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Bridging the "Philosophical Void" In Punitive Damages: Empowering Plaintiffs and Society Through Curative Damages

LEAH R. MERVINE†

INTRODUCTION

On Saturday, March 25, 1995, at 3:35 p.m., eighteen-year-old driver Jason Moore approached the peak of a steep hill in Stark County, Ohio transporting five of his friends from Northwest High School.1 Little did they know that on a routine drive, their lives would be shattered. A blink-of-the-eye later, all of the car's backseat passengers were dead. Like the many accidents that occurred at this exact spot, Moore's car collided with a Conrail freight train. This

† Managing Editor, Buffalo Law Review, 2006-2007; J.D. Candidate, Class of 2007, State University of New York at Buffalo Law School; M.S.W. State University of New York at Buffalo; B.A. The University of Vermont. Without the guidance and encouragement of Giuseppe A. Ippolito, this Comment would not have been possible. I am also grateful to my moot court partner Geoffrey A. Kaeuper, for his unwavering support throughout this writing process and law school. Additionally, I owe much gratitude to the Moore family for sharing their story, attorney Tom Murray for his time, Professor Laura Reilly for her editing assistance, and to the associates and editors of the Buffalo Law Review who worked on this Comment. This Comment is dedicated to my parents, Barbara I. Mervine and Lawrence E. Mervine, and to my grandparents, Otto Hahn, and the late Pearl Nevins Hahn, not only for teaching me the value of tzedakah, tikkun olam, and social justice through their words, but for instilling these virtues in me through their actions, and to Nathaniel Carpenter Merritt for reminding me of their lessons daily.

1. See James F. McCarty, Turning Tragic Loss Into Help for Others, PLAIN DEALER, Feb. 28, 1998, at 1A; Dave Sereno, Railroad Guardians, REPOSITORY, Feb. 24, 1998, at 1A. The teenagers decided to take a Saturday afternoon drive to see a piece of land that Jason Moore's parents were contemplating purchasing. See Affidavit of Jason B. Moore at 3, Moore v. Consol. Rail Corp., 1995-CV-01196 (Stark County Ct. of Com. Pl. filed July 18, 1995).
train-car collision was the eighth accident and eighth fatality to occur at the Deerfield crossing since 1975.\textsuperscript{2}

The driver's parents, Vicky and Dennis\textsuperscript{3} Moore, were devastated. Jason Moore, along with Jennifer Helms and Rebecca White, were seriously injured; seventeen-year-old Joshua White and sixteen-year-old Alyson Ley were dead.\textsuperscript{4} But the most devastating blow to the Moores came when they learned that their youngest child, sixteen-year-old Ryan Moore, was also killed.\textsuperscript{5} To add insult to injury, the Moores discovered that the accident could have easily been avoided if the crossing had been properly marked.\textsuperscript{6} Instead of flashing lights and a gate, all that marked the Deerfield Avenue crossing was a simple crossbuck sign.\textsuperscript{7} When the

\begin{itemize}
\item \textsuperscript{2} McCarty, supra note 1, at 1A. The first accident occurred on July 12, 1975 when a southbound car was struck by a Conrail train. The driver, Theodore Mika, along with his wife Marion, and passenger Judith Hammock were killed. Only one passenger in the car, Judith Hammock's husband Lee, survived. See Affidavit of Lee Hammock at 1, Moore v. Consol. Rail Corp., 1995-CV-01196 Stark County Ct. of Com. Pl. filed July 18, 1995). According to Vicky Moore, gates were finally installed in November of 1995 at the Deerfield crossing, eight months after their son and his friends were killed. Interview with Vicky L. Moore, Trustee, The Angels on Track Foundation/Crossing To Safety, in Salineville, Ohio (July 31, 2006) [hereinafter Vicky Moore Interview].
\item \textsuperscript{5} See id.
\item \textsuperscript{6} Despite the fact that Jason slowed the car to around ten miles per hour and looked both ways, he only saw the train as it began to collide with his car. See Order at 9, Moore v. Consol. Rail Corp., 1995-CV-01196 (Stark County Ct. of Com. Pl. filed July 18, 1995). Moreover,

Conrail knew that Deerfield [Road] had a 55 miles per hour speed limit and that 25 trains a day traveled at speeds up to 60 miles over this crossing. Conrail knew that no stop sign was present on Deerfield Road at the crossing. Conrail knew that foliage significantly obstructed the view of cars on Deerfield Road. With the accident history, with the road and track speed, with the hill contour, with the foliage, Conrail knew harm accompanied its failure to safeguard this crossing.

