THE PRACTICAL EFFECTS OF SPLIT-RECOVERY STATUTES AND THEIR VALIDITY AS A TOOL OF MODERN DAY "TORT REFORM"

TABLE OF CONTENTS

I. INTRODUCTION

Since United States courts first recognized punitive damages in the 1800s,[1] all but four states have come to recognize punitive damages as a valid damages award.[2] While the constitutional validity of punitive damages has been

1. Day v. Woodworth, 54 U.S. (13 How.) 363 (1851).
2. Gregory A. Williams, Tuttle v. Raymond*: An Excessive Restriction upon Punitive Damages Awards in Motor Vehicle Tort Cases Involving Reckless Conduct*, 48 OHIO ST. L.J. 551, 555 n.33 (1987) (noting Louisiana, Nebraska, Massachusetts, and Washington do not recognize punitive damages awards).

concretely determined[3] and most commentators agree that they serve a legitimate purpose,[4] some have become unnerved by the increase in punitive damage awards in recent years.[5] Examples of amounts of punitive damage verdicts prompting concern are the following: $5 billion, $109 million, $80 million, several in the $50 million to $60 million range, and many more in the $2 million to $50 million range.[6] Even given these figures and concerns, most commentators agree that, because punitive damages are such a well-founded piece of our justice system, any attempt to eliminate them would be futile.[7] Therefore, efforts have turned to curbing the rising tide of awards. To this end, a number of states enacted provisions, generally under the heading of "tort reform," that sought to limit the amount of damages a plaintiff could recover.[8] Common in this tort reform effort were statutes that applied actual dollar amount limits on the amount of punitive damages that could be awarded in a single case.[9]

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3. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (upholding the general constitutionality of punitive damages); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (upholding the general constitutionality of punitive damages).

4. Clay R. Stevens, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 PEPP. L. REV. 857, 860-61 (1994) (noting commentators "universally recognize and accept" punitive damages for at least some of their stated purposes, for example, deterrence, punishment, and vindication).

5. Matthew J. Klaben, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 CORNELL L. REV. 104 & n.1 (1994) (citing a study by the National Center for State Courts showing that the filing of tort cases in state courts grew eighteen percent from 1985 to 1991); *see also* Browning-Ferris Indus. Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. Since then, awards more than 30 times as high have been affirmed on appeal.").

6. Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1587 & n.54 (1997) (discussing punitive damage awards against Exxon-Valdez for $5 billion, Blockbuster Entertainment Corp. for $109 million, Hughes Aircraft for $80 million and several in the $50 million to $60 million range including those against McDonald's, Wal-Mart, Chevron and Merrell Dow Pharmaceuticals).

7. Williams, *supra* note 2, at 560. An analysis of whether the increase in punitive damage awards is unhealthy and whether they need to be "dealt with" at all is beyond the scope of this Note. This Note accepts, for the sake of argument, that the concern over the increase is legitimate.

8. *See* Pace, *supra* note 6, at 1589-91 (stating that forty-six states have enacted legislation seeking to limit punitive damage awards).

9. *Id.* at 1590; *see also* CONN. GEN. STAT. ANN. § 52-240b (West 1991) ("If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff."); KAN. STAT. ANN. § 60-3701(e) (1994) (mandating that punitive damages cannot exceed the lesser of the defendant's annual gross income or $5 million); N.C. GEN. STAT. § 1D-25(b) (1999) ("Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or [$250,000], whichever is greater.").

Also common were statutes that limited the amount an attorney could recover in contingency fee cases—apparently under the theory that if there were less incentive for an attorney, fewer lawsuits would be filed.[10] Less common than these methods of tort reform is the split-recovery statute.[11] Split-recovery statutes are those that demand that a portion of a plaintiff's punitive damage award goes into a state-run or judicially administered fund.[12]

This Note analyzes split-recovery statutes and the different forms they take, and seeks to determine their validity. Part II discusses the general nature of these statutes, including a discussion of which states have them and how they are applied. Part III takes a brief look at the development of the statutes. Part IV of this Note evaluates the validity of split-recovery statutes by delving into their constitutionality and evaluating whether they are consistent with the goals of the United States judicial system. Part V concludes with a brief recap of the validity of the statutes and a recommendation of whether they should be used.

II. THE STATUTES

Currently there are eight states with split-recovery statutes on the books: Alaska, Indiana, Illinois, Oregon, Missouri, Iowa, Georgia, and Utah.[13] As this Part will show, these statutes take varying forms and are applied in different ways and to different ends.

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10. *See, e.g.*, WIS. STAT. ANN. § 655.013 (West 1995):

> (a) Except as provided in par. (b), 33 1/3% of the first $1,000,000 recovered (b) Twenty-five percent of the first $1,000,000 recovered if liability is stipulated within 180 days after the date of filing of the original complaint and not later than 60 days before the first day of trial, (c) Twenty percent of any amount in excess of $1,000,000 recovered.

Id.

11. Currently, eight states have these statutes on the books. *See* ALASKA STAT. § 09.17.020(j) (Michie 2000); GA. CODE ANN. § 105-2002.1(e)(2) (Harrison Supp. 1999); 735 ILL. COMP. STAT. § 5/2-1207 (West Supp. 2001); IND. CODE ANN. § 34-51-3-6 (Michie 1998); IOWA CODE § 668A.1(2)(b) (2001); MO. ANN. STAT. § 537.675(2) (West 2000); OR. REV. STAT. § 18.540(1) (1999); UTAH CODE ANN. § 78-18-1(3) (1996).

