerations.[147] Therefore, the court reasoned that the state acted within its purview, as the ultimate policy maker, to codify and regulate the plaintiff's right to punitive damages.[148]

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140. *Id.* at 273.

141. *See supra* notes 137, 139 and accompanying text.

142. 585 So. 2d 1033 (Fla. Dist. Ct. App. 1991).

143. *Id.* In *Gordon*, the plaintiff received a punitive damage award from K-Mart after having been falsely imprisoned by the store. Upon entry of an amended final judgment, the court entered judgment in favor of the plaintiff as to 40% of the punitive damage award, while the state received judgment to the remaining 60% of the bounty. *Id.* at 1035.

144. Gordon v. State, 608 So. 2d 800 (Fla. 1992), *cert. denied*, 61 U.S.L.W. 3667 (1993). In a fairly brief opinion, the court was in complete agreement with the Appellate Court concerning the constitutionality of the split award statute. The court supported the lower court's reasoning that the split award statute did not constitute a taking because the plaintiff had no vested right to recover punitive damages. *Id.* at 801. In further concurring with the Appellate Court, the Florida Supreme Court explained that the right to have punitive damages awarded "is not property." *Id.* Therefore, the court reasoned that the state, as ultimate policymaker, had the "plenary authority" to regulate an inchoate claim to punitive damages "or even abolish it altogether." *Id.* The court concluded that the Florida Legislature's action was rationally related to the legislative objectives of compensating the public and discouraging the abuse of claiming punitive damages by making their award less attractive to plaintiffs and plaintiffs' attorneys. *Id.* at 802. Therefore, the court upheld Florida's split award statute. *Id.*

145. *Gordon*, 585 So. 2d at 1035. In the *Gordon* case, unlike the *Kirk* case, the plaintiff obtained a vested right to only 40% of the punitive damage award. *Id.* The state obtained a vested interest to the 60% immediately upon entry of the judgment against the defendant. *Id.* Also unlike *Kirk*, in *Gordon*, the state was responsible for the collection of payment.

146. *Id.* at 1036.

147. *Id.* at 1035.

148. *Id.* at 1036. The court suggested that the state could completely eliminate the award of punitive damages if it so desired. For the states that have adopted this position, see *supra* note 62 and accompanying text.

Applying a minimal scrutiny test to the Florida split award statute, the *Gordon* court found that the state had a legitimate interest in returning the use of punitive damages to its original intended purpose.[149] The court further recognized that awarding a percentage of the punitive damage award to the state assisted in effectuating the public policy goals of the legislature by allowing the public, as represented by the state, to receive compensation for the losses suffered.[150] The *Gordon* court also accepted the legislative history's justification for this statute.[151] Again giving deference to the legislature as ultimate maker of public policy, the court found no difficulty with a statute enacted for the purpose of discouraging the filing of punitive damage claims.[152]

Florida, however, was not the only state to reject the *Kirk* court's decision and instead hold that a split award statute does not violate the Takings Clause. In *Shepherd Components v. Brice Petrides*,[153] a 1991 case analyzing Iowa's split award statute, the Iowa Supreme Court upheld an award of seventy-five percent of a punitive damage award to the state's civil reparation fund.[154] In *Shepherd*, the court held that the plaintiff had no vested right to the recovery of

149. Gordon v. State, 608 So. 2d 800, 1036 (Fla. 1992). The court explained that the primary purpose of punitive damages is to vindicate public wrongs and to protect the public from similar egregious conduct in the future. *Id.* The net effect of achieving this purpose is to compensate society for the losses suffered because of the defendant's egregious conduct and maintain social order in the future.

150. *Id.* at 1037. In this respect, the court also seemed to imply that the plaintiff should feel fortunate to receive any of the punitive damage award. *Id.* at 1037 n.5. This point is reinforced in a state adopting the Illinois split award statute approach. Because under the Illinois wild card approach, the trial court judge has the absolute discretion in determining how, if any, distribution takes place between the plaintiff and the state. Therefore, nothing would seem to prevent the judge from awarding the entire punitive damage award to the state. Under this analysis, the Florida plaintiff should feel fortunate that 40% of the award is guaranteed to end up with the plaintiff. Under the Illinois approach, the plaintiff has no such guarantee.

151. *Id.* Florida's legislative history cited dramatically rising commercial liability insurance rates, complete lack of insurance coverage, and high jury awards as the motivating factors to enacting the tort reform legislation. *House of Representatives Committee on Health Care and Insurance Staff Analysis: Tort Reform and Insurance*, Fla. ch. 86-160, SB465 at § 70. The legislature expected that the limitations placed on non-economic damage awards, like punitive damages, would help release some tensions in the insurance industry. *Id.*

In particular, the statute was enacted with the hope that limits on non-economic damages would lower insurance rates because presumably costs to the insurance provider would be lowered by the limits. *Id.* Additionally, the legislature believed that the limits placed on punitive damages and other non-economic damages might possibly encourage settlements therefore reducing litigation costs. *Id.*

152. *Gordon*, 585 So. 2d at 1037.

