The Feasibility of Full State Extraction of Punitive Damages Awards

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The Feasibility Of Full State Extraction Of Punitive Damages Awards

Punitive damages have been awarded by American juries since the beginning of the nation. In 1851, the United States Supreme Court recognized punitive damages as a firmly established principle of common law. From the beginning, courts and commentators have criticized punitive damages because they (1) cause excessive litigation, (2) may subject some defendants to multiple punishments, (3) incorporate procedures giving juries too much discretion in determining the size of the awards, (4) overcompensate plaintiffs, (5) may surpass the maximum criminal penalties, (6) have been challenged as unconstitutional, and (7) negatively affect American society and economic competitiveness.

As a result of these criticisms, reformers have called for substantial change in the doctrine of punitive damages, including abolition. Mainly through legislative action, many proposed punitive

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5. International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 50 (1978) (stating "juries are accorded broad discretion both as to the imposition and amount of punitive damages, the import of these windfall recoveries is unpredictable and potentially substantial.").
6. Chief Justice Rehnquist stated in Smith v. Wade: A fundamental premise of our legal system is the notion that damages are awarded to compensate the victim—to redress the injuries that he or she actually suffered. . . .
8. See Part IV below.
9. David Margolick, Address by Quayle on Justice Proposals Irks Bar Association, N.Y. Times, Aug. 14, 1991, at A1. However, former Vice President Quayle and other reformers' claims of the negative effects of punitive damages, are based on "scanty empirical data and highly questionable interpretations of those data." Steven Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 4 (1990). Daniels and Martin point out that a number of law review articles rely on this questionable data as support for arguments to reform punitive damages.
10. See, e.g., James B. Sales & Kenneth B. Cole, Jr., Punitive Damages: A Relic That
damage reforms have been implemented. This reform legislation falls into three broad categories: (1) changing the common law burden of proof standard,11 (2) placing caps on the amount of punitive damage awards,12 and (3) abolishing punitive damage awards.13

Another reform, first suggested over a century ago,14 is state ex-
traction of punitive damages.¹⁸

State extraction statutes provide that part of any punitive damage award is to be paid to the state or a fund created by the state.¹⁶ No state, however, requires the entire punitive damage award be paid to it.¹⁷ This comment will focus on the feasibility of full statutory extraction of punitive damages as a means of taking the windfall of punitive damages away from the plaintiff and compensating society for the injury the defendant inflicted upon it.

Part I of this comment will discuss the underlying purpose of punitive damages. A capsule summary of the economics of punitive damages is presented in Part II. Current state extraction statutes are reviewed in Part III. Part IV discusses potential constitutional issues related to state extraction statutes. Part V explains the workings of a full statutory extraction statute and the problems that may be encountered by such a system. This comment concludes that full extraction of punitive damages is constitutional, feasible, and if properly implemented, provides the same level of deterrence and punishment as the current system of awarding punitive damages.

I. PURPOSE OF PUNITIVE DAMAGES

In Pacific Mutual Life Insurance Co. v. Haslip,¹⁸ the United States Supreme Court held that the purpose for awarding punitive damages is not to compensate for injury, but rather to punish the defendant and to deter others from engaging in similar conduct.¹⁹ Virtually all legal scholars agree that punitive damage awards are to punish and deter, not to compensate.²⁰ However, some commen-

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¹⁸ Equal difficulty 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. Bass, 42 Wis. at 672.

¹⁵ The phrase “state extraction” as it relates to punitive damages was coined by Professor James D. Ghiardi in Punitive Damages: State Extraction Practice Is Subject to Eighth Amendment Limitations, 26 TORT & INS. L.J. 119 (1990).

¹⁶ See Part III below.

¹⁷ Id.


tators have also argued that punitive damages serve as compensation for injuries for which there is no redress.21

In order to recover punitive damages22 most jurisdictions require the plaintiff to prove and be awarded compensatory damages.23 Even in states where punitive damages are allowed as a matter of common law, most states hold that there is no separate cause of action for punitive damages.24 Therefore, to recover punitive damages, a plaintiff must base his or her claim for punitive damages on a legal theory which involves actual damages.25 However, a plaintiff may be awarded punitive damages for harm that is likely to occur as a result of the defendant's conduct, even though the plaintiff's actual damages are negligible.26

21. David G. Owen, Civil Punishment and the Public Good, 56 S. CAL. L. REV. 103, 112 (1982) ("The final goal [of punitive damages], compensation, including payment of the victim's costs of litigation (including attorneys' fees), is the easiest objective to state in terms of fairness in a scheme of punitive damages."); David L. Walther & Thomas A. Plein, Punitive Damages: A Critical Analysis: Kink v. Combs, 49 MARQ. L. REV. 369, 381 (1965) (Punitive damages serve to compensate the victim of a wrong for injuries that are not legally cognizable.); but see, Sales & Cole, cited at note 10, at 1164 ("Compensatory awards currently provide recovery of all costs for physical injuries, disfigurement, physical impairment, loss of earnings and earnings capacity, past and future medical expenses, past and future pain and suffering, past and future mental anguish, loss of society and companionship, and every conceivable intangible and imagined injury such as emotional distress and insult.")


22. Punitive damages are defined as:
Damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, or else to punish the defendant for his evil behavior or to make an example of him. . . .


Compensatory damages are awarded as "compensation, indemnity or reparation for the loss or injury sustained by the injured party, so that he may be made whole and restored as nearly as possible to the position or condition he was in prior to the injury." 25 C.J.S., Damages, § 3 (1966).

24. GHIARDI & KIRCHER, cited at note 13, § 6.16.

25. Id.


In TXO Production, the West Virginia Court of Appeals, in a unique decision, pushing Haslip to the limit, reviewed punitive damages cases since the Haslip decision and broke them down into three categories based on the defendant's conduct: 1) "really stupid defendants" (reckless disregard); 2) "really mean defendants" (willful or malicious); and 3) "really stupid defendants who could have caused a great deal of harm" though only minimal harm
In addition to being awarded compensatory damages, most jurisdictions require the plaintiff to show that the defendant's conduct was intentional, willful, wanton, malicious, reckless or outrageous.\textsuperscript{27} The extent of the plaintiff's injury is not a factor; rather, it is the "character and nature of the defendant's conduct" that determines whether punitive damages are justified.\textsuperscript{28}

Some commentators believe that punitive damages should be replaced with what are known as aggravated damages.\textsuperscript{29} An award of aggravated damages compensates the plaintiff for his or her physical and mental suffering, but is not intended to be a form of punishment for the defendant's egregious conduct.\textsuperscript{30} Most jurisdictions, however, already allow compensation for emotional and mental suffering, as well as for the injuries of insult, fear, and humiliation.\textsuperscript{31} Therefore, aggravated damages would result in overcompensating the plaintiff, just as punitive damages provide the plaintiff with a windfall.

Finally, some proponents of abolishing punitive damages argue that civil remedies are to compensate for injury, not punish or deter wrongful conduct.\textsuperscript{32} These commentators believe the criminal law better serves the roles of punishment and deterrence than does the civil law.\textsuperscript{33} The basis of this argument is that society has no interest in the enforcement of an individual's civil or private

resulted. 419 S.E.2d at 888. For really stupid defendants, punitive damages should be no more than five times the compensatory damages. \textit{Id}. at 889. For really mean defendants, punitive damages of 500 times compensatory damages is not violative of due process. \textit{Id}.

