

SOLVING THE PUNITIVE DAMAGE MISMATCH

M. Ari Behar

Abstract

There are several reasons underlying the system of punitive damages. Application of these reasons to cases yields differing results. The reasons fall into two categories: those that support awarding additional damages to the plaintiff and those that support extracting more damages from the defendant. When the reasons in favor of extraction exceed those in favor of award, the award should be split between the plaintiff and a fund. This fund should be used to supplement awards when the reasons favoring award exceed those favoring extraction.

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It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished.¹

I. INTRODUCTION

Punitive damages have long puzzled judges and scholars.² Indeed, several states do not permit punitive damages to be awarded at all, except where explicitly authorized by statute.³ The standard purpose courts assert behind punitive damages is to “punish the defendant for reprehensible conduct and to deter him and others from engaging in similar conduct.”⁴ However, this statement is somewhat cryptic.⁵ Thus, commentators have expounded extensively upon the actual reasons behind punitive damages.⁶ Several of the commentators agree that there are seven reasons for punitive damages, although they disagree somewhat as to what those reasons are.⁷

The reasons underlying punitive damages can be grouped into two categories: those that support extracting more money from the defendant and those that support giving the plaintiff more money.

The reasons that support extracting more money from the defendant are as follows:

- (1) **Full Deterrence:** If the compensatory award is less than the actual cost imposed on the plaintiff,⁸ then the defendant will be under-deterred, thereby necessitating an additional exaction.⁹ In addition, if the defendant has a particularly low marginal utility

¹ Bass v. Chicago & N.W. Ry., 42 Wis. 654, 672 (1877) (Ryan, C.J., concurring).

² E.g., *id.*; Murphy v. Hobbs, 5 P. 119 (Col. 1884).

³ These states include Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington. N.H. REV. STAT. ANN. § 507:16 (2003); Ciecierski v. Avondale Shipyards, Inc., 572 So. 2d 834 (La. 1990); Freeman v. World Airways, Inc., 596 F. Supp. 841, 844 (D. Ma. 1984); Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989); Kennewick Educ. Ass’n v. Kennewick Sch. Dist., 666 P.2d 928, 930 (Wa. 1983). The extent to which these states allow punitive damages by statute varies.

⁴ Kemezy v. Peters, 79 F.3d 33, 34 (7th Cir. 1996).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 34-35; 4-40 DAMAGES IN TORT ACTIONS § 40.02[2] (Matthew Bender 2003); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982)

⁸ If the law does not yet recognize a particular type of damage as compensable (e.g., damages caused by pain in suffering in the days before that kind of damage was recognized as compensable), then the jury, applying principles of common-sense, will still be able to properly impose those damages against the defendant through the mechanism of punitive damages.

⁹ Kemezy, 79 F.3d at 34.

- of wealth,¹⁰ then he will be under-deterred by the compensatory damages. Thus, when the defendant's marginal utility of wealth is less than average, an additional extraction will be necessary.
- (2) **Channeling Transactions:** We want parties to channel transactions through the market when transaction costs are low. In a case in which the defendant derives more utility from his tort than the plaintiff loses, we would rather have the parties reach an agreement in advance, if possible, thereby avoiding a breach of the peace and disrespect for the rule of law. This goal can be accomplished by adding an additional exaction against the defendant so as to make the cost to the defendant at least equal to the cost to the plaintiff in any case in which transaction costs were low in advance.¹¹ This reason will also serve to strip the defendant of all gain.¹²
- (3) **Discount:** When a tort is concealable, or is otherwise unlikely to ever be brought to court, the defendant will be under-deterred by compensatory damages alone. Thus, in a suit for such a tort, the defendant's compensatory damages must be multiplied by the reciprocal of the probability of detection or litigation for such a tort (to account for the defendant's similar, yet undetected or unlitigated, tortious actions).¹³
- (4) **Retribution:** Sometimes an action will be so abhorrent to society (for non-economic reasons), that merely deterring the defendant optimally will not be sufficient. In such a case the jury will express society's outrage at the action by adding punitive damages.¹⁴

¹⁰ This is likely to be the case when the defendant is rich. The declining marginal utility of money is a standard assumption of economics. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 913 n.141 (1998). For more on using differential marginal utility of money in assessing punitive damages, see Kimberly A. Pace, *Recalibrating the Scales of Justice through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1583-85 (1997); but see Polinsky, *supra*, at 910-914 (arguing that this reason should not apply to corporations except in certain situations).

¹¹ *Kemezy* at 34-35; Polinsky, *supra* note 10, at 945-46

¹² See *Cent. Armature Works, Inc. v. Am. Motorists Ins. Co.*, 520 F. Supp. 283, 296 (D.D.C. 1980); Brief of Amicus Curiae Keith N. Hylton, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289).

¹³ *Kemezy*, 79 F.3d at 35.

¹⁴ Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2085-86 (1998); *c.f.* *Kemezy*, 79 F.3d at 35. For a list of factors relevant to retribution, see DAMAGES IN TORT ACTIONS, *supra* note 7, at § 40.02[4]. While reasons 1, 2, and 3 are economic in nature, this reason is retributive. The economic reasons will often apply in negligence cases by setting damages at the socially optimum level. In intentional torts, however, there is rarely a socially optimal amount of the activity. Therefore, the economic reasons will rarely apply, and the retributive reason will apply instead. For example, there is no socially optimal amount of nose-punching in society (assuming that we disregard any illicit therapeutic gain by the tortfeasor). Thus, we cannot seek to deter tortfeasors from nose-punching by imposing a socially desirable cost on the act. Thus, the only measure of punitive damages is the outrage that the act engenders in society. Note that the retributive reason can sometimes apply even to negligence cases when the economic reasons also apply. This can happen when the society decides that certain acts are not tolerable on non-economic grounds. For example, torts against life or liberty will be less bound to economics than torts against property. Also, a tortious action that

It must be kept in mind that all the above deterrence rationales (reasons 1, 2, and 3) apply equally to deterring the defendant from future misconduct and to deterring other individuals from engaging in similar conduct. It must also be kept in mind that the deterrent rationales will be mitigated in cases in which the defendant is already sufficiently deterred by factors other than the imposition of punitive damages.¹⁵

The reasons that support awarding additional money to the plaintiff are as follows:

- (5) **Full Compensation:** Because compensatory damages do not always cover all the costs imposed upon the plaintiff by a tort, punitive damages will sometimes serve to make up the shortfall.¹⁶ Among the costs underlying this reason are the plaintiff's attorney's fees, which would not have been incurred but for the tort.¹⁷
- (6) **Private Law Enforcement:** The promise of punitive damages relieves the pressure on the criminal justice system by giving an injured party the incentive to bring suit and bring malfeasors to justice. In many cases in which the criminal justice system is not able to bring such defendants to justice due to strained resources, the public will be able to rest knowing that the injured party will bring suit in tort, with the promise of punitive damages as the reward for serving as a private attorney general.¹⁸
- (7) **Preventing Violence:** To the extent that certain types of suits would not otherwise be brought, but instead injured parties would seek violent extrajudicial remedies (such as revenge by retaliation, hiring a "hit man," or, in the olden days, dueling), the promise of punitive damages is needed to channel such disputes into the courts.¹⁹

These motivations for awarding punitive damages are generally well-accepted, but what happens when there is a mismatch? If the different

has a discriminatory effect may engender greater societal outrage than an economically deterrent punitive award could express.

¹⁵ DAMAGES IN TORT ACTIONS, *supra* note 7, at § 40.02[4].

¹⁶ *Kemezy*, 79 F.3d at 34. Damages awarded for this reason are sometimes (properly) referred to as "aggravated damages," rather than "punitive damages." Irish Law Reform Commission, *Report on Aggravated, Exemplary and Restitutionary Damages*, LRC 60-2000, 79 (2000); James A. Breslo, Comment, *Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis*, 86 NW. U. L. REV. 1130, 1138-39 (1992).

¹⁷ *Cent. Armature Works*, 520 F. Supp. at 296-97; DAMAGES IN TORT ACTIONS, *supra* note 7, at § 40.02[2].7, [3]; Breslo, *supra* note 16, at 1136; Junping Han, Student Author, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477, 487-88 (2002); cf. Steven R. Salbu, *Developing Rational Punitive Damage Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 273 (1997).

¹⁸ *Kemezy*, 79 F.3d at 35; *Kink v. Combs*, 135 N.W.2d 789, 798 (Wis. 1965); DAMAGES IN TORT ACTIONS, *supra* note 7, at § 40.02[2][b][iii].

¹⁹ *Kemezy*, 79 F.3d at 35.

motivating factors argue for different amounts of punitive damages, which factor ought to control?²⁰

If different reasons within the same category argue for different amounts,²¹ then it is not particularly troubling to choose between them. In fact, the reasons will typically add together quite nicely.²² However, if the reasons from the two categories support two very different punitive damage awards, then a traditional punitive damage award will generally either incorrectly compensate the plaintiff or improperly fine the defendant.

Most strikingly, the mismatch often supports fining the defendant a large amount but only awarding the plaintiff much less.²³ The obvious solution in this case is to split the punitive damage award (sized to properly fine the defendant) between the plaintiff and some other entity (perhaps the state). Indeed, several states have so-called split-recovery statutes.²⁴

There may also be a problem in the opposite case, where traditional punitive damage doctrine does not support the award of punitive damages at all because of a lack of the requisite element of intent.²⁵ In such cases (and in cases in which the punitive award is very small because the defendant's conduct is not so outrageous), the plaintiff must bear his own attorney's fees²⁶ and other intangible costs and thus is not fully compensated.

This article proposes a solution to the mismatched punitive damages problem. It first focuses on the case of the overly compensated plaintiff by having the court analyze the punitive damage factors actually involved and distribute only so much to the plaintiff as is proper. It then modifies that solution to also solve the case of the under-compensated plaintiff.²⁷ This is done by allocating the excess funds from overcompensated plaintiffs to a fund to benefit under-compensated plaintiffs.

²⁰ The only commentator to notice this kind of mismatch (albeit with a different list of reasons) seems to be Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 849-53 (1989).

²¹ For example, this might happen if the defendant's behavior is particularly egregious but not concealable, in which case reason 4:Retribution will support high punitive damages, while reason 3:Discount will support low punitive damages.