153. 473 N.W.2d 612 (Iowa 1991).

154. *Id.* In *Shepherd*, the plaintiff challenged the state's receipt of any of the punitive damage award. The plaintiff claimed a vested property right in the judgment and advocated that a taking without just compensation violated his due process rights. *Id.*

punitive damages.[155] The court reasoned that because punitive damages are a statutorily created right, the manner with which the monies were distributed was subject to legislative codification without offending any constitutional provisions.[156]

As *Gordon* and *Shepherd* indicate, the Takings Clause does not seem to be an insurmountable barrier to the split award statute. However, the *Kirk* decision makes it clear that both the procedure implemented to obtain the monies and exactly when the state's interest attaches to the judgment are two crucial elements of a successful split award statute. To withstand a Takings Clause challenge, the statute must provide the state with an interest to its portion of the monies immediately upon entry of the judgment.[157] Further, it is crucial that the state be responsible for collecting its own share of the award.[158] The *Kirk* decision indicates that leaving this task to the plaintiff would create a vested property right in any of the monies obtained by the plaintiff. Therefore, the required remission of a portion of that money to the state would violate the Takings Clause.[159]

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155. *Id.* at 619. The contention that punitive damages are not a matter of right is not a novel concept to the Iowa courts. In Claude v. Weaver Const. Co., 158 N.W.2d 139, 143 (Iowa 1968), the Iowa Supreme Court rather strongly asserted:

> [T]he award of such damages constitutes an effective deterrent to such offenders, and a salutary protection to society and the public in general. They are not recoverable as a matter of right and are only incidental to the main cause of action, and can be awarded only when actual and substantial damages are allowed. They are in no way compensatory, and while they have a secondary purpose in adding to the complainant's award because injury to him may well have been aggravated by its malicious, oppressive, willful, wanton, or reckless causation, yet, whatever benefit he so receives comes to him not as compensation for the wrong done him but as purely incidental and by the grace and gratuity of the law, as punishment of the wrongdoer, and as an example and deterrent to others.

Id. at 143. The court, therefore, identified the plaintiff as a fortuitous beneficiary of the punitive damage award and reinforced the fact that society is really meant to be benefitted through the award of such damages. *Id.*

The acknowledgement that punitive damages are not a matter of right is not limited to Iowa. *See, e.g.*, American Bank & Trust Co. v. Community Hosp., 683 P.2d 670, 676 (Cal. 1984); Samsel v. Wheeler Transp. Sevrs., 789 P.2d 541, 555 (Kan. 1990).

156. *Shepherd*, 473 N.W.2d at 619. The *Shepherd* court candidly stated that in the past punitive damages were always awarded to the plaintiff because no one else ever laid claim to the award. *Id.* For this reason, the Court dubbed the plaintiff a "fortuitous beneficiary" of the award. *Id.* Like the *Gordon* court, the *Shepherd* court seemed to be implying that the plaintiff should feel fortunate to be receiving any portion of the punitive damage award.

157. *Kirk*, 818 P.2d at 266.

158. *Id.* at 272.

159. *Id.*

B. The Excessive Fines Clause

A second major stumbling block that has been cited to strike down the split award statute is the Eighth Amendment Excessive Fines Clause.[160] This constitutional concern has become especially salient because of the Supreme Court decision in *Browning-Ferris Industries v. Kelco Disposal, Inc.*[161] The *Browning-Ferris* decision was a landmark case because it firmly established the constitutionality of awarding punitive damages in civil proceedings, rejecting the Excessive Fines Clause challenge. The Supreme Court set forth specific guidelines as to what circumstances did not violate the Excessive Fines Clause.[162] Specifically, the Court limited the non-applicability of the Excessive Fines Clause to punitive damage awards when private parties were involved.[163]

Citing this specific limitation, a United States District Court, in *McBride v. General Motors Corp.*, struck down the Georgia split award statute.[164] The court found that the state's entitlement to seventy-five percent of the punitive damage award was a violation of due process and in contravention of the Excessive Fines Clause.[165] The court further found that the split award statute was a poorly disguised attempt to discourage the identification of public wrongs

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160. McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990). The *McBride* decision was the first case to delve into an analysis of the split award statute. The case has been acknowledged in each of the previously mentioned decisions concerning split award statutes.

161. *Browning-Ferris*, 492 U.S. 257 (1989).

162. *See supra* note 23 and accompanying text for an explanation of the guidelines.