Upon appeal, the United States Supreme Court did not embrace the ratios set forth by the West Virginia court, but instead stated that it is the harm that was actually caused or could have been caused by the defendant’s conduct that is the determining factor. \textit{TXO Prod. Corp. v. Alliance Resources Corp.}, 113 S. Ct. 2711, 2721 (1993).

27. Owen, cited at note 21, at 114-15; \textit{also see}, Sales & Cole, cited at note 10, at 1130.
28. Ghiardi & Kercher, cited at note 13, § 5.01.
29. "'Aggravated damages are damages which take into account the additional harm caused to the plaintiff's feelings by such reprehensible or outrageous conduct on the part of the defendant.'" Breslo, cited at note 23, at 1138 n.37 (quoting \textit{Walker v. CFTO Ltd.}, 59 O.R.2d 104, 111 (C.A. 1987)).
30. Zitzer, cited at note 10, at 677-78 nn.112-17 (discussing \textit{Rookes v. Barnard}, 1 All E.R. 367, 407 (1964) (aggravated damages are to compensate the plaintiff, not punish the defendant).
33. \textit{See e.g.}, Zitzer, cited at note 10.
rights; only the state has the authority to punish a person for wrongful conduct. This proposition is inherently incorrect because it assumes that society does not care about the individual's rights even though that individual is a member of society. Further, this argument ignores the fact that many wrongful acts will not or cannot be punished in a criminal proceeding.

Nevertheless, where a plaintiff recovers compensatory damages for the harm he or she suffered and also recovers punitive damages, the plaintiff is overcompensated, and, thus, receives a windfall. Paying punitive damages awards to the state takes this windfall away from the plaintiff. However, some form of economic incentive is needed to ensure that the plaintiff brings and prosecutes a claim for punitive damages even if the plaintiff is not the beneficiary of the punitive damage award.

II. THE ECONOMICS OF PUNITIVE DAMAGES

Many commentators have attempted to explain punitive damages in terms of economic theory. Keeping in mind the purpose of punitive damages (deterrence and punishment), a simple economic analysis provides a sound basis for analyzing punitive dam-

34. Id. at 674.
35. It should be noted that some proponents of this argument believe that since criminal law better serves society, any punitive damage award should be paid to the state (society) and not the individual. Andrew M. Kenefick, Note, The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment, 85 MICH. L. REV. 1699, 1704 (1987) (stating that criminal fines are paid for the benefit of society).

Other critics argue that punitive damages should be abolished or all procedural safeguards of criminal law should be afforded the punitive damages defendant. See, e.g., Grass, cited at note 10, at 269; Wheeler, cited at note 10, at 322-51; Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U. L. REV. 1158, 1180-81 (1966).


37. See note 6.

"[T]he practices and law governing private adjudication appear to be strongly influenced by economic considerations and explicable in economic terms, is evidence that economic theory has a major role to play in explaining fundamental features of the legal system." William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 J. LEGAL STUD. 235, 284 (1979).
The "extraordinary sanctions model" provides the economic explanation for punitive damages in cases where the defendant intentionally harmed the plaintiff or the plaintiff's property. Such intentional conduct is the type that society seeks to abolish. Compensatory damages will not be enough to deter the defendant's intentional conduct because the defendant, absent punitive damages, will retain the profits that resulted from the tortious conduct.

In theory, a tortfeasor will evaluate the costs of undertaking a particular action against the benefits to be derived by taking that action. Where the tortfeasor believes the costs of undertaking this action, including compensatory damages for injury to the plaintiff, are less than the benefits from doing the activity, then the tortfeasor will proceed to do the activity. On the other hand, if the costs to the tortfeasor are higher than the benefits, the tortfeasor will not take the action that results in injury to the plaintiff. Assuming the tortfeasor does act and the plaintiff is harmed as a result...

39. The "standard tort model" is often used to explain how compensatory damages create efficiency in negligence situations. Amelia J. Toy, Comment, Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective, 40 EMORY L.J. 303, 305 (1991). Under the standard tort model, a potential tortfeasor will evaluate the accident costs of undertaking a particular action against the benefits derived by taking that action. Id. If the tortfeasor believes the costs of the action, including compensatory damages for injury to the plaintiff, are less than the benefits from doing the activity, then the tortfeasor will proceed to do the activity. If, on the other hand, the accident costs to the tortfeasor are higher than the benefits, the tortfeasor will not take the action that results in injury to the plaintiff. Haddock, cited at note 38, at 8.

For a detailed explanation and applications of the standard tort model, see generally, Cooter, cited at note 20.

40. Toy, cited at note 39, at 307. The extraordinary sanctions model was first formulated in Haddock, cited at note 38.


42. Id. at 6.

43. For example, assume that D manufactures 100 widgets per year. D can prevent 10 serious injuries per year by installing a $10 safety device on each widget. If D does not, D can expect to pay $50 in compensatory damages per injury. Thus, with no safety device D would pay $500 to P; but D would pay $1000 to install the safety device on all the widgets he manufactures. From an economic stand point, D would not install the safety device. However, if punitive damages can be awarded against D because D intentionally manufactured and marketed an unsafe product, D will now have the incentive to install the safety device. This, of course, assumes that the aggregate punitive damage awards per year are more than $500.

Therefore, to be economically efficient, an award of punitive damages to any plaintiff must be greater than $10—the cost of the safety device. But note that punitive damages become economically inefficient from society's point of view if the aggregate of all punitive damage awards does not exceed $500.
sult, the plaintiff will be compensated and the tortfeasor's costs will reflect the cost of the harm to the plaintiff.\textsuperscript{44}

The defendant will be able to estimate the costs of his or her actions prior to undertaking the action where punitive damages may be imposed. The defendant knows that not only will compensation be required, but where punitive damages can be awarded, the defendant will risk losing all profits gained as a result of his or her actions.\textsuperscript{45} The result is that the defendant is punished for engaging in wrongful conduct, and conduct that society condones is more likely to be deterred. This will only be true, however, if the punitive damages awarded are greater than the profits the defendant expected to earn.\textsuperscript{46}

It does not, however, necessarily follow that the plaintiff should be the beneficiary of the punitive damage award. An award of compensatory damages returns the plaintiff to the position he or she was in prior to the defendant's wrongful conduct.\textsuperscript{47} Giving the plaintiff an award of punitive damages, in addition to the compensatory damages, rewards the plaintiff for being a victim of a tort irrespective of the punishment value of the punitive damages.

In summary, punitive damages operate to deter conduct that society wishes to abolish. A court needs to set the punitive damage award high enough to efficiently achieve this goal. Further, just as the defendant should not be allowed to profit from his or her wrongful conduct, neither should the plaintiff be allowed to profit from the defendant's wrongful conduct.\textsuperscript{48} Some states have taken steps in the direction of taking the profit of punitive damages away from the plaintiff by enacting some form of extraction statute.

III. STATES THAT TAKE PART OF THE PUNITIVE DAMAGES AWAY

As stated above, a few states have enacted statutes that take part of a punitive damage award away from the plaintiff. These state statutes extract only a portion of a punitive damage award. Even if unstated, the justification for allowing the plaintiff a portion of a punitive damage award is that the plaintiff must have an

\begin{itemize}
\item \textsuperscript{44} For simplification the transaction costs have been ignored. The transaction costs would be the legal fees and litigation costs paid by each party.
\item \textsuperscript{45} Toy, cited at note 39, at 312.
\item \textsuperscript{46} \textit{Id}.
\item \textsuperscript{47} See note 23.
\item \textsuperscript{48} Some states achieve this by capping punitive damages; but capping punitive damages at an arbitrary level would result in under deterring conduct that is condoned by society. Toy, cited at note 39, at 304.
\end{itemize}
incentive to seek punitive damages.

