PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 40 | Issue 3 Article 7

4-8-2013

Uncle Sam and the Partitioning Punitive Problem: A Federal Split-Recovery Statute or a Federal Tax?

Skyler M. Sanders

Uncle Sam and the Partitioning Punitive Problem: A Federal Split-Recovery Statute or a Federal Tax?

I. INTRODUCTION

Explosion in the Gulf of Mexico! Five million barrels of crude oil escape into the ocean![1] During the spring and summer of 2010, the world

1. Jeremy Repanich, *The Deepwater Horizon Spill by the Numbers*, POPULAR MECHANICS

watched as the Deepwater Horizon sank into the sea.[2] And as the doomed oilrig settled upon the seafloor, attorneys filed mounting lawsuits against the companies involved.[3] Concurrently, speculation arose as to how much money, if any, the companies would have to pay in punitive damages—a question that remains unanswered to this day.[4] Certainly, with hundreds of thousands affected in the Gulf States and beyond, if punitive damages are

---

(Aug. 10, 2010), http://www.popularmechanics.com/science/energy/coal-oil-gas/bp-oil-spill-statistics. At the time of the Deepwater Horizon explosion, the ink had barely dried on the Supreme Court decision of *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514 (2008), where the Court determined punitive damages were permissible under maritime law if they were equal to compensatory damages. *See also* David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and* Townsend, 70 LA. L. REV. 463, 466–69 (2010) (recounting the history of punitive damages in maritime law, including their original purpose as a tool for punishment and deterrence). In *Exxon*, the plaintiffs were originally given a $5 billion punitive damage award after the *Exxon Valdez* ran aground—thanks to the captain of the ship being intoxicated—and millions of gallons of crude oil spilled into Prince William Sound. 554 U.S. at 471. The punitive damage award was later reduced to a little over $500 million. *Id.* at 515. Almost immediately after the Deepwater Horizon disaster, people began to draw comparisons to the *Exxon Valdez* oil spill, contemplating whether BP would be subjected to the same treatment by the courts as Exxon. Anne C. Mulkern, *BP's Oil Spill Bill Could Dwarf Exxon's* Valdez *Tab*, N.Y. TIMES, May 3, 2010, http://www.nytimes.com/gwire/2010/05/03/03greenwire-bps-oil-spill-bill-could-dwarf-exxons-ivaldezi-91298.html?pagewanted=all.

2. Associated Press, *Deepwater Horizon Oil Rig Sinks, Sparking Pollution Fears*, THE GUARDIAN (Apr. 23, 2010), http://www.guardian.co.uk/world/2010/apr/23/deepwater-horizon-oil-rig-pollution.

3. Curt Anderson & Thomas Watkins, *Lawyers Flock to Gulf Coast for Oil Spill Lawsuits*, SAN DIEGO UNION-TRIB., May 1, 2010, http://www.utsandiego.com/news/2010/may/01/lawyers-flock-to-gulf-coast-for-oil-spill-lawsuits/. Within the first two weeks of the incident, twenty-six lawsuits were filed in federal court "by commercial fishermen, charter boat captains, resort management companies and individual property owners in Louisiana, Florida, Alabama and Mississippi." *Id.* The companies being sued—particularly by the United States Department of Justice—include: Anadarko Exploration & Production LP and Anadarko Petroleum Corp.; British Petroleum; MOEX Offshore 2007 LLC.; Triton Asset Leasing GMBH; Transocean Holdings LLC, Transocean Offshore Deepwater Drilling, Inc., and Transocean Deepwater, Inc.; and Transocean's insurer, QBE Underwriting Ltd./Lloyd's Syndicate 1036. *Justice Department Sues BP, Others Over Gulf Spill*, NPR (Dec. 15, 2010), http://www.npr.org/2010/12/15/132083722/u-s-sues-bp-others-over-gulf-oil-spill.

4. Some economists have hypothesized that the spill could cost BP as "little" as $3 billion while other professionals—particularly attorneys—foresee BP paying $10–$15 billion or possibly more. Betsy Schiffman, *How Much Will BP Have to Pay for the Oil Spill?*, DAILYFINANCE (Apr. 30, 2010), http://www.dailyfinance.com/2010/04/30/how-much-will-bp-have-to-pay-for-the-oil-spill/. By August 2011, BP had paid more than $5 billion to 204,434 victims and had agreed to spend $1.7 billion on cleanup efforts as well as alternative expenses. Moira Herbst, *BP Fund Has Paid Out $5 Billion to Gulf Spill Victims*, RECENT BUS. NEWS (Aug. 24, 2011), http://ourbusinessnews.com/bp-fund-has-paid-out-5-billion-to-gulf-spill-victims. This money has come from a $20 billion escrow account set up by BP and managed by Kenneth Feinberg. *Id.* As of January 2012, BP had paid $7 billion in personal claims and remains responsible for clean-up costs and economic losses expected to total about $40 billion. Margaret Cronin Fisk & Allen Johnson Jr., *BP Must Cover Some Halliburton Gulf Spill Costs, Judge Says*, BLOOMBERG (Jan. 31, 2012), http://www.bloomberg.com/news/2012-01-31/bp-must-indemnify-halliburton-for-gulf-oil-spill-judge-says.html.

awarded, they will be monumental.[5] However, a seemingly curious but equally important question also arises: if punitive damages are ordered, to whom should they be awarded to best ensure that they benefit the Gulf Coast and those affected by the tragedy?

Firmly rooted in American jurisprudence, punitive damages are intended to be a societal good—serving the vital roles of punishment and deterrence, and thereby filling the niche between civil and criminal law.[6] Yet, there are two major problems with punitive damages: first, even though punitive damages are meant to benefit society as a whole, without specified funds plaintiffs often receive windfalls; and second, if left unchecked, punitive damages have a detrimental affect upon the courts, and, more importantly, upon the economy.[7] With regard to the oil spill, nearly everyone agrees that BP and some of the other companies involved should be punished for any tortious improprieties that led to the Deepwater Horizon disaster.[8] But there is nothing to ensure that the named plaintiffs would spend a punitive damage award—above any money they have already received—in a manner beneficial to the area affected by the spill, nor is there a proper understanding about the effect a large punitive damage award would have on oil economy states like Louisiana.[9] Some degree of regulation is necessary to address these issues.[10]

---

5. Currently there is a push to increase the cap on punitive damages awarded in maritime cases to $10 billion to make sure that BP can be properly punished and plaintiffs can receive as much money as possible. *BP Oil Spill Damages & Compensation*, RUMRELL L. NETWORK, http://bpoilspilldamages.us/damages-compensation /overview/ (last visited Jan. 31, 2012).

6. *See infra* Part II.B.

7. *See infra* Part II.B.

8. *Punishing BP: 6 Brutal Proposals*, THE WEEK (May 28, 2010), http://theweek.com/article/index/ 203410/punishing-bp-6-brutal-proposals.

9. John Burnett, *Despite Spill, Louisiana Remains Wedded To Oil*, NPR (June 24, 2010), http://www.npr.org/templates/story/story.php?storyId=128064058. By August 2011, 947,892 claims had been filed by plaintiffs from all fifty states and from thirty-six countries. Herbst, *supra* note 4. The U.S. District Court for the Eastern District of Louisiana—located in New Orleans—is overseeing all litigation against the companies involved in the Deepwater Horizon Oil Spill. *See Update: Agreement Reached with BP*, PLAINTIFFS' STEERING COMMITTEE, http://www.bpmdl2179.com/ (last visited Oct. 26, 2012)*; see also Current Developments*, MDL-2179 OIL SPILL BY OIL RIG "DEEPWATER HORIZON", http://www.laed.uscourts.gov/OilSpill/OilSpill.htm (last visited Oct. 26, 2012) (including the docket for the Deepwater Horizon federal claims).

In a major ruling, District Court Judge Carl Barbier limited all lawsuits to federal claims, concluding that "[t]he case properly falls into maritime law and the Outer Continental Shelf Lands Act, both federal laws." Rebecca Mowbray, *Judge Allows Some Punitive Damages in BP Oil Spill Lawsuits*, TIMES-PICAYUNE, Aug. 29, 2011, http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/08/judge_dismisses_bp_oil_spill_c.html. While the latter is silent as to punitive damages, maritime law provides that punitive damages may be awarded. *Id*.; *see also* Lauren E.

One such proposed regulation on punitive damages has been the split-recovery statute.[11] Recently, a bill for the National Endowment for the Oceans included a split-recovery statute, allocating to the Endowment 25% of any punitive damages awarded in a federal civil action arising from torts occurring on the Outer Continental Shelf in excess of $100,000.[12] Even so, split-recovery statutes have not come without their own problems and challenges—particularly, allegations that they violate the Constitution's Takings and Excessive Fines Clauses.[13] Although a number of state courts have heard cases involving these arguments, the judicial outcomes have been conflicting and non-dispositive.[14] As such, the Ninth Circuit's ruling in *Engquist v. Oregon Department of Agriculture* was important because it specifically analyzed the two-horn constitutional dilemma and concluded that split-recovery statutes do not violate the Constitution.[15]

However, the court failed to resolve the problem that arises when a plaintiff is awarded punitive damages in federal court on federal law claims in a state that has a split-recovery statute.[16] More importantly, the court failed to solve the issue of nullification of split-recovery statutes through post-verdict settlements.[17] This is particularly important to the BP oil spill, where all claims have been limited to those arising under federal law and there is no current federal punitive restrictor.[18] In light of the foregoing, the question arises: is a split-recovery statute the best way to control punitive damages and make sure they function as a societal benefit? Given the residual problems associated with split-recovery statutes, it is more prudent

---

Hume, *Are We Sailing in Occupied Waters?: Rethinking the Availability of Punitive Damages Under the Oil Pollution Act of 1990*, 86 N.Y.U. L. REV. 1444, 1446 (2011) (discussing whether punitive damages should be awarded under the Oil Pollution Act of 1990 for the Deepwater Horizon incident). Additionally, this means that the case will be decided "by a judge without a jury," *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 363 (1959), with the judge hopefully keeping the aforementioned considerations in mind when deciding a damage award.

10. *See infra* Part III.B.

11. *See infra* Part III.

12. S. 973, 112th Cong. § 5 (2011). After being read twice by the Senate Committee in 2011, the bill was referred to the Committee on Commerce, Science, and Transportation where it remains to date. Library of Congress, *Bill Summary & Status 112th Congress (2011–2012) S.973*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.00973: (last visited Oct. 26, 2012).

The United States Outer Continental Shelf (OCS) encompasses the underwater area lying between a coastal state's jurisdiction and federal jurisdiction. *The Outer Continental Shelf*, OCS ALTERNATIVE ENERGY AND ALTERNATE USE PROGRAMMATIC EIS, http://ocsenergy.anl.gov/guide/ocs/index.cfm (last visited Jan. 29, 2012). Generally, the OCS begins three to nine miles offshore and extends 200 nautical miles outward. *Id.*

13. *See infra* Part III.B.

14. *See infra* Part III.B.

15. Engquist v. Or. Dep't of Agric., 478 F.3d 985 (9th Cir. 2007).

16. *See infra* Part V.

17. *Id.*

18. *See supra* note 9 and accompanying text.

for the federal government to adopt a federal monitory tax on punitive damage awards, thereby magnifying the benefits of a split-recovery system through an already-functioning tool without the perennial problems associated with split-recovery statutes.[19]

Part II of this Comment progresses through the history of punitive damages, including the purpose behind punitive damages and attempts to reform or limit punitive damages. Part III reviews the history and purpose of split-recovery statutes. Additionally, this Part discusses the dual constitutional challenges brought against split-recovery statutes and the courts that have found split-recovery statutes to be invalid. Part IV analyzes the Ninth Circuit's decision in *Engquist v. Oregon Department of Agriculture*, specifically examining the court's conclusion that the split-recovery statute did not violate the Fifth Amendment's Takings Clause or the Eighth Amendment's Excessive Fines Clause. Part V examines the current federal restrictions on punitive damages, shows why it is important for the federal government to take swift action to prevent plaintiff windfalls, and advocates for a federal monitory tax to regulate punitive damage awards.

II. PUNITIVE DAMAGES GENERALLY

A. History and Purpose of Punitive Damages

Though precursors of punitive damages may be traced back to thirteenth century England,[20] the genesis of modern day United States punitive damage law came about in the late eighteenth century.[21] Beginning with the 1784

19. *See infra* Part V.

20. *See* Semra Mesulam, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class*, 104 COLUM. L. REV. 1114, 1121 (2004) (reviewing the early history of punitive damages).

21. Leah R. Mervine, *Bridging the "Philosophical Void" in Punitive Damages: Empowering Plaintiffs and Society Through Curative Damages*, 54 BUFF. L. REV. 1587, 1599–1603 (2007); *see also* Lee Katherine Goldstein, *Split-Recovery Statutes Do More Harm Than Good*, 38 COLO. LAW. 105 (2009) (discussing the use establishment of punitive damages in English common law by 1763, as well as their use in America prior to the adoption of the Constitution); Bethany Rabe, *The Constitutionality of Split-Recovery Punitive Damage Statutes: Good Policy but Bad Law*, 2008 UTAH L. REV. 333, 333–35 (suggesting that while what we think of as punitive damages arose in England during the latter part of the 1700s, punitive damages may be traced back to the days of Hammurabi's Code). Other legal scholars have also pointed to the Mosaic Law for evidence of punitive damages. James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic that has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119 (1984) (citing multiple Scriptures from the biblical book of Exodus wherein a person was required to restore more to the injured party than the

case of *Genay v. Norris*, the practice of awarding punitive damages for particularly repugnant conduct or for a very serious injury was introduced as an arrow in the court's quiver.[22] It has subsequently become a powerful weapon.[23]

Initially, punitive damages were only available for traditional intentional torts—"assault and battery, libel and slander, malicious prosecution, false imprisonment, and intentional interferences with property."[24] Additionally, they were not widely used, nor were they readily distinguishable from traditional damages awards.[25] Over time, however, courts began to apply the legal theory more frequently, forging a common law delineation between compensatory damages—meant to place the injured party in the position he or she was in prior to the injury—[26]and "punitive damages [which] are awarded against the defendant to punish and deter [him or her], not as additional compensation for the plaintiff."[27] By 1818, the Supreme Court of the United States had begun to recognize that in cases of gross or wanton misconduct, a defendant "may be made responsible beyond the loss actually sustained."[28] Thirty-three years later, the Supreme Court, in *Day v.*

---

actual harm caused).

22. Genay v. Norris, 1 S.C.L. (1 Bay) 6, 6 (1784); *see* Mervine, *supra* note 21, at 1600; *see also* Coryell v. Colbaugh, 1 N.J.L. 77, 77–78 (N.J. 1791) (encouraging the jury to award damages beyond actual suffering and losses, in an attempt to deter such offenses in the future). While the term "punitive damages" is used to identify an amount of damages awarded in excess of compensatory damages, it also often connotes "exemplary or vindictive damages, 'smart money,' and the like." Jay M. Zitter, Annotation, *Punitive Damages: Power of Equity Court to Award*, 58 A.L.R. 4th 844, 844 n.2 (1987).

23. *See infra* notes 30–42.

24. Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform By Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1007 (1999) [hereinafter Schwartz, *Reining in Punitive Damages*].

25. Mervine, *supra* note 21, at 1601–02; *see* Mesulam, *supra* note 20, at 1122 (describing how punitive damages were slow to become widespread); Victor E. Schwartz et al., *I'll Take That: Legal and Public Policy Problems Raised by Statutes That Require Punitive Damages Awards to be Shared with the State*, 68 MO. L. REV. 525, 527–28 (2003) [hereinafter Schwartz, *I'll Take That*] (explaining the slow growth of punitive damages between the early days in America and the 1960s).

26. RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979). *See generally* Jill Wieber Lens, *Honest Confusion: The Purpose of Compensatory Damages in Tort and Fraudulent Misrepresentation*, 59 U. KAN. L. REV. 231, 235–36 (2011) (reviewing a four-step purpose analysis for compensatory damages).

27. Mervine, *supra* note 21, at 1597 (emphasis omitted). Multiple courts, like the Supreme Court of Indiana, have stated, "To the extent punitive damages are recoverable, they are a creature of the common law." Cheatham v. Pohle, 789 N.E.2d 467, 471 (Ind. 2003). As such, the power of punitive damages can quickly be overcome by legislation. *See infra* notes 78–89 and accompanying text.

28. The Amiable Nancy, 16 U.S. 546, 553 (1818); Mesulam, *supra* note 20, at 1122 (discussing the early Supreme Court cases that received punitive damages); *see also* Mervine, *supra* note 21, at 1601 (analyzing the history of the judicial crafted category of exemplary or punitive damages).

Woodworth, formally recognized the validity of punitive damages as a well-established principle in American jurisprudence.[29]

After receiving approval from the Supreme Court, punitive damages began to serve the twin societal aims of retribution and deterrence.[30] The rationale behind retribution was that the defendant deserved to be punished for his or her gross misconduct by paying a special damage award beyond just the compensatory damages.[31] Similarly, the rationale behind deterrence suggested that by punishing the defendant through an exemplary fine, both the defendant and society in general would be discouraged from performing a similar act.[32] Thus, the traditional focus for punitive damages—vis-à-vis the twin aims—was to bridge the gap between criminal and tort theory, punishing a defendant for the benefit of society.[33]

Despite the potential benefits of punitive damages as originally purposed, their tenure in United States jurisprudence has not been left unscathed by criticism.[34] An early example of such court-based exegesis

29. Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) ("It 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, having in view the enormity of his offence rather than the measure of compensation to the plaintiff."); *see* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996) (reviewing the 150-year-old decision of *Day*); Meredith Matheson Thoms, *Punitive Damages in Texas: Examining the Need for a Split-Recovery Statute*, 35 ST. MARY'S L.J. 207, 210 (2003) (examining early American court cases that involved punitive damages).

30. Thoms, *supra* note 29, at 216.

31. *Id*. at 214–15.

32. *Id*. at 216. *But cf*. Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 463 n.317 (2008) ("I disagree, however, that punitive damages may be used to completely 'deter . . . others . . . from similar conduct in the future. . . .' That might be a welcome side effect of punitive damages, but it cannot be a driving force behind them without violating procedural due process.") (citation omitted).

33. Meulam, *supra* note 20, at 1119–21. One scholar has commented on three specific ways in which society is benefited from punitive damages:

> [F]irst, unlike predictable damage caps, punitive damages prevent wealthy corporations from engaging in cost-benefit analysis with people's lives; second, punitive damages provide an incentive to victims and their attorneys to endure lengthy, draining, and costly litigation; and third, they provide victims the control with which to fix the harm.

Mervine, *supra* note 21, at 1623.