12. *See, e.g.*, ALASKA STAT. § 09.17.020(j) (requiring that "[fifty] percent of the award be deposited into the general fund of the state"); MO. ANN. STAT. § 537.675(2) (requiring that fifty percent of punitive damage awards be paid to the state); OR. REV. STAT. § 18.540(1) (stating that sixty percent of punitive damage awards be paid into a state fund); UTAH CODE ANN. § 78-18-1(3) (requiring that fifty percent of all punitive awards be "remitted to the state treasurer for deposit into the General Fund").

13. *See* ALASKA STAT. § 09.17.020(j); GA. CODE ANN. § 105-2002.1(e)(2); 735 ILL. COMP. STAT. § 5/2-1207; IND. CODE ANN. § 34-51-3-6 (Michie 1998); IOWA CODE 668.A.1(2)(b); MO. ANN. STAT. § 537.675(2); OR. REV. STAT. § 18.540(1); UTAH CODE ANN. § 78-18-1(3).

A. *Determining the Amount Paid to the State*

In terms of how the amount of money paid to the state is determined, these statutes fall into two general categories: statutes that demand a certain percentage of the award go to the state[14] and statutes that require the trial judge to determine how much will go to the state.[15] The most popular form of these statutes is the type that demands a specific percentage of the award be paid to the state.[16]

B. *Application of the Statutes*

Utah, Oregon, Indiana, Alaska, and Missouri have designed their statutes to apply to all punitive damage awards.[17] In contrast, Georgia's statute applies only to punitive damages awarded in product liability cases.[18] Iowa, while making the statute applicable to punitive damages in all types of claims, does not apply it in cases in which "the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived."[19]

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14. *See, e.g.*, ALASKA STAT. § 09.17.020(j) (requiring that "[fifty] percent of the award be deposited into the general fund of the state"); MO. ANN. STAT. § 537.675(2) (requiring that fifty percent of punitive damage awards be paid to the state); OR. REV. STAT. § 18.540(1) (stating that sixty percent of punitive damage awards be paid into a state fund); UTAH CODE ANN. § 78-18-1(3) (requiring that fifty percent of all punitive awards be "remitted to the state treasurer for deposit into the General Fund").

15. *See, e.g.*, 735 ILL. COMP. STAT. § 5/2-1207 (giving the trial court discretion to "apportion the punitive damage award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Human Services").

16. *See* ALASKA STAT. § 09.17.020(j) (requiring that fifty percent of the punitive award be paid to the state); GA. CODE ANN. § 105-2002.1(e)(2) (requiring that seventy-five percent of the total punitive award be paid to the state); IND. CODE ANN. § 34-51-3-6 (requiring that seventy-five percent of the total punitive award be paid to the state); IOWA CODE § 668A.1(2)(b) (requiring that seventy-five percent of the total punitive award be paid to the state); MO. ANN. STAT. § 537.675(2) (requiring that fifty percent of the total punitive award be paid to the state); OR. REV. STAT. § 18.540(1) (requiring that sixty percent of the total punitive award be paid to the state); UTAH CODE ANN. § 78-18-1(3) (requiring that fifty percent of any punitive amount exceeding $200,000 be paid to the state). Illinois, the one state that does not statutorily specify the percentage, states that the trial court "in its discretion" may apportion part of the award to the state. 735 ILL. COMP. STAT. § 5/2-1207. I found no instance in which Illinois' split-recovery statute has been challenged on appeal for constitutionality or for purposes of evaluating the judge's determination for abuse of discretion. Therefore, this Note cannot comment on those issues or the amounts dictated by trial judges.

17. ALASKA STAT. § 09.17.020(j); IND. CODE ANN. § 34-51-3-6; MO. ANN. STAT. § 537.675; OR. REV. STAT. § 18.540; UTAH CODE ANN. § 78-18-1.

18. *See* GA. CODE ANN. § 105-2002.1(e)(2) (stating that a seventy-five percent of punitive damages awarded in product liability cases shall be paid to the state).

19. IOWA CODE § 668A.1(1)(b).

Within the states that have statutes that specify the percentage to be paid to the state, there are differences as to when, and therefore how, the percentages are calculated.[20] In Iowa, the seventy-five percent is calculated "after payment of all applicable costs and fees."[21] This allows the attorney's fees to come off of the top of the award before the deduction in favor of the state. The Georgia statute allows the state to receive seventy-five percent of the award "less a proportionate part of the costs and litigation, including reasonable attorney's fees."[22] Presumably, this includes standard contingency fee amounts. If it does, Georgia's statute, like Iowa's, would allow attorneys to take the percentage fee out of the entire award before the percentage allocated to the state is deducted.[23] The Utah statute also allows the percentage allocated to the state—fifty percent on punitive damage awards exceeding $20,000—to be calculated "after payment of attorneys' fees and costs."[24] Similarly, Missouri allocates its fifty percent to the state after attorneys' fees and expenses are deducted.[25] The Oregon statute demands that the state's share of sixty percent be calculated before deduction of attorneys' fees.[26] Attorneys can then be paid "out of the amount allocated" to the prevailing party as that party and the attorney had agreed.[27] Finally, the Indiana and Alaska statutes are not specific as to when the state's share is calculated.[28] As this specific issue has not been litigated in either state, we can only speculate as to when and how this is calculated. But it is clear that the trend among these eight states is to allow attorneys' fees and costs to be deducted before the calculation.

C. *Destination of the Money*

The statutes also fall into two categories when it comes to determining the specific destination of the money: those that direct the money to the general treasury and those that direct the money to a specific state fund. For example,

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20. *See* GA. CODE ANN. § 105-2002.1(e)(2) (allowing fees to be deducted from the entire punitive award amount); IOWA CODE § 668A.1(2)(b) (allowing fees to be deducted from the entire punitive award amount); MO. ANN. STAT. § 537.675(2) (allowing fees to be deducted from the entire punitive award amount); OR. REV. STAT. § 18.540(1)(a) (demanding that the state's money be deducted from the punitive award before fees are calculated); UTAH CODE ANN. § 78-18-1(3) (allowing fees to be deducted from the entire punitive award amount).