Florida, by statute, is entitled to thirty-five percent of any punitive damage award. The state deposits its portion in the general revenue fund. If the cause of action is for personal injury or wrongful death, payment is made to the "Public Medical Assistant Trust Fund." The plaintiff's attorney's fees are to be based on and paid from the sixty-five percent the plaintiff receives. If the parties settle after the trial and verdict, the state is entitled to thirty-five percent of the amount of the settlement that represents punitive damages.

In an effort to reduce requests for punitive damages, Illinois gives the trial judge discretion to apportion any punitive damage award between the plaintiff, the plaintiff's attorney and the state Department of Rehabilitative Services. The attorney's share is determined by what is reasonable, but the judge cannot award an amount that exceeds the attorney-client fee arrangement. The plaintiff's share is determined by whether the defendant owed a special duty to the plaintiff.

Utah, after the payment of attorney fees, requires fifty percent of a punitive damage award over the amount of $20,000 to be paid to the state's general fund. Oregon also requires that fifty percent of a punitive damage award be paid to the state's "Criminal Injuries Compensation Account." Oregon becomes a judgment creditor as to the punitive damages upon entry of a judgment for punitive damages.

If the defendant's conduct was not specifically directed at the plaintiff, Iowa takes seventy-five percent of a punitive damage

49. FLA. STAT. ANN. § 768.73(2) (West 1992 & Supp. 1993). Florida also imposes a cap on punitive damage awards of three times the amount of compensatory damages awarded to the claimant. FLA. STAT. ANN. § 768.73(1).
50. FLA. STAT. ANN. § 768.73(2).
51. Id.
52. FLA. STAT. ANN. § 768.73(7).
53. FLA. STAT. ANN. § 768.73(4).
54. ILL. ANN. STAT. ch. 735 para. 5/2-1207 (Smith-Hurd 1992).
55. Id.
56. Id.
57. UTAH CODE ANN. § 78-18-1(3) (1989). Except for driving while intoxicated and driving while under the influence of drugs, punitive damages may only be awarded if compensatory damages are awarded and the plaintiff proves by clear and convincing evidence that the defendant acted willfully and maliciously, or intentionally, fraudulently or with knowledge and reckless indifference toward others. UTAH CODE ANN. § 78-18-1(1).
59. OR. REV. STAT. § 18.540(1).
award after deducting attorney fees and litigation costs. The state's portion is paid to the "Civil Reparations Trust" that was established for the benefit of indigent civil litigation or insurance assistance.

In Missouri, the plaintiff keeps fifty percent of a punitive damage award and the remainder, less attorney fees, is paid to the "Tort Victims Compensation Fund." The state may execute upon the judgment or enter into a settlement with the defendant, but Missouri has no interest in or right to intervene on its own behalf in lawsuits. The Missouri Legislature believed that punitive damage awards overcompensate the plaintiff, but to ensure that plaintiffs continue to pursue punitive damages, the legislature decided that an economic incentive was needed.

Critics contend that states with statutory extraction and states that have capped punitive damage awards require a plaintiff to "seriously evaluate whether a punitive damage claim may adversely impact the compensatory damages awarded by the trier of fact." If this is true, however, the problem is not with the payment of punitive damages to the state, but with the jury's method of arriving at the compensatory damages. The jury instruction may fail to adequately explain the purpose of compensatory damages, or juries may not give plaintiffs adequate compensatory damages because the juries believe that the plaintiff's punitive damages will make up for any shortfall. In such a case, the punitive damages are compensation to the plaintiff and that is not the function of punitive damages. A clear explanation, within the jury instruction, of the function of compensatory damages and the function of punitive damages would alleviate this problem.

Given that punitive damages are economically justified and that

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60. IOWA CODE ANN. § 668A.1(2)(b) (West 1992). To be awarded punitive damages, Iowa requires the plaintiff to prove by clear and convincing evidence that the defendant's conduct was a willful and wanton disregard for the rights or safety of another. IOWA CODE ANN. § 668A.1(1)(a).
61. IOWA CODE ANN. § 668A.1(2)(b).
63. Id.
64. Mo. REV. STAT. § 537.675(3).
67. This is not to say that punitive damages should be capped or eliminated in an effort to make compensatory damages function properly. See note 48.
68. See notes 133-44 and accompanying text.
a few states have implemented extraction statutes, the question remains as to whether punitive damages extraction statutes are constitutionally valid.

IV. THE CONSTITUTIONAL LIMITS OF STATUTORY EXTRACTION

Regardless of whether a state imposes statutory extraction of punitive damages or follows the common law, the United States Constitution and its limitations and protections must be considered. There are four main constitutional challenges that must be overcome before a state may implement statutory extraction of punitive damages: (1) double jeopardy, (2) due process, (3) excessive fines, and (4) the taking of property without just compensation.

A. Double Jeopardy

Some critics argue that a defendant found guilty of a criminal offense and held liable for punitive damages is subject to double punishment in violation of the Fifth Amendment prohibition against double jeopardy. However, the Supreme Court has held that the Double Jeopardy Clause only applies where the defendant is subject to two criminal punishments. The double jeopardy prohibition applies to proceedings that are "essentially criminal." In determining whether a proceeding is "essentially criminal," the purpose of the proceeding, the consequences and the extent that state resources were used to bring and prosecute the action are considered. Punitive damages awarded in a private action are not "essentially criminal" because state resources are not expended to institute or prosecute the claim.

Further, the Double Jeopardy Clause should not create a greater

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70. U.S. CONST. amend. V guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life and limb". Id.
73. Breed, 421 U.S. at 529.
74. Hansen v. Johns-Manville Prod. Corp., 734 F.2d 1036, 1042 (5th Cir. 1984) (holding actions not brought by the state do not subject the defendant to double jeopardy).
risk of unconstitutionality for statutory extraction than it does for the common law method of imposing punitive damages so long as the state is not prosecuting both the civil and criminal actions. Statutory extraction merely alters the party that receives the punitive damage award.

B. Due Process

The Fifth and Fourteenth Amendments prohibit federal or state governments from denying a person due process of law. Due process applies to both criminal and civil proceedings by requiring a definitive standard that notifies individuals of what constitutes punishable conduct and by requiring a fundamentally fair procedure.

Some commentators argue that the procedures used to impose punitive damages lack the fundamental fairness required by due process. However, the Supreme Court has stated that the common law method of assessing punitive damages does not violate the Fourteenth Amendment Due Process Clause. There will be no violation of due process, even if the jury has significant discretion in awarding punitive damages, so long as the jury understands that the purpose of punitive damages is to punish and deter, the jury

75. The Fifth Amendment provides that no person shall "be deprived of life, liberty or property, without due process of law." U.S. Const. amend. V.

The Fourteenth Amendment prohibits a state from "depriving any person of life, liberty, and property without due process of law." U.S. Const. amend. XIV.

Procedural due process requires that a party whose rights are to be affected by a proceeding be given notice and an opportunity to be heard by an unbiased decisionmaker. Fuentes v. Shevin, 407 U.S. 67, 80 (1977). Substantive due process, on the other hand requires "legislation to be fair and reasonable in content as well as application." Black's Law Dictionary 1429 (6th ed. 1990). Both procedural and substantive due process are guaranteed by the Fifth and Fourteenth Amendments.