²² Reasons 1:Full Deterrence and 3:Discount will multiply together, while reason 2:Channeling Transactions will add on. Reason 4:Retribution will only apply if the product (and/or sum) of reasons 1, 2, and 3 is too small, in which case it will serve to add to that amount. On the other side, reason 5:Full Compensation will add to the larger of reasons 6:Private Law Enforcement and 7:Preventing Violence.

²³ See e.g. Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900, 1903-04 (1992) [hereinafter *Plaintiff's Windfall*].

²⁴ See *infra* Part II.B and Table 1.

²⁵ See Breslo, *supra* note 16 at 1136.

²⁶ The so-called "American rule" generally requires each side to bear its own attorney's fees, but this rule is often recognized as too harsh. Thus, there may be situations in which society's interests in having the suit brought demand that the plaintiff's fees be paid even when the punitive damages are small or nonexistent.

²⁷ The article will not focus on improperly fined defendants. Jury instructions typically specify that the jury should award punitive damages in an amount that the defendant deserves (without specifying any motivation on behalf of the plaintiff); Sunstein, *supra* note 14 at 2081; Clay R. Stevens, Student Author, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 PEPP. L. REV. 857, 865 and n.53.

II. SOLVING THE MISMATCH ONE WAY

A. *The Plaintiff's Windfall*

When the defendant deserves a large exaction of punitive damages but the plaintiff does not require a comparatively large award, it makes little sense to award all the punitive damages to the plaintiff. For example, if the defendant committed a tort against a plaintiff and the plaintiff was very insulted but also very law-abiding the plaintiff might not need much incentive²⁸ to convince him to bring an action. And if the case is easy enough, the costs²⁹ will also be low enough that the plaintiff does not need a significant amount of super-compensation in the form of punitive damages. However, if the defendant's action was extremely abhorrent³⁰ (and, for good measure, easily concealable³¹), the case for a punitive exaction from the defendant would be particularly high (especially if the plaintiff was much poorer than the defendant³²).³³ Awarding the full amount of damages that the defendant deserves to the plaintiff will result in an undue windfall to the plaintiff.³⁴ In such a case, it makes more sense to award the excess to the state.³⁵

Aside from the undue windfall to the plaintiff not making sense, there are three other reasons not to award the full punitive damages to the plaintiff when the plaintiff does not require such a large award. First, the windfall creates an inefficient allocation of resources.³⁶ Splitting the punitive damage award in accordance with the reasons underlying punitive damages allows the money to be allocated towards a higher-valued use.³⁷ Second, the windfall encourages plaintiffs to pursue frivolous claims.³⁸ Under the traditional scheme, even when a claim has little merit and a very low probability of success, a plaintiff might be induced to bring suit anyway because of the prospect of a tremendous punitive damage award. However, if the plaintiff knows that his portion of any punitive damage award will be limited to what is needed to encourage him to bring a socially desirable

²⁸ Consistent with reasons 6:Private Law Enforcement and 7:Preventing Violence.

²⁹ Consistent with reason 5:Full Compensation.

³⁰ Consistent with reason 4:Retribution.

³¹ Consistent with reason 3:Discount.

³² Consistent with reason 1:Full Compensation.

³³ For illustrations of this kind of case, *see infra* Part IV, cases 1 and 2.

³⁴ *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

³⁵ *Id.* Actually, Justice Rehnquist here suggests that the entire punitive award should go to the state, but he does not consider the possibility of a split award. *See also* *Bass v. Chicago & N.W. Ry.*, 42 Wis. 654, 672 (1877) (Ryan, C.J., concurring).

³⁶ Stevens, *Supra* note 27 at 869.

³⁷ *See id.*; *Plaintiff's Windfall*, *supra* note 23 at 1907 -09.

³⁸ Han, *supra* note 17 at 502.

claim – an amount which is certain to be less than the multi-million or billion dollar punitive awards the plaintiff might otherwise imagine – he will no longer have such a skewed incentive to bring frivolous claims. Third, the windfall might lead plaintiffs into risk-seeking behavior by failing to take appropriate precautions against the torts of others, even when the precautions are socially optimal.³⁹

*Table 1:
States with Punitive Split-Recovery*

| State | Still in force? | What kind? | Statute |
|--------------|---|---|---|
| Alaska | Yes | 50% of punitive award to state general fund | ALASKA STAT. § 09.17.020(j) (Michie 2003) |
| Colorado | No. Repealed in 1995, after a 1991 decision declared the law unconstitutional | 1/3 of punitive award to state general fund | COLO. REV STAT. § 13-21 102(4) (1989) (repealed 1995) |
| Florida | No. Repealed in 1995 | 60% (later 35%) to either the state general fund, or the state Public Medical Assistance Trust Fund (depending if it is a personal injury / wrongful death suit or not) | FLA. STAT. ch. 768.73(2)(b) (1986) (repealed 1995), quoted in <i>Gordon v. State</i> , 585 So. 2d 1033, 1035 n.1 (Fla. Dist. Ct. App. 1991) |
| Georgia | Yes | Only in products liability cases, 75% to state general fund | GA. CODE ANN., § 51-12 5.1(e)(2) (2002) |
| Illinois | Yes | Discretion of judge to apportion between plaintiff, attorney, and state Dept. of Human Services | 735 ILL. COMP. STAT. 5/2-1207 (2003) |
| Indiana | Yes | 75% of punitive award to state Violent Crime Victims Compensation Fund | IND. CODE § 34-543- 6 (2003) |
| Iowa | Yes | If directed at plaintiff, he gets all, otherwise, state Civil Reparations Trust Fund gets 75% | IOWA CODE § 668A.1 (2003) |
| Kansas | No. Expired in 1989 | 50% to state Health Care Stabilization Fund, but only in medical malpractice cases... | KAN. STAT. ANN. § 60-3402 (1988) (expired 1989); 1988 Kan. Sess. Laws 209.1 |
| Missouri | Yes | 50% of most punitive damages awards to a Tort Victims' Compensation fund. Of this, 26% to be disbursed annually to legal services for low income people fund | MO REV. STAT. § 537.675 (2003) |
| New York | No. Expired in 1994 | 20% of all punitive awards to state general fund. | N.Y. C.P.L.R. 8701 (McKinney Supp. 1994) (expired 1994); 1992 N.Y. Laws 55 §§ 393, 427(dd) |
| Oregon | Yes | 60% to state Criminal Injuries Compensation Account | OR. REV. STAT. § 18.540 (2001) |
| Pennsylvania | Yes | 25% of medical malpractice punitive awards to state Medical Care Availability and Reduction of Error Fund | PA. STAT. ANN. tit. 40 § 1303.505(e) (2003) |
| Utah | Yes | 50% of punitive award above \$20,000 to state general fund | UTAH CODE ANN. § 78-18 1(3) (2003) |
| Ohio | Yes | By judicial decision. To charity or wherever the court wants | --- |

³⁹ *Plaintiff's Windfall*, *supra* note 23 at 1908; Stevens, *supra* note 27 at 869.

B. History of Split Recovery

Beginning in the 1980's, the thirteen states shown in table 1 passed split-recovery statutes for punitive damages.⁴⁰ These statutes vary in many of their provisions. Some are of general application, while others are limited to specific kinds of cases (e.g., medical malpractice, products liability). They also vary in the percentage of the award left to the plaintiff.⁴¹ Some of the statutes split the award between the state general fund and the plaintiff, while others split the award with a special state fund. Four of these statutes have expired or were repealed.⁴² One of these had been declared to be unconstitutional,⁴³ while many others were able to survive constitutional challenge.⁴⁴

All but one of the thirteen statutes apportioned the punitive award so that the plaintiff received a fixed ratio of the award (with the remainder going to some combination of the state, a special fund, and the attorneys). The Illinois statute, however, grants the judge the discretion to apportion the award.⁴⁵ Nevertheless, the statute does not provide much guidance to the judge regarding how to apportion the award; it only provides that "the court shall consider, among other factors it deems relevant, whether any special duty was owed by the defendant to the plaintiff."⁴⁶

Up until 2002, split recovery was always accomplished through statute.⁴⁷ However, a recent decision apportioned a punitive damage award

⁴⁰ Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 373 (2003). Pennsylvania passed its statute recently, escaping Sharkey's notice. Act of March 20, 2002, § 505, 2002 Pa. Laws 13.

⁴¹ This percentage varied between 25% and 80%.

⁴² The split-recovery statutes in Colorado and Florida were repealed while the statutes in Kansas and New York expired. See *supra* Table 1.

⁴³ The Colorado Supreme Court declared the Colorado statute to be unconstitutional in 1991. *Kirk v. Denver Publ'g Co.*, 818 P.2d 262 (Colo. 1991). The statute was then repealed in 1995. Sharkey, *supra* note 40 at 373 n.75. In *McBride v. Gen. Motors Corp.*, 737 F. Supp 1563 (M.D. Ga. 1990) a federal district court declared the Georgia split-recovery statute to be unconstitutional, but this precedent seems to have been ignored in later cases such as *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635 (Ga. 1993).

⁴⁴ *Burke v. Deere & Co.*, 780 F. Supp. 1225 (S.D. Iowa 1991), *rev'd in part on other grounds*, 6 F.3d 497 (8th Cir. 1993); *Anderson v. State ex rel. C. Bering Sea Fishermen's Ass'n*, 78 P.3d 710 (Alaska 2003); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Gordon v. State*, 608 So. 2d 800 (Fla. 1992); *Mack Trucks*, 436 S.E.2d 635; *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (Iowa 1994); *Shepard Components, Inc. v. Brice Petrides-Donohue & Assocs.*, 473 N.W.2d 612 (Iowa 1991); *Kan. Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988); *Fust v. Attorney General of Mo.*, 947 S.W.2d 424 (Mo. 1997); *Tenold v. Weyerhaeuser Co.*, 873 P.2d 413 (Or. App. 1994).

⁴⁵ The ABA has also made a similar suggestion. ABA, *Report of the ABA Commn. to Improve the Tort Liability System* 19 (February 1987); ABA Resolution 5(e), 1987 midyear meeting; Robert B. McKay, *Rethinking the Tort Liability System: A Report from the ABA Action Commission*, 32 VILL. L. REV. 1219, 1231 (1987); Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 90 (1992).

⁴⁶ 735 ILL. COMP. STAT. 5/2-1207 (2003).