163. *Id.* at 260. The Court further made mention of the fact that the government could not be directly involved in the imposition of the punitive damages. *Id.* at 275. However, the split award statute does not violate this condition because the state is not directly imposing a fine against the defendant. As mentioned in section IV where the split award statute was analyzed, the state is prohibited, expressly in most statutes, from becoming an active participant in the lawsuit. Rather, the state's role is limited to receiving a portion of the award after the court has entered judgment against the defendant.

164. 737 F. Supp. 1563 (M.D. Ga. 1990).

165. The plaintiff in *McBride* sued GM for a defective product liability claim. Specifically, the complaint challenged Georgia's statutory provision that limited recovery of punitive damages to a one-time award when products liability was the basis of the claim. The plaintiff also claimed that the state's status as a non-party judgment creditor to 75% of the punitive damage award was a violation of the Excessive Fines Clause.

Interestingly, the Georgia split award statute, unlike the other split award statutes, was limited in application to products liability claims. GA. CODE ANN. § 51-12-5.1(e)(1)-(2) (1987). Ultimately, this specificity contributed to the demise of the statute because the court found that such a distinction between the tort claims was arbitrarily discriminatory. *McBride*, 737 F. Supp. at 1569. Only Florida's split award statute has a similar procedure wherein the type of claim is even at issue; however, under Florida's statute the distinction between the actions determines where the money is distributed, not whether a special distribution of the punitive damage award should take place. FLA. STAT. ANN. § 768.73(2)(b) (West 1986).

committed by big business[166] because the statute reduced the incentive to litigate punitive damage claims.[167]

In striking down the Georgia statute, the court relied heavily on the *Browning-Ferris* decision.[168] The *McBride* court, however, neglected to acknowledge the Supreme Court's express reservation of the issue whether the Excessive Fines Clause should apply to the states via incorporation.[169] Instead, the *McBride* court unilaterally decided that the Clause did apply, and therefore, struck down the split award statute. The court held that the statute, by creating a right for the state to seventy-five percent of the bounty, had explicitly violated the rule set forth in *Browning-Ferris* by imposing a fine on behalf of government.[170] The court further reasoned that such a provision would constitute raising revenue in unfair ways by the government, therefore violating the Excessive Fines Clause.[171]

Like the Takings Clause issue, a split among the states has developed concerning the Excessive Fines Clause acting as a barrier to the viability of split

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166. The court rejected the state's justification that the split award statute was a valid revenue-raising effort or that the statute was necessary to maintain business viability within Georgia. *McBride*, 737 F. Supp. at 1568.

167. Such reasoning by the district court is truly faulty and basically amounts to an admission by the judge that punitive damages have become the object of misuse. The measurement of punitive damages focuses on the outrageous or egregious nature of the defendant's conduct, not the dollar figure the plaintiff obtains from the judgment. Further, the Georgia split award statute still allows plaintiffs to receive 25% more than they are really entitled to because, theoretically, plaintiffs are considered whole upon receipt of compensatory damages. In this respect, plaintiffs have technically received a windfall when a punitive damage award of one dollar is awarded. Therefore, receiving a 25% windfall of the overall punitive damage award should be considered enough of an incentive to encourage plaintiffs to bring meritorious claims. At the same time, the plaintiff's incentive to bring a "not so valid" claim with the hope of hitting the proverbial "punitive damage award lottery" will rightfully be reduced.

168. *Id.* at 1577-78. The court quoted heavily from the *Browning-Ferris* opinion and repeatedly emphasized the Supreme Court's limitation of the precedential value of the case to private parties and where the government had no share of the recovery. *Id.* at 1577.

Interestingly, the *McBride* court never addressed the Takings Clause argument. It appears from the opinion that no challenge to the statute was made on those grounds. The only mention of a vested property right in the award was raised by the defendant in light of a standing challenge. *Id.* at 1573.

The defendant claimed that because the plaintiff had no vested right to an inchoate claim, the split award statute could not be challenged. *Id.* The court rejected this contention. *Id.* Meanwhile, the issue concerning the state's status as non-party judgment creditor was summarily declared unconstitutional because the court found such a status to be arbitrary and without a rational basis. *Id.* at 1578.

169. *Browning-Ferris*, 492 U.S. at 276 n.22.

170. *McBride*, 737 F. Supp. at 1578.