78. Ellis, cited at note 76, at 990. In addition commentators often argue that since punitive damages and criminal fines serve the same function of punishment and deterrence, criminal procedural safeguards guaranteed by the Fourth, Fifth, Sixth and Eighth Amendments should apply to cases where punitive damages are demanded. See, e.g., Beckman, cited at note 10; Grass, cited at note 10; Wheeler, cited at note 10; Comment, Criminal Safeguards and the Punitive Damage Defendant, 34 U. Chi. L. Rev. 408 (1967).


80. Haslip, 499 U.S. at 29.
Comments

is impartial, the award is based on the evidence and arguments presented to the jury, and the award is reviewed and upheld by the trial judge as reasonable.81 If these things are done, the procedures for imposing punitive damages will not violate the Due Process Clause.

Due process will, however, be violated where there is state action and the law is not rationally related to a legitimate state objective.82 The rational basis test is applied where a fundamental right is not involved.83 An award of punitive damages is not a fundamental right guaranteed under the Constitution.84 Where a jury award of punitive damages is found to be state action, then all jury determinations would necessarily have to be considered state action.85 When judges exercise their discretion in interpreting the common law, appellate courts will only reverse upon a showing of abuse of discretion.86 It would be difficult to reconcile why a jury's exercise of its discretion is subject to state action due process claims while a judge, who is an officer of the state, is not subject to state action due process claims when the judge exercises his or her discretion.87 Where a state codifies the common law standards for punitive damages, it must be careful to sufficiently define the standards to avoid attack as violative of substantive due process. A law will be struck down as being violative of due process if it is vague.88 The void-for-vagueness doctrine has been applied in civil proceedings as well as criminal proceedings.89 Where a defendant has attacked a punitive damage statute, however, the courts have rejected the

81. TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2719-20 (1993). If fair procedures are followed, there is a strong, if not irrebuttable, presumption that the process is valid. TXO Prod., 113 S. Ct. at 2720.
83. Moore v. City of E. Cleveland, 431 U.S. 547-50 (1977) (White, J., dissenting) (explaining the three levels of judicial scrutiny used by the Court for due process analysis).
84. In TXO Production, the Court, however, rejected Alliance's argument that the rational basis test should be applied to punitive damages awards. TXO Prod., 113 S. Ct. at 2720. The conclusion is that an award of punitive damages is not a right guaranteed under the Constitution. Nevertheless, an award of punitive damages can be unconstitutional if it is not reasonable in relation to the defendant's conduct. Id. at 2721.
86. Comment, Due Process, cited at note 85, at 415-416.
87. Id. at 416. However, a judge's exercise of discretion is reviewable by the appellate courts.
88. A law is considered void for vagueness if persons "of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).
89. GHIARDI & KIRCHER, cited at note 13, § 3.03.
void-for-vagueness argument by finding sufficient standards. To pass muster, the standard established within the state, whether by the state’s courts or its legislature, must articulate the standards of conduct necessary for the imposition of punitive damages and notify people as to what conduct is punishable.

In the end, statutory extraction statutes face no greater risk of being unconstitutional on due process grounds than does the common law method of awarding punitive damages because both face the same issues as to vagueness and fundamental fairness. Further, both remain constitutional only by clearly defining the conduct that is subject to punitive damages and ensuring that a fair procedure is followed.

C. The Excessive Fines Clause

The Eighth Amendment provides in pertinent part: “[N]or shall excessive fines [be] imposed.” Commentators have argued that the history of the Eighth Amendment indicates that it applies to both criminal fines and civil punishment.

In Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., the Supreme Court rejected this argument and held that the Eighth Amendment cannot be used to challenge an award of punitive damages. The Court determined that the Eighth Amendment meaning of “fine” did not include civil damages.

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90. Id.
91. More than mere negligence is required before punitive damages will be assessed; “the defendant’s conduct must be aggravated or outrageous, or characterized by some positive element of conscious wrongdoing.” Sales & Cole, cited at note 10, at 1130.
Professor Owen suggests that words such as “deliberate,” “conscious,” “reckless,” and “willful and wanton” are vague to the average lay person. Owen, cited at note 21, at 115. However, words such as “outrageous,” “malicious,” “flagrant disregard,” and “extreme departure” are accurate in describing a defendant’s conduct that is outside the societal norm. Id.
92. TXO Prod., 113 S. Ct. at 2724 (stating that “the notice component of the Due Process Clause is satisfied if prior law fairly indicates that a punitive damages award might be imposed in response to egregiously tortious conduct.” Id.).
93. U.S. Const. amend. VIII.
97. Id. at 265-66. The Court stated that a “fine was understood to mean a payment to a sovereign as punishment for some [criminal] offense” and was “not concern[ed] with the extent or purpose of civil damages.” Id. The Court went on to say that “[t]he fact that punitive damages are imposed through the aegis of courts and serve to advance governmental interests is insufficient to support” the argument that the Eighth Amendment applies to private actions. Id. at 275.
The Supreme Court stated, however, that punitive damages do not violate the Eighth Amendment where the state neither prosecutes the claim nor "has any right to recover a share of the damage awards."\footnote{98} Hence, the Court left unanswered questions of whether the Excessive Fines Clause applies in cases where punitive damages are paid directly to the state as a result of a private civil action.\footnote{99} or where the civil damages are used to raise revenue.\footnote{100}

One federal district court has held that the Excessive Fines Clause applied to a state extraction of punitive damages.\footnote{101} However, rather than justify this conclusion on substantive law, the court justified its holding based only on the question left open by the United States Supreme Court in \textit{Browning-Ferris}.\footnote{102}

D. \textit{The Takings Clause}

The Takings Clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, prohibits the taking of private property for a public use without the payment of just compensation.\footnote{103} It can be argued that where a state receives a portion of a punitive damage award, the plaintiff’s property is taken.

The Colorado Supreme Court has held that the plaintiff has a property interest in an award of punitive damages.\footnote{104} In \textit{Kirk v. Denver Publishing Co.}, the court held that after a judgment is entered, the plaintiff has a vested right to satisfaction out of the personal and real property of the judgment debtor.\footnote{105} Further, where a private property interest is created as a result of a final judgment, the state legislature cannot diminish that interest by statute.\footnote{106}

\footnote{98. Id. at 264.} \footnote{99. Id. at 276 n.21.} \footnote{100. Id. at 275.} \footnote{101. McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990). The district court stated that "there can be no legitimate purpose for a state to involve itself in the area of civil damage litigation between private parties wherein punitive damages are a legitimate item of recovery, where the State, through the legislative process, preempts for itself a share of the award." \textit{Id.} at 1579.} \footnote{102. See notes 95-100 and accompanying text.} \footnote{103. U.S. Const. amend. V.} \footnote{104. Kirk v. Denver Publishing Co., 818 P.2d 262, 269 (Colo. 1991).} \footnote{105. \textit{Kirk}, 818 P.2d at 269.} \footnote{106. \textit{Id.} at 268 (citing McCullough v. Virginia, 172 U.S. 102, 123-24 (1898)). The court held that: [F]orcing a judgment creditor to pay the state general fund one-third of a judgment for exemplary damages . . . without conferring on the judgment creditor any benefit or service not furnished to other civil litigants not required to make the same contribution[ ] amounts to an unconstitutional taking of the judgment creditor's property in violation of the Takings Clause. . . .}
The Colorado statute specifically required the plaintiff to pay one-third of the punitive damage award to the state, but the statute specifically disclaimed an interest until payment of the state share became due.\textsuperscript{107}

The Florida Supreme Court reached the opposite result in \textit{Gordon v. Florida}.\textsuperscript{108} The Florida court held that there is no property right in punitive damages.\textsuperscript{109} In \textit{Gordon}, the court stated that punitive damage awards are not meant to be compensation to the plaintiff, but are based on public policy considerations, and as such, the legislature has plenary authority to place whatever conditions it deems appropriate on the award of punitive damages.\textsuperscript{110} The court held that no taking occurs when the state receives a portion of the punitive damage award because it achieves a legitimate public purpose.\textsuperscript{111}

It is possible to avoid the result reached by the Colorado Supreme Court by requiring the defendant to pay the state's portion of a punitive damage award directly to the clerk of courts rather than to the plaintiff. The result is that the plaintiff has no interest in the punitive damage award and, hence, no property interest.\textsuperscript{112} The Florida court's holding that punitive damages are not a matter of inherent right is in accord with the majority of commentators.\textsuperscript{113} In addition, the court's holding is logically supported by the fact that punitive damages are awarded for the benefit of society.\textsuperscript{114} A plaintiff cannot possibly have a property right in something where there is discretion in whether the plaintiff should receive it.