34. *See* Kirk v. Denver Publ'g Co., 818 P.2d 262, 276 n.5 (Colo. 1991). Even in *Day*, the Court recognized that a number of legal scholars had been and were questioning the validity of punitive damages in American courts. Day v. Woodworth, 54 U.S. (1 How.) 363, 371 (1851); s*ee also* Murphy v. Hobbs, 5 P. 119, 121–22 (Colo. 1884) ("[I]t is the aim of civil jurisprudence to mete out as nearly exact justice as possible between contending litigants. There ought to be no disposition to take from the defendant or give to the plaintiff more than equity and justice require. Yet under this rule of [punitive] damages these principles are forgotten, and judicial machinery is used for the avowed purpose of giving plaintiff that to which he has no shadow of right. . . . Who will undertake

comes from the New Hampshire Supreme Court, which famously decreed, "The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law."[35] Likewise, other courts suggested that there was something amiss about compensating the plaintiff beyond the level necessary to cure the harm.[36] A similar lack of synergism between state courts and this legal approach was evidenced in Indiana; there, the court reviewed the history of punitive damages in America and stated, "The question of exemplary damages is not settled beyond dispute. . . . [T]he rule in the several States is not uniform, and amongst text-writers the same difficulty exists. . . . The doctrine of exemplary or punitive damages rests upon a very uncertain and unstable basis."[37] As such, many sought to cleanse this unsettled and unsettling enigma from the chronicles of the common law.[38]

In light of the foregoing, the Supreme Court set out to resolve the

---

to give a valid reason why plaintiff, after being fully paid for all the injury inflicted upon his property, body, reputation, and feelings, should still be compensated, above and beyond, for a wrong committed against the public at large? The idea is inconsistent with sound legal principles, and should never have found a lodgment in the law.").

35. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 8 n.4 (1991) (quoting Fay v. Parker, 53 N.H. 342, 382 (1872)); *see* Scott Dodson, *Assessing the Practicality and Constitutionality of Alaska's Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1340 (2000) (discussing early judicial controversies with the doctrine of punitive damages). Not every state court judge, however, thought punitive damages were evil. As evidence of this, the Court in *Pacific Mutual Life Insurance Co.* compared the New Hampshire court's comment to a comment by a Wisconsin judge in 1914:

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

499 U.S. at 8 n.4 (quoting Luther v. Shaw, 147 N.W. 18, 19–20 (Wis. 1914)).

36. *See supra* note 34 and accompanying text; s*ee also* Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., 473 N.W.2d 612, 619 (Iowa 1991) ("[A] plaintiff is a fortuitous beneficiary of a punitive damage award simply because there is no one else to receive it.") (citations omitted); Thoms, *supra* note 29, at 218–19 (allowing the plaintiff to be the sole recipient of the punitive damage award contradictory to the underlying purpose of punitive damages, to benefit the public good).

37. Stewart v. Maddox, 63 Ind. 51, 56–57 (1878); s*ee also* Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1075 (Wash. 1891) ("[W]e believe that the doctrine of punitive damages is unsound in principle, and unfair and dangerous in practice."); Roose v. Perkins, 2 N.W. 715, 721–22 (Neb. 1879) ("In law, the party injured, upon being allowed this compensation, has no further claim upon the defendant for that injury, therefore he is not entitled to recover more. . . . The effect ordinarily of instructing a jury that they may find exemplary damages is to say to them that in estimating damages they need be governed by no rules, be bound by no oath, and that they may return a verdict . . . according to their whim or caprice they may deem expedient, without regard to the amount of the injury.").

38. Rabe, *supra* note 21, at 334–35. *See also Kirk*, 818 P.2d at 266 n.5 (examining how the Colorado Supreme Court removed punitive damages from its list of available remedies during the late nineteenth century).

ambiguity over the punitive damage doctrine.[39] Although the Court acknowledged the state courts' grievances, it determined that the legal tool had become too entrenched in United States common law to be removed.[40] The Court also held, at a later date, that it would only review cases where the punitive damages awarded were "so grossly excessive as to amount to a deprivation of property without due process of law."[41] So this was the state of punitive damages for the next seventy years: reluctantly accepted, infrequently used, often struck down by trial courts, rarely reviewed by the Supreme Court, and awarded in such nominal amounts as to be inconsequential.[42] However, punitive damages soon surfaced in a monumental manner.

Spurred by the consumer movement in the late 1950s and early 1960s,[43] American courts began to award punitive damages much more frequently, "radically expand[ing their] availability" to misconduct beyond traditional intentional torts.[44] Additionally, many courts decreased the burden of proof needed to prevail in a claim involving punitive damages.[45] Yet, the number and monetary amount of punitive damage awards remained fairly manageable.[46]

---

39. *See infra* notes 40–41.

40. Mervine, *supra* note 21, at 1601 (citing Milwaukee & St. Paul Ry. v. Arms, 91 U.S. 489, 492 (1875)). Many courts, such as the Oregon court in *Sullivan v. Oregon Railway & Navigation Co.*, 7 P. 508, 515–16 (Or. 1885), agreed that "[i]t would be extremely difficult, if not impossible, to give any good reason for" the allowance of punitive damages, yet "it seems to have attached itself to our jurisprudence." *See* Rabe, *supra* note 21, at 335 (indicating that famed nineteenth century legal scholars Theodore Sedwick and Simon Greenleaf recognized the oddity of punitive damages; however, Sedwick believed the courts and the states should not be removed because punitive damages had become a part of American legal tradition).

41. Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909); Rabe, *supra* note 21, at 335 (commenting on the Supreme Court's concern for punitive damages). This attitude towards punitive damages has subsequently been affirmed in more modern Supreme Court cases like *TXO Productions Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 456 (1993), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996). It was not until 1915 that the Supreme Court overturned a punitive damage award for being unreasonable and "so plainly arbitrary and oppressive as to be nothing short" of a taking in violation of the Fourteenth Amendment. Sw. Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 491 (1915) (finding a $6,300 exemplary award for not furnishing telephone services to be unconstitutional).

42. ROBERT W. HAMMESFAHR & LORIS S. NUGENT, PUNITIVE DAMAGES STATE-BY-STATE GUIDE § 1:4 (2011).

43. *Id.* § 1:5.

44. Schwartz, *I'll Take That*, *supra* note 25, at 528.

45. *Id.* (explaining how numerous state courts "instituted the 'triple trigger' approach of 'willful, wanton, or reckless disregard'" with regard to the burden of proof required for plaintiffs to prove punitive damages, while some courts even lowered the standard to "gross negligence").

46. Mesulam, *supra* note 20, at 1122 (discussing how punitive damages were slow to find

Enter the 1970s and 1980s.[47] Predicated upon the foundation laid by courts during the 1960s and fueled by their extension into product liability claims, punitive damage awards exploded.[48] Punitive damages began to be awarded at unprecedented levels and in astronomical amounts.[49] Although some Supreme Court Justices were concerned about the massive "windfall recover[ies]"[50] plaintiffs were receiving, the Court, for the most part, watched as the "[a]wards of punitive damages . . . skyrocket[ed]."[51] Subsequently, the expansion of punitive damages "'continued and accelerated,' thanks in part to the rise of mass tort litigation,"[52] and the ensuing two decades saw punitive damage awards continue to escalate.[53] It

---

widespread growth until the 1960s when they became available for unintentional torts).

47. *Id*.; Schwartz, *I'll Take That*, *supra* note 25, at 528–29 (discussing the evolution of punitive damages during this time period); s*ee also* Mervine, *supra* note 21, at 1604 (starting in the late 1960s, the allowance of lower standards for punitive damages caused punitive damage awards to radically expand).

48. Mervine, *supra* note 21, at 1604. During this time period, courts gradually became cognizant of the complete lack of any mechanism to control punitive damage awards, with any level of sanction conceivably serving any legitimate purpose. John Calvin Jefferies, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986). And as courts saw "a system careening out of control . . . unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface. Many of these awards were also unprecedented in amount. And these trends continued and accelerated into the 1980's." *Id*.

49. Mesulam, *supra* note 20, at 1122–23.

50. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981) (Brennan, J., dissenting).

51. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part); *see* Mervine, *supra* note 21, at 1604 n.95 (citing multiple Supreme Court decisions during this time period where the Court recognized that large punitive damage awards were being administered, but did not see fit to intervene); *see also* Schwartz, *Reining in Punitive Damages*, *supra* note 24, at 1003 ("The United States Supreme Court has expressed serious concern in recent years that punitive damages awards in this country have 'run wild,' jeopardizing fundamental constitutional rights."). A 1989 commentator also observed that "hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989). *But cf*. Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 54 ("All [empirical studies] conclude that punitive damages verdicts are rare."); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990) (examining the infrequency of punitive damage awards and their manageable size when awarded).

52. Mesulam, *supra* note 20, at 1122 (quoting Jefferies, *supra* note 48, at 142).

53. "Until 1987 no punitive award . . . ever exceeded $1 billion, but since then at least nine have reached that level." Mesulam, *supra* note 20, at 1123. An example of a suspect punitive damage award in excess of a billion dollars occurred in 1999, when a Los Angeles jury ordered General Motors to pay $4.9 billion dollars in punitive damages to six individuals who were injured when a drunk driver rear-ended their vehicle. Schwartz, *I'll Take That*, *supra* note 25, at 531. Another particularly noteworthy cased occurred in 2002 when a jury awarded a single individual—who had developed lung cancer from smoking cigarettes—$28 billion in punitive damages. Bullock v. Philip Morris USA, Inc., 42 Cal. Rptr. 3d 140, 151 (Ct. App. 2006), *vacated*, 159 P.3d 33 (Cal. 2007). The largest reported punitive damage award, $145 billion, was assessed in *Engle v. RJ Reynolds Tobacco*, 94–08273, 2000 WL 33534572 (Fla. Cir. Ct., Nov. 6, 2000), *rev'd sub nom. Liggett Group Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003), *aff'd*, 945 So. 2d 1246 (Fla. 2006). *See* HAMMESFAHR, *supra* note 42 § 1:8 (2011) ("While the jury's punitive damage award is the largest

was during this era of uncertainty and concern about exorbitant punitive damage awards that many proposed reform.[54] Additionally, with the rise of punitive damages in United State courts, it became necessary to decide what, if any, tax liabilities would be implicated.

B. Taxation of Punitive Damages

The Constitution confers upon Congress the ability to lay and collect income taxes.[55] Taxable income has been defined as "all income from whatever source derived."[56] Inherent to the taxing power is "the power to select the subjects of taxation, rates, classes of beneficiaries, deductions and exemptions, and the power to enact whatever measures are reasonably necessary to aid in the assessment and collection of any tax."[57] Furthermore, as a legislative function, the power to tax is construed broadly and much deference is given to the decisions of Congress.[58]

Although Congress's power to tax is extensive, enacted taxes are subject to several constitutional restrictions.[59] Moreover, while a number of federal taxes have been enacted incident to police power or the power to regulate

---

ever reported, it is notable that the Supreme Court of Florida found the jury's verdict to be excessive.").

54. *See infra* note 73.

55. U.S. CONST. amend. XVI, § 8.

56. I.R.C. § 61 (2006). This definition was originally found in I.R.C. § 22(a) (1939), and was used by Congress to exert "the full measure of its taxing power." Helvering v. Clifford, 309 U.S. 331, 334 (1940).

57. 47A C.J.S. *Internal Revenue* § 3 (2012). Therefore, Congress can create a federal monitory tax on punitive damages by selecting a rate that would work to prevent plaintiffs' windfalls. Congress has subsequently delegated this power to the "Internal Revenue Service with broad power to enforce our revenue laws. . . . The power to collect, however, is not an unrestricted power. The government must abide by the laws of the United States including constitutional, statutory, and decisional constraints against unequal treatment." IRS v. Blais, 612 F. Supp. 700, 703–04 (D. Mass. 1985).

58. In *Commissioner v. Jacobson*, 336 U.S. 28, 49 (1949), the Supreme Court defined the general rule for taxing income: "The income taxed is described in sweeping terms and should be broadly construed in accordance with an obvious purpose to tax income comprehensively. The exemptions, on the other hand, are specifically stated and should be construed with restraint in the light of the same policy."

59. Limitations include a general restriction on the power to tax under the Due Process Clause, the Fifth Amendment's right against self-incrimination, and the Fourteenth Amendment's Equal Protection Clause. 47A C.J.S. *Internal Revenue* § 3 (2012). Furthermore, Congress is prohibited from imposing non-uniform direct or indirect taxes throughout the United States, and from laying any tax on the export of goods. U.S. CONST. art. I, § 8, cl. 1; *id.* § 9, cl. 4, 5. Additionally, Congress may tax a particular class of persons if the tax bears a rational relation to a legitimate governmental purpose. Wheeler v. United States, 768 F.2d 1333, 1336–37 (Fed. Cir. 1985).

certain activities, taxes are generally unavailable for strictly regulatory purposes.[60] Nevertheless, the Supreme Court has shown considerable deference to federal tax measures, even where the tax is so regulatory that it preempts the activity it seeks to control.[61] Given these general premises, Congress's power to tax punitive damages has not been questioned,[62] yet its applicability has been unsettled.

For many years, the ambiguity that originally shrouded punitive damage awards in the United States extended to Congress's ability to tax punitive damages.[63] Originally, under the "capital labor" theory, taxable income only included income derived from the capital markets, labor, or both.[64] Thus, it excluded any damages that restored a loss or sought to make a victim whole.[65] Because punitive damages are "[w]indfall income" in that they are not derived from traditional capital or labor expenditures, they were generally considered to be exempt from any federal income tax.[66]

It was not until the Supreme Court abandoned the "capital or labor" requirement in its 1955 decision *Commissioner v. Glenshaw Glass Co.* that punitive damages became taxable as gross income.[67] However, complete

---

60. 47A C.J.S. *Internal Revenue* § 3 (2012). The test that is applied to determine whether a tax is an exercise of the taxing power or is merely regulatory is to

> view the objects and purposes of the statute as whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.

Rodgers v. United States, 138 F.2d 992, 994 (6th Cir. 1943).

61. Ruth Mason, *Federalism and the Taxing Power*, 99 CAL. L. REV. 975, 995, 1029 (2011) ("Supreme Court doctrine is unclear on the limits of Congress's ability to use tax penalties to regulate. Although the Court unequivocally stated in several cases decided in the 1920s and 1930s that the Constitution forbids Congress from using tax penalties to accomplish what it could not accomplish via direct regulation, the precedential value of these cases is unclear.").

62. 2 FEDERAL TAX GUIDE TO LEGAL FORMS § 12:15 (2d ed. 2011).

63. *See* 2 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 18.1(B) (6th ed. 2010) (reviewing the pre-1984 tax treatment of punitive damages in its entirety).

64. Stratton's Independence, Ltd. v. Howbert, 231 U.S. 399, 417–19 (1913). Consequently, the Revenue Act of 1918 excluded from gross income "[a]mounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness." O'Gilvie v. United States, 519 U.S. 79, 85 (1996) (citing Revenue Act of 1918, 40 Stat. 1057, 1066 (1919)).

65. *O'Gilvie*, 519 U.S. at 85–87; *see also* Doyle v. Mitchell Bros., 247 U.S. 179, 187 (1918); S. Pac. Co. v. Lowe, 247 U.S. 330, 335 (1918) (concluding punitive damages were a restoration of capital, and were thus excluded from the definition of taxable income).

66. Douglas A. Kahn, *Compensatory and Punitive Damages for A Personal Injury: To Tax or Not to Tax?*, 2 FLA. TAX REV. 327, 332 (1994).

67. Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431–32 (1955); *see* 2 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 14:02 (2000) ("The case of *Commissioner v. Glenshaw Glass Company* . . . has long been interpreted to mandate that all

clarity on the taxability of punitive damages did not follow. Courts around the country did not apply *Glenshaw Glass Co*. to punitive damage awards for physical injury or sickness, because they construed the Court's opinion to apply only to fraud and anti-fraud claims.[68] Additionally, Internal Revenue Code § 104(a)(2) exempted from taxation punitive damages awarded for personal injury or sickness.[69] This only caused more confusion.[70] After several decades of conflicting decisions in the Tax Court and the Courts of Appeal, however, the Supreme Court finally concluded that punitive damages are not excludable from income, even when awarded for personal injury.[71] Today, punitive damages are considered gross income and are subject to a federal income tax of around 50%.[72] However, the

---

punitive damage awards be taxed unless there exists some express statutory exclusion."). Pointedly, Glenshaw Glass Company—the original beneficiary of the punitive damage award after their anti-trust case—attempted to characterize the award as "'windfalls' flowing from the culpable conduct of third parties," and, thus "not within the scope" of taxable gross income. *Glenshaw Glass Co*., 348 U.S. at 429, 431 ("The mere fact that the payments were extracted from the wrongdoers as punishment for unlawful conduct cannot detract from their character as taxable income . . . ."); *see also* Jennifer J.S. Brooks, *Tax Consequences of Damages and Settlements*, *in* AM. BAR ASS'N, DIVISION FOR PROFESSIONAL EDUCATION PRESENTS A NATIONAL INSTITUTE ON DAMAGES, NEW SETTLEMENT TECHNIQUES, AND TAX CONSEQUENCES 213, 227–29 (1986) ("A punitive damage award in any cause of action should be thought of as a windfall to the taxpayer, because it does not compensate for loss."); James D. Ghiardi, *The Federal Taxation of Punitive Damage Awards*, 11 J.L. & COM. 1, 12–13 (1991) (discussing how punitive damages are considered income for tax liability purposes unless they involve physical injury, physical sickness, or wrongful death).

68. Ghiardi, *supra* note 67, at 12.

69. "Without section 104(a)(2), punitive damages would fall under the broad definition of gross income." Clay R. Stevens, *Killing Two Birds with One Stone: Elimination of the Punitive Damage Exemption of Section 104(a)(2) Leads to Greater Efficiency and Raises Revenue*, 28 BEVERLY HILLS B. ASS'N J. 168, 169 (1994).

70. *See* Ghiardi, *supra* note 67, at 2 (noting that the ambiguity surrounding the taxation of punitive damages was caused by Internal Revenue Code § 104(a)(2)); James Serven, *The Taxation of Punitive Damages: Horton Lays an Egg?*, 72 DENV. U. L. REV. 215, 216 (1995) (analyzing the development and application of Internal Revenue Code § 104(a)(2), including relevant case law).

71. I.R.C. § 104(a)(2) (2006); 2 FEDERAL TAX GUIDE TO LEGAL FORMS § 12:15 (2d ed. 2011) (citing *O'Gilvie v. United States*, 519 U.S. 79, 83 (1996)). Congress subsequently amended Section 104(a)(2) to expressly state that punitive damages could not be excluded from tax liability. KIRCHER, *supra* note 67 § 14:01. Today, punitive damages awarded in wrongful death cases represent the most controversial area wherein punitive damages are excluded from federal taxes. 2 FEDERAL TAX GUIDE TO LEGAL FORMS § 12:15 (citing I.R.C. § 104(c)). It should also be noted that punitive damage payments are currently a deductible expense for businesses and individuals. KIRCHER, *supra* note 67 §§ 14:13, 14:15. Scholars argue that such exemptions should be removed because they work against the twin aims of punishment and deterrence. *See* Catherine M. Del Castillo, *Should Punitive Damages Be Nondeductible? The Expansion of the Public-Policy Doctrine*, 68 TEX. L. REV. 819 (1990).

72. SCHLUETER, *supra* note 63 § 18.1(C); *see* KIRCHER, *supra* note 67 § 14:08 (examining the exclusions to the general rule that punitive damages are taxable).

taxation of punitive damages has never been used as a governor or curative tool for the punitive damage problem; instead, opponents to skyrocketing punitive damage awards have adopted alternate controls.

C. Modern Reform Measures

The prevailing perception amongst reformers and courts during the mid-to-late twentieth century was that rampant punitive damages were wreaking havoc upon both the economy and the judicial system.[73] Equally important, people were concerned about the massive windfalls plaintiffs were receiving.[74] As such, revisionists articulated several different solutions meant to curb the punitive damage dilemma.

