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## Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma

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# Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma

## I. INTRODUCTION

For the past 150 years, the United States judicial system has followed the eighteenth century English tradition of allowing punitive damage awards.<sup>1</sup> As early as 1852, the United States Supreme Court expressly recognized the validity of punitive damages as an available remedy above and beyond compensation for loss.<sup>2</sup> Although punitive damages exceed the plaintiff's actual loss, their continued application in cases involving fraud, malice, or oppression is justifiable for the sake of the community.<sup>3</sup> Additionally, modern American judicial decisions extend the application of punitive damages to conduct by defendants that is outrageous, malicious, reckless, or willful and wanton.<sup>4</sup>

While widely recognized for many years, punitive damages have been the subject of frequent criticism.<sup>5</sup> This criticism has increased dramati-

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1. Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 3-4 (1985). Modernly, all but five states "recognize the practice of awarding punitive damages in civil cases." *Id.* at 4 n.9. These five states are Louisiana, Nebraska, Massachusetts, Washington and Indiana. *Id.*

2. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 26 (1991) (Scalia, J., concurring). Justice Scalia observed that "[i]t is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant." *Id.* (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852)).

3. *Id.* at 25. Justice Scalia quoted from an influential 19th Century treatise by Theodore Sedgwick stating that in cases "where gross fraud, malice, or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant and hold up an example to the community." *Id.* (quoting THEODORE SEDGWICK, *MEASURE OF DAMAGES* 522 (4th ed. 1868)).

4. James D. Ghiardi, *Punitive Damages: State Extraction Practice Is Subject to Eighth Amendment Limitations*, 26 TORT & INS. L.J. 119, 120 (1990) (arguing that courts may award punitive damages if the defendant's action results from outrageous, malicious, reckless, or willful and wanton conduct).

5. Theodore B. Olsen & Theodore J. Boutros, Jr., *Constitutional Restraints on the Doctrine of Punitive Damages*, 17 PEPP. L. REV. 907, 908 (1990) ("Since its virtual

cally<sup>6</sup> because of a recent increase in punitive damage awards.<sup>7</sup> This increase has caused many critics to call for the complete abolition of punitive damages.<sup>8</sup> While the arguments against awarding punitive damages may be legitimate,<sup>9</sup> the history and established tradition of awarding punitive damages is so deeply rooted in the American judiciary that its complete abolition is unlikely.<sup>10</sup> Cognizant of this reality, many of these same critics have instead focused on other less drastic methods of tort reform.<sup>11</sup>

Concerned with rising punitive damage awards,<sup>12</sup> advocates of tort reform have proposed "absolute limits on punitive damages, proportional caps based on compensatory damages, and more recently, 'split-recovery' provisions that allow the state to claim a portion of any punitive damages awarded."<sup>13</sup> While all of these reform methods have re-

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inception in the United States, the judiciary has criticized punitive damage awards as a disruptive and distorting component of the justice system.").

6. Sharon G. Burrows, Comment, *Apportioning a Piece of a Punitive Damage Award to the State: Can State Extraction Statutes Be Reconciled with Punitive Damage Goals and the Takings Clause?*, 47 U. MIAMI L. REV. 437, 437-38 (1992) (noting that "the apparently dramatic increase in the number and dollar amount of punitive damage awards over the last several decades has fueled a debate over the propriety of allowing punitive damages").

7. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part). Arguing against excessive punitive damage awards, Justice O'Connor stated that the amounts awarded in punitive damage claims have "skyrocketed" more than 30 times in the past 10 years. *Id.* (noting an increase in the highest award from \$250,000 to \$10,000,000).

8. Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 3 (1990).

9. This Comment will not address the age-old debate about the soundness of punitive damages, but will presume that punitive damages will continue to be a part of the United States judicial system.

10. John D. Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 889 (1976). Political realities indicate that the "vigor of the plaintiffs' bar, the prevailing sympathetic temperaments of many state and federal judges, the disproportionately heavy representation of plaintiff attorneys in state legislatures and the United States Congress, and the tradition of two hundred years or so will not soon be overcome." *Id.* The Supreme Court's reluctance to overturn unduly excessive punitive damage awards evidences the long-standing tradition inherent in punitive damage recovery. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993) (upholding a punitive damage recovery 526 times greater than compensatory damages).

11. 2 JAMES D. GHIARDI & JOHN J. KIRCHER, *PUNITIVE DAMAGES LAW & PRACTICE* § 21.08 (1984 & Supp. 1993) (stating that advocates of complete abolition often realize the political realities of the situation and suggest less drastic reforms).

12. Burrows, *supra* note 6, at 439 ("This tort reform crusade is a legislative response to the fear that tort liability has expanded too far. Critics have attacked punitive damages in particular as an unregulated and growing menace to our economy and our civil justice system.").

13. Recent Case, *Eighth Amendment—Punitive Damages—Florida Supreme Court*

ceived considerable attention as of late, split-recovery, in particular, has risen in prominence since its introduction in the mid-1980s.<sup>14</sup> Split-recovery denotes the practice of allocating a portion of a punitive damage award to someone other than the plaintiff.<sup>15</sup> Since the introduction of split-recovery, ten states have passed split-recovery statutes in one form or another.<sup>16</sup> Three other states have split-recovery proposals pending

*Upholds "Split-Recovery" Statute*—Gordon v. State, 608 So. 2d 800 (Fla. 1992) (Per Curiam), 106 HARV. L. REV. 1691, 1691 (1993) [hereinafter *Eighth Amendment*]. Another suggested reform advocates a zero percent system in which the plaintiff receives none of the punitive damage recovery. E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 856-57 (1993). Under this system, the court bifurcates the trial after a successful determination of compensatory damages and dismisses the plaintiff from the proceedings. *Id.* Thereafter, the plaintiff's attorney argues the punitive damage claim in the name of the government and receives a small percentage of any award. *Id.* While this proposal addresses many of the same problems and questions encountered by split-recovery, the government's extended role in the subsequent suit raises constitutional issues under the Double Jeopardy and Excessive Fines Clauses. See *infra* notes 182-245 and accompanying text.

14. 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). In 1987, the American Bar Association introduced a proposal to award a portion of punitive damage awards to "public purposes" as a method of tort reform. *Id.* Although brought to public attention in 1987, the concept of split-recovery arose at least as early as 1983. Robert H. Arnold, *Punitive Damages in Product Liability Litigation: Redirecting the Windfall*, 6 J. PROD. LIAB. 367, 374 (1983) (suggesting a proposal granting the state a 90% share of any punitive damages awarded).

15. While this Comment uses the term "split-recovery," other commentators differ on terminology. See, e.g., James A. Breslo, Comment, *Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis*, 86 NW. U. L. REV. 1130, 1139 (1992) (restricted recovery plan); Ghiardi, *supra* note 4, at 119 (state extraction); *Eighth Amendment*, *supra* note 13, at 1691 (split-recovery); Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 473 (1993) (split award); Paul F. Kirgis, Note, *The Constitutionality of State Allocation of Punitive Damage Awards*, 50 WASH. & LEE L. REV. 843, 843 (1993) (state allocation).

16. As of 1993, ten states had enacted split-recovery statutes: Colorado, Florida, Georgia, Illinois, Iowa, Kansas, Missouri, New York, Oregon, and Utah. COLO. REV. STAT. ANN. § 13-21-102(4) (West 1989); FLA. STAT. ANN. § 768.73(1)(a) (West Supp. 1992); GA. CODE ANN. § 51-12-5.1(e)(2) (Michie Supp. 1992); ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd Supp. 1992); IOWA CODE § 668A.1.2.b (1991); KAN. STAT. ANN. § 60-3402(e) (Supp. 1992); MO. REV. STAT. § 537.675.2 (Supp. 1992); N.Y. CIV. PRAC. L. & R. § 8701(1) (McKinney Supp. 1993); OR. REV. STAT. § 18.540(1)(c) (1991); UTAH CODE ANN. § 78-18-1(3) (1992).

In addition, the Alabama Supreme Court has recognized such a split-recovery proposal as implicit under the powers granted the judiciary. *Smith v. States Gen. Life Ins. Co.*, 592 So. 2d 1021, 1023 (Ala. 1992) (holding punitive damage distribution of

in their legislatures.<sup>17</sup>

The growth of split-recovery statutes has caused many to question the necessity, efficiency, equity and constitutionality of these laws. This Comment addresses these concerns. Section II examines the goals of punitive damages and demonstrates that split-recovery statutes are consistent with the public policy objectives of punitive damages.<sup>18</sup> Section III explores the policy rationale for split-recovery and refutes the contention that these statutes do not serve a legitimate and necessary societal purpose.<sup>19</sup> Section IV analyzes the constitutionality of the statutes.<sup>20</sup> Section V surveys the specific provisions of the split-recovery statutes under scrutiny.<sup>21</sup> Finally, this Comment proposes a model split-recovery statute which not only functions equitably and efficiently, but passes constitutional muster.<sup>22</sup>

## II. PURPOSES OF PUNITIVE DAMAGES

An examination of the rationale behind punitive damages clarifies the legitimacy of split-recovery statutes and indicates that such statutes are consistent with the purposes of punitive damages.<sup>23</sup> Punitive damages serve at least five public policy purposes: deterrence of similar egregious acts by the defendant and others in the future,<sup>24</sup> punishment of the defendant for his wrongdoing,<sup>25</sup> incentive for plaintiffs to bring claims on the society's behalf,<sup>26</sup> compensation for non-pecuniary losses to the victim,<sup>27</sup> and compensation for attorney's fees.<sup>28</sup> While commen-

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half to the plaintiff and half to the American Medical Association constitutional).

17. Andrew Blum, *States Want Share of Punitives; Three More Join Trend*, NAT'L L.J., Mar. 8, 1993, at 3 (Texas, Indiana, and New Jersey have split-recovery proposals pending in their legislature).

18. See *infra* notes 23-73 and accompanying text.

19. See *infra* notes 74-95 and accompanying text.

20. See *infra* notes 96-245 and accompanying text.

21. See *infra* notes 246-96 and accompanying text.

22. See *infra* notes 297-339 and accompanying text.

23. Many critics attack split-recovery extraction statutes as violating the general purposes behind punitive damages. Burrows, *supra* note 6, at 448 (split-recovery statutes fail to promote the goals of punitive damages and instead serve as a political tool favoring businesses).

24. Shores, *supra* note 14, at 69. See *infra* notes 31-38 and accompanying text.

25. Shores, *supra* note 14, at 69. See *infra* notes 31-38 and accompanying text.

26. Shores, *supra* note 14, at 74. See *infra* notes 39-47 and accompanying text.

27. Shores, *supra* note 14, at 74. See *infra* notes 49-59 and accompanying text.

28. Burrows, *supra* note 6, at 447 (compensation theory of punitive damages includes litigation-related expenses). See *infra* notes 60-73 and accompanying text.

tators universally recognize and accept the first three purposes,<sup>29</sup> they hotly debate the legitimacy of the latter two.<sup>30</sup>

#### A. *Punishment and Deterrence*

An award of full compensation to an injured party in a civil suit often fails to provide sufficient deterrence and punishment to prevent future reoccurrence of the reprehensible act.<sup>31</sup> In such cases, punitive damage awards that allow for recovery beyond the value of the compensatory award serve to fully punish the defendant for committing the egregious act and discourage the defendant or others from engaging in similar conduct in the future.<sup>32</sup> In addition, publicity surrounding the recovery of punitive damage awards also serves to deter reoccurrences of the egregious behavior.<sup>33</sup>

Taken at face value, split-recovery statutes that allocate a portion of punitive damage awards to an individual other than the plaintiff do not appear to dilute the punishment or deterrent effects of punitive damages because the total damage award owed by the defendant wrongdoer

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29. The Supreme Court of the United States, as well as the judiciary of most states, clearly identifies deterrence and punishment as legitimate purposes of punitive damages. *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (noting that punitive damages are levied to "punish reprehensible conduct and to deter its future occurrence"); *Smith v. States Gen. Life Ins. Co.*, 592 So. 2d 1021, 1024 (Ala. 1992) (stating that the main goals of punitive damages are vindication and deterrence); *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 266, 274 (Colo. 1991) (majority and dissenting opinions agreeing that punishment and deterrence are the primary goals of punitive damages).

Legal scholars also agree as to deterrence and punishment aspects of punitive damages. Breslo, *supra* note 15, at 1135 (stating that legal scholars "stand in virtual unanimity that punitive damage awards serve the purpose of either punishment or deterrence").

30. *See infra* notes 39-73 and accompanying text.

31. James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived its Origins*, 37 VAND. L. REV. 1117, 1126 (1984) (noting that "the judicial system needs punitive damages to deter socially harmful, loss creating conduct by defendants"). To be reprehensible to society and bring rise to a punitive damage claim, the act complained of must involve willful and wanton behavior, malice, moral turpitude, or outrageous conduct. *Ross v. Gore*, 48 So. 2d 412, 414 (Fla. 1950) (en banc) (holding constitutional a libel statute limiting punitive damages).

32. Burrows, *supra* note 6, at 444 ("The imposition of punitive damages punishes the defendant for committing some socially undesirable act, while discouraging similar conduct in the future by the defendant and others.").

33. Shores, *supra* note 14, at 69.

is unaffected.<sup>34</sup> Some commentators suggest this appearance is illusory because split-recovery statutes diminish the plaintiff's incentive to bring suit.<sup>35</sup> However, the *proper* allocation of a punitive award under a split-recovery statute does not eliminate the plaintiff's incentive to sue.<sup>36</sup> In fact, where the advent of punitive damages may result in overdeterrence of tort-feasors,<sup>37</sup> split-recovery may actually lead to a more efficient level of deterrence.<sup>38</sup> Therefore, split-recovery will not diminish the deterrence and punishment effects of punitive damages.

### B. Incentive to Sue

Punitive damages provide an appropriate incentive for private plaintiffs to bring suit.<sup>39</sup> To preserve the legal and community norms of society, the public as a whole has an interest in preventing those who recklessly injure others or who commit socially unacceptable acts from escaping punishment.<sup>40</sup> Without punitive damages, however, plaintiffs

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34. Burrows, *supra* note 6, at 444 ("Because the defendant must still pay the full amount of the punitive damage award, the provisions of the statute appear not to reduce the level of punishment and deterrence that the defendant would receive were the money to go to the claimant rather than the state.").

35. *Id.* at 446-47. If split-recovery reduces the incentive for all plaintiffs to bring suit, a potential reduction in the primary goals of deterrence and punishment occurs because some victims with worthy claims will not bring suit and the wrongdoers will go unpunished. *Id.*

36. See *infra* notes 39-47 and accompanying text.

37. Grube, *supra* note 13, at 852 n.63 (noting that the potential for punitive damages can lead to overaggressive plaintiffs and an inefficient level of deterrence). The potential for increased settlement recovery with punitive damage claims causes this overdeterrence. Sales & Cole, *supra* note 31, at 1156 ("A byproduct of the continued success that plaintiffs have experienced in obtaining large punitive damage awards is the now universal practice of plaintiffs alleging and demanding punitive damages in an effort to increase the ultimate recovery from juries, and to compel defendants to settle meritless cases because of the fear that a jury will return an outrageous punitive damage award.").

38. By creating the proper level of incentive for plaintiffs to bring worthy claims, split-recovery may lead to a more efficient number of suits and the proper level of deterrence to potential tortfeasors. See *infra* notes 90-95 and accompanying text. However, even when inefficient, the outrageousness of the conduct leading to punitive damage recovery may lead society to favor overdeterrence. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 194 (3d ed. 1986) (noting that society "may want to make sure that I am not indifferent between stealing and buying my neighbor's car" by imposing excess punishment on the thief).

39. Grube, *supra* note 13, at 851 ("Society pays punitive damages to plaintiffs as an incentive for them to perform this service.").

40. See Breslo, *supra* note 15, at 1151 n.84 ("The private plaintiff is seen as performing a public service by litigating the issue, with the benefits of the litigation flowing not only to the plaintiff but also to society."); Burrows, *supra* note 6, at 446 (encouragement of lawsuits against those who commit socially undesirable acts is

with socially desirable suits might not undertake the litigation when the cases involve either extremely high degrees of emotional and financial stress<sup>41</sup> or the potential for only minimal financial benefit.<sup>42</sup> By allowing the potential of punitive damages, society can insure that all private plaintiffs have the proper incentive to bring publicly beneficial suits.<sup>43</sup> Punitive damages also induce injured individuals to become plaintiffs by rewarding them for their efforts in the litigation process.<sup>44</sup>

Split-recovery statutes that allocate a portion of punitive damage awards to one other than the plaintiff appear to negate the incentive rationale behind awarding punitive damages.<sup>45</sup> However, these statutes do not hinder the effectiveness of punitive damages because a victim who receives full compensation through compensatory damages has the incentive to sue without *full* recovery of a punitive damage award.<sup>46</sup> In

society's best method for enforcing societal norms).