\textbf{V. Full Statutory Extraction}

Although similar to the states that require a portion of punitive damages be paid to the state, full statutory extraction would require payment to the state of the entire punitive damage award,

\begin{flushright}
\textit{Kirk}, 818 P.2d at 272.
\end{flushright}

\begin{itemize}
  \item \textsuperscript{108} 608 So.2d 800 (Fla. 1992), cert. denied, 113 S. Ct. 1647 (1993).
  \item \textsuperscript{109} \textit{Gordon}, 608 So.2d at 801.
  \item \textsuperscript{110} \textit{Id.}
  \item \textsuperscript{113} See, e.g., \textit{Keeton et al.}, cited at note 32, § 2, at 14 ("It is generally agreed that punitive damages are . . . not a matter of right and that it is always within the discretion of the jury or trial judge to withhold them." \textit{Id.}).
  \item \textsuperscript{114} See note 19.
\end{itemize}
less the plaintiff's litigation costs and reasonable attorney fees. Implementing such a scheme is a form of tort reform. Although one benefit of full statutory extraction is that fewer marginal suits seeking punitive damages will be brought, this is not, however, the main purpose of the plan. The purpose of full statutory extraction is three-fold: (1) to take the windfall of punitive damages away from the plaintiff; (2) to maintain the level of punishment and deterrence provided by punitive damage awards; and (3) to provide a means to compensate plaintiffs who cannot have their compensatory judgments satisfied.

This section describes some of the aspects that a state will need to consider prior to enacting full statutory extraction. Part A covers the first issue that must be settled: where the punitive damages award would go. Pleading punitive damages is discussed in Part B. Part C discusses the function of the jury. Part D describes how an incentive is provided to the plaintiff and the payment of attorney fees. Part E discusses the impact of statutory extraction on the settlement process.

A. The Tort Victims' Compensation Fund

Upon judgment and satisfaction, the state would deposit the award of punitive damages into a specially created “Tort Victims' Compensation Fund.” The primary purpose of the compensation fund is to provide compensation to plaintiffs who could not have their compensatory judgments satisfied because of the defendant’s insolvency. Where the defendant is insolvent, the plaintiff would

115. Statutory extraction should not be used to limit the size of punitive damage awards since placing caps on such awards would result in underdeterring egregious conduct. However, to avoid excessive fines issues, such caps or fixed ratios may need to be established. See notes 123-24 and accompanying text.

116. However, it may be that where full statutory extraction is in effect, more litigation may be instituted by plaintiffs who know that they cannot collect a compensatory damage award from insolvent defendants, but can nevertheless recover from the compensatory fund. See note 118 and accompanying text.

117. The Tort Victims' Compensation Fund postulated is similar to that established by Missouri. Mo. Rev. Stat. § 537.675(2) (1988).

118. The question that arises is whether the victims' compensation fund would have enough money to carry out its purpose. If the critics that charge that punitive damages awards are increasing in frequency and amount are correct, then the compensation fund will be fully funded. See, e.g., Sales & Cole, cited at note 10, at 1154. However, if the proponents of punitive damages are correct, the compensation fund will be under funded. See e.g., Daniels & Martin, cited at note 9, at 43.

It is interesting to note that both sides to this argument have cited the same study performed by the Rand Corporation Institute for Civil Justice. See Daniels & Martin, cited at note 9, at 24-27 (discussing Tort Policy Working Group, United States Department of
apply to the fund to receive payment to cover the uncollectible portion of its compensatory judgment. In setting up the compensation fund, the state should limit claims against the fund to natural persons who suffered tort injuries.\textsuperscript{119}

Paying the punitive damage award to the compensation fund would serve the public purpose more so than allowing the plaintiff to keep the entire award or any portion of it.\textsuperscript{120} In a sense, awarding punitive damages to the state is compensation to society for the harm inflicted by the defendant.\textsuperscript{121} The compensation fund is

\textit{JUSTICE,} 39-42 (1986) (punitive damages are increasing in size and frequency); \textit{SPECIAL COMMITTEE ON PUNITIVE DAMAGES, SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION} 17-18 (1986) (except for intentional torts, punitive damages are neither awarded frequently nor in excessive amounts). For a more current and more comprehensive survey and analysis, see Daniels & Martin, cited at note 9. \textit{See also,} Justice Janie L. Shores, \textit{A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls,} 44 \textit{ALA. L. REV.} 61, 82-84 (1992) (citing Milo Geylelin, \textit{Product Suits Yield Few Punitive Awards,} \textit{WALL ST. J.}, Jan. 6, 1992, at B1 (summarizing a study of punitive damages in products liability cases released by the Roscoe Pound Foundation)).

\textsuperscript{119} Corporations, partnerships, associations and the like, would be excluded from recovery from the fund even though their injuries may be just as severe as a natural person's injury. Statutory extraction can be likened to state-provided benefits. As with welfare benefits, only natural persons should be allowed to collect them.

In so limiting who may collect from the compensation fund, the state may violate the Fourteenth Amendment's Equal Protection Clause. However, since the rational basis test is applied, a state may justify such a limitation as being rationally related to a legitimate state interest: protecting natural individuals from the effects of harmful conduct beyond their control. \textit{See generally, McBride v. General Motors Corp.,} 737 F. Supp. 1563, 1576 (M.D. Ga. 1990) (holding that the Georgia statutory extraction scheme violated equal protection because it discriminates against individual plaintiffs for which such discrimination is not rationally related to a legitimate state interest).

Likewise, persons unable to collect contract action judgments should be prohibited from recovering from the compensation fund. Generally, the recovery of damages in actions arising out of contract are limited to those losses that are within the contemplation of the parties at the time the contract was formed. Hadley v. Baxendale, 156 Eng. Rep. 145 (1854). As a general rule, punitive damages are not recoverable in actions based on breach of contract unless the breach supports an independent action in tort. \textit{See RESTATEMENT (SECOND) OF CONTRACTS} § 355 (1981) (punitive damages not recoverable for breach of contract); \textit{Id.} at § 344(a) (damages may not exceed the expected benefit of the bargain). It would be unfair to allow the victim of a contract action to recover an uncollectible judgment from the compensation fund because contract actions alone never produce punitive damages. Further, the insolvency of a party to a contract is one of the risks taken by the other party when entering an arm's length transaction. Tort victims do not have the opportunity to enter into a free bargain with the wrongdoer.

\textsuperscript{120} Regardless of whether the punitive damage award is paid to the plaintiff or to the compensation fund, the public purpose of punishing and deterring conduct which society condones is served; but payment of the punitive damage award to the state serves the added public purpose of preventing hardship to some members of society.