⁴⁷ One other court did attempt to allocate a punitive damage award, but it was later reversed. *Smith v. States Gen. Life Ins. Co.*, No. CV-89-002449 (Ala. Cir. Ct. Dec. 19, 1990), *rev'd*, 592 So. 2d 1021 (Ala.1992). In addition, the Alabama Supreme Court at one point established a prospective rule for allocating punitive damage awards. *Life Ins. Co. of Ga. v. Johnson*, 684 So. 2d 685 (Ala. 1996). However, this judgment was vacated by the Supreme Court on other grounds. *Life Ins. Co. of Ga. v. Johnson*, 519 U.S. 923 (1996). On remand, the Alabama

via the common law. In *Dardinger v. Anthem Blue Cross & Blue Shield*,⁴⁸ the Ohio Supreme Court split a \$30 million punitive damage award, by apportioning \$10 million to the plaintiff and the remainder to the attorneys and a new fund to be established in memory of the victim.⁴⁹ The court reasoned that “[t]here is a philosophical void between the reasons we award punitive damages and how the damages are distributed.”⁵⁰ The court took notice of the fact that other states split punitive recoveries by statute, but noted that since “punitive damages are an outgrowth of the common law. . . , Ohio’s courts have a central role to play in the distribution of punitive damages.”⁵¹ In addition, “those awards making the most significant societal statements [are] the most likely candidates for alternative distribution.” In order not to dissuade plaintiffs from bringing important claims, however, the “distribution of the jury’s award must recognize the efforts the plaintiff undertook in bringing about the award and . . . necessary changes that society agrees need to be made.”⁵² This might often be accomplished (at least partially) through involving the plaintiff in determining the recipient of the award.⁵³

C. A Solution

At first glance, both the Illinois split recovery statute and the Ohio common law approach seem to solve the problem of the overcompensated plaintiff. However, neither approach leaves judges much guidance in apportioning the punitive award. Thus, I suggest an approach that provides judges with guidance for solving the problem.

The solution must begin by looking at the reasons behind punitive damages, identified in section I above. The jury⁵⁴ will (as is common in most jurisdictions) base its punitive damage extraction from the defendant on some combination of reasons 1:Full Deterrence, 2:Channeling Transactions, 3:Discount, and 4:Retribution.⁵⁵ The judge⁵⁶ (after dismissing

Supreme Court abolished the rule without explanation. *Life Ins. Co. of Ga. v. Johnson*, 701 So. 2d 524 (Ala. 1997).

⁴⁸ 781 N.E.2d 121 (Ohio 2002).

⁴⁹ *Id.* at 146.

⁵⁰ *Id.* at 145.

⁵¹ *Id.* at 145-146.

⁵² *Id.* at 146.

⁵³ *Id.*

⁵⁴ In keeping with traditional common law practice, the jury will decide punitive damages.

⁵⁵ Currently, the jury instructions rarely make any specific reference to these reasons. However, the instructions typically are motivated by concerns expressed by these reasons.

⁵⁶ In theory, the jury could make this determination as well. However, that would involve keeping the jury intact for a long time. In addition, by putting the responsibility for allocating the award in the hands of the judge, we can require the judge to report the reasons behind the allocation, thereby allowing oversight of the system.

the jury) should then conduct a separate hearing (bifurcating, or in some cases even trifurcating,⁵⁷ the trial) to determine the punitive assessment.

The judge would then consider reasons 5:Full Compensation, 6:Private Law Enforcement, and 7:Preventing Violence in assessing a punitive award in favor of the plaintiff. Attorney's fees under reason 5 will be easy to calculate, but because reasons 6 and 7 (and sometimes 5 as well) will sometimes be rather difficult to determine precisely, a presumptive amount (excluding the attorney's fees) will often be needed. Such a presumptive amount must be high enough that it will entice most people to bring a socially desirable suit, but it ought not be so high that it catapults the plaintiff into wealth. This amount will vary from state to state, and its exact determination should be left to the legislature of every state. Even so, the amount will differ depending upon the socio-economic class of the plaintiff; this cannot be avoided, but the effect may be minimized by considering the average plaintiff (likely to be squarely in the center of the middle class). Because the amount is merely presumptive, the judge would be free to modify that amount if the plaintiff's wealth differs significantly from that of the average plaintiff⁵⁸ or if the plaintiff has more or less of an intrinsic motivation to bring suit.⁵⁹ Reason 6 will also, in some cases, support awarding additional money to the plaintiffs' attorneys. In any case, there need to be guidelines as to how exactly to apportion the award among the plaintiff and his attorneys. These guidelines will have to take into consideration many sorts of suit – in particular class actions suits.

Finally, any remainder must be put to some public purpose. There are several possible recipients of this excess: the state general fund, a special state fund, the court system, or charity. The choice of recipients is a matter left to the desires of the individual states, but in the absence of specific guidelines, the judge might be free to decide upon the recipient as suggested by the parties. It must be kept in mind, however, that awarding the excess to the state general fund might raise constitutional concerns (*see infra* part V.A) and awarding it to the court system might raise fairness problems by

⁵⁷ Many courts already bifurcate trials with punitive damages. Breslo, *supra* note 16, at 1148; Pace, *supra* note 10, at 1585; Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 178-79 and n.339 (2002); Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1018-19 (1999); *see generally* Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 999-1003 (1989). This prevents the jury from hearing evidence that may be highly prejudicial to the defendant (such as evidence of wealth) until after a finding of liability. Pace, *supra* note 10 at 1585; Robbennolt, *supra*, at 178; Schwartz, *supra*, at 1018; *see* ABA, *Report of the ABA Comm. to Improve the Tort Liability System*, *supra* note 45, at 19; ABA Resolution 5(b)(2), 1987 midyear meeting. In a court which already bifurcates punitive damage trials for this reason, the trials would need to be trifurcated in order to apportion the punitive award.

⁵⁸ Because of the declining marginal utility of wealth, a richer plaintiff will need a larger amount of money to bring suit than a poorer plaintiff even if both require the same amount of abstract incentive.

⁵⁹ A plaintiff who is already very likely to bring suit (e.g., a plaintiff who is extremely insulted, yet very law-abiding) needs less incentive to sue than one who is not likely to bring suit (e.g., a plaintiff who has suffered only minimal harm and insult or one who lacks trust in the courts).

giving the judge too much of an incentive to allocate the award to an under-budgeted court system.

D. Implementation

Although it is theoretically possible to impose a solution to the problem of the overcompensated plaintiff via the common law,⁶⁰ such a solution would not work very effectively. The parties before a typical lawsuit are only the plaintiff and the defendant. Neither party has any incentive to ask the court to allocate the punitive damage award – the defendant only wants the punitive extraction to be small, and the plaintiff only wants his personal punitive award to be large – so unless the court acts *sua sponte*, no punitive award will ever be allocated in a non-traditional manner. Courts only act *sua sponte* on occasion, and there is no guarantee that the court will even think to apply an alternative allocation on its own. However, a statute on the books will make the procedure hard for judges to ignore. They will be particularly unlikely to ignore the statute if doing so puts them at risk of committing judicial misconduct.⁶¹

III. EXTENDING THE SOLUTION

A. Recipient of the Surplus

The above solution does not devote much attention to the recipient of the excess portion of the punitive award that does not go to the plaintiff (or the attorneys). This is a rather complex matter, however. Several states allocate the remainder of the punitive award to the state general fund.⁶² Other states allocate the remainder to a special state fund, typically associated with remedying the harm caused by some sort(s) of torts.⁶³ One particular special fund that courts might be tempted to allocate the remainder to would be the fund of the judiciary. The common law remedy imposed by the Ohio Supreme Court involved setting up a special charity fund in the name of the victim. Another possibility would be to allocate the remainder to a pre-existing charity.

⁶⁰Dardinger, 781 N.E.2d at 145-146; Sharkey, *supra* note 40 at 422 -27; Shores, *supra* note 45 at 90.

⁶¹This will be an even stronger incentive if removal from office is a possibility.

⁶²Alaska, Georgia, and Utah. In addition, Colorado and New York allocated the remainder to the state general fund when their split recovery statutes were in effect. Florida also allocated the remainder to the state general fund in some cases when its statute was still in effect.

⁶³Illinois, Indiana, Iowa, Missouri, Oregon, and Pennsylvania. While its split recovery statute was still in effect, Kansas also did this. And Florida did too in certain cases when its statute was still in effect.

All of these solutions serve the public benefit and would be consistent with the purposes behind punitive damages. Yet, they all pose problems.

Allocating money to the state, particularly when directed at the general fund, raises a constitutional question: Is the portion taken by the state an excessive fine taken in violation of the eighth amendment? This question will be discussed in section V.A. below.

Allocating the remainder to the judiciary's fund raises a more potent issue: Is the judge fit to decide upon the allocation when he may be biased towards funding his own courtroom? Furthermore, is the court system even fit to decide if the punitive extraction against the defendant is fair when a portion of that extraction goes to the courts (with a higher percentage the larger the award)? These questions are so potent, that it is unlikely that any state would opt for this solution.

Finally, allocating the remainder to charity seems like a good solution, but it too has problems. Selecting a pre-existing charity can be difficult, particularly if the judge sits on the board of a charity⁶⁴ or if the preferred charity has religious or political ties.⁶⁵ It can be difficult to choose the charity – Should the plaintiff get to pick the charity?⁶⁶ What if it is a sham? What if it bears no relation to the harm found in the case? What if no suitable charity can be found? Setting up a new charity presents many of the same concerns, and, in addition, the court must administer the charity (by appointing an administrator and setting up the bylaws), which may be no easy task.

Thus, there are several good possible recipients of the remainder of the punitive award. However, they all have some potential problems, and it is difficult to choose between them.

B. Matching Surplus to Shortfall

Recall that split recovery only solves the problem of the overcompensated plaintiff. It does nothing for the under-compensated plaintiff. This suggests a solution to the problem of deciding the recipient of the remainder of the punitive award – the recipient should be a special fund to help fully compensate the under-compensated plaintiff.

As suggested by reason 5:Full Compensation, the under-compensated plaintiff ought to have his costs paid. He also may need additional incentives to bring suit, as suggested by reasons 6:Private Law Enforcement and 7:Preventing Violence. However, the culpability of the defendant may

⁶⁴ Dede W. Welles, Note, Charitable Punishment: A Proposal to Award Punitive Damages to Nonprofit Organizations, 9 STAN. L. & POL'Y REV. 203, 207 (1998).