171. *Id.*

award statutes.[172] In *Burke v. Deere & Co.*,[173] a case decided a year after the *McBride* decision, an Iowa district court rejected the applicability of the Excessive Fines Clause to the split award statute.[174] The *Burke* court reconciled its holding with the *McBride* decision by drawing a distinction between the two split award statutes, noting that the entity receiving the state's share differed within the respective states.[175] The court explained that in Georgia, the state treasury was the direct recipient of the award, whereas in Iowa the split award statute dictated that the court receive and administer the monies.[176] The court found that judicial administration of the monies received under the split award statute removed the need to subject the statute to a *Browning-Ferris* analysis.[177]

The court's attempt to distinguish the Iowa statute from the Georgia statute is tenuous at best. It seems that the *Burke* court realized that the *McBride* decision was erroneous in allowing the split award statute to be struck down based on the Excessive Fines Clause. Therefore, the *Burke* court drew a distinction that is really without a difference to avoid being in direct conflict with the *McBride* decision. It is difficult to fathom how the court came to the conclusion that the state's judicial system is not really an arm of the state, considering the fact that all judges and related support staff are in fact paid by the state. Nonetheless, the *Burke* court's ultimate holding that the Excessive Fines Clause does not invalidate the split award statute is correct. However, the court did not have to draw such a meaningless distinction to come to the same conclusion.[178]

Instead, the *Burke* court had two more logical analyses to choose from. First, the court could have found that the state was not a party to the action; and therefore, the *Browning-Ferris* limitation would not be implicated.[179] The Iowa statute is particularly amenable to this analysis because of the two-step

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172. For example, the Florida district court, in *Gordon*, recognized and then summarily dismissed the *McBride* decision that struck down Georgia's split award statute because of the Excessive Fines Clause. *Gordon*, 585 So. 2d at 1037 n.9. The court found that the *McBride* decision was "completely unpersuasive." *Id.*

173. 780 F. Supp. 1225 (S.D. Iowa 1991).

174. *Id.*

175. Specifically, the court noted that the Georgian split award statute placed the "funnelled" funds into the state's treasury. *Id.* at 1242. The Iowa split award statute, on the other hand, provides that the monies be remitted to a civil reparation trust fund. IOWA CODE ANN. § 668A.1(2)(b) (West 1987).

176. *Burke*, 780 F. Supp. at 1242.

177. *Id.* For a discussion of the *Browning-Ferris* decision, see *supra* notes 161-63 and accompanying text.

178. For the alternative argument, see *infra* notes 179-81 and accompanying text.

179. *See supra* note 23 and accompanying text for discussion of what the *Browning-Ferris* limitation entails.

process involved with activating the state's interest under the split award distribution scheme.[180]

Alternatively, the *Burke* court, as well as any other court addressing an Excessive Fines challenge, could uphold the state's receipt of a portion of the award, under the split award statute, by finding that the award is not excessive.[181] Under either analysis, the Excessive Fines Clause should no longer be an obstacle to the split award statute. Therefore, the split award statute can continue to carry out the true purpose of punitive damages by punishing and deterring defendants in the interest of improving society.

C. The Jury Instruction Question

The final concern associated with the split award statute is how to deal with the jury instruction question. In 1990, the Oregon Supreme Court addressed this question directly in *Honeywell v. Sterling Furniture Co.*[182] The court held that the jury had been erroneously instructed about Oregon's split award statute.[183] The *Honeywell* court reasoned that informing the jury about the use of the award would not in any way assist the jury with proper deliberation.[184] Rather, the court feared that this type of instruction would act as a diversion to the jury, thus distracting their attention from the task at hand.[185] Specifically, the jury must concentrate on deciding the case before it.

In particular, the *Honeywell* court had two main concerns.[186] First, the

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180. Specifically pertinent to this discussion, the state's share, under Iowa's split award statute, vests only after the jury finds that the claimant was not the specific target of the defendant's conduct. IOWA CODE ANN. § 668A.1 (2)(b) (West 1987). For a more detailed discussion of this process, see *supra* notes 112-13 and accompanying text.

181. For a more detailed discussion, see *infra* notes 205-211 and accompanying text.

182. 797 P.2d 1019 (Or. 1990). The plaintiffs had received both compensatory and punitive damage judgments against the defendant. The jury instruction issue was raised by the defendant after the jury had already been informed of the special distribution procedure associated with the award of punitive damages under Oregon's split award statute.

183. *Id.* at 1022. As was the case in *McBride* and in *Burke*, no constitutional challenge was made of the statute on the grounds of an invalid taking. Further, the *Honeywell* court never addressed the issue of the Excessive Fines Clause. In fact, absolutely no challenge was reported as to the validity of the split award statute per se. Rather, the case focused only on the jury instruction question.

184. *Id.* at 1021.