\textsuperscript{121} Dorsey D. Ellis, Jr., \textit{Fairness and Efficiency in the Law of Punitive Damages,} 56 \textit{S. CAL. L. REV.} 1, 29 (1982) (compensatory damages paid to the plaintiff alone do not pro-
rationally related to a legitimate legislative purpose: preventing some members of the public from bearing the full cost of injuries resulting from another's egregious conduct.

Without the compensation fund, a tort victim must rely on public support in the form of welfare or Medicaid if the victim cannot recover compensatory damages because of the defendant's insolvency and the victim's medical or accident bills drive the victim to insolvency. To this end, the compensation fund would help relieve the state's citizens of the tax burden of supporting such a tort victim.122

A state with full statutory extraction may run the risk that the statute violates the Eighth Amendment Excessive Fines Clause.123 If the Excessive Fines Clause does apply, a state may have to impose a cap or a fixed ratio on awards of punitive damages,124 and ensure that amounts received are earmarked for purposes other than general revenue.

B. Pleading and Proving Punitive Damages

With statutory extraction, the plaintiff must still make a demand for punitive damages125 and prove the defendant's conduct was oppressive, malicious, intentional, willful and wanton, reckless, or outrageous. The finder of fact would award punitive damages as it has always done, based on the severity of the defendant's conduct and the defendant's character.126
In any proceeding where there is state action that can potentially deprive a person of his or her life, liberty or property, the person is entitled to due process. Under full statutory extraction, the defendant's due process rights are protected because the demand notifies the defendant that he must defend against punitive damages. This notification allows the defendant to prepare a defense against the claim for punitive damages.

Full statutory extraction of punitive damages does not require the state to change the burden of proof required of the plaintiff. However, it can be argued that the burden of proof for awarding punitive damages should be clear and convincing evidence.

Should the jury return a verdict for punitive damages, the defendant would be able to move for remittitur or new trial. The court would then determine whether the jury's award was the result of passion, bias, or other improper motive. Where the court

1147. In so doing, these jurisdictions set an award of punitive damages higher in some cases and lower in others for the same wrong. In theory, the defendant's wealth is irrelevant as a factor in setting the punitive damage award: a wrong committed by a wealthy defendant injures society to the same extent as the exact same wrong committed by a poor defendant.

Under full statutory extraction there is no incentive for the plaintiff to litigate the issue of wealth since he is not the beneficiary of the punitive damage award. Aside from judicial economy, not introducing evidence of the defendant's wealth also preserves the privacy of the defendant. This is important where the plaintiff cannot make out a prima facie case for punitive damages.

However, what is adequate deterrence to one person, may not be for another. Therefore, bifurcation of the punitive damages issue from the defendant's liability may offer a method of preserving the defendant's privacy while at the same time ensuring an adequate level of deterrence. With bifurcation, discovery of the defendant's wealth would take place before the trial that determines the defendant's liability. However, evidence of the defendant's wealth would only be presented after the jury found the defendant liable of the wrongful conduct. Wheeler, cited at note 10, at 300. The trial judge would then make a determination of whether the plaintiff has made out a prima facie case for punitive damages. If so, the trial would enter a second phase to assess punitive damages at which point the plaintiff would then be able to introduce evidence of the defendant's wealth.

127. See, e.g., Shaffer v. Heitner, 433 U.S. 186 (1977) (holding that traditional quasi in rem jurisdiction is constitutionally inadequate for lack of proper notice before deciding the dispute over the property); Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (due process affords to every person the right to be treated with fundamental fairness). See also notes 75-92 and accompanying text.

128. 22 Am. Jur. 2d Damages § 819 (1988) (state and federal courts require that a demand for punitive damages be made so as to put the defendant on notice as to what he must defend against).

129. Shores, cited at note 118, at 88.

130. Id. at 92. It has been argued that "awarding exemplary damages to the state might permit the jury to take a more objective view of the defendant's motives and conduct, divorced from sympathy or dictate for the plaintiff." Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 517 (1957). But see, Steven J. Sensibar, Punitive Damages: A Look at Origins and Legitimacy, 41 Fed'n. Ins. & Corp. Couns. Q. 375, 387 (1991) (Punitive
concludes that the verdict was the result of passion, bias, or other improper motive, the court could order a new trial. However, if this is not the case, the trial judge would next consider whether the punitive damage award was excessive based on the evidence of the defendant's conduct. Where the court determines the verdict is excessive, the court may deny the defendant's motion for a new trial conditioned upon the plaintiff's remittitur in the amount determined by the court.

C. Function of the Jury and Appellate Review

The jury that determines the defendant's liability is in the best position to determine the compensatory and punitive damage awards. Full statutory extraction does not change the function of the jury. However, proper jury instructions that explain the differences and applications of each are necessary to ensure that the plaintiff is fully compensated for his or her actual injuries.

The common law method of instructing the jury is not only constitutional, but is also the proper method for use with full statutory extraction. When instructing juries on the amount to award as punitive damages, the court normally explains that the jurors may, in their discretion, award an amount that is sufficient to punish the defendant and to protect the public by deterring the defendant and others from engaging in similar conduct. As long as the damage awards would more than increase, "[t]hey would follow the Voyager spacecraft out of the solar system." Id.).

131. Shores, cited at note 118, at 92.
132. See generally, FED. R. CIV. P. 50 & 59.
133. Even if the punitive damages issue is bifurcated from the liability issue, the jury that determined the defendant's liability is in the best position to determine the level of punishment and deterrence necessary because it will have heard all the evidence.
134. Some commentators have argued that juries tend to mix the awards together causing the compensatory damages to be less than compensatory and the punitive damages to be more than punishment and deterrence. See, e.g., Clarence Morris, Punitive Damages in Personal Injury Cases, 21 Ohio St. L.J. 216, 226 (1960) ("[T]he latitude permitted in calculating personal injury award[s] is so wide that proof of defendant's outrage will enhance some verdicts without an express instruction allowing punitive damages." Id.).

Other commentators have argued that trials should be bifurcated so that the issue of punitive damages is tried only after the liability of the defendant is established. Wheeler, cited at note 10, at 300; see also note 126. The rationale is that to prevent swaying the jury, inflammatory evidence of the defendant's conduct will not be present at the trial that determines the defendant's liability. Wheeler, cited at note 10, at 301. Only California and Georgia have enacted bifurcated trial procedures for punitive damages cases. CAL. CIV. CODE § 3295 (West Supp. 1992); GA. CODE ANN. § 15-12-5.1 (Michie Supp. 1992).