⁶⁵ *Id.* at 206.

⁶⁶ *Id.* at 206-207

not be sufficient to impose a punitive extraction large enough to cover all these costs. If a fund were established to pay the under-compensated plaintiff an amount that would make up for this shortfall, then the goals of punitive awards would be better fulfilled. It would only be fitting that the surplus from some punitive damage cases be used to fill the shortfall from others, making the whole punitive damage system more efficient.

However, it is not clear that the under-compensated plaintiff (as defined above) is a common enough occurrence to utilize the entire surplus generated by the split recovery.⁶⁷ It is also not clear why the plaintiff ought to be entitled to receive full compensation and incentives when punitive damages are extracted, but not when none are extracted (either from lack of the requisite level of culpability⁶⁸ or from lack of the defendant's ability to pay the judgment).

Thus, when a defendant is unable to satisfy the full judgment against him (whether it be the punitive extraction or even the compensatory damages), the plaintiff ought to be able to recover the shortfall from the fund.⁶⁹ This raises the likelihood that many additional claims would be brought against judgment-proof or poor defendants. However, so long as we can assure that all these defendants are represented sufficiently by counsel,⁷⁰ this is not a problem. For, why should I be able to sue a rich man who chops off my finger for medical expenses but not a poor man who does the same?⁷¹ The increased litigation will actually solve that additional problem. However, it may be difficult to ensure adequate representation for all the indigent defendants. Indigent defendants are not provided counsel by the state in civil trials. This is usually not a problem, because indigent defendants are rarely sued (because they will not be able to pay). However,

⁶⁷ The reverse situation might even be the case. It is possible that the surplus from split recovery will be less than the shortfall of the undercompensated plaintiff.

⁶⁸ Recall that the typical common law rule is that punitive extractions are only appropriate when the defendant acts with gross negligence/recklessness or actual intent.

⁶⁹ Thanks to Judge Stephen J. Fortunato of the Rhode Island Superior Court for making this suggestion. *See also* Breslo, *supra* note 16 at 1139 -40; Leo M. Stepanian II, Comment, *The Feasibility of Full State Extraction of Punitive Damage Awards*, 32 DUQ. L. REV. 301, 317-18 (1994).

⁷⁰ This is no easy task. The system of public defenders might have to be extended to civil cases in which the defendant can show that he is judgment-proof (or nearly so).

⁷¹ One of the purposes of the doctrine of vicarious liability (or *respondeat superior*) is to solve this problem. *See* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 64-65 (1982). However, that doctrine solves the problem imperfectly, because not all poor defendants act in the course of employment (and almost none do at all times). Thus, even though the doctrine of vicarious liability is a superior solution when it works (because it gives employers an incentive to make sure that its employees are acting properly), it is often inapplicable. Because the shortfall recovery approach is unlikely to ever provide claimants with the full amount that they request, plaintiffs will still opt to sue employers under vicarious liability when possible, thereby ensuring the benefits of that approach. Only when a suit under vicarious liability is not possible will plaintiffs sue the poor defendants directly. And even though the defendant will not have to pay the full amount of damages, he will still be deterred from acting irresponsibly by the extreme inconvenience of the lawsuit and the possibility that he will have to pay what little he has to satisfy a portion of the judgment. Furthermore, employers will not be able to argue that they should not be held responsible due to the fund because *respondeat superior* will still be considered the superior doctrine when applicable.

my solution would increase the number of suits for damages against indigent defendants without counsel. Furthermore, the fund will end up paying many of the judgments, even if they are made because of a lack of an adequate preparation of a defense! This will encourage people to sue poor people even when they have no valid claim at the cost of society. Nevertheless, if suing a poor person for a frivolous claim is made a criminal offense with a strong enough penalty, potential plaintiffs will be deterred from bringing these meritless suits, and the system should work correctly. If it turns out that the criminal penalty is not an effective deterrent, however, the surplus can also be used to hire counsel for defendants in cases in which the plaintiff seeks punitive damages.⁷²

In addition, even if no punitive extraction is made against the plaintiff at all, perhaps the judge ought to be able to conduct a hearing to determine the amount of punitive award that the plaintiff ought to be entitled to.⁷³ The plaintiff would then be able to seek that amount from the fund as well. However, this process must be tempered – the cost on the judicial system would be rather high if a hearing to determine punitive awards were conducted at every single trial at which the plaintiff prevailed (regardless of whether there were punitive damages). Thus, a hearing ought only to be held if there was significant social value in bringing the suit. The determination of significant social value can either be made by the jury on a special verdict, or it can be left to the judge.

C. Implementation

In order to implement the above plan to transfer the excess punitive damages to higher-valued uses, I propose the establishment of a special state agency, called the Punitive Damage Distribution Administration (PDDA) to administer the Punitive Damage Distribution Fund (PDDF).

The PDDA would be a judicial agency, with its director appointed by the courts. It would consist of a director and several attorneys (in addition to clerks and secretaries as needed). If possible within the constraints of the state budget, the PDDA should be administered through funds apportioned by the legislature, rather than by using funds from the PDDF.⁷⁴

⁷² This proposal might backfire by inducing plaintiffs not to seek punitive damages when suing indigent defendants (because then the defendant will not get a free lawyer). However, if the surplus is only used to pay the shortfall in a case involving punitive damages, then these 2 conditions combined will ensure that poor defendants are only sued when the case is strong enough that the plaintiff is likely to prevail and win punitive damages (even with a lawyer provided for the defense).

⁷³ Since there still may be enough societal value in encouraging the claim for the plaintiff to qualify for costs and inducement. There may also still be enough of a threat of violent self-help.

⁷⁴ This will allow the fund to pay out what is paid in with no overhead. It will also minimize the incentive of the PDDA to try to take more than its fair share of punitive awards.

Whenever a punitive damage verdict is entered against a defendant and the defendant loses a motion to remit the award (or chooses not to make such a motion), the defendant should be dismissed from further proceedings and the PDDA joined as a party. The PDDA would then present evidence and argue in favor of a particular distribution of the punitive award,⁷⁵ while the plaintiff would present evidence and argue in favor of retaining all (or much) of the award or more.

Any surplus not awarded to the plaintiff would go to the PDDA. Any shortfall created by the amount due to the plaintiff being more than the amount exacted from the defendant should be certified to the PDDA, so that the agency can pay the plaintiff his shortfall (or a portion thereof, if the PDDF has insufficient funds to satisfy all such claims).

If the PDDA is able to pay out all of these claims, then it may also pay out funds to plaintiffs who are unable to collect their damage awards from indigent defendants (as well as those who have managed to avoid payment by removing money from the reach of the state's jurisdiction). If this becomes common practice, the PDDA might also decide to provide counsel to indigent defendants in punitive damage cases.

IV. EXAMPLES OF THE SOLUTION IN PRACTICE

In order to illustrate the workings of the revised model statute, several examples are in order.

Case 1:

D, a rich tycoon with a tendency towards violence and a dislike of the poor, punches P, a poor street-performer, in the face on the street in a run-down area of town. D was unprovoked and has a tendency to do this often. P sustains heavy injuries to his face and incurs \$100,000 of medical expenses. Very upset, P decides to sue D for battery.⁷⁶

The jury returns a verdict in favor of P, awarding him \$100,000 in medical expenses, \$100,000 in pain and suffering, and \$1,100 in lost pay for the time that P could not work due to being hospitalized. The judge adds \$1,000 in court costs and fees to that amount. Thus P's compensatory (and equitable) award is \$202,100.

⁷⁵ The PDDA is not the enemy of the plaintiff. Thus, the agency's attorney should present to the court the fair value of the portion of the award he believes the plaintiff and its attorney are entitled to. He should not try to get away with as much money as possible, but rather with what the law dictates. Thus, in some cases the distribution will not actually be in dispute.

⁷⁶ P's medical insurance company (assuming that P is a rare poor person with medical insurance) probably has a lot to do with the decision to sue, but that need not be considered now.

The jury also considers an award of punitive damages. Under standard principles of the common law, D is subject to punitive damages because he committed an intentional tort. Of course, the jury is free to decide how much to assess in punitive damages, but they are constrained to only consider the appropriate factors (reasons 1-4). The recommended (and maximum) jury analysis follows:

Because D has a propensity to go around punching poor people on the street and because, let us assume, only 1 in 4 victims⁷⁷ with comparable injuries actually sues,⁷⁸ the compensatory damages must be multiplied by a factor of 4 in order to account for the people who do not sue.⁷⁹ Furthermore, because D is very rich, he places the marginal value of money at, let us assume,⁸⁰ 2.5 times the value to the plaintiff. Therefore, the award must be multiplied by an additional factor of 2.5 in order to insure that D feels the full social cost of his actions.⁸¹ So, the jury would be justified in assessing punitive damages of:

$$\$201,100^{82} \times 4 \times 2.5 + \$1,000 - \$202,100^{83} = \underline{\$1,809,900}.$$

Note that only 2 of the 4 reasons for extracting punitive damages have been considered. However, the other 2 reasons (reasons 2:Channeling Transactions and 4:Retribution) add nothing to the award. Retribution might in principle be necessary, but \$1.8 million of punitive damages adequately expresses the community's outrage at D's actions, so no more is needed.

After the jury has assessed the compensatory and punitive damages, the judge should begin stage two of the bifurcated trial.⁸⁴ P would present as

⁷⁷ For example, there might be a witness who testifies that he is the defendant's best friend and he has observed him punch people on the street on over 50 occasions over the past 15 years. Of these, 25 were poor people, and of those about half had serious injuries like the plaintiff. Over the past 15 years, two of the seriously injured poor people had sued, and now the plaintiff is the third, so only 3 out of 12 (or 1/4) of similarly situated plaintiffs sue (assuming that there is no chance that any of the remaining members of the class is likely to ever sue, perhaps due to the expiration of the statute of limitations). Alternatively, a sociologist might testify that there were approximately 28,000 such incidents in the past 10 years in this country and that there were 7,000 lawsuits.

⁷⁸ When deciding upon the multiplier, it must be noted that there is a problem in categorizing the class of harms that should be considered. In general, the solution is to use the narrowest reasonable categorization. Polinsky, *supra* note 10 at 893 -94.

⁷⁹ Consistent with reason 3:Discount.