185. *Id.*

186. An additional difficulty that could be encountered because of jury instructions that explain the distribution procedure would be the belief that the jurors will obtain a tax break. *Pro and Con: Should Punitive Damages Be Paid to State Funds*, PUNITIVE DAMAGES UPDATE (ATRA, Washington, D.C.). The American Tort Reform Association's (ATRA) briefing paper analyzing the validity of the split award statute concept cited this problem as a potential difficulty with implementing the statute. *Id.* ATRA contends that jurors may be induced to inflate the punitive

court believed that instructing the jury as to how the final award would be distributed created the potential for even higher jury verdicts.[187] The court reasoned that the jury may predetermine that the plaintiff should be entitled to a particular figure.[188] Then, the court predicted, the jury would increase the overall punitive damage award to match that sum.[189] Second, the *Honeywell* court perceived a more serious problem. The court feared that a "Good Cause" syndrome would develop.[190] Specifically, the court explained that jurors might inflate the punitive damage award to provide more monies to the fund receiving the state's share if the jurors empathized with the goal of the fund.[191] Such a practice would not comply with the purposes for awarding punitive damages. Therefore, the jury should not be instructed as to the special distribution plan that will take place after the verdict has been rendered.

VI. A MODEL SPLIT AWARD STATUTE

The debate over whether the reform of punitive damages is a necessary element of the tort reform movement will not be resolved any time in the near future.[192] However, the concept of the split award statute is not contingent upon the existence of an insurance liability crisis or juries returning verdicts that render astronomical punitive damage awards.[193] Instead, the split award statute is a useful method of effectuating the true purpose of punitive damages: to preserve social order. By punishing a defendant's egregious conduct through the award of punitive damages, the court's purpose is to benefit the public by deterring others from harming members of society with similar conduct in the future and to require the defendant to repay society for the losses incurred because of the defendant's conduct.[194] For this reason, punitive damages

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damage award under the mistaken belief that their tax burden will be decreased. *Id.* This aspect of the concern is not really focused on the individual jurors believing that they will receive a tax credit personally. Rather, ATRA stressed that jurors may erroneously conclude that by increasing the amount the defendants have to pay into the state programs they will ultimately reduce the citizen tax burden. *Id.* This problem would be particularly present when the defendant is a wealthy out-of-state corporation. *Id.*

187. *Honeywell*, 797 P.2d at 1022.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. For a discussion of the debate, see *supra* notes 65-90 and accompanying text.

193. For a full discussion of the insurance crisis and its progeny, see *supra* Section III, notes 65-90 and accompanying text.

194. 22 AM. JUR. 2D *Damages* § 734 (1988) provides:

> The intentional or reckless infliction of harm may be likened to culpable negligence in criminal cases and authorizes the infliction of punishment which may deter future harm to the public. So viewed, punitive damages are allowed on grounds of public policy and in the interest of society and for the public benefit.

always have served and will continue to serve a very important function in the judicial system.[195]

The need for the split award statute arises because it is a means of truly carrying out the message being sent by the award of punitive damages. As it stands now in the forty-one states that do not have a split award statute, the award of punitive damages constitutes a windfall for plaintiffs.[196] There is no justification for allowing only one member of society to collect monies that are awarded in the interest of society at large. Because of this inequity,[197] the split award statute must be adopted to distribute punitive damage awards properly. The following model statute offers a constitutional approach to implementing a realistic split award statute that disgorges the plaintiff's windfall and allows society to receive some benefit from punitive damage awards made in its behalf.

Id.

195. Eshelman v. Rawalt, 131 N.E. 675 (Ill. 1921).

> [T]he doctrine is too firmly rooted in our jurisprudence to be disturbed . . . and the court recognizing the doctrine, within its proper scope, ought to exercise a high degree of watchfulness to prevent it from being perverted and extended beyond the real principles which it is based . . . .

Id. at 677. The court further explained:

> [W]here [punitive damages] may be assessed they are allowed in the interest of society in the nature of punishment, and as a warning and example to deter the defendant and others from committing like offenses in the future, and a frequent objection to the doctrine is in allowing an individual to recover and appropriate damages for an offense against the social order and in the interest of society.

Id.

Implementation of the split award statute accomplishes both of these goals. First, the statute allows the punitive damage doctrine to remain a useful tool in our jurisprudence. Second, the split award statute provides for the compensation and restoration of social order by requiring a percentage of each punitive damage award to be paid to the state. Additionally, the split award statute gives the court a means to prevent abuse of the doctrine by at least reducing the plaintiff's windfall, if not eliminating it in some instances.

196. For identification of the plaintiff's windfall, see *supra* note 16 and accompanying text.

197. Some may argue that no inequity exists because the plaintiff is the party who brings and litigates the entire punitive damage claim; however, punitive damages have absolutely no relation to the individual bringing the claim. Instead, the defendant's conduct is the sole focus in assessing the award of punitive damages. Therefore, while it is true that the plaintiff brings the claim, the ultimate award of punitive damages is based on the egregiousness of the defendant's conduct and the extent of harm suffered by society because of that wilful, wanton conduct. For this reason, society is entitled to receive at least a portion of the damage award ordered on its behalf.