\textit{Id.} at 10.
\item \textsuperscript{7} A crossbuck sign is “a white, X-shaped sign with the words ‘RAILROAD CROSSING’ written in black.” Justice Paul E. Pfeifer, Railroad Crossings (Sept. 4, 2002) (unpublished column on file with the Supreme Court of Ohio Office of Public Information). On June 23, 1993, a “Buckeye crossbuck” was installed at
\end{itemize}
Moores learned of the hazard the crossing presented, they mustered their strength and decided to fight back. But as they considered a civil suit against Conrail, they faced the disconnect created by America's civil litigation system—how do you derive satisfaction from the legal fiction that money can replace lives? The Moores, determined to make Conrail accountable for its actions, went through the motions of a civil trial, if for nothing else but to punish Conrail for its inaction and achieve some semblance of justice for their son. They had no intention to use the legal system to swap their son's life for a check.\(^8\) Represented by several attorneys, including Tom Murray,\(^9\) the Moores sued Conrail for wrongful death.\(^10\)

During the litigation of the Moore case something "magical" happened.\(^11\) After the jury assessed compensatory damages against Conrail, the jury affirmed that punitive damages were warranted.\(^12\) Before assessing punitive

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the Deerfield Road crossing. A "Buckeye crossbuck" is also a passive marker, but offers additional features including red and white reflective material and a red panel on the lower half featuring the word "YIELD." See Affidavit of F.X. Giacoma at 1, Moore v. Consol. Rail Corp., 1995-CV-01196 (Stark County Ct. of Com. Pl. filed July 18, 1995).

8. Before going to trial, the Moores spoke with their attorneys about their desire to earmark any award toward protecting the public from dangerous, unmarked crossings like the one that killed their son. "Denny and I had always known what we wanted to do; we just didn't know how to go about it." Vicky Moore Interview, supra note 2.

9. Thomas (Tom) J. Murray, Jr. is a senior partner at Murray & Murray Co., L.P.A. in Sandusky, Ohio. Mr. Murray has coined the concept of "curative damages."


12. In the Moore case, liability was assessed separately from the punitive damages in what is known as a bifurcated trial. See id. Ohio Civil Rule 42(B) provides:

The court, after a hearing, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, or third-party claims, or issues, always preserving inviolate the right to trial by jury.
damages the jury recognized the Moore's dilemma—money could never replace their son. Disturbed by the hazardous conditions that existed at the crossings like the one that killed Ryan Moore, Joshua White, and Alyson Ley, the jury wanted Conrail to be held accountable in a meaningful way. In a special note sent to the trial judge, the jury questioned whether they were permitted to ask the plaintiffs to use a portion of the punitive damages to install safety lights and gates at similar crossings. In an unprecedented move, Judge James S. Gwin allowed the question. The Moores, who sued seeking justice not "blood money," eagerly agreed to sign a binding stipulation to assign one hundred percent of their punitive damages award toward improving the safety of Ohio's railroad crossings.

In another unprecedented move, Judge Gwin also informed the jury that the Moores agreed to use their portion of the punitive damages toward improving the safety of crossings like the one that killed their son. When the trial ended on June 28, 1997, the Moores were awarded $7 million in punitive damages. Like soon-to-be-parents, the Moores spent the next year preparing for the arrival of the award. They worked with attorneys from Akron, Ohio to set up a charitable foundation, naming it "The Angels on Track Foundation." In February 1998, after the Ohio Supreme Court approved the award, and attorney's fees and costs were deducted, $5.4 million provided the seed


13. Tom Murray Interview, supra note 11.


15. See Tom Murray Interview, supra note 11; see also Vicky Moore Interview, supra note 2.

16. The White family, who also lost their son, received $1 million in punitive damages, which they donated to the YMCA of Stark County. The family of Alyson Ley settled out of court with Conrail. See McCarty, supra note 1, at 1A.

money for the new foundation.\textsuperscript{18} At the time, Vicky Moore declared, "[w]e wan[t] to correct the problem, and we're going to spend the rest of our lives trying to do it."\textsuperscript{19}

The Moores have remained true to their word. With the mantra "Bad Crossings Kill Good Drivers,"\textsuperscript{20} the Moores have taken railroads to task, testifying at the highest levels of government,\textsuperscript{21} all while disbursing grants to help communities afford flashing lights and gates. The autonomy provided by punitive damages funding has allowed Angels on Track to become a vocal advocate for a critical issue that is often swept under the rug by the powerful railroad interests.\textsuperscript{22} But, most importantly, this new type of justice, coined "curative damages," has given both the Moore family and society something the traditional civil system could not—a cure.