21. IOWA CODE § 668A.1(1)(b).

22. GA. CODE ANN. § 105-2002.1(e)(2).

23. *Cf.* IOWA CODE § 668A.1 (allowing fees to be deducted from the entire punitive award amount).

24. UTAH CODE ANN. § 78-18-1(3).

25. MO. ANN. STAT. § 537.675.

26. OR. REV. STAT. § 18.540 (1999).

27. *Id.*

28. ALASKA STAT. § 09.17.020(j) (Michie 2000); IND. CODE § 34-51-3-6 (2000).

Alaska and Georgia require that the money be paid into the state general treasury,[29] and Utah requires the money to be paid "to the state treasurer for deposit into the General Fund."[30] On the other hand, Iowa requires that the money be directed specifically to the "civil reparations trust fund" to be used for "indigent civil litigation programs or insurance assistance programs."[31] Likewise, Missouri requires that the money go to the "Tort Victims' Compensation Fund."[32]

III. DEVELOPMENT OF THE STATUTES

Split-recovery statutes came into being in the mid-1980s as a supplement or alternative to other types of tort reform statutes.[33] Some of the statutes currently on the books have survived attacks on their constitutionality,[34] while one statute has been held unconstitutional.[35] In addition to the statute that has been held unconstitutional, three other split-recovery statutes are no longer on the books. Florida repealed its split-recovery statute in 1995;[36] Kansas allowed its statute to expire in 1989,[37] and New York permitted its statute to expire in 1994.[38]

In addition to the statutes currently on the books and the ones invalidated, repealed, or allowed to expire, at least three states—New Jersey, California, and Texas—have contemplated, but not yet adopted, split-recovery statutes.[39]

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29. ALASKA STAT. § 09.17.020(j); GA. CODE ANN. § 105-2002.1(e)(2) (Harrison Supp. 1999).

30. UTAH CODE ANN. § 78-18-1.

31. IOWA CODE § 668A.1 (2001).

32. MO. ANN. STAT. § 537.675 (West 2000).

33. Stevens, *supra* note 4, at 858-59.

34. *See, e.g.*, 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 Iowa's statute requiring seventy-five percent of each punitive damage award to be paid into a state fund is constitutional); Ford v. Uniroyal Goodrich Tire Co., 476 S.E.2d 565, 570 (Ga. 1996) (holding Georgia's statute requiring that seventy-five percent of punitive damages be paid to the state is valid).

35. *See* Kirk v. Denver Publ'g. Co., 818 P.2d 262, 272 (Colo. 1991) (holding Colorado's statute requiring thirty-three percent of punitive damage awards to be paid to the state was an unconstitutional taking of property).

36. FLA. STAT. ANN. § 768.73 (West 1997) (repealed 1995).

37. KAN. STAT. ANN. § 60-3402 (Supp. 2000).

38. N.Y. C.P.L.R. 8701 (Consol. 1996).

39. Klaben, *supra* note 5, at 111.

IV. CHALLENGING THE VALIDITY OF THE STATUTES

There are two general ways in which split-recovery statutes can be judged for validity: on the basis of validity under the United States Constitution and on the basis of whether they comport with the basic goals of our judicial system.

A. *Are These Statutes Constitutional?*

The constitutionality of split-recovery statutes has been challenged by claims questioning their validity under the Eighth, Fifth, and Fourteenth Amendments. In *Burke v. Deere & Co.*,[40] the defendant incurred at trial a large punitive damage award, of which seventy-five percent, by statute, was to be paid to the state.[41] The defendant argued the requirement that a percentage be paid to the state rendered the punitive damage award an excessive fine in violation of the Eighth Amendment of the United States Constitution.[42] The court rejected the claim, stating that, because the statute requires the money to be paid into a specific, judicially administered fund, the State has no interest in the punitive damage award.[43] Therefore, the statute was not violative of the Eighth Amendment.[44]

In *Mack Trucks, Inc. v. Conkle*,[45] the Georgia Supreme Court held Georgia's split-recovery statute did not constitute a "taking" under the Fifth and Fourteenth Amendments.[46] The basis for the court's decision was that "[a] plaintiff has no vested property rights in the amount of punitive damages which can be awarded in any case."[47] If plaintiffs have no property right in the money, they cannot claim a taking when they do not receive it.[48]

Likewise, in *Gordon v. State*,[49] the Florida Supreme Court held Florida's statutory requirement that plaintiffs pay sixty percent of their punitive damage award to the state did not violate due process.[50] This court, like the court in

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40. Burke v. Deere & Co., 780 F. Supp. 1225 (S.D. Iowa 1991) *rev'd on other grounds*, 6 F.3d 497 (8th Cir. 1993).

41. *Id.*; *see also* Shepherd Components, Inc. v. Brice Peterides-Donohue & Assocs., Inc., 473 N.W.2d 612 (Iowa 1991) (holding Iowa's split-recovery statute does not violate the Equal Protection or Due Process Clauses of the United States Constitution).

42. Burke v. Deere & Co., 780 F. Supp. at 1242.

43. *Id.*

44. *Id.*

45. Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635 (Ga. 1993).

46. *Id.* at 639.