---

73. Gary S. Becker, *How to Put the Right Cap on Punitive Damages*, BUS. WK. N.Y., Sept. 15, 2003, at 28, *available at* http://home.uchicago.edu/~gbecker/Businessweek/BW/2003/09_15_2003.pdf ("Excessive punitive damage awards are not harmless transfers of wealth: They damage the functioning of the U.S. economy and judicial system."). Runaway punitive damages threatened the economy because they stemmed "research and development of new products," dramatically increased businesses' insurance premiums, forced businesses to settle meritless claims or risk exposure to immense punitive damage awards, and pressured numerous large companies into bankruptcy, thus causing many employees to lose their jobs. Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., dissenting); Sales & Cole, *supra* note 21, at 1153, 1156–57; David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 6 (1982) ("[T]he increasing number and size of such awards may fairly raise concern for the future stability of American industry."). The courts' concerns are derived from the fact that juries are left mostly to their own devices when setting the punitive damage amounts, an "important, and potentially devastating, decision." *Browning-Ferris*, 492 U.S. at 281 (Brennan, J., concurring).

74. The term "plaintiff windfall" is used to denote, in the words of Justice Harlan, "private fines levied for purposes that may be wholly unrelated to the circumstances of the actual litigant." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 74 (1971) (Harlan, J., dissenting). In other words, "whenever the amount of punitive damages exceeds the plaintiff's litigation costs," a windfall in the favor of plaintiff results. Note, *An Economic Analysis of the Plantiff's Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900, 1904 (1992) [hereinafter *Economic Analysis*]. Windfalls are problematic because they produce inefficient compensation, encourage risk-seeking behavior, and misallocate legal resources. *Id*. at 1907. It can also be said that plaintiff windfalls do little to promote the societal good punitive damages were meant to accomplish. *Id*.

It is true that "conventional economic opinion has . . . long regarded the plaintiff's windfall as a necessary byproduct of adequately deterring the defendant. . . . [R]ecent scholarship, however, has identified two potential inefficiencies associated with windfall awards to plaintiffs: unnecessary or frivolous litigation and inadequate precautionary measures undertaken by plaintiffs." Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 370–71 (2003); Sales & Cole, *supra* note 21, at 1165 ("Considering the expanded and virtually unlimited access to compensatory damages, punitive damages simply provide a windfall to the plaintiff, penalize the innocent consumers or society, and unnecessarily sap the vitality of the economy upon which society is totally dependent."). Given the negative treatment of plaintiff windfalls, the law should prevent their occurrence.

Connecticut has made one of the best attempts at reforming punitive damages to eliminate plaintiffs' windfalls. There, a plaintiff may only recover the amount of his or her actual litigation, minus taxable costs. Triangle Sheet Metal Works, Inc. v. Silver, 222 A.2d 220 (Conn. 1966). In this way, Connecticut strikes at the cause of the windfalls. However, this Comment favors an alternative regulatory tool because the Connecticut rule does not seek to punish the defendant, one of the

The most radical of the proposed measures was the complete abandonment of punitive damages. Federal law delegates broad discretion to state legislatures in authorizing and limiting punitive damage awards.[75] As such, some states—going back to the nineteenth century—have banned punitive damages either in specific instances or in their entirety.[76] Even so, abolishment has not been widely used. Most jurisdictions recognize some beneficial purpose served by punitive damages or remain convinced—like the Supreme Court of yesteryear—that punitive damages are too firmly entrenched in the common law to truly be eradicated.[77]

Although few states have explicitly banned punitive damages, numerous states have placed caps on them. In the 1980s, monetary caps were one of the first retorts issued against punitive damages.[78] There are two types of caps. Some courts use a hard cap—a maximum set amount that the law will allow for a punitive damage recovery.[79] Other state legislatures set the

primary purposes of punitive damages. *See* LeBlanc v. Spector, 378 F. Supp. 301, 305 (D. Conn. 1973) ("'[P]unitive' damages in Connecticut serve a compensatory function limited by plaintiff's actual costs, rather than a punitive function which computes damages in terms of the wantonness of defendant's conduct.").

75. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

76. Kirk v. Denver Publ'g Co., 818 P.2d 262, 276 n.5 (Colo. 1991). Nebraska courts have completely banned punitive damages. 1 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 4:9 (2d ed. 2011). Louisiana, Massachusetts, New Hampshire, and Washington have banned punitive damages unless explicitly authorized by statute. *Id*. §§ 4:7, 4:8, 4:10, 4:11. Additionally, eight states have specifically banned punitive damages with regard to certain causes of action. ALA. CODE § 6-11-26 to 27 (2011) (statutory prohibition on punitive damages against any state agency); COLO. REV. STAT. § 13-21-102 (2011) (punitive damages not allowed in administrative proceedings or arbitration); 735 ILL. COMP. STAT. ANN. 5/2-1115 (LexisNexis 2012) (prohibition on punitive damages in legal or medical malpractice actions); 745 *id*. 10/2-102 (LexisNexis 2012) (prohibition on punitive damages against public officials); KAN. STAT. ANN. 60-3701 (West 2011) (use of punitive damages banned against drug manufacturer); MONT. CODE ANN. § 27-1-220 (2011) (punitive damages not allowed in contract and breach of contract claims); OHIO REV. CODE ANN. § 2307.80(C) (LexisNexis 2012) (punitive damages banned against drug manufacturers); OR. REV. STAT. ANN. §§ 31.740, 30.927 (West 2011) (punitive damages prohibited with regard to medical claims and drug manufacturers); W. VA. CODE ANN. § 29-12A-7 (LexisNexis 2011) (punitive damages not allowed in civil lawsuits against a political subdivision or public employee).

77. Thoms, *supra* note 29, at 223; *see also supra* note 40. Many professionals and scholars still find that punitive damages serve a "vital means of punishing and deterring wrongful conduct," thereby providing a mechanism to a judicial system that lacks the ability to punish defendants who engage in conduct that society will not tolerate, but which falls outside the bounds of criminal law. Goldstein, *supra* note 21, at 105; *see also* DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 18:6 (3d ed., 2000) [hereinafter OWEN, PRODUCTS LIABILITY] (noting that most people, including non-attorneys, tag punitive damages as a valuable tool for punishing severe malfeasance).

78. Thoms, *supra* note 29, at 221.

79. *See* Schwartz, *I'll Take That*, *supra* note 25, at 533 (explaining how states like Kansas use a punitive damages system that limits the award amount to the lesser of $5 million or the defendant's

punitive damage amount as an arranged multiple of the compensatory damages.[80] A majority of states use both types of caps.[81] The Supreme Court, on the other hand, has consistently rejected the notion that punitive damages can be measured by "a simple mathematical formula."[82] The Court bases its argument on the observation that where compensatory damages are low but conduct is particularly repulsive, a set multiplier may result in defendants paying only nominal damages.[83] In such circumstances, the purpose of punitive damages to punish and deter the defendant from similar conduct is severely circumscribed.[84]

---

annual gross income) (citing KAN. STAT. ANN. § 60-3701(e) (1994)); ALA. CODE § 6-11-21 (2011) (affixing a $500,000 cap to punitive damages with minimal exceptions). *See also infra* note 84 and accompanying text.

80. Schwartz, *I'll Take That*, *supra* note 25, at 533; Thoms, *supra* note 29, at 222 (discussing how states have capped punitive damages, generally using a fixed multiplier of compensatory damages); *see infra* note 84 and accompanying text; *see, e.g.*, MISS. CODE ANN. § 11-1-65(3)(a) (2011) (statutorily mandated scale capping punitive damages according to defendant's net worth); OHIO REV. CODE ANN. § 2315.21 (LexisNexis 2011) (cap on punitive damages of twice the compensatory damages).

81. OWEN, PRODUCTS LIABILITY, *supra* note 77; *see also, e.g.*, IDAHO CODE ANN. § 6-1604 (2011) ("No judgment for punitive damages shall exceed the greater of two hundred fifty thousand dollars ($250,000) or an amount which is three (3) times the compensatory damages contained in such judgment."); N.D. CENT. CODE ANN. § 32-03.2-11 (2011) ("[T]he amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater.").

82. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996). And it is not just the Supreme Court that believes this. Multiple commentators "have criticized caps and ratios, however, for undermining the punishment and deterrence effects of punitive damages, while still allowing the plaintiff to reap a windfall gain." Dodson, *supra* note 35, at 1336. The best thing that can be said about a punitive cap is that there are low administrative costs—but even then, "this virtue comes with a vice: If the cap is too low, it will prevent large judgments that are entirely justified." Cass R. Sunstein, *What Should Be Done?*, *in* CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 242, 256–57 (2002) (discussing the benefits and problems with modern punitive damage reforms). The Court reaffirmed its reluctance to set a constitutional cap to punitive damages in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 410 (2003), and "[b]ecause there are no rigid benchmarks, ratios greater than" ten to one may still be upheld unless they are so grossly excessive as to constitute a taking in violation of defendant's due process of law. And although the Court refuses to set a specific ratio to which punitive damages should be awarded, it acceded in *State Farm*, "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." *Id.; see also* Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 87 (1992) (discussing how the capping of punitive damage awards is an inefficient remedy to prevent plaintiff windfalls because each defendant's wealth is different, and, as such, a low cap may prevent a particularly wealthy defendant from being deterred from similarly repugnant conduct in the future).

83. *BMW of N. Am., Inc.*, 517 U.S. at 582.

84. *See id.* In light of the aforementioned, it is a wonder that a large number of states use identical statutory language to cap punitive damage awards: "If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice the award made under [the compensatory damages] section." CONN. GEN. STAT. ANN. § 35-53 (West 2011); D.C. CODE § 36-403 (LexisNexis 2012); GA. CODE ANN. § 10-1-763 (2011); HAW. REV. STAT. § 482B-4 (West 2011); ME. REV. STAT. tit. 10, § 1544 (2011); MD. CODE ANN., COM.

Another of the more popular restrictions placed upon punitive damages has been to increase the requisite burden of proof. Most states have chosen to apply a "clear and convincing evidence" standard, and the Supreme Court suggested in dicta that this is the correct standard.[85] Raising the burden of proof was meant to serve two goals: first, to limit the jury's ability to award punitive damages to cases involving egregious conduct; second, to "permit closer scrutiny of the evidence by trial judges and reviewing courts."[86] Moreover, by increasing the requisite evidentiary standard, the jury is

---

LAW § 11-1203 (West 2011); N.M. STAT. ANN. § 57-3A-4 (West 2011); 12 PA. CONS. STAT. ANN. § 5304 (West 2011); R.I. GEN. LAWS ANN. § 6-41-3 (West 2011); S.D. CODIFIED LAWS § 37-29-3 (2011); W.VA. CODE ANN. § 47-22-3 (West 2011); WYO. STAT. ANN. § 40-24-103 (West 2011). Moreover, additional states employ a derivation or alteration of the above double ratio standard. *See, e.g.*, TENN. CODE ANN. § 29-39-104 (2011) ("Punitive or exemplary damages shall not exceed an amount equal to the greater of: (A) Two (2) times the total amount of compensatory damages awarded; or (B) Five hundred thousand dollars ($500,000)."). Both types of caps, as pointed out by the Supreme Court, seem ineffective or counterintuitive to the twin aims of punitive damages—punishment and deterrence—when compensatory damages are low. *BMW of N. Am., Inc.*, 517 U.S. at 580–81. It also seems the states that use split-recovery statutes possess this same ideology. *See, e.g.*, Northrup v. Miles Homes, Inc., 204 N.W.2d 850, 861 (Iowa 1973) (In a case involving a relatively nominal amount of actual damages, the court held, "Exemplary damages are intended to punish the defendant and deter others from similar wrongdoing. . . . To be effective in this purpose the exemplary damages awarded must be relatively large."). The double ratio standard limits the aforementioned goal when actual damages are small.

85. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 n.11, 58 (1991) (suggesting that within the context of civil cases, due process concerns will not be raised by using a standard less than "clear and convincing evidence" or, even, "beyond a reasonable doubt"); Schwartz, *I'll Take That*, *supra* note 25, at 531 ("[This] standard has also been recommended by the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws."); CONG. BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES (June 2004) [hereinafter EFFECTS OF TORT REFORM], *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5549/report.pdf (outlining the limits on punitive damages since 1985, including most states increasing the burden of proof for punitive damages to clear and convincing evidence). This stands in contrast to the report of the Senate Committee on Commerce, Science and Transportation given in 1986, where the Committee identified that most states were using a "preponderance of the evidence." 1 KIRCHER, *supra* note 76 § 9:10.

For the jurisdictions that have adopted the clear and convincing evidence standard, some have done so "in light of the 'quasi-criminal' nature of punitive damages." Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 106 (2005). The explanation for this practice arises from courts' belief that punitive damages are analogous to a criminal fine, and, as such, should approximate a higher burden of proof. *Id.* Additionally, while most jurisdictions have adopted a higher burden of proof—clear and convincing evidence or even proof beyond a reasonable doubt—some courts "continue to adhere to the traditional 'preponderance of the evidence' standard. Most often, courts in these jurisdictions have based their conclusions on the absence of legal authority suggesting that anything more is required of a civil plaintiff than factual proof of a claim by a 'preponderance of the evidence.'" 1 KIRCHER, *supra* note 76 § 9:10.

86. *Pac. Mut. Life Ins. Co.*, 499 U.S. at 58 (O'Connor, J., dissenting).

reminded that it should be highly confident of the evidence before awarding punitive damages.[87]

In some states, a byproduct of this heightened standard has been the bifurcated trial.[88] "In a bifurcated proceeding, the jury first resolves the issue of compensatory damages before determining the amount of punitive damages, if any, to be paid the defendant."[89] By separating the compensatory and punitive damage awards, "jurors are better able to separate the burden of proof that is required for compensatory damage awards from a heightened burden of proof for punitive damages."[90] Even so, when punitive damages are awarded, an increased burden of proof or bifurcated trial does nothing to prevent a plaintiff's windfall.[91] As such, split-recovery statutes have been offered as another novel solution to the problem.

III. SPLIT-RECOVERY STATUTES

A. History and Purpose of Split-Recovery Statutes

Starting in 1985, states began to propagate what have become known as split-recovery statutes.[92] Split-recovery statutes provide for some percentage of the punitive damage award to go to the state, a state agency, a statutorily specified fund, or a fund of the plaintiff's choosing, rather than entirely to the plaintiff and his or her attorney.[93] The percentage and distribution of a

---

87. *Id*.

88. *See* EFFECTS OF TORT REFORM, *supra* note 85.

89. Schwartz, *I'll Take That*, *supra* note 25, at 533.

90. *Id*. at 533–34.

91. *Id*.

92. Dodson, *supra* note 35, at 1337.

93. *See* Goldstein, *supra* note 21, at 106 (giving a brief description of what punitive damages are and what they seek to accomplish); Schwartz, *I'll Take That*, *supra* note 25, at 534–38 (explaining how split-recovery statutes are formed, how they differ from state to state, and some of the problems they face); Benjamin F. Evans, *"Split-Recovery" Survives: The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 511–12 (1998) (split-recovery statutes represent a popular method for how to mitigate the punitive damages problem). As summarized by one author:

> [S]ociety could put punitive damages awards to better use than allowing individual civil plaintiffs windfall recoveries. 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, or the funds could be used to relieve the tax burden on all the state's taxpayers. Alternatively, society could create a special fund for a deserving cause-possibly a cause related to the reason punitive damages were assessed (such as a tort victims' relief fund) or one otherwise needing funds (such as a school fund). The state need not limit those benefiting from punitive damages to one class of citizens—civil plaintiffs.

E. Jeffrey Grube, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 854 (1993)

state's punitive damage apportionment differs from jurisdiction to jurisdiction.[94]

Within the first two years of the doctrine's inception, four states adopted split-recovery statutes.[95] Subsequently, nine additional jurisdictions embraced the legal theory.[96] Today, eight different states retain some form of split-recovery statute.[97]

(footnotes omitted); *see also* Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 154 (2007) ("Such apportionment is necessary to address concerns of plaintiff 'windfalls' and ensure that any punitive damages awarded based on 'wrongs' to the public go to the public.").

A few courts have refused to enforce their state's split-recovery statute where the statute did not identify a fund that was capable of distributing the punitive damage award. Eulrich v. Snap-On Tools Corp., 798 P.2d 715 (Or. 1990), *superseded by statute*, OR. LAWS, ch. 862, § 1 (1991), *as recognized in* Patton v. Target Corp., 242 P.3d 611 (Or. 2010). In light of the foregoing, some states with split-recovery statutes have been constantly concerned with keeping the state's punitive damage portion separate from the general state fund. *See, e.g.*, Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 868–69 (Iowa 1994) ("We find a clear distinction between the Fund and the general state treasury. The damage awards are not commingled with state revenues and are to be disbursed only for the purposes of indigent civil litigation programs or insurance assistance programs.") (internal quotation marks and citation omitted). On the other hand, some state legislatures have left it up to the judiciary to determine the state's portion of the split-recovery and where that portion should go. *See* 735 ILL. COMP. STAT. 5/2–1207 (West 2007) ("[The] trial court may also in its discretion, apportion the punitive damage award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Human Services."). In one instance, a judge directed the plaintiff to pay a portion of his punitive damage award to a charity of his choosing. Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121, 144–46 (Ohio 2002). But some critics insist that while a state legislature may have the power to enact a split-recovery statute, the judiciary should not be allowed to redirect a punitive damages award. Mervine, *supra* note 21, at 1617; Jessica Nielsen, Note, *A True Hollywood Story: Alternative Distributions and the Ohio Supreme Court's* Dardinger v. Anthem Blue Cross and Blue Shield, 72 U. CIN. L. REV. 815 (2003).

Such was the case in Alabama, where the State Supreme Court formulated, in *Life Insurance Co. of Georgia v. Johnson*, 684 So. 2d 685, 698 (Ala. 1996), its own judicial split-recovery clause, allocating a portion of the plaintiff's $5 million punitive damage award to the state's general fund. Mervine, *supra* note 21, at 1612–13. After the Supreme Court effectuated its three prong test to measure punitive damages in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), however, the Supreme Court of Alabama terminated the split-recovery program, determining that the new test prohibited plaintiffs from receiving a windfall, and, thus, that the split-recovery clause was no longer needed. Life Ins. Co. of Ga., 701 So. 2d at 535; Mervine, *supra* note 21, at 1613–14. In light of the foregoing, it is interesting to note that the current Alabama punitive damage statute specifically prohibits any portion of a punitive damage award from being infringed upon by the state: "No portion of a punitive damage award shall be allocated to the state or any agency or department of the state." ALA. CODE § 6-11-21(1) (2011).

94. *See supra* note 93 and accompanying text; *see also infra* Appendix A.

95. Act of May 16, 1986, 1986 Colo. Sess. Laws 675 (repealed 1995); Act of June 26, 1986, 1986 Fla. Laws 749 (repealed 1997); Act of May 22, 1986, 1986 Iowa Acts 313 (codified with amendments at IOWA CODE ANN. § 668A.1 (West 1998)); Act of April 26, 1985, 1985 Kan. Sess. Laws 951, 953 (repealed 1988).