Curative damages have tremendous potential to improve the American civil litigation system. Like any promising doctrine, curative damages are garnering both praise and controversy.\textsuperscript{23} The concept involves simply allowing the plaintiff to stipulate in court that the punitive award will be put toward societal good. While this stipulation may appear simplistic, the concept is sweeping punitive damages into a new era. Rather than a purely mechanistic system of monetary compensation for losses and punishment, curative damages respond to the plaintiff's need for fulfillment. Curative damages denounce the harm to the world and restore the plaintiff's sense of justice. They do not make the plaintiff complete, but curative damages can prevent the same catastrophe from

ripping apart the fabric of someone else’s life. Curative damages have the ability to do just that—cure.

While the concept of curative damages is simple, the history behind the doctrine from which curative damages extends is dense and controversial. This Comment demonstrates the potential of curative damages and offers solutions to minimize the controversy surrounding this new doctrine. Part I of this Comment provides an overview of the concept of curative damages and how to implement curative damages into the framework of our civil litigation jurisprudence. In order to learn more about how curative damages fit into the civil litigation framework, Part II provides a look at the divisive history of punitive damages. Part III reviews modifications to punitive damages including split recovery. Part IV defends the doctrine of punitive damages. Finally, in Part V, this Comment will provide a framework for integrating curative damages into our civil justice system.

I. OVERVIEW OF CURATIVE DAMAGES

The idea behind curative damages is simple. “The idea is that damages awards are used to ‘cure’ a problem rather than provide punitive relief in the traditional sense.”24 Thus, “[i]t is an idea that promotes more constructive interaction between negligent defendants and harmed individuals.”25 Much like a class action settlement, where a corporation may give money to a charity of the plaintiff’s choice to ameliorate a harm,26 curative damages expand this arrangement into the courtroom.27


25. Id.

26. For about a decade, a number of states have routinely used the doctrine of cy pres, which was traditionally used to distribute a trust fund when the original purpose could no longer be met, in the class action arena. See NY STATE BAR ASSOC., MANUAL ON CY PRES FOR LEGAL SERVICES (2007). For example, New York’s Attorney General sued a popular women’s shoe company, Nine West, for price fixing. After “the court concluded it would have been extremely difficult to identify a meaningful number of individual shoe purchasers who were economically injured by Nine West’s conspiracy,” the court approved a cy pres settlement and allowed the Attorney General to use the funds to assist women’s charities. Press Release, Office of the New York State Attorney General, Domestic Violence, Breast Cancer Awareness Groups Among
Two main principles guide curative damages: first, that the plaintiff has a choice, and second, that instead of receiving a meaningless windfall, the plaintiff has the power to provide a curative effect. The doctrine's founder, Tom Murray, explained, "[i]t occurred to me, years ago, that this idea of punishing a defendant in a civil case could be improved upon by addressing what has historically been the most persuasive argument against punitive damages, namely that it represents a windfall for the plaintiff who has already been compensated." While curative damages were created in the context of wrongful death litigation, the concept is expandable to other civil harms.

The process is simple—with the jury's knowledge, plaintiffs make binding stipulations that they will turn a portion or the entirety of the punitive damages over to a specific charity. Informing a jury that the punitive damages are earmarked toward societal good need not be prejudicial to the defendant. Despite heavy criticism from the defense bar and judiciary, if the trial has been bifurcated and fault has been previously assigned, this information is not prejudicial to the defendant and prevents the jury from providing an inadequate award. Not only does informing the jury insure an adequate reward, it shifts power back to plaintiffs by allowing them to publicly disavow the notion that they are "trying to make a profit off a loved one's death," or trying to make a profit off of a misfortune that befell them. It is not enough for a plaintiff to make the donation after the trial is complete; the power in curative damages comes from the court's involvement with the beneficiary charity.