47. *Id.*

48. *Id.*

49. Gordon v. State, 608 So. 2d 800 (Fla. 1992).

50. *Id.* at 802 (upholding FLA. STAT. ANN. § 768.73(2) (West 1992) which required that sixty percent of punitive damage awards be paid to a trust fund). This statute was subsequently

Mack Trucks, determined that the plaintiff has no property right in a punitive damage award.[51] Because of this, "it cannot, then, be said that the denial of punitive damages has unconstitutionally impaired any property rights of [the plaintiff]."[52] The court also noted the statute does not represent a violation of substantive due process rights because it "bears a rational relationship to legitimate legislative objectives."[53]

In contrast, in *Kirk v. Denver Publishing, Inc.*,[54] the Colorado Supreme Court held Colorado's split-recovery statute constituted a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[55] The court reasoned that by requiring successful plaintiffs to pay a percentage of the punitive damage award to the state, the state was forcing the plaintiffs to "bear a disproportionate burden of funding the operations of state government, which, 'in all fairness . . . should be borne by the public as a whole.'"[56] In so holding, the court determined the argument that the plaintiff never has a vested interest in the money is "devoid of merit."[57] The court held this based on

> the cumulative effect of all factors bearing on the "taking" issue . . . [including]: the legislative renunciation of any interest in the judgment prior to collection; the absence of any demonstrable nexus between, on the one hand, any alleged governmental interest in punishing and deterring fraudulent, malicious or willful and wanton tortious conduct and, on the other, the statutory imposition of the forced contribution on the person injured by the wrongful conduct; and the gross disproportion between the statutory forced contribution and any governmental service made available to the judgment creditor but not otherwise funded by fees and other statutory assessments imposed on civil litigants using the judicial process to resolve their disputes.[58]

In addition to this technical argument, the court also rested its holding on the idea of basic fairness, pointing out that "the judgment itself results

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repealed by the Florida legislature. FLA. STAT. ANN. § 768.73 (West 1997) (repealed 1995). Florida currently has no split-recovery statute.

51. Gordon v. State, 608 So. 2d at 801-02; *see* Mack Trucks, Inc. v. Conkle, 439 S.E.2d at 639.

52. Gordon v. State, 608 So. 2d at 802.

53. *Id.*

54. Kirk v. Denver Publ'g Co., 818 P.2d 262 (Colo. 1999).

55. *Id.* at 272 (striking down the Colorado statute that required one-third of punitive damage awards be paid to the state).

56. *Id.* at 271-72 (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980)).

57. *Id.* at 272.

58. *Id.* at 272-73.

exclusively from the judgment creditor's time, effort, and expense in the litigation process without any assistance whatever from the state."[59]

It is clear from these cases that the court's decision of constitutionality will usually hinge on the court's determination of whether the plaintiff, state, both, or neither have a property interest in the punitive damage award before the state's share is deducted. If the plaintiff has a vested interest in the money before the state takes its share, a statute requiring payment of a portion of a punitive damages award to the state constitutes a taking in violation of the Constitution.[60] If the state has an interest in the money before its amount is allocated, the court is likely to hold the allocation represents an excessive fine in violation of the Eighth Amendment.[61]

These holdings show that, although one state has found the statutes to be unconstitutional and the United States Supreme Court has yet to weigh in on the matter, for the most part, split-recovery statutes are deemed constitutional. Most commentators end the analysis here. However, there still remains the question of whether split-recovery statutes are desirable—that is to say whether they are consistent with the purpose of the American judicial system.

B. *Do These Statutes Comport with the Purpose of the American Judicial System?*

"[T]he main purpose of civil litigation is to do justice between the parties."[62] There are two ways to determine if split-recovery statutes promote justice between the parties and thus further the main purpose of civil litigation. The first is to look at the justifications cited by proponents of the statutes.[63] The

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59. *Id.* at 272.

60. *See* Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 639 (Ga. 1993); Gordon v. State, 608 So. 2d 800, 801-02 (Fla. 1992); Kirk v. Denver Publ'g Co., 818 P.2d at 272.

61. *See* 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). Interestingly, *Burke*'s distinction between states that allocate the money to a specific fund and those that allocate it into the general treasury has not been cited or mentioned again in later cases. *See id.* I found no other court that has used this distinction as argument for or against a finding that the state has a property interest in the punitive damage award.

62. Town of Hopkinton v. B.F. Sturtevant Co., 189 N.E. 107, 108 (Mass. 1934); *see* Karjanis v. Bradford Realty Corp., 5 Conn. Supp. 32 (1937) ("[T]he aim of the court is to do justice under the law."); Krahan v. J.L. Owens Co., 165 N.W. 129, 130 (Minn. 1917) ("It is the purpose of our judicial system to give every man his day in court, to afford him a full and fair opportunity to prepare and present his case.").

63. *See* Stevens, *supra* note 4, at 868-89 (examining the stated purposes of split-recovery statutes).

second is to gauge the effect these statutes have or are likely to have on the litigation process and the parties to a lawsuit.[64]

1. *Justifications*

If the very justifications for the statutes run counter to the promotion of justice between the parties in a lawsuit, then logically, the statutes are repugnant to the purpose of the judicial system. This section looks at the justifications and analyzes their legitimacy in light of that purpose. The most commonly proposed justifications for the existence of split-recovery statutes are the following: (1) The plaintiff does not "deserve" the money;[65] (2) Funneling the money to the government is a more intelligent and judicious use of the money than is giving it to the plaintiff;[66] and (3) They encourage settlement by getting rid of the "misincentive" of large punitive damage potentials.[67]

a. *The Plaintiff Does Not "Deserve" the Money, But "Society" Does.* The advocates of this justification tend to split it into two distinct parts: (1) The plaintiff does not deserve the money;[68] and (2) society does.[69]

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64. *See* Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska's Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1346-52 (2000) (examining potential effects of split-recovery statutes).