41. Burrows, *supra* note 6, at 446.

42. Breslo, *supra* note 15, at 1151 (stating that "without the prospect of a punitive award, worthy claims with litigation costs that exceed the potential recovery would not be brought"); Grube, *supra* note 13, at 846 (these plaintiffs bring those wrongdoers to justice who may otherwise go unpunished). The potential for such problems is likely in worthy claims that are socially and personally significant but only have minimal compensatory damages. *Id.* (stating that punitive damages are particularly important in cases involving only nominal monetary damages).

43. Ausness, *supra* note 1, at 69 ("[T]he prospect of punitive damages encourages private persons to enforce societal norms through civil litigation . . .").

44. *Smith v. States Gen. Life Ins. Co.*, 592 So. 2d 1021, 1024 (Ala. 1992) (stating that because the plaintiff "has expended considerable effort in exposing and prosecuting Defendants' conduct . . . , it would be inappropriate to deprive [the] Plaintiff of a substantial recovery in this case").

45. Burrows, *supra* note 6, at 447. By reducing the potential monetary recovery from bringing suit, split-recovery statutes "greatly minimize an injured victim's incentive to sue . . ." *Id.*

46. Many economists have argued that punitive damages are completely unnecessary for this purpose because the potential for full compensation creates sufficient incentive to bring suit. Grube, *supra* note 13, at 846-47. Even those who argue that punitive damages are necessary to maintain the proper level of deterrence must acknowledge that the plaintiff need not necessarily receive the *entire* punitive damage award to give her incentive to bring suit. Because juries assess punitive damages based upon defendants' reckless conduct and not plaintiffs' costs or inconvenience, a reduced award may or may not provide sufficient incentive to encourage the plaintiff to bring suit. *See* Breslo, *supra* note 15, at 1135. However, by allowing the legislature to set the amount of state appropriation, the state can effectively determine the amount of recovery necessary to effectuate the proper incentive to sue. *See infra* note 312 and accompanying text. The Missouri split-recovery statute illustrates this principle, as it was enacted under the belief that the "plaintiffs should receive only



addition, full recovery of punitive damages may provide too great an incentive and lead to inefficient and undesirable levels of litigation.<sup>47</sup> For these reasons, a proper allocation of a punitive damage award between the plaintiff and society under a split-recovery statute will not negate the incentive function of punitive damages.

### C. *Compensation for Non-pecuniary Losses*

Another rationale proposed by punitive damage advocates suggests that punitive damage awards serve to compensate victims for typically non-pecuniary injury.<sup>48</sup> The basis behind the rationale for compensation is that punitive damages compensate for those damages that are particularly difficult to ascertain and not generally recoverable through compensatory damages.<sup>49</sup> While compensatory damages may fail to compensate a victim completely for her actual loss, the majority of legal scholars disagree with the use of punitive damages to accomplish this purpose.<sup>50</sup> The Supreme Court has also expressly disavowed the compensation rationale behind punitive damages.<sup>51</sup>

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so much of the award as is necessary to give them incentive to assert justified punitive damage claims." Breslo, *supra* note 15, at 1134. See MO. REV. STAT. § 537.675.2 (Supp. 1992).

47. Breslo, *supra* note 15, at 1130 (stating that full recovery of punitive damages "stimulate[s] excessive and unnecessary litigation"); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1183 (1931) ("[I]nadvertently severe admonition in many cases may be too great a price to pay for the prosecution of a few wrongdoers who might otherwise escape.").

48. Shores, *supra* note 14, at 74. At common law, compensation was a major justification for punitive damage awards because compensatory damages did not include recovery for insult, suffering, mental anguish, or other non-pecuniary losses. Sloane, *supra* note 15, at 481. However, expansion of compensatory damages to include recovery for pain and suffering, mental distress, and hedonic damages decreased the need for punitive damages to serve this gap-filling function. *Id.* at 481-82. Yet, some commentators still maintain that compensatory damages significantly undercompensate for actual damages. Burrows, *supra* note 6, at 447.

49. Injured plaintiffs often "suffer damage to emotional tranquility, family harmony and employment security that is particularly difficult to prove and generally not compensable anyway." David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1298 (1976). See also Burrows, *supra* note 6, at 447 (noting that the compensation theory includes any additional uncompensated mental anguish resulting from the defendant's actions).

50. See Breslo, *supra* note 15, at 1135 (legal scholars "stand in virtual unanimity that punitive damage awards serve the purpose of either punishment or deterrence, but not compensation"); see also *Burke v. Deere & Co.*, 780 F. Supp. 1225, 1237 (S.D. Iowa 1991) (noting that punitive damages "are in no way intended to be compensatory"); Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 1005 (1989) (same). But see Burrows, *supra* note 6, at 451 (proposing that the judiciary has implicitly recognized the compensatory function of punitive damages for many years).

51. *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 350 (1974). The Court clearly enunci-

Scholars and the judiciary enunciate three reasons for their distaste for the compensation rationale.<sup>52</sup> First, using punitive damages to compensate victims for losses not recovered through compensatory damages is inefficient because courts base punitive damage assessments on the defendant's conduct rather than the plaintiff's need for compensation.<sup>53</sup> Second, the compensation rationale discriminates against plaintiffs who do not incur punitive damage type harm because only those victims who incur such harm will be eligible for "full" compensation through punitive damages.<sup>54</sup> Finally, punitive damages circumvent the current system of compensatory damages by allowing victims who are being compensated for all damages for which the legislature chooses to compensate them to recover this additional compensation.<sup>55</sup> For these reasons, the compensation argument behind punitive damages is illusory, and an examination of the effect of split-recovery on this purpose is unnecessary.<sup>56</sup>

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ated that punitive damages do not compensate for injury. *Id.* "Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Id.*

52. See Ausness, *supra* note 1, at 68-69 (the *ad hoc* method of assessment for punitive damages and the inequality of 'fully' compensating victims only in punitive damage claims are two possible reasons); Grube, *supra* note 13, at 852-53 (the judicial attempt to circumvent current compensatory statutes is another objection to the compensation function).

53. Breslo, *supra* note 15, at 1137-38 (most states do not instruct the jury to base their punitive damage allocation on the actual injury or expenses incurred, but instead instruct the jury to make their determination based upon the defendant's wealth). Because courts do not instruct juries to base a punitive damage award on the actual injury incurred by the victim, the award is likely to result in either excess or insufficient compensation for the plaintiff. *Id.*

54. Ausness, *supra* note 1, at 68. On the contrary, some scholars suggest that the difference between the harm suffered by punitive damage claimants and non-punitive damage claimants justifies the discrimination. See Burrows, *supra* note 6, at 447. For example, the malicious conduct behind punitive damages often causes a stronger sense of violation, outrage, and degradation, not present in non-punitive damage type claims, and worthy of compensation. *Id.*

55. Grube, *supra* note 13, at 852-53. If plaintiffs are truly under-compensated, a revision of the tort system better serves the judicial system than allowing the courts to address the need through the arbitrary allocation of punitive damages. *Id.* See also Breslo, *supra* note 15, at 1138.

56. Even if the effects of split-recovery statutes on the compensation purpose of punitive damages were at issue, whether the statutes diminish such a purpose is unclear because punitive damages do not bear any relationship to the amount of non-pecuniary loss. See *supra* note 53 and accompanying text. For example, if a punitive damage claim exceeded the amount of non-pecuniary loss, awarding a portion of the

While the compensation function of punitive damages is illusory, compensation remains a part of any punitive damage award. Punitive damages depend on compensatory damages because a punitive damage claim is only litigable if brought concurrently with an underlying claim for compensatory damages.<sup>57</sup> Additionally, courts in some states instruct juries to consider the severity of injury and harm to the victim when determining the amount of a punitive damage award.<sup>58</sup> Split-recovery, however, will not effect this limited role of compensation in a punitive damage claim because the statutes do not affect the distribution of the punitive damage award until after the allocation of the award.<sup>59</sup>

#### D. Compensation for Litigation Expenses

The final rationale proposed for punitive damages stems from the high cost of litigating most civil suits. Unlike the English system, where losing parties are responsible for all attorney's fees,<sup>60</sup> the United States judicial system does not typically reimburse victorious parties for litigation expenses incurred in bringing suit.<sup>61</sup> Because attorneys' fees alone often account for more than one-third of a potential recovery,<sup>62</sup> the victorious party, who society intends to fully compensate for injury, still incurs substantial loss.<sup>63</sup> Some commentators use this deprivation as a

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windfall to one other than the plaintiff would not diminish the compensation function. Only where the entire punitive damage award did not fully compensate the plaintiff, or the allocation of the award caused the punitive award to fail to meet the non-pecuniary loss, would the split-recovery statute frustrate this illusory compensation purpose.

57. *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991) (stating that a punitive damage claim is auxiliary to a compensatory claim).

58. *Id.* at 266 (noting that a punitive damage claim "contemplates that the trier of fact will fix the award only after giving due consideration to the severity of the injury perpetuated on the injured party by the wrongdoer").

59. *Burrows*, *supra* note 6, at 457 (stating that a state or agency takes no interest in a punitive damage allocation under a split-recovery statute until the issuance of a judgment).

60. See John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1570-71 (1993) (describing generally the English system of awarding attorney costs).

61. *Breslo*, *supra* note 15, at 1136. Commentators speculate on several possible rationales for this exclusion: the fear that attorneys would charge exorbitant legal fees if imposed on opposing parties; the desire not to punish parties for honestly contesting or bringing a reasonable suit; and the confusion, in many cases, as to the prevailing party. *Id.*

62. *Owen*, *supra* note 49, at 1297.

63. *Ausness*, *supra* note 1, at 68 (noting that because of the high costs of litigation, "verdicts that do not include an award of attorneys' fees usually leave the victim in worse financial condition than before his injury").

justification for imposing punitive damages.<sup>64</sup> Thus, by making claims less remunerative to the plaintiff, split-recovery frustrates this proposed function.<sup>65</sup>

While split-recovery admittedly hinders the ability of the plaintiff to offset her litigation expenses, most courts and legal scholars do not regard this as a legitimate legislative objective of punitive damages.<sup>66</sup> As with non-pecuniary losses, using punitive damages as a gap-filler for litigation expenses is both inefficient<sup>67</sup> and inequitable.<sup>68</sup> If compensation for litigation expenses is a legitimate objective of the legislature, the state can employ better methods for achieving their purpose. Instead of indirectly compensating for litigation expenses through punitive damages, the state should order reimbursement for prevailing parties regardless of their role in the dispute<sup>69</sup> or the nature of their case.<sup>70</sup>

In considering a split-recovery statute's effect on the objectives behind punitive damages, a determination of each objective's legitimacy is necessary. Split-recovery statutes do not diminish the overall effectiveness of the widely recognized purposes of punitive damages: punishment, deterrence, and incentive to sue.<sup>71</sup> As for the two compensation purposes behind punitive damages, most courts and scholars disavow

64. See, e.g., Burrows, *supra* note 6, at 447; Ausness, *supra* note 1, at 68-69; Owen, *supra* note 49, at 1297. But see Jeffrey W. Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, 304-05 (1985) (criticizing the proposition of using punitive damages to compensate for litigation costs).

65. Burrows, *supra* note 6, at 448. See Sloane, *supra* note 15, at 482.

66. See *supra* note 51 (emphasizing that punitive damages do not serve a legitimate compensatory function).

67. See *supra* note 53 and accompanying text (noting that punitive damages do not efficiently serve to compensate because courts base their award on the defendant's conduct rather than the plaintiff's loss).

68. Breslo, *supra* note 15, at 1136. Using punitive damages to compensate for litigation expense is "unfair to defendants—who do not have a similar mechanism—and to other plaintiffs who are not fortunate enough to have a suit that the law deems worthy of special punitive damages." *Id.* To compare this with the policy rationale against using punitives to compensate for non-pecuniary losses, see *supra* notes 52-56 and accompanying text.

69. Breslo, *supra* note 15, at 1136 (maintaining that "a proper plan for reimbursing litigation costs would allow victorious parties, regardless of their role in the litigation, to recover their costs").

70. Grube, *supra* note 13, at 864 ("If full compensation is the concern, however, plaintiffs should be awarded litigation costs in all suits—whether or not punitive liability is proven.")

71. See *supra* notes 31-47 and accompanying text.

their underlying rationale.<sup>72</sup> Even accepting these purposes as legitimate, allocation of punitive damages does not effectively, efficiently, or equitably serve to compensate for loss or for expense.<sup>73</sup> Therefore, split-recovery is consistent with the public policy objectives behind punitive damages.

### III. PURPOSES OF SPLIT-RECOVERY

Assuming that punitive damages will continue to be assessed against civil defendants for malicious or reckless conduct,<sup>74</sup> several notable jurists and scholars question whether allocating a portion of the punitive damage award to someone other than the plaintiff better serves the interests of justice.<sup>75</sup> Under the traditional tort system used in most jurisdictions, a plaintiff receives not only recovery for her injury, but the entire punitive damage award.<sup>76</sup> Because the plaintiff's recovery exceeds her actual compensatory damages, she often appears to receive an undeserved windfall.<sup>77</sup>

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72. See *supra* notes 50-51 and accompanying text.

73. See *supra* notes 48-72 and accompanying text.

74. See *supra* note 10 and accompanying text.

75. *Smith v. States Gen. Life Ins. Co.*, 592 So. 2d 1021, 1028 (Ala. 1992) (Shores, J., concurring and dissenting) (stating that eminent jurists and scholars such as Chief Justice Rehnquist and Dean Robert McKay suggest that allocating a portion of a punitive award to one other than the plaintiff better serves the interests of justice).

76. Andrew M. Kenefick, Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699, 1721 (1987) ("Courts have historically imposed punitive damages to punish a culpable defendant."). The only states that prevent a plaintiff from recovering the full punitive damage award are those that disavow any punitive damage recovery and those that apportion a part of the recovery to the state. See *infra* note 118 (listing the five states that do not allow any punitive damage recovery); *supra* note 16 (listing the ten states with split-recovery statutes).

77. Breslo, *supra* note 15, at 1134 n.15. See Grube, *supra* note 13, at 862.

In fact, some jurists suggest that the plaintiff receives the undeserved windfall "simply because there is no one else to receive it." *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs.*, 473 N.W.2d 612, 619 (Iowa 1991). However, the plaintiff is not completely undeserving because she must expend time, effort, and money as the catalyst who brings the defendant to justice for the sake of society. See *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 272 (Colo. 1991) (noting that the judgment against the defendant "results exclusively from the [plaintiff's] time, effort, and expense in the litigation process without any assistance whatever from the state"). Therefore, an allocation of the entire punitive damage award to one other than the plaintiff would also be an injustice.

For a more detailed analysis of the windfall recovery problem of punitive damages, see *infra* text accompanying note 84, and *infra* note 85 and accompanying text.

While most jurists and scholars acknowledge this windfall,<sup>78</sup> they accept it as a necessary consequence of using punitive damages to further society's goals of punishment and deterrence.<sup>79</sup> However, economically these windfalls detract from the usefulness of punitive damages because they create an inefficient allocation of resources and promote frivolous lawsuits by encouraging plaintiffs to take risks in pursuing unnecessary litigation.<sup>80</sup> Split-recovery, on the other hand, alleviates these problems by allocating a portion of the award to a higher-valued use and by discouraging risk-seeking behavior by making the awards less remunerative.<sup>81</sup>

#### A. *Judicious Allocation of Resources*

Promotion of societal norms through deterrence and punishment of outrageous conduct is the central purpose of punitive damage awards.<sup>82</sup> While society receives this benefit regardless of whether it has a pecuniary stake in the award, allocating a portion of the award to an organization designed to benefit society as a whole promotes efficiency as opposed to windfall recovery.<sup>83</sup> Instead of bestowing a windfall recovery on the plaintiff, split-recovery of punitive damage awards allows society to distribute the award to a higher-valued use.<sup>84</sup> For example, portions of those punitive damage awards that are collected could go into a general fund<sup>85</sup> to benefit society as a whole or a special

78. Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900, 1903 (1992) [hereinafter *Economic Analysis*].

79. *Id.* at 1900 (noting that "in attempting to punish or deter the defendant, punitive damages often endow plaintiffs with windfalls that produce inefficient results").

80. *Id.* at 1907.

81. See *Eighth Amendment*, *supra* note 13, at 1691 (split-recovery upholds the purpose of punitive damages "while reducing plaintiff windfall from lawsuits and providing funds for the public's benefit").

82. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (noting that the main goals of punitive damages are punishment and deterrence). See also *Gordon v. State*, 585 So. 2d 1033, 1035 (Fla. Dist. Ct. App. 1991) (stating that "the allowance of punitive damages is based entirely upon considerations of public policy"), *aff'd*, 608 So. 2d 800 (Fla. 1992), and *cert. denied*, 113 S. Ct. 1647 (1993). See *supra* notes 31-38 and accompanying text.