27. See McDonough, supra note 3, at 24.
28. See Tom Murray Interview, supra note 11.
29. McDonough, supra note 3, at 25 (quoting Tom Murray).
30. See Tom Murray Interview, supra note 11.
31. See id.
32. See id.; McDonough, supra note 3, at 25.
33. See infra Part V.
The Moore case planted the seed of possibility that curative damages can become a critical component in civil cases. Ohio Supreme Court Justice Paul E. Pfeifer praised the case's outcome, noting that the Moores, "endured catastrophe and turned their suffering into a victory of the soul." However, the Moore case is not the first time that Tom Murray attempted to make damages curative. Before the Moore case, Tom Murray litigated a similar case against the same defendant. That case involved sixteen-year-old driver Michelle Wightman and her friend Karrie Wieber, who were killed when Michelle followed a heavy stream of motorists crossing a railroad track where the gates had been activated for an extended period of time due to a disabled train. As their car crossed the track, both girls were killed instantly by a train passing on the opposite tracks.

The Wightman case has become the pioneering case for the concept of curative damages. Due to a procedural ruling that came down from the Supreme Court of Ohio, a significant break occurred between the liability phase and the penalty phase of that trial. In the time in between, Tom Murray counseled his client Darlene Wightman, who sued Conrail on behalf of her daughter's estate for wrongful death and on her own behalf for the loss of her life.

35. Id. at 34. Interestingly, despite his public praise for the Moore case, noting in the same article that "the [Moore] jury was presented with the information that money from punitive damages would go into a charitable trust," id., Justice Pfeifer has also been quoted as saying, "juries should not be made aware that part of the punitive damages would be diverted into a special fund." Lee Leonard, Ruling Highlights Court's Split: Punitive Damages Given to New Fund, COLUMBUS DISPATCH, Jan. 3, 2003, at 1C.

36. See Wightman v. Consol. Rail Corp., 715 N.E.2d 546 (Ohio 1999). The employees of the disabled train were aware that there were other active trains in the area and the visibility of their parked train created a dangerous situation as traffic began to flow across the crossing, yet they chose not to post a flagman. Police became aware of the situation, but left the scene for another call after Conrail was advised to post a flagman. One train passed the crossing at seventy miles per hour without incident. The next train to pass, which was traveling almost sixty miles per hour, broadsided the Wightman vehicle. Id. at 549.

37. Id.

38. Darlene Wightman has since divorced and changed her name to Darlene Lowery. See McDonough, supra note 3, at 24.

39. Like many other states, Ohio does not allow punitive damages in cases where the sole claim is for wrongful death. See Wightman, 715 N.E.2d at 559.
Acting on Mr. Murray's suggestion that something positive could come from the loss of the girls, Mrs. Wightman formed the Michelle Wightman Charitable Foundation. While the jury was unaware of the existence of the Foundation, the Foundation was permitted to become a party of interest in the case. In 1999, in a decision written by Justice Priefer, the Supreme Court of Ohio upheld the punitive award of $15 million, all of which went to fund the Foundation.

Just as the concept of curative damages has received national attention and praise, Tom Murray, the pioneer of this concept, has been commended by colleagues. Notre Dame Law School Dean Emeritus David Link is an advocate of the concept. He applauded Tom Murray's model, noting that "[i]t's not enough to win cases for clients. [Tom Murray] wants to make sure this doesn't

(Lundberg Stratton, J., concurring and dissenting) ("Under Ohio law, punitive damages are not permitted in wrongful death cases."); see also McBride v. Gen. Motors Co., 737 F. Supp. 1563, 1576 (M.D. Ga. 1990) ("Punitive damages are not permitted in wrongful death actions in Georgia, for this would permit a double recovery to the plaintiff."); Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 399 (Cal. Ct. App. 4th 1981) ("[T]o grant the heirs an additional, separate and independent right to recover punitive damages in a wrongful death action would permit double punishment for the same tortious conduct and could also lead to double recovery of punitive damages by the heirs."). The widespread use of curative damages may open the door for punitive damages in wrongful death cases where no property loss has occurred. The court in Wightman alludes to this issue, noting that "[a]n expensive car does not make the [punitive] award more legitimate." Wightman, 715 N.E.2d at 554.

40. The claim for the loss of the automobile allowed for punitive damages in this case. Wightman, 715 N.E.2d at 552-53.

41. The name of the foundation has been changed to the "Wightman-Wieber Foundation." The foundation is focused on granting funds to various Ohio organizations. Mrs. Lowery, Michelle's mother said, "[b]y having a foundation and knowing that if [Michelle] were still alive, she would be doing so much for other people, it kind of makes you feel like you've got part of her here." McDonough, supra note 3, at 25 (quoting Darlene (Wightman) Lowery).