65. *See* Stevens, *supra* note 4, at 865 (arguing that by receiving the compensatory award, the plaintiff has already been compensated to the extent allowed by the state and thus, receiving the "additional compensation" of punitive damages amounts to a circumvention of the system of compensatory damages); *see also* Dodson, *supra* note 64, at 1346 ("[T]here just seems to be something fundamentally unfair about a plaintiff, who after being made whole by full compensation, then harvests the extra benefit of an enormous punitive award."); Todd M. Johnson, Comment, *A Second Chance at a Proposal to Amend Missouri's Tort Victims' Compensation Fund*, 67 U.M.K.C. L. REV. 637, 648 (1999) ("It is difficult on principal to understand why, when the sufferer of a tort has been fully compensated for his suffering, he should recover anything more.").

66. *See* Dodson, *supra* note 64, at 1345 ("A more sensible distribution would thus allocate the award to some public purpose benefiting a part of society than just the already-compensated plaintiff."); Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 93 (1992) (considering that by use of split-recovery, the judiciary will benefit society "by allocating part of the verdict to the state general fund or some special fund that will advance the cause of justice"); Stevens, *supra* note 4, at 869 ("Instead of bestowing a windfall recovery on the plaintiff, split-recovery of punitive damage awards allows society to distribute the award to a higher-valued use.").

67. *See* Dodson, *supra* note 64, at 1345-46, 1351 (arguing that "the prospect of excessive punitive awards creates misincentives that can corrupt the legal system by luring plaintiffs and their attorneys into unnecessary or extraneous litigation" and noting, "[I]f a split-recovery mandate does not reach settlements, both sides have strong reasons to settle"); Stevens, *supra* note 4, at 864 ("[F]ull recovery of punitive damages may provide too great an incentive and lead to inefficient and undesirable levels of litigation.").

68. *See* Dodson, *supra* note 64, at 1346 ("[T]here just seems to be something fundamentally unfair about a plaintiff who, after being made whole by full compensation, then harvests the extra benefit of an enormous punitive award."); Johnson, *supra* note 65, at 648 ("'It is

The argument that the plaintiff does not deserve the money flows from the commonly held purpose of punitive damages themselves.[70] Because punitive damages are generally considered to hold a punitive or deterrent purpose rather than one of compensation,[71] some believe that it makes no difference who receives the money award, as long as the defendant is made to pay.[72] These commentators argue that because the purpose is not to compensate, it is unfair for the plaintiff to get the money because the plaintiff is just "lucky" enough to have been the member of society to bring suit.[73] After all, in theory, plaintiffs have

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difficult on principal to understand why, when the sufferer of a tort has been fully compensated for his suffering, he should recover anything more.'" (quoting Bass v. Chi. & Northwestern Ry. Co., 42 Wis. 654 (1877))); Stevens, *supra* note 4, at 865 (arguing that by receiving the compensatory award, the plaintiff has already been compensated to the extent allowed by the state and, thus, receiving the "additional compensation" of punitive damages amounts to a circumvention of the system of compensatory damages).

69. *See* Klaben, *supra* note 5, at 114 ("Rather, punitive damages are more similar to a public good than a private right . . . . [A]ccordingly, punitive recoveries should be rewarded to the general public, not private plaintiffs."); Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 478, 491 (1993) (noting "[t]he fundamental purpose behind these statutes [is] to compensate society for the injury inflicted by the defendant" and split-recovery statutes allow "the public to receive some compensation for the losses it suffered as a result of the defendant's outrageous conduct").

70. Historically, the purpose of punitive damages has been to punish defendants and to deter other like behavior, indeed, the majority of states today consider that to be the sole purpose of punitive damages. *See, e.g.*, McClure v. Walgreen Co., 613 N.W.2d 225, 230 (Iowa 2000) (noting, "Punitive damages serve 'as a form of punishment and to deter others from'" egregious conduct (citation omitted)); Philip Morris, Inc. v. Angelleti, 752 A.2d 200, 247 (Md. 2000) (noting "the purpose of a punitive damages award is to punish the defendant"); Newton v. Standard Fire Ins. Co., 229 S.E.2d 297, 302 (N.C. 1976) (noting punitive damages are awarded, not for compensation, but for "'the defendant's intentional wrong'" (quoting Transp. Co. v. Int'l Bhd. of Teamsters, 125 S.E.2d 277, 286 (N.C. 1962))). However, Connecticut, New Hampshire, and Michigan consider punitive damages to serve a compensatory function. Lyons v. Nichols, No. CV 940312019S, 1999 WL 329954, at *3 (Conn. Super. Ct. May 13, 1999) (stating that punitive damage awards in Connecticut serve "compensatory, punitive and deterrence" purposes); Eide v. Kelsey-Hayes Co., 427 N.W.2d 488, 498 (Mich. 1988) (Griffin, J., concurring in part and dissenting in part) (noting Michigan allows punitive damages for compensation purposes); Vratsenes v. N.H. Auto, Inc., 289 A.2d 66, 67 (N.H. 1972) (noting the function of punitive damages are to compensate the plaintiff in New Hampshire).

71. *See supra* note 70.

72. *See, e.g.*, Shores, *supra* note 66, at 93 ("The particular recipient of the funds is irrelevant to the public policy considerations which underlie punitive damage awards.").

73. *See, e.g.*, Dodson, *supra* note 64, at 1346 ("There just seems to be something fundamentally unfair about a plaintiff who, after being made whole by full compensation, then harvests the extra benefit of an enormous punitive award."); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 688 n.26 (1999) (citing Shepard Components v. Brice Petrides-Donohue & Assocs., Inc., 473 N.W.2d 612 (Iowa 1991), and referring to the first plaintiff that sues as "lucky"); Jill McKee Pohlman, Comment, *Punitive Damages in the American Civil Justice System: Jackpot or Justice?*, 1996 UTAH L. REV. 613, 628 (noting "because of the

already been fully compensated for their injuries by the compensatory portion of the award. Collecting a punitive damage award, in these commentator's eyes, amounts to multiple recovery.[74]

While it is true that, generally speaking, the purpose of punitive damages is not to compensate,[75] one can take issue that this precludes it from being fair that the plaintiff is awarded punitive damages, or that it renders the plaintiff undeserving of the money. While compensatory damages may compensate the plaintiff fully for the injury done by the defendant, they do not, nor are they designed to, compensate the plaintiff for the pain and suffering of the long, arduous trial process.[76] While the statutes allow the plaintiff to collect at least a portion of the award, most allow the government to collect the majority.[77] Of the two options of who should get the money, the plaintiff who endures the hardship of litigation or the government who does nothing, the plaintiff is the deserving party.