⁸⁰ This determination is not easy to make. It is likely that the PDDA will have to call an economist as an expert witness to assess the defendant's marginal value of money (and how that marginal value will vary as the extraction increases) in comparison to the average. Of course the defendant would then want to counter with an expert witness of his own. Note, however, that this will not always be an issue. Many tortfeasors who are neither rich nor poor will marginally value money normally. Expert economic testimony would likely not be needed in cases with such defendants.

⁸¹ Consistent with reason 1:Full Deterrence. This can also be conceptualized by saying that although the plaintiff might have consented to being punched if the plaintiff had promised him \$201,100, the defendant would have been willing to pay 2.5 times that amount in order to engage in that activity.

⁸² The figure of \$201,100s used here rather than \$202,100 because the court costs are an equitable remedy rather than true compensatory damages, and thus need not be assessed multiple times.

⁸³ The full compensatory (and equitable) award must be subtracted from the full amount that D should be liable for in order to calculate the punitive portion.

evidence the contract between P and P's attorney to establish attorney fees. We will assume that they signed a standard 1/3 contingency contract. P would also present arguments (and possibly expert testimony, but that would be unlikely in this case) in favor of paying him more in accordance with reasons 6:Private Law Enforcement and 7:Preventing Violence. The PDDA, which was joined as a party at the beginning of this stage, would then rebut. In this case, it would likely introduce P's destitute condition to argue that not much monetary incentive beyond compensation was necessary to induce P to file suit. P's attorneys would also argue why they should get more than they got under their contract.⁸⁵

The judge should apportion the punitive damages as follows. P should get $\$201,100 / 3 = \$67,033.33$ to cover the attorney fees that he is liable for from his compensatory award. P should also get an additional award for bringing the suit. The judge will first consider the presumptive amount established by statute. However, because of P's poor status and correspondingly likely low marginal utility of money (together with a probable high incentive to sue anyway) the judge would probably modify this amount downward somewhat. Assuming a statutory presumptive amount of \$350,000, the judge might award P \$150,000 or so as reward for bringing the lawsuit.⁸⁶

The judge would probably also award the attorneys an additional sum because of the societal value of the case and the low probability of success. Assume that the attorneys' actual costs of conducting the suit were \$25,000.⁸⁷ Because of the large amount of resources available to D, P's attorneys may have assumed they had only a 1 in 5 chance of winning. Therefore, they would need \$125,000 to fully convince them to represent P. Because they already received money from P, however, the judge should award them an additional $\$125,000 - \$67,033.33 = \$57,966.67$.

The attorneys that represented P in the punitive phase of the trial⁸⁸ should also get a reasonable hourly wage for their work. Assume that is \$2,500.⁸⁹ Therefore, the attorneys get an extra \$2,500 from the punitive damages.

⁸⁴ If the assessment of punitive damages was itself done in a separate phase of the trial, as is done in several states, *see supra* note 57 then this would be stage three of a trifurcated trial.

⁸⁵ Note that above, it was probably P's attorneys that presented the evidence and argument on behalf of P in stage 2 of the trial. However, it is possible that P hired alternative counsel because of a potential conflict of interest. There is little likelihood of such a conflict in this case, however.

⁸⁶ It is difficult to explain why this amount is correct. The determination is a highly case-specific endeavor, which the judge will make based on his experience and the amount suggested by the legislature. Thus, it is difficult to see the basis for this amount in the limited space of this example.

⁸⁷ For example: 1 partner at \$400/hr x 25 hours = \$10,000;
 1 associate at \$200/hr x 50 hours = \$10,000;
 1 paralegal at \$100/hr x 50 hours = \$5,000; for a total of \$25,000.

⁸⁸ Again, these are probably the same as the main attorneys, but they could be different. See *supra*, note 85

⁸⁹ 1 paralegal at \$200/hr x 10 hours + 1 paralegal at \$100/hr x 5 hours = \$2,500.

Altogether the punitive award is distributed as follows:

\$150,000 + \$67,033.33 = \$217,033.33 to P

\$57,966.67 to P's attorneys as reward

\$2,500 to P's attorneys for work done in the punitive phase

That leaves \$1,532,400 of the punitive award left to go to the PDDF.

Case 2:

One night, D goes around town shooting everyone's chickens. He causes \$2,000 damage to each of the 50 chicken farms in town. D is well-known to everyone in town, and it is quite clear to everyone that D was the shooter. The 50 farmers join together to sue D in class action with the assistance of the local lawyer.

The farmers will obviously win \$100,000 in compensatory damages plus court costs (say \$1,000). However, there is little economic basis for punitive damages since D's marginal utility of wealth is typical,⁹⁰ there are no uncompensated costs,⁹¹ and the act was not concealable.⁹² Nevertheless, D's act was extremely abhorrent,⁹³ showing a complete lack of respect for the well-being of animals and for the property of others, so there is still a strong basis for extracting punitive damages.⁹⁴

The jury will want to consider the reprehensibility of D's actions (fairly high) as well as D's wealth⁹⁵ (neither very high nor very low) in assessing the punitive damages. While punitive damages may punish the wrongdoer, they ought not to bankrupt him.⁹⁶ Thus, the jury might impose punitive damages on the order of \$400,000.

Because the case was so easy, it is unlikely that the lawyer would charge a contingency fee. Instead he probably charged the plaintiffs as needed. Although this was a simple case, it did involve the management of a class, and thus an attorney fee of \$10,000 might be reasonable.⁹⁷ The plaintiffs wanted compensation for their losses, and they knew that the cost of suing would be rather low, so there is little doubt that the plaintiffs would have sued even without any extra incentive.⁹⁸ Thus, the plaintiffs need only receive the attorney fee of \$10,000 out of the punitive damages. The lawyer

⁹⁰ Consistent with reason 1: Full Deterrence.

⁹¹ Consistent with reason 1: Full Deterrence.

⁹² Consistent with reason 3: Discount.

⁹³ Consistent with reason 4: Retribution.

⁹⁴ Because D has committed the intentional tort of conversion, he is eligible for punitive damages under the common law.

⁹⁵ So as to mitigate the damages.

⁹⁶ Shores, *supra* note 45 at 65.

⁹⁷ Consistent with reason 5: Full Compensation.

⁹⁸ Consistent with reasons 6: Private Law Enforcement and 7: Preventing violence.

himself might possibly deserve an additional award of \$10,000 beyond his fee, only because he managed the class and instigated the suit (so that he would receive \$20,000 in total), even though there was very little risk.

Thus, D will pay \$100,000 in compensatory damages, \$1,000 in court costs, and \$400,000 in punitive damages, for a total of \$501,000. At the end of the day, each plaintiff will take home \$2,000 in compensatory damages, and the lawyer will take \$20,000, with \$1,000 going to the court. The remaining \$380,000 will go to the PDDF.

Case 3:

D, an inexperienced teenage driver, wants to look “cool” to his friends so he drives at 75 MPH in a 25 MPH zone. This causes an accident in which D himself is seriously injured. Bystanders P and Q are also slightly injured. P and Q have very little incentive to sue P because they know that the suit will be expensive, compared to their minor injuries totaling \$2,000 in medical expenses. Nevertheless, believing that they might get punitive damages, they decide to sue.

The jury will clearly find D liable for \$2,000 in compensatory damages and, say \$500 in court costs. However, there is little reason to assess punitive damages against him.⁹⁹ The tort may be slightly concealable, and some plaintiffs would choose not to sue. And the act was reprehensible, but the reprehensibility is mitigated by the childish desire to look “cool” and the punishment D has already suffered by his own injury. Thus, a jury might award something like \$2,000 in punitive damages. D would then have to pay a total of \$5,000.

However, P and Q incurred, let us assume, \$2,000 in attorney fees. In addition, there is a strong social benefit to bringing suits against reckless teenage drivers, so as to ensure that other teenage drivers are deterred from driving recklessly. The court will likely find that the plaintiffs need an additional \$20,000 as retroactive encouragement to bring suit. Thus, in addition to the \$2,000 in compensatory damages, the plaintiffs are entitled to \$22,000 in punitive damages.¹⁰⁰

Since \$22,000 exceeds the \$2,000 punitive damage extraction, the judge will certify the excess of \$20,000 to the PDDA. P and Q will then make a claim before the PDDA for their \$20,000 shortfall. If the PDDF has enough

⁹⁹ Note that punitive damages are available under the common law because driving at three times the speed limit is reckless and grossly negligent.

¹⁰⁰ \$22,000 = \$20,000 (enticement) + \$2,000 (attorney fees)

funds,¹⁰¹ it will pay it to them immediately. Otherwise, it will determine how much it can afford to pay and pay them that amount.¹⁰²

Case 4:

Consider the facts of *BMW of North America, Inc. v. Gore*.¹⁰³ In that case a BMW dealership repainted a new car before selling it. Upon the sale, the dealer did not notify the buyer of the repainting, contrary to Alabama's fraud law.¹⁰⁴ The buyer did not notice any flaws until notified of evidence of repainting by an independent detailer 9 months later.¹⁰⁵ The jury awarded \$4,000 in compensatory damages.¹⁰⁶ Based on evidence that BMW had engaged in similar conduct 983 times in the United States, the jury awarded \$4 million in punitive damages,¹⁰⁷ which the Alabama Supreme Court reduced to \$2 million.

In this case, there does not seem to be any evidence that the compensatory damages were any less than the full cost imposed on the plaintiff. Therefore reason 1:Full Deterrence does not apply.¹⁰⁸ There is also no evidence to support application of reason 2:Channeling Transactions.

There is, however, a basis for applying reason 3:Discount. Indeed, the plaintiff did not discover the damage for quite some time in this case. Nevertheless, as the U.S. Supreme Court noted, it would violate due process for the state of Alabama to impose punitive damages based on conduct that occurred beyond the state's jurisdiction.¹⁰⁹ Thus, instead of multiplying the compensatory damages by 1000 (or 983), the jury should have multiplied by a factor 14, because the evidence reflected 14 other cases of paint-fraud by BMW in the state (and none by any other company). Therefore, an appropriate punitive damage exaction would be:

$$\$4,000 \times 14 - \$4,000 = \$52,000.$$

There might be a basis for applying reason 4:Retribution, but it is weak. Certainly BMW's actions were not particularly outrageous. Thus, it is clear that \$4 million (or even \$2 million) would be excessive. However, it is not clear if \$52,000 is enough of an expression of community outrage, although it might be. I could see a reasonable jury imposing a punitive exaction of

¹⁰¹ Keep in mind that this kind of claim (a punitive shortfall) receives the highest priority. Thus, this claim will be paid in full before the PDDA begins paying any claims to plaintiffs who cannot collect against judgment-proof defendants or attorney fees to tort parties when no punitive damages are levied.