Section One: Distribution

> *Upon entry of final judgment against a defendant for an award of punitive damages, fifty percent of such damages shall be paid to the state treasurer, who shall become a judgment creditor as to that amount. The remaining fifty percent of the punitive damage award shall be paid to the prevailing party.*

Commentary: A middle-of-the-road approach, splitting the award equally between the state and the plaintiff, must be used. Realistically, the state must continue to allow the plaintiff to receive some of the punitive damage award to maintain the incentive for bringing such a claim. In this respect, the middle-of-the-road approach also reinforces the common law private attorney general theory as a justification for allowing the plaintiff to recover some of the punitive damage award.[198]

The statute must also create the judgment creditor status for the state treasurer, immediately upon entry of judgment, to avoid the linguistic and procedural difficulties that led to the demise of Colorado's split award statute.[199] The state's status as judgment creditor is initially significant because it makes the state responsible for the collection of its fifty percent share. As the *Kirk* decision indicated, to withstand a Takings Clause challenge this procedural provision is imperative to the viability of the split award statute.[200] The judgment creditor status and the independent collection responsibilities assigned to the state remove any possibility for the plaintiff to argue successfully that the split award statute constitutes an unlawful taking by the state. A criticism that may be associated with such a procedure would be that in the event a defendant has insufficient funds to satisfy the full judgment, the plaintiff may be pitted against the state in the collection process. However, this should not be viewed as problematic because once a judgment has been entered, this situation is really no different than two private individuals pursuing the same tortfeasor as both the plaintiff and the state are judgment creditors. Therefore, whoever is most diligent will reap the benefit of their judgment.

The right to receive a punitive damage award is not constitutionally protected;[201] therefore, the state has the legislative power to regulate or codify one's entitlement to such an award. Further, a plaintiff does not receive a vested right or property interest in a damage award until the actual entry of

198. *See supra* notes 19, 44-48 and accompanying text for a discussion of the private attorney general theory.

199. *See supra* notes 126-41 and accompanying text.

200. *See supra* notes 137-41 and accompanying text.

201. *See supra* notes 8, 155 and accompanying text.

judgment against the defendant.[202] Given these two corollaries, it is difficult to comprehend how a plaintiff could make a successful Takings Clause challenge.

Once the split award statute is codified, thus giving the plaintiff notice, an argument claiming a reasonable expectation to the entire punitive damage award is illogical. As the United States Supreme Court set forth in *Board of Regents of State Colleges v. Roth*,[203] "to have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it."[204]

The Supreme Court has additionally held, in *Penn Central Transportation Co. v. City of New York*,[205] that simply because a government's actions may affect an individual's economic interest, absent a showing by the plaintiff that "the interests were sufficiently bound up with reasonable expectations," a takings problem does not exist.[206] In the *Penn Central* decision, the Court also expressed a desire to give deference to government actions that adjusted the economic benefits of an individual in favor of public programming to promote the common good.[207] Realigning the distribution scheme when punitive damages are awarded is a measure designed to assist the common good. Thus, the state's decision to enact a split award statute is worthy of judicial deference. Therefore, this model split award statute should not pose a takings problem.

Section Two: Attorneys Fees

> *Calculation and payment of the prevailing party's attorney's fees shall be based solely on the prevailing party's fifty percent share of the award.*

Commentary: A clear majority of the existing split award statutes provide that attorneys fees should be calculated before the division of funds between the state

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202. *See supra* notes 145-48 and accompanying text.

203. 408 U.S. 564, 577 (1972).

204. *Id.* In *Roth*, the Court discussed property interests obtained from statutes rather than the Constitution. In particular, the Court used the example of welfare recipients receiving their right to entitlement from the state. *Id.* The award of punitive damages to plaintiffs is somewhat analogous because the plaintiff receives the right to seek punitive damages from the state. The Court held that welfare recipients' property interest in benefits stemmed from the state. *Id.* Likewise, any property interest the plaintiff might obtain in the punitive damage award is granted and defined by statutory terms.

205. 438 U.S. 104 (1978).

206. *Id.* at 124-25.

207. *See supra* section IV and accompanying text.

and the plaintiff occurs.[208] This model statute, however, requires that plaintiffs use their own share of the award to pay attorney costs. Designing the provision in this way is in keeping with the common law goal of having the award of punitive damages act as a gap filler to allow the plaintiff's compensatory award to remain intact.[209] This objective can be satisfied without the need for the state to receive less so that plaintiffs can, in effect, receive more. In addition, a strong policy argument can be made that under this distribution scheme, wherein fifty percent of the entire award will have to be shared between the plaintiff and the attorney, the instances of bringing punitive damages claims with the hope of receiving a windfall will decrease.