The second part of the justification, that society deserves the money, hinges on the belief that society as a whole has incurred injury as a result of the

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possibility of winning punitive damages awards and 'hitting the jackpot,' lawyers are now more likely to bring lawsuits in hopes of getting lucky"); Elizabeth Rolph, *Framing the Compensation Inquiry*, 13 CARDOZO L. REV. 2011, 2016 (1992) (noting punitive damages serve "to punish and deter against future similar behavior—and the plaintiff is the lucky recipient of the additional levy").

74. *See, e.g.*, Stevens, *supra* note 4, at 865 (arguing that by receiving the compensatory award, the plaintiff has already been compensated to the extent allowed by the state and thus, receiving the "additional compensation" of punitive damages amounts to a circumvention of the system of compensatory damages).

75. *See supra* note 70. *But see* Benjamin F. Evans, *"Split-Recovery" Survives: The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511, 518 (1998) ("[S]ome commentators suggest that punitive damages serve to compensate plaintiffs for non-pecuniary injuries that are often difficult to determine and that remain unaccounted for in an award of compensatory damages. . . . [P]unitive damages may be viewed as a way to compensate plaintiffs for litigation expenses . . . .").

76. *See* Stevens, *supra* note 4, at 864. Some commentators have suggested that a valid reason for punitive damages is to compensate the plaintiff for the monetary costs of a trial. *See, e.g.*, Evans, *supra* note 75, at 518. This justification has been widely criticized. *Id.* (noting "most legal scholars have disavowed these as legitimate purposes of punitive damage awards").

77. *See* GA. CODE ANN. § 105-2002.1(e)(2) (Harrison Supp. 1999) (requiring that seventy-five percent of the total punitive award be paid to the state); IND. CODE ANN. § 34-51-3-6(b)(2) (Michie 1998) (requiring that seventy-five percent of the total punitive award be paid to the state); IOWA CODE § 668A.1(2)(b) (2001) (requiring that seventy-five percent of the total punitive award be paid to the state); MO. ANN. STAT. § 537.675(2) (West 2000) (requiring that fifty percent of the total punitive award be paid to the state); OR. REV. STAT. § 18.540(1) (1999) (requiring that sixty percent of the total punitive award be paid to the state); UTAH CODE ANN. § 78-18-1(3) (1996) (requiring that fifty percent of any punitive amount exceeding $200,000 be paid to the state).

defendant's conduct.[78] Therefore, the thinking goes, society deserves to get at least a portion of the punitive damage award. This prong suffers from some very fundamentally flawed notions.

First, and most predominately, it turns punitive damages into a compensation mechanism—something that runs directly counter to the proponents' basis for the first prong of this justification.[79] As discussed, punitive damages are mainly to punish and deter.[80] Are these purposes flexible in the context of these statutes? They must be, in order for proponents to use the punitive purpose of punitive damages to allege that the plaintiff does not deserve them, and then turn around and say that society should get them for compensation for its injuries.

Second, the assumption that society has been wronged by the defendant's conduct is not a reliable one.[81] In most cases, only in a general, speculative, almost metaphysical sense could one say that, as a society, we have all been injured by the egregious conduct of a defendant. It is doubtful that any plaintiff could take such a tenuous damage claim past summary judgment. One cannot help but wonder whether the elemental requirements of a tort claim are suspended for the purposes of the proponent's arguments.

Third, even if we overlook the flaws previously discussed, we must take issue with another assumption of this prong of the justification—that by the government collecting the money, society is being compensated.[82] For the reasons discussed in the next section, this assumption is not a reasonable one.

Given the faultiness in the logic that support of this justification demands, a cynic might say that the real thinking behind this justification is much different than that forwarded. One could say that the main purpose of these statutes is to

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78. *See* Klaben, *supra* note 5, at 114 ("Rather, punitive damages are more similar to a public good than a private right. . . . Accordingly, punitive recoveries should be rewarded to the general public, not private plaintiffs."); Sloane, *supra* note 69, at 478, 491 (noting, "The fundamental purpose behind these statutes [is] to compensate society for the injury inflicted by the defendant" and that split-recovery statutes allow "the public to receive some compensation for the losses it suffered as a result of the defendant's outrageous conduct").

79. *See* Part IV.B.1.a (discussing proponent's argument that because punitive damages are designed to punish and deter and not to compensate, the plaintiff does not deserve to collect them).

80. *See supra* note 70.

81. *See, e.g.*, E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 853 (1993) (stating conclusorily that in these cases there is a "wrong committed against a public at large," and that "[i]f anyone has a compensatory right to punitive damages, it is society"). In support of this notion, Grube cites *Pegram v. Stortz*, 6 S.E. 485, 497 (W. Va. 1888), a case in which the judge likened punitive damages to criminal fines. Grube, *supra*, at 853. Unfortunately, neither Grube nor the judge in the cited case gives a reason why punitive damages are comparable to criminal fines, or why or how defendant conduct harms society as a whole.

