



1-1-2003

Punitive Damages in Texas: Examining the Need for a Split-Recovery Statute.

Meredith Matheson Thoms

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Environmental Law Commons](#), [Health Law and Policy Commons](#), [Immigration Law Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Military, War, and Peace Commons](#), [Oil, Gas, and Mineral Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Meredith Matheson Thoms, *Punitive Damages in Texas: Examining the Need for a Split-Recovery Statute.*, 35 ST. MARY'S L.J. (2003).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol35/iss1/6>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

**PUNITIVE DAMAGES IN TEXAS: EXAMINING THE NEED
FOR A SPLIT-RECOVERY STATUTE**

MEREDITH MATHESON THOMS

I. Introduction.....	207
II. Punitive Damages in the United States.....	210
A. A Brief Historical Perspective on Punitive Damages.....	210
B. The Purposes Behind Punitive Awards.....	213
1. The Punishment Rationale.....	214
2. The Deterrence Rationale.....	216
3. Punitive Damages Are Intended to Benefit Society.....	217
C. Modern Reform Measures.....	218
1. Statutory Limits.....	221
2. Abolishment.....	223
3. Split-Recovery Statutes.....	223
III. Split-Recovery Statutes: A More Effective Solution.....	225
A. The Underlying Rationale.....	225
B. States Currently Utilizing Split-Recovery Statutes.....	227
C. Creative Uses of Split-Recovery Statutes.....	230
IV. A Proposal for a Split-Recovery Statute in Texas.....	233
A. Texas and Its Current Cap.....	233
B. Why a Split-Recovery Statute Is Preferable to the Current Cap.....	234
C. A Split-Recovery Statute for Texas.....	239
V. Conclusion.....	241

I. INTRODUCTION

As lawmakers throughout the fifty states continue to face waning budgets and search for ways to replenish depleted coffers while trying to avoid raising taxes, they may look to a source that is not often considered for funding programs—punitive damages. Since 1985, twelve states have enacted “split-recovery” statutes,¹ a legislative scheme that requires a fixed

1. See Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska’s Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1337 (2000) (listing the twelve states that have enacted split-recovery statutes). Those twelve states are: Alaska, Colo-

portion of punitive damage awards to be awarded to the state, rather than allowing the plaintiff to receive the entire amount.² Some predict that such statutes will attract the attention of lawmakers, and that we will see more states attempting to adopt such measures.³

The concept of split-recovery statutes is one of the newest reform measures to come out of the increasingly heated debate over tort reform and the growing amounts of punitive damage awards.⁴ This debate has in-

rado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Missouri, New York, Oregon, and Utah. ALASKA STAT. § 09.17.020 (Michie 2002) (amended 2003); COLO. REV. STAT. § 13-21-102 (2002) (repealed 1995); FLA. STAT. ANN. § 768.73 (West 1997) (repealed 1997); GA. CODE ANN. § 51-12-5.1 (2000); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 2003); IND. CODE ANN. § 34-51-3-6 (Michie 1998); IOWA CODE ANN. § 668A.1 (West 1998); KAN. STAT. ANN. § 60-3402 (1994) (expired 1989); MO. ANN. STAT. § 537.675 (West 2000); N.Y. C.P.L.R. 8701 (McKinney 1994) (repealed 1994); OR. REV. STAT. § 18.540 (2001); UTAH CODE ANN. § 78-18-1 (2002).

2. See Benjamin F. Evans, "Split-Recovery" Survives: *The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 512 (1998) (describing the concept of split-recovery statutes); see also, e.g., Kevin M. Epstein, Note, *Punitive Damage Reform: Allocating a Portion of the Award to the State*, 13 REV. LITIG. 597, 598 (1994) (explaining that this type of legislation allows a portion of punitive damage awards to be redirected to the state); E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 861-62 (1993) (describing the American Bar Association's proposal, which similarly allocates a reasonable portion of any punitive damage award to public purposes); Junping Han, Note, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477, 481 (2002) (introducing the concept of split-recovery statutes); Matthew J. Klaben, Note, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 CORNELL L. REV. 104, 105 (1994) (describing the concept of split-recovery statutes); Patrick White, Note, *The Practical Effects of Split-Recovery Statutes and Their Validity As a Tool of Modern Day "Tort Reform"*, 50 DRAKE L. REV. 593, 595 (2002) (recognizing split-recovery statutes, "those that demand that a portion of a plaintiff's punitive damage award goes into a state-run or judicially administered fund," as one of the less common tort reform methods); Sonja Larsen, Annotation, *Validity, Construction, and Application of Statutes Requiring That Percentage of Punitive Damages Awards Be Paid Directly to State or Court-Administered Fund*, 16 A.L.R.5th 129, 129 (1993) (explaining split-recovery statutes, their construction, and their application).

3. See Molly McDonough, *State Gets a Share of Punitive Damages*, A.B.A. J. E-REP. (Aug. 30, 2002), at <http://www.abanet.org/journal/ereport/au30oregon.html> (quoting Susan Howley, director of public policy for the National Center for Victims of Crime, who predicts that many states will attempt to make a split-recovery statute work in their state) (on file with the *St. Mary's Law Journal*).

4. See Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska's Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1336 (2000) (describing the concept of split-recovery statutes as novel, and pointing out that some states are utilizing them in their push for tort reform); see also Benjamin F. Evans, "Split-Recovery" Survives: *The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 511-12 (1998) (explaining that split-recovery statutes are becoming an "increasingly popular method" of reforming punitive damages); Michael Finch, *Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the*

creased in fervor⁵ as reformers and commentators consider whether punitive damages should be limited,⁶ whether particular forms of limitations are more effective than others,⁷ or whether they should only be awarded in certain types of cases.⁸ Some assert that punitive damages should be abolished completely, arguing that they are no longer an appropriate remedy at all.⁹

This Comment considers the increasing trend among states in adopting split-recovery statutes as a measure to limit punitive awards and identifies some of the arguments supporting the enactments. It then goes further to examine Texas's current cap and explain why a split-recovery statute would be a more effective measure.

Part II briefly discusses the history of punitive damages in this country. It also examines the purposes and justifications behind punitive damages, as well as the more recent movement to reform and limit tort law's ever-increasing punitive damage awards. This section briefly surveys some of the different ways in which states have attempted to establish such limits.

Part III analyzes the underlying rationale of split-recovery statutes. It surveys the use of split-recovery statutes in many states as a limit on punitive damage awards and the different manners in which those states administer the statutes. This section also recognizes some of the more

Nation?, 86 MINN. L. REV. 497, 533 (2002) (observing that the remedy of punitive damages has undergone significant evolution since the eighteenth century, and referring to the concept of split-recovery statutes as an "unprecedented action" that many states have recently taken).

5. See Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1, 14 (1998) (comparing the controversial nature of the issue of punitive damages to gun control or abortion, as the doctrine has generated "heated rhetoric and an unwillingness to undertake sustained and dispassionate analysis").

6. See generally Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103 (2002) (surveying the various reform measures and their effects).

7. See generally Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247 (1997) (summarizing the views of both opponents and supporters of punitive damages).

8. See generally Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303 (1991) (discussing the need for punitive damages in certain classes of intentional torts cases, as well as evaluating the many types of statutory caps on punitive damages in selected states).

9. See, e.g., James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1154-58 (1984) (advocating the abolishment of punitive damages); W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381, 381 (1998) (arguing that there is no evidence that punitive damages occupy a constructive role in our society; therefore the costs that they impose on society are not justified).

creative proposed uses of split-recovery statutes and the rationales supporting them.

Finally, Part IV examines punitive damages reform specifically in Texas, and the state's current statutory cap on punitive damage award amounts. This section includes discussion explaining why such a change in Texas law would be favorable. Additionally, Part IV sets forth a proposal for replacing the Texas cap with a split-recovery statute, and discusses some of the provisions that should be considered by the legislature in creating the proposed statute.

II. PUNITIVE DAMAGES IN THE UNITED STATES

A. *A Brief Historical Perspective on Punitive Damages*

The judicial system of the United States has allowed punitive damage awards for over 150 years, a tradition which stems back not only to eighteenth-century England,¹⁰ but to the Code of Hammurabi of 2000 B.C.¹¹ The first case decision in the United States to specifically address the theory of punitive damages was *Coryell v. Colbaugh*,¹² in 1791, in which the court charged the jury to award damages not only for suffering or actual loss, but also for "example's sake," and to deter such conduct in the future.¹³ The United States Supreme Court later recognized the validity of punitive damage awards in its 1851 decision of *Day v. Woodworth*,¹⁴ finding that a jury may assess damages against a defendant based on the nature of the offense.¹⁵

10. Clay R. Stevens, Comment, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 PEPP. L. REV. 857, 857 (1994) (relating that the United States has "followed the eighteenth-century English tradition of allowing punitive damage awards").

11. See James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119 (1984) (noting that the Code of Hammurabi was one of the earliest civil law systems to utilize punitive damages, in the year 2000 B.C.). Punitive damages also appeared in some form as far back as 1400 B.C. in Hittite law and 200 B.C. in the Hindu Code. *Id.* There are even examples in the Bible of Mosaic law providing for types of punitive damages. *Id.*

12. 1 N.J.L. 77 (N.J. 1791).

13. See *Coryell v. Colbaugh*, 1 N.J.L. 77, 77 (N.J. 1791) (stating that because of the atrocious and dishonorable nature of the injury complained of, breach of promise of marriage, the damages for seduction should be such a sum to show disapprobation, and to be an example to others).

14. 54 U.S. 363 (1851).

15. See *Day v. Woodworth*, 54 U.S. 363, 371 (1851) (pointing out that "a jury may inflict . . . exemplary, . . . or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff"). The Court elaborated that although the doctrine of punitive damages has been questioned by many, it is a well-established principle of common law. *Id.*

Since that time, punitive damages have come to be permitted in all but four states.¹⁶ Fourteen states limit punitive damage awards to cases involving intentional acts,¹⁷ while all other states allowing punitive damage awards require reckless or grossly negligent conduct as a basis for the award.¹⁸ Very recently, a Los Angeles jury awarded the largest punitive damage award to an individual plaintiff in history—\$28 billion.¹⁹ Some commentators point out that such excessive awards have become more commonplace, claiming that the civil justice system is “running amok,” and even going so far as to say that the awarding of punitive damages has become a national sport.²⁰

16. See AMERICAN LAW OF PRODUCTS LIABILITY 3d § 60:63 (1999) (summarizing those jurisdictions in which punitive damage awards have been precluded). New Hampshire and Louisiana have made punitive damage awards available only in actions where specifically statutorily authorized. *Id.* Also, the Nebraska Constitution prevents plaintiffs from receiving punitive damage awards. *Id.* In addition, Washington does not allow punitive damage awards. *Id.*; see also NEB. CONST. art. VII, § 5 (providing that any fines or penalties imposed under the state’s laws are to be paid to the counties for the use and support of the county schools); N.H. REV. STAT. ANN. § 507:16 (1997) (outlawing awards of punitive damages in New Hampshire, “unless otherwise provided by statute”); *Billiot v. British Petroleum Oil Co.*, 645 So. 2d 604, 612 (La. 1994) (demonstrating that a statute must authorize a punitive damage award by applying a state statute that provided for such a remedy in a case involving the storage or handling of a toxic substance), *overruled on other grounds by Adams v. J.E. Merit Constr., Inc.*, 712 So. 2d 88, 90 (La. 1998); Donald C. Massey & Martin A. Stern, *Punitive Damages and the Louisiana Constitution: Don’t Leave Home Without It*, 56 LA. L. REV. 743, 745 (1996) (stating that Louisiana only permits punitive damage awards “where specifically provided for by statute”).

17. VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 209 (2d ed. 1999) (quoting James J. Restivo, Jr., *Insuring Punitive Damages*, NAT’L L.J., July 24, 1995, at C1).

18. *Id.*

19. See Henry Weinstein, *Philip Morris Ordered to Pay \$28 Billion to Smoker Courts*, L.A. TIMES, Oct. 5, 2002, at A1 (detailing the tobacco case which resulted in “the largest punitive award to an individual in U.S. history”). A Los Angeles jury ordered the defendant tobacco company, Philip Morris Companies, to pay the award to the 64-year-old defendant, who has lung and liver cancer. *Id.* Jurors believed the award “was justified by the reprehensibility of Philip Morris’ conduct during the last 50 years and the company’s profits.” *Id.* One juror noted: “It’s just a year’s revenue for Philip Morris.” *Id.*

20. See Theodore B. Olson, Editorial, *Rule of Law: The Dangerous National Sport of Punitive Damages*, WALL ST. J., Oct. 5, 1994, at A17 (expressing outrage at the increasing number of multi-million-dollar punitive awards). Olson points to a New Mexico case in which a fast-food restaurant customer was awarded \$2.7 million after spilling hot coffee on herself, a Texas case involving a wrongful employee termination which resulted in an \$80 million punitive damages verdict, and also notes that Alabama juries awarded over \$200 million in punitive damages just in 1994. *Id.*; see also Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska’s Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1335-36 (2000) (noting the fear among American businesses of tort liability as the result of the modern perception that punitive damages are out of control); Gregory Nathan Hoole, Note, *In the Wake of Seemingly Exorbitant Punitive Damage Awards*

Throughout our nation's history, the awarding of punitive damages has been vigorously criticized.²¹ Numerous cases comment that the doctrine has never been favored.²² Modern concern about excessively high awards has led to many proposals for reform.²³ Most people, however, generally find that the doctrine of punitive damages serves a valuable purpose.²⁴ Rather than seeking to eliminate punitive damages completely, most reforms are aimed at adjusting their administration.²⁵ Several of these reforms and controls will be discussed in further detail below.

America Demands Caps on Punitive Damages—Are We Barking Up the Wrong Tree?, 22 J. CONTEMP. L. 459, 460-62 (1996) (pointing out the growing frustration in our legal system as a result of increasing punitive damages, and specifically describing three cases that resulted in exorbitant punitive damage awards); Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 303 (1991) (suggesting that “punitive damage awards are skyrocketing”).

21. *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). Justice Rehnquist points out that while the fundamental premise behind damages within our legal system is to compensate a victim for her actual losses, the concept of punitive damages is an anomaly, and a sharp contrast to this fundamental premise in that it allows for “the award of ‘damages’ beyond even the most generous and expansive conception of actual injury to the plaintiff.” *Id.* at 57-58.

22. *See id.* at 58 (citing many cases that demonstrate this criticism of the doctrine of punitive damages); *see also, e.g.*, *Williams v. Bone*, 259 P.2d 810, 812 (Idaho 1953) (stating that “[e]xemplary damages are not a favorite of the law, and the power to give such damages should be exercised with caution and within the narrowest limits”); *Cays v. McDaniel*, 283 P.2d 658, 661 (Or. 1955) (commenting that “the tendency of the courts is to restrict rather than to extend their allowance”).

23. *See* Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1, 3 (1998) (observing that “[w]orries about excessive and unwarranted punitive damages have spawned many reform proposals”); *see also* Benjamin F. Evans, “*Split-Recovery*” *Survives: The Missouri Supreme Court Upholds the State’s Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 511 (1998) (mentioning the increasing demands for tort reform in the area of punitive damages and the range of proposed reforms); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 105-06 (2002) (recognizing that increasing criticism of the punitive damages doctrine has led to the push for reform); Kevin M. Epstein, Note, *Punitive Damage Reform: Allocating a Portion of the Award to the State*, 13 REV. LITIG. 597, 597-98 (1994) (commenting on the increasing concern of legislators toward the issue of punitive damages and reforms).

24. DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 18:6 (3d ed. 2000). Most people in the United States view punitive damages as a valuable remedy to keep extreme misconduct in check. *Id.*

25. *See id.* (emphasizing that neither the courts nor scholars are urging elimination of punitive damages as a remedy in appropriate cases). Most members of the legal community, with a few exceptions, simply want to see reforms in the administration of punitive damage awards rather than complete abolishment. *Id.*

B. *The Purposes Behind Punitive Awards*

Two of the recognized purposes behind punitive damage awards are punishment and deterrence.²⁶ Other rationales offered include compensation of plaintiffs,²⁷ and the “private attorney general” rationale, which suggests that plaintiffs are more likely to bring suit against wrongdoers who would not otherwise be prosecuted, and that punitive damages provide the incentive for private plaintiffs to provide this service.²⁸ Most

26. See VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 25 (2d ed. 1999) (pointing out that punitive damages are intended to punish the defendant and to deter conduct that fails to meet accepted behavioral standards); see also *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989) (agreeing that punitive damages advance interests of punishment and deterrence); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1428 (1993) (identifying retribution and deterrence as the two most likely justifications for punitive damage awards); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 111 (2002) (illustrating that deterrence and retribution are the two justice motivations behind punitive damages). But see Benjamin F. Evans, “Split-Recovery” Survives: *The Missouri Supreme Court Upholds the State’s Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 519 (1998) (recognizing the argument of some critics that the justifications of punishment and deterrence do not have a place in civil law); Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 253-54 (1997) (discussing the challenge of some critics that punitive damages are inappropriate in civil venues). Based on this line of reasoning, commentators argue that retribution and deterrence are not matters for the civil law system, which should be concerned only with compensation, but rather, should be within the venue of the criminal law system. *Id.*

27. See Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 113-14 (2002) (identifying compensation of plaintiffs as an additional rationale). Robbennolt continues to point out that some commentators claim that punitive damages are justified because they “compensate plaintiffs for losses and expenses that are not otherwise covered in the law of damages.” *Id.* at 113. Punitive damages and compensatory damages do overlap to some extent. *Id.* Some argue that punitive damages provide additional compensation to plaintiffs, however many object to this argument, claiming that a more appropriate solution would be “to reform the law of damages to allow appropriate compensation.” *Id.* at 114. But see Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska’s Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1339-40 (2000) (claiming that punitive damages are not compensatory); E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 851 (1993) (arguing that the compensation justification for punitive damages is inappropriate because compensatory damages alone should be adequate to compensate plaintiffs).

28. See Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska’s Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1340 (2000) (discussing the concept of the private attorney general and punitive damages). A plaintiff that may expect to receive full compensation will have no incentive to expend additional resources attempting to prove that a defendant acted so egregiously as to warrant punitive damages, unless there is “the expectation of additional remuneration.” *Id.* Furthermore, a plaintiff whose actual damages total a small sum may not be compelled to bring suit unless there is

jurisdictions that apply the punitive damages doctrine have done so based on the purposes of punishment and deterrence;²⁹ however, some jurisdictions have adopted only one or the other.³⁰ Nevertheless, contrary to what some plaintiffs may believe, punitive damages are not meant to be a compensatory award to plaintiffs.³¹ Rather, they are to benefit society.³²

1. The Punishment Rationale

Punishment, or retribution, as a rationale for imposition of punitive damages is based on the idea that a wrongdoer who has injured another

the prospect of receiving punitive damages to make the effort worthwhile. *Id.* The private attorney general theory is that a punitive damages award will inure “to the plaintiff as a reward for acting as a private attorney general.” *Id.*; see also Benjamin F. Evans, “Split-Recovery” Survives: *The Missouri Supreme Court Upholds the State’s Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 518 (1998) (recognizing the theory that punitive damages may be seen as a reward for plaintiffs who bother to pursue litigation); E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 851 (1993) (recognizing the private attorney general rationale, but arguing that plaintiffs do not have an inherent right, but rather, are awarded punitive damages only as a matter of expediency).

29. James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1126 (1984); see also Gregory Nathan Hoole, Note, *In the Wake of Seemingly Exorbitant Punitive Damage Awards America Demands Caps on Punitive Damages—Are We Barking Up the Wrong Tree?*, 22 J. CONTEMP. L. 459, 463-64 (1996) (stating that since the mid-nineteenth century, the sole purpose of punitive damages is to punish and deter the egregious behavior of tortfeasors as a benefit to society, and noting that these objectives have been confirmed by numerous modern decisions).

30. James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1126 (1984); see also J. Stephen Barrick, Comment, *Moriel and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1061 (1995) (noting that in Texas, since 1995, punitive damages are awarded only on the basis of punishment, and not on the basis of deterrence).

31. See *O’Gilvie v. United States*, 519 U.S. 79, 84 (1996) (stating that punitive damages are not compensatory, as they do not compensate for loss).

32. See Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 349 (1996) (suggesting that society benefits through punitive damage awards). The theory is that society receives vindication through the imposition of punishment, as well as reaffirmation of society’s moral and legal expectations. *Id.*; see also Michael Finch, *Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the Nation?*, 86 MINN. L. REV. 497, 538 (2002) (recognizing the observation of advocates that because punitive damages are usually intended to punish and deter, they should be shared by all of society rather than just the plaintiff); Junping Han, Note, *The Constitutionality of Oregon’s Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477, 486 (2002) (commenting that society as a whole, rather than just the plaintiff, has an interest in punishing and deterring tortious conduct). Punitive damages function as compensation to society for the harms resulting from the defendant’s tortious conduct, and are not awarded merely to compensate the wronged plaintiff. *Id.* at 498.

through tortious conduct must suffer for committing the wrong.³³ This fundamental tenet provides that wrongdoers deserve to be punished beyond merely paying compensatory damages.³⁴ This retributive function is based on a sense of balance and justice, and is intended to match the offense to the punishment.³⁵

The concept of punitive damages functioning as a form of retribution ranks high among the justifications typically asserted for the doctrine.³⁶ Many courts and commentators identify this rationale as the primary reason for awarding punitive damages,³⁷ observing that they are frequently awarded in actions involving intentional torts upon a showing of malice, recklessness, or fraud.³⁸ Some states have even identified punishment as the sole rationale for imposing punitive damages.³⁹

33. Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 *BUFF. L. REV.* 103, 112 (2002). This rationale asserts that “every wrong deserves punishment” proportional to the tortious act. *Id.* Under this view, the defendant should suffer, regardless of whether he will be reformed or deterred. Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 *DEPAUL L. REV.* 341, 349 (1996).

34. James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 *VAND. L. REV.* 1117, 1126 (1984); *see also* Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 *DEPAUL L. REV.* 341, 349 (1996) (describing the retributive function of punitive damages). Not only does the plaintiff receive vindication in seeing the defendant suffer, but society also has an interest in seeing its moral standards reaffirmed. *Id.* The retributive function of punitive damages echoes the stance that the nature of the defendant’s wrong morally requires that he suffer. *Id.*

35. *See* Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 *FLA. L. REV.* 247, 266 (1997) (suggesting that there is an ethical component to the concept of retribution as related to punitive damages). Punishment through punitive damages is ethical and just, based on the belief that returning suffering to one who has voluntarily committed a moral evil is an act that is just and morally good in itself. *Id.* Furthermore, this theory is predicated on the premise that the punishment should fit the offense. *Id.* *But see* W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 *GEO. L.J.* 381, 382-83 (1998) (suggesting that retribution is not a legitimate objective, and pointing out that often, the person ultimately punished is not the person that made the risk decision).

36. Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 *FLA. L. REV.* 247, 266 (1997). This preeminence is “based on the elemental nature of retribution in regard to any system of punishment.” *Id.* at 267. However, some find that punishment is not an acceptable element of the civil law system, and that it is more appropriate in the realm of criminal law. *Id.* at 266.

37. Note, *An Economic Analysis of the Plaintiff’s Windfall from Punitive Damage Litigation*, 105 *HARV. L. REV.* 1900, 1901 (1992).

38. *Id.* In fact, punitive damages are most frequently awarded in actions involving intentional torts. *Id.*

39. *See* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 *VAND. L. REV.* 1117, 1128 (1984) (noting that Delaware adopted punishment as the sole rationale behind imposing punitive damages, and that it will only allow punitive awards to punish the wrongdoer for “willfully and wantonly committed

2. The Deterrence Rationale

Deterrence is another commonly accepted rationale asserted to justify the punitive damages doctrine.⁴⁰ The basis for this rationale is the economic theory that if a defendant is forced to pay damages in addition to other costs of the wrongful conduct, the defendant is more likely to be deterred, because if the tortfeasor is not liable for amounts beyond actual damages, the harmful behavior is likely to continue unless it is profitable to discontinue.⁴¹ The publicity that may surround a defendant's punitive damage award may deter others from engaging in the harmful conduct.⁴² Furthermore, punitive damages tend to serve purposes of general deterrence by establishing norms of behavior in society.⁴³

wrongful acts"); *see also* *Malcolm v. Little*, 295 A.2d 711, 714 (Del. 1972) (stating that punitive damages are not awarded as compensation for injury, but instead, as punishment of the tortfeasor); J. Stephen Barrick, Comment, *Moriel and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1061 (1995) (noting that Texas now only recognizes punishment, and not deterrence, as a rationale for its punitive damages statute).

40. *See* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1428 (1993) (identifying deterrence as one of the two most likely justifications for punitive damage awards).

41. Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 69-70 (1992); *see also* Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 111-12 (2002) (observing that a potential tortfeasor may be deterred for fear of legal punishment). *But see* Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 347-48 (1996) (pointing out the suggestion by some scholars that "punitive damages are an economically inefficient means of deterrence"). Some scholars argue that punitive damages result in under-deterrence of risk takers, and the over-deterrence of some cautious businesses. *Id.* at 348. However, there are also those who find that although the doctrine is not an economically perfect means of effecting deterrence, "sometimes absolute economic efficiency must be sacrificed for the more important goal of eliminating conduct society deems reprehensible." *Id.* at 349. However, there are those who contend that there is no evidence that punitive damages have a deterrent effect. W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381, 381-82 (1998).

42. Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 69 (1992); *see also* Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 356 (1996) (urging that the punitive damages system could be more efficacious if public awareness was heightened regarding the reasons for assessing monetary sanctions against a business). Punitive damage awards can provide a more effective deterrent effect if there is public notification of such awards, because "[p]ublic condemnation and its attendant sense of shame are integral to the concept of exacting retribution." *Id.* at 357. Public notification not only serves to educate, but also to deter, and may assist both in the offender's rehabilitation and the protection of the public. *Id.* at 358.

43. Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 112 (2002). Punitive damages can serve deterrence purposes by both "defining and communicating norms of behavior." *Id.*

In a few jurisdictions, deterrence is the sole basis for authorizing punitive damages.⁴⁴ Some jurisdictions intend to deter persons other than the defendant,⁴⁵ while some observe that they intend to deter both potential and current defendants.⁴⁶ Other jurisdictions only intend to deter the current defendant.⁴⁷

3. Punitive Damages Are Intended to Benefit Society

Regardless of which of the above-mentioned rationales forms the underlying basis of awarding punitive damages, the doctrine is meant to function in the interest of society, because social order is maintained by carrying out these purposes.⁴⁸ Society has an interest in both punishing wrongdoers and preventing similar future acts.⁴⁹ Inflicting harm on a tortfeasor “may be viewed as a goal of justice” and as a means to social betterment because it ultimately benefits society.⁵⁰ Additionally, puni-

44. See James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1128 (1984) (claiming that impliedly, deterrence is the singular basis for punitive damage awards in the following states: Alaska, Georgia, Idaho, Maine, Oregon, Rhode Island, and Utah). *But see* Jennifer K. Robbenolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 112 (2002) (asserting that deterrence alone as a rationale for punitive damage awards may not be likely to be sufficient). Deterrence alone may be insufficient if circumstances make it difficult to try the tortfeasor, if the amount of compensatory damages awards are too low, or if “a social judgment has been made that specific illicit subjective gains should not be allowed to enter into a cost-benefit analysis.” *Id.*

45. See James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1127 (1984) (identifying some states which “intend to deter persons *other than the defendant* from committing acts similar to those that prompted the punitive damage award”).

46. *Id.*

47. *Id.*

48. Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 474 (1993); *see also* Eshelman v. Rawalt, 131 N.E. 675, 677 (Ill. 1921) (stating that punitive damages are allowed as punishment and deterrence in the interest of society); Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 277-78 (1997) (examining the idea that punitive damages are to benefit society rather than plaintiffs). A line of reasoning exists which sees that private litigants serve as additional law enforcement, and that therefore, the doctrine expands the scope of justice beyond what law enforcement entities can reach alone, operating as a “supplementary enforcement function of punitive damages.” *Id.* at 278.

49. Junping Han, Note, *The Constitutionality of Oregon’s Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477, 486 (2002); *see also* Clay R. Stevens, Comment, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 PEPP. L. REV. 857, 862 (1994) (asserting that the public has an interest in preventing wrongdoers from escaping punishment for committing socially unacceptable acts).

50. See Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1397 (1993) (defining the punishment rationale behind

tive damage awards serve to compensate society for the harm caused by a tortfeasor's wrongdoing.⁵¹ Thus, the United States Supreme Court has held that the purpose of punitive damages is not to compensate plaintiffs.⁵²

C. Modern Reform Measures

The doctrine of punitive damages has drawn much criticism. Many case decisions have recognized that this type of award has never been favored.⁵³ As the amounts of punitive damage awards have been "skyrocketing,"⁵⁴ commentators have called for reforms.⁵⁵ These commentators have asserted several different arguments for reform of the punitive damages doctrine.

Some authorities complain that punitive damage awards allow the plaintiff to receive a "windfall."⁵⁶ They argue that the purpose of the

punitive damage awards as a harm that ultimately benefits society, and even benefits the offender).

51. Junping Han, Note, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477, 498 (2002).

52. See *O'Gilvie v. United States*, 519 U.S. 79, 84 (1996) (noting that punitive damages are not intended to compensate victims, but are punitive in nature); see also Charles F. G. Parkinson, Note, *A Shift in the Windfall: An Analysis of Indiana's Punitive Damages Allocation Statute and the Recovery of Attorney's Fees Under the Particular Services Clause*, 32 VAL. U. L. REV. 923, 933-34 (1998) (discussing the Supreme Court's decision in *O'Gilvie*). Parkinson observes that the decision in *O'Gilvie v. United States* reinforces the common belief that punitive damages are not awarded for the compensation of the plaintiff. *Id.* at 934.

53. *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). Justice Rehnquist points out that the doctrine of punitive damages is the target of much criticism, and as a result, has met with much opposition and reform. *Id.* at 58-59.

54. See *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring and dissenting) (stating that "[a]wards of punitive damages are skyrocketing").

55. See Benjamin F. Evans, "Split-Recovery" Survives: *The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 516 (1998) (recognizing that increases in the rates of tort litigation and in punitive damage awards have led to general calls for tort reform, and specifically, for reforms in the area of punitive damages). Although there has been a great deal of criticism and controversy surrounding the issue of punitive damages, most scholars agree "that such awards serve desirable ends." *Id.* at 516. But see James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1154 (1984) (identifying the escalation in the amount and number of punitive damage awards as a rationale for abolishing the awards); W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381, 381 (1998) (arguing that abolition of punitive damages would result in an improvement in social welfare, due to the substantial societal costs currently imposed through punitive damages in environmental and products liability cases).

56. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 74 (1971) (Harlan, J., dissenting). The Court stated that "from the standpoint of the individual plaintiff such damage awards

award is to punish and deter—in effect, to benefit society.⁵⁷ Therefore, allowing the plaintiff to be the sole recipient of this benefit is contradictory to the underlying purpose of assessing the damages.⁵⁸ In further support of this argument, many assert that a plaintiff has no personal right to receive the punitive damages award.⁵⁹

are windfalls. They are, in essence, private fines levied for purposes that may be wholly unrelated to the circumstances of the actual litigant.” *Id.*; see also Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska’s Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1340-41 (2000) (describing the “plaintiff’s windfall” that results when there is any amount in excess of the plaintiff’s costs of bringing suit); Jumping Han, Note, *The Constitutionality of Oregon’s Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477, 490 (2002) (explaining the windfall effect that results when a plaintiff is awarded punitive damages as well as compensatory damages); Todd M. Johnson, Comment, *A Second Chance: A Proposal to Amend Missouri’s Tort Victims’ Compensation Fund*, 67 UMKC L. REV. 637, 648 (1999) (asserting that the reason for the concern is that essentially the plaintiff’s windfall is the equivalent of the plaintiff winning the lottery, and this does not serve the interest of the public). Justice Shores notes that complaints about the windfall effect of punitive damages can be found as far back as 1877, and that courts have generally recognized that the plaintiff is not personally entitled to punitive damages. Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 89-90 (1992).

57. See *Bass v. Chicago & N.W. Ry.*, 42 Wis. 654, 672 (Wis. 1877) (commenting that exemplary damages should benefit the general public). In *Bass*, the court observed that exemplary or punitive damages should ultimately benefit the public rather than the sufferer who has already been compensated, for it is on behalf of the public that the tortfeasor is being punished. *Id.*; see also Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska’s Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1345 (2000) (explaining that the punitive damage award is reflective of society’s outrage at the egregious behavior of the defendant, which has harmed not only the plaintiff, but a segment of the public in general).

58. See Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska’s Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1345 (2000) (arguing that it is not sensible to provide further compensation to the plaintiff who has already been adequately compensated). Dodson finds that it is unfair to allow a plaintiff to be “made whole” through compensatory damages and to then receive the additional benefit of a large punitive award. *Id.* at 1346; see also Michael Finch, *Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the Nation?*, 86 MINN. L. REV. 497, 538 (2002) (highlighting the argument of some advocates that because the purpose of punitive awards is to punish and deter, they should be shared with the public).

59. See *Smith v. Wade*, 461 U.S. 30, 52 (1983) (illustrating that a plaintiff is not entitled to a punitive damage award). The court noted that a key feature of a punitive award is that no matter how egregious the conduct of the defendant, a plaintiff does not have a right to receive such an award. *Id.* The jury may choose not to award punitive damages to the plaintiff. *Id.*; see also Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 90 (1992) (noting that courts do not award punitive damages to plaintiffs as a matter of right); Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 485 (1993) (stating that plaintiffs are not entitled to receive punitive damage awards).