42. See Tom Murray Interview, supra note 11.

43. See Wightman, 715 N.E.2d at 557. The jury had originally awarded Michelle Wightman's mother $25 million, however the Court granted Conrail's request for remittitur and reduced the award by $10 million. Id. at 550.

44. David T. Link is the Joseph A. Matson Dean Emeritus and Professor of Law at Notre Dame Law School. He is also President of the International Centre for Healing and the Law and a board member of Tom Murray's Future of Russia Foundation.
happen to someone else . . . he gives lawyers a great name."  

Currently, Murray is working with Dr. Camille Wortman to garner empirical data on the effects of curative damages. Thus far, Dr. Wortman’s research shows that the parents Murray has worked with have “shown miraculous evidence of getting over their grief because their energy is focused on others.” In addition to working with Dr. Wortman, Murray has also enlisted the support of Dean Link to promote the concept of curative damages. Murray notes that curative damages return the law to what it is intended to be: a “healing profession.”

II. HISTORY OF PUNITIVE DAMAGES

In order to understand the positive direction in which curative damages are leading America’s civil litigation system, it is helpful to understand what the doctrine of punitive damages is missing. Like the outgrowth of curative damages, punitive damages are not without their own set of controversy. While many solutions have been proposed to redefine and reform punitive damages, they fall flat in the face of curative damages.

Throughout their history, punitive damages have also been known as exemplary damages, vindictive damages, smart money, punitory damages, and a host of other names. Just as the name for this type of damages varies,

45. Michael K. McIntyre, To Russia, With Love, PLAIN DEALER SUN. MAG., Dec. 21, 2003, at 7 (quoting Dean Link).
46. Camille Wortman, Ph.D. is a professor of psychology at State University of New York at Stony Brook. Her work focuses on grief and loss issues.
47. See Tom Murray Interview, supra note 11; see also Professional Profile, Camille Wortman, Ph.D., http://wortman.socialpsychology.org (last visited Jan. 25, 2007).
48. Tom Murray Interview, supra note 11.
49. Id.
50. See Smith v. Wade, 461 U.S. 30, 41 (1983) ("Punitive damages are also called exemplary damages, vindictive damages, or smart money."); Murphy v. Hobbs, 5 P. 119, 122 (Colo. 1884) ("The words 'smart money' and also the following adjectives have been used to designate this class of damages: 'speculative,' 'imaginary,' 'presumptive,' 'exemplary,' 'vindictive,' and 'punitive' or 'punitory.'"); Fay v. Parker, 53 N.H. 342, 343 (1872) ("[W]e must regard the
so do the reasons for it. In order to get a sense of how curative damages fit into our modern day context, it is helpful to review the extensive history of punitive damages.

The purpose of civil litigation is "the redress of wrongs by compelling compensation or restitution: the wrongdoer is not punished, he only suffers so much harm as is necessary to make good the wrong he has done." Thus, a plaintiff can obtain compensatory damages which cover the amount of a plaintiff's damaged property and in some cases intangible damages such as "pain and suffering." Unlike compensatory damages, punitive damages are awarded against the defendant to punish and deter them, not as additional compensation for the plaintiff.

Because punitive damages are an outgrowth of common law, states vary on the conduct necessary to award punitive awards. As a general rule, at a minimum, some type of reckless disregard for the plaintiff is needed before punitive damages can be imposed. In a sense, this makes punitive damages a "quasi-criminal" remedy as punitive damages are a punishment for the defendant. The true intent of punitive damages is an area of intense debate. While punitive damages punish egregious actions, they stop short of ameliorating the wrong done to the plaintiff.

The concept of giving the plaintiff more compensation than the value of the loss dates back to ancient times. Hammurabi's Code demands that "the tamkarum who

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53. See, e.g., Dardinger v. Anthem Blue Cross Blue Shield, 98 Ohio St. 3d 77, 2002-Ohio-7113, 781 N.E.2d 121, 145.


falsely denies the receipt of money from his agent must pay *sixfold* and the samallum in the converse case pays *threefold* the amount of the sum denied.\(^5\) This payment of money above compensation resembles punitive damages in our modern law.\(^6\) Another important distinction that these primitive punitive damages carry is the fact that unlike the criminal fines of today, "[n]one of these payments . . . goes [sic] to the state,"\(^7\) instead, they are "payable to the injured party."\(^8\) Thus, the Babylonians recognized the individual's need to be vindicated by way of additional compensation. It has been noted that these "payments must be distinguished from fines, which are penalties paid to the state because in theory the community has been injured . . . ."\(^9\) This valuation of the victim gives historical precedent to the notion that victims are deserving of additional compensation. Yet, empowering the victim by way of putting money toward ameliorating the problem was centuries away.