136. See Model Jury Instruction quoted in GHIARDI & KIRCHER, cited at note 13, ch. 11; Haslip, 111 S. Ct. at 1037 n.1 (quoting the Alabama jury instruction).
standards are "sufficiently definite and meaningful" so as to con- 
strain the discretion of the jury, a defendant's due process rights 
will not be violated.137

Reasonableness requires that the state provide a procedure for 
the trial judge or appellate courts to review the amount of punitive 
damages awarded by the jury. Further, to be reasonable, there 
must be a rational relationship between the amount of the punitive 
damages awarded and the amount necessary to punish and de- 
ter.138 Additionally, "[p]unitive damages should bear a reasonable 
relationship to the harm that is likely to occur from the defend-
ant's conduct as well as to the harm that has actually occurred."139 
Judicial review of reasonableness may be self-imposed by the 
courts, or the legislature may establish the reasonableness stan-
dard.140 As long as review is possible, this method of awarding pu-
nitive damages does not violate due process,141 even if the jury is 
given significant discretion in determining the amount of the 
award.142

Therefore, states that enact full statutory extraction143 should 
continue to use the common law methods of jury instruction and 
allow the jury to determine the size of the award, subject to judi-
cial review for reasonableness. Merely codifying the common law 
rules should not impact this result.144 In either case, the critical

137. Haslip, 111 S. Ct. at 1045; also see notes 75-92 and accompanying text.
138. Haslip, 111 S. Ct. at 1045-46. The traditional test of reasonableness is "that puni-
tive damages must bear a reasonable relationship to [the] compensatory damages." Galligan, 
cited at note 38, at 34.
139. TXO Prod. Corp. v. Alliance Resources Crop., 419 S.E.2d 870, 909 (W. Va. 1992), 
aff'd, 113 S. Ct. 2711, 2721 (1993) (citing this passage with approval).
140. Justice Kennedy criticized the reasonableness standard as "nothing more than [a 
court's] own subjective reaction to a particular punitive damages award." TXO Prod., 113 S. 
Ct. at 2725. The Justice would change the focus of reviewing a punitive damages award 
away from the amount awarded to the jury reasons for awarding it. Id.
141. Haslip, 111 S. Ct. at 1043.
142. Id. at 1044. Discretion cannot be unlimited, but must be "confined to deterrence 
and retribution... the state policy concerns sought to be advanced." Id.
Some commentators suggest that appellate courts must make a presumption that the jury 
acted reasonably in determining liability and unreasonably in granting punitive damages. 
Wheeler, cited at note 10, at 301. They argue that bifurcation eliminates this split presump-
tion since the issue of liability is established first. Id.
143. A state's legislature does not have to enact a statute in order for the state to 
enjoy the benefits of statutory extraction. "Courts have the inherent authority to allocate 
punitive damage awards without legislation directing such allocation." Shores, cited at note 
118, at 90. Such an allocation of punitive damages would, however, require the court to 
determine the beneficiary of the award and administrate the payment.
(Brennan, J., concurring) (stating "[w]ithout statutory (or at least common law) standards
elements are ensuring that the jury is given clear instructions on
the purpose of punitive damages and the factors and evidence that
it must consider in determining the size of the award.

D. Plaintiff’s Incentive and Attorney Fees

It makes no difference to the defendant, who must pay punitive
damages, whether he or she must pay them to the plaintiff or to
the state. If paid to the state, however, the plaintiff will lack an
incentive to pursue punitive damages because the plaintiff is not
the beneficiary of the award. After all, why should the plaintiff pay
an attorney to pursue and prosecute the elements necessary to re-
cover punitive damages if the plaintiff will not receive an economic
benefit from such an expenditure?

In order to ensure that a plaintiff pursues punitive damages
under full statutory extraction, the plaintiff’s litigation costs, in-
cluding reasonable attorney fees,\textsuperscript{145} would be paid from the puni-
tive damage award.\textsuperscript{146} After the plaintiff’s judgment for compen-
satory damages has been satisfied, the defendant would make
payment directly to the clerk of courts for the punitive damages
assessed. The clerk of courts would then, upon the trial judge’s or-
der, pay the plaintiff any costs incurred,\textsuperscript{147} the plaintiff’s attorney
fees, and forward the remainder to the compensation fund. Under
full statutory extraction, the state is the judgment creditor for the
punitive damage award. Making payment to the clerk of courts di-
rectly avoids the issue of a “taking.”\textsuperscript{148} The result of this process is
that compensatory damages become truly compensatory because
the plaintiff’s litigation costs are entirely paid, and punitive dam-
ages perform their primary function of deterrence and punish-ment.\textsuperscript{149}
In determining the attorney fees, the trial judge should be given broad discretion, with the attorney-client fee agreement as the starting point. It would not matter whether the plaintiff agreed to pay an hourly rate or a contingency fee to the attorney.\textsuperscript{150}

The trial judge must also be given broad discretion to strike from the pleading the demand for punitive damages to insure that the plaintiff's attorney seeks punitive damages only in a proper case.\textsuperscript{151} Therefore, a plaintiff who cannot make out a case for punitive damages would not be paying his or her attorney for trying to prove the necessary elements.\textsuperscript{152}

If a plaintiff demands punitive damages, and the judge does not strike the demand from the case, but the jury does not return an award for punitive damages, the plaintiff would not be required to pay the attorney for pursuing the punitive damages demanded. Rather, the trial judge would make a determination of the reasonable value of the attorney's work in pursuing the punitive damages claim and issue an order entitling the attorney to seek payment from the compensation fund in the amount specified by the judge's order.\textsuperscript{153} Payment from the compensation fund ensures that attorneys continue to seek legitimate claims for punitive damages.

There are cases where the defendant's wrong justifies assessing the defendant. Breslo, cited at note 23, at 1136. Under the American Rule, the successful party is not awarded attorney fees unless such are granted by statute. Douglas Laycock, Modern American Remedies 2 (1989). A plaintiff who recovers only compensatory damages is not made whole because he must pay his attorney. Ghiardi, cited at note 66, at 194. Hence, the American Rule actually may cause a successful plaintiff to incur a loss.

Where punitive damages can be awarded, the plaintiff will, in most cases, be able to cover litigation costs whether the state follows the common law or statutory extraction. Even if this truly is an unfair advantage, the plaintiff would not have gained the advantage but for the defendant's egregious conduct.

\textsuperscript{150} The statute could require the trial judge to justify any decision where the attorney's fees are reduced from those requested. Further, the state should allow the attorney to appeal the trial judge's decision. For contingency fee agreements, the state may seek to impose a limit such as 25\% of the total of compensatory and punitive damages or some form of a sliding scale based on the size of the award.

\textsuperscript{151} Professor Owen suggested a judge be given power to "screen out" improper claims for punitive damages for the purpose of promoting fairness and efficiency even under the current system of awarding punitive damages. Owen, cited at note 21, at 120.

\textsuperscript{152} The trial judge's power to strike a demand for punitive damages should extend up to the time of trial. In making this decision, the trial judge could review all discovered material on either side. If the trial judge determines that there is a reasonable likelihood that the jury will return an award for punitive damages, the judge should let the claim go forward.

\textsuperscript{153} In this situation, the attorney's efforts should be based on the prevailing local hourly rate regardless of the fee arrangement with the client. It is entirely possible for the attorney to bring a claim of quantum meruit against the state for the services rendered; after all, the state is the beneficiary of the attorney's efforts.
punitive damages but the actual injury suffered by the plaintiff is insignificant. Under the current system of awarding punitive damages, if the total award is not large enough to cover the plaintiff's compensatory damages and attorney fees, the plaintiff will probably not bring suit because doing so would result in a pecuniary loss. The result is that the defendant is not punished for wrongful conduct. Where there is a shortfall, statutory extraction would allow the attorney to recover the amount of the shortfall from the compensation fund. Further, the plaintiff has an incentive to bring suit to recover compensatory damages for his or her injury regardless of how small. The assessment of punitive damages also punishes the defendant and deters him and others from engaging in low injury wrongs that otherwise would have gone unpunished.

It is not clear whether full statutory extraction would reduce the number of claims for punitive damages, but it is clear that allowing plaintiffs to keep punitive damage awards promotes persons to become "eager victims." An eager victim consciously increases his or her losses by allowing the defendant to act wrongfully. Full statutory extraction would reduce the number of "eager victim" cases by taking away the incentive to become a victim.