82. *See* Klaben, *supra* note 5, at 105.

get the money out of the hands of the plaintiffs—no matter who gets it. Realizing that they can never get rid of punitive damages altogether, "tort reformists" may be using split-recovery statutes as a means of tort reform that is more palatable than outright caps on damages.[83] Aside from being a natural default for the recipient of the money, the government is a good recipient under this scheme for two reasons: (1) It allows proponents to use the "society has been injured" justification that it can sell to the citizenry; and (2) It is one that legislatures are likely to get behind—conservatives are apt to support it as a deterrent to litigation[84] and liberals are likely to support it as a government spending program.[85]

b. *The Statutes Are a More Intelligent and Judicious Allocation of Resources*. Following from the theory that the plaintiff has already been fully compensated by the collection of compensatory damages, and closely intertwined with the notion that society as a whole is harmed, a second justification for split recovery statutes is that they are a more intelligent and judicious allocation of resources than is giving the entire award to the plaintiff.[86] Proponents of this justification argue that allocating the money to a special fund or into the state treasury will allow "society to distribute the award to a higher-valued use"[87] as compared to allowing the plaintiff to receive a "windfall."[88] This justification also rests upon assumptions that are suspect.

First is the assumption that society does not benefit, or benefits little, if the money is paid to the plaintiff. As will be explained in more detail, society is the direct beneficiary of the plaintiff's zealous pursuit toward victory in the courtroom.[89] The prospect of a large punitive award is a reliable incentive for the plaintiff to punish the defendant to the fullest extent possible; and it is undeniable

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83. *See* Williams, *supra* note 2, at 560 (noting that completely eliminating punitive damages would likely be futile "because they continue to serve useful purposes").

84. *See* Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 346 (1994) (noting conservatives tend to favor limits on damages).

85. *See* Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099, 1125 (1997) (noting liberals generally support "redistributive governmental programs").

86. *See* Dodson, *supra* note 64, at 1345 ("A more sensible distribution would thus allocate the award to some public purpose benefiting a part of society greater than just the already-compensated plaintiff."); Shores, *supra* note 66, at 93 (considering that by use of split-recovery, the judiciary will benefit society "by allocating part of the verdict to the state general fund or some special fund that will advance the cause of justice"); Stevens, *supra* note 4, at 869 ("Instead of bestowing a windfall recovery on the plaintiff, split-recovery of punitive damage awards allows society to distribute the award to a higher-valued use.").

87. Stevens, *supra* note 4, at 869.

88. *Id.*

89. *See infra* Part IV.B.1.c.

that a zealous plaintiff is a formidable deterrent to egregious defendant behavior. This buttressing of the twin purposes of punitive damages is a direct benefit to society.

Second, this justification assumes that by paying the government the money, society is benefiting. While an exhaustive investigation of how this money is handled is beyond the scope of this Note, given the government's record in allocating resources, one can be reasonably suspicious of this notion.[90] To trust governmental management of this money requires a multi-layered faith in the system. First, one must believe that the punitive award will be uniformly and correctly collected in each applicable state in each case.[91] One must then hope that the money actually makes it into the fund to which it is directed.[92] Finally, and most importantly, one must have faith in the politicians governing the money to apply it to its intended use.

c. *Split-Recovery Statutes Encourage Settlement.* Another justification for split-recovery statutes is that they encourage parties to settle[93] by getting rid of the "misincentives"[94] provided to lawyers and plaintiffs by the allure of potentially high punitive damage collections. Upon analysis, this argument must fail. First, it is built on two faulty assumptions. Second, it is founded on an elitist outlook that runs counter to that for which our judicial system stands.

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90. *See, e.g.*, William V. Roth, Jr., *The "Malmanagement" Problem: Finding the Roots of Government Waste, Fraud, and Abuse*, 58 NOTRE DAME L. REV. 961, 961 (1983) (noting the "widespread impression that government is, by and large, ineffective in solving the nation's problems, inefficient in carrying out its assigned functions, wasteful of taxpayer's dollars, and highly subject to fraudulent practices by those who work for the government and those who benefit from its programs").

91. While this may seem like a harmless step in the process, Missouri found it to be difficult. Johnson, *supra* note 65, at 642. Audits of Missouri's Tort Victims' Compensation Fund found that Missouri "had not established procedures to ensure circuit clerks notified it of final judgment awarding punitive damages; did not follow up when attorneys failed to respond to requests for payment; and did not verify amounts when it did receive payment by requiring attorneys to document their fees and expenses." *Id.*

92. Obviously, this is not an issue in the states that make no pretense of putting the money to a specific use. *See, e.g.*, OR. REV. STAT. § 18.540 (1999) (stating the punitive damage award goes into the general treasury as do tax revenues).

93. *See* Dodson, *supra* note 64, at 1345-46, 1351 (arguing that "the prospect of excessive punitive awards creates misincentives that can corrupt the legal system by luring plaintiffs and their attorneys into unnecessary or extraneous litigation" and noting "if a split-recovery mandate does not reach settlements, both sides have strong reasons to settle") (footnotes omitted); Stevens, *supra* note 4, at 864 ("[F]ull recovery of punitive damages may provide too great an incentive and lead to inefficient and undesirable levels of litigation.").

94. Dodson, *supra* note 64, at 1345-46 ("[T]he prospect of excessive punitive awards creates misincentives that can corrupt the legal system by luring plaintiffs and their attorneys into unnecessary or extraneous litigation.").