96. Act of May 9, 1997 Alaska Sess. Laws 1, 5 (codified at ALASKA STAT. ANN. § 09.17.020(j) (2003)); Tort Reform Act of 1987, 1987 Ga. Laws 915 (codified with amendments at GA. CODE

From their inception, split-recovery statutes were promoted as a mechanism for vindicating the rights of society in general—bringing some of the punitive damage award back to the public—while still allowing the plaintiff to personally collect some of the punitive damage award and so be fully compensated or cover legal fees.[98] Importantly, the statutes acted to mitigate the plaintiff's windfall recovery.[99] And by encouraging a more "judicious allocation of resources,"[100] split-recovery statutes aligned with the Supreme Court's long-held axiom that punitive damages are meant to

---

ANN. § 51-12-5.1 (Supp. 1999)); Act of March 6, 1988, 1995 Ill. Laws 507 (codified at 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 1997)); 1998 Ind. Acts 317 (codified at IND. CODE ANN. § 34-51-3-6 (LexisNexis 2007)); 1996 Mo. Laws 869 § C (codified at MO. ANN. STAT. § 537.675(3) (West 2000)); Act of April 10, 1992, 1992 N.Y. Laws 2286; Act of July 17, 1987, 1987 Or. Laws 1570, 1571 (codified with amendments at OR. REV. STAT. § 18.540 (Supp. 1996)); An Act Relating to Punitive Damages, 1989 Utah Laws 717 (codified at UTAH CODE ANN. § 78-18-1 (1996)). Additionally, New Jersey, Indiana, and Texas have also considered enacting split-recovery statutes. *See* Matthew J. Klaben, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 CORNELL L. REV. 104, 111 (1994) (citing Andrew Blum, *Three More Join Trend: States Want Share of Punitives*, NAT'L L.J., Mar. 8, 1993, at 3). At the federal level, in 1994, the Senate Mainstream Coalition even proposed a split-recovery statute that would require 75% of health care malpractice punitive damage awards be paid to the state to fund licensing, disciplinary, and quality assurance programs. *Id*. at 106 n.14 (citing Senate Mainstream Coalition's "Proposed Agreement" on Health Care Reform, Dated Aug. 22, 1994, 1994 Daily Rep. for Exec. (BNA) No. 162, at d57 (Aug. 24, 1994)).

97. The state legislatures in California, Florida, Kansas, and New York allowed their split-recovery statutes to expire without renewal. CAL. CIV. CODE § 3294.5 (Deering 2004) (expired 2006); FLA. STAT. ANN § 768.73(2) (West 1993) (expired 1995); KAN. STAT. ANN. § 60-3402 (2004) (expired 1989); N.Y. C.P.L.R. 8701 (McKinney 1992) (expired 1994).

98. Mervine, *supra* note 21, at 1605. Some courts have approved the state's use of split-recovery statutes because the goal of punitive damages is to punish defendants who have wronged society and split-recovery statutes properly allocate the award back to society. Ford v. Uniroyal Goodrich Tire Co., 476 S.E.2d 565 (Ga. 1996).

99. Schwartz, *I'll Take That*, *supra* note 25, at 534. Such a sentiment has been popularized throughout the judicial system. Some scholars, however, have argued against this so-called windfall myth, contending that in many instances punitive damages provide the only means for plaintiffs to fully recover expenses sustained through litigation. *See* Goldstein, *supra* note 21, at 107 (arguing that the windfall myth should be dispelled). *But see supra* note 74 and accompanying text (describing how plaintiffs' windfalls are harmful to the judicial system). It is for this very reason that many states that use split-recovery statutes allow attorneys' fees to be taken from the punitive damage award before the award is split between the trier of fact and the state or specific fund. *See infra* note 215 and accompanying text. Other commentators have postulated, "[A]n award of full punitive damages to the plaintiff serves to deter future harm as fully as an award that splits the punitive damages between the state and the plaintiff." Evans *ex rel*. Kutch v. State, 56 P.3d 1046, 1075 (Alaska 2002) (Bryner, J., dissenting). Therefore, these critics find that split-recovery statutes only jam the rudder instead of steering punitive damages back to their original aims of punishment and deterrence in the name of societal benefit. *Id*. This is a circular argument. Admittedly, a defendant will still be punished and deterred if the punitive damage award goes to plaintiff alone. Scholars have yet to decide how a society is benefited by the punitive damage award going to one person rather than being divided between an individual and the state or specified public fund representative of the general populace.

100. Clay R. Stevens, *Split-Recovery: A Constitutional Answer to the Punitive Damages Dilemma*, 21 PEPP. L. REV. 857, 869–70 (1994).

service the public good, not to compensate the plaintiff.[101] Moreover, "[b]y creating the proper level of incentive for plaintiffs to bring worthy claims," split-recovery statutes refocused punitive damages on the original twin aims of punishment and deterrence.[102] Still, split-recovery statutes have been met with vigorous criticism.[103]

B. Main Constitutional Challenges to Split-Recovery Statutes

Despite the benefits of split-recovery statutes,[104] critics have argued fervently against their adoption and application. Some have challenged the practice as nothing more than a tool to "pad[] states' budgets while eviscerating the plaintiff's autonomy," or have argued that such statutes are guilty of blurring the "line between criminal and civil law."[105] Other

---

101. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 293 (1989) (O'Connor, J., concurring in part and dissenting in part) (returning to the genesiacal days of punitive damages in England, the award was "not meant to compensate the injured plaintiff, but rather to punish the wrongdoer and express society's displeasure at the improper act"). By requiring the punitive damage award to be split between the plaintiff and the state, many courts looked at split-recovery statutes "as a way to maintain adequate levels of deterrence and punishment for the defendant while reducing [a] plaintiff['s] windfall from lawsuits and providing funds for the public's benefit." *Recent Case, Eighth Amendment—Punitive Damages—Florida Supreme Court Upholds "Split Recovery" Statute*.—Gordon v. State, *608 So. 2d 800 (Fla. 1992) (per curiam)*, 106 HARV. L. REV. 1691, 1691 (1993) [hereinafter *Recent Case*]. This is consistent with Chief Justice Rehnquist's belief that plaintiffs should only be awarded compensatory damages:

> Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries—but no more. Even assuming that a punitive 'fine' should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff—who by hypothesis is fully compensated.

Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). Moreover, going back to the earlier days of the legal theory, "some of the critics of the doctrine of punitive damages regret the state's loss of a source of income through the diversion of penalties to private plaintiffs." Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1177 n.7 (1931). As such, some states have viewed split-recovery statutes as a way to raise revenue. The 2004 California split-recovery statute explicitly stated that it was enacted due to "extraordinary and dire budgetary needs." CAL. CIV. CODE § 3294.5 (Deering 2004) (expired 2006); *see also* McBride v. Gen. Motors Corp., 737 F. Supp. 1563, 1568 (M.D. Ga. 1990) (court stated that one reason why the state legislature enacted a split-recovery statute was due to an "interest [in] generating revenue"). Despite any feelings of impropriety, a revenue-raising motive by the states does not affect the fact that split-recovery statutes, at their core, seek to limit plaintiff windfalls by giving excess money resulting from the litigation back to society. *See supra* note 74. However, Excessive Fines Clause concerns may be raised where the state government seeks to raise revenue through the courts. *See infra* notes 133–38 and accompanying text.

102. Stevens, *supra* note 100, at 862 n.38.

103. *See infra* Part III.B.

104. *See supra* notes 92–103 (reviewing the history and purpose of split-recovery statutes).

105. Mervine, *supra* note 21, at 1617–18. Some critics fear that by allowing punitive damages to

"commentators fear that allowing the state to become 'free riders' on the backs of the plaintiffs, will limit plaintiffs' abilities to secure representation and to be afforded justice."[106] The most prolific contention arising against split-recovery statutes, however, has been that they are unable to overcome significant constitutional challenges.[107] Such challenges manifest in two

---

become additional revenue for a government, lawmakers and judges may loosen restrictions on punitive damages to make them easier to recover. Goldstein, *supra* note 21, at 108 (ensuring punitive damages will be used for a broader societal good leads to conspicuous motivation for judges and juries); Schwartz, *I'll Take That*, *supra* note 25, at 540 (because state court judges are elected, they have added incentive to produce judgments that give money back to their constituents). However, precautions can be taken not to instruct juries about the allocation—in fact, multiple cases have held that instructions to the jury regarding the function of a split-recovery statute can be reversible error. *See infra* note 215. Furthermore, if court-appointed judges cannot be trusted to uphold justice in a detached and ethical matter, there are greater problems with their appointment than any self-interest split-recovery statutes may provide. *See generally* Lara A. Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted to Police Themselves and What Congress Can Do About It*, 97 KY. L.J. 439 (2009) (examining judges misallocation of rights between the plaintiff and defendant). The same can be said to the argument that judges may be swayed to deliver inflated damage awards out of sympathy to the plaintiff. *Id*. With regard to the argument that split-recovery statutes blur the line between criminal and civil law, as indicated in Part II.A, the original purpose of punitive damages was to bridge the gap between criminal and civil punishments. *See supra* note 33 and accompanying text. Therefore, this argument appears hollow in light of the original twin aims of punitive damages—punishment and deterrence. *Id*. Finally, why should other people benefit when it is the plaintiff who is injured by the defendant's malfeasance, files the case, and has to endure the hardships of trial? An expert provided a well-articulated reason:

> Although the public's claim to a punitive award is greatest where the actions that gave rise to that award are indiscriminately directed at society as a whole, the public nevertheless has a valid claim even where the actions are directed at only one person. In the criminal context, crimes are no less crimes against society just because they are directed at one individual. Similarly, in the context of punitive damages, the public has a claim to the punitive debt that the malicious tortfeasor owes to society as a result of outrageous acts against some of its members.

Klaben, *supra* note 96, at 115 n.70. Therefore, because society is also a victim of the defendant's actions, the public has a valid claim to any damages set aside to punish and deter the defendant.

106. Mervine, *supra* note 21, at 1618. Proponents of split-recovery statutes argue that no such result occurs, particularly where the statute permits the attorneys' fees to be commensurate to the entire punitive damage amount. *See infra* note 215 and accompanying text. As summarized by one bankruptcy court,

> [T]he fact that 60 percent of any punitive damage award must be paid to the state . . . does not support disallowance of punitive damages across the board. Debtor argues that, because claimants would receive only approximately 10 percent of any punitive damage award (after payment to the state, to the claimant's attorney, and taxes), there would be little or no economic benefit of such damages to the claimants. The purpose of punitive damages is not to provide an economic benefit to claimants, however; the purpose of punitive damages is to deter and punish the wrong-doer. Any economic benefit to the claimants is not relevant to those purposes.

In re Roman Catholic Archbishop of Portland in Or., 339 B.R. 215, 228 (Bankr. D. Or. 2006) (citation omitted).

107. *See* Rabe, *supra* note 21, at 343–51 (analyzing the constitutional challenges brought against split-recovery statutes); Schwartz, *I'll Take That*, *supra* note 25, at 551–56 (addressing constitutional questions regarding split-recovery law).

primary forms: violations of the Fifth Amendment's Takings Clause and the Eighth Amendment's Excessive Fines Clause.[108]

1. Takings Clause

Perhaps the most vibrant constitutional challenge levied against split-recovery statutes has been that they violate the Takings Clause of the Fifth Amendment.[109] Under the Fifth Amendment, "private property [shall not] be

108. *See* Rabe, *supra* note 21, at 344–48 (specifically commenting on the Excessive Fines Clause and Takings Clause); Evans, *supra* note 93, at 520–27 (addressing the takings, due process, equal protection, and excessive fines issues); Stevens, *supra* note 100, at 872–90 (reviewing the constitutionality of split-recovery statutes). While the "two horns of a constitutional dilemma," Recent Case, *supra* note 101, at 1694, occupies the bulk of cases challenging split-recovery statutes, alternative ancillary arguments have intermittently arisen in different courts; these include violations of the Equal Protection Clause, Double Jeopardy, and Due Process.

The only context wherein a split-recovery statute would raise constitutional concern under the Fourteenth Amendment's Equal Protection clause—which prohibits a state from treating similarly situated individuals differently under the law—is where the statute treats plaintiffs or types of cases differently. Paul F. Kirgis, Note, *The Constitutionality of State Allocation of Punitive Damage Awards*, 50 WASH. & LEE L. REV. 843, 856 n.90 (1993). While the former is never really at issue, the latter situation does arise, as some states only apply split-recovery statutes to certain types of recovery. *See* Stevens, *supra* note 100, at 882 n.174 ("[M]aking the split-recovery statute applicable only when the plaintiff was not the intended recipient of the defendant's conduct."). However, if the narrow application of a split-recovery statute can withstand judicial scrutiny under a rational basis test—where the court determines it is in the best interest of the state—"courts have given almost unlimited deference to the judgment of the state legislature." Kirgis, *supra*, at 856 n.90.

With regard to the argument that split-recovery statutes violate the Double Jeopardy Clause, the Fifth Amendment prevents "any person [from] be[ing] subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. In *United States* ex rel. *Marcus v. Hess*, 317 U.S. 537, 548–49 (1943), the Supreme Court held that civil actions may implicate the protection of the Double Jeopardy Clause if they are punitive or vindictive in nature. Although the Court in that case did not address whether its analysis would be applicable to split-recovery statutes, the argument follows that when the state apportions part of the punitive damage award, it subjects the defendant to repeated and excessive litigation. Dodson, *supra* note 35, at 1359–60. Yet, because punitive damages are already being paid to the plaintiff, any allocation of those damages does not subject the defendant to multiple or excessive litigation. *See* Stevens, *supra* note 100, at 885–86 (noting that due to the ambiguity and noted indifference of the Court to apply the abovementioned analysis to split-recovery statutes, it is probable a court would not find a split-recovery statute to violate the Double Jeopardy Clause). For an analysis of the constitutionality of split-recovery statutes with regard to Due Process limitations see *infra* note 130 and accompanying text.

109. *See, e.g.*, Engquist v. Or. Dep't of Agric., 478 F.3d 985, 1001–04 (9th Cir. 2007); Evans v. State, 56 P.3d 1046, 1058 (Alaska 2002); Kirk v. Denver Publ'g Co., 818 P.2d 262, 267–73 (Colo. 1991); Gordon v. State, 608 So. 2d 800, 801–02 (Fla. 1992); Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 639–40 (Ga. 1993); Cheatham v. Pohle, 789 N.E.2d 467, 472–75 (Ind. 2003); DeMendoza v. Huffman, 51 P.3d 1232, 1245–48 (Or. 2002); Smith v. Price Dev. Co., 125 P.2d 945, 949–50 (Utah 2005); Rabe, *supra* note 21, at 347–48; Schwartz, *I'll Take That*, *supra* note 25, at 552–53; Dodson, *supra* note 35, at 1362–66.

taken for public use, without just compensation."[110] Opponents of split-recovery statutes argue that when a state takes a portion of the punitive damage award and applies it to a general or specified public fund, the state unjustly deprives the plaintiff of his or her private property without compensation.[111] To conclude that a split-recovery statute operates as an unconstitutional taking, however, a court must first determine whether a punitive damage award is considered property.[112]

The term "property" denotes anything that can be subjected to an ownership interest, both tangible and intangible, as well as any interests that might have value to the owner.[113] Since the late nineteenth century, the Supreme Court has held that rights affixed by a judgment are protectable under the Takings Clause.[114] Therefore, once a plaintiff secures a properly vested interest in a damage award during the litigation process, any diminution of that award by the state is unconstitutional.[115]

Of the numerous cases brought before tribunals throughout the country alleging that split-recovery statutes violate the Fifth Amendment, two state courts have found their respective states' statutes to be unconstitutional.[116] Employing the same reasoning and analysis, both the Colorado and Utah supreme courts held that their state's split-recovery statute violated the Takings Clause because the state's interest in the punitive damage award only vested once the award had been properly transferred to the plaintiff.[117] Therefore, the statutes were invalid.[118]

In *Kirk v. Denver Publishing Co.*, the Colorado Supreme Court undertook an "'ad hoc, factual' analysis" of the state's split-recovery statute and concluded that the statute effectuated a "forced taking" of the plaintiff's "property interest in the judgment."[119] To reach this conclusion, the court

---

110. U.S. CONST. amend. V. Additionally, the Takings Clause is meant to prohibit the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 123 (1978).

111. *See Engquist*, 478 F.3d at 1002; *Evans*, 56 P.3d at 1058; *Kirk*, 818 P.2d at 264–65; *Cheatham*, 789 N.E.2d at 470; *Smith*, 125 P.3d at 948; Rabe, *supra* note 21, at 348; Dodson, *supra* note 35, at 1362–63.

112. *Kirk*, 818 P.2d at 267.

113. BLACK'S LAW DICTIONARY 1252 (8th ed. 1999).

114. McCullough v. Virginia, 172 U.S. 102, 123–24 (1898). Unlike real property or personal property, a damage award does not belong to the plaintiff, or vest in the plaintiff, until the jury has awarded it to him or her. *Id.*

115. *Id.*; *Kirk*, 818 P.2d at 268 (concluding that once an punitive damage award becomes "*vested by a judgment*," "[i]t is not within the power of a legislature to take away") (emphasis added).

116. *Kirk*, 818 P.2d 262; *Smith*, 125 P.3d 945.

117. The statute purported to vest the state's interest in the punitive damage award only after the judgment had been paid to the plaintiff. *Kirk*, 818 P.2d at 264; *Smith*, 125 P.3d at 950.

118. *Kirk*, 818 P.2d at 272–73; *Smith*, 125 P.3d at 953.

119. *Kirk*, 818 P.2d at 264, 268 (looking at such factors as economic impact and the

looked at the statute, which affirmatively disavowed "any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due."[120] Precisely because the statute specifically articulated that the state did not acquire an interest in the punitive damage award until after the plaintiff secured the award, the punitive damages had already become the plaintiff's property by the time the state's statute perpetrated the taking.[121] By taking the award once it had vested in the plaintiff, the statute—through its own verbiage—functioned contrary to the Fifth Amendment.[122]

Relying on the decision in *Kirk*, the Utah Supreme Court analyzed its own split-recovery statute.[123] It quickly noted, "It is significant that the [Utah] provision contains no language making the State a party to the . . . action or a judgment creditor in the . . . punitive damages award."[124] Pursuant to such language, the statute only applied once the punitive damage judgment had been awarded and paid to the plaintiff.[125] Accordingly, the state had "no interest whatsoever in the underlying judgment," and an apportionment of the punitive damage award could only take place once the judgment had properly vested in the plaintiff, thus resulting in enmity between the taking and the Fifth Amendment.[126]

To bolster the proposition that split-recovery statutes violate the Takings Clause, plaintiffs, courts, and critics have turned to *Webb's Fabulous*

---

government's interference with a reasonable economic expectation). The court also looked to see if the statute could be categorized as a tax. *Id*. at 270. After the court determined the statute did "not satisfy the criteria for an *ad valorem* property tax," it determined that the only "conceivable justification" for the statute was a "user fee." *Id*. at 270–71. But even then, the court could not reconcile the lack of a reasonable relationship to the "overall cost" of the service. *Id*. (noting that the statutorily appropriated funds were not related to the cost of funding the civil justice system, nor were they earmarked for a specific purpose related to the judicial process).

120. COLO. REV. STAT. § 13-21-102(4) (1989) (repealed 1995).

121. *Kirk*, 818 P.2d at 264.

122. *Id*.

123. *Smith*, 125 P.3d at 950.

124. *Id*. The Utah statute at the time read, "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 treasurer for deposit into the General Fund." UTAH CODE ANN. § 78-18-1(3) (LexisNexis 2005).

125. *Smith*, 125 P.3d at 950.

126. *Id*. ("[B]ecause the specified [split-recovery statute] can be satisfied only when a judgment is paid, the statute gives the State no interest whatsoever in the underlying judgment . . . . The State's only interest, therefore, is one to the *proceeds* of punitive damages judgments."). It is important to note, however, that both the Utah and Colorado legislatures revised their split-recovery statutes to have the punitive damage award vest in both the state and the plaintiff concurrently, thus bringing the statutes into conformity with their courts' judicial holdings. *See infra* Appendix A.