Another argument is that recent excessive punitive awards encourage plaintiffs to bring suits in search of outrageous recoveries rather than justice.⁶⁰ By asking for extravagant amounts in punitive damages, some maintain that plaintiffs are enabled to frighten defendants into settling, for fear that a jury may actually award the requested amount.⁶¹ Many reformers argue that punitive damage awards over-punish defendants and over-deter others in the future.⁶² This over-deterrence can result in a decrease in innovation and new products.⁶³ Critics are also concerned that the increasing size and number of such awards poses a threat to the economic stability of the United States.⁶⁴ Relatedly, punitive damage awards are often alleged to be the cause of the increasing cost of insurance.⁶⁵

60. See Gregory Nathan Hoole, Note, *In the Wake of Seemingly Exorbitant Punitive Damage Awards America Demands Caps on Punitive Damages—Are We Barking Up the Wrong Tree?*, 22 J. CONTEMP. L. 459, 465 (1996) (recognizing that legal scholars question plaintiffs' motives). Many scholars believe that plaintiffs are more concerned with increasing their own awards rather than seeking justice for the wrongdoing that they suffered. *Id.*

61. James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1156 (1984); see also Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1, 5 (1998) (discussing the "shadow effects" of punitive damages in the settlement process). Some assert that "frequent and huge private settlements [are] driven by the fear of punitive damages." *Id.*

62. Junping Han, Note, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477, 492 (2002). Furthermore, as a result of the over-deterrence of defendants, the credibility of our justice system could be impaired. *Id.*

63. See *id.* at 492-93 (noting concern that fear of liability may inhibit marketing of drugs, development of medical equipment, and influence doctors to avoid certain treatments, as well as adversely affect the economy as a whole); see also Gregory Nathan Hoole, Note, *In the Wake of Seemingly Exorbitant Punitive Damage Awards America Demands Caps on Punitive Damages—Are We Barking Up the Wrong Tree?*, 22 J. CONTEMP. L. 459, 476 (1996) (asserting that modern tort law detrimentally affects innovation). This argument is based on the premise that the strength of the United States depends upon innovative thinking. *Id.* Fears voiced by business leaders of corporate America suggest that companies will discontinue to manufacture products, withhold new products, and discontinue research as a result of trends in recent litigation. *Id.*

64. See James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1156-57 (1984) (stating that the trend of affirming most huge punitive awards creates a significant threat to economic stability); see also Gregory Nathan Hoole, Note, *In the Wake of Seemingly Exorbitant Punitive Damage Awards America Demands Caps on Punitive Damages—Are We Barking Up the Wrong Tree?*, 22 J. CONTEMP. L. 459, 476 (1996) (restating the attack on punitive damages that they hinder the United States economy).

65. Junping Han, Note, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477, 493 (2002); see also Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 486 (1993) (providing that some attribute rising liability insurance rates to punitive damage awards).

State legislators and courts have responded in different manners to these calls for reform.⁶⁶ While there have been some tort reform advocates who have called for the abolishment of punitive damage awards,⁶⁷ most focus on the administration of punitive awards, rather than the elimination of the damages, as a remedy.⁶⁸ Some of the reforms that courts and legislatures have initiated are: narrowing and refining the standard of liability for punitive damages; raising the standard of proof required to recover punitive damages; exercising remittitur of excessive awards; limiting liability of defendants to a single award; permitting bifurcation at trial of the punitive damages award issue; and allowing the court to determine the amount of punitive awards.⁶⁹ The most common limitation method is setting a cap on the amount of punitive damages a plaintiff may receive.⁷⁰ Many states, including Texas, have taken such a step, imposing statutory limits and caps on punitive damages.⁷¹

1. Statutory Limits

Beginning in the 1980s, reformers began to call for ceilings on punitive damages.⁷² Since then, many jurisdictions have adopted statutory limits in order to curb the jury's discretion and prevent excessively high

66. See DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 18:6 (3d ed. 2000) (stating that “[a] number of ‘reform’ proposals are indeed afoot”); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 106-07 (2002) (explaining that the judiciary and legislators have responded to cries for reform of the punitive damages doctrine by attempting to limit and restrict the size of awards, as well as other various reforms).

67. See generally, e.g., James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984) (supporting the view that punitive damages should be abolished because of adverse economic results, and because punishment, deterrence, and compensation are not viable theories for supporting the imposition of punitive awards); W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381 (1998) (maintaining that punitive damage awards should be abolished as an improvement for social welfare).

68. DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 18:6 (3d ed. 2000). Most advocates do not wish to eliminate punitive damages completely, but rather, view them as an appropriate remedy in appropriate circumstances. *Id.*

69. *Id.*

70. See *id.* (stating that the most common limitation on punitive damage awards is to cap the amount of the award at a particular multiple of the compensatory award assessed in favor of the plaintiff).

71. *Id.*; see also TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon 1997 & Supp. 2003), amended by Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 13.06, 2003 Tex. Sess. Law Serv. 888-89 (Vernon) (demonstrating the statutory cap on punitive damage awards in Texas, which is the greater amount of either \$200,000 or the amount of economic damages multiplied by two plus noneconomic damages up to \$750,000).

72. Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 297 (1997).

awards.⁷³ Usually, the legislation caps the amount of the award at an amount equal to a multiplication of the compensatory award entered for the plaintiff.⁷⁴ Some states, however, choose to state an absolute dollar amount as a limit.⁷⁵ For example, the amount may be fixed at the defendant's gross income or a percentage of the defendant's net worth.⁷⁶ Most statutes combine more than one of these forms of limitations in establishing the cap.⁷⁷

Those who defend such statutory caps claim that they are a valid remedy to protect businesses and our economy from "a number of the ills of an overly litigious society."⁷⁸ Opponents, however, suggest that such legislation undermines the deterrent effect of punitive damages.⁷⁹ Furthermore, critics contend that statutory limits are "an arbitrary mechanism for containing punitive damage awards."⁸⁰

73. DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 18:6 (3d ed. 2000).

74. *See id.* § 18:6 n.51-55 (pointing out that Connecticut and North Dakota cap punitive damages at a multiple of two times the plaintiff's compensatory award, Florida and Nevada at three times, Maryland at four times, and New Jersey at five times compensatory damages); *see also* Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 297-98 (1997) (explaining the variations of multiple caps used by various states). A multiple of three is a common statutory cap. *Id.* at 298.

75. DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 18:6 (3d ed. 2000). Virginia caps its punitive damage awards at \$350,000, while Kansas, in some cases, caps awards at \$5 million. *Id.* § 18:6 n.56.

76. *Id.* § 18:6; *see also* KAN. STAT. ANN. § 60-3701(e)(1) (1994) (demonstrating that the defendant's annual gross income may determine the award amount).

77. DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 18:6 (3d ed. 2000); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon 1997 & Supp. 2003), *amended by* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 13.06, 2003 Tex. Sess. Law Serv. 888-89 (Vernon) (limiting punitive damage awards to either \$200,000, or the amount of economic damages multiplied by two plus noneconomic damages up to \$750,000, whichever is greater).

78. Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 298 (1997). Proponents of statutory caps suggest that caps prevent juries from rendering excessive awards, which would "expose businesses to undue volatility and unjustifiable risk at best, and potential financial ruin at worst." *Id.*

79. *Id.* This view is based on the suggestion that defendants can calculate the costs of caps and figure them into their budgets. *Id.* This would allow companies to continue dangerous or tortious behavior and to pass the cost to along to customers. *Id.* at 298-99. Statutory caps assist this method of operation by keeping punitive damage awards amounts at a moderate level. *Id.* at 299.

80. *Id.* at 300.

2. Abolishment

Several states have eliminated punitive damages in one form or another.⁸¹ Some jurisdictions prohibit punitive damages completely, such as Nebraska, where they are constitutionally forbidden.⁸² In five states, punitive damages are prohibited unless a statute specifically authorizes a punitive award.⁸³ Opponents of punitive damages urge that the doctrine should be abolished for several reasons, noting the lack of deterrent effect and lack of predictability.⁸⁴ However, abolishment is less widely utilized, as most jurisdictions do recognize the role of punitive damages as a remedy available under the common law.⁸⁵

3. Split-Recovery Statutes

Among the most recent reform measures are “split-recovery” statutes. These statutes mandate that a portion of each punitive damage award be handed over to the state.⁸⁶ Many states direct this portion of the award into a special fund, such as a crime victim compensation fund that assists with costs of counseling and funeral expenses, or a fund for medical assis-

81. James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1125 (1984); see also Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 168 (2002) (providing that several states have abolished punitive damage awards through constitutional provisions, judicial decisions, or enacting legislation). However, studies suggest that as a result of abolishing punitive damages, juries will award higher amounts in compensatory awards. *Id.*

82. NEB. CONST. art. VII, § 5 (providing that punitive damages are not permitted under the state’s constitution); *Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 566, 574 (Neb. 1989) (emphasizing that the Nebraska constitution prohibits punitive damages, and they are not allowed in that jurisdiction); see also Junping Han, Note, *The Constitutionality of Oregon’s Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477, 479 (2002) (observing that eight states do not recognize punitive damages).

83. DAVID G. OWEN ET. AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 18:1 (3d ed. 2000). In order for punitive damage awards to be available in Louisiana, Massachusetts, Nebraska, New Hampshire or Washington, they must be specifically authorized by statute. *Id.*

84. See W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381, 394-95 (1998) (arguing that punitive damages do not provide a deterrent effect, and that they are unpredictable, preventing a potential defendant from being able to make the choice that would be least likely to result in a punitive sanction); see also James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1154-58 (1984) (detailing the adverse economic affects that result from punitive damages).

85. James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1124-25 (1984).

86. VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 218 (2d ed. 1999).

tance.⁸⁷ In some jurisdictions, the state receives a fixed percentage.⁸⁸ In others, the judge has discretion to designate the percentage going to the state.⁸⁹ As noted previously, twelve states have enacted split-recovery statutes.⁹⁰ Such statutes are increasing in popularity as a way to mitigate the problems that accompany punitive damage awards.⁹¹ Split-recovery statutes have met with much litigation regarding their constitutionality.⁹²

87. See Benjamin F. Evans, "Split-Recovery" Survives: *The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 512 (1998) (explaining that often, the state's portion of the award goes into the state's general revenue fund or a special fund designated in the statute); see also Patrick White, Note, *The Practical Effects of Split-Recovery Statutes and Their Validity As a Tool of Modern Day "Tort Reform,"* 50 DRAKE L. REV. 593, 597-98 (2002) (relating that some states require the money to be paid to the general state treasury fund, such as Alaska and Georgia, while others direct the money into specially designated funds, such as Iowa, which uses the money in a "civil reparations" fund, and Missouri, which uses the money for a compensation fund for tort victims).

88. See Kevin M. Epstein, Note, *Punitive Damage Reform: Allocating a Portion of the Award to the State*, 13 REV. LITIG. 597, 599-600 (1994) (delineating which states specify the percentage of recovery for the plaintiff). Most states with split-recovery statutes do set a fixed percentage. *Id.* at 600.

89. *Id.* In Illinois, the judge has the sole discretion to determine the percentage. *Id.*

90. See Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska's Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1337 (2000) (listing the twelve states that have enacted split-recovery statutes: Alaska, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Missouri, New York, Oregon, and Utah). Since that time, several of these statutes have been repealed, permitted to expire, or have been held unconstitutional. COLO. REV. STAT. § 13-21-102 (2002) (repealed 1995); FLA. STAT. ANN. § 768.73 (West 1997) (repealed 1997); KAN. STAT. ANN. § 60-3402 (1994) (expired 1989); N.Y. C.P.L.R. 8701 (McKinney Supp. 1994) (repealed 1994).