83. See *Smith v. States Gen. Life Ins. Co.*, 592 So. 2d 1021, 1024 (Ala. 1992) (stating that allocation of punitive damages could better serve the purposes behind awarding punitive damages) (quoting *Fuller v. Preferred Risk Life Ins. Co.*, 577 So. 2d 878, 887 (Ala. 1991)).

84. Grube, *supra* note 13, at 854.

85. For example, the money could be paid to the general state treasury to relieve

fund<sup>86</sup> designed to benefit those directly injured by the outrageous conduct of the defendant.<sup>87</sup> In either case, the statute puts the money to a more publicly judicious use than allowing the individual plaintiff to receive a windfall recovery.<sup>88</sup> Therefore, the split-recovery allocation of punitive damages better serves the public by compensating society, as well as the plaintiff, for the harm committed against it.<sup>89</sup>

### *B. Discouragement of Unnecessary Litigation*

While a primary purpose of punitive damages is to encourage plaintiffs to bring suit,<sup>90</sup> allowing a plaintiff to claim the entire punitive damage award leads to risk-seeking behavior that "stimulate[s] excessive and unnecessary litigation."<sup>91</sup> This threat is especially prevalent in today's society where punitive damage awards may exceed actual damages by as much as 526 times the actual damages suffered.<sup>92</sup> By apportioning a part of the punitive damage recovery to one other than the plaintiff, split-recovery helps alleviate this problem by making claims less remunerative and decreasing the plaintiff's incentive to bring suit.<sup>93</sup> Although these statutes will have a disincentive effect on valid

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the tax burden, to a governmental agency designed to regulate misconduct, or to a private medical agency that could use the funds for research. *See* Grube, *supra* note 13, at 854; *Smith*, 592 So. 2d at 1024 (disbursing a portion of the punitive damages award to the state's affiliate of the American Heart Association).

86. For example, some commentators suggest distributing the award to a tort victims' relief fund or a special fund created to compensate other victorious plaintiffs unable to collect against insolvent defendants. *See* Grube, *supra* note 13, at 854; Breslo, *supra* note 15, at 1139-40. For other possible allocation schemes, see *infra* note 252.

87. *Smith*, 592 So. 2d at 1027 (Shores, J., concurring and dissenting) (stating that allocating a portion of a punitive award to either a general or special fund that advances the cause of justice best serves public policy).

88. Grube, *supra* note 13, at 854 ("For instance, the State could deposit the money into its general treasury. The funds could then be used directly to regulate the misconduct for which the punitive damages were assessed, thus more directly deterring such misconduct . . .").

89. *Id.* The Iowa split-recovery statute illustrates this principle by allocating a portion of the punitive damage award to a civil reparations fund when the defendant specifically directs her conduct at society in general as opposed to the plaintiff. *See* IOWA CODE § 668A.1 (1991).

90. *See supra* notes 48-59 and accompanying text.

91. Breslo, *supra* note 15, at 1130 (noting that the potential for high punitive damage recovery leads parties to take risks in pursuing unnecessary litigation).

92. *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993) (plaintiff awarded \$19,000 in compensatory damages and \$10 million in punitive damages). *See generally* Nancy G. Dragutsky, Note, *Walking the Invisible Line: TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), 21 PEPP. L. REV. 909 (1994) (analyzing the Court's decision in upholding the punitive damage award).

93. *Gordon v. State*, 585 So. 2d 1033, 1037 (Fla. Dist. Ct. App. 1991) (stating that

claims as well as frivolous ones, some incentive remains for the plaintiff because the state only appropriates a *portion* of the plaintiff's punitive damage recovery.<sup>94</sup> Even at the expense of a few valid claims, however, the overall disincentive effect of a split-recovery statute may still benefit society.<sup>95</sup> Therefore, these split-recovery statutes serve a valid public policy purpose because, in addition to allocating resources to more publicly efficient uses, they decrease the potential for frivolous litigation resulting from punitive damage awards.

#### IV. CONSTITUTIONALITY OF SPLIT-RECOVERY

Although allocating a portion of punitive damage recoveries to one other than the plaintiff better serves the interests of justice,<sup>96</sup> these statutes raise several potential constitutional problems.<sup>97</sup> These potential constitutional challenges stem from the Takings Clause of the Fifth Amendment,<sup>98</sup> the substantive<sup>99</sup> and procedural Due Process Clauses of the Fifth and Fourteenth Amendments,<sup>100</sup> the Equal Protection

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one of the purposes of split-recovery is discouragement of "punitive damage claims by making them less remunerative"), *aff'd*, 608 So. 2d 800 (Fla. 1992), and *cert. denied*, 113 S. Ct. 1647 (1993); Amelia J. Toy, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 329 n.88 (1991).

94. See *supra* note 46 and accompanying text.

95. Some scholars and jurists suggest that the potential for needless and unnecessary litigation negates the societal benefit of bringing these defendants to justice. See Breslo, *supra* note 15, at 1153 n.96 (arguing that an increase in inadvisable lawsuits may be too high a price to pay to prosecute those defendants who would not be brought to justice without the incentive of punitive damages) (quoting Morris, *supra* note 47, at 1183); *Smith v. Wade*, 461 U.S. 30, 59 (1982) (Rehnquist, J., dissenting) (stating that the encouragement of needless litigation perpetuated by allocating the punitive damage windfall to the plaintiff outweighs the deterrent effects of punitive damages).

96. See *supra* notes 82-95 and accompanying text.

97. While punitive damage awards alone raise several constitutional concerns, see *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (discussing the constitutionality of punitive damages), this Comment will not specifically address these issues.

98. See *infra* notes 104-140 and accompanying text. While the Fifth Amendment Takings Clause does not explicitly apply to state action, the Fourteenth Amendment makes it applicable to the states through the doctrine of incorporation. Grube, *supra* note 13, at 867.

99. See *infra* notes 141-59 and accompanying text.

100. See *infra* notes 160-67 and accompanying text.



Clause of the Fifth and Fourteenth Amendment<sup>101</sup> the Double Jeopardy Clause of the Fifth Amendment,<sup>102</sup> and the Excessive Fines Clause of the Eighth Amendment.<sup>103</sup>

#### A. *Takings Clause*

The Fifth Amendment prohibits the governmental taking of private property for public use without just compensation.<sup>104</sup> As early as 1898, the Supreme Court announced guidelines for determining whether state action hindering a party's right to a judgment passes constitutional scrutiny.<sup>105</sup> To violate the party's constitutional rights, the Court held that the state action must "take away rights which have been once vested by a judgment."<sup>106</sup> Under this premise, once a plaintiff in a civil suit secures a vested property right in a damage award, state action to diminish the award may constitute an unconstitutional taking.<sup>107</sup> However, the same state action may not constitute a taking where the plaintiff never obtains a right to the specific damage award.<sup>108</sup> The ultimate determination of constitutionality thus hinges on whether the private

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101. See *infra* notes 168-81 and accompanying text.

102. See *infra* notes 182-213 and accompanying text. While the Fifth Amendment Double Jeopardy Clause does not explicitly apply to state action, the Fourteenth Amendment makes it applicable to the states through the doctrine of incorporation. Grube, *supra* note 13, at 867.

103. See *infra* notes 214-245 and accompanying text. Application of the Eighth Amendment Excessive Fines Clause to state action through the doctrine of incorporation has drawn less acceptance from the judiciary than other Fifth Amendment clauses. Kirgis, *supra* note 15, at 860-61. In fact, at least one state has declined to make the Excessive Fines Clause applicable to state action. See *People v. Elliot*, 112 N.E. 300, 303 (Ill. 1916). However, Justice O'Connor's strong endorsement for its application in her dissent in *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284 (1989) (O'Connor, J., dissenting), suggests that the Supreme Court would likely conclude that the Excessive Fines Clause does apply to state action through the Fourteenth Amendment. Kirgis, *supra* note 15, at 860-61.

104. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

105. *McCullough v. Virgin*, 172 U.S. 102, 123-24 (1898) (noting that a taking of rights that have been vested by a judgment exceeds the power of a legislature).

106. *Id.* at 123.

107. Lawrence King, *Enforcement of Florida's Punitive Damage Sharing Statute—Is It Constitutional?*, FLA. BAR J., NOV. 1991 AT 63 (citing *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950)). However, state appropriation of a vested right may still not be a taking if the appropriation is "reasonably related to the costs of using the courts." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980).

108. *Eighth Amendment*, *supra* note 13, at 1694 ("If the plaintiff never has a right to the state's share of the punitive damages, the statute cannot be a taking of the plaintiff's property.").

party has a vested property right in the judgment being subject to state action.<sup>109</sup>

To make this determination, a court must first distinguish the type of judgment sought. A party suffering legally recognizable injury generally receives an automatic right to bring suit for compensatory damages.<sup>110</sup> Because this right attaches immediately after the party suffers the injury, the party's interest vests prior to entry of judgment.<sup>111</sup> Therefore, any state action that appropriates a portion of the compensatory award would constitute a taking.<sup>112</sup>

While this characterization exists for compensatory damages, most courts do not extend similar rights to the recovery of punitive damages until the trier of fact renders judgment.<sup>113</sup> Because a party has no immediately vested right to punitive damage recovery, most courts conclude that the party's ability to sue for punitive damages does not con-

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109. Kirgis, *supra* note 15, at 849.

110. *Id.* While this "right" to redress exists at common law in most states, many states specifically guarantee this right in their state constitutions. *Id.* Some courts refuse to even recognize this right, however, and instead claim that a plaintiff has no vested rights in any measure of damages. *See, e.g.,* Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., 473 N.W.2d 612, 619 (Iowa 1991).

111. Kirgis, *supra* note 15, at 851.

112.. *Id.*

113. *Id.* at 850 (stating that contrary to "the right to compensatory damages, a person generally does not have a right to punitive damages"). *See* Gordon v. State, 608 So. 2d 800, 801-02 (Fla. 1992) (stating that the right to punitive damages is not property because it is based entirely on public policy and is subject to changes by the legislature), *cert. denied*, 113 S. Ct. 1647 (1993); Smith v. States Gen. Life Ins. Co., 592 So. 2d 1021, 1026 (Ala. 1992); Seaward Constr. Co. v. Bradley, 817 P.2d 971, 975 (Colo. 1991); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., 473 N.W.2d 612, 619 (Iowa 1991); Ross v. Gore, 48 So. 2d 412, 414 (Fla. 1950) (holding that the plaintiff has no vested right to a punitive damage award until awarded by the trier of fact); DAN B. DOBBS, LAW OF REMEDIES § 3.9 (1973) (noting that no state grants punitive damages as a right).

fer on him any property rights in a potential judgment.<sup>114</sup> As such, state action that appropriates a portion of a potential punitive award does not necessitate a Takings Clause analysis.<sup>115</sup>

The rationale behind the different characterization of punitive and compensatory damages emanates from two distinctive differences between the available remedies. First, unlike the right to compensatory damages guaranteed by common law or state constitutions,<sup>116</sup> the allowance of punitive damages is subject to the discretion of state legislatures.<sup>117</sup> This discretion gives the states authority to condition or even abolish punitive damages.<sup>118</sup> Because of this conditional nature, the plaintiff has no vested right to the punitive damage award until secured by a judgment.<sup>119</sup> Second, unlike a compensatory damage claim which

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114. *Ross*, 48 So. 2d at 414 (holding that “[t]he right to have punitive damages assessed is not property”); *Gordon*, 608 So. 2d at 801-02 (following the decision in *Ross*); *Osborn v. Leach*, 47 S.E. 811, 813 (N.C. 1904). *But see Kirk v. Denver Publishing Co.*, 818 P.2d 262, 266-67 (Colo. 1991) (holding that a punitive damage award is a private property right). While only a few decisions specifically analyze the property issue, this deficiency stems not from ambivalence but from the broad acceptance of the principle that a plaintiff receives no vested rights in the assessment of punitive damages. *Kirgis*, *supra* note 15, at 857 n.47.

115. *Grube*, *supra* note 13, at 873-74 (noting that under accepted legal theory “[i]f the plaintiff has no vested property right in potential punitive damages, then the State does not ‘take’ the plaintiff’s property for purposes of the Fifth Amendment when it requires that one third of these damages be paid to the state”).

116. *See supra* note 110 (noting that common law guaranteed the right to redress for compensatory damages).

117. *Gordon* 608 So. 2d at 801 (stating that any punitive damage award is subject to the plenary authority of the legislature); *Shepherd Components*, 473 N.W.2d at 612 (noting that punitive damages “are not allowed as a matter of right and are discretionary”). *But see Burrows*, *supra* note 6, at 454 (maintaining that the legislature has only limited discretion because punitive damages are derived from common law as well as statutory pronouncement).

118. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1991) (Scalia, J., concurring) (noting that courts and state legislatures are given the power to restrict and even abolish the practice of awarding punitive damages); *Gordon*, 608 So. 2d at 801 (stating that state legislatures have the power to condition or abolish punitive damages as public policy dictates). In fact, the legislatures in five states completely bar punitive damage recovery. Harold Lee Schwab, *The State of Punitive Damages: Constitutional Law, Pretrial Strategy and Trial Techniques*, 41 FED’N INS. & CORP. COUNS. Q. 57, 63 (1990) (the five states that do not allow punitive damage recovery are Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington).

119. *Gordon*, 608 So. 2d at 801 (stating that the plaintiff has no vested right to recovery of punitive damages because the award is strictly subject to the authority of the legislature). *See also Kirk v. Denver Publishing Co.*, 818 P.2d 262, 274 (Colo. 1991) (Rovira, J. dissenting) (stating that because a punitive damage claim is conditioned by the legislature, the entire judgment does not immediately vest in the plaintiff). *But see Burrows*, *supra* note 6, at 456 (suggesting that this conclusion is faulty because it confuses the right of the legislature to condition a punitive award with the plaintiff’s right to collect the full amount awarded by the jury); *Kirk*, 818

courts can independently award, courts can only award punitive damages in conjunction with a successful claim for compensatory damages.<sup>120</sup> Thus, a plaintiff is unable to secure an immediate property right in the punitive damage award until it becomes viable at entry of judgment.<sup>121</sup>

Two state supreme courts illustrate this interpretation of the Takings Clause. The Florida Supreme Court held that the Fifth Amendment challenge to the state's split-recovery allocation system of punitive damages was not valid in *Gordon v. State*.<sup>122</sup> Because the recovery of punitive damages was subject to the discretion of the legislature, the court found that the plaintiff never obtained a property right in the punitive damage claim.<sup>123</sup> Likewise, the Iowa Supreme Court, in *Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc.*,<sup>124</sup> held that Iowa's split-recovery allocation system did not violate the plaintiff's Fifth Amendment rights because the discretionary nature of punitive damages vested no immediate rights in the plaintiff before entry of a judgment.<sup>125</sup>

Contrary to these rulings, in *Kirk v. Denver Publishing Co.*,<sup>126</sup> the Colorado Supreme Court applied an alternate analysis in holding that Colorado's punitive damage allocation system violated the Fifth Amendment Takings Clause.<sup>127</sup> While the court based its decision on a broader interpretation of the property interests of a civil plaintiff,<sup>128</sup> the de-

P.2d at 272 (noting that the mere fact that the existence of punitive damages is subject to the discretion of the legislature does not guarantee the statute's constitutionality).

120. Kirgis, *supra* note 15, at 851.

121. *Id.*

122. 608 So. 2d 800, 801-02 (Fla. 1992), *cert. denied*, 113 S. Ct. 1647 (1993).

123. *Id.*

124. 473 N.W.2d 612 (Iowa 1991).

125. *Id.* at 619.

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

127. *Id.* at 273. Justice Shaw, the lone dissenting judge in *Gordon* also proposed this alternate analysis. *Gordon*, 608 So. 2d at 802 (Shaw, J., concurring and dissenting).

128. *Kirk*, 818 P.2d at 267. The court tried to broaden the typical definition of property to include a "multiplicity of interests" including "everything that is the subject of ownership, whether tangible or intangible, as well as those rights and interests which have value to the owner." *Id.* (citing BLACK'S LAW DICTIONARY 1095 (5th ed. 1979)). The court based its definition on a liberal interpretation of Supreme Court takings cases. *See Burrows, supra* note 6, at 461-62 (citing *Penn Cent. Transp. v. City of New York*, 438 U.S. 104 (1978); *Armstrong v. United States*, 364 U.S. 40 (1960)).

termining factor was a provision in the Colorado statute disavowing any state interest in the punitive damage award prior to the payment becoming due.<sup>129</sup> Interpreting the provision as an indication of the legislature's intent to treat a claim for punitive damages as a vested right, the court concluded that the plaintiff's right to the award superseded the state's interest.<sup>130</sup> Relying on the Supreme Court's decisions in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*<sup>131</sup> and *United States v. Sperry Corp.*,<sup>132</sup> the court then concluded that the state appropriation of the vested property constituted a taking because it did not "bear a reasonable relationship to the governmental services provided."<sup>133</sup>

Because of the disparity in Takings Clause decisions among the states,<sup>134</sup> only the Supreme Court can ultimately resolve the question of constitutionality.<sup>135</sup> However, if current commentary and accepted legal theory accurately project the modern trend, the Florida and Iowa decisions appear to be correct.<sup>136</sup> While some commentators limit their acceptance of a statute's constitutionality according to the statute's language,<sup>137</sup> others argue that split-recovery statutes are constitutional re-

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Instead of focusing on whether the plaintiff had a vested right to the appropriated property, the court in *Kirk* focussed on whether "fairness and justice" necessitate that the state appropriation be compensated. Burrows, *supra* note 6, at 461.