Section Three: State's Interest

> *At no time during the litigation of the suit shall the state obtain any interest in the claim for punitive damages. The state's interest shall become activated only upon entry of final judgment and the achievement of the judgment creditor status provided under Section (1) of this statute.*

Commentary: This provision is necessary to avoid conflict with the second major obstacle to the split award statute, specifically a challenge based on the Eighth Amendment Excessive Fines Clause. The statutory language expressly prohibits state involvement in the actual suit, including the appeal process and the possibility of settlement discussion. The intent behind the provision is to limit the state's role and interests to that of judgment creditor only. The net effect is to distance the state as far as possible from the actual litigation of the action with the hope that a court would not find the state to be a party to the case. Provided the provision is interpreted in this way, the potential problem posed by the *Browning-Ferris* decision, and the justification used by the *McBride* court,[210] would have no application to the statute.[211]

In the alternative, if a court would choose not to adhere to that interpretation and instead find that the Excessive Fines Clause did apply, the split award statute would not be unconstitutional per se because of this application. On the contrary, this Note asserts that an application of the

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208. *See supra* section IV.B. and accompanying text.

209. *See supra* note 56 and accompanying text.

210. For a discussion of these cases, see *supra* notes 160-71 and accompanying text.

211. It is worth mentioning that no court examining the split award statute is necessarily bound by the *Browning-Ferris* decision to strike that statute down because of state involvement. The Court reserved the question of whether the Excessive Fines Clause applied to the states via incorporation for future consideration. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.22 (1989).

Excessive Fines Clause to the split award statute would require a finding by the court that the state's share under the statute constituted an excessive fine imposed by government.[212] In her concurring opinion in *Browning-Ferris*, Justice O'Connor agreed that before a punitive damage award could be held unconstitutional under the Excessive Fines Clause, a determination of whether the fines were excessive must be made.[213]

Justice O'Connor offered "some broad guidelines" that emerged from the *Solem v. Helm*[214] decision to assess when a punitive damage award is excessive. First, Justice O'Connor provided, "substantial deference [must be afforded] to legislative judgments concerning appropriate sanctions for the conduct at issue."[215] Second, the court's examination of that question should focus on the defendant's conduct and the gravity of the punitive damage award.[216] Finally, Justice O'Connor suggested comparing the civil and criminal penalties for the conduct.[217]

In applying Justice O'Connor's framework to the split award statute, it seems that a substantial number of awards to the state pursuant to the statute would not be violative of the Excessive Fines Clause. First, the state is receiving its share of the award pursuant to the legislative determination that society should benefit from the award of punitive damages against a defendant. As Justice O'Connor has indicated, under these circumstances, a court analyzing the split award statute should be examining the statute under a minimal scrutiny test. Therefore, most awards to the state should be upheld.

The second prong of O'Connor's analysis mandates that a court should focus on the size of the punitive damage award in relation to the egregious nature of the defendant's conduct. Under this analysis, the absolute dollar figure awarded by the jury and the state's percentage share of the judgment are irrelevant. Again, following this procedure to analyze the split award statute should generally lead to a finding of constitutionality as to the state's share. The only time the award should be struck down is upon a finding that the punishment, in most cases an extremely high jury verdict, is excessive as related

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212. Justice Shores advances a similar contention as to when a jury verdict should be deemed excessive. Shores, *supra* note 104, at 92. Specifically, Shores counsels that a determination that the verdict is excessive must "focus on the defendant insofar as the particular defendant's conduct was concerned." *Id.* Justice Shores further asserts that punitive damage awards are meant to "financially wound, but fall short of destroying the defendant." *Id.* Therefore, absent a finding that the state's share of the award is financially devastating to the defendant, the award should stand.

213. *Browning-Ferris*, 492 U.S. at 299-300 (O'Connor, J., concurring).

214. 463 U.S. 277, 290 (1983).

215. *Browning-Ferris*, 492 U.S. at 301.

216. *Id.*

217. *Id.* This factor has limited applicability in the case of the split award statute.

to the defendant's conduct.

Therefore, an Excessive Fines Clause challenge of the split award statute should usually fail. A court should find that the state is not technically a party to the action under the split award statute, thus never requiring an Excessive Fines Clause analysis. Alternatively, if the state is found to be a party, thereby possibly[218] implicating the Excessive Fines Clause, implementing Justice O'Connor's analysis should lead to a finding that the split award statute and the state's receipt of a share of the award does not violate the Clause.

Section Four: Jury Instruction

> *The jury shall not be instructed or made aware of the special distribution scheme provided for under this statute.*

Commentary: As explained in the *Honeywell* case,[219] it is best not to instruct the jury as to how the punitive damage award will be distributed following the entry of judgment. The issue of confusing the jurors during deliberation, and therefore, potentially contaminating the judgment assessment process recommend against advising the jury of the split award statute. The jury should focus solely on the error of the defendant's ways and what damages should be assessed, rather than concerning itself with how the distribution will occur.