91. Benjamin F. Evans, "Split-Recovery" Survives: *The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 511-12 (1998); see also Molly McDonough, *State Gets a Share of Punitive Damages*, A.B.A. J. E-REP. (Aug. 30, 2002), at <http://www.abanet.org/journal/ereport/au30oregon.html> (implying that split-recovery statutes will become increasingly popular among reformers and legislators) (on file with the *St. Mary's Law Journal*). Since Oregon's split-recovery statute was held constitutional in 2002, that state's attorney general's office has received a large number of inquiries regarding the statute. *Id.* Some predict that many states will soon follow Oregon's example. *Id.*

92. Benjamin F. Evans, "Split-Recovery" Survives: *The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 512 (1998); see also *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1579 (M.D. Ga. 1990) (ruling that Georgia's split-recovery statute was unconstitutional); *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 273 (Colo. 1991) (striking down the Colorado split-recovery statute as unconstitutional). See generally Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska's Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335 (2000) (analyzing constitutional issues affecting the split-recovery statute in Alaska); Kevin M. Epstein, Note, *Punitive Damage Reform: Allocating a Portion of the Award to the State*, 13 REV. LITIG. 597 (1994) (summarizing the various constitutional challenges that have been brought to challenge split-recovery statutes); Junping Han, Note,

Although both plaintiffs and defendants have initiated such challenges, many of the statutes have survived these attacks.⁹³

III. SPLIT-RECOVERY STATUTES: A MORE EFFECTIVE SOLUTION

A. *The Underlying Rationale*

Many states recognize the public policy behind punitive damage awards and see this as a basis for awarding portions of punitive damage awards to the state.⁹⁴ In these jurisdictions, the split-recovery statute is viewed as a way to accomplish the true purpose of awarding punitive damages—to maintain order in society.⁹⁵ To achieve this goal, the punitive damage award that is shared with the state brings financial hardship and punishment to the tortfeasor that serves a public purpose.⁹⁶ By awarding a portion to the state, the wrongdoer is punished while the public in general is benefited, rather than only the plaintiff receiving that benefit.

The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute, 38 WILLAMETTE L. REV. 477 (2002) (examining possible plaintiffs' and defendants' challenges to Oregon's split-recovery statute); Clay R. Stevens, Comment, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 PEPP. L. REV. 857 (1994) (analyzing the constitutionality of split-recovery awards and proposing a model version of a split-recovery statute to pass constitutional scrutiny).

93. Benjamin F. Evans, "Split-Recovery" Survives: *The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 512 (1998); see also, e.g., *Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992) (per curiam) (declaring Florida's split-recovery statute constitutional, although it was later repealed); *State v. Moseley*, 436 S.E. 2d 632, 634 (Ga. 1993) (upholding the Georgia split-recovery statute); *Fust v. Attorney Gen. for the State of Missouri*, 947 S.W.2d 424, 432 (Mo. 1997) (affirming the constitutionality of the Missouri split-recovery statute); *DeMendoza v. Huffman*, 51 P.3d 1232, 1249 (Or. 2002) (en banc) (finding Oregon's split-recovery statute constitutional). As the most recent state to uphold the constitutionality of its split-recovery statute, the Oregon Supreme Court determined that through the statute, the legislature "established reasonable guidelines for courts to follow in the exercise of their duties." *Id.* at 1248. However, DeMendoza's lawyer predicts that as a result of this decision, plaintiffs' attorneys will be cautious about taking on a case that relies on punitive damage awards for the attorney's compensation. Molly McDonough, *State Gets a Share of Punitive Damages*, A.B.A. J. E-REP. (Aug. 30, 2002), at <http://www.abanet.org/journal/ereport/au30oregon.html> (on file with the *St. Mary's Law Journal*).

94. DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 18:6 (3d ed. 2000).

95. Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 491 (1993).

96. See *id.* (emphasizing that the imposition of a punitive fine serves a public purpose by wreaking financial distress on the defendant); see also Recent Case, *Eighth Amendment—Punitive Damages—Florida Supreme Court Upholds "Split-Recovery" Statute*, 106 HARV. L. REV. 1691, 1691 (1993) (recognizing the rationale for split-recovery statutes regarding using the funds for the benefit of the public).

Many states have enacted split-recovery statutes in order to limit and counteract the “windfall” effect that occurs when plaintiffs receive high punitive damage awards.⁹⁷ By enacting such a statute, the belief is that there is a disincentive for the plaintiff to bring suit seeking punitive damages if the claim lacks merit.⁹⁸ The plaintiff’s incentive to receive a windfall has been removed.⁹⁹ Because any punitive damage awards will be less profitable to the plaintiff if a portion will go to the state, the plaintiff is less likely to sue for punitive damages.¹⁰⁰ Therefore, many find split-recovery statutes to be an effective means for addressing the concerns of reformers while preserving the interests that are served by punitive awards.¹⁰¹ Supporters of split-recovery statutes urge that plaintiffs are made whole through compensatory damages, and that the purpose of punitive damages is not to provide additional compensation to the vic-

97. DAVID G. OWEN ET AL., *MADDEN & OWEN ON PRODUCTS LIABILITY* § 18:6 (3d ed. 2000); see also Sonja Larsen, Annotation, *Validity, Construction, and Application of Statutes Requiring That Percentage of Punitive Damages Awards Be Paid Directly to State or Court-Administered Fund*, 16 A.L.R.5th 129, 129 (1993) (noting that legislatures are enacting split-recovery statutes to counteract the windfall effect).

98. See Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 491 (1993) (explaining that the plaintiff will be less likely to bring suit if the temptation to seek a windfall is removed).

99. See Benjamin F. Evans, “*Split-Recovery*” *Survives: The Missouri Supreme Court Upholds the State’s Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 520 (1998) (claiming that split-recovery statutes will diminish plaintiffs’ incentives to pursue excessive or frivolous litigation because recovery of punitive damages would be divided with the state); E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 862-63 (1993) (noting that under the American Bar Association’s proposal, similar to the concept of a split-recovery statute, plaintiffs would no longer have an incentive for having their attorneys pursue punitive damages); Junping Han, Note, *The Constitutionality of Oregon’s Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477, 496 (2002) (claiming that “[b]y allocating a portion of a punitive damage award, Oregon’s split-recovery scheme effectively solves the windfall problem associated with punitive damages”).

100. Kevin M. Epstein, Note, *Punitive Damage Reform: Allocating a Portion of the Award to the State*, 13 REV. LITIG. 597, 599 (1994).

101. See Benjamin F. Evans, “*Split-Recovery*” *Survives: The Missouri Supreme Court Upholds the State’s Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 519-20 (1998) (noting that split recovery statutes not only address the rationales behind punitive damages of punishment and deterrence, but also serve effectively to eliminate windfalls); see also Charles F. G. Parkinson, Note, *A Shift in the Windfall: An Analysis of Indiana’s Punitive Damages Allocation Statute and the Recovery of Attorney’s Fees Under the Particular Services Clause*, 32 VAL. U. L. REV. 923, 944 (1998) (observing that by directing a portion of the award to the state, the deterrent effect of the award is undisturbed and the plaintiff does not receive an undeserved windfall).

tims.¹⁰² Furthermore, the courts have determined that plaintiffs have no right to receive punitive damage awards.¹⁰³

B. *States Currently Utilizing Split-Recovery Statutes*

Currently there are seven states that award a portion of punitive damage awards to the state rather than allowing the plaintiff to receive the entire amount of the award.¹⁰⁴ Each state employs its split-recovery statute in a slightly different manner. Below is a brief survey of each split-recovery statute now in effect.

Alaska is the most recent state to enact a split-recovery statute. Its 1997 split-recovery statute provides that punitive damages may only be awarded where a defendant's conduct is found to be outrageous or is committed with reckless indifference to another.¹⁰⁵ If the fact-finder answers these issues in the affirmative, and a punitive award is assessed against the defendant, then fifty percent of that award is deposited into the state's general fund.¹⁰⁶

102. *See* *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (declaring that punitive damages should not be awarded to a fully compensated plaintiff). Rehnquist stresses that plaintiffs are entitled to nothing more than full compensation for injuries, and anything more should be awarded to the state. *Id.*; *see also* Benjamin F. Evans, "Split-Recovery" Survives: *The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 519 (1998) (citing the contention of many critics of punitive damages that plaintiffs are able to receive a windfall after being fully compensated); Charles F. G. Parkinson, Note, *A Shift in the Windfall: An Analysis of Indiana's Punitive Damages Allocation Statute and the Recovery of Attorney's Fees Under the Particular Services Clause*, 32 VAL. U. L. REV. 923, 943-44 (1998) (identifying the complaint of tort reformers "that punitive damages are not meant to compensate tort victims, who are otherwise made whole through compensatory damage awards").

103. *See* *Smith*, 461 U.S. at 52 (dispelling the belief that plaintiffs are somehow entitled or that they have a right to receive punitive damage awards); *see also* Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 90 (1992) (emphasizing that courts have held on a uniform basis that plaintiffs do not have a personal right to punitive damages).

104. ALASKA STAT. § 09.17.020 (Michie 2002) (amended 2003); GA. CODE ANN. § 51-12-5.1 (2000); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 1993); IOWA CODE ANN. § 668A.1 (West 1998); MO. ANN. STAT. § 537.675 (West 2000); OR. REV. STAT. § 18.540 (2001); UTAH CODE ANN. § 78-18-1 (2002).

105. *See* ALASKA STAT. § 09.17.020(b) (Michie 2002) (amended 2003) (providing that the factfinder may only award punitive damages if the plaintiff proves that the conduct of the defendant was "outrageous, including acts done with malice or bad motives" or if the defendant "evidenced reckless indifference to the interest of another person"). *See generally* Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska's Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1337 (2000) (discussing the Alaska split-recovery statute and evaluating its constitutionality).

106. ALASKA STAT. § 09.17.020(j) (Michie 2002) (amended 2003).

Georgia only applies its split-recovery provision to punitive damages awarded in products liability cases.¹⁰⁷ After the deduction of reasonable attorney's fees and costs of litigation, seventy-five percent of the amount of the punitive award is paid to the state treasury.¹⁰⁸ The statute also provides for the state to have the rights of a judgment creditor and to stand in a position equal to the plaintiff in recovering its portion of the award.¹⁰⁹

The Illinois split-recovery statute is unique in that it allows for the trial court to apportion punitive damage awards at its own discretion.¹¹⁰ The court may divide the award among the plaintiff, the plaintiff's attorney, and the state's Department of Rehabilitation Services.¹¹¹ In deciding how to apportion the award, the court must determine an amount for the attorney that is reasonable, and may not exceed the amount settled upon in any contingent fee contract.¹¹²

In Iowa, the jury must answer special interrogatories in a suit involving punitive damages.¹¹³ First, the jury must determine whether the defendant's conduct "constituted willful and wanton disregard for the rights or safety of another."¹¹⁴ Punitive damages can be awarded only if the jury answers in the affirmative.¹¹⁵ Then, if the jury determines that the defendant's conduct was specifically directed at the plaintiff, the plaintiff will receive 100% of any punitive damages awarded.¹¹⁶ If the answer to this second special interrogatory is "no," then seventy-five percent of the award will be funneled to the state's civil reparations trust fund.¹¹⁷

Missouri's split-recovery statute provides for a plaintiff to receive fifty percent of the punitive damage award after attorney's fees and expenses have been deducted.¹¹⁸ The remaining fifty percent goes to the state's

107. GA. CODE ANN. § 51-12-5.1(e) (2000).

108. *Id.*

109. *Id.*

110. 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 1993); *see also* Kevin M. Epstein, Note, *Punitive Damage Reform: Allocating a Portion of the Award to the State*, 13 REV. LITIG. 597, 600 (1994) (noting that of the states with split-recovery statutes, Illinois is the only state to allow the judge complete discretion in determining the portion of the award to go to the state).

111. 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 1993).

112. *Id.*

113. *See* IOWA CODE ANN. § 668A.1(1) (West 1998) (providing that either the jury must make the special interrogatories, or, if there is not a jury, the court shall make findings regarding the special interrogatories).

114. *Id.* § 668A.1(1)(a).

115. *Id.* § 668A.1(2).

116. *Id.* § 668A.1(2)(a).

117. *Id.* § 668A.1(2)(b).