129. *Kirk*, 818 P.2d at 267. See COLO. REV. STAT. § 13-21-102(4) (1990) ("Nothing in this subsection (4) shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due.").

130. *Kirk*, 818 P.2d at 267 (stating that "the statutory disavowal . . . of any state interest in a claim for exemplary damages 'at any time prior to payment becoming due' is an implicit legislative acknowledgement of the property interest created in the judgment creditor by virtue of the judgment itself").

131. 449 U.S. 155 (1980). In *Webb's*, the Supreme Court acknowledged that a state may deprive a private party of his property if necessary to promote general welfare. *Id.* at 163. However, the state's appropriation of interest on a court mandated deposit fund violated the Takings Clause because the state action bore no reasonable relation to "the costs of using the courts." *Id.*

132. 493 U.S. 52 (1989). In *Sperry*, the Supreme Court used a similar analysis to that used in *Webb's* to find that a 1.5% state deduction from an arbitration award for administrative expenses was reasonable and not violative of the Takings Clause. *Id.* at 62.

133. *Kirk*, 818 P.2d at 270 (stating that the state appropriation was not reasonable because the percentage prevented the statute from qualifying as a valid tax).

134. Compare *Gordon v. State*, 608 So. 2d 800 (Fla. 1992) (split-recovery held constitutional on Takings grounds), *cert. denied*, 113 S. Ct. 1647 (1993) and *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc.*, 473 N.W.2d 612 (Iowa 1991) (constitutional) with *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991) (unconstitutional).

135. Although the Supreme Court denied certiorari on these constitutional questions in *Gordon*, *Gordon v. Florida*, 113 S. Ct. 1647 (1993), increased litigation on the matter will likely continue until the Supreme Court definitively rules on the issue.

136. See *Gordon*, 608 So. 2d at 800; *Shepherd Components*, 473 N.W.2d at 612.

137. Kirgis, *supra* note 15, at 855 ("Any interpretation that gives the plaintiff a

ardless of their statutory provisions.<sup>138</sup> Either way, the vast majority of commentators agree that without a provision granting them special rights, plaintiffs do not secure vested property rights in punitive damage claims.<sup>139</sup> Therefore, under most split-recovery statutes, state appropriation of a portion of a punitive damage award does not violate the Takings Clause of the Fifth Amendment.<sup>140</sup>

### B. *Substantive Due Process*

Besides prohibiting government takings of protectable private property, the Fifth Amendment to the Constitution also prohibits the government from depriving a person of private property without affording due process of law.<sup>141</sup> This right to due process consists of both procedur-

property interest in the entire award before the government takes its share will likely doom state allocation on Takings Clause grounds.”).

138. *Kirk*, 818 P.2d at 273 (Rovira, J., dissenting). The dissent in *Kirk* argued that even the Colorado statute survived Takings Clause challenges because the plaintiff only secured a constitutionally protectable property interest in the share of the punitive damages award the statute allocated to him. *Id.* at 275 (Rovira, J., dissenting). The dissent reasoned that because a claim for punitive damages is a statutory right subject to the discretion of the legislature, the plaintiff took the punitive award subject to the statutory conditions imposed by the legislature. Consequently, the entire judgment never vested with the plaintiff. *Id.* at 273-75 (Rovira, J., dissenting).

139. Grube, *supra* note 13, at 873 (“The overwhelming majority of commentators have agreed . . . that plaintiffs do not have a right to punitive damages and that punitive damages are awarded at the discretion of trier of fact.”). See also *American Bank & Trust Co. v. Community Hosp.*, 683 P.2d 670, 676 (Cal. 1984) (“It is well established that a plaintiff has no vested property right in a particular measure of damages, and that the Legislature possesses broad authority to modify the scope and nature of such damages.”); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS*, § 2, at 14 (5th ed. 1984) (“It is generally agreed that punitive damages are a windfall to the plaintiff and not a matter of right, and that it is always within the discretion of the jury or trial judge to withhold them.”); Long, *supra* note 10, at 882 (“The plaintiff, as the incidental recipient, generally has no right to punitive damages but rather receives them only if and as they are awarded by the jury (or by the court in the absence of a jury).”); Shores, *supra* note 14, at 90 (“Courts have uniformly held that the plaintiff has no personal right to punitive damages.”); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 292 (1983) (“As courts have uniformly held, no plaintiff has a right to punitive damages . . .”). But see Burrows, *supra* note 6, at 454 (“[A]s long as punitive damages are allowed by the common law of a state, a constitutionally protected property right attaches to the jury’s reasonable determination of punitive damages so that the state may not confiscate from the plaintiff a piece of the award for itself.”).

140. Grube, *supra* note 13, at 873-74.

141. U.S. CONST. amend. V. The Fourteenth Amendment also prohibits the govern-

al and substantive components.<sup>142</sup> To find a violation of due process, a court must first conclude that the disputed state regulation infringes upon a protectable interest.<sup>143</sup> Upon such a finding, substantive due process then requires that the disputed statute be rationally related to a legitimate governmental purpose.<sup>144</sup> Therefore, a split-recovery statute will not violate substantive due process unless a court finds both a protectable property interest in a punitive damage claim and no rational relationship between the statute and a legitimate governmental objective.<sup>145</sup>

Because courts generally hold that a plaintiff secures no vested property right in a punitive damage claim,<sup>146</sup> most split-recovery statutes fail this initial criterion and, thus, do not violate due process.<sup>147</sup> Even upon a finding of a protectable property interest,<sup>148</sup> a split-recovery statute will not violate substantive due process if the legislation "bears a rational relation to legitimate legislative objectives."<sup>149</sup> Of the two

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ment from depriving a person of private property without due process of law. U.S. CONST. amend. XIV.

142. J. Michael McGuinness & Lisa A. McGuinness Parlagreco, *The Reemergence of Substantive Due Process as a Constitutional Tort: Theory, Proof, and Damages*, 24 NEW ENG. L. REV. 1129, 1132-33 (1990). For procedural due process analysis, see *infra* notes 160-67 and accompanying text.

143. U.S. CONST. amend. V (the Constitution limits its protection to life, liberty, or property).

144. *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (holding that laws that bear "a reasonable relation to a proper legislative purpose," satisfy substantive due process).

145. Kirgis, *supra* note 15, at 847-48 n.27.

146. See *supra* note 139 (demonstrating that the overwhelming majority of courts and commentators agree that a plaintiff does not secure a protectable property right in a potential punitive damage claim).

147. Courts that found no protectable property interest in punitive damages have not expressly differentiated between Due Process claims and Takings claims because each claim lacks the required property interest. *Id.* See, e.g., *Gordon v. State*, 608 So. 2d 800 (Fla. 1992), *cert. denied*, 113 S. Ct. 1647 (1993); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612 (Iowa 1991).

148. While most courts uniformly maintain that a plaintiff secures no vested personal right to a punitive damage claim, at least two courts have found an inherent property right in such a claim. See, e.g., *Shores*, *supra* note 14, at 90 ("Courts have uniformly held that the plaintiff has no personal right to punitive damages."). *McBride v. General Motors Co.*, 737 F. Supp. 1563, 1573 (M.D. Ga. 1990) (implying that Georgia common law guarantees a protectable property right in a punitive damage claim); *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 267 (Colo. 1991) (noting that Colorado's split-recovery statute implicitly recognizes the property interest inherent in a punitive damage claim).

For further analysis on whether a protectable property right vests in a claim for punitive damages, see *supra* notes 109-40 and accompanying text.

149. *Gordon*, 608 So. 2d at 802 (Shaw, J., concurring in part and dissenting in part). The dissent in *Gordon* outlines an approach for courts to take in making this determination. *Id.* at 803 (Shaw, J., concurring in part and dissenting in part). To deter-

states that have expressly ruled on the underlying purpose of a split-recovery statute, each reached a different conclusion about its respective statute's legitimacy.<sup>150</sup>

In *McBride v. General Motors Corp.*, a district court in Georgia found that the state's split-recovery statute was not rationally related to a legitimate purpose.<sup>151</sup> The court reasoned that the promotion of the economic viability of Georgia businesses was the true objective of the Georgia split-recovery statute.<sup>152</sup> The court based its reasoning on the fact that Georgia split-recovery statute applied only to product liability awards.<sup>153</sup> Based on this finding, the court concluded that this objective was not a legitimate state interest and, thus, the statute violated the Due Process Clause.<sup>154</sup>

In *Gordon v. State*, however, the Florida Supreme Court found that Florida's split-recovery statute did bear a rational relation to a legitimate governmental objective.<sup>155</sup> The *Gordon* court reasoned that the

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mine whether an encroachment by the state passes constitutional scrutiny, courts should consider:

the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of the individual's right being infringed upon; the nexus between the means chosen by the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights.

*Id.* (Shaw, J., concurring in part and dissenting in part).

150. *See, e.g., McBride*, 737 F. Supp. at 1579 (finding the statute unconstitutional on due process grounds); *Gordon*, 608 So. 2d at 802 (upholding the statute as constitutional).

151. *McBride*, 737 F. Supp. at 1579 (finding that the statute bore "no legitimate purpose").

152. *Id.* at 1570 ("This provision is a thinly disguised arbitrary restraint in favor of business seeking to deter punitive damage actions against egregious business practices by reducing incentives for injured plaintiffs to take action to punish and deter such practices.").

153. *Id.* at 1567. *See* GA. CODE ANN. § 51-12-5.1(e)(1) (Michie 1993). By restricting the awards to certain classes of torts, the legislature made the statute incompatible with any potential legitimate objectives such as revenue raising or reduction of plaintiff's incentive. *McBride*, 737 F. Supp. at 1570. Therefore, the legislature's arbitrary classification of when to apply the statute led directly to the court's finding that the statute was unconstitutional. *Id.* at 1567.

154. *Id.* at 1577, 1579 ("Nor is the State's purpose, as expressed, legitimate."). In addition to violating the Due Process Clause, the court also held that the statute violated the Excessive Fines and Equal Protection clauses of the Constitution. *Id.* at 1579.

155. *Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992), *cert. denied*, 113 S. Ct. 1647



Florida statute served dual legislative objectives: to raise money for the state treasury and to reduce the incentive for plaintiffs and their attorneys to bring punitive damage claims.<sup>156</sup> Because the court accepted the legitimacy of these objectives, it held that the Florida split-recovery statute was constitutional.<sup>157</sup> Applying the reasoning of *Gordon* and *McBride*, a statute demonstrating the type of objectives advanced in *Gordon*, without the arbitrary classification enunciated in *McBride*, satisfies substantive due process.<sup>158</sup> Regardless of this determination, however, most split-recovery statutes do not implicate the Due Process clause because a plaintiff typically holds no protectable property right in a potential punitive damage award.<sup>159</sup>

### C. Procedural Due Process

The guarantees of procedural due process require courts to grant parties notice and the opportunity to be heard.<sup>160</sup> Like substantive due process, procedural due process flows from the Fifth and Fourteenth Amendments to the United States Constitution.<sup>161</sup> Similar to a substantive due process analysis, parties must establish a protectable property right before the guarantees of procedural due process apply.<sup>162</sup>

Assuming, *arguendo*, that a court has found such a protectable property interest in a punitive damage claim,<sup>163</sup> the next question is whether the state action implicates the Due Process Clause. The Supreme Court answered this question in the negative in *Pacific Mutual Life Insurance Co. v. Haslip*.<sup>164</sup> In *Haslip*, the Court held that the common law method of assessing punitive damages did not violate due process.<sup>165</sup> The Court maintained that the "issue of whether the plaintiff receives the punitive damage award is irrelevant because the defendant could get the same process whether the money goes to the plaintiff or to the State."<sup>166</sup> Therefore, regardless of the state's appropriation, split-

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(1993).

156. *Id.*

157. *Id.*

158. Kirgis, *supra* note 15, at 847-48 n.27.

159. *See supra* text accompanying notes 146-47.

160. *Fuentes v. Shevin*, 407 U.S. 67, 79-80 (1972).

161. *See* U.S. CONST. amend. IV; U.S. CONST. amend. XIV.

162. U.S. CONST. amend. V (stating that no person shall "be deprived of life, liberty, or property, without due process of law"). *See supra* text accompanying note 145.

163. *See supra* note 150 and accompanying text.

164. 499 U.S. 1 (1991).

165. *Id.* at 17 ("[E]very state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process.").

166. Grube, *supra* note 13, at 874.

recovery statutes do not implicate procedural due process guarantees in cases between private parties.<sup>167</sup>

#### D. Equal Protection

While each of the preceding constitutional challenges depends on a finding of a protectable property interest,<sup>168</sup> a successful equal protection challenge does not require such a determination.<sup>169</sup> Generally, the constitutional guarantee of "equal protection of the laws"<sup>170</sup> means that no state may treat similarly situated persons differently under the law.<sup>171</sup> However, unless the class being discriminated against is a suspect class,<sup>172</sup> a state can satisfy equal protection questions by merely showing that the discriminatory classification bears a rational relation to a legitimate state interest.<sup>173</sup> Thus, a split-recovery statute may raise

167. Kirgis, *supra* note 15, at 847-48 n.27 ("State allocation may survive in any event since the Supreme Court has determined that existing common-law methods generally provide enough protection in cases solely between private parties.").

168. See *supra* notes 106, 145, and 162 and accompanying text.

169. Kirgis, *supra* note 15, at 856 n.90.

170. U.S. CONST. amend. XIV.

171. *Dorsey v. Solomon*, 435 F. Supp. 725, 732-33 (D.C. Md. 1977).

172. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). Courts employ a strict scrutiny standard in determining the legitimacy of classifications when they involve members of a "suspect" class. *Id.* The classes typically considered suspect are those which society has traditionally subjected to "a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Examples of suspect classifications include race, national origin, and alienage. *Massachusetts*, 427 U.S. at 313 n.4.

Even if a state classification does not involve the rights of a suspect class, a plaintiff can still secure strict scrutiny analysis by proving that the state action "interferes with the exercise of a fundamental right." *Id.* at 312. Although plaintiffs may argue that split-recovery statutes deny them the fundamental right to punitive damage recovery, the wide latitude states have to condition or even abolish punitive damages suggests that this argument would likely fail. Kirgis, *supra* note 15, at 856 n.90. See *supra* note 118 (states given discretion to condition or abolish punitive damages); 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 14.7 (2d ed. 1992) (summarizing equal protection analysis).

Absent a finding of a suspect class, courts also impose heightened scrutiny for discriminatory classifications involving gender and illegitimacy. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting that intermediate scrutiny applies to all "classifications based on sex or illegitimacy"). However, most split recovery statutes do not implicate such scrutiny because they do not typically differentiate based on either gender or illegitimacy.

173. Kirgis, *supra* note 15, at 856 n.90. See ROTUNDA & NOWAK, *supra* note 172,

equal protection questions if the statute differentiates between the types of cases and plaintiffs subject to the state allocation.<sup>174</sup>

Upon determining that a split-recovery statute applies to only certain classes, the court must apply the "rational basis test" to ascertain the legitimacy of the state's interest.<sup>175</sup> In *American Bank & Trust Co. v. Community Hospital, Inc.*,<sup>176</sup> the California Supreme Court held that because reducing medical malpractice insurance costs was a legitimate objective and that the statute in question bore a rational relation to that objective, the state's statute, which only applied to malpractice cases, did not violate equal protection principles.<sup>177</sup>

Contrary to such holdings, in *McBride v. General Motors Corp.*,<sup>178</sup> the district court in Georgia found that Georgia's split-recovery statute failed to rationally further the state's alleged revenue raising purpose because "the differentiation [bore] no real relationship to the object or purposes of the legislation."<sup>179</sup> While the district court in *McBride* refused to accept the state's purported revenue related purpose, most courts give broad deference to the state legislature's judgment.<sup>180</sup> Therefore, the decision in *McBride* may have limited application to other state's split-recovery statutes.<sup>181</sup> Under either analysis, however, a split-recovery statute that applies only to certain classes will not violate the Equal Protection Clause if the statute discriminates for a rational and legitimate purpose.

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§ 14.7 (summarizing equal protection analysis).

174. Kirgis, *supra* note 15, at 856 n.90. See IOWA CODE § 668A.1 (1987) (making the split-recovery statute applicable only when the plaintiff was not the intended recipient of the defendant's conduct); GA. CODE ANN. § 51-12-5.1(2) (Michie 1987) (only applicable in products liability cases); KAN. STAT. ANN. § 60-3402 (Supp. 1993) (only applicable in medical malpractice cases).