English statutes that date as far back as the thirteenth century allow for double and treble damages.\(^10\) In addition to allowing plaintiffs to collect damages beyond their physical loss, the Crown also assessed fines against wrongdoers.\(^11\) These fines were called "amercements" and

\begin{align*}
57. & \text{THE BABYLONIAN LAWS 500 (G.R. Driver & John C. Miles trans., eds., 1952) (emphasis added).} \\
58. & \text{See, e.g., Michael Rustad & Thomas Koenig, The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers, 42 Am. U. L. Rev. 1269, 1285 (1993).} \\
59. & \text{THE BABYLONIAN LAWS, supra note 57, at 500.} \\
60. & \text{Id.} \\
61. & \text{Id.} \\
63. & \text{Browning-Ferris Indus. of Vt., Inc., 492 U.S. at 269-70.} \\
\end{align*}

Amercements were an 'all-purpose' royal penalty; they were used not only against plaintiffs who failed to follow the complex rules of pleading and against defendants who today would be liable in tort, but also against an entire township which failed to live up to its obligations, or against a sheriff who neglected his duties. The use of amercements was widespread; one commentary has said that most men in England could expect to be amerced at least once a year.

\textit{Id.}
as explained by the United States Supreme Court, "were payments to the Crown, and were required of individuals who were 'in the Kings mercy,' because of some act offensive to the Crown."\(^{64}\) By way of comparison, amercements are similar to the fines imposed by criminal and administrative law, more so than civil.\(^{65}\) Thus, amercements mirror modern day split-recovery statutes wherein states take a portion of the plaintiff's punitive award.\(^{66}\) Like split recovery, amercements are antithetical to the concept of curative damages. It is illogical for the state to benefit when it takes no steps toward correcting the problem and bears no expense in the litigation. The modern doctrine of punitive damages is more closely related to curative damages than amercements are.

While double and treble damages existed in early English jurisprudence,\(^{67}\) the first case involving modern punitive damages appeared thirteen years before America obtained independence. In *Wilkes v. Wood*,\(^{68}\) the Court of Common Pleas in England heard a case involving an illegal search and seizure. The court held that "[w]hen we consider the persons concerned in this affair, it ceases to be an outrage to [the victim] personally, it is an outrage to the constitution itself."\(^{69}\) The court then concluded that "[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."\(^{70}\) While the court’s reasoning that the illegal search and seizure was an affront to England, it notably awarded the damages to the victim, rather than as a fine payable to the Crown.\(^{71}\) This progression acknowledged the plaintiff's right to collect the punitive award simply because the plaintiff

\(^{64}\) *Id.* at 269.

\(^{65}\) However, as discussed in Part III *infra*, the concept of amercements whereby a government can take due to a wrong against a private party reappears in split recovery.

\(^{66}\) *See infra* Part III.A.

\(^{67}\) *See supra* note 62 and accompanying text.

\(^{68}\) 98 Eng. Rep. 489 (1763).

\(^{69}\) *Id.* at 490.

\(^{70}\) *Id.* at 498-99.

\(^{71}\) *See id.*
was the harmed party, and it was the plaintiff, not the state, that took the time and expense to sue the defendant.

Similarly, in *Huckle v. Money*, the court refused to grant a new trial on the ground of excessive damages in a trespass, assault, and unlawful imprisonment case. The court gave great deference to the jury's determination of additional damages, noting "it is very dangerous for the Judges to intermeddle in damages for torts . . . ." The court explained that to grant a new trial based on excessiveness, the award must be "glaring" and "all mankind at first blush must think so." This standard, in variation, still exists today.