Pharmacies, Inc. v. Beckwith.[127] In that case, the Supreme Court determined that a state could not constitutionally collect the interest accruing on money in court accounts because the principal-holder had a viable expectation of receiving the interest.[128] Similarly, opponents of split-recovery statutes argue that plaintiffs have a reasonable expectation in punitive damage awards, and, thus, that when the state deprives the plaintiff of the award it violates the Takings Clause.[129] Moreover, critics contend that, based upon the Court's analysis in *Beckwith*, split-recovery statutes should be found unconstitutional under the Takings Clause because the state's allocation of a plaintiff's punitive damage award to a state or public fund serves no reasonable relation to the cost of using the courts.[130]

---

127. Webb's Fabulous Pharms., Inc. v. Beckwith, 449 U.S. 155, 162 (1980).

128. *Id*.

129. Kirk v. Denver Publ'g Co., 818 P.2d 262, 269, 271–72 (Colo. 1991).

130. Stevens, *supra* note 100, at 876. The Supreme Court in *Beckwith* concluded that a state could not constitutionally collect the interest accruing on money in court accounts as a fee for using the courts because it bore no reasonable relationship to the cost of using the courts:

> To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking[s] Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

449 U.S. at 164. Similarly, the Court in *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 156 (1998), held that interest collected from Interest on Lawyers' Trust Accounts (IOLTA) could not be assigned to the state, as it was protected by the Takings Clause. Additionally, the Supreme Court upheld a federal statute that required the Federal Reserve Bank of New York to deduct 1.5% from the first $5 million dollars of an arbitration award entered by the Iran-United State Claims Tribunal because it fairly represented the expenses of the United States government incurred during the arbitration. United States v. Sperry Corp., 493 U.S. 52, 394–95 (1989). Therefore, the rule to be gleaned from these cases is that where the government infringes upon a vested property interest, the appropriation, in order to be constitutional, must "bear a reasonable relationship to the governmental services" leading to the damage award. *Kirk*, 818 P.2d at 270.

The Supreme Court in *Beckwith*, however, did acknowledge that a state might rightly deprive a private party of his or her property if doing so to promote general welfare. 449 U.S at 163. Proponents of split-recovery statutes argue that the statutes bear a reasonable relationship to a legitimate government purpose: to stop plaintiffs from receiving a windfall when punitive damages are meant to benefit society generally. *See supra* note 36 and accompanying text. By so doing, split-recovery statutes operate to promote the general welfare of society, and, thereby, escape liability under the Takings Clause. *See supra* note 36 and accompanying text.

Another issue commonly blended with and often indistinguishable from the aforementioned Takings Clause argument is that split-recovery statutes violate the Due Process Clause under the Fourteenth Amendment. Evans, *supra* note 93, at 520–22. Similar to the argument in *Beckwith*, the argument here is that a plaintiff is denied his or her due process when a legislative enactment has no reasonable relationship to a legitimate governmental purpose. Evans v. State, 56 P.3d 1046, 1058 (Alaska 2002). Moreover, under the Fourteenth Amendment's Due Process Clause, one has a right to be heard by the court prior to deprivation of property. U.S. CONST. amend. XIV. "If the state is the direct beneficiary of a punitive damages award, broader due process concerns might be implicated by the very fact that the government and its officers (i.e., judges) have an arguable pecuniary interest in the case." Sharkey, *supra* note 74, at 438; *see also* Schwartz, *I'll Take That*, *supra* note 25, at 550 ("Split-recovery laws provide the jury with a motive for awarding punitive

For example, turning to the Supreme Court's decisions in *Beckwith* and *United States v. Sperry Corp.*, the *Kirk* court determined that there was no acceptable justification, under the Fifth Amendment, for the taking perpetrated by the split-recovery statute because the statute operated "in a manner and to a degree unrelated to any constitutionally permissible governmental interest."[131] Thus, the statute was invalid.[132] But this has not been the only challenge to split-recovery statutes.

2. Excessive Fines Clause

Contemporaneous to the constitutional challenges brought under the Fifth Amendment, critics have suggested that split-recovery statutes violate the Eighth Amendment by imposing excessive fines upon plaintiffs.[133] And although only those fines that are criminal in nature are traditionally considered to fall under the auspices of the Excessive Fines Clause,[134] judges and scholars agree that punitive damages—and, by extension, split-recovery statutes—may implicate Eighth Amendment constraints by bridging the gap between civil and criminal theory through the twin aims of punishment and deterrence.[135]

---

damages other than for punishment or deterrence."). While the court turns to the rational basis test to determine whether there is a legitimate governmental purpose for the split-recovery statute, Stevens, *supra* note 100, at 878, the fulcrum for this argument again rests upon the definition of property, leading back to the analysis required for a violation of the Takings Clause. *See* Part III.A.1.

131. *Kirk*, 818 P.2d at 264. Furthermore, "placing the burden of payment on the judgment creditor who suffered the wrong bears no reasonable relationship to any arguable goal of punishing the wrongdoer or deterring others from engaging in similar conduct." *Id.* at 270.

132. *Id.* at 273.

133. U.S. CONST. amend. VIII; Schwartz, *I'll Take That*, *supra* note 25, at 554–56 (analyzing whether split-recovery statutes violate the Excessive Fines clause). While the Supreme Court has never expressly held that the Excessive Fines Clause was meant to apply directly to the states, some judges and scholars have indicated that it should—in light of the fact that two other clauses in the Eighth Amendment have been applied to the states. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 284 (1989) (O'Connor, J., dissenting in part and concurring in part) ("I see no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation," and, as such, "would hold that the Excessive Fines Clause also applies to the States."); Rabe, *supra* note 21, at 344–46 (noting that *Browning-Ferris* left the door open to challenge split-recovery statutes).

134. Stevens, *supra* note 100, at 878–88.

135. *Recent Case*, *supra* note 101, at 1695–96; Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 109 n.20 (1995) ("Defendants who have been assessed punitive awards in" states that use split-recovery statutes "have argued that their awards are 'excessive fines,' claiming that the state-payee distinguishes these awards from private damage awards that escape Eighth Amendment review.").

In the seminal case of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, the Supreme Court concluded that punitive damages do not inherently violate the Excessive Fines Clause; yet the Court limited its analysis to "a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[136] The Court continued, "[T]he only shield that protects ordinary punitive damages from Eighth Amendment scrutiny appears to be a formalistic distinction between 'governmental involvement and purely private suits.'"[137] Thus, when punitive damages are diverted from the plaintiff to the state under a split-recovery statute, the shield is effectively removed, causing the punitive damage award to fall outside the purview of *Browning-Ferris* and function in a manner that could trigger an excessive fines breach.[138] It is for these

136. *Browning-Ferris*, 492 U.S. at 263–64, 275 ("Here the government . . . 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.").

137. *Recent Case*, *supra* note 101, at 1696 (quoting *Browning-Ferris*, 492 U.S. at 298 (O'Connor, J., concurring in part and dissenting in part)).

138. *Id.* Indeed, it is significant to note that while the Court implied that a government might violate the Eighth Amendment by recovering punitive damages in a civil action, the justices explicitly left the issue open. *See Browning-Ferris*, 492 U.S. at 275 n.21. More notable is the fact that Justice O'Connor cited Florida's split-recovery statute as an example for when the Excessive Fines Clause may apply to punitive damages. *Id.* at 298–99 (O'Connor, J., concurring in part and dissenting in part). Justice Stevens commented in another seminal punitive damages case originating in a state with a split-recovery statute, "The fact that part of the award in this case is payable to the State lends further support to my conclusion that it should be treated as the functional equivalent of a criminal sanction." Philip Morris USA v. Williams, 549 U.S. 346, 359 n.1 (2007) (Stevens, J., dissenting). In this Comment, it is assumed *arguendo* that the Excessive Fines Clause applies to state action resulting from a split-recovery statute.

One federal court did determine that Georgia's split recovery statute was in violation of the Constitution's Excessive Fines Clause. McBride v. Gen. Motors Corp., 737 F. Supp. 1563, 1579 (M.D. Ga. 1990). The district court in that case "declare[d] that there can be no legitimate purpose for a state to involve itself in the area of civil damage litigation between private parties wherein punitive damages are a legitimate item of recovery, where the State, through the legislative process, preempts for itself a share of the award." *Id.* By the state receiving a portion of the punitive damages, the court reasoned that the state converted the civil nature of the prior Georgia punitive damages statute into a statute where fines are used for the benefit of the state. *Id.* Thus, the statute fell outside the bounds set by *Browning-Ferris*, and it ran contrary to the Constitution's prohibition on excessive fines and double jeopardy. *Id.*; *see also supra* note 108 and accompanying text. The court was later criticized for its conclusion that any statutes which fell outside the scope of *Browning-Ferris* were a "per se 'constitutional infirmity.'" Engquist v. Or. Dep't of Agric., 478 F.3d 985, 1006 n.23 (9th Cir. 2007). A more thorough reading of the Supreme Court's holding indicates that the Court left open the question of what would happen if the state received a portion of the punitive damage award. *Id.*

The district court also reasoned that the split-recovery statute denied equal protection to product liability plaintiffs because it was only applicable in product liability cases; non-product liability plaintiffs were able to collect 100% of the punitive damage award, whereas 75% of the punitive damage award went to the state in a product liability case. *McBride*, 737 F. Supp. at 1578. Subsequently, the court could find no rational basis for the inequality:

> [T]he 75% award is a revenue producing measure inasmuch as it would be arbitrary to

reasons that constitutional challenges threaten the viability of split-recovery statutes without ameliorating judicial instruction.

IV. FEDERAL COURTS, THE NINTH CIRCUIT, AND THE IMPORTANCE OF *ENGQUIST*

Although lawsuits concerning the constitutionality of split-recovery statutes have intermittently arisen in state courts, federal courts have remained largely aloof from review of split-recovery statutes, allowing the ambiguity surrounding their constitutionality to persist.[139] To date, less than

---

> fail to assess all punitive damage awards if the purpose of assessing any award was to raise revenue for the State. The Court finds that revenue is incidental, and that the arbitrary and unreasonable provision is business oriented, designed to restrict injured plaintiffs of an incentive to bring actions to punish, penalize, or deter egregious business practices.

Id.

Three years later, however, the Supreme Court of Georgia reversed any negative sentiment towards its split-recovery statute when it found the statute to be constitutional. Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 639 (Ga. 1993) (determining that the risk of the defendant's actions "falls on society as well as on the individual plaintiff who has been harmed. . . . [And] [a]s the risk and harm are distributed between the individual plaintiff and all citizens . . . the legislature has seen fit to distribute a portion of the damages awarded to those at potential risk—all citizens of the state"). The court specifically determined that the split-recovery statute did not violate the Equal Protection Clause because "all similarly situated plaintiffs and defendants . . . are treated equally by the statute." *Id*. It also determined that there was not an unconstitutional taking under the Fifth and Fourteenth Amendment—and thus no due process violation—because the plaintiff did not have a vested right in the punitive damage award. *Id*.; *see also infra* Part IV.A. Noticeably absent from the Georgia Supreme Court's analysis, however, was any ruling as to whether the statue violated the Excessive Fines Clause. *Mack Trucks, Inc*., 436 S.E.2d at 635. Nevertheless, the court was not bound by the district court's ruling in *McBride*, *id*. at 642 (Benham, J., concurring in part and dissenting in part); thus, when it determined the statute to be constitutional, the court effectively mooted the ruling by the district court in *McBride*.

To this day, the statute remains effective in Georgia. GA. CODE ANN. § 51-12-5.1 (West 2011). The only difference between the statute cited as unconstitutional in *McBride* and the current Georgia split-recovery statute is that the Georgia Tort Reform Act of 1987, section 51-12-5.1(e)(1)–(2), indicated that the state's punitive damage apportionment would be paid to the Fiscal Division of the Department of Administrative Services, whereas the current statute directs the funds to the Office of the State Treasurer. Thus, there does not seem to be any major reform to the statute that would have made the district court in *McBride* alter its ruling; but this is inconsequential given the Georgia Supreme Court's holding in *Mack Trucks*.

139. *See infra* note 140. While it does not take a federal court to determine the constitutionality of split-recovery statutes, absent review by the Supreme Court, a decision by a federal court—particularly a circuit court—is important because there are multiple inconsistent state court rulings. *Compare* Evans v. State, 56 P.3d 1046 (Alaska 2002), *and* Cheatham v. Pohle, 789 N.E.2d 467 (Ind. 2003), *with* Kirk v. Denver Publ'g Co., 818 P.2d 262, 267–73 (Colo. 1991), *and* Smith v. Price Dev. Co., 125 P.3d 945 (Utah 2005). A decision by a federal circuit can provide needed guidance in the area of law. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483–84 (1981) (determining

a handful of federal courts have specifically analyzed the constitutionality of split-recovery statutes.[140] Of those cases, less than half provide the type of substantive analysis necessary for a proper resolution of any aspect of split-recovery statutes' constitutional obscurity.[141] And although the Supreme Court is aware of the legal theory, they have not taken an opportunity to

---

that a "uniform interpretation" is advanced by the decision of a federal court); *see also* Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. CAL. L. REV. 975, 997 (2004) ("A federal judge's 'superior appreciation of and sensitivity to the [state law] issues . . . and the underlying state policies bearing on [those issues]' should be a source of greater reliability." (quoting Randall P. Bezanson, *Abstention: The Supreme Court and Allocation of Judicial Power*, 27 VAND. L. REV. 1107, 1123 (1974))).

140. Engquist v. Or. Dep't of Agric., 478 F.3d 985 (9th Cir. 2007); Burke v. Deere & Co., 780 F. Supp. 1225, 1242 (S.D. Iowa 1991), *rev'd on other grounds*, 6 F.3d 497 (8th Cir. 1993) (holding that the Iowa split-recovery statute was not unconstitutional because "[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"); McBride v. Gen. Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990). Some federal courts have mentioned that a state's split-recovery statute is constitutional, but have provided no substantive analysis as to why the underlying issue does not require the court to undertake such an examination. *See* Patton v. Target Corp., 627 F.3d 1304 (9th Cir. 2010) (determining that while the state had a valid interest in the punitive damage vis-à-vis Oregon's split-recovery statute, the state's consent to a post-verdict settlement that destroyed its interest was not required); Miele v. Prudential Bache Sec., 62 F.3d 1315 (11th Cir. 1995) (deferring to the Florida Supreme Court's decision regarding its split-recovery statute, which required that 60% of a punitive damages award be paid to the state Criminal Injuries Compensation Account); Finley v. Empiregas Inc. of Potosi, 28 F.3d 782, 785 (8th Cir. 1994) (determining that while the Missouri split-recovery statute was constitutional, because the Missouri statute merely stated that a portion of the punitive damages "'shall be *deemed* rendered in favor of the state of Missouri," the state's interest in the punitive damage award did not automatically vest and "[t]he statute [did] not direct the district court to enter judgment in the underlying action in favor of the State or to make the award payable to the State") (quoting MO. REV. STAT. § 537.675(2) (1995)); Liberty Natural Prods., Inc. v. Hoffman, 03:11-CV-00264-HU, 2011 WL 4625703 (D. Or. Sept. 2, 2011) (rejecting plaintiff's request to allow the state to intervene and remand the case to state court where punitive damages were sought, reaffirming that "the State can merely be identified as a judgment creditor in the judgment and need not intervene as a party" (quoting *Engquist*, 478 F.3d at 1001)). Certain bankruptcy courts have also undertaken an exploration of split-recovery statutes in their decisions, but any analysis they include is largely lackluster. *See In re* Roman Catholic Archbishop of Portland in Or., 339 B.R. 215, 228 (Bankr. D. Or. 2006) (challenging the constitutionality of the payment to the state of its statutory portion of the punitive damage award would result in a violation of the Establishment Clause under the First Amendment; the court in this case gave no weight to the "difficult to understand" argument); *In re* Kelly, J08-00681-DMD, 2010 WL 7507399 (Bankr. D. Alaska June 4, 2010) (mentioning that Alaska's "punitive damages are capped at $500,000.00 and 50% of any punitive damage award is payable to the State of Alaska").

In a few instances, a plaintiff in his or her complaint has brought up the constitutionality of a split-recovery statute only to have the case subsequently dismissed or disposed of on other issues. *See, e.g.*, Blume v. Myers, CV-99-1423-HU, 2000 WL 210605 (D. Or. Feb. 22, 2000) (granting the motion to dismiss and declining to determine the constitutionality of the statute). Thus, the question of the statute's constitutionality remains unanswered. Other times, a federal court may make some comment in dicta about a state's split recovery statute, but does not initiate an inquisition into its constitutionality. *See* Chadima v. Nat'l Fid. Life Ins. Co., 894 F. Supp. 1300, 1301 n.4 (S.D. Iowa 1995) ("[I]t is interesting to note that Iowa is one of only eight states to have passed legislation requiring payment of some portion of punitive damages to the state or state-sponsored funds.").

141. *See supra* note 140.

specifically address the constitutionality of this legislative tool.[142] Thus, when the Ninth Circuit undertook a review of Oregon's split-recovery statute in *Engquist v. Oregon Department of Agriculture*, its de novo analysis was the first real federal attempt at solving this constitutional conundrum.[143]

In an opinion written by Judge Tashima, the Ninth Circuit examined whether Oregon's split-recovery statute, which allocated 60% of the plaintiff's $175,000 punitive damage award to Oregon's Criminal Injuries Compensation Account, violated the Fifth Amendment's Takings Clause and the Eighth Amendment's Excessive Fines Clause.[144] Moreover, the *Engquist* court attempted to answer whether the split-recovery statute gave a non-party an interest in the judgment or implicated judicial estoppel concerns.[145]

A. Takings Clause

To determine whether Oregon's split-recovery statute operated as an unlawful taking, the Ninth Circuit first had to determine if the punitive damage award could be defined as property under the Fifth Amendment.[146] If the punitive damages could be defined as property, any subsequent taking

142. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 613–14, 616–18 (1996), Justice Ginsburg attached an appendix to her dissent that specifically identified split-recovery statutes as a valid control on punitive damages. The split-recovery statutes are listed under the heading "Allocation of Punitive Damages to State Agencies." *Id.* at 616. Furthermore, the Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 429 (2001), recognized that the Oregon split-recovery statute took 60% of the plaintiff's punitive damage award, but declined to comment on the issue. Another opportunity for the Supreme Court to review the constitutionality of split-recovery statutes came in the 2007 case of *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). In what has become a key case for reviewing the constitutionality of punitive damages generally, the Supreme Court limited its review to only two questions: (1) whether Oregon had unconstitutionally permitted the defendant to be punished for harming nonparty victims; and (2) whether Oregon had disregarded "the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm." *Id.* at 352. And while the court could have included an analysis of Oregon's split-recovery statute under the second question, it did not. *Id.* at 357–58. As recently as 2009, the United States Supreme Court has had an opportunity to specifically answer the question of whether the Alaska split-recovery statute—which allowed the State to collect 50% of any award of punitive damages—violated the Takings Clause or the Due Process Clause, but the Court declined to grant certiorari to resolve the issue. Reust v. Alaska Petroleum Contractors, Inc., 206 P.3d 437 (Alaska 2009), *cert. denied*, 130 S. Ct. 461 (2009).