118. MO. ANN. STAT. § 537.675(2) (West 2000).

Tort Victims' Compensation Fund.¹¹⁹ The statute also provides for twenty-six percent of the percentage that is deposited into the state's Tort Victim's Compensation Fund to be directed into the "Legal Services for Low-Income People Fund."¹²⁰

In Oregon, a plaintiff receives forty percent of the punitive damages award.¹²¹ The plaintiff's attorney is paid out of this amount, but may not receive more than twenty percent.¹²² The remaining sixty percent of the total punitive damage award is paid to the state's Criminal Injuries Compensation Account.¹²³ If the plaintiff is a public entity, however, the state's sixty percent will be paid to the public entity's general fund.¹²⁴ Oregon's split-recovery statute is the most recent to survive a constitutional challenge. That state's supreme court recently held its split-recovery statute to be constitutional under the Oregon Constitution in *DeMendoza v. Huffman*.¹²⁵

Utah's split-recovery statute allows punitive damages only if compensatory damages are awarded.¹²⁶ Furthermore, there must be clear and convincing evidence that the actions of the tortfeasor were intentional or knowing and reckless.¹²⁷ Under the state's statute, if a punitive damage award exceeds \$20,000, then half of the excess amount will be paid into the state's general fund, after attorney's fees and costs have been deducted.¹²⁸

119. *Id.* See generally Benjamin F. Evans, "Split-Recovery" Survives: *The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511 (1998) (discussing the Missouri split-recovery statute and whether the statute will be able to survive constitutional attacks); Todd M. Johnson, Comment, *A Second Chance: A Proposal to Amend Missouri's Tort Victims' Compensation Fund*, 67 UMKC L. REV. 637 (1999) (recommending to redraft the Missouri split-recovery statute in order to clarify some of the ambiguous provisions and to avoid difficulties in enforcing the statute).

120. MO. ANN. STAT. § 537.675 n.5 (West 2000).

121. OR. REV. STAT. § 18.540(1)(a) (2001).

122. *Id.*

123. *Id.* § 18.540(1)(b).

124. *Id.*

125. 51 P.3d 1232, 1249 (Or. 2002) (en banc). See generally Junping Han, Note, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477, 486 (2002) (detailing Oregon's punitive damages scheme, as well as possible constitutional challenges); Molly McDonough, *State Gets a Share of Punitive Damages*, A.B.A. J. E-REP. (Aug. 30, 2002), at <http://www.abanet.org/journal/ereport/au30oregon.html> (describing the recent Oregon supreme court ruling) (on file with the *St. Mary's Law Journal*).

126. UTAH CODE ANN. § 78-18-1(1)(a) (2002).

127. *Id.*

128. *Id.* § 78-18-1(3)(a).

C. *Creative Uses of Split-Recovery Statutes*

Of the states that have enacted split-recovery statutes, each employs the concept in a different form. While each may adopt a different percentage of the award to be diverted to the state, the basic idea and execution is the same. There have also been many suggestions for some rather creative implementations of split-recovery statutes—suggestions that differ greatly from the previously discussed statutes.¹²⁹ These proposed statutes would allow the plaintiff to receive only a specified portion of the award; however, the remaining portion would not go to the state.¹³⁰

For example, one commentator has suggested a split-recovery statute with a “charitable donation alternative,” which would apply in cases involving punitive damage awards for medical malpractice.¹³¹ This proposal calls for a plaintiff to receive only one-third of the punitive damage award.¹³² The plaintiff would then be required to designate a charitable organization to receive the remainder of the award.¹³³ The plaintiff’s designation would then be subject to court approval.¹³⁴ The rationale for this particular scheme is that the public will benefit from the wrongdoing.¹³⁵ The victim will have the opportunity to determine how other vic-

129. See generally Nicholas M. Miller, Note, *'Tis Better to Give Than to Receive: Charitable Donations of Medical Malpractice Punitive Damages*, 12 J.L. & HEALTH 141, 163-71 (1998) (proposing a scheme to allocate a portion of punitive damage awards from medical malpractice cases as charitable donations, rather than to the state); Dede W. Welles, Note, *Charitable Punishment: A Proposal to Award Punitive Damages to Nonprofit Organizations*, 9 STAN. L. & POL'Y REV. 203, 205 (1998) (favoring the division of all punitive damage awards between the plaintiff and a nonprofit organization chosen by the plaintiff).

130. See Nicholas M. Miller, Note, *'Tis Better to Give Than to Receive: Charitable Donations of Medical Malpractice Punitive Damages*, 12 J.L. & HEALTH 141, 163-64 (1998) (advocating sharing a portion of the award with the charitable organizations); Dede W. Welles, Note, *Charitable Punishment: A Proposal to Award Punitive Damages to Nonprofit Organizations*, 9 STAN. L. & POL'Y REV. 203, 205 (1998) (calling for nonprofit organizations to receive half of all punitive damage awards).

131. See Nicholas M. Miller, Note, *'Tis Better to Give Than to Receive: Charitable Donations of Medical Malpractice Punitive Damages*, 12 J.L. & HEALTH 141, 163-64 (1998) (elaborating that the plaintiff must prove that the defendant acted egregiously or with malice).

132. See *id.* (explaining that the rationale for designating one-third of the award as the plaintiff’s portion is based on the traditional amount of retainer fee for attorneys). The plaintiff provides a service as a private attorney general, and therefore, is entitled to keep one-third of the award. *Id.* at 164.

133. *Id.*

134. *Id.*

135. See *id.* at 166 (indicating that charitable donations will serve the public good, an advantage that is absent under other punitive damages schemes).

tims of the same type of harm could best benefit from the award.¹³⁶ Such a statute recognizes that the state has an interest in providing an incentive for the plaintiff to pursue such a claim, but at the same time, the state also has an interest in placing realistic limits on that incentive.¹³⁷ The proposal provides several advantages, such as: allowing for adequate compensation for the victim of the wrongdoing while punishing and deterring the wrongdoer;¹³⁸ preventing the plaintiff from receiving a windfall;¹³⁹ reducing the incentive for plaintiffs to seek punitive damage awards;¹⁴⁰ and by favoring charitable donations, providing a great benefit to society.¹⁴¹

Another interesting proposal, which is somewhat similar to the previously discussed alternative, is that of awarding half of all punitive damage awards to a nonprofit organization.¹⁴² This proposal calls for the plaintiff to choose, with the court's approval, a nonprofit organization to be the recipient of the remaining fifty percent of the award.¹⁴³ The chosen organization must be involved in preventing the type of harm that was the basis of the punitive damage award assessed against the tortfeasor, or the organization must benefit the same class of people injured or likely to be injured by the action of the tortfeasor that gave rise to the plaintiff's

136. See Nicholas M. Miller, Note, *'Tis Better to Give Than to Receive: Charitable Donations of Medical Malpractice Punitive Damages*, 12 J.L. & HEALTH 141, 166 (1998) (emphasizing that this provision will remove skepticism concerning the plaintiffs' motives for bringing suit). Rather than questioning the possibility of government abuse in a jurisdiction employing a split-recovery statute, or questioning plaintiffs' motives in a jurisdiction where the plaintiff retains the entire award, courts can be more comfortable with awarding punitive damages. *Id.*

137. See *id.* at 164 (identifying compensation for public service as the true justification for allowing the plaintiff to recover an award in addition to compensatory damages).

138. *Id.* at 165.

139. See *id.* at 166 (pointing out that like a split-recovery statute, the plaintiff is limited in his compensation, reducing, but not eliminating, a plaintiff's incentive).

140. *Id.* at 165.

141. Nicholas M. Miller, Note, *'Tis Better to Give Than to Receive: Charitable Donations of Medical Malpractice Punitive Damages*, 12 J.L. & HEALTH 141, 166-67 (1998) (illustrating the importance of charitable donations by pointing out the broad definition Congress gives to deductible charitable donations). "It is well recognized that charitable gifts are favored by the law and by the courts. Courts will give effect to charitable gifts where it is possible to do so. . . ." *Id.* at 166 (quoting *Mercy Hosp. of Williston v. Stillwell*, 358 N.W.2d 506, 509 (N.D. 1984)).

142. See generally Dede W. Welles, Note, *Charitable Punishment: A Proposal to Award Punitive Damages to Nonprofit Organizations*, 9 STAN. L. & POL'Y REV. 203, 205 (1998) (detailing a proposed statute that would allow one-half of the award to be donated to a chosen nonprofit organization).

143. *Id.* For purposes of the proposed statute, the chosen organization must meet the Internal Revenue Code definition of a "nonprofit organization." *Id.*

claim.¹⁴⁴ If there is no such organization that meets these criteria, the plaintiff must choose an organization that is “reasonably related to the subject matter of the suit.”¹⁴⁵ Similar to the previous proposed statute, the rationale asserted for this proposal is that the proposed statute furthers the goals of punishing and deterring wrongdoing by assessing punitive damage awards against tortfeasors, while removing the possibility of the plaintiff receiving a windfall.¹⁴⁶ Such a statute would avoid any possible constitutional challenges that might be brought if the state were receiving a portion of the award.¹⁴⁷ Additionally, the statute would further civil law goals and would increase incentive to sue, but the damages would be used to benefit the public.¹⁴⁸

Recently, in *Dardinger v. Anthem Blue Cross & Blue Shield*,¹⁴⁹ the Ohio Supreme Court opted to split the plaintiff's punitive damage award recovery, despite the absence of such a statute in that state.¹⁵⁰ In this case, the jury at the trial court level had found in favor of the plaintiff on his claims against the insurance company for breach of contract and bad faith in its failure to pay for his then-deceased wife's cancer treatments.¹⁵¹ The state's supreme court then reduced the plaintiff's recovery from the insurance company from \$49 million to \$30 million.¹⁵² The court instructed that the plaintiff was to receive \$10 million, the attorneys were to be paid according to their contract with Dardinger based on the \$30 million amount, and the remainder of the money was to be used to establish a fund to support cancer research.¹⁵³ Interestingly, the court stated that

144. *See id.* (advancing that by awarding damages to an organization related to the wrongdoing, the scheme continues to advance the deterrence rationale behind punitive damages).

145. *See id.* (recognizing the possibility that an organization may not exist that is related to the nature of the underlying litigation).

146. *Id.*

147. Dede W. Welles, Note, *Charitable Punishment: A Proposal to Award Punitive Damages to Nonprofit Organizations*, 9 STAN. L. & POL'Y REV. 203, 206 (1998) (commenting that the statute is protected from a potential constitutional attack should the plaintiff choose to award the money to a religious nonprofit organization).

148. *See id.* at 207-08 (admitting that although the proposal may not completely solve the windfall problem, it will help to ensure that plaintiffs continue to pursue claims). It is necessary to award a portion of the damages to the plaintiff in order to ensure that defendants are adequately punished and deterred. *Id.* at 208.

149. 781 N.E.2d 121 (Ohio 2002).

150. *See Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 146 (Ohio 2002) (stating that “[d]ue to the societal stake in the punitive damages award, . . . it [is] most appropriate that it go to a state institution”).

151. *Id.* at 134.

152. *Id.* at 144-45.