E. The Settlement Process

One advantage of full statutory extraction is that it provides an incentive to settle rather than to litigate. The main reason for this is that plaintiffs would be entitled to keep any amount the defendant is willing to pay in settlement of the plaintiff's claim. This includes amounts greater than that necessary to compensate the plaintiff for his or her injuries.

Under statutory extraction, a plaintiff will seek to settle at any amount that is equal to or greater than the plaintiff's actual injury. Of course, the plaintiff will also factor in the probability of succeeding in litigation should the plaintiff be forced to pursue the claim in court. However, the plaintiff's attorney fees are recovered under full statutory extraction and, thus, this is not a factor for the

154. Cases where the compensatory damages are low may be important to society (e.g., activity that results in a large number of small injuries, infringement of the right to vote, etc.). Dan B. Dobbs, Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies, 40 ALA. L. REV. 831, 846-48 (1989). The punitive damage award pays the attorney fee for the plaintiff who acts as a "private attorney general." Id. at 847.
155. Toy, cited at note 39, at 328.
156. Id. at 328-29.
plaintiff in determining whether to settle or not.\textsuperscript{157}

The defendant will settle at any amount that is less than what the defendant would pay in compensatory and punitive damages plus the defendant’s litigation costs. The defendant will also factor in the probability of his or her being held liable if forced to go to court. Under full statutory extraction, punitive damages act as an incentive for each side to settle because, should the case go to trial, the defendant would still be liable for punitive damages even though the plaintiff would not receive the award. Settling allows the plaintiff to receive more than his or her expected award and the defendant to pay less than his or her expected liability.

The following example will illustrate how full statutory extraction would impact the settlement process.\textsuperscript{158} Assuming a non-statutory extraction scheme, the plaintiff may estimate his or her compensatory award at $10,000, punitive damages award at $10,000, litigation costs at $1,000, and settlement costs at $500. The plaintiff may view the probability of success for each award at fifty percent, respectively. Hence, the plaintiff would be willing to settle at any amount over $9,500.\textsuperscript{159} Assuming that the defendant estimates the same amounts for each award, estimates a fifty percent probability of being held liable on each award, and has the same litigation costs and settlement costs, then the defendant will settle at any amount less than $10,500.\textsuperscript{160} Therefore, the plaintiff and defendant in this example will agree on any amount between $9,500 and $10,500.

The only difference between a nonstatutory extraction scheme

\textsuperscript{157} However, settlement costs are a factor that both the plaintiff and the defendant must consider. Presumably, these costs will be less than the expected litigation costs.

\textsuperscript{158} The examples used in this comment are a modified version of examples from Breslo, cited at note 23, at 1158-61. The modification made herein is that this comment argues in favor of having attorney fees paid from the punitive damage award or from the compensation fund.

Breslo provides a thorough economic explanation of the settlement process under a plan similar to full statutory extraction.

\textsuperscript{159} The plaintiff's settlement amount is determined by the summation of (1) the compensatory damages multiplied by the probability of success, (2) the plaintiff's estimation of the punitive damages multiplied by the probability of success, and (3) subtracting the estimated litigation costs plus the estimated settlement costs. Mathematically:

\begin{equation}
($10,000 \times .50) + ($10,000 \times .50) - $1000 + $500 = $9,500.
\end{equation}

\textsuperscript{160} The defendant's settlement amount is determined by the summation of (1) the defendant's estimate of the compensatory damages multiplied by the probability of liability, (2) the defendant's estimation of punitive damages multiplied by the probability of liability, and (3) the defendant's litigation costs minus the difference between litigation costs and settlement costs. Mathematically:

\begin{equation}
($10,000 \times .50) + ($10,000 \times .50) + $1000 - $500 = $10,500.
\end{equation}
and a full statutory extraction is that the plaintiff's expected punitive damages would be zero. The defendant must still factor an award of punitive damages into the amount he is willing to pay to settle. Thus, the plaintiff would be willing to settle for any amount above $5,500. The defendant would still be willing to settle at any amount less than $10,500 since nothing has changed for him.

In either case, settlements are possible, but the mere fact that the possible settlement range is larger under statutory extraction suggests that plaintiffs and defendants are more likely to reach a settlement favorable to both. Each side will benefit from settlement under full statutory extraction. For the above example, assuming a settlement at the midpoint, or $8,000, the defendant would pay $2,500 less than the defendant would expect to pay if he or she were forced to go to trial. Likewise, the plaintiff would receive $2,500 more than the plaintiff would expect to receive if the plaintiff were forced to press his or her claims.

Where the parties do in fact settle, the state should not have an interest in the amount that may represent punitive damages. This would be the case where the plaintiff receives more from the settlement than his or her actual injuries. The state would discourage settlement if it were to do otherwise.

VI. Conclusion

Full statutory extraction is a method of tort reform that prevents the plaintiff from receiving a punitive damages windfall. Proper implementation of statutory extraction would not be disruptive to the state's legal system, but would easily fit within it. The state, however, would need to formulate administrative procedures for the effective tracking and execution of punitive damage awards.

161. ($10,000 X .50) + ($0 X .50) + $0 + $500 = $5,500. The plaintiff's attorney fees are paid from the punitive damage award or the compensation fund if litigation is necessary.

162. There is a drawback to this approach. Where the defendant settles for less than what the defendant otherwise would have paid had the suit gone to trial, it can be argued that the defendant is not effectively punished.

163. There are, of course, a number of reasons why the settlement process could break down: (1) both parties are overly optimistic of their probability of success at trial; (2) one party may try to squeeze the other causing ill will and spite; (3) the plaintiff may not be financially motivated, but motivated by punishing the defendant; (4) the defendant may prefer to defend against all claimants. Breslo, cited at note 23, at 1161 (citing, ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 485-86 (1988); Elizabeth Hoffman & Matthew L. Spitzer, Experimental Tests of the Coase Theorem with Large Bargaining Groups, 15 J. LEGAL STUD. 149, 168 (1986)).
Statutory extraction offers several advantages over the common law method of allowing the plaintiff to keep a punitive damage award. First, statutory extraction avoids windfalls for the plaintiff that the common law cannot avoid. Second, statutory extraction benefits society by accomplishing the purposes of punishment and deterrence and by establishing a tort victims’ compensation fund for those claimants who cannot collect their compensatory judgments. Finally, with the exception of eager victim cases, statutory extraction should not reduce the number of punitive damages cases, but will help to ensure that only legitimate cases for punitive damages are brought forward.

There are a number of constitutional issues that must be addressed when crafting the legislation necessary to implement statutory extraction. The Fifth Amendment Takings Clause can be avoided by requiring the defendant to pay the award directly to the state via the clerk of courts. The statute must also expressly state that the state is the judgment creditor to the punitive damage award, and the plaintiff has no right to the award.

However, in avoiding the Takings Clause, the statute may run afoul of the Excessive Fines Clause. Only by giving trial judges and appellate courts broad discretion to ensure that the punishment fits the wrong and to reduce damage awards that are unreasonable will the state be able to avoid the Excessive Fines Clause. Nevertheless, the state must not cap punitive damage awards, otherwise, wrongful conduct would be undeterred.

Finally, even though the state is to be considered a judgment creditor, the state should not have any interest in the litigation or its outcome, nor should the state be able to compel a claimant to seek punitive damages. In addition, should the plaintiff and defendant settle, the state must not have an interest in the settlement, nor should the state seek payment from the settlement. Careful navigation of the constitutional issues would result in effective extraction of punitive damages. This writer believes that extraction of punitive damages would serve our legal system well.

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