Section Five: State Recipient

> *Upon collection of the state's share of the punitive damage award, the state treasurer shall appropriate the monies collected from the defendant to the governmental agency most affected by the defendant's egregious conduct.*

Commentary: This provision is a novel disbursement scheme that is intended to maximize the true purpose behind the state receiving a share of the punitive damage award. The possibility of simply placing the collected monies into a general state fund[220] is unattractive because the nebulous nature of such a fund gives the appearance of never really being put to use to benefit the public. Alternatively, placing all the monies collected into a particularized governmental fund, for example, the State Department of Rehabilitation Services,[221] is only useful for those members of society falling into the category of need addressed

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218. *See supra* note 211.

219. *See supra* notes 182-91 and accompanying text.

220. *See supra* note 108 for identification of the states that place the collected monies into a general state fund.

221. ILL. REV. STAT. ch. 110, para. 2-1207 (1986).

in that fund. Such a procedure never takes into account whether those individuals were subjected to the defendant's outrageous conduct.

Under this model statute, the governmental agency most affected by the defendant's egregious conduct would be the recipient of the funds. Therefore, the agency could directly assist those individual members of the public who were subjected to and affected by the defendant's outrageous conduct, who, for some reason were unable to obtain formal relief against the defendant. Additionally, the agency could use the funding to improve facilities, safety standards, or research and developments efforts.[222] Therefore, implementation of the split award statute is the most comprehensive means available to effectuate the true purpose of punitive damages by restoring and maintaining social order through the imposition of this type of damage award.[223]

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222. Perhaps an example would best illustrate the benefits of this provision. Recently, General Motors was found guilty by a jury of having produced and maintained in the market, pickup trucks that exploded upon side-impact. *Big-Bucks Truck Stops*, TIME, February 15, 1993, at 17. This particular case involved the death of a 17-year-old boy who burned to death after his truck was struck from the side. *Id.* The "visibly angry" jurors awarded $105 million in punitive damages against GM. *Id.*

In the absence of a split award statute, the plaintiffs will receive the entire punitive damage award and thus receive a windfall. However, under the model statute proposed in this note, this substantial punitive damage award could be put to use in a way to benefit all of society, rather than overcompensating just one family. For example, a portion of that money could be used to develop better governmental safety standard tests that would detect such a hazardous defect. Or perhaps, funding could be allocated to the research and development of better car frame designs that would later be made available by the state researchers to all car companies. Arguably, all would agree that society would benefit from the implementation of such tests and studies because all vehicles travelling the highways, in our highly mobile society, would be safer.

Additionally, although it is unlikely that GM will go out of business because of this verdict, theoretically the split award statute, and particularly this distribution scheme, would also solve the "race to the courthouse door" problem created when a company becomes insolvent because of numerous punitive damage awards. Suppose, for example, that this suit was the first of one hundred similar suits filed against GM. Very few businesses would have the financial stamina to withstand more than a dozen similar verdicts before having to declare bankruptcy. The remaining 88 plaintiffs would technically be left without a remedy despite being subjected to the same hardships and injuries as the prior twelve plaintiffs. With the model split award statute in place, these plaintiffs would be able to receive compensation for these injuries through application to the appropriate governmental agency responsible for distributing the split award funds. Thus, the split award statute allows everyone affected by the defendant's outrageous conduct to receive at least some compensation for the injuries suffered.

223. Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976).

> [Punitive damages] have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as other who might otherwise be so prompted, from indulging in similar conduct in the future. It is a social exemplary "remedy," not a private compensatory remedy.

Id. at 795.

VII. CONCLUSION

The punitive damage doctrine is a necessary component of our civil justice system. The doctrine is an extremely effective method of compelling defendants to redress the harms suffered by society because of the defendants' egregious conduct. Further, the threat of similar punitive damages being imposed against other members of society is an effective deterrent against the reoccurrence of outrageous behavior. Keeping this type of conduct to a minimum necessarily maximizes society's quality of life through the maintenance of social order. Taken together, these elements comprise the true purpose behind awarding punitive damages.

Implementation of the split award statute is a move toward effectuating this true purpose. First, the purpose is advanced because the statute reinforces the concept of retribution by collecting monies from defendants because of their egregious conduct. At the same time societal order will be maintained because other individuals will be deterred from harming society in a similar fashion.

Second, and more importantly, the split award statute effectuates the true purpose of punitive damage awards by compensating society for the losses suffered because of this particular defendant's egregious conduct, thereby restoring and rehabilitating social order. Because of the benefits received from the split award statute, this Note recommends that states that view punitive damages as "problematic" should consider adopting the split award statute.

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