¹⁰² This will depend on the procedures that the PDDA has established. It is possible that the PDDA will choose to pay the plaintiffs with an annuity or in several installments so as to be able to pay the entire amount.

¹⁰³ 517 U.S. 559 (1996).

¹⁰⁴ *Id.* at 563.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 565.

¹⁰⁷ *Id.* at 564-65.

¹⁰⁸ Even if BMW is richer than the plaintiff, as a corporation it is likely that the principle of declining utility of wealth does not apply to its decisions.

¹⁰⁹ *BMW*, 517 U.S. at 572.

maybe up to \$500,000, but I could also see the jury as being content with mere \$52,000. This determination must be made by a jury, with the guidance of the judge and the state legislature.

Once the punitive exaction is determined, the court ought to focus on the distribution of the award. First, the judge should pay the attorney's fees from the punitive award. After that, the judge should look to reasons 6:Private Law Enforcement and 7:Preventing Violence. Reason 7 does not seem to apply in this case. Reason 6 might apply to the extent that the state has an interest in bringing defendants like BMW to justice for conduct like repainting cars. The state undoubtedly has some interest in doing so, but it does not have a very large interest. I doubt that the state has more than, say a \$100,000 interest in doing so (and it may even be less). Thus, if the jury properly awarded \$500,000 in punitive damages, the court should award the plaintiff its attorney's fees plus up to \$100,000, with any remainder going to the PDDF.

V. PROBLEMS AND ADDITIONAL CONSIDERATIONS

A. Constitutional Considerations

This proposal is subject to many of the same constitutional questions that surround other split recovery statutes. Nevertheless, it has been constructed so that all of these concerns are minimized, if not eliminated.

1. Takings clause¹¹⁰

The only decision to permanently strike down a split-recovery statute as unconstitutional was one which struck down the Colorado statute on the basis of the takings clause.¹¹¹ Thus this issue deserves special attention.

Unlike compensatory damages, there is no inherent right to collect punitive damages.¹¹² Thus, a plaintiff has no vested right in a punitive

¹¹⁰ The Takings clause provides that "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

¹¹¹ *Kirk v. Denver Publ'g Co.*, 818 P.2d 262 (Colo. 1991).

¹¹² *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1991) (Scalia, J., concurring); *Gordon v. State*, 608 So. 2d 800, 801 (Fla. 1992); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs.*, 473 N.W.2d 612, 619 (Iowa 1991); *Katko v. Briney*, 183 N.W.2d 657, 662 (Iowa 1971); *DeMendoza v. Huffman*, 51 P.3d 1232, 1242, 1245 (Or. 2003); Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska's Split-Recovery Punitive Damages Statute*, 49 DUKE L.J. 1335, 1364 (2000); E. Jeffrey Grube, Note, *Punitive Damages: A Mismatched Remedy*, 66 S. CAL. L. REV. 839, 850-51 (1993); Stevens, *supra* note 27 at 874; Welles, *supra* note 64, at 208.

damage award until a final judgment is rendered.¹¹³ Therefore, as long as the statute specifies that the punitive damages are assessed against the defendant and the plaintiff is entitled to only so much of the award as the court deems appropriate, there should be no takings clause problem. In the Colorado decision the state interest in the award only came into being upon the judgment becoming payable;¹¹⁴ however, my proposal provides for the state to become interested in the award in a special phase of the trial to determine the distribution. In effect, the state will have had a potential interest in the award all along, but that interest will only mature upon entry of judgment.¹¹⁵ ¹¹⁶ Indeed, numerous other courts have not found takings problems with other state split-recovery statutes, leading to the conclusion that the *Kirk* decision was an aberration, perhaps caused by the unique language of the Colorado statute.¹¹⁷

2. Substantive due process

Substantive due process presents no challenge to the proposal. Substantive due process protects individuals against laws that deprive them of property without having any rational basis in furthering a legitimate state interest. The plaintiff has no vested property interest in a punitive damage award prior to final judgment.¹¹⁸ Even if this were not the case, however, there is clearly a rational basis for eliminating the plaintiff's windfall.¹¹⁹ The proposal is particularly unlikely to be found to abridge the plaintiff's substantive due process rights because "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."¹²⁰

The defendant, however, may complain of substantive due process. If a punitive damage award is "grossly excessive," then it is unconstitutional via

¹¹³ *Gordon*, 608 So. 2d at 801; *Dodson*, *supra* note 112, at 1364; *Sharkey*, *supra* note 40 at 436; *Stevens*, *supra* note 27 at 874; *Welles*, *supra* note 64 at 208.

¹¹⁴ Matthew J. Klaben, Note, *Split Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 CORNELL L. REV. 104, 124 (1994). In fact, the Colorado statute explicitly disclaimed any state interest in the award prior to being due. *Id.*

¹¹⁵ This also allows the statute to avoid an excessive fine challenge, since the state exercises no control over its interest until after the final judgment. See Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 508 (1993).

¹¹⁶ Another way to eliminate a takings challenge would be to have the defendant pay the entire punitive damage award to the clerk of the court, who would then distribute the award as directed by the judge. *Stepanian*, *supra* note 69 at 316.

¹¹⁷ *Sharkey*, *supra* note 40 at 436 -37.

¹¹⁸ *Supra* note 113.

¹¹⁹ *Supra* part II.A.

¹²⁰ *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

substantive due process.¹²¹ However, the proposed statute is no more likely to run afoul of this requirement than a traditional punitive damage scheme.

3. Procedural due process

Like substantive due process, procedural due process only protects vested property interests. Since the plaintiff has no vested property interest in a punitive award until final judgment is rendered, the proposed statute poses no procedural due process problem on behalf of the plaintiff.¹²² Even were this not the case, procedural due process only requires notice and an opportunity to be heard by the party deprived of a property right.¹²³ The hearing on the apportionment of the punitive damages will satisfy this requirement.

The defendant may also complain of procedural due process. However, so long as the government does not intervene in the trial until after the verdict against the defendant is issued and ruled upon by the judge, there can be no basis for the defendant to complain that the decision against him was not fair.

4. Excessive fines

In 1989, the Supreme Court ruled that the Excessive Fines Clause of the eighth amendment does not apply to punitive damages. The court relied heavily on the fact that the damages were solely between two private parties.¹²⁴ This suggests casts doubt upon the status of split-recovery awards taken by the state.¹²⁵ However, the majority opinion does note that “the Excessive Fines Clause was intended to limit only those fines *directly imposed by, and payable to,* the government.”¹²⁶ Thus, the excessive fines clause may only apply when the government both receives a portion of the award and directly imposes it. In any case, the model statute protects against government involvement in the imposition of the award by not allowing the government to intervene until after a final decision has been reached on the damages assessed against the plaintiff. It also protects against the Excessive Fines Clause by awarding the public portion of the award to a special state fund, rather than to the state general fund.¹²⁷

¹²¹ State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

¹²² See *supra* note 113.

¹²³ Han, *supra* note 17 at 512.

¹²⁴ Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 298 (1989) (O’Connor & Stevens, JJ., concurring in part and dissenting in part).

¹²⁵ Browning-Ferris, 492 U.S. at 298-99 (O’Connor & Stevens, JJ., concurring in part and dissenting in part).

¹²⁶ *Id.* at 268 (emphasis added).

¹²⁷ Cf. Sharkey, *supra* note 40 at 435.

Whether or not the excessive fines clause applies to split-recovery awards is no longer an important question, however. For even if the clause does apply, it only prohibits fines that are excessive. The Supreme Court already prohibits all punitive damage awards from being excessive, under *BMW of North America, Inc. v. Gore*.¹²⁸ Therefore, excessiveness analysis must be applied regardless of whether the excessive fines clause applies, so that clause has now become irrelevant to the discussion.¹²⁹

5. Common law re-examination clause

The Seventh Amendment provides that “no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”¹³⁰ It might be argued that for the court to reexamine the jury’s assessment of punitive damages in a manner unheard of by the common law at the time of the adoption of the Seventh Amendment violates that amendment. However, the only “fact tried by” the jury under the proposed statute is the amount that is to be assessed against the defendant. Therefore, the judge is free to apportion that award as he sees fit without disturbing the jury’s verdict.¹³¹

B. Empirical Concerns

An empirical concern with the proposal is that it is unclear if the numbers will match up. Although it seems likely that the problem of the overcompensated plaintiff will produce more dollars going into the PDDF than the problem of the under-compensated plaintiff will take out of the fund, there is no empirical evidence for this result. It may be that more money is claimed from the fund (even by just paying the under-compensated plaintiffs) than the fund can supply. On the other hand, the fund may supply more than is needed to satisfy all claims by under-compensated plaintiffs. In that case, claims would be entertained by the PDDA for plaintiffs who are unable to collect their awards and for plaintiffs who deserve punitive awards when defendants do not qualify. However, it is almost certain that the fund would be unable to satisfy all such claims in their entirety. However, that situation would still be better than the situation today, when there is no chance for plaintiffs to recover in many situations.

¹²⁸ 517 U.S. 559.

¹²⁹ Pace, *supra* note 10 at 1596 -97; Welles, *supra* note 64 at 210.

¹³⁰ U.S. CONST. amend. VII.

¹³¹ Furthermore, the Seventh Amendment may not apply in state courts. *See Alexander v. Virginia*, 413 U.S. 836 (1973).

Another empirical concern is that by allowing the PDDF to satisfy claims against indigent defendants, frivolous lawsuits will ensue against poor defendants who cannot afford to defend themselves.¹³²

C. Effects on Settlement

If a portion of the punitive damages goes to a recipient other than the plaintiff, there will be an increased pressure to settle claims out of court.¹³³ Normally, that would be considered a good thing,¹³⁴ but in this case, it will result in plaintiffs recovering more than their fair share and defendants not facing the full social value of their torts. If the case went to trial, the plaintiff would receive the compensatory award plus a portion of the punitive award, while the plaintiff would be forced to pay the sum total of both the compensatory and punitive awards. However, if both the plaintiff and defendant estimate the awards correctly in advance, they would likely settle for an amount between the plaintiff's expected recovery and the defendant's expected loss, so the plaintiff will get more by settling and the defendant will lose less (and the state will get nothing).¹³⁵ This is problematic because it will decrease the deterrent effect of punitive damages by allowing defendants to often pay less than they should be forced to pay. In addition, the plaintiff will still recover a windfall, albeit one not as large as under the current system.¹³⁶ Nevertheless, the uncertainty inherent in the implementation of the proposal (that is, the uncertainty over how much the plaintiff can expect to actually receive) will reduce the incentive to settle by making the plaintiff's settlement amounts larger as compared with the situation in states that have fixed split recovery statutes.