143. Engquist v. Or. Dep't of Agric., 478 F.3d 985 (9th Cir. 2007).

144. *Id.* at 1000.

145. *Id.* at 1000–01.

146. *Id.* at 1002; *see supra* notes 113–15 and accompanying text (reviewing the definition of property in a judicial context).

by the State's split-recovery statute would violate the Constitution.[147] Whether punitive damage awards qualified as property under the Takings Clause was "a question of first impression in the federal courts."[148]

The Ninth Circuit began its analysis by turning to *Webb's Fabulous Pharmacies, Inc. v. Beckwith* and *Phillips v. Washington Legal Foundation*, both cases wherein the Supreme Court concluded that a property interest had existed and said that the interest had been invaded by the state through legislative action in violation of the Fifth Amendment.[149] Although these cases lacked a general rule for how to define property under the Takings Clause, the *Engquist* court highlighted the Supreme Court's reliance on the "certainty of the principal-holder's expectation of receiving" the property to determine if a protectable interest existed.[150]

When measured under this certainty standard, the *Engquist* court could not find a cognitive justification for defining punitive damages as property.[151] Punitive damages only exist when a jury bestows them upon the plaintiff.[152] Similarly, even if the jury finds that the defendant acted maliciously or recklessly, there is nothing that requires a jury to award punitive damages.[153] Due to these volatile and speculative circumstances, the court determined that punitive damages lacked the essential feature requisite for Takings Clause protection—certainty.[154] Furthermore, the *Engquist* court found any attempt to analogize punitive damage awards to an incidental ownership property right like those at issue in *Beckwith* and *Phillips* equally unavailing: "Simply put, punitive damages do not follow compensatory damages, as interest follows principal."[155] Thus, because

147. *Engquist*, 478 F.3d at 1002.

148. *Id*.

149. *Id*. The *Engquist* court was quick to recognize a property owner's fundamental ability to dispose of all or part of a property interest as he or she sees fit. *Id*. The court also noted that the Supreme Court in *Beckwith* focused on "incidents of ownership," with the Supreme Court holding that incidental rights of ownership carry with them the same protection under the Fifth Amendment as the property to which they belong. *Id*. at 1002–03.

150. *Id*. at 1003. The most critical question as to "whether these intangible rights are constitutionally protected from a government taking is the nature of the 'reasonable investment-backed expectations' of the party seeking protection." Anderson v. State *ex rel*. Cent. Bering Sea Fishermen's Ass'n, 78 P.3d 710, 715 (Alaska 2003) (Matthews, J., dissenting) (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1006–07 (1984)). As described by the Alaska Supreme Court, "[R]easonable expectations are critical both in determining whether a claim is property and whether government interference with it is a taking." *Id*.

151. *Engquist*, 478 F.3d at 1003–04.

152. *Id*.

153. *Id*. Only when the jury awards punitive damages and the damage properly vests in the plaintiff are exemplary damages transformed from their ephemeral state to a state of permanency. *Id*.

154. *Id*.

155. *Id*. at 1003; *see supra* notes 114–15 (discussing how the Supreme Court has determined that once a judgment is vested in the plaintiff, it becomes the property of the plaintiff, carrying with it the

punitive damage awards "are necessarily contingent and discretionary," the plaintiff did not and could not have a reasonable expectation in the award.[156] Therefore, the Ninth Circuit could not define punitive damages as property under the Fifth Amendment, and, as a result, the split-recovery statute did not operate as an unlawful taking.[157]

The *Engquist* court further supported its position by reaffirming the non-compensatory nature of punitive damages.[158] Because punitive damages are meant to punish and deter, the court resolved that any supplemental profit

---

constitutional protections of the Fifth Amendment). Property rights are a creation of state law. Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 88 n.32 (1978) ("Our cases have clearly established that a person has no property, no vested interest, in any rule of the common law. The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object, despite the fact that otherwise settled expectations may be upset thereby.") (internal quotations, alterations, and citations omitted); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972). As such, a state legislature "may abate actions *pending*," *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 268 (Colo. 1991) (emphasis added), by creating a statute that "prospectively limit[s] the availability of punitive damage[] awards." Smith v. Price Dev. Co., 125 P.3d 945, 953 (Utah 2005); *see* Stevens, *supra* note 100, at 874 ("[U]nlike the right to compensatory damages guaranteed by common law or state constitutions, the allowance of punitive damages is subject to the discretion of state legislatures," the same power which gives states the authority to condition or completely abolish punitive damages.); *see also* Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 639 (Ga. 1993) ("A plaintiff has no vested property right in the amount of punitive damages which can be awarded in any case, and the legislature may lawfully regulate the amount of punitive damages which can be awarded."). Specifically, "[t]he legislature cannot modify a judgment which is a property right, but the legislature is free to condition a claim for exemplary damages which is allowed only pursuant to a statutory grant." *Kirk*, 818 P.2d at 274–75. Viewed in that light, a state legislature cannot pass a law that deprives a citizen of a vested right *only* if the citizen has more than a mere anticipated expectation in the right; the citizen must have legal or equitable title to the property. *Id.* Nonetheless, unlike real or personal property—which belongs to the plaintiff prior to litigation—"[b]ecause of the inherently uncertain nature of punitive damages, which are a 'discretionary moral judgment' by the jury . . . a plaintiff's interest in receipt of any certain amount of punitive damages is too speculative to constitute property under the Takings Clause." *Engquist*, 478 F.3d at 1003 (quoting Larez v. City of L.A., 946 F.2d 630, 648 (9th Cir. 1991)); DeMendoza v. Huffman, 51 P.3d 1232, 1246 (Or. 2002) ("[T]he Supreme Court held that interest earned on principal was 'private property' subject to a takings claim only because it was a 'traditional property interest[] long recognized under state law'. . . . [T]here is no 'long-recognized' private property interest in a . . . punitive damage[] award before judgment; it has always been, at most, an expectation.").

156. *Engquist*, 478 F.3d at 1002, 1004; *see DeMendoza*, 51 P.3d at 1246 ("'A vested right must be something more than a mere expectation based upon the anticipated continuance of existing laws; it must have become a title legal or equitable to the present or future enjoyment of property.'") (quoting Coshun v. Hurlburt, 201 P. 870, 871 (Or. 1921)); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., 473 N.W.2d 612 (Iowa 1991) (considering the discretionary nature of punitive damages and because they are not awarded to a successful claimant as a matter of right, the plaintiff did not have a constitutionally protected interest in the punitive damage award).

157. *Engquist*, 478 F.3d at 1004.

158. *Id.*

derived from the punitive damage award by the plaintiff resulted from the award having no other beneficiary, and, therefore, the benefit was inconsequential to a Takings Clause analysis.[159] In like manner, the *Engquist* court reasoned, given the broad discretion granted to the states by the Supreme Court in fashioning "their punitive damages schemes," the allocation of a punitive damage award between the plaintiff and the state vis-a-vis a split-recovery statute did not raise Takings Clause concern.[160] As a result, the split-recovery statute stood up to Fifth Amendment review. Next, the court had to see if the split-recovery statute could withstand critical analysis under the Eighth Amendment.

---

159. *Id*.

160. *Id*. (reviewing the Court's general analysis of punitive damages in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996)); *see also supra* notes 75–76 and accompanying text (commenting on the broad discretion given by the Supreme Court to states regarding the regulation of punitive damages). The court in *Engquist* also looked at several state court decisions where the state supreme "courts concluded that a plaintiff has no vested right in punitive damages, either (1) because the damages are discretionary and non-compensatory, or (2) because the statutes operate to limit the awards *before* the time of judgment." *Id*. at 1004–05. As part of that analysis, the court looked at the decisions by the supreme courts of Colorado and Utah, but merely concluded that its "holding that punitive damages are not cognizable as property under the Takings Clause" is consistent with the majority of state supreme courts who have decided the issue. *Id*. at 1005. The court did not, however, undertake an exploration of the decisions in *Kirk* and *Smith*. *Id*.; *see supra* notes 116–26 and accompanying text (explaining the facts and holding for both cases). Yet, in light of the court's holding in *Engquist*, it is unclear whether the Ninth Circuit would have reached the same decision if the Oregon split-recovery statute did not give any interest to the state until after the punitive damage award vested in the plaintiff. *See Engquist*, 478 F.3d at 1005. Given the *Engquist* court's conclusion that punitive damages cannot be defined as property under the Fifth Amendment given their uncertainty, it seems the court would have reached the same result, even under the circumstances described in *Kirk* and *Smith*. *Id*. However, that would lead to the conclusion that no matter the circumstances surrounding a split-recovery statute, there is no argument that the statute violates the Fifth Amendment's Takings Clause because the punitive damage award is so speculative. *Id*.

On the other hand, the *Smith* court determined that the uncertainty associated with punitive damages could be removed once the award vested in the plaintiff and prior to the state's intercession upon it for public use. 125 P.3d at 949. By so doing, the plaintiff is provided with a reasonable and protectable property interest in the punitive damage award, thereby precluding the state from any interference with the award. *Id*. It seems logical that if the state has not attempted to allocate the punitive damage award between itself and the plaintiff prior to plaintiff realizing the award, the state losses its opportunity to intervene because the award becomes plaintiff's property. *See supra* notes 113–14 and accompanying text (defining property within this context). Therefore, when the Ninth Circuit says its *Engquist* opinion is in accordance with a majority of the states that have decided the issue, it is probable the court excluded *Kirk* and *Smith* because Oregon's split-recovery statute did not wait until after the award had vested in the plaintiff to become effective. *See Engquist*, 478 F.3d at 1005.

Proceeding to the argument that split-recovery statutes violate the Due Process Clause under the Fifth Amendment, the gravamen of this issue once again turns on whether a punitive damage award is property unlawfully taken by the government. *See supra* note 130 and accompanying text. Adopting the Ninth Circuit's holding in *Engquist* quickly resolves the question. Once again, punitive damages cannot be considered property given their uncertainty, and, therefore, any contention that split-recovery statutes deprive plaintiffs of property prior to a judicial hearing similarly fails. *See supra* note 130 and accompanying text.

B. Excessive Fines Clause

In a question of first impression for the Courts of Appeal, the Ninth Circuit attempted to resolve the question left open by the Supreme Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*: is the Excessive Fines Clause violated when the state receives a portion of the punitive damage award under a split-recovery statute?[161] Specifically, the court sought to determine whether the State having a right to share in the punitive damage award violated the Eighth Amendment.[162] Once again, the *Engquist* court turned to judicial precedent.[163]

In *United States v. Bajakajian*,[164] the Supreme Court remarked that at the time the Constitution was adopted, the word "fine" was understood to mean "a payment to a sovereign as punishment for some offense."[165] Thus, to elicit Eighth Amendment protection, a government-induced monetary extraction would need to function "as punishment for some offense."[166] With regard to Oregon's split-recovery statute, however, the Ninth Circuit found that, because the "operation" of the statute was unrelated to the plaintiff's culpability, no punishment of the plaintiff occurred.[167]

---

161. *See supra* notes 135–38 and accompanying text. It is also important to note that the Supreme Court declined to address the issue in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 429 (2001), even though the Court was aware that Oregon had a split-recovery clause that allocated 60% of the punitive damage award to the state. *See supra* notes 140, 142 and accompanying text. Once again, the Supreme Court has never explicitly stated that the Eighth Amendment applies to the states, *see supra* notes 134–35, but the *Engquist* court's analysis is important regarding the ramifications of a federal split-recovery statute or similar regulatory tool. *See infra* Part V.

162. *Engquist*, 478 F.3d at 1006.

163. *Id.*

164. United States v. Bajakajian, 524 U.S. 321, 334 (1998). "*Bajakajian* ultimately concluded that the statutory provision at issue in that case—which required certain felons to forfeit their currency at sentencing—did implicate the Excessive Fines Clause because it was intended to punish." *Engquist*, 478 F.3d at 1006.

165. *Bajakajian*, 524 U.S. at 327–28.

166. *Id.* at 328.

167. *See Engquist*, 478 F.3d at 1007. The court in *Engquist* also analogized its situation involving the Excessive Fines Clause to another case in which taxpayers objected to a retroactive tax on their Roth IRA. *Id.* at 1006 (citing Kitt v. United States, 47 Fed. Cl. 821, 827 (2000)). In that case, the court decided that the tax was unrelated to the taxpayers' culpability, as well as not being imposed as punishment for any purpose within the ambit of the Excessive Fines Clause. *Id.* Similarly, the split-recovery statute in *Engquist* did not look to the plaintiff's culpability to determine if it would come into effect and could not be considered a punishment of the plaintiff. *Id.* at 1006–07. In *Hosking v. Business Men's Assurance,* 79 S.W.3d 901, 904 (Mo. 2002), the Missouri Supreme Court concluded that Missouri's split-recovery statute did not violate the Excessive Fines Clause because the statute "did not implicate the state's prosecutorial power or provide the state with any interest in the punitive damages award prior to a final judgment . . . ." Schwartz, *I'll Take That*,

Accordingly, the court determined that the split-recovery statute did not violate the Eighth Amendment's Excessive Fines Clause.[168]

C. Supplementary Issues Decided By the Engquist *Court*

Also at issue in *Engquist* was whether the split-recovery statute, which awarded 60% of plaintiff's punitive damage award to Oregon when the State was not a plaintiff in the action, operated as a judgment in favor of a non-party.[169] Traditionally, a person who is not a party to an action cannot be a party to the judgment of that action.[170] Yet, the split-recovery statute allowed the State to "assert its 'substantive right as a judgment creditor.'"[171] Under Federal Rule of Civil Procedure 69(a), a judgment creditor is permitted to intervene in a lawsuit to the extent necessary to secure its interest.[172] Consequently, the split-recovery statute entitled the state to assert the same substantive rights upon the punitive damage award as those associated with a judgment creditor, and, therefore, the court determined that there was not a judgment in favor of a non-party.[173] Indeed, as a statutory judgment creditor, the State was capable of intervening with a punitive damage to secure its interest.[174]

The final question the *Engquist* court addressed with regard to the split-recovery statute was the potential for a judicial estoppel violation.[175] "Judicial estoppel prevents a party from taking inconsistent positions when those inconsistencies have an adverse effect on the judicial process."[176] This is only at issue within the context of split-recovery statutes where—as in *Engquist*—the state is a named defendant in the action, denies liability for punitive damages, and subsequently seeks a portion of the punitive damage

---

supra note 25, at 555 (reviewing the Missouri Supreme Court's decision in that case).

168. *Engquist*, 478 F.3d at 1007.

169. *Id*. at 1001.

170. RESTATEMENT (FIRST) OF JUDGMENTS § 93 (1942).

171. *Engquist*, 478 F.3d at 1001 (citing OR. REV. STAT. ANN. § 31.735(1) (West 2011) (Oregon's split-recovery statute)).

172. *Id*. at 1001. A judgment creditor is "[a] person having a legal right to enforce execution of a judgment for a specific sum of money." BLACK'S LAW DICTIONARY 921 (9th ed. 2009).

173. *Engquist*, 478 F.3d at 1001. Some commentators have observed, "[C]ompensation for harms to individuals other than the plaintiff before the court, or to 'society' more generally, would seem to fall outside the confines of the doctrine of punitive damages . . . ." Sharkey, *supra* note 74, at 350. However, in the case of split-recovery statutes, once the jury awards punitive damages, the state is automatically entitled to its statutory portion of the punitive damages award as a judgment creditor. DeMendoza v. Huffman, 51 P.3d 1232, 1247 (Or. 2002) (A split-recovery statute "asserts that the state has an interest immediately 'upon entry of a verdict.'").

174. *Engquist*, 478 F.3d at 1001.

175. *Id*. at 1000.

176. *Id*.

award.[177] While it was true that the state could not take contradictory positions adverse to the litigation process, the court determined that it was not the defendant's view that changed when the punitive damage award was apportioned to the state, but the state's position.[178] Moreover, it was the jury that determined the defendant in *Engquist* had acted so inappropriately as to merit punitive damages, not the State.[179] And because, as indicated above, the state was a judgment creditor, the Ninth Circuit held that the state was automatically entitled to its portion of the punitive damage award.[180]

Alas, *Engquist* did not result in answers to the Fifth and Eighth Amendment questions that have plagued split-recovery statutes since their inception, nor did it provide resolution or clarity as to additional issues. It would seem, then, that split-recovery statutes may now become the gold standard in punitive damage regulation—but this may not necessarily be the case. There are still residual issues surrounding split-recovery statutes that have been left unresolved by the courts and the legislature.

V. LINGERING PROBLEMS AND A PROPOSAL FOR FEDERAL ACTION

A. Why Federal Action is Needed: Erie *and the State v. Federal Law Problem*

While a number of states have undertaken legislative attempts to reform and regulate punitive damages—including the use of split-recovery statutes—regulation at the federal level is minimal.[181] Admittedly, some federal statutes have expressly prohibited the recovery of punitive damages.[182] Yet, the bulk of federal punitive damage jurisprudence is

177. *See id*. In this case, the Oregon Justice Department, as Defendant's counsel, had vehemently denied liability for any damages caused by the Oregon Department of Agriculture. *Id*. Yet, as soon as the jury found for the plaintiff and punitive damages were awarded, Oregon sought a portion of those damages. *Id*.

178. *Id*.

179. *Id*.

180. *Id*.

181. Although judicial review is constitutionally mandated, "[b]ecause of the difficulty of probing juror reasoning," judges generally only review punitive damage awards when there is "passion, prejudice, or partiality from the size of the award." Honda Motor Co. v. Oberg, 512 U.S. 415, 425 (1994). Therefore, many cases involving punitive damages escape regulation through judicial review. *See id*.

182. Examples include: the Communications Act of 1934; the Federal Tort Claims Act; the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA); the Foreign Sovereign Immunities Act; the Interstate Commerce Act; the Interstate Land Sales Full Disclosure Act; the National Vaccine Injury Compensation Program; and the Securities Acts. SCHLUETER,

contained in three Supreme Court cases.

In *BMW of North America, Inc. v. Gore*, the Court explicated its three famous guideposts, which require courts to examine: (1) the reprehensibility of the defendant's conduct; (2) the disparity between the actual damages or harm incurred by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages and civil penalties imposed in comparable cases to determine whether the punitive damage award is constitutional.[183] A few years later, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court determined that a proper punitive damage award should rarely exceed a single-digit ratio between it and the compensatory damage award.[184] Most recently, in *Philip Morris USA v. Williams*, the Court held that a jury might only consider the harm done to the plaintiff when calculating the punitive damage award.[185]

Without a doubt, these judicial guidelines have had a positive effect in controlling grossly excessive punitive damage awards.[186] Moreover, they provide general parameters for all courts to follow. Nonetheless, they fall short of consistently curing plaintiffs' windfalls or refocusing the award to benefit society in general.[187] Perhaps that is why states have stepped in to create their own punitive damage controls.[188] Even still, a major problem arises for states that have attempted to enforce a punitive regulatory measure—like a split-recovery statute—when a case goes to federal court and the court applies the *Erie* doctrine.[189]

---

supra note 63 § 21.2.

183. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

184. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

185. Phillip Morris USA v. Williams, 549 U.S. 346, 353 (2007).

186. *See* Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 105–24, 158–59 (2007) (reviewing the propriety of numerous post-guidepost decisions).

187. *See supra* notes 26–33 and accompanying text. While the aforementioned Supreme Court cases coincide chronologically with reformists' calls for punitive damage regulation, the Court as a body has demonstrated particular ambivalence to plaintiffs' receiving windfalls or making sure that punitive damages serve their originally intended purpose as a societal benefit. *See supra* notes 39–74. Even so, one wonders why the Court has not taken more affirmative steps towards the issue. The same can be said for Congress.