153. *Id.* at 146.

the “courts have a central role to play in the distribution of punitive damages.”¹⁵⁴

IV. A PROPOSAL FOR A SPLIT-RECOVERY STATUTE IN TEXAS

A. *Texas and Its Current Cap*

In response to growing controversy over large punitive damage awards,¹⁵⁵ Texas made substantial reforms to its punitive damage system in 1995 when the legislature reworked Chapter 41 of the Texas Civil Practice and Remedies Code, which concerns punitive awards.¹⁵⁶ In addition to implementing other reforms affecting punitive damage awards, the legislature created a statutory cap to limit further the amount of punitive damages that may be awarded to a plaintiff.¹⁵⁷ These changes served not only to restrict punitive damage awards, but also to provide defendants with increased procedural safeguards.¹⁵⁸

Based on the statute, a plaintiff’s punitive damage award is capped at either a maximum of \$200,000, or the amount of economic damages multiplied by two plus noneconomic damages of up to \$750,000, whichever

154. *Id.*

155. See J. Stephen Barrick, Comment, *Moriel and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1060 (1995) (commenting on the fact that increasingly high punitive awards “earned the state a reputation as a plaintiff’s haven”).

156. See TEX. CIV. PRAC. & REM. CODE ANN. § 41.001-.013 (Vernon 1997 & Supp. 2003), amended by Act of June 11, 2003, 78th Leg., R.S., ch. 204, §§ 13.01-.09, 2003 Tex. Sess. Law Serv. 886-89 (Vernon) (containing statutory provisions regarding the punitive damages system in Texas). See generally Jan Woodward Fox & Kate McConnico, *Punitive Damages in Texas 1995—Chapter 41 of the Texas Civil Practice & Remedies Code*, 21 T. MARSHALL L. REV. 21 (1996) (detailing the various changes made to the punitive damages system in Texas after the 1995 legislative enactments); J. Stephen Barrick, Comment, *Moriel and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059 (1995) (analyzing the changes in the Texas punitive damage system enacted in 1995).

157. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 1997 & Supp. 2003), amended by Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 13.06, 2003 Tex. Sess. Law Serv. 888-89 (Vernon).

158. *Id.*; J. Stephen Barrick, Comment, *Moriel and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1060 (1995). Some of these increased protections include: the plaintiff must prove the elements of punitive damages by clear and convincing evidence; the criminal acts of another cannot be assessed against a defendant; and, upon the defendant’s motion, the determination of a punitive damage award must take place in a bifurcated trial. Stephen Barrick, Comment, *Moriel and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1062 (1995).

amount is greater.¹⁵⁹ This cap does not apply, however, if the claim is based upon the knowing or intentional felonies of: murder; capital murder; aggravated kidnapping; aggravated assault; sexual assault; aggravated sexual assault; injury to a child, elderly or disabled individual; forgery; commercial bribery; misapplication of fiduciary property or property of a financial institution; deceptively securing execution of a document; fraudulent destruction, removal, or concealment of a writing; third degree or higher felony theft; intoxication assault; intoxication manslaughter; or methamphetamine manufacture.¹⁶⁰ It is not necessary that the crimes of intoxication assault or intoxication manslaughter be committed knowingly or intentionally to support a punitive damage award.¹⁶¹

Some commentators have noted that the only amount that is not limited by a specific number under this cap is the amount of economic damages.¹⁶² Therefore, they observe that it is important to understand what constitutes an "economic damage," because this could determine the magnitude of any punitive damages penalties assessed in a case.¹⁶³ They warn that there may be ways to categorize certain losses as economic losses in order to receive a higher punitive award amount under the cap, allowing plaintiffs to evade the limitations of the statute.¹⁶⁴

B. *Why a Split-Recovery Statute Is Preferable to the Current Cap*

For several reasons, a statutory cap on punitive damage awards is not the most effective reform measure. First, the arbitrary limit imposed by the Texas statute allows a potential defendant to calculate potential puni-

159. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon 1997 & Supp. 2003), amended by Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 13.06, 2003 Tex. Sess. Law Serv. 888-89 (Vernon).

160. *Id.* § 41.008(c), (f).

161. *Id.* § 41.008(c).

162. See Jan Woodward Fox & Kate McConnico, *Punitive Damages in Texas 1995—Chapter 41 of the Texas Civil Practice & Remedies Code*, 21 T. MARSHALL L. REV. 21, 25, 28 (1996) (suggesting that plaintiffs may be able to "convert" other losses, such as emotional or psychological losses, into economic losses).

163. *Id.* at 23.

164. *Id.* at 27-28 (recognizing several methods by which a plaintiff may disguise a non-economic loss as an economic loss in order to gain a higher punitive damage award). For example, the loss of loved one, such as a grandparent, could not only be considered a loss of society or companionship, which are non-economic losses, but could also be quantified as a lost source of house care and child care to the children of the deceased. *Id.* at 28. That grandparent would no longer be available to provide services such as babysitting or running errands. These losses could then be characterized as economic. *Id.* An additional example illustrating this concept is that of the loss of a child. While parents cannot claim damages for the pain and anguish they suffer at the loss of their child, they may attempt to recover their economic investment made in the life of the child. *Id.*

tive damage awards as part of operation costs,¹⁶⁵ thus circumventing the whole purpose of imposing the assessment against the defendant. Furthermore, because every defendant will have a different economic situation, setting the cap at a specific amount or ratio is inefficient.¹⁶⁶

To be efficient, the amount of damages imposed in each case should be particularized to that defendant.¹⁶⁷ An extremely wealthy potential defendant may find the limits of the statutory cap to be so insignificant in comparison to its wealth as to make a tortious course of conduct profitable.¹⁶⁸ Although the rationale in Texas for imposing punitive damage awards is only punishment and not deterrence,¹⁶⁹ punishment does in effect provide deterrence, and is imposed as an example to others. The concept of deterrence is arguably so intertwined with that of punishment

165. See Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 339 (1991) (arguing that an absolute dollar cap or a fixed ratio cap allow defendants to “reduce punitive damage awards to just ‘another cost of doing business’”). This undermines the deterrent effect of a punitive damage award, which is one of the main goals of assessing punitive damages. *Id.*

166. See Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 87 (1992) (advancing the argument that, in order to be efficient and effective, our “civil justice system must be particularized to specific defendants”). Legislatively mandated caps may under-deter harmful conduct. *Id.*; see also Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 299-300 (1997) (claiming that “statutory caps make little sense” because they are arbitrary). Salbu notes that statutory caps may aid businesses by keeping the costs of punitive damages low so that they can be more easily absorbed into the costs of operation. *Id.* at 299.

167. See Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 87 (1992) (explaining that “society will continue to suffer the effects of [the tortious] conduct either directly or indirectly”).

168. See Mark D. Clore, *Medical Malpractice Death Actions: Understanding Caps, Stowers, and Credits*, 41 S. TEX. L. REV. 467, 481 (2000) (advocating the right of judges and juries to particularize the punishment to the nature of the crime, and arguing that an arbitrary limit on punitive damages impairs this ability). A cap on punitive damages may have the unexpected opposite effect of encouraging, rather than deterring, wrongdoing if a wealthy defendant can afford to take the calculated risk. *Id.*; see also Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 338 (1991) (emphasizing the importance of enabling courts to make exceptions to statutory caps). Allowing a court to remove a cap in extraordinary cases would “allow the courts discretion to extract the defendant’s expected profit,” thereby restoring the effectiveness of the deterrent effect of the punitive award. *Id.*

169. See J. Stephen Barrick, Comment, *Moriel and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1060 n.10 (1995) (noting the deletion of the deterrence rationale from the Texas definition of punitive damages).

that it is implied also as a rationale behind awarding punitive damages,¹⁷⁰ even if not stated in the Texas statute. However, a wealthy potential defendant is not deterred, and would be only slightly punished, by a punitive damage award that is limited to an amount that is a minute fraction of the would-be defendant's economic worth.

Relatedly, another drawback to Texas's statutory cap is that it intrudes into the function of the jury by preventing it from determining a level of punishment appropriate for each particular defendant.¹⁷¹ A jury may determine that a defendant's conduct is particularly egregious or malicious and deserving of a harsher punishment, yet is limited by the statutory cap. In situations where the amount of damages that may be awarded is so limited by the cap that the amount bears a severely disproportionate relationship to the wrongdoing, there will be little, if any, deterrence or punishment.¹⁷² In such a situation, "[a]rbitrary limits on punishment impair [the] legitimate capability . . . of . . . [j]udges and juries . . . to make the punishment fit the crime."¹⁷³

Another obvious flaw of the statutory cap is that it may discourage settlement.¹⁷⁴ Studies show that if the cap is high in relation to the expectations of the involved parties in the litigation, the parties are less likely

170. See Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 349-50 (1996) (identifying the argument of some scholars that "the retributive function of punitive damages coincides with their deterrent goals"); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1434 (1993) (summarizing one commentator's theory that the deterrence rationale is "an integral part of the retributive idea").

171. See Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 169 (2002) (discussing the criticism of caps on punitive damages because they fail to relate to the nature of the defendant's conduct).

172. See *id.* at 169-70 (asserting that such a statutory cap has the effect of inhibiting the deterrent purpose of the punitive damage award if the amount cannot be enough to financially hurt the defendant); see also J. Stephen Barrick, Comment, *Moriel and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1089 (1995) (suggesting that caps result in little pecuniary loss to a plaintiff, therefore providing little deterrence or punishment effect).

173. Mark D. Clore, *Medical Malpractice Death Actions: Understanding Caps, Stowers, and Credits*, 41 S. TEX. L. REV. 467, 481 (2000); see also Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 300 (1997) (observing that "[t]he amount needed to punish the wrongdoer, and to deter future wrongdoings by the defendant and others, will be related to a number of variables"). Therefore, statutory caps are too arbitrary to be effective limits on punitive damage awards. *Id.*; see also J. Stephen Barrick, Comment, *Moriel and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1089 (1995) (maintaining that caps on punishment impair the function of judges and juries).

174. See Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 174 (2002) (explaining the "paradoxi-

to reach a settlement.¹⁷⁵ In addition, psychological theorists suggest that statutory caps may anchor the decisions of jurors.¹⁷⁶ Because the jurors begin with a set initial value, determined by the cap, they tend to adjust from this anchor value.¹⁷⁷ Typically, they will fail to make a sufficient adjustment away from this amount; therefore, this anchoring could result in increasing the size and variability of the awards in some cases.¹⁷⁸

A split-recovery statute, however, could be more effective in guiding the awarding of punitive damages. A split-recovery statute would continue to allow a plaintiff to be made whole by recovering all economic damages and costs of bringing suit, but would limit any additional amounts the plaintiff could receive, thus eliminating the “windfall effect.”¹⁷⁹ Also, such a statute would serve to carry out the punishment and deterrence purposes behind punitive damages.¹⁸⁰ Because jurors are

cal effects” that caps may have on litigation strategies such as settlement). Caps may influence the pretrial bargaining process. *Id.*

175. *See id.* (explaining the manner in which statutory caps may affect the settlement process). If a damage cap is low enough, it may prohibit the anticipated award of litigants, causing them to settle at a lower amount. *Id.* Conversely, if a cap is high in relation to the expectation of the parties, they may be less likely to reach a settlement at all. *Id.*

176. *See id.* at 171 (referring to experimental research that shows a tendency of statutory caps to increase the size and variability of awards). Psychological theory describes anchoring as a “cognitive bias in which decision makers begin with an initial value and then adjust that value to arrive at their final decision.” *Id.*

177. *Id.*

178. *Id.* Researchers first investigated this anchoring effect on the process juries use to award compensatory damages, focusing on pain and suffering aspects. *Id.* Participants in the study were asked to make an award based on a description of the injury. Only some were told there was a cap on the amount to be awarded. In cases of more severe injury, statutory caps decreased the amount and the variability of compensatory awards. Conversely, in less severe injury cases, the cap resulted in an increase in the size and variability of compensatory awards. *Id.* The researchers suggest that jurors assimilated their awards toward the amount of the cap. *Id.*

179. *See* Sonja Larsen, Annotation, *Validity, Construction, and Application of Statutes Requiring That Percentage of Punitive Damages Awards Be Paid Directly to State or Court-Administered Fund*, 16 A.L.R.5th 129, 129 (1993) (stating that legislators are enacting split-recovery statutes as a measure to limit the windfall effect that some plaintiffs enjoy); *see also* Benjamin F. Evans, “Split-Recovery” Survives: *The Missouri Supreme Court Upholds the State’s Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 519-20 (1998) (asserting that plaintiffs will be made whole through compensatory awards, and further pointing out that split-recovery statutes assist in removing a plaintiff’s incentive to pursue a windfall).