¹³² For a discussion of this issue, see *supra* part III.B.

¹³³ *Report on Aggravated, Exemplary and Restitutory Damages*, *supra* note 16 at 40; Welles, *supra* note 64 at 211; cf. Breslo, *supra* note 16 at 1158 -64 (showing that there will be an increase in settlements if the plaintiff is only permitted to recover his attorney fees but no other amount from the punitive damage award).

¹³⁴ Indeed, some authorities consider it to be positive even in this case. Han, *supra* note 17 at 49 9-501; Stepanian, *supra* note 69 at 325 -327; cf. Dodson, *supra* note 112, at 1352; Grube, *supra*, note 112, at 875-76.

¹³⁵ For example, assume the expected compensatory award is \$100,000, the expected punitive award is \$200,000, and the expected litigation expenses (including attorney fees) to be incurred between the time of settlement and the end of trial are \$10,000 for each party. Under the traditional scheme, the plaintiff will recover \$300,000 after trial, for a net benefit of \$290,000, while the defendant would have to pay \$300,000 in damages for a net loss of \$310,000. The parties would then typically settle for \$300,000, each saving \$10,000. However, under the proposed split-recovery scheme, assume the plaintiff only expects to recover \$100,000 as the punitive award. Then, the plaintiff would expect a net recovery after trial of only \$190,000, while the defendant's expected net loss would remain at \$310,000 (and the PDDF would get \$100,000). The parties would then be very likely to settle for \$250,000, because that would save each of them \$60,000 (but leaving the PDDF with nothing). Thus, under the proposed split-recovery scheme, the pressure to settle increases and the amount of settlement decreases.

¹³⁶ Grube, *supra* note 112, at 875; Welles, *supra* note 64 at 211.

In any case, empirical studies have shown that it is not clear that the availability of split recovery actually causes an increase in settlements.¹³⁷ In addition, any problem could also be avoided by forbidding (or regulating) settlements in punitive damage cases; however, such solutions are typically not feasible.¹³⁸ One partial solution, which I adopt, is to regulate settlement after a verdict has been reached by having the court extract a proportionate part of the settlement on behalf of the PDDF.¹³⁹ Beyond that, any problems raised by settlement must simply be accepted as a necessary byproduct of the split-recovery plan.¹⁴⁰

There can also be a pressure against settling. In any case in which the plaintiff expects to receive some money from the PDDF the plaintiff's minimum settlement offer may increase to an amount larger than what the defendant would be held liable for (or able to pay) in court. This will encourage defendants to refuse to settle. However, this is a positive effect, because it will prevent defendants from settling for more than they should.

D. Attorney Fees

The fact that attorney fees (and other uncompensated injuries) are to be included under punitive rather than compensatory damages is somewhat strange. The proper solution would be to include all injuries (including the attorney fees of the prevailing party in all cases) under compensatory damages and assess them directly, rather than through the punitive damage workaround.¹⁴¹ This problem is largely a result of the long-standing and much-criticized U.S. convention of every party bearing its own litigation expenses.¹⁴² However, this is a political issue,¹⁴³ and it is not likely to be changed.

VI. CONCLUSION

Although there are several minor unresolved potential concerns with my model statute, it is more effective at solving the problem of mismatched punitive damage reasons than most of the existing split recovery statutes. It is also superior to standard punitive damage regimes. Therefore, I urge legislatures to consider the model statute I have proposed. Once it is

¹³⁷ Sharkey, *supra* note 40 at 444 -45.

¹³⁸ Welles, *supra* note 64 at 212.

¹³⁹ *Cf. id.*

¹⁴⁰ Report on Aggravated, Exemplary and Restitutionary Damages, *supra* note 16 at 40.

¹⁴¹ Grube, *supra* note 112, at 852-53; Polinsky, *supra* note 10 at 939.

¹⁴² Salbu, *supra* note 17 at 275.

¹⁴³ *Id.* at 276.

implemented the empirical questions will be more easily resolved, and the statutes will be able to be revised accordingly (if needed) to become most effective.

APPENDIX

Below is a model statute that incorporates the proposal suggested in the article.

- (1) The trier of fact shall exact punitive damages from the defendant only:¹⁴⁴
 - a. to punish the defendant or to express the abhorrence of the community at the defendant's actions;
 - b. to sufficiently deter the defendant's conduct when compensatory damages alone would be insufficient;¹⁴⁵
 - c. to account for concealable or otherwise unactionable similar torts;
 - d. to encourage tortfeasors to channel transactions through the market rather than through tortious acts.
- (2) The trier of fact need not consider all the enumerated factors, but the trier of fact may consider no others.¹⁴⁶ In a jury trial, the jury may not be informed of the fact that any party other than the plaintiff will be a recipient of the punitive damage award until after it has reached its verdict as to both compensatory and punitive damages.¹⁴⁷
- (3) Punitive damages shall be awarded to the plaintiff only to the extent that:¹⁴⁸

¹⁴⁴ The statute expresses no opinion as to how the trier of fact shall reach this decision. Various alternative schemes should still be consistent with this statute. So even if the judge decides the final amount of the punitive exaction based on non-monetary values assigned by the jury to various of the enumerated factors, that would be consistent with this. *See generally* Sunstein, *supra* note 14 at 2112 -2121; CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE, ch. 13 (U. Chi. Press 2002).

¹⁴⁵ This factor is meant to include the situation in which a rich defendant's low marginal utility of wealth is less than the plaintiff's.

¹⁴⁶ These factors are not meant to establish guidelines for exacting punitive damages from defendants. They merely limit the courts to not using any other criteria besides these. However, the courts need not construe these criteria narrowly. For example, in assessing the community abhorrence, many additional factors will be relevant, including reprehensibility, the social status of the victims, etc.

¹⁴⁷ Not informing the jury about the recipient of the punitive damages solves two problems. First, if the jury knew that the plaintiff would not receive the entire punitive award, it might be tempted to increase the size of either the compensatory or punitive award. *Cf.* Robbennolt, *supra* note 57 at 172; Stevens, *supra* note 27 at 898 -99. Second, if the jury knew that the state (or some other worthy cause) were to be the recipient of a portion of the award, it might be tempted to increase the punitive damages beyond what the defendant deserves. Robbennolt, *supra* note 57 at 181 -82; Stevens, *supra* note 27 at 898.

¹⁴⁸ For example, the court might start off by including attorney's fees (either by multiplying the hours worked by a reasonable fee or by taking a percentage of the compensatory award if the attorney-client contract so specifies) and adding to that figure all other damages not recognized by law as the basis for compensatory damages (within reason). The court should then determine if that figure is large enough that were the plaintiff to have expected to

- a. the compensatory award falls short of what is necessary to fully compensate the plaintiff, including all expenses reasonably incurred in litigating the claim (including opportunity costs as well as attorney fees, when charged in good faith);
 - b. an additional award to the plaintiff would serve to ensure that the plaintiff and all other similarly situated potential plaintiffs had sufficient incentive to bring the claim if there is a public interest in such a claim being brought, taking into account the likelihood of success of the claim reasonably anticipated by the plaintiff before bringing suit as well as the effective value to the plaintiff of such an award; or
 - c. an additional award to the plaintiff would prevent similarly situated potential plaintiffs from seeking extra-judicial remedies that would breach the peace in lieu of litigating.
- (4) An additional sum from a punitive damages award may also be awarded to the attorneys for the plaintiffs to the extent that the portion of the award to which they would otherwise be entitled would be insufficient to induce them and other similarly situated attorneys to bring this claim and other similar claims in future cases if there is a public interest in claims of this nature being brought.¹⁴⁹
- (5) Except as provided in this section and section 4, no portion of a punitive damage award shall be paid to the attorneys for the plaintiff, even if the contract between the attorneys and the plaintiffs specifies otherwise. Furthermore, attorneys may not seek contingency fees in excess of [40]% of the compensatory award in any case in which punitive damages are pled.¹⁵⁰ However, the attorneys may be paid a reasonable hourly fee for all hours spent working on the punitive damages portion of the lawsuit.¹⁵¹

receive that much money (the compensatory award plus the above figure minus all the plaintiff's actual costs – that is, essentially, the compensatory award in full but no more) he would have still brought the suit rather than pursue some other violent extrajudicial remedy. Similarly, if the court finds that the suit served the public interest in some way, the court should determine if the amount is large enough that it would have encouraged the plaintiff sufficiently to bring the suit if he had expected this result (taking into consideration the societal value of the suit). If the figure does not satisfy either of these tests, it should be raised so as to satisfy both of them.

¹⁴⁹ Often, particularly in civil rights cases, the attorneys take a substantial risk of non-payment in serving as attorneys. In order to encourage attorneys to take such cases without depriving the plaintiffs of much of their deserved awards, this punitive award to the attorneys may be necessary. It will often also be necessary in class-action claims where the attorneys bear the costs of the suit and of managing the class.

¹⁵⁰ This sentence is necessary to prevent attorneys from claiming attorney fees so large that the effect is either that the entire punitive exaction is always awarded to them or that the plaintiff is not properly compensated. The figure of 40% might be modified slightly by legislatures enacting this model statute depending on the maximum “fair market” contingency rates typically charged by attorneys in the state in cases not involving punitive damages.