175. Kirgis, *supra* note 15, at 856 n.90.

176. 683 P.2d 670 (Cal. 1984).

177. *Id.* at 679. Although the statute in question concerned periodic payment provisions rather than state appropriation, the reasoning in the case is analogous to the treatment of split-recovery of punitive damages. *Id.* at 678.

178. 737 F. Supp. 1563 (M.D. Ga. 1990).

179. *Id.* at 1570. The statute bore no rational relationship because it arbitrarily discriminated between products liability plaintiffs who could retain only 25% of any punitive damages awarded and plaintiffs in other areas who could retain 100% of any punitive damages awarded. *Id.*

180. Kirgis, *supra* note 15, at 856 n.90 ("Traditionally, under the rational basis test of a state's interest, courts have given almost unlimited deference to the judgment of the state legislature."). See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

181. Kirgis, *supra* note 15, at 856 n.90.

*E. Double Jeopardy*

While the Fifth Amendment of the United States Constitution expressly applies to government appropriation of vested property through the Takings and Due Process clauses, the amendment also provides private parties protection against double jeopardy.<sup>182</sup> The Double Jeopardy Clause maintains that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."<sup>183</sup> The Supreme Court has consistently held that this clause provides protection against the peril of multiple punishment and against multiple prosecution for the same offense.<sup>184</sup> However, the Court limits the clause's applicability to punishment or prosecution that is "essentially criminal."<sup>185</sup>

In determining whether a subsequent action is essentially criminal, the specific label given a type of proceeding is not determinative.<sup>186</sup> Instead, a court must evaluate the purpose of the proceedings to determine whether it is criminal in nature.<sup>187</sup> If the purpose of the subse-

182. U.S. CONST. amend. V.

183. *Id.*

184. *United States v. Halper*, 490 U.S. 435, 440 (1989). Split-recovery statutes may implicate either of these prohibitions in several ways. Kirgis, *supra* note 15, at 864-65. If the state brings a criminal action against a defendant, it may implicate the prohibition against multiple prosecutions for the same offense by retrying the case civilly. *Halper*, 490 U.S. at 444 (noting that in an analogous Supreme Court case, the defendants unsuccessfully argued that due to the double jeopardy prohibition against multiple prosecution, a prior criminal case forbid a later civil case). Even if the state dispenses with this prohibition, a civil suit that follows a successful criminal suit and that imposes a fine may still implicate double jeopardy by violating the proscription against multiple punishment. *Id.*

185. *Breed v. Jones*, 421 U.S. 519, 528 (1975). *See also Helvering v. Mitchell*, 303 U.S. 391, 398 (1938) (noting that the Double Jeopardy Clause "prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether (the statute in question) imposes a criminal sanction").

While the Court prohibits multiple criminal punishment for the same offense, the Court has held that the government can bring dual criminal and civil actions for a single offense without implicating the Double Jeopardy Clause. *United States ex. rel. Marcus v. Hess*, 317 U.S. 537, 551 (1943).

186. *Halper*, 490 U.S. at 447-48 (stating that the type of proceedings is of little importance in determining the nature of the action because the "notion of punishment . . . cuts across the division between the civil and the criminal law").

187. *Id.* at 447 n.7 ("[W]e hold merely that in determining whether a particular civil sanction constitutes criminal punishment, it is the purpose actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated."). The Court used a similar analysis in *Breed* when

quent proceedings is punitive, rather than remedial, the action implicates the Double Jeopardy Clause because of its criminal nature.<sup>188</sup> The central idea behind this limitation is that the government should not be able to use its resources and position to subject a defendant to repeated and excessive punishment or prosecution.<sup>189</sup> Therefore, in determining whether split-recovery statutes subject an accused to double jeopardy, a court must assess the character of the state action.<sup>190</sup>

While the Supreme Court has yet to apply the above analysis to split-recovery, several cases using this reasoning suggest that split-recovery statutes may implicate double jeopardy. In *United States ex rel. Marcus v. Hess*,<sup>191</sup> the Court held that punishment in a prior criminal prosecution did not preclude the government from recovering its portion of the civil damages in a *qui tam* action.<sup>192</sup> Although the case did not discuss the constitutionality of split-recovery statutes or even punitive damages, the analysis of recovery in a *qui tam* action is analogous to modern split-recovery statutes in that the government receives a portion of the plaintiff's recovery.<sup>193</sup> The Court maintained that civil actions that allocate an award between the government and a private party implicate double jeopardy when they are punitive or vindictive rather than remedial.<sup>194</sup> While ultimately ruling that double jeopardy was not applicable, the Court based its decision on the determination that the *qui tam* proceeding was remedial and did not impose a criminal sanction.<sup>195</sup> There-

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it determined the criminal nature of the proceedings using three factors: the purpose of the proceedings, the potential consequences, and whether the government brought the action. *Breed*, 421 U.S. at 528.

188. *Halper*, 490 U.S. at 448-49 (holding that "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution").

189. *Kirgis*, *supra* note 15, at 866.

190. *See Halper*, 490 U.S. at 447 (maintaining that double jeopardy violations "can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state").

191. 317 U.S. 537 (1943).

192. *Id.* at 549. In a *qui tam* action, a private party brings suit in the name of the government for an offense committed against society. *United States ex rel. Givler v. Smith*, 760 F. Supp. 72, 72 n.1 (E.D. Pa. 1991).

193. While the private party in a *qui tam* action receives a portion of the recovery for her effort, the government receives the majority of the recovery. *Halper*, 490 U.S. at 444 n.5. The Court noted that in *Hess*, the *qui tam* provisions of the statute in question limited the private party plaintiff's share to a maximum of 25% of the total award. *Id.* at 444. Similarly, under a split-recovery statute, the government receives a portion of any punitive damages awarded to a private plaintiff bringing suit on behalf of society to punish and deter future tort-feasors. *See supra* notes 31-38 and accompanying text.

194. *Hess*, 317 U.S. at 548-49.

195. *Id.* at 549.

fore, if the underlying purpose of the state action is punitive, as in split-recovery, the decision in *Hess* implies that the Court would consider the state action criminal and subject it to double jeopardy scrutiny.<sup>196</sup>

In *United States v. Halper*,<sup>197</sup> the Supreme Court again implicitly suggested that split-recovery of punitive damages implicates double jeopardy. In *Halper*, the Court held that when the government criminally prosecutes and punishes a defendant, any subsequent civil suit that does not serve a strictly remedial function violates the Double Jeopardy Clause.<sup>198</sup> While the Court maintained that this type of suit between private parties does not implicate double jeopardy, it emphasized that this same suit, when instigated by the government, infringes upon a defendant's double jeopardy rights.<sup>199</sup> Although the Court left unresolved the question of whether an action brought by a private party on behalf of the government was constitutional,<sup>200</sup> it suggested that this type of suit, if punitive, would violate double jeopardy.<sup>201</sup> Therefore, if the government maintains an interest in a punitive damage claim brought by a private party, as in suits brought under a split-recovery statute, the state appropriation may violate double jeopardy.<sup>202</sup>

The Court's noted reluctance to resolve the issue, however, leaves the question as to whether double jeopardy applies to split-recovery unsettled.<sup>203</sup> While the Court in *Halper* held that the Double Jeopardy

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196. *See id.* at 548-49.

197. 490 U.S. 435 (1989).

198. *Id.* at 451 ("[T]he only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole.").

199. *Id.* at 450.

200. *Id.* at 451 n.11. The Court noted that, like the decision in *Hess*, it was leaving the constitutional question of double jeopardy unresolved. *Id.*

201. Kirgis, *supra* note 15, at 866. The Court specifically noted that its decision in *Hess* assumed that civil litigation instigated by the government and a private party jointly implicates double jeopardy. *Halper*, 490 U.S. at 451 n.11 ("In *Hess*, the Court assumed but did not decide that a *qui tam* action could give rise to double jeopardy."). The Court reiterated this assumption in a later case when it noted that the Double Jeopardy Clause limits the amount the government may recover in a civil suit, after fully punishing the defendant criminally. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.21 (1989).

202. Kirgis, *supra* note 15, at 866.

203. *Halper*, 490 U.S. at 451 n.11. *See* Kirgis, *supra* note 15, at 19. The district court in Georgia is the only lower court to rule whether split-recovery violates double jeopardy. *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990).

Clause prevents the government from instigating a subsequent claim for punitive damages in a civil action, the Court focused on the government's initiative in bringing the suit.<sup>204</sup> Unlike the governmental action in *Halper*, the government plays no role in instigating a claim for punitive damages under a split-recovery statute.<sup>205</sup> Moreover, a claim for punitive damages under a split-recovery statute differs from a *qui tam* action in which the plaintiff sues in the name of the government<sup>206</sup> because the government under a split-recovery statute is not a named party to the action.<sup>207</sup> Therefore, a court "may find that the mere diversion of money to the government does not by itself distinguish that type of action from a private civil action which is immune from double jeopardy analysis."<sup>208</sup>

In the event a court rejects this proposition and holds split-recovery accountable to double jeopardy protection, the next concern becomes whether a specific split-recovery allocation violates either the prohibition against multiple punishment or multiple prosecution.<sup>209</sup> To make this determination, courts must individually examine each case to ascertain whether the defendant has been subject to previous criminal prosecution,<sup>210</sup> whether the portion of the punitive damage recovered by the

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Relying on the Court's decision in *Browning-Ferris*, the court in *McBride* held that split-recovery transforms the civil nature of punitive damage recovery into an action implicating the Double Jeopardy Clause. *Id.* at 1578. However, this decision is tenuous at best because the "court had little justification or reason to find that awarding a portion of the award to the State would alter the civil status of the action." Grube, *supra* note 13, at 869. Because the district court in *McBride* does not adequately substantiate its holding, the precedential value of the ruling is suspect. *Id.* See also Kirgis, *supra* note 15, at 856 n.90 ("The decision in *McBride* . . . may have little or no precedential value").

204. *Halper*, 490 U.S. at 450 (limiting its holding to actions where the government "bring[s] a separate civil action based on the same conduct").

205. No state split-recovery statute awards the government any right to take an active role in a punitive damage claim until the court renders a judgment. See, e.g., COLO. REV. STAT. § 13-21-102(4) (1989) ("Nothing in this subsection (4) shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due.").

206. See Kirgis, *supra* note 15, at 866.

207. *Id.*

208. *Id.* Commentators attribute this interpretation to a greater emphasis on the general theory behind double jeopardy, that the government should not be able to use resources and position to subject defendants to repeated and excessive prosecution. *Id.*

209. *United States v. Halper*, 490 U.S. 435, 440 (1989).

210. See *id.* (noting that double jeopardy protection only arises upon the "second" prosecution or upon "multiple" punishments for a single offense). While the Double Jeopardy Clause may prevent a subsequent criminal prosecution after a civil punitive recovery, a civil punitive recovery alone does not violate double jeopardy since the defendant has not been subject to a second prosecution. See Kirgis, *supra* note 15, at

state exceeds the full civil penalty allowed by law,<sup>211</sup> or whether the defendant was subject to multiple punitive damage awards.<sup>212</sup> However, before making any such determination, the court must first decide if split-recovery statutes are criminal in nature so as to give rise to double jeopardy protection.<sup>213</sup>

#### F. Excessive Fines

The Eighth Amendment prevents the imposition of "excessive fines" by any state<sup>214</sup> or the federal government.<sup>215</sup> While many civil fines are excessive, the Supreme Court has ruled that only those fines imposed in actions that are criminal in nature are subject to a constitutional determination of excessiveness.<sup>216</sup> The reason for this distinction arises from the traditional notion of the Excessive Fines Clause as protection against governmental abuse of its power, rather than protection from civil penalties.<sup>217</sup> As in double jeopardy analysis,<sup>218</sup> the specific

867 (noting that a civil punitive recovery must prohibit any subsequent criminal action).

211. *Halper*, 490 U.S. at 450 (noting that nothing "precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive").

Additionally, if the specific split-recovery statute allocates the state's share of the award directly to a non-governmental agency, the statute can avoid violating the prohibition against multiple punishment or prosecutions by the government. *See infra* notes 300-03 and accompanying text; *see, e.g.*, FLA. STAT. ANN. § 768.73(4) (West Supp. 1993) (awarding a portion of the punitive damages award to the state's Public Medical Assistance Trust Fund); OR. REV. STAT. § 18.540(1)(c) (1993) (awarding a portion of the punitive damage award to the state's Criminal Injuries Compensation Account).

212. *Kirgis*, *supra* note 15, at 867. While the government may not have brought any criminal action against the defendant, imposing multiple civil penalties on the defendant through multiple punitive damage awards could violate the prohibition against multiple punishment for the same offense. *Id.*

213. *See supra* note 185 and accompanying text.

214. *See supra* note 103 (discussing incorporation of the Excessive Fines Clause).

215. U.S. CONST. amend. VIII.

216. *See Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (noting that the traditions of the Eighth Amendment suggest "an intention to limit the power of those entrusted with the criminal-law function of government").

217. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989) ("Simply put, the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purpose of civil damages."). *See Eighth Amendment*, *supra* note 13, at 1695.

218. *See supra* note 186.



label given to a type of proceeding is not determinative of the civil or criminal nature of the action.<sup>219</sup> Even in civil actions, courts must focus on whether the sanction imposed is penal and thus criminal in nature.<sup>220</sup> Because most commentators and jurists agree that the main purpose of punitive damages is retribution and deterrence, punitive damage awards, as well as split-recovery statutes, may implicate the Eighth Amendment.<sup>221</sup>

The Supreme Court specifically addressed the first issue in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*<sup>222</sup> In *Browning-Ferris*, the Court held that the Excessive Fines Clause “does not constrain an award of [punitive] damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”<sup>223</sup> The Court reasoned that because the government had not actively sought to punish, nor had used the public court system to impose excessive penalties for the purpose of revenue raising, an award of punitive damages between private citizens passed constitutional scrutiny.<sup>224</sup> Although the Court expressly declined to decide whether the Excessive Fines Clause applied to split-recovery of punitive damages,<sup>225</sup> many commentators and jurists maintain that the Court implied that any punitive damage award shared by the government implicates the Excessive Fines Clause.<sup>226</sup>

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219. *Ingraham*, 430 U.S. at 669 n.37 (“Some punishments, though not labeled ‘criminal’ by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment.”).

220. Ghiardi, *supra* note 4, at 126. Even when the state categorizes an action as a civil penalty, courts must examine the nature of the proceedings to determine if it is so “punitive either in purpose or effect as to negate [this] intention.” *United States v. Ward*, 448 U.S. 242, 249 (1980).

221. *Eighth Amendment*, *supra* note 13, at 1695-96.

222. 492 U.S. 257 (1989). In *Browning-Ferris*, the defendant, a commercial waste management company, used unfair price cutting schemes to drive its main competitor, the plaintiff, out of business. *Id.* at 260-61. Because this conduct violated the Sherman Act, the plaintiff sued and won an award of \$51,146 in compensatory damages and \$6 million in punitive damages. *Id.* at 262. The defendant appealed the decision claiming that the punitive damage award violated the Excessive Fines Clause. *Id.* 223. *Id.* at 263-64.

224. *Id.* at 275 (“Here the government of Vermont has not taken a positive step to punish, as it most obviously does in the criminal context, nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual.”).

225. Olsen & Boutros, *supra* note 5, at 922 (noting that “the Court in *Browning-Ferris* reserved for future review the issue whether punitive damage awards imposed in civil cases . . . by private parties who share some part of the award with the government . . . are constrained by the [Eighth Amendment’s Excessive Fines Clause]”). See *Browning-Ferris*, 492 U.S. at 276 n.21 (“We leave [this] question open for purposes of the Eighth Amendment’s Excessive Fines Clause.”).

226. Kirgis, *supra* note 15, at 857. See *Browning-Ferris*, 492 U.S. at 298-99

Extrapolating from this inference, other commentators suggest that the penal nature of punitive damages, along with the undeserved state appropriation, demands that split-recovery undergo the scrutiny of the Excessive Fines Clause.<sup>227</sup> Professor James Ghiardi, a leading authority on punitive damages, proposes that split-recovery triggers excessive fine scrutiny because the statutes serve only to fulfill the state function of punishment and deterrence.<sup>228</sup> Therefore, these states are using their split-recovery statutes to "punish through the civil law conduct which might otherwise go unpunished under the criminal law."<sup>229</sup> Because Ghiardi concludes that statutes are used to exact punitive measures, he maintains that the state appropriation, if excessive, is unconstitutional.<sup>230</sup>

While the Supreme Court declined to decide whether split-recovery implicated the Excessive Fines Clause, two district courts have ruled on the issue, each resolving it differently.<sup>231</sup> In *McBride v. General Motors Corp.*,<sup>232</sup> the district court in Georgia relied on the Court's inference in *Browning-Ferris*<sup>233</sup> in holding that it was unconstitutional for the state of Georgia "to involve itself in the area of civil damage litigation between private parties . . . when the state through the legislative process, preempts for itself a share of the award."<sup>234</sup> The court reasoned that the state extraction of an interest in the punitive damage

(O'Connor, J., concurring and dissenting) (noting that the majority's position suggests that punitive damages recovered by the government are subject to the Excessive Fines Clause); Ghiardi, *supra* note 4, at 126 (stating that *Browning-Ferris* indicates that the Court is "leaning toward imposing excessive fines limitations upon state-extracted punitive damage awards").