180. *See* VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 25 (2d ed. 1999) (explaining that the purpose of punitive damages is to punish and to deter); *see also* Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 512 (1993) (concluding that split-award statutes effectively carry out the true purposes of punitive damages—deterrence and punishment). Sloane asserts that such statutes reinforce retribution by demand-

aware that the plaintiff will not be receiving a windfall, they are more likely to punish the defendant fully.¹⁸¹ Furthermore, the purpose of benefiting society as a whole through punitive damage awards will be furthered because all of society receives the benefit of the award, rather than the plaintiff alone enjoying the award.¹⁸²

Split-recovery statutes also have the effect of encouraging settlement and ultimately conserving judicial resources.¹⁸³ If plaintiffs will receive only a set percentage of any punitive judgment, they are more likely to settle the suit before trial if they can negotiate full compensation.¹⁸⁴ Because plaintiffs are aware that any amount awarded above a certain percentage will go to the state, a settlement that allows them to receive an amount above that specified portion will be attractive, as they will be able to keep the amount that would otherwise be funneled to the state.¹⁸⁵ Defendants are also responsive to the option of paying this amount rather

ing monetary compensation for the tortious behavior, and also, deter others from inflicting similar harm on society. *Id.*

181. See Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 *BUFF. L. REV.* 103, 181-82 (2002) (presuming that jurors will be less likely to consider a plaintiff's windfall in determining an award amount if they are aware that the state will be receiving a portion of the award, rather than the plaintiff receiving the entire amount). Furthermore, judges and jurors also have an interest in the amount awarded, because as taxpayers and residents of that state, they will also benefit. *Id.* If the decision maker perceives that the state fund that the money is being directed to is a "good cause," then they may be more likely to award a higher amount of punitive damages. *Id.* at 181. It is for these reasons that a state might choose not to inform the jury that the state will receive a portion of the award. *Id.* at 182. However, some researchers also suggest that when an award is to be given to the plaintiff, jurors are more likely to award a greater amount, suggesting that "perhaps punitive damages serve a symbolic restorative function that is dependent upon receipt by the plaintiff." *Id.*

182. See Clay R. Stevens, Comment, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 *PEPP. L. REV.* 857, 869 (1994) (commenting that split-recovery statutes "allow[] society to distribute the award to a higher-valued use"). Because the money is allocated to a more judicious use for the public as a whole, it serves the public better as compensation to society. *Id.* at 870.

183. See Junping Han, Note, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 *WILLAMETTE L. REV.* 477, 499-501 (2002) (claiming that split-recovery statutes increase the chances of settlement): see also Clay R. Stevens, Comment, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 *PEPP. L. REV.* 857, 869 (1994) (remarking that split-recovery statutes aid in decreasing frivolous litigation, thereby serving public policy by saving judicial resources).

184. Junping Han, Note, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 *WILLAMETTE L. REV.* 477, 499-500 (2002).

185. *Id.* at 500. For example, Han explains that an Oregon plaintiff may receive forty percent of the punitive award, and the state receives the remainder; therefore, the plaintiff will likely accept any settlement above the forty percent. *Id.* Furthermore, the defendant would likely accept to pay a settlement as long as it was less than the expected punitive damages award, because the defendant has an obligation to pay no matter who will be the

than risking a high punitive damage award at trial, adverse publicity, and litigation expenses.¹⁸⁶

An additional benefit to a split-recovery statute is that it may discourage frivolous lawsuits.¹⁸⁷ Because the plaintiff will not receive the entire punitive damage award, if awarded, a plaintiff has less incentive to bring suit.¹⁸⁸ This ensures that those suits which are brought forth are more likely to be meritorious.¹⁸⁹

C. *A Split-Recovery Statute for Texas*

To replace the current cap, Texas legislators should consider enacting a split-recovery statute.¹⁹⁰ Such an enactment would continue to restrict punitive damage awards and to protect defendants. Furthermore, it would serve to punish wrongdoers while deterring others and benefiting all of society instead of benefiting only the plaintiff.

If Texas legislators enact a split-recovery statute, they must determine the percentage that a plaintiff would receive from the award. As discussed previously, the percentages of punitive damage awards that are allotted to plaintiffs in those states that have enacted split-recovery statutes vary from twenty-five percent¹⁹¹ to fifty percent.¹⁹² It is difficult to determine, however, what would be a fair amount for plaintiffs to retain

recipient. *Id.* Therefore, both parties would likely be willing to settle for any amount in between the estimated award and the plaintiff's estimated forty percent. *Id.*

186. *See id.* at 501 (pointing out that due to the defendant's concern about litigation, the plaintiff would have leverage in a settlement negotiation).

187. *Id.* at 502; *see also* Benjamin F. Evans, "Split-Recovery" Survives: *The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 520 (1998) (explaining that split-recovery statutes reduce plaintiffs' incentives to bring suit). Although some proponents find that providing an incentive to sue is one of the justifications behind punitive damage awards, many find that this has become excessive. *Id.* Split-recovery statutes may be useful in diminishing this incentive to some degree. *Id.*

188. Benjamin F. Evans, "Split-Recovery" Survives: *The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 520 (1998).

189. Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 491 (1993).

190. *See* J. Stephen Barrick, Comment, *Moriel and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1088 (1995) (suggesting that the public should receive any punitive damages awarded, rather than the public).

191. *See* GA. CODE ANN. § 51-12-5.1(e)(2) (2000) (providing that plaintiffs may retain twenty-five percent of the punitive damage award); IOWA CODE ANN. § 668A.1(2)(b) (West 1998) (permitting plaintiffs to have only twenty-five percent of punitive damages if the trier of fact finds that the defendant's conduct was not specifically directed at the plaintiff or the person from which the plaintiff's claim is derived).

without analyzing the situation in each case. It seems that the more egregious the wrong, the higher the percentage the plaintiff should be permitted to take. Therefore, the most equitable solution may be to allow the trial court to apportion the damages, instructing the jury to determine the appropriate percentage. The Illinois legislature took this approach when it enacted a statute that allowed the trial court to use its discretion in apportioning the award.¹⁹³

The Texas legislature would also need to determine the recipient of the remaining percentage of the award if it enacted a split-recovery statute. Some states direct the remaining percentage into the state's treasury or general fund,¹⁹⁴ while others have set up specific funds.¹⁹⁵ A plaintiff may have greater incentive to seek redress of a wrong if she knows that a percentage of any punitive damages award received will go toward alleviating the damage of the specific type of wrongdoing. In other words, if a portion of the money will go to preventing the same type of harm that formed the basis of the suit, or will ultimately benefit the same class of persons as the plaintiff, a plaintiff may feel this allocation compensates for the fact that she will not receive all of the potential award and will continue to provide some incentive to pursue correcting the wrong.¹⁹⁶

192. See ALASKA STAT. § 09.17.020(j) (Michie 2002) (providing for plaintiffs to retain fifty percent of the punitive damage award); MO. ANN. STAT. § 537.675(3) (West Supp. 2003) (directing fifty percent of punitive damage awards to plaintiffs).

193. 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 2003).

194. See ALASKA STAT. § 09.17.020(j) (Michie 2002) (requiring fifty percent of the punitive damage award to go to the state's general fund); GA. CODE ANN. § 51-12-5.1(e)(2) (2000) (directing the state's portion of punitive damage awards be paid to the state's Office of the Treasury); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 2003) (apportioning the state's portion of punitive damages to the Illinois Department of Rehabilitation Services).

195. See IOWA CODE ANN. § 668A.1(2)(b) (West 1998) (providing that the state's portion of punitive awards will be placed in a civil reparations trust fund); MO. ANN. STAT. § 537.675(5) (West Supp. 2003) (specifying a special fund in the state's treasury, a tort victims' compensation fund named the "Legal Services for Low-Income People Fund"); OR. REV. STAT. § 18.540(1) (2001) (identifying the state's Department of Justice Criminal Injuries Compensation Fund as the recipient of the state's portion of punitive damage awards). Oregon uses this fund to aid crime victims, assisting with payments for expenses such as counseling, medical care, and funerals. Molly McDonough, *State Gets a Share of Punitive Damages*, A.B.A. J. E-REP. (Aug. 30, 2002), at <http://www.abanet.org/journal/ereport/au30oregon.html> (on file with the *St. Mary's Law Journal*).

196. See Dede W. Welles, Note, *Charitable Punishment: A Proposal to Award Punitive Damages to Nonprofit Organizations*, 9 STAN. L. & POL'Y REV. 203, 211 (1998) (explaining that allowing a plaintiff to choose an organization to receive the money, rather than the state, may be perceived by the plaintiff as more worthwhile, and the plaintiff may even be seen as "an active agent of public good"). Similarly, even if the plaintiff isn't choosing the recipient of the money, knowing that the money is going to a related cause may continue to provide incentive. *Id.*

V. CONCLUSION

As a result of the increasing number and amounts of punitive damage awards,¹⁹⁷ the call for reform is much-warranted. As reformers and legislators continue to seek out measures to effectively limit excessive punitive damage awards and deter unnecessary and frivolous litigation, they must consider not only the effects of the enactments, but also the purposes served by the enactments. Split-recovery statutes can serve as a valuable reform tool to continue to allow the plaintiff recovery, providing incentive to bring suit, but at the same time, discouraging those suits that are for less egregious wrongs. They also continue to serve the goals of punitive damages by carrying out punishment and retribution as well as deterrence.

Split-recovery statutes arguably enlarge government, which contradicts the bi-partisan recognition in recent years that “government is the problem”,¹⁹⁸ however, we must choose the lesser of the two evils.¹⁹⁹ Split-recovery statutes serve a valuable purpose in not only furthering the goals of the tort reform movement, but also doing so while serving the purposes behind punitive damage awards, namely punishment and deterrence, as well as remaining true to the foundation of our tort system by seeing that the plaintiff receives redress for his injuries. Texas legislators should recognize the benefits of the split-recovery statute over the current cap, and take steps to enact such an improvement to our current punitive damages scheme.

197. See Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 250-51 (1997) (relating that the increasing concern over excessive punitive damage awards stems from an increase in the number of such awards and an increase in cases seeking punitive damage awards). Salbu points out that the reform movement peaked during the presidency of George Bush, when Vice President Quayle spoke out against punitive damages. *Id.* at 251.

198. Nicholas M. Miller, Note, *'Tis Better to Give Than to Receive: Charitable Donations of Medical Malpractice Punitive Damages*, 12 J.L. & HEALTH 141, 160 (1998) (quoting President Reagan). Miller also notes that “retention by the state of any portion of punitive damage awards flies in the face of current bipartisan support for smaller government,” discussing the conservative ideology of “devolution” under Reagan, and the continuation of this theme under President Clinton. *Id.*

199. See *id.* (observing that many supporters of split-recovery awards do so in recognition that it is better than the alternative). Many split-recovery supporters see it as “enlargement of government over ‘millionaire-through-injury syndrome’” and would prefer the former evil over the latter. See *id.* (quoting Philip K. Howard, *Judges and Courts Should Perform Justice, Not Theater*, STAR TRIBUNE, Apr. 16, 1995, at 11A).