¹⁵¹ The attorneys must be given incentive to actually try and secure punitive damages for their clients. This much should already be insured by the ethical duty of attorneys. However, it would be unjust to fail to compensate the attorneys for the time spent on punitive damages if their contingent fee comes only from the compensatory award. In addition, because there might be a conflict of interest between the attorneys and the plaintiffs in seeking

- (6) The judge shall make the determination of how much of the punitive award should go to the plaintiff and the attorneys.¹⁵² If evidence as to the factors listed in sections 3 and 4 is needed, it shall be brought to the attention of the judge after the trier of fact has determined the amount of the punitive exaction against the defendant and after any motions for remittitur have been ruled upon by the trial judge.¹⁵³
- (7) In any case in which the punitive exaction exceeds the plaintiff's itemized attorney fees¹⁵⁴ plus \$XXX,XXX¹⁵⁵ (in today's dollars, to be adjusted for inflation annually by the state treasurer and promulgated by the treasurer to the clerks of the various courts), if the punitive award to the plaintiff differs from that amount, the judge must state his reasons for such deviation in a written opinion, and he must direct the attention of the clerk of the court to such opinion. Similarly, if the punitive exaction is less than that amount and the punitive award differs from the punitive exaction, the judge must state his reasons in a written opinion and direct the attention of the clerk of the court to such opinion. The clerk of the court must then compile copies of all such opinions at the end of every year and send them to the judiciary oversight committees of the state House and Senate.¹⁵⁶ Failure of any judge to state his reasons for deviating from these presumptive standards or to direct the attention of the clerk of the court to the appropriate opinions shall constitute judicial misconduct, to be brought to the attention of any body the law directs to oversee the conduct of judges. However, no judge shall be removed from office based on the distribution of punitive awards.¹⁵⁷

distribution of the punitive damages (although this is unlikely), plaintiffs might hire alternative counsel to represent their interests in the punitive damage allocation portion of the trial. In that case, the alternative counsel would need to be compensated for their services.

¹⁵² The judge makes the decision so that the reasons for decision can be studied by the legislature in reviewing the effect of this law in accordance with section 7.

¹⁵³ The evidence concerning distribution of the award is admitted after final decision of the award so as not to influence the exaction of punitive damages by any factor not found in section 1. However, even if the defendant plans to appeal a decision not to remit the award (or to remit it less than desired), the apportionment phase may continue before the appeal is heard (because the decision of the trial judge is not very likely to be disturbed on appeal and it is more economical for the lower court to make a final determination without waiting for the appeals court to respond). That will not pose a problem, because when deciding if the remittitur decision was correct, the appellate judges need not (and should not) examine the portion of the record dealing with the punitive apportionment.

¹⁵⁴ The itemized attorney fees are easy to calculate directly. There is thus no need for the legislature to oversee this amount. However, any amount awarded to the plaintiff as a punitive award beyond the attorney fees will be more difficult to calculate, and this must be subject to legislative oversight.

¹⁵⁵ The individual legislatures enacting this model statute must determine an amount that represents a fair incentive to bring suit to the average plaintiff. Tentatively, I suggest a number in the ballpark of \$350,000.

¹⁵⁶ The particular legislative committees will, of course, vary from state to state.

¹⁵⁷ A judge may be removed for failing to report his reasons for deviating from the presumptive allocation, but once he makes such a report, he cannot be removed for making a bad decision. Note that it would be considered judicial misconduct for a judge to fail to consider the allocation of an award altogether. This is needed to ensure that judges engage in the allocation proceedings even though neither party has any reason to request them.

- (8) Section 7 shall not be construed to give any body, other than an appellate court of competent jurisdiction, the authority to review the judgment of any case decided by a trial judge. However, the decision of the trial judge concerning the amount of the punitive awards to the plaintiffs and the attorneys is reviewable by an appellate court if such appellate court has the authority to review the amount of the punitive extraction and the compensatory damages.¹⁵⁸
- (9) There shall be established a fund, to be called the “Punitive Damage Distribution Fund” (PDDF), and an agency, to be called the “Punitive Damage Distribution Administration.” (PDDA). The PDDA shall administer the PDDF. The PDDA shall be governed by a director,¹⁵⁹ appointed by the chief justice of the state supreme court,¹⁶⁰ to be assisted by other individuals as necessary. [Such fund shall be administered only using funds appropriated by the legislature for that purpose.]¹⁶¹
- (10) The PDDA shall be joined as a party to any case in which a punitive exaction is made, after all motions for remittitur have been made but before the punitive awards are decided. At that point, the defendants may be dismissed from further proceedings in the trial court. A PDDA attorney shall represent the PDDA’s potential stake in the punitive award and he shall represent to the court that share of the award to which the plaintiff and the attorneys should be entitled.¹⁶² He shall also present evidence to support his representations if necessary. However, he may not present any evidence nor make any argument concerning the financial status of the PDDF. The plaintiffs and their attorneys shall also present any

¹⁵⁸ In exercising this control, the legislature must be careful not to run afoul of the ruling in *Ass’n of Admin. L. JJ. v. Heckler*, 594 F. Supp. 1132 (D.D.C. 1984) (holding that an agency may not review the decisions of administrative law judges based purely on their allowance rates of claims), although this case is not directly applicable.

¹⁵⁹ A formal fund is needed because the courts will not be able to deal with the redistribution of funds in their normal course of operation. It would be very unlikely for a judge to be overseeing two cases simultaneously in one of which there is an excess of punitive damages and in the other a shortfall of the same amount. The money must be placed somewhere in case it is not needed right away. In addition, a specialized fund management will better be able to oversee distribution of funds than will a diverse collection of judges, each administering their own ad hoc mini-funds.

¹⁶⁰ The courts appoint the director, because the fund is an agency within the judicial branch. Whether the director is appointed by the chief justice or by the court at large is of no consequence to the immediate discussion. So long as state law allows principal officers to be appointed by the courts of law, this will work. Otherwise, a different method of appointment may be needed.

¹⁶¹ If the state cannot afford to fund the PDDA out of the budget (which should not be very burdensome, since the PDDA is unlikely to need more than a few lawyers, clerks, and secretaries, at an annual cost of probably less than \$2 million per year or so, depending on the size of the state), then the enacting legislature may wish to alter this provision to allow the PDDA to take its operating expenses from the fund, while implementing some other measure to minimize the incentive to take more than the proper amount.

¹⁶² The PDDA is not the enemy of the plaintiff. Thus, he should present to the court the fair value of the portion of the award he believes the plaintiff and its attorney are entitled to. He should not try to get away with as much money as possible, but rather with what the law dictates. Thus, in some cases the distribution will not actually be in dispute.

relevant evidence if necessary. The judge shall then decide, based on the factors enumerated in sections 3 and 4 and the evidence presented, the appropriate distribution of the award.

- (11) Any portion of the punitive extraction collected from the defendant in excess of the amounts awarded under sections 3 and 4 (under the procedures established in section 10) shall be awarded to the PDDA to be placed in the PDDF.
- (12) If the judge makes a punitive award to the plaintiffs and their attorneys that exceeds the punitive extraction from the defendants, then the judge shall certify such excess to the PDDA.
- (13) The PDDA shall attempt to distribute to all parties brought to its attention under section 12 the amount certified in a timely and reasonable manner. However, if the PDDA is unable to satisfy all such claims, it shall distribute the money in a manner so as to fairly ensure maximum distribution (by percentage of the size of the award) to all claimants, without regard to the merits of the original claims. The PDDA shall establish procedures to comply with this section. A claimant who has not received the full amount certified by the judge may only bring an action against the PDDA if these policies were not followed correctly, or if the policies established are not consistent with this statute, the state constitution, or federal law.
- (14) Once the trier of fact returns a finding of punitive damages, the parties may not settle the case without permission of the court. If the court allows settlement, it shall require that a portion of the settlement be withheld from the plaintiff and distributed to the PDDF. In determining what portion of the settlement shall be distributed to the PDDF, the court shall attempt to replicate the percentage of the total damages (compensatory plus punitive) that the PDDF would have been entitled to had the parties not settled.¹⁶³
- (15) If the PDDA is able to satisfy all claims in their entirety certified to it under section 12, then it may, at its discretion, award money to tort plaintiffs who have not been able to collect full judgments from defendants due to inability to pay.¹⁶⁴ If the PDDA decides to offer

¹⁶³ This section is needed to discourage parties from settling cases with an intent to evade the allocation of punitive damages. Otherwise, once it becomes clear that punitive damages will be awarded, plaintiffs will settle for any amount larger than the compensatory damages plus their expected punitive award and defendants will settle for any amount less than the compensatory damages plus the punitive extraction. This will result in an under-deterred defendant and an overcompensated plaintiff. This fear becomes more pronounced once the punitive damages are determined, because that finding eliminates much of the uncertainty.

¹⁶⁴ Ideally the PDDA will be able to distribute funds to plaintiffs regardless of whether they requested punitive damages. If, however, the PDDA finds it necessary to provide attorneys to defendants in cases involving punitive damages, then it will likely have to limit payments under this section to plaintiffs who requested punitive damages (to prevent plaintiffs from suing poor people and purposely not requesting punitive damages so that the poor will not be entitled to a lawyer).

such awards, it shall establish procedures to ensure fair distribution. It shall also keep public records of all such awards so as to prevent plaintiffs from seeking payment from defendants if already fully compensated by the PDDF.

- (16) A judge may, in his discretion or upon a special finding of the jury, make a determination of punitive awards in accordance with sections 3 and 4 even if no punitive extraction is made. The judge shall then certify such amount to the PDDA, making explicit note of the portion due to attorney fees.¹⁶⁵ The judge may also certify to the PDDA a claim for attorney fees brought by any prevailing defendant in a tort case if the law does not otherwise assess those fees against the plaintiff.¹⁶⁶
- (17) Claims certified to the PDDF under section 16 shall be treated exactly like claims for unpaid damages under section 15.
- (18) It shall be a criminal offense to sue a defendant in tort when the claim is without merit and the plaintiff knows (or has good reason to believe) that the defendant is so poor that he may not have the resources to defend against the claim or to pay the judgment rendered against him. This crime shall be punishable by not less than 1 year nor more than 5 years in prison.¹⁶⁷
- (19) If the PDDA determines that too many claims are being brought against indigent defendants due to the promise of a PDDF distribution under section 15, then the PDDA shall provide attorneys (or the funds to hire attorneys, taken from the PDDF) to all indigent defendants being sued for punitive damages.

¹⁶⁵ This requirement will allow the PDDA to pay claims for attorney fees before inducement claims if there is not enough money to satisfy all the claims.

¹⁶⁶ Without this provision, plaintiffs would be at a distinct advantage over defendants. *See* Breslo, *supra* note 16, at 1136.

¹⁶⁷ This provision will counter the chance that plaintiffs will bring frivolous lawsuits against indigent defendants, motivated by the completion of unpaid judgments by the PDDF in section 15.