227. Ghiardi, *supra* note 4, at 129. See Kirgis, *supra* note 15, at 859.

228. Ghiardi, *supra* note 4, at 129 (noting that the current statutes serve no function other than to "allow state governments to reap the benefits of successful punitive damage claims, even though the states have not been damaged in any way").

229. *Id.* at 121.

230. *Id.* at 129.

231. *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990) (unconstitutional); *Burke v. Deere & Co.*, 780 F. Supp. 1225 (S.D. Iowa 1991) (constitutional).

232. 737 F. Supp. 1563 (M.D. Ga. 1990).

233. *Eighth Amendment*, *supra* note 13, at 1694 (noting that the district court relied heavily on the Court's decision in *Browning-Ferris* to strike down Georgia's split-recovery statute). Some commentators are critical of *McBride's* heavy reliance on the Court's decision in *Browning-Ferris*. Grube, *supra* note 13, at 869 ("The *McBride* court could have properly argued that its holding was *not inconsistent* with the *Browning-Ferris* dictum, but not that *Browning-Ferris* stated a legal conclusion substantiating the *McBride* holding.") (emphasis in original).

234. *McBride*, 737 F. Supp. at 1579.

award transformed the civil nature of the action into a fine imposed for the benefit of the state.<sup>235</sup> Therefore, the court concluded that the statute implicated the Excessive Fines Clause.<sup>236</sup>

On the contrary, in *Burke v. Deere & Co.*,<sup>237</sup> the district court in Iowa held that the Iowa split-recovery statute was clearly distinguishable from the split-recovery statute in *McBride* and did not implicate the Excessive Fines Clause.<sup>238</sup> The court noted that the Iowa split-recovery statute, unlike the Georgia statute, gave the state no monetary interest in the punitive damage award.<sup>239</sup> Referencing the Supreme Court decision in *Browning-Ferris*, the district court reasoned that “[a] clear distinction can be made between funds that are to be placed into the state treasury and those funds that are to be placed into a civil reparations trust fund to be administered by the courts.”<sup>240</sup> Therefore, the legislature’s decision to apportion the state’s share of the award to a non-governmental agency prevented the statute from violating the Excessive Fines Clause.<sup>241</sup>

Even if a court determines that the Excessive Fines Clause applies to a state’s split-recovery statute, this does not automatically render the statute unconstitutional.<sup>242</sup> The court must examine each apportionment on a case-by-case basis to determine whether the state’s share is excessive.<sup>243</sup> Ultimately, if a court adopts the inference set down in *Browning-Ferris* and followed by *McBride*, only a split-recovery statute allocating an excessive proportion of a punitive damage award to a state agency renders the statute unconstitutional.

While the ultimate resolution of these unsettled constitutional issues is left to the Supreme Court, current commentary and accepted legal theory suggest that most split-recovery statutes do not constitute an unconstitutional taking, violate either party’s due process rights, or fail equal protection scrutiny.<sup>244</sup> However, state appropriation of the collected funds may translate the nature of the punitive damage claim into a criminal action implicating the Double Jeopardy and Equal Protection

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235. *Id.* at 1578.

236. *Id.* at 1579.

237. 780 F. Supp. 1225 (S.D. Iowa 1991).

238. *Id.* at 1242.

239. *Id.* See IOWA CODE § 668A.1 (1993).

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

241. See *infra* notes 300-03 and accompanying text.

242. *Eighth Amendment*, *supra* note 13, at 1696 (noting that even if a statute comes within the scope of the Eighth Amendment, this “should not result in facial invalidity of these provisions”).

243. *Id.* For discussion of possible methods of determining “excessiveness,” see Kirgis, *supra* note 15, at 861.

244. See *supra* notes 104-81 and accompanying text.

clauses of the Constitution.<sup>245</sup> Therefore, unless the split-recovery statute can prevent such a determination, the Supreme Court may find the statute unconstitutional.

## V. SURVEY OF SPLIT-RECOVERY STATUTES

Based on the potential constitutional infirmities of current split-recovery statutes, many commentators have suggested altering the current statutes to meet constitutional scrutiny.<sup>246</sup> This Comment proposes a model statute which satisfies all potential constitutional challenges.<sup>247</sup> Before making such a proposal, however, the underlying principles behind each of the split-recovery statutes currently utilized must first be examined. Rather than separately surveying each state's split-recovery statute, a general examination of the specific provisions of these statutes allows a better understanding of the underlying principles. The specific provisions of these statutes are devisable into four categories that this Comment labels the Identity, Allocation, Timing, and Logistical provisions.

### A. Identity Provisions

The Identity provisions of a split-recovery statute identify the recipient of the distribution<sup>248</sup> and the types of cases to which the provisions apply.<sup>249</sup> The first type of Identity provision in a split-recovery statute designates to whom the legislature awards an interest in the plaintiff's punitive damage recovery. This interest can take the form of either a general fund created for society's benefit as a whole or a special fund designed to reduce the harm suffered by those members of society foreseeably injured by the defendant's action.<sup>250</sup> Of the ten jurisdictions recognizing split-recovery of punitive damages, five allocate

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245. See *supra* notes 182-243 and accompanying text.

246. See, e.g., Kirgis, *supra* note 15, at 873; Sloane, *supra* note 15, at 505; Burrows, *supra* note 6, at 467.

247. See *infra* notes 297-339 and accompanying text.

248. See *infra* notes 245-51 and accompanying text.

249. See *infra* notes 252-55 and accompanying text.

250. *Smith v. States Gen. Life Ins. Co.*, 592 So. 2d 1021, 1026-27 (Ala. 1992) (concurring and dissenting) (noting that split-recovery can allocate some portion of a punitive award to a state's general fund or a special fund "to reduce the harm for which the defendant has been found guilty"); Grube, *supra* note 13, at 854.

the public's share to their state's general revenue fund,<sup>251</sup> while the remaining five award the share to a special fund.<sup>252</sup>

While the revenue generating purpose behind awarding the punitive damage share to the state's general fund is obvious, the purposes behind the special fund allocations are more complex. By allocating the public's share to a special fund, the state legislatures attempt to directly benefit either those members of the public foreseeably injured by the defendant's outrageous conduct<sup>253</sup> or the industry sustaining the punitive damage award.<sup>254</sup> Alternatively, some jurisdictions use special funds to indirectly benefit those same members of society by promoting justice throughout the judicial system.<sup>255</sup> Regardless of whether the purpose of the special fund is direct or indirect, taking a portion of the

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251. See, e.g., COLO. REV. STAT. ANN. § 13-21-102(4) (1989); GA. CODE ANN. § 51-12-5.1(e)(2) (Michie Supp. 1992); MO. REV. STAT. § 537.675.2 (Supp. 1992); N.Y. CIV. PRAC. L. & R. § 8701(1) (McKinney Supp. 1993); and UTAH CODE ANN. § 78-18-1(3) (1992).

252. See, e.g., ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd Supp. 1992) (Department of Rehabilitation Services); IOWA CODE § 668A.1.2.b (1991) (civil reparations trust fund); KAN. STAT. ANN. § 60-3402(e) (Supp. 1992) (health care stabilization fund); OR. REV. STAT. § 18.540(1)(c) (1991) (criminal injuries compensation account). Florida has both a general and special fund allocation provision depending upon the nature of the case. See FLA. STAT. ANN. § 768.73(2)(b) (West Supp. 1992) (public medical assistance trust fund in cases of personal injury or wrongful death and to general fund otherwise).

253. For example, distribution of a portion of a punitive award in a tort case to a state's department of rehabilitation or to a criminal injuries compensation account or, in the case of personal injury litigation, distribution to a public medical assistance trust fund, directly benefits those groups likely to suffer harm from the defendant's action. See ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd Supp. 1992) (Department of Rehabilitation Services); OR. REV. STAT. § 18.540(1)(c) (1991) (criminal injuries compensation account); FLA. STAT. ANN. § 768.73(2)(b) (West Supp. 1992) (public medical assistance trust fund).

254. For example, an award to a health care stabilization fund in medical malpractice cases directly benefits the entire health care industry rather than just those injured by the defendant's action. See KAN. STAT. ANN. § 60-3402(e) (Supp. 1992) (health care stabilization fund). While Kansas is the only state to use this type of special fund to benefit a specific industry, several commentators suggest alternate ways to use split-recovery statutes to benefit certain constituencies. See, e.g., Ghiardi & Kircher, *supra* note 11, at § 21.03 (stating that split-recovery statutes could promote business in products liability cases by awarding money to either an insurance liability fund or an independent national research organization).

255. For example, the statute can promote justice by allocating the public's share to a civil reparations fund to foster litigation programs for indigent citizens, or to a fund for plaintiffs unable to collect judgments against insolvent defendants. See IOWA CODE § 668A.1.2.b (1991) (civil reparations trust fund); Breslo, *supra* note 15, at 1139-40 (maintaining that a fund for plaintiffs unable to collect against insolvent defendants allows full reparation for those citizens deserving of full compensation).

monetary benefit of the punitive award away from the plaintiff and allocating it to a public fund benefits society rather than individuals.<sup>256</sup>

The second Identity provision of a split-recovery statute determines the types of cases in which a punitive damage recovery will be subject to split-recovery. Three possible statutory classifications exist: all civil cases, specific cases, or only cases in which the defendant did not specifically direct his conduct at the plaintiff. The majority of jurisdictions with split-recovery statutes do not distinguish between the types of civil cases that give rise to a split-recovery allocation.<sup>257</sup> In some states, however, legislatures have attempted to avoid such an arbitrary application by tailoring their split-recovery statutes to benefit a certain industry believed to necessitate special treatment.<sup>258</sup> For example, the Kansas legislature has limited the application of its split-recovery statute to medical malpractice cases in an attempt to reduce rising insurance costs caused by unfettered punitive damage allocations.<sup>259</sup> Another attempt to avoid such an arbitrary application, utilized by one state, Iowa, limits the use of its split-recovery statute to cases in which the defendant did not specifically direct his conduct at the plaintiff.<sup>260</sup>

### *B. Allocation Provisions*

The Allocation provisions of split-recovery statutes determine the proportion of the punitive damage award to be extracted and when to deduct attorney's fees from this allocation. To maintain the proper level

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256. Grube, *supra* note 13, at 854 ("[S]ociety could put punitive damage awards to better use than allowing individual civil plaintiffs windfall recoveries."). *See supra* notes 83-89 and accompanying text.

257. *See, e.g.*, COLO. REV. STAT. ANN. § 13-21-102(4) (1989) (in all civil actions); FLA. STAT. ANN. § 76.73(1)(a) (West Supp. 1992); ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd Supp. 1992); MO. REV. STAT. § 537.675.2 (Supp. 1992); N.Y. CIV. PRAC. L. & R. § 8701(1) (McKinney Supp. 1993); OR. REV. STAT. § 18.540(1) (1991); UTAH CODE ANN. § 78-18-1(3) (1992). Although the state of Utah allows for split-recovery in all civil suits, it does impose a \$20,000 minimum on the punitive damage award for the statute to apply. *Id.* (percentage of the punitive damage award "in excess of \$20,000").

258. *See, e.g.*, GA. CODE ANN. § 51-12-5.1(e)(2) (Michie Supp. 1992) (tort cases arising from product liability claims); KAN. STAT. ANN. § 60-3402(e) (Supp. 1992) (medical malpractice cases).

259. *See American Bank & Trust Co. v. Community Hosp.*, 683 P.2d 670, 678 (Cal. 1984) (stating that the Kansas legislature attempted to reduce insurance costs in medical malpractice cases by enacting their split-recovery statute).

260. *See IOWA CODE* § 668A.1 (1991).

of incentive for plaintiffs to bring punitive damage claims,<sup>261</sup> a state legislature's determination of the proper proportion of extraction that can be imposed on a punitive damage award may take into consideration several different factors, including the costs of litigation,<sup>262</sup> the effort undertaken by the plaintiff,<sup>263</sup> and the maintenance of the proper incentive to bring suit.<sup>264</sup> In weighing these factors, the proportion deemed adequate by state legislatures ranges from twenty percent to seventy-five percent of a punitive damage award.<sup>265</sup> Alternatively, some jurisdictions do not set an arbitrary percentage, but give the trial court discretion to determine the reasonable proportion depending on the facts of a given case.<sup>266</sup>

The timing of the attorney fee deduction appears to be a primary reason for disparities among extraction percentages. Some states deduct attorney's fees from the original punitive damage award before the split-recovery allocation.<sup>267</sup> Because this deduction eliminates a major factor in determining an adequate proportion,<sup>268</sup> it substantially reduces the need for a low extraction percentage. Therefore, an extraction percentage in these states will take a higher portion from the plaintiff's punitive damage recovery. Other states do not deduct fees from the original punitive damage award and thus an adequate extraction proportion need not be as high.<sup>269</sup> Therefore, the timing of attorney fee de-

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261. See *supra* notes 39-47 and accompanying text.

262. Grube, *supra* note 13, at 861 (costs and expenses were a factor in determining what percentage would be adequate as early as the first formal proposal made by the American Bar Association regarding split-recovery).

263. *Id.* (determining what is a reasonable proportion to award the plaintiff by examining how much compensation he should receive for his effort).

264. Breslo, *supra* note 15, at 1135 (to determine proper allocation, use the proportion necessary to give the plaintiff the proper incentive to bring valid punitive damage claims).

265. See, e.g., COLO. REV. STAT. ANN. § 13-21-102(4) (1989) (33.3% extracted from plaintiff's award); FLA. STAT. ANN. § 768.73(2) (West Supp. 1992) (35%); GA. CODE ANN. § 51-12-5.1(e)(2) (Michie Supp. 1992) (75%); KAN. STAT. ANN. § 60-3402(e) (Supp. 1992) (50%); MO. REV. STAT. § 537.675.2 (Supp. 1992) (50%); N.Y. CIV. PRAC. L. & R. § 8701(1) (McKinney Supp. 1993) (20%); OR. REV. STAT. § 18.540(1)(c) (1991) (50%); UTAH CODE ANN. § 78-18-1(3) (1992) (50%).

266. See, e.g., ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd Supp. 1992) ("The trial court may also in its discretion, apportion the punitive damage award . . ."). Instead of giving the trial court unfettered discretion, some jurisdictions have set a cap on the potential percentage allotted to the plaintiff and give the court the discretion to award any amount up to the percentage cap. See IOWA CODE § 668A.1.2.b (1991) (the court can award the plaintiff "an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded").

267. See IOWA CODE § 668A.1.2.b (1991); OR. REV. STAT. § 18.540(1)(a) (1991); UTAH CODE ANN. § 78-18-1(3) (1992); MO. REV. STAT. § 537.675.2 (Supp. 1992) (percentage allocated after "the deduction of attorneys' fees and expenses").

268. See *supra* notes 261-64 and accompanying text.

269. Compare COLO. REV. STAT. ANN. § 13-21-102(4) (1989) (no prior deduction of

ductions will likely have little effect on the plaintiff's ultimate recovery because the proportion extracted by these split-recovery statutes typically reflects an adjustment for the deduction of attorney's fees.<sup>270</sup>

While the timing of the deduction may have a negligible impact on the plaintiff's ultimate recovery, it may substantially reduce the recovery of an attorney working for a contingency fee. A main purpose of making claims less remunerative under a split-recovery statute is to decrease the number of frivolous claims by reducing the plaintiffs—and the attorney's—incentive to sue.<sup>271</sup> However, an allocation provision that awards the plaintiff's attorney a share of the punitive recovery before making the split-recovery extraction does not reduce the attorney's recovery.<sup>272</sup> To counter this effect, of the four states that make this initial deduction, at least one provides that the basis of the contingency fee is the plaintiff's punitive recovery rather than the overall punitive recovery.<sup>273</sup>

attorney's fees and one-third extracted from plaintiff's punitive award); FLA. STAT. ANN. § 768.73(2) (West Supp. 1992) (no prior deduction and 35% extracted); KAN. STAT. ANN. § 60-3402(e) (Supp. 1992) (no prior deduction and 50% extracted); N.Y. (no prior deduction and 20% extracted) *with* GA. CODE ANN. § 51-12-5.1(e)(2) (Michie Supp. 1992) (attorney's fees deducted from state's share and 75% deducted).

270. Regardless of when the statute deducts the fund's share of the punitive damage award, the statute can achieve the same level of appropriation by altering the percentage deducted.