Punitive damages first appeared in the United States in 1784 in South Carolina. In *Genay v. Norris*, the court upheld punitive damages assessed against a physician for poisoning the drink of a "foreigner" after an unsuccessful duel. The trial court noted that the plaintiff suffered a "very serious injury" and "such a one as entitled him to very exemplary damages." Seven years later, New Jersey's highest court allowed punitive damages against a defendant who breached a promise of marriage. The court upheld the trial judge's instructions that the jury should not only consider the actual loss, but also to make an example of the defendant and to compensate the plaintiff bride-to-be for the hardship she would suffer in the future due to the defendant's breach. The jury was told "not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for example's sake, to prevent such offences in future; and also to allow liberal damages for . . . the great disadvantages which must follow

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73. Id. at 769.
74. Id.
76. 1 S.C.L. (1 Bay) 6, 6 (1784).
77. Id.
78. Id.
79. Id.
81. Id.
to her through life." 82 The punitive damages in this case served both the function of deterrence as well as victim compensation.

Recovery for emotional harm as well as pain and suffering was often not recognized in early tort cases. 83 Thus, as one commentator explains, "[t]he origin of punitive damages may in fact be compensatory rather than punitive. Judges crafted the category of exemplary damages as a justification for affirming jury awards that exceeded the tangible losses when the award seemed appropriate given other losses not then compensable under the law." 84 However, as time passed, compensatory damages evolved to compensate for pain and suffering and other intangible losses. Yet, despite these new categories of compensatory damages, punitive damages have remained. 85 By the middle of the nineteenth century, the Supreme Court of the United States declared that "[i]t is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant . . . ." 86 As of 1875, the Court stated that "the doctrine is too well settled now to be shaken, that exemplary damages may in certain cases be assessed." 87 Yet not all states were pleased with these assertions. Many courts voiced their disapproval of the intrusion of criminal

82. Id.

83. See, e.g., Cooper Indus., Inc., v. Leatherman Tool Group, 532 U.S. 424, 437 n.11 (2001) ("Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time."); see also Sylvia M. Demarest & David E. Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?, 18 ST. MARY'S L.J. 797, 801 (1987) ("Exemplary damages were also historically justified as a means for the jury to compensate for elements of damages not otherwise recoverable at common law. These elements included inconvenience, attorneys' fees . . . and other losses too remote to be considered under actual damages.").

84. Kelly, supra note 56, at 1429-30.

85. But see supra note 39.


law into civil.88 In one of the most famous anti-doctrinal quotes, Judge Foster of the Supreme Judicial Court of New Hampshire declared punitive damages to be "a monstrous heresy."89 Mincing no words, he questioned, "[i]s not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong."90

Similarly, the Supreme Court of Colorado, while conceding that the doctrine of punitive damages "has taken deep root in the law"91 provided an example to illustrate their discontent with the doctrine. Using the hypothetical situation of being assaulted and insulted in public, the court noted that

five dollars may fully compensate the injury inflicted to my person and clothing; but $500 may be utterly inadequate to requite the sense of insult, the personal indignity, the public disgrace and humiliation. The extra $500 exacted may operate indirectly as punishment. It may constitute an example to others, and also deter my assailant himself from repetitions of the offense in the future. In law, however, it is simply compensation for the private wrong; a kind of indemnity which, probably, no court has ever refused to allow when warranted by the circumstances. But under the doctrine of exemplary damages, as announced by the instruction given in this case, the jury are not required to stop with the five dollars for material injury and $500 for lacerated feelings; they may turn to the domain of criminal law, and consider the public wrong, and they may add $1,000 more as a

88. Many legal scholars were split on the issue as well. See GEORGE W. FIELD, A TREATISE ON THE LAW OF DAMAGES 65-66 (1876) (citing THEODORE SEDGWICK, SEDGWICK ON THE MEASURE OF DAMAGES 525-32 (4th ed. 1868) and SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 253, 244 (3rd ed. 1850)) ("The doctrine of exemplary or punitive damages is entirely ignored by Mr. Greenleaf . . . . While on the other hand, Mr. Sedgwick, in his valuable work on Damages, denies the limited rule laid down by Mr. Greenleaf; and maintains the doctrine of exemplary or punitive damages.").


90. Id. But see Alcorn v. Mitchell, 63 Ill. 553, 553 (1872) (awarding a party that was spat on $1,000 in exemplary damages, noting "the law, as far as it may, should afford substantial protection . . . . in the way of liberal damages, that the public tranquility may be preserved by saving the necessity of resort to personal violence as the only means of redress").

punishment to my assailant. The arrangement is highly satisfactory to me, since I have the pleasure of pocketing the additional $1,000 to which I am not entitled; but as we have already seen, it hardly comports with correct legal principles.\textsuperscript{92}

Despite these early protests, the doctrine of punitive damages remains intact in most states.\textsuperscript{93} In the last few decades the Supreme Court of the United States has continually broadened its recognition of punitive damages,\textsuperscript{94} and unheld repeated constitutional challenges against their validity.\textsuperscript{95}

\textsuperscript{92} Id. at 123-24.