188. *See supra* notes 78–91 and accompanying text.

189. For federal courts exercising diversity jurisdiction, the rule articulated in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), requires application of state rules of decision to all nonfederal matters. In the words of Chief Justice Warren:

> The Erie rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court. . . . The decision was also in part a reaction to the practice of "forum-shopping."

Hanna v. Plumer, 380 U.S. 460, 467 (1965). For federal claims, a federal court will apply federal law. *Erie*, 304 U.S. at 78. Consequently, issues for punitive damage regulation arise for federal claims in federal court, even when the state has attempted to enact regulatory measures. *See infra* notes 190–92 and accompanying text. There is no challenge to a state exerting its power to allocate the punitive damage award under a split-recovery statute on state law claims in federal court:

> [Where the l]egislature intended that the split-recovery statute allocating 60 percent of

Consider the following: a case is filed in federal court—either originally or via removal—including both state and federal law claims.[190] Furthermore, the state where the federal court sits employs a split-recovery statute. Under these circumstances—and in accordance with the *Erie* doctrine—the split-recovery statute is only effective as to any punitive damages awarded on the state law claim. As a result, most punitive damages awarded on a federal law claim escape regulation due to minimal monitoring by the federal courts, thereby frustrating the intentions of the states.[191] Observing the numerous

---

> each punitive damages award in Oregon to the state's Criminal Injuries Compensation Account would apply in federal cases arising under state law, even if the federal courts, because of the Supremacy Clause, would not be subject to the statute's procedural requirement that the court identify the state as a judgment creditor; the 60 percent recovery was a substantive right, and the state had other procedural methods for enforcing that right, even if was not named as judgment creditor.

Sonja Larsen, Annotation, *Validity, Construction, and Application of Statutes Requiring that Percentage of Punitive Damages Awards be Paid Directly to State or Court–Administered Fund*, 16 A.L.R.5th 129 (1993); Benjamin Grossberg, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. PA. L. REV. 217, 269 (2010) ("And if states attempt to use that power to accomplish substantive ends, there is no reason that the Erie doctrine should make all of those efforts per se unenforceable in federal court merely because the state laws can be characterized as conflicting with one of the Federal Rules.").

190. A perfect example of this is *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985, 999–1000 (9th 2007). *See supra* notes 139–45 (reviewing the factual background of the case). In that case, punitive damages were awarded for two causes of action: $125,000 on an equal protection claim and $125,000 on a contractual interference claim. *Engquist*, 478 F.3d at 992. In the court's analysis, however, it commented that pursuant to *Erie*, Oregon's split-recovery statute—which allocated 60% of the award to the state—only applied to the contractual interference claim. *Id.* at 1000. Subsequently, a "State Account" was credited $75,000 representing the state's apportioned punitive damage amount, but $125,000 awarded as punitive damages on the federal equal protection claim escaped regulation. *Id.* at 992. So, while the Ninth Circuit provided unprecedented answers to the two-horned constitutional dilemma—split-recovery statutes do not violate the Takings or Excessive Fines Clauses—the *Engquist* court failed to provide a resolution for the *Erie* issue described in the example. *Id.*

191. Even in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996), the Supreme Court made clear that its analysis into the excessiveness of a punitive damage award "appropriately begins with an identification of the state interests that a punitive award is designed to serve." This is not a new problem. State courts and state legislatures have consistently contemplated how to make sure that their own regulations on punitive damages are enforced in federal court. When faced with the *Erie* situation for a federal gender discrimination action, the Eight Circuit concluded:

> Our decision leaves open the question of how the State should enforce its alleged interest in federal punitive damages awards. . . . The statute places the burden on the attorney general to "collect upon such judgment," perhaps in a later action against one of the parties. In such action the court could, of course, consider that a portion of the punitive damages award is "deemed" to be the property of the State under Missouri law. In the present action, however, the State has no interest in the judgment upon which to execute.

Finley v. Empiregas Inc. of Potosi, 28 F.3d 782, 785–86 (8th Cir. 1994) (citations omitted). Therefore, because the split-recovery statute carried no force upon the federal gender discrimination action, there was nothing the federal court could do to ensure the punitive damage award in a manner

federal laws that allow punitive damages to be awarded in civil cases,[192] this is problematic.

One solution is for Congress to pass legislation—like that found in the National Endowment for the Oceans—meant to strictly scrutinize all punitive damage awards, prevent plaintiffs' windfalls, and concentrate on fully using punitive damages for societal benefit.[193] As established in Part

---

prescribed by the state. *Id*. This is justifiable in that the federal courts have their own interest of uniformity to pursue: "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." *Hanna*, 380 U.S. at 473–74. However, what it does not excuse is the lack of punitive damage regulation in the aforementioned scenario.

192. One of the largest areas, as far as the number of cases brought to federal court combined with punitive damages awarded on those cases, is for violations of the Federal Civil Rights Acts under 42 U.S.C. §§ 1981, 1983, 1985, and 1988 (2006). *Punitive Damages in Actions for Violations of Federal Civil Rights Acts*, 14 A.L.R. FED. 608 (1973) (listing cases in which punitive damages were awarded for violations under a Federal Civil Rights Act). Many of these arise under the banner of § 1983, where the defendant's conduct exhibits "reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30, 56 (1983). Punitive damages are statutorily permissible in a number of other situations. *See infra* Appendix B; *see also* HAMMESFAHR, *supra* note 42 § 1:13 (examining the main areas of federal law that allow for punitive damages). Punitive damages have also been awarded for violations of 18 U.S.C. § 248 (2011), the Freedom of Access to Clinic Entrances Act. SCHLUETER, *supra* note 63 § 21.1(X).

Treble damages—exemplary damages defined as three times the amount of compensatory damages—may also be awarded on a number of federal law claims. The most important of these statutes is the Clayton Act, 15 U.S.C. § 15(a) (2006), which permits recovery of treble damages in successful anti-trust claims. The reason the statute draws so much attention is that treble damages are mandatory under the Clayton Act, do not require the plaintiff to prove malice, and are generally large. HAMMESFAHR, *supra* note 42 § 1:13; *see also* Neil Hamilton & Virginia B. Cone, *Mitigation of Antitrust Damages*, 66 OR. L. REV. 339, 349–56 (1987) (giving concern to the rising number of treble damages awarded in anti-trust claims and its effect on the economy). Treble damages are also available in a number of other circumstances. 7 U.S.C. § 2321 (2011) (improper use of plant patents); 18 U.S.C. § 1964(c) (2011) (recovery of treble damages for RICO case in civil courts); *see* 35 U.S.C. § 284 (2011) (patent infringement); Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1301 (7th Cir. 1987). Additionally, treble damages have been imposed under the False Claims Act. *See* United States v. Karron, 750 F. Supp. 2d 480, 493 (S.D.N.Y. 2011). Though such damages seem to be inherently regulated, they still allow plaintiffs to receive a windfall and have been considered punitive damages for all practical purposes. *See* 22 AM. JUR. 2D *Damages* § 616 (2012) (examining punitive treble damages' effect on plaintiff awards). Additionally, there are a number of federal statutes that neither expressly provide for nor exclude punitive damages: Copyright Infringement; damages awarded under the Labor Relations Acts; Alien Tort Claims Act; Consumer Product Safety Act; Employee Retirement Income Security Act (ERISA); Federal Employers' Liability Act (FELA); Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); Magnuson-Moss Warranty Act; National Health Service Corps Scholarship Program; Oil Pollution Act of 1990; Privacy Act; Real Estate Settlement Procedures; and the United States Housing Act of 1937. SCHLUETER, *supra* note 63 § 21.3.

193. *See supra* note 12 and accompanying text. This action, however, necessarily implicates an inverse retort—the enforcement of a federal split-recovery statute in states that do not have one—so there is again an imbalance in regulation. True, federal courts are no stranger to conflicting federal and state laws; by using the test established in *Hanna v. Plumer*, 380 U.S. 460, 463–64 (1965), the federal courts could enforce a split-recovery statute if it is deemed constitutional—which it seems to be—and falls within § 2072 of the Rules Enabling Act. Under the Rules Enabling Act, 28 U.S.C. §

II.A, split-recovery statutes are likely the best of the current modern reform measures at preventing plaintiffs' windfalls and allocating the money to the public generally—while, at the same time, encouraging plaintiffs to bring claims, paying for additional litigation expenses, and maintaining the primary purposes of punitive damages: punishment and deterrence. Additionally, split-recovery statutes are likely constitutional.[194] But before sending Mr. Smith to Washington, split-recovery statutes have a lingering problem, unresolved by the courts, which must be addressed.

B. The Problem: Voluntary Settlement by the Parties and Its Effect on Split-Recovery Statutes

One of the unanticipated side effects of split-recovery statutes has been that they encourage adverse parties to settle: the plaintiff wants to settle to escape the apportionment of his or her punitive damage award by the state and the defendant wants to settle to avoid a large punitive damage judgment.[195] Some scholars place a positive spin on this settlement effect, claiming that it gets at the central purpose of the tort system—compensating the plaintiffs for their injuries—while limiting litigation time and expense, as well as conserving judicial resources.[196] However, such a theory becomes perverted once an impaneled jury imposes a punitive judgment on the defendant and the parties subsequently attempt to settle.[197]

2072(a), the Supreme Court has the power to prescribe general rules of practice and procedure in United States district courts and courts of appeal. Moreover, a uniform federal rule may be required when divergent state regulation conflicts with federal interests. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 496 (9th ed. 2005) (discussing how the Federal Rules were a response to "an extended period of agitation for uniform procedural rules"); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 429, 432 (6th ed. 2002) (noting that the Federal Rules were created to address "erratic conformity to state procedure" by creating a system of uniform procedure). However, such rules are "few and restricted" and limited to situations where there is a "significant conflict between some federal policy or interest and the use of state law." Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966).

194. *See supra* Part IV.A.

195. *See* Sharkey, *supra* note 74, at 444–45. Split-recovery statutes may have a similar effect on arbitration. *Id*. The Florida Supreme Court has been one of the few courts to address this issue, concluding that the State's split-recovery statute had no effect upon an arbitration agreement and that the parties did not need the consent of the state to arbitrate. Miele v. Prudential-Bache Secs., Inc., 656 So. 2d 470, 473 (Fla. 1995).

196. Dodson, *supra* note 35, at 1351. "Regardless of whether collusive settlements are a real concern with existing split-recovery schemes, however, the problem of the incentive for the plaintiff and defendant to settle in order to cut out the state's portion" is of paramount concern. Sharkey, *supra* note 74, at 445.

197. Under these circumstances, the court has already had to expend time and resources on

Such was the issue at hand in *Patton v. Target Corp.*[198] In that case, the parties sought to settle at the post-verdict stage, thus eliminating the state's share of the punitive damage award under Oregon's split-recovery statute.[199] The state attempted to intervene in the settlement by claiming that it was a judgment creditor, and, as such, had a protectable interest in the award.[200] After certification by the Ninth Circuit,[201] the Supreme Court of Oregon reviewed the facts and determined that the interested parties did not need the state's consent to settle the claim despite the state being classified as a judgment creditor.[202] The court's conclusion resulted from the lack of a definitive description for the rights of a judgment creditor in the text of the split-recovery statute; as presently worded there was nothing in the statute requiring the state's consent to the settlement.[203] Therefore, the parties were

---

hearing the case, reviewing the court documents, and running the trial; the jurors have already taken time away from their lives to hear the case; and the parties to the litigation have spent a lot of time and money taking the case all the way through trial.

198. Patton v. Target Corp., 242 P.3d 611 (Or. 2010), *aff'd*, 627 F.3d 1304 (9th Cir. 2010). The case involved a wrongful discharge wherein the jury awarded the ex-employee plaintiff $85,000 in compensatory damages and $900,000 in punitive damages. *Id.* at 613.

199. *Id.* at 613. Such an ex post facto decision fails to eliminate time and expense from litigation, as well as to preserve judicial resources: the court already did the legwork.

200. *Id.*

201. The Ninth Circuit certified the following question for the Supreme Court of Oregon to answer: "When a jury has returned a verdict that includes an award of punitive damages . . . is the [s]tate['s] . . . consent necessary before a court may enter a judgment giving effect to any settlement between the parties that would result in a reduction or elimination of the punitive damages to which the [s]tate would otherwise be entitled . . . ?" Patton v. Target Corp., 580 F.3d 942, 948–49 (9th Cir. 2009).

202. *Patton*, 242 P.3d at 619. The *Patton* court looked to the legislative history for any guidance in what the Oregon legislature intended by using the term "judgment creditor." *Id.* at 615. But the court could not find any reason to extend the definition of judgment creditor beyond the common and usual meaning, including the requirement of a final decision of the court. *Id.* (citing BLACK'S LAW DICTIONARY 841–42 (6th ed. 1990)).

203. *Patton*, 242 P.3d at 616–17, 619. There are numerous problems with requiring a state's consent to a settlement to make sure that the state does not get cut out. Rachel D. Trickett, Comment, *Punitive Damages: The Controversy Continues*, 89 OR. L. REV. 1475, 1497 (2011) ("First, requiring the State's consent before two parties may settle a claim might block worthy settlements that would otherwise end litigation and allow plaintiffs to obtain needed compensation without delay. Second, if parties must obtain the state's consent prior to settlement, many attorneys may be reluctant to pursue claims for punitive damages at the risk of not being able to control the claim or minimize the potential risk of taxation, allocation, and appeal on behalf of their clients. Third, the inability to settle a claim without the state's consent could render the recovery of punitive damages meaningless to plaintiffs and attorneys as a result of tax consequences."). Consequently, it seems ill-advised to construct a split-recovery statute that would give the state an interest in the punitive damage award before the award was ever awarded. The only solutions to the situation seem to be: (a) allow the state to intervene in a settlement where the settlement is done in bad faith—meaning that the only reason the parties are settling is to avoid apportionment by the state—however, such a theory requires the judge to read the minds of the parties, and the theory could easily be overcome by the parties devising an alternative motivation for their settlement; or (b) have the judge review all post-verdict settlement awards to find any money dispersed in excess of litigation costs and allocate that to the state. *See infra* notes 216–17 and accompanying text.

free to settle the case at any stage in the litigation—even when a judgment had been entered and the very purpose of the split-recovery statute frustrated.[204]

Patton makes clear that in order to stop a split-recovery statute from being rendered obsolete by post-verdict settlement, a statute must explicitly indicate that the government has an interest in the award once delivered by the jury.[205] For this reason, most hypothetical split-recovery statutes include a timing provision that gives the state or governmental fund an interest in any post-verdict settlement.[206] Although such a provision complicates any settlement between the parties, it does not allow them to evade regulation under the split-recovery statute.[207] Additionally, because the timing provision does not give the state a pre-verdict interest in the settlement, it seeks to eliminate any concerns about giving the state an interest in a settlement.[208] Crafting a brand new and unproven statute may not be the best solution to the punitive damage problem.

C. An Alternative Solution: A Federal Punitive Monitory Tax

Although split-recovery statutes have been declared constitutional, considering the settlement problem coupled with the other harsh criticisms to which the statutes have been exposed,[209] it is advantageous for the Federal Government to determine if there is a similarly useful tool it could use to regulate punitive damage awards—something that deals punishment and deterrence to defendants regardless of the compensatory damage amount, while stopping plaintiffs from receiving windfalls. A simple (yet overlooked) solution is a federal tax on federal punitive damage awards.

---

204. *Patton*, 242 P.3d at 619. Moreover, it seems the Oregon legislature contemplated a settlement between the parties to defeat the split-recovery statute—thereby providing a windfall to the plaintiffs—however, "there is an unbridged gap between what the legislature is said to have intended and what the words that the legislature chose to use actually do . . . ." *Id*.

205. *Id*.

206. Stevens, *supra* note 100, at 899. If there were to be a federal split-recovery statute, it should follow the model statute proposed in Stevens's article. *Id*. at 899–906. His model statute includes (a) an identity provision, designating a special compensation fund as the beneficiary—thus eliminating Double Jeopardy Clause and Excessive Fines Clause concerns while creating a more equitable remedy—as well as determining the types of cases the statute will apply to; (b) an allocation provision that identifies the percentage of the punitive damage award to be allocated after attorney's fees are awarded; and (c) the aforementioned timing provision. *Id*.

207. *Id*. at 904–06.

208. *See supra* note 203 and accompanying text.

209. *See supra* notes 105–06 and accompanying text.

It is no secret that the federal government has broad discretion to tax.[210] Additionally, under the Spending Power, Congress can spend money—including any collected under the taxing power—as it sees fit if such spending rationally relates to the general public welfare,[211] allowing public expenditures to evade recuse under a *Beckwith* or *Sperry* analysis for an unreasonably related expenditure.[212]

A few scholars have voiced concern over the ramifications of a federal monitory punitive damage tax. These voices agree that such a tax would "reduce the plaintiff's windfall," but assert that "it would at the same time reduce the defendant's punishment below that which a jury would have awarded."[213] Additionally, mavens contend that "such an excise tax . . . could be easily circumvented through settlement in most cases" where punitive damages are "disguise[d]" as compensatory damages.[214] However, these arguments are open to inquest.

---

210. *See* License Tax Cases, 72 U.S. 462, 471 (1866) ("It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."). According to some scholars, "It is also possible that a state could avoid the Eighth Amendment question altogether by drafting or interpreting its statute as a tax on the plaintiff's punitive damage award, rather than as a direct payment from the defendant to the state." *Recent Case*, *supra* note 101, at 1696.

One academic contemplated what would happen if a state legislature used "a special tax on all punitive awards to eliminate the plaintiff's windfall" rather than split-recovery statutes. Klaben, *supra* note 96, at 116 n.76. He determined that while states are given broad discretion to impose and collect taxes, *id*. (citing Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n, 488 U.S. 336, 344 (1989)), the Constitution prohibits a state from enacting a tax "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power . . . ." *Id*. (quoting Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934)). In light of the foregoing, the scholar concluded that the Supreme Court would find a special tax on punitive damages to be a mere regulation, and, therefore, an unconstitutional taking. *Id*. The federal government, on the other hand, is not bound by such narrowing restrictions. *Id*.

211. U.S. CONST. amend. XVI, § 8; South Dakota v. Dole, 483 U.S. 203, 207 (1987) (reviewing Congress's ability to use tax revenue under the spending power).

212. *See supra* notes 127–31 and accompanying text.

213. Gregg D. Polsky & Dan Markel, *Taxing Punitive Damages*, 96 VA. L. REV. 1295, 1351 (2010). Because these are cases where a state split-recovery statute would be ineffective, there should not be any concern about the federal government cutting into money that should be going to benefit the state.

214. *Id*. at 1350. Perhaps the greatest foreseeable potential flaw with a federal monitory tax on punitive damages is that it would be viewed as a regulation rather than a tax. *See* Ruth Mason, *Federalism and the Taxing Power*, 99 CAL. L. REV. 975 (2011) (analyzing Congress's ability to tax). This would be fatal. *Id*. at 977. Although Congress has ample power to tax, if the tax is a hidden regulation, it is unconstitutional:

> Taxes are occasionally imposed in the discretion of the Legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment.

Bailey v. Drexel Furniture Co. (*Child Labor Tax Case*), 259 U.S. 20, 38 (1922); *see also* United States v. Butler, 297 U.S. 1, 69 (1936) ("The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible."). Therefore, there is a fine line between a tax being a revenue-raising measure with incidental regulatory features and a tax being a hidden regulation.