For example, if the statute appropriates 50% of a \$100,000 punitive damage award and then mandates the plaintiff to pay attorney's fees (\$20,000) out of his own share (\$50,000), the plaintiff will end up with a \$30,000 windfall (share - cost) as incentive for bringing the claim to justice and the designated fund will end up with \$50,000.

We can also reach the same result by taking out the plaintiff's proportion first, and increasing the fund's share in the award to 62.5%. In this case, the statute would first deduct the attorney's fees (\$20,000) from the punitive damage award (\$100,000) and then appropriate 62.5% of the difference for the designated fund. This division would again give the plaintiff a \$30,000 windfall (37.5% of \$80,000) and the designated fund a \$50,000 share (62.5% of \$80,000).

271. See *supra* notes 90-95 and accompanying text.

272. For example, if an attorney takes a case for a one-third contingency fee and brings suit against the defendant for \$300,000 (\$100,000 compensatory and \$200,000 punitive damages), under a 50% split-recovery statute, the attorney would recover the following:

If attorney's fees are deducted before the split:

$$\$300,000 \times 33.3\% = \$100,000$$

If attorney's fees are deducted after the split:

$$(\$100,000 \times 33.3\%) + (\$200,000 \times 50\% \times 33.3\%) = \$66,667$$

273. FLA. STAT. ANN. § 768.73(7) (West Supp. 1992) ("Claimant's attorney's fees, if



Another problem with the Allocation provisions that may diminish the function of these split-recovery statutes arises in the case of insolvent defendants. It is obviously not the intent of split-recovery statutes to hinder the effectiveness of compensatory damages. However, a state that extracts a portion of an award before complete recovery of compensatory damages potentially decreases the overall compensation to the plaintiff if the defendant cannot satisfy the entire judgment.<sup>274</sup> To alleviate this potential problem, at least one state has imposed a statutory limitation on the public's share of a split-recovery extraction.<sup>275</sup> Under the New York statute, the state may not collect any portion of its share until payment of all compensatory damages, costs, and attorney's fees.<sup>276</sup> Therefore, the defendant's insolvency will not affect the plaintiff's decision whether to add a punitive damage claim to her claim for compensatory damages.

### C. *Timing Provisions*

The Timing provisions within a split-recovery statute serve to determine when the state's interest in the punitive damage claim arises. While some jurisdictions fail to explicitly address this issue,<sup>277</sup> others realize the importance of these provisions in controlling settlement negotiations<sup>278</sup> and deterring constitutional challenges.<sup>279</sup> Most schol-

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payable from the judgment, are, to the extent that they are based on the punitive damages, calculated based only on the portion of the judgment payable to the claimant . . .").

274. For example, a plaintiff wins a judgment for \$500,000 (\$100,000 compensatory and \$400,000 punitive damages) in a jurisdiction with a split-recovery extraction of 75% to the state. The defendant's total assets amount to \$150,000, which is allotted proportionally between the punitive and compensatory damages claims: \$30,000 [1/5 of \$150,000] to compensatory damages and \$120,000 [4/5 of \$150,000] to punitive damages. Under the split-recovery extraction statute, the plaintiff will only receive \$60,000 (\$30,000 from compensatory damages + \$30,000 from punitive damages [25% of \$120,000]) and thus will not be fully compensated for compensatory damages that would have been fully reimbursed without the punitive damage award.

275. N.Y. CIV. PRAC. L. & R. § 8703 (McKinney Supp. 1993).

276. *Id.* It is imperative to note that this rule applies to attorney's fees as well as compensatory damages. While one might expect the application of this rule in cases in which the deduction for attorney's fees occurs before the splitting of the award, New York applies this rule even though the payment of attorney's fees occurs solely out of the plaintiff's share after the splitting of the award. *See id.*

277. *See, e.g.*, KAN. STAT. ANN. § 60-3402(e) (Supp. 1992); IOWA CODE § 668A.1.2.b (1991); ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd Supp. 1992); and UTAH CODE ANN. § 78-18-1(3) (1992).

278. Several states at least implicitly recognize the problems associated with settlement under a split-recovery statute. *See* FLA. STAT. ANN. § 768.73(1)(a) (West Supp. 1992); GA. CODE ANN. § 51-12-5.1(e)(2) (Supp. 1992); N.Y. CIV. PRAC. L. & R. § 8701(1) (McKinney Supp. 1993); and OR. REV. STAT. § 18.540(1)(c) (1991). The pro-

ars recognize that by apportioning a percentage of punitive damage awards to the state, parties in litigation have an increased incentive to settle because awards recovered in settlement are not subject to split-recovery.<sup>280</sup> While the overcrowded judicial system typically welcomes settlement of civil litigation as socially beneficial,<sup>281</sup> settlement undertaken to avoid the imposition of a split-recovery statute often leads to inefficient and socially detrimental results.<sup>282</sup>

To avert this potential for unwanted settlement, some jurisdictions enacted provisions under their split-recovery statutes to limit the plaintiff's ability to settle. Although no jurisdiction has gone so far as to make settlements illegal in punitive damage claims,<sup>283</sup> some jurisdictions give the state an interest in the litigation as soon as the trial court renders its initial decision.<sup>284</sup> On the other hand, some jurisdictions do not claim an interest in the plaintiff's punitive damage recovery until

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ponents of this principle assert that split-recovery statutes "generate difficult problems of application and administration, particularly for the large number of cases that are settled out of court." James D. Ghiardi, *Punitive Damages—Legislative Reform*, 39 FED'N INS. & CORP. COUNS. Q. 189, 197 (1989).

279. By controlling when the state's interest in the award attaches, this provision may affect a split-recovery statute's constitutionality. See *supra* note 129 and accompanying text (explaining how a provision in the Colorado statute disavowing any state interest prior to payment becoming due implicated the Takings Clause).

280. See Grube, *supra* note 13, at 875; see also Breslo, *supra* note 15, at 1157. Split-recovery statutes have no effect until the court renders a punitive damages judgment against the defendant. Burrows, *supra* note 6, at 457-58. Thus, a plaintiff can evade an extraction statute through early settlement of her claim. See *id.* By settling for an amount between the defendant's estimated liability and the plaintiff's expected recovery, both parties have the potential to benefit at the state's expense. See Grube, *supra* note 13, at 875. Specifically, the defendant averts a potential loss of both punitive and compensatory damages while the plaintiff obtains a judgment in excess of her expected recovery from trial. *Id.*

281. Jennifer O'Hearne, Comment, *Compelled Participation in Innovative Pretrial Proceedings*, 84 NW. U. L. REV. 290, 290-91 (1989).

282. See Grube, *supra* note 13, at 875. Settlements not only create an additional windfall to the plaintiff, but diminish the deterrence and punishment effects of punitive damages by reducing the defendant's penalty. *Id.*

283. This proposition is almost a necessity under a zero percent system in which the plaintiff does not receive any percentage of a punitive damage award. See Grube, *supra* note 13, at 875. Because the plaintiff receives no pecuniary benefit from a punitive damage award, his incentive to fully litigate the punitive damage claim is nonexistent. See *id.*

284. See, e.g., FLA. STAT. ANN. § 768.73(1)(a) (West Supp. 1992); GA. CODE ANN. § 51-12-5.1(e)(2) (Michie Supp. 1992); N.Y. CIV. PRAC. L. & R. § 8701(1) (McKinney Supp. 1993); and OR. REV. STAT. § 18.540(1)(c) (1991).

after exhaustion of the appeals process.<sup>285</sup> In the former case, the state's attorney general becomes a party to the litigation and receives all the rights of a judgment creditor.<sup>286</sup> Given these rights, the state can control subsequent settlement negotiations by rejecting any proposed settlement not in the best interests of society.<sup>287</sup> These Timing provisions thus allow a state to limit the plaintiff's ability to avert the split-recovery statute by entering into socially inefficient settlement agreements.

#### D. Logistical Provisions

The final provisions of a split-recovery statute are the Logistical provisions that determine whether the court informs the jury about the split-recovery provision and whether the state takes its share in actions in which the government is a party. Only a few states have directly addressed whether the parties may inform the jury of the presence of the split-recovery provisions.<sup>288</sup> While some may claim that no substantial harm results from informing the jury of these split-recovery statutes, this information is likely to inflate a jury award for two reasons. First, civic-minded jurors are likely to award higher punitive damage claims when they know a portion of the award advances a public purpose or increases state revenues.<sup>289</sup> Second, a jury may inflate an award "to ensure that a specific amount will be paid to the plain-

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285. See, e.g., MO. REV. STAT. § 537.675.2 (Supp. 1992); COLO. REV. STAT. ANN. § 13-31-102(4) (1989).

286. See, e.g., N.Y. CIV. PRAC. L. & R. § 8704(1) (McKinney Supp. 1993) (the attorney general is given discretion to enter into settlement negotiations); GA. CODE ANN. § 51-12-5.1(e)(2) (Michie Supp. 1992) ("Upon issuance of judgment in such a case, the state shall have all the rights due a judgment creditor until such judgment is satisfied and shall stand on equal footing with the plaintiff . . .").

287. See, e.g., FLA. STAT. ANN. § 768.73(1)(a) (West Supp. 1992); GA. CODE ANN. § 51-12-5.1(e)(2) (Michie Supp. 1992); N.Y. CIV. PRAC. L. & R. § 8701(1) (McKinney Supp. 1993); and OR. REV. STAT. § 18.540(1)(c) (1991).

288. See, e.g., FLA. STAT. ANN. § 768.73(8) (West Supp. 1992) ("The jury may neither be instructed nor informed as to the provisions of this section."); *Honeywell v. Sterling Furniture Co.*, 781 P.2d 379, 380-81 (Or. Ct. App. 1989), *aff'd*, 797 P.2d 1019 (Or. 1990); Vincent C. Alexander, *1993 Supplemental Practice Commentaries*, N.Y. CIV. PRAC. L. & R. § 8701 (McKinney Supp. 1993).

289. See Steven J. Sensibar, *Punitive Damages: A Look at Origins and Legitimacy*, 41 FED'N INS. & CORP. COUNS. Q. 375, 387 (1991) ("If jurors realized that any punitive damage award were to be returned to public use, the size of awards would not simply skyrocket. They would follow the Voyager spacecraft out of the solar system."). However, some commentators suggest that juries currently award insufficient punitive damage awards because they realize that plaintiffs already receive a windfall. Grube, *supra* note 13, at 855. Therefore, telling the jury about the public's share could lead to more efficient awards by removing some of the jury's incentive to award inefficiently low punitive damage awards to prevent total windfall recoveries. *Id.*

tiff."<sup>290</sup> In attempting to avoid these problems, only two states have explicitly ruled on the issue. In Florida, the split-recovery statute specifically disallows any instruction about split-recovery provisions.<sup>291</sup> In Oregon, a court held that a jury instruction based on the split-recovery statute interjected inappropriate factors into the jury's deliberation.<sup>292</sup> Although not explicitly recognized in other jurisdictions, some states will likely follow these rulings and disallow the use of this information in jury instructions.<sup>293</sup>

The other Logistical provision addresses actions in which the government is a party. In actions against a governmental agency, a possible conflict of interest is created if the government receives a share of the punitive damage award.<sup>294</sup> New York is the only state to specifically address this issue.<sup>295</sup> The New York statute exempts any civil action rendered against the state from the force of the statute.<sup>296</sup> Therefore, in those cases, a split-recovery statute does not affect the plaintiff's punitive damage recovery.

## VI. PROPOSED SPLIT-RECOVERY STATUTE

### Model Statute

§ \_\_\_\_: Punitive Damages; split-recovery

(1)(a) In all civil actions resulting in an award of punitive damages, 50% of the amount of punitive damages awarded in excess of \$20,000 shall be remitted to a special compensation fund designed to reimburse plaintiffs unable to collect against insolvent defendants.

(b) Calculation and payment of a claimant's attorney fees, if payable from the judgment, are based solely on the portion of the judgment payable to the claimant under section (1)(a) with respect to any punitive damage recovery.

(2)(a) At no time prior to entry of judgment shall the state or any public fund obtain an interest in the punitive damage claim, nor shall the state nor any public fund control or influence any settlement negotiations between the parties.

(b) The fund designated in section (1)(a) becomes a judgment creditor upon

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290. Alexander, *supra* note 288, at § 8701.

291. See, e.g., FLA. STAT. ANN. § 768.73(8) (West Supp. 1992).

292. *Honeywell*, 781 P.2d at 380.

293. See Alexander, *supra* note 288, at § 8701.

294. *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1578 (M.D. Ga. 1990) (noting that a potential problem develops when the conduct of the state or any of its officers results in litigation).

295. See N.Y. CIV. PRAC. L. & R. § 8701(1) (McKinney Supp. 1993).

296. *Id.*

entry of a verdict awarding the plaintiff punitive damages.

(c) Any settlement agreement between the original parties to the action after the verdict must remit to the designated fund the share required in section (1)(a). The portion of the damages treated as punitive in the new agreement will be determined by the proportion of the damages treated as punitive in the original verdict.

(3) If insolvency prevents the party awarded punitive damages from collecting the outstanding compensatory and punitive damages due to that party, the designated fund takes no interest in the award until satisfaction of these unpaid debts by the insolvent party.

(4) The jury shall not be informed or instructed of the provisions of this section.

#### A. *Commentary on Specific Provisions of Model Statute*

As tort reformers promote new ways to distribute or limit windfall recoveries from punitive damages and to discourage unnecessary litigation, states must consider split-recovery as a viable and necessary alternative.<sup>297</sup> While a state electing to utilize split-recovery will want to tailor their statute to its particular legislative objectives, this proposed statute is a general model that would function efficiently, equitably, and constitutionally.

##### 1. Identity Provisions

The first Identity provision of the model statute designates to whom the legislature will award an interest in the plaintiff's punitive damage recovery. Section (1)(a) designates a special compensation fund as the recipient of the apportioned interest. Although general revenue funds are the easiest types of funds to administer,<sup>298</sup> the proposed statute designates a special fund rather than a general governmental fund because general governmental funds may raise constitutional concerns implicating the Double Jeopardy Clause and Excessive Fines Clause of the Constitution.<sup>299</sup> Because an agency receives a general interest in receipts from a general revenue fund, an award to such a fund could transform the civil

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297. See *supra* notes 92-95 and accompanying text (illustrating the benefits of split-recovery).

298. Awards to general revenue funds do not generally distinguish among the government agencies to receive the money or mandate how those agencies spend their money, while special funds that restrict uses of awards cause greater administrative burdens to the extent that such restrictions must be administered. Compare UTAH CODE ANN. § 78-18-1(3) (1992) (general fund) with IOWA CODE § 668A.1.2.b (1991) (civil reparations trust fund disbursing funds solely for indigent civil litigation programs or insurance assistance programs).

299. See *supra* notes 182-245 and accompanying text (explaining the potential constitutional concerns over awarding the collected funds to a governmental agency).

nature of the action into one of a "criminal nature"<sup>300</sup> or "essentially criminal."<sup>301</sup> By designating a special non-governmental fund to receive the collected money, however, the legislature can avoid this transformation and prevent a successful constitutional challenge.<sup>302</sup> Additionally, placing collected money into a specific fund designed to further a legitimate legislative objective is more equitable than treating the receipts as general revenue because the nebulous nature of a general revenue fund conceals potential benefits of the distribution and prevents the recipients from being held specifically accountable for the distribution.<sup>303</sup>

While courts employ many different types of special fund disbursement schemes,<sup>304</sup> allocating the money to a fund designed to reimburse plaintiffs with judgments against insolvent defendants appropriately complements the rationale behind split-recovery allocation. Because one of the main purposes of split-recovery statutes is to reduce windfall recoveries to undeserving plaintiffs, it seems appropriate that the collected funds go to support other plaintiffs, deserving of compensation, yet unable to collect for their injury.<sup>305</sup>

The second Identity provision determines the types of cases in which a punitive recovery will be subject to split-recovery. Section (1)(a) does not distinguish between cases,<sup>306</sup> instead making all civil actions applicable to split-recovery. The proposed statute favors broad application of split-recovery statutes because such an approach is more efficient and less likely to raise constitutional issues. First, state legislatures should

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300. See *supra* note 216 and accompanying text.

301. See *supra* note 185 and accompanying text.

302. *Burke v. Deere & Co.*, 780 F. Supp. 1225, 1242 (S.D. Iowa 1991) ("A clear distinction can be made between funds that are to be placed into the state treasury and those funds that are to be placed into a [civil fund] to be administered by the courts."). See *supra* notes 182-245 and accompanying text.

303. Sloane, *supra* note 15, at 510 (noting that general funds are less attractive because they give the appearance that the money is "never really being put to use to benefit the public").

304. See *supra* note 252 (listing the state statutes that allocate collected money to special funds).

305. See Breslo, *supra* note 15, at 1140. One problem with this type of disbursement scheme is that it may lead to increased litigation by providing plaintiffs the opportunity to bring suit and recover against insolvent defendants. However, one could argue that the benefit to society of allowing an innocent party to collect for actual injury suffered greatly outweighs the potential for minimal increased litigation.