This justification starts with the assumption that encouraging settlement is good.[95] This is not necessarily true.[96] It could be argued that, over time, juries, as a reasonable arbiters of cases, represent the market in litigated disputes.[97] The award the jury arrives at represents the market award—price—for that defendant's conduct.[98] Forcing or over-encouraging settlement takes this struggle out of the hands of the market and resolves it in a vacuum—one in which the defense typically has more resources and thus more leverage.[99] Encouraging settlement in this sense is tantamount to intimidating the plaintiff into settling for less than market value.[100]

The second assumption this justification makes is that the incentive of potentially high punitive collection is a "misincentive."[101] While it may be true that the potential for large punitive damage awards is what attracts and drives plaintiffs and attorneys in *some* cases,[102] it could be argued that this is consistent with the normal, healthy workings of a capitalist society. Ours is an economy and a society that revolves around and is based on the individual pursuit of self-enrichment.[103] I believe that this self-interest produces benefits for the whole; for example, new products are invented and jobs are created. The same is true in the plaintiff-lawyer attraction to large damages. In the relentless pursuit of money damages, we have in the plaintiffs and their attorneys, reliable and tenacious agents of justice.[104]

Finally, and most disturbingly, this justification suffers the ultimate fatal flaw—elitism.[105] One cannot propose this justification without admitting that

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95. *See id.* at 1345-46, 1351.

96. Judith Resnick et al., *The Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 351 (1996) (noting cases are settled upon "a variety of incentives to avoid litigation rather than of the merits of claims").

97. *See id.* (implying that verdicts are "good measures of the 'legal value' of cases"). As the Note emphasizes, I work under the assumption that juries are reasonable.

98. *Id.*

99. *See id.* (stating that "the dollar amount of a settlement fails as an accurate economic metric" of the value of the claim).

100. *See id.*

101. *See supra* note 70.

102. For the purpose of analyzing this justification, I lend credence to the popular theory that plaintiffs and their attorneys are driven by the potential for gain rather than more idealistic pursuits.

103. *See* Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principal*, 110 YALE L.J. 173, 180, 212 n.170 (2000) (noting the American economy is one "in which an individual cannot 'promote his self-interest without benefiting others as well as himself'" (quoting Richard A. Posner, THE ECONOMICS OF JUSTICE 83 (1981))).

104. *See, e.g.*, Grube, *supra* note 81, at 843 (noting punitive damages are designed "primarily to create an incentive to prove defendant's punitive liability").

105. For an example of other reform measures being criticized as elitist, see David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457, 497-98 (1999) (reviewing MARCIA

one does not trust juries to make intelligent, informed decisions.[106] If one assumes juries are not capable of this, one assumes that people are not capable of this. While this all-too-common rationale could be the subject of a Note itself, suffice it to say that I do not agree—and I am in good company. Our founders had full and complete faith in juries and the jury system.[107] Are proponents of this justification willing to put themselves at odds with the founders' outlook on juries? It appears so. How can we trust juries with the very lives of men in criminal trials but then doubt their ability to judge matters of money?

Because the justifications for the statutes are not legitimate, they represent a baseless infringement upon the civil litigation process. This represents a violation of justice, which in turn represents a theory that runs counter to the very purpose of our civil judicial system. As such a destruction to our sense of justice, split-recovery statutes must be eradicated. However, I will briefly analyze the effects of the statutes as an academic exercise.

2. *Effects of the Statutes*

Because split-recovery statutes are so young in their existence, there can exist no reliable data with which to judge their actual effect on litigation and the legal system. However, some legitimate assumptions and projections can be made.

As previously stated, a primary effect of these statutes is to deter litigation and, as discussed, this is even a goal of the proponents of the legislation.[108] Without the allure of a potential punitive damage collection, plaintiffs will be less likely to want to endure the process of litigation.[109] They will be more likely to settle the case without giving the "conscience of society" a chance to inflict

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ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE (1996), and noting the idea that certain complex cases should be reviewed by "juries composed of well-educated jurors, or of jurors with appropriate technical backgrounds" and that these suggestions are "likely to continue to founder because of their perceived elitism").

106. *Id.* at 495 (finding civil juries in complex cases fail to "comprehend the evidence before them" and, for this reason, "civil juries have been largely abolished in every common law jurisdiction other than the United States").

107. *See* Steven M. Fernandes, Comment, *Jury Nullification and Tort Reform in California: Eviscerating the Power of the Civil Jury by Keeping Citizens Ignorant of the Law*, 27 SW. U. L. REV. 99, 108 (1997) (noting the founders trusted jury members to decide matters of law as well as fact).

108. *See* Dodson, *supra* note 64, at 1345-46 (stating that excessive awards may lure plaintiffs and attorneys into frivolous lawsuits); Stevens, *supra* note 4, at 864 (stating that full recovery "may provide too great an incentive and lead to inefficient and undesirable levels of litigation").

109. *See* Sloane, *supra* note 69, at 476 & n.19 (noting one of the benefits of punitive damages is that they give the plaintiff an "incentive to pursue the claim").

punishment on the wrongdoer or to exercise the powerful tool of deterrence that is punitive damages.[110] There is no way for this *not* to have the effect of allowing egregiously tortious defendants to escape punishment. It will also have the effect of encouraging like behavior by not discouraging it.

In the jurisdictions that calculate the state's share such that it decreases the attorney's collection, these statutes will have the effect of denying plaintiffs the best representation available.[111] Outstanding attorneys, who can generate more revenue elsewhere, may shy away from cases which, because of this legislation, lack the upside necessary to make the litigation gamble worth it. The only attorneys left to accept these cases will be those who have fewer revenue options available—inexperienced or substandard attorneys.

IV. CONCLUSION

As the perceived need for tort reform continues, split-recovery statutes are likely to become more prevalent. Because of this, and because the consensus seems to be that they are not violative of the Constitution, it is important to determine whether they are consistent with the purpose of our civil judicial system—to promote justice. Because these statutes are not backed by legitimate justifications, split-recovery statutes do not promote justice and should therefore be eradicated.

Patrick White

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110. United States v. Bailey, 444 U.S. 394, 435 (1980).

111. *But see supra* Part II.B (concluding that the trend is to allow attorney's fees to be deducted before calculating the amount of the split recovery).