As a general rule, to determine whether a statute is a tax or merely a regulatory scheme requires the inquisitor to view the objectives and purposes of the statute as whole. 47A C.J.S. *Internal Revenue* § 3 n.14 (citing Moon v. Freeman, 379 F.2d 382 (9th Cir. 1967)). If, after review, it is concluded that revenue is the primary purpose for the statute, any regulation flowing therefrom is merely incidental and the statute is controlled by the taxing provisions of the Constitution. *Id*. But if regulation is the primary goal of the statute, the "mere fact that incidental revenue is also obtained" makes the statute an unconstitutional sanction. *Id*. In the *Child Labor Tax Case*, the court found that the tax was designed to regulate child labor and not to collect revenue. 259 U.S. at 40–41. As such, it invaded the rights of the states and was invalid. *Id*. at 36. In *United States v. Butler*, 297 U.S. 1, 61 (1936), the Court also used the aforementioned formula and concluded that the tax was a regulation because the tax was an "expropriation of money from one group for the benefit of another," rather than "an exaction for the support of the Government." *See also* Am. Petrofina Co. of Tex. v. Nance, 859 F.2d 840, 841 (10th Cir. 1988) ("The mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised."). Since the mid-nineteenth century, however, the Supreme Court has upheld a number of seemingly regulatory taxes, obscuring the general rule for a tax's constitutionality. Mason, *supra*, at 1000–03.

Today, the rule seems to be: if it objectively reads like a tax, it is a tax even if it seems strictly regulatory. 47A C.J.S. *Internal Revenue* § 3. There is no real consideration of motive:

> Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution.

Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937) (citations omitted); *see also* Steward Mach. Co. v. Davis, 301 U.S. 548, 589–90 (1937) ("[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems."). Therefore, it is unlikely that a court would hold a federal monitory tax to be unconstitutional even though one of its primary purposes would be to regulate punitive damages:

> Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect, and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.

Sonzinsky, 300 U.S. at 513 (citations omitted). Additionally, due to the large monetary amount involved in punitive damage litigation, a federal monitory tax would raise sufficient funds—unlike the tax in the *Child Labor Tax Case*—to potentially escape any suspicion of being a hidden regulatory tax. *See* HAMMESFAHR & NUGENT, *supra* note 42 §§ 1:8–1:10 (listing the monetary amounts of punitive damages over the past four decades). For example, from 1979 to 1989 over $1.3 billion in punitive damages were awarded in California alone. *Id*. § 1:10. As such, a tax on that amount would have raised substantial revenue.

As to the first argument, if the federal government were to use a monitory tax to regulate punitive damage awards, the defendant would still have to pay any punitive amount decided by the jury. Accordingly, punishment and deterrence would still be dutifully distributed. Moreover, with only a percentage of the punitive damage awarded being taxed at a fixed rate, the plaintiff would retain an incentive to bring the suit and would also receive money to cover litigation expenses.[215] With regard to the second argument, the Supreme Court has concluded that any money received in a settlement above that which is compensatory in nature connotes exemplary damages and is also taxable gross income.[216] And although

---

Moreover, a federal monitory tax would be unlike the penalties which were held invalid in the *Child Labor Tax Case*, *United States v. Constantine*, 296 U.S. 287 (1935) (excise tax used to regulate the sale of liquor), *Linder v. United States*, 268 U.S. 5 (1925) (tax used to regulate the practice of medicine), *Hill v. Wallace*, 259 U.S. 44 (1922) (tax used to regulate grain), and multiple other cases where the taxes were held to be instruments of regulation by virtue of their coercive effect on matters left to the control of the states. Because, as discussed in Part V.A, a federal monitory tax on punitive damage would seek to eliminate the lack of regulation for punitive damages awarded on federal law claims, it is an area of the law that falls under the purview of the federal government. Thus, a federal monitory tax would not encroach upon a state's ability to regulate punitive damages and should not be held invalid.

215. If a federal monitory punitive damage tax were enacted, it could learn from split-recovery statutes and employ the beneficiary parts of the statutes (like allowing attorney's fees to be removed from the punitive damage award prior to the calculation and enforcement of the tax). Mervine, *supra* note 21, at 1607 (an attorney should be able to take a contingency fee from the entire punitive damage amount as an incentive to file and follow through with the litigation). *Contra* Gordon v. State, 608 So. 2d 800, 802 (Fla. 1992) (in Florida, attorneys' fees were to "be calculated based only on the portion of the judgment payable to the" plaintiff). For the current punitive damage tax situation, there is a split on the issue—with some states permitting the attorney's fees to be taken prior to calculating the tax while other jurisdictions require taxpayers to include the amount with their gross income. SCHLUETER, *supra* note 63 § 18.1(C). As a general rule, however, the Supreme Court has suggested that the "litigant's income includes the portion of the recovery paid to the attorney as a contingent fee." Banks v. Comm'r, 543 U.S. 426, 430 (2005).

Additionally, a mandate could be included that juries would not be instructed of the tax. *See supra* note 105 and accompanying text. A valid argument made by many opponents of split-recovery statutes is that if the citizens who compose a jury know that a substantial portion of a punitive damage award would be taken from the plaintiff and given to a state or specified fund vis-à-vis a split-recovery statute, the jury would be more inclined to not only grant a punitive damage award, but a much larger punitive damage award:

> In *Honeywell v. Sterling Furniture Co.*, 797 P.2d 1019 (1990), the court held that it was reversible error for the jury to be informed of the distribution of a punitive damages award, first to the claimant's attorney, and then in equal parts to the state and the claimant. . . . noting that punitive damages were designed to punish the offender and deter others from similar conduct, while the instructions to the jury here improperly shifted the jury's consideration to how much of the award the plaintiff would be forced to share.

Larsen, *supra* note 189; *see* Goldstein, *supra* note 21, at 108. Furthermore, by using an already extant system and functional tool—the Internal Revenue Service—few judicial resources would need to be expended in creating and enforcing a federal monitory tax.

216. Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955). For such an inference it is important to look at the facts underlying *Commissioner v. Glenshaw Glass Co.* In that case, Glenshaw Glass Company filed a fraud and anti-trust lawsuit against the manufacturer of its

parties may attempt to disguise punitive damages in a post-verdict settlement, a court reviewing the settlement should be able to compare the offer with the complaint to determine if the plaintiff received any post-compensatory money.[217] In this way, a federal monitory tax highlights the benefits of a split-recovery statute—preventing plaintiffs from receiving a windfall while remaining focused on the twin aims of punishment and deterrence regardless of the compensatory damage amount—without the uncertainty.[218]

VI. CONCLUSION

In the wake of the BP oil spill, it is most likely that the pearls soon to be found in the oysters of the Gulf Coast will not be white or even black, but green and in the shape of punitive damages. Yet, an unshuckable question remains: how will punitive damages—a staple of American jurisprudence—punish and deter BP and the other oil industry companies for engaging in malicious practices without leading to a windfall for plaintiffs? Thus far, attempts to limit plaintiffs' windfalls by refocusing punitive damage awards on society while remaining true to the twin aims of punishment and deterrence have been moderately successful.[219] Split-recovery statutes—supported by constitutional backing from the Ninth Circuit—have provided a glimmer of hope, but are easily overcome by the post-verdict settlement of

---

equipment. *Id*. at 427–28. The two parties eventually settled the claim for $800,000, with "$324,529.94 represent[ing] payment of punitive damages for fraud and antitrust violations." *Id*. at 428. Therefore, the Court's conclusion that the punitive damages were taxable as gross income means that the damage award amount above compensatory damages is considered income from the lawsuit and is taxable. *Id*. at 432–33; *see* I.R.C. § 61(a) (2006) (defining gross income as "all income from whatever source derived"). Moreover, after the Ninth Circuit's decision in *Patton*, such an argument seems circular in that a split-recovery statute would have to be modified in a manner to require the government's consent to a settlement.

217. In the vast majority of settlements, the parties will not allocate an amount for punitive damages. SCHLUETER, *supra* note 63 § 18.3. Under such circumstances, "[t]he court must look beyond the settlement language and determine the basis for the damages," *id*. § 18.3 n.5 (citing Bagley v. Comm'r, 105 T.C. 396, 406 (1995)), and take the following steps: "(1) look to the express language of the agreement; (2) determine the amount was 'in lieu of what' damages; and (3) should neither engage in speculation nor blind themselves to a settlement's realities." *Id*. Additionally, an express allocation of the settlement is not necessarily dispositive of the intent of the parties. *Id*.

218. *Economic Analysis*, *supra* note 74, at 1917–19 (encouraging the use of a tax on punitive damages to help eliminate plaintiffs' windfalls). *But see* Lawrence Zelenak, *Of Punitive Damages, Tax Deductions, and Tax-Aware Juries: A Response to Polsky and Markel*, 96 VA. L. REV. IN BRIEF 61, 64 (2010) (claiming that the IRS would not be able to "identify with perfect accuracy in every instance how much of a settlement was paid with respect to punitive damage claims").

219. *See supra* notes 73–103 and accompanying text.

the parties.[220] Considering the lack of regulation by the federal courts of punitive damages, "[t]he time is thus ripe for reconceptualizing the civil damages landscape,"[221] and federal action through a federal monitory tax appears to be the most appropriate response.[222]

Skyler M. Sanders*

220. *See supra* notes 92–102, 195–208 and accompanying text.

221. Sharkey, *supra* note 74, at 352.

222. *See supra* notes 209–18 and accompanying text.

* J.D. Candidate, 2013, Pepperdine School of Law, B.A. in History, 2009, Brigham Young University. The author would like to thank Robert Kelly, Lukian Kobzeff, Margot Parmenter, Mark Reinhardt, Kristopher Wood, and all the members of the *Pepperdine Law Review* for all of their hard work and dedication. He would also like to thank Judge Otis Wright II of the Central District Court for inspiring the topic of this Comment, and his family—especially his wife and daughter—for their love and support.

VIII. APPENDICIES

Appendix A. Current Split-Recovery Statutes by State

Statute	Text
ALASKA STAT. § 09.17.020(j) (2011)	If a person receives an award of punitive damages, the court shall require that 50 percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages.
COLO. REV. STAT. § 24-75-201.7 (2011)	Any punitive or exemplary damages awarded to any party to a lawsuit brought to enforce the restriction on state spending as set forth in section 24-75-201.1 shall be deposited and credited to the property tax relief fund, which is hereby created in the state treasury. All moneys in the fund at the end of any fiscal year shall remain in the fund and shall not be transferred or credited to the state general fund or to any other state fund. All interest derived from the deposit and investment of moneys in the fund shall be credited to the fund. Moneys in said fund shall be used only in such manner as the general assembly deems appropriate as to provide property tax relief throughout the state and shall never be available for appropriation for any other state purpose.
GA. CODE ANN. § 51-12-5.1(e)(1–2) (2011)	(1) In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages. Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act

or omission.
(2) Seventy-five percent of any amounts awarded under this subsection as punitive damages, less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge, shall be paid into the treasury of the state through the Office of the State Treasurer. Upon issuance of judgment in such a case, the state shall have all rights due a judgment creditor until such judgment is satisfied and shall stand on equal footing with the plaintiff of the original case in securing a recovery after payment to the plaintiff of damages awarded other than as punitive damages. A judgment debtor may remit the state's proportional share of punitive damages to the clerk of the court in which the judgment was rendered. It shall be the duty of the clerk to pay over such amounts to the Office of the State Treasurer within 60 days of receipt from the judgment debtor. This paragraph shall not be construed as making the state a party at interest and the sole right of the state is to the proceeds as provided in this paragraph.

735 ILL. COMP. STAT. ANN. 5/2-1207 (West 2011)

The trial court may also in its discretion, apportion the punitive damage award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Human Services.

IND. CODE ANN. § 34-51-3-6 (West 2011)

(a) . . . when a finder of fact announces a verdict that includes a punitive damage award in a civil action, the party against whom the judgment was entered shall notify the office of the attorney general of the punitive damage award.
(b) When a punitive damage award is paid, the party against whom the judgment was entered shall pay the punitive damage award to the clerk of the court where the action is pending.
(c) Upon receiving the payment described in

subsection (b), the clerk of the court shall:
(1) pay the person to whom punitive damages were awarded twenty-five percent (25%) of the punitive damage award; and
(2) pay the remaining seventy-five percent (75%) of the punitive damage award to the treasurer of state, who shall deposit the funds into the violent crime victims compensation fund established by IC 5-2-6.1-40.
(d) The office of the attorney general may negotiate and compromise a punitive damage award described in subsection (c)(2).
(e) The state's interest in a punitive damage award described in subsection (c)(2) is effective when a finder of fact announces a verdict that includes punitive damages.

IOWA CODE ANN. § 668A.1 (West 2011)

1. In a trial of a claim involving the request for punitive or exemplary damages, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:
a. Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.
b. Whether the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived.
2. An award for punitive or exemplary damages shall not be made unless the answer or finding pursuant to subsection 1, paragraph "a", is affirmative. If such answer or finding is affirmative, the jury, or court if there is no jury, shall fix the amount of punitive or exemplary damages to be awarded, and such damages shall be ordered paid as follows:

a. If the answer or finding pursuant to subsection 1, paragraph "b", is affirmative, the full amount of the punitive or exemplary damages awarded shall be paid to the claimant.
b. If the answer or finding pursuant to subsection 1, paragraph "b", is negative, after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator. Funds placed in the civil reparations trust shall be under the control and supervision of the executive council, and shall be disbursed only for purposes of indigent civil litigation programs or insurance assistance programs.

MO. ANN. STAT. § 537.675 (West 2011)

The State of Missouri shall have a lien for deposit into the tort victims' compensation fund to the extent of fifty percent of the punitive damage final judgment which shall attach in any such case after deducting attorney's fees and expenses. . . . The state cannot enforce its lien until there is a punitive damage final judgment. Cases resolved by arbitration, mediation or compromise settlement prior to a punitive damage final judgment are exempt from the provisions of this section.

UTAH CODE ANN. § 78B-8-201(3) (West 2011).

(a) In any case where punitive damages are awarded, the court shall enter judgment as follows:
(i) for the first $50,000, judgment shall be in favor of the injured party; and
(ii) any amount in excess of $50,000 shall be divided equally between the state and the injured party, and judgment to each entered accordingly.

Appendix B. Federal Statutes That Permit Punitive Damages

Statute	Text
6 U.S.C. § 1142(d)(3) (2006)	Firing or otherwise discriminating against a public transportation employee for reporting a violation of federal law or for refusing to violate a federal law
7 U.S.C. § 21(b)(10)(ii) (2006)	Failure to correctly register as a futures association
7 U.S.C. §§ 601–24, 1301–1992 (2006)	Violations of the Agricultural Adjustment Acts
10 U.S.C. § 987(f)(2) (2006)	Violating the terms required to extend consumer credit to members of the armed forces and their dependents
10 U.S.C. § 2207(a)(2) (2006)	Giving gratuity in order to secure a Department of Defense contract
12 U.S.C. § 1723a(e) (2006)	Using the words "Federal National Mortgage Association," "Government National Mortgage Association," or any combination thereof as the name or part of the name for a sole proprietorship, association, partnership, or corporation
12 U.S.C. §§ 1972, 1975 (2006)	Bank requiring a customer to obtain additional services from the bank before extending credit in violation of the Bank Holding Company Act

12 U.S.C. § 3417(a)(3) (2006)	Unlawful intentional disclosure of a customers financial information
15 U.S.C. § 298(c) (2006)	Frivolous suits by jewelry trade associations for injunctive relief
15 U.S.C. § 1117(a) (2006)	Ability to recover any profits gained by the defendant in addition to plaintiff's damages or court costs for trademark infringement in violation of the Lanham Act
15 U.S.C. § 1681n(a)(2) (2006)	Consumer protection from credit reporting agencies
15 U.S.C. § 1691e(b) (2006)	Creditors discriminating against an individual based on race, religion, national origin, sex, marital status, or age
15 U.S.C. § 2622(b)(2)(B) (2006)	Termination or discrimination against an employee by an employer for reporting or not participating in the unlawful control of toxic substances
15 U.S.C. § 2805(d)(1)(B) (2006)	Franchisor of motor fuels unlawfully violates relationship with franchisee
18 U.S.C. § 2252A(f)(2)(B) (2006)	Civil damages related to child pornography
18 U.S.C. § 2520(b)(2) (2006)	Unlawful use of any person's wire, oral, or electronic communication
18 U.S.C. § 2707(c) (2006)	Violations of the "Stored Wire and Electronic Communications and Transactional Records Access" statute
18 U.S.C. § 2710(c)(2)(B) (2006)	Wrongful disclosure of video tape rental or sale records

18 U.S.C. § 2724(b)(2) (2006)	"Prohibition on Release and Use of Certain Personal Information from State Motor Vehicle Records"
22 U.S.C. § 2399b(b) (2006)	False or misleading information about commodities
25 U.S.C. § 305e(c) (2006)	Misrepresentation of Indian produced goods
28 U.S.C. § 1605A(c) (Supp. 2009)	A foreign state that is or was a state sponsor of terrorism, which lead to personal injury or death
31 U.S.C. § 3720D(e)(2) (2006)	Employer fires or otherwise discriminates again an employee because the United States Government is garnishing the employee's income to pay back taxes
31 U.S.C. § 3729 (2006)	Filing false claims against the government
33 U.S.C. § 1514(c) (2006)	Person willfully violates a rule of the Deepwater Ports statute
39 U.S.C. § 3018(g)(2) (2006)	Mailing hazardous material
41 U.S.C. § 4705(b)(d)(2) (Supp. IV 2011)	Termination or discrimination against a federal contractor employee "as a reprisal for disclosing to a Member of Congress or an authorized official of an executive agency or the Department of Justice information relating to a substantial violation of law related to a contract"

42 U.S.C. § 300aa-23(d) (2006)	Vaccine manufacturer found to be liable
42 U.S.C. § 300j-9(i)(2)(B)(ii) (2006)	Termination or discrimination against an employee by an employer for reporting or not participating in the unlawful violation of drinking water regulations
42 U.S.C. §§ 3604, 3613(c)(1) (2006)	Discrimination in the sale or rental of housing based on race, religion, color, gender, martial status, or national origin
42 U.S.C. § 7622(d) (2006)	Employee is dismissed, demoted, or discriminated against for testifying or planning on testifying against company for air pollution
42 U.S.C. § 13981 (2006)	Violation of the Violence Against Women Act
45 U.S.C. § 711(j) (2006)	Using the words "United States Railway Association" as a name for any business purpose
47 U.S.C. § 338(i)(7)(B) (2006)	Unlawful disclosure of personal information by a satellite provider
47 U.S.C. § 551(f)(2)(B) (2006)	Unlawful disclosure of personal information by a cable operator
49 U.S.C. § 5122(a) (2006)	Unlawful transportation of hazardous materials
49 U.S.C. § 28103(a)(1)–(2) (2006)	Civil cases arising under rail passenger transportation
50 U.S.C. § 1828(2) (2006)	Where a person's "premises, property, information, or material has been subjected to a physical search within the United States or about whom information obtained by such a physical search has been disclosed or used in violation of " the War and National Defense statute

50 U.S.C. § 2702(k) (2006)	Where an "individual has been discharged, demoted, or otherwise discriminated against as a reprisal for making a protected disclosure" about the Atomic Energy Defense Program

***