306. While some statutes limit the applicability of split-recovery to certain causes of action, others apply split-recovery to all types of civil cases. See *supra* notes 257-60 and accompanying text.

not limit split-recovery to certain types of actions because reducing windfall recoveries and discouraging unnecessary litigation benefits all areas of civil litigation.<sup>307</sup> Second, broad application prevents the possibility that a statute will be discriminatory and violative of the Equal Protection Clause of the Constitution.<sup>308</sup>

## 2. Allocation Provisions

The Allocation provisions determine the percentage of the plaintiff's punitive damage award to extract and the timing of the deduction of attorney's fees from this allocation.<sup>309</sup> Section (1)(a) of the proposed statute awards the special compensation fund a fifty percent interest in any punitive damage award in excess of \$20,000.

The proper level of appropriation depends upon a balance between the public's interest in encouraging socially beneficial litigation and its interest in reducing windfall recoveries and discouraging unnecessary litigation.<sup>310</sup> Once the plaintiff has sufficient incentive to bring suit, however, balancing competing interests becomes unnecessary because the incentive function becomes immaterial.<sup>311</sup> Therefore the most judicious Allocation provision appropriates the largest percent from the punitive damage award without offending the plaintiff's incentive to bring suit.

Although in theory, a determination of the precise point at which this occurs is impossible to make,<sup>312</sup> this Comment proposes that a fifty per-

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307. See *supra* note 81 and accompanying text (explaining the benefits of split-recovery).

308. See *supra* notes 168-81 and accompanying text (explaining when split-recovery implicates the Equal Protection Clause).

309. Because of the direct relation between these provisions, one must read them together to accurately interpret their effect. See *supra* notes 266-68 and accompanying text.

310. For example, in cases involving minimal individual compensatory recovery or extensive litigation costs, if the proportion extracted from the plaintiff's punitive award is too high, society will lose the deterrent and punishment benefits of punitive damages because the plaintiff will lack the incentive to expend the time, effort, or money to bring the claim to justice. See *supra* note 42 and accompanying text. On the other hand, if the proportion extracted from the plaintiff's punitive award is too low, society will lose a major part of the benefits associated with split-recovery because the plaintiff will still receive a substantial windfall recovery and the appropriation will discourage few plaintiffs from bringing unnecessary suits. See *supra* notes 82-95 and accompanying text.

311. Unlike the benefits of split-recovery that continuously rise as the share awarded to the public increases, the incentive benefit of awarding a share to the plaintiff actually decreases once the plaintiff's share gives her sufficient incentive to bring suit. In this case, any excess amounts given to the plaintiff serve to encourage others with meritless claims to bring suit with the hope of receiving a large punitive damage recovery.

312. In practice, however, a state legislature can continuously adjust the percentage

cent split of any punitive damage award efficiently balances these factors. Compared to current split-recovery statutes, fifty percent is a relatively high split considering that the plaintiff remains responsible for attorneys' fees.<sup>313</sup> Although this high percentage barely affects the incentive function of punitive damages in large recovery cases, because the plaintiff's fifty percent share would likely cover the emotional and financial costs of bringing suit, it could affect cases involving minimal financial recovery.<sup>314</sup> However, adopting the \$20,000 minimum as used in the Utah split-recovery statute alleviates this potential problem.<sup>315</sup> The high extraction rate in the model statute would not deter small claims because the statute assures the plaintiff 100% recovery of the first \$20,000 in punitive damages in any successful action. Therefore, in all cases involving punitive damages, this Allocation provision would maximize the benefits of split-recovery while minimizing potential harm from decreasing punitive damage awards.

The second type of Allocation provision also involves a balancing of competing factors.<sup>316</sup> Because this provision establishes when to deduct attorneys' fees from the punitive damage award, the determination affects the ultimate recovery of both the plaintiff and the plaintiff's attorney.<sup>317</sup> Therefore, the most judicious provision will balance the plaintiff's incentive to bring suit with the attorney's incentive to take the case.

Section (1)(b) of the proposed statute limits the claimant's attorney from using publicly collected punitive damages to determine her contingency fee. This provision most appropriately furthers the principles of split-recovery because the timing of such a deduction similarly discourag-

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until the result is satisfactory. For example, the Florida statute initially appropriated 60% of all punitive damage awards. Blum, *supra* note 17, at 3. However, after the legislature determined that this 60% state split did not provide enough of an incentive for plaintiffs' attorneys to take punitive potential cases, the legislature amended the split-recovery statute to extract only 35% of the plaintiff's recovery. *Id.*

313. See *supra* notes 261-69 and accompanying text.

314. See *supra* notes 42-46 and accompanying text.

315. See UTAH CODE ANN. § 78-18-1(3) (1992) ("In any judgment where punitive damages are awarded and paid, 50% of the amount of the punitive damages in excess of \$20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasury for deposit into the General Fund.")

316. The second Allocation provision involves the timing of the attorney fee deduction. See *supra* notes 266-71 and accompanying text.

317. See *supra* notes 267-71 and accompanying text.



es attorneys and plaintiffs from undertaking inefficient litigation.<sup>318</sup> While the timing of this deduction reduces the incentive for the plaintiff's attorney, her portion of the plaintiff's overall recovery should provide sufficient incentive to take a meritorious case.<sup>319</sup>

The final Allocation provision concerns the effect of an insolvent defendant on a split-recovery statute. When a defendant is unable to pay the entire award rendered against him, the split-recovery statute may hinder both the plaintiff's compensatory recovery<sup>320</sup> and the plaintiff's incentive to bring suit.<sup>321</sup> Therefore, an Allocation provision that avoids these detrimental effects allows the split-recovery statute to function effectively. Section (3) of the proposed statute satisfies these concerns by limiting the ability of the designated fund to collect its share until the plaintiff collects the outstanding compensatory and punitive damages he is due.

### 3. Timing Provisions

By determining when the public's interest in the punitive damage award arises, the Timing provisions of a split-recovery statute control settlement negotiations and prevent potential constitutional challenges.<sup>322</sup> First, section (2)(a) of the proposed statute provides that no state or public fund shall obtain any interest in the punitive damage award prior to the entry of judgment. By separating the public appropriation

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318. See *supra* notes 269-71 and accompanying text.

319. The only facts to suggest that this percentage is appropriate to provide a plaintiff's attorney with the incentive necessary to undertake a case can be inferred from the Florida legislature's conclusion that a 60% deduction did not provide the plaintiff attorneys with enough of an incentive. Blum, *supra* note 17, at 3 (noting that the reduction of the state appropriation from 60% to 35% resulted from a legislative conclusion that the statute failed to provide plaintiff attorneys with enough incentive to bring punitive potential cases). This problem is most likely to occur in cases involving the potential for minimal financial recovery. See *supra* note 42. While the Florida legislature fixed the state deduction at 35%, see FLA. STAT. ANN. § 768.73(2)(b) (West Supp. 1992), the 50% deduction of the proposed statute should provide enough of an incentive since it includes \$20,000 of reduction-free punitive damages. Therefore, even in cases involving minimal financial recovery, the split-recovery deduction should not overly deter plaintiff attorneys from taking worthy cases.

320. See *supra* notes 272-74 and accompanying text (explaining how split-recovery may diminish compensatory damage recovery).

321. If the current allocation provides only the minimal amount necessary to encourage a plaintiff to bring suit, see *supra* notes 310-11 and accompanying text, a split-recovery statute may reduce the incentive effect of punitive damages. By reducing the amount of the plaintiff's expected recovery by the uncollected portion of the judgment, the split-recovery statute no longer provides the plaintiff with the proper incentive and will deter some worthy claims from being undertaken. *Id.*

322. See *supra* notes 275-79 and accompanying text.

from the actual litigation of the suit, this provision distances the state from the actual litigation in order to retain the "civil" nature of the action.<sup>323</sup> Therefore, the statute avoids Double Jeopardy and Excessive Fines objections.<sup>324</sup>

While this Timing provision insulates split-recovery from these constitutional problems, a similar provision in the Colorado split-recovery statute led its supreme court to find that the plaintiff obtained a vested property interest in the entire award.<sup>325</sup> As such, the court held that the appropriation violated the constitutional proscription of government takings.<sup>326</sup> However, the proposed statute treats the plaintiff as having no vested right to the entire award. Section (2)(b) provides that the designated fund becomes a judgment creditor immediately upon entry of a verdict awarding punitive damages. By immediately granting the fund judgment creditor status, this provision expressly indicates an intent to avoid treating the plaintiff as holding a vested interest in the entire punitive damage award.<sup>327</sup> Therefore, when read together, these Timing pro-

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323. See *supra* notes 203-08 and accompanying text (explaining how the lack of government involvement in instigating the punitive damage suit may insulate the split-recovery statute from being considered criminal in nature). See also Sloane, *supra* note 15, at 508 (proposing that this type of provision may distance the state from the litigation).

Additionally, the fact that the recipient of the appropriated funds is a public entity rather than a governmental agency also fosters the non-criminal nature of the proposed statute. See *supra* notes 298-303 and accompanying text.

324. See *supra* notes 185, 220 (explaining that only actions that are criminal in nature invoke the Excessive Fines and Double Jeopardy clauses of the Constitution). Even if the Supreme Court found these statutes to be criminal in nature, the split-recovery statute would not automatically be unconstitutional. A violation of the Double Jeopardy Clause occurs when the specific appropriation infringes upon the plaintiff's right to be free from multiple punishment or multiple prosecution. See *supra* notes 209-10 and accompanying text. Likewise, the specific appropriation will not violate the Excessive Fines Clause unless the court determines the public's share to be excessive. See *supra* notes 242-43 and accompanying text.

325. *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 267 (Colo. 1991) (stating that the legislature's disavowal of any state interest in the punitive damage claim prior to payment becoming due was "an implicit legislative acknowledgement of the property interest created in the judgment creditor by virtue of the judgment itself"). See COLO. REV. STAT. ANN. § 13-21-102(4) (1987).

326. *Kirk*, 818 P.2d at 273.

327. See *supra* note 139 and accompanying text (noting that without a provision granting the plaintiff any vested right to recovery, the plaintiff secures no protectable property right in the recovery of the entire punitive damage award). See also Sloane, *supra* note 15, at 506 (maintaining that a split-recovery statute that immediately grants the state a judgment creditor status upon the entry of judgment avoids impli-

visions eliminate the applicability of the Fifth Amendment prohibition against government takings.<sup>328</sup>

In addition to dispensing with constitutional concerns, the Timing provisions of a split-recovery statute also affect settlement negotiations. Although the model statute prohibits the designated fund from obtaining any interest in a pre-judgment settlement,<sup>329</sup> section (2)(c) of the proposed statute grants the designated fund a proportionate share of any post-judgment settlement between the original parties.<sup>330</sup> While this provision complicates the administration of settlement agreements,<sup>331</sup> it prevents parties from evading the statute by settling the case during the appellate process simply to avoid imposition of the split-recovery allocation.<sup>332</sup> Therefore, this Timing provision prevents manifest abuse of the legal system<sup>333</sup> and upholds the principles of split-recovery.<sup>334</sup>

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cation of the Takings Clause).

328. Without infringing a protectable property right, the model statute also protects itself against a successful due process challenge. *See supra* text accompanying note 145.

329. Under section (2)(a) of the proposed statute, neither the state nor any public fund obtains any interest in the punitive damage claim prior to the entry of judgment.

330. A post-judgment settlement includes any settlement between the original parties entered into from the time of the initial verdict through the entire appeals process.

While this provision allows the public fund to collect its share of any post-judgment settlement, section (2)(c)(1) grants the fund no right to control or influence the settlement negotiations between the parties. Therefore, this provision is consistent with the purpose of section (2)(a), to distance the public appropriation from the actual litigation, and does not implicate the Excessive Fines Clause or Double Jeopardy Clause. *See supra* notes 323-24 and accompanying text.

331. To determine the public's share of a post-judgment settlement agreement, one must first determine the proportionate share of the original verdict allocated to punitive damages. For example, if the original verdict awarded the plaintiff \$150,000 in damages, of which \$100,000 consisted of punitive damages, the proportionate share allocated to punitive damages would be  $\$100,000/\$150,000$  or  $2/3$ . Next, one must multiply the total amount of the settlement by this fraction to determine the portion of the settlement awarded for punitive damages. In the above example, if the original parties settled the case for \$75,000, the statute considers  $2/3$  of the settlement award, or \$50,000, as the portion of the settlement awarded as punitive damages. Therefore, the public fund can use only this portion of the settlement to determine its share of the post-judgment settlement agreement.

332. *See supra* notes 278-80 and accompanying text.

333. Without such a provision, all parties to a case involving punitive damages have a substantial financial incentive to reach an out-of-court settlement prior to final adjudication of their suit. *See supra* note 278 and accompanying text. For example, in a case involving an initial jury verdict of \$20,000 in compensatory damages and \$100,000 in punitive damages, a 50% split-recovery statute without such a Timing provision allows the plaintiff to benefit from any settlement above \$70,000 (her expected recovery upon final adjudication) and allows the defendant to benefit from any settlement below \$120,000 (her expected payment upon final adjudication). There-

#### 4. Logistical Provisions

While the previous types of provisions control the principle matters of a split-recovery allocation, the final type controls the logistical aspects of a split-recovery statute. The first Logistical provision, in section 2(a), concerns actions to which the government is a party. In actions against a governmental agency, a split-recovery statute may create a possible conflict of interest if the government is the recipient of a share in a punitive damage award assessed against it.<sup>336</sup> In the proposed model statute, however, the government receives no interest in the collected funds. Therefore, regardless of whether the government is a party to the action, the appropriation presents no conflict of interest problems.<sup>336</sup>

The final Logistical provision, in section (4), prohibits either party or the court from informing or instructing the jury about the split-recovery allocation. The purpose of this Logistical provision is to insure that this information does not affect the jury's deliberations in assessing punitive damages against the defendant.<sup>337</sup> Because such an instruction would create the potential for inflated punitive damage awards,<sup>338</sup> the split-recovery statute could diminish the benefits of punitive damages by separating their assessment from their principle function as a method of providing punishment, deterrence, and incentive to sue.<sup>339</sup> Therefore, add-

fore, a settlement of \$95,000 would provide each party with a \$25,000 benefit while depriving the designated public fund of its rightful share of the award.

334. By permitting the parties to deprive the designated public fund of its rightful share, a split-recovery statute without such a Timing provision contradicts the principles of split-recovery by creating an additional windfall recovery for the plaintiff and decreasing the punishment and deterrent effects of punitive damages on the defendant. *See supra* notes 278-80 and accompanying text.

335. *See supra* note 294 and accompanying text (conflict arises when the statute awards the funds to the general revenue fund of the state).

336. If a state legislature elects to allocate the collected funds to a governmental agency, a split-recovery statute can rectify the potential conflict of interest problem by exempting all punitive damage awards rendered against the state from the appropriation. *See supra* notes 291-93 and accompanying text.

337. *See supra* notes 288-93 and accompanying text.

338. *See supra* notes 289-90 and accompanying text (noting that civic-minded jurors may assess higher awards to advance the public purpose behind the designated fund or may inflate an award to ensure that the plaintiff receives the full punitive damage award initially intended).

339. Because the purposes of punitive damages are punishment, deterrence, and incentive to sue, *see supra* notes 31-59 and accompanying text, an inflated award unfairly punishes the defendant, overly deters the defendant's conduct, and provides the plaintiff with an excessive incentive to sue.

ing this Logistical provision to a split-recovery statute protects the integrity of assessing punitive damage awards.

## VII. CONCLUSION

Punitive damages have been subject to constant criticism since their introduction into United States jurisprudence. Opponents of punitive damages contend that any recovery unrelated to the plaintiff's injury fosters inefficiency by promoting windfall recoveries and encouraging unnecessary litigation. Because the Supreme Court is not likely to disavow the use of punitive damages as a method of civil recovery, those demanding change must look to alternatives.

By allocating a portion of a plaintiff's punitive damage award to the public, split-recovery is such an alternative. Split-recovery diminishes windfall recoveries, promotes judicious use of collected funds, and discourages unnecessary litigation. Additionally, unlike other proposed solutions, split-recovery does not substantially interfere with the three legitimate functions of punitive damages: punishment, deterrence, and incentive to sue.

While several states recently enacted split-recovery statutes to control punitive damage recovery, the Double Jeopardy, Equal Protection, Due Process, and Excessive Fines clauses of the Constitution stand as significant impediments to widespread acceptance. Although the Supreme Court has yet to settle these issues, it appears that some of the current split-recovery statutes fail constitutional scrutiny. However, if properly drafted, a split-recovery statute can avoid these constitutional concerns and better serve the interests of justice. Therefore, for states that seek to address the problem of punitive damages, split-recovery may be the constitutional answer to the punitive damage dilemma.

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