\textsuperscript{93} Currently Nebraska is the only state that does not recognize any form of punitive damages, although other states, including Colorado, Louisiana, New Hampshire, Massachusetts, and Washington only recognize punitive damages by specific statute. See Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989); see also Cheatham v. Pohle, 789 N.E.2d 467, 472 n.1 (Ind. 2003) ("In Nebraska punitive damages are constitutionally prohibited."); RICHARD L. BLATT, ROBERT W. HAMMESFAHR & LORI S. NUGENT, PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO LAW AND PRACTICE 425 (2005) ("Nebraska is one of the few states which does not permit the recovery of punitive damages.").


\textsuperscript{95} See TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 (1993) ("The punitive damages award in this case is certainly large, but . . . we are not persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow."); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 25 (1991) (Scalia, J., concurring) ("[I]n this case, [the punitive award] does not cross the line into the area of constitutional impropriety."); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 280 (1989) ("Neither federal common law nor the Excessive Fines Clause of the Eighth Amendment provides a basis for disturbing the jury's punitive damages award in this case."); Smith, 461 U.S. at 35 ("Although there was debate about the theoretical correctness of the punitive damages doctrine in the latter part of the last century, the doctrine was accepted as settled law by nearly all state and federal courts, including this Court."); Rustad & Koenig, supra note 58, at 1284 ("The punitive award has been a 'settled doctrine in England and in the general jurisprudence of the country' for more than two hundred years."); see also Cooper Indus., Inc. v. Leatherman Tool Group, 532 U.S. 424 (2001) (holding that the Court of Appeals should review punitive damages with a de novo standard); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71 (1988) (upholding a Mississippi statute that imposed a penalty on a party that unsuccessfully appealed from a punitive damages award). But see Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007) (limiting punitive damages when a jury metes out the award based not just on harm done to the plaintiff, but based on harm to nonparties); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 412 (2003) ("[A]n award of $145 million in punitive damages, where full compensatory damages are $1 million,
The doctrine of punitive damages remained relatively low-profile for many years. But, in the late 1960s, "American courts radically expanded the availability of punitive damages beyond traditional intentional torts. Lesser misconduct could now merit punitive damages."96 The allowance of lower standards for the recovery of punitive damages increased many damages awards in litigation. By the 1990s, concerns about "lawsuit abuse"97 and lawsuits being transformed into "lotteries"98 were highly prevalent. Justice Sandra Day O'Conner declared "[a]wards of punitive damages are skyrocketing"99 and two years later, Justice Blackmun wrote "[w]e note once again our concern about punitive damages that 'run wild.'"100

The negative attention surrounding punitive damages may suggest that the doctrine should be eliminated from modern jurisprudence, or at least significantly limited. But, without punitive damages, our civil system would require serious alteration in order to effectuate justice for plaintiffs who were egregiously wronged in monetarily immeasurable ways.

III. ATTEMPTS TO REFORM Punitive DAMAGES

As a result of the perception that punitive damages are out of control, states have tinkered with different methods

is excessive and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996) ("[W]e are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit.").

96. Victor E. Schwartz, Mark A. Behrens & Cary Silverman, I'll Take That: Legal and Public Policy Problems Raised by Statutes That Require Punitive Damages Awards to be Shared with the State, 68 Mo. L. Rev. 525, 528 (2003).


98. Nicholas M. Miller, Note, Tis Better to Give Than To Receive: Charitable Donations of Medical Malpractice Punitive Damages, 12 J.L. & Health 141, 144 (1997-98) ("[T]he entire tort system . . . resembles a 'lottery' for all involved.").


to assert control. In addition to damages caps, several states have implemented split-recovery systems.

A. Split Recovery

Split-recovery legislation enables a state to collect a set portion of the punitive damages award. Yet, split-recovery statutes are antithetical to the concept of curative damages because, rather than ameliorate the problem that led to the award, most states use split recovery to pad their budget’s shortcomings. Additionally, split recovery is a strange modification to the doctrine of punitive damages because, unlike curative damages, which put the plaintiff’s needs first, it ignores the aggrieved party.

In a 1983 dissent, Justice Rehnquist explained, “[p]unitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries—but no more.” He then continued, “[e]ven assuming that a punitive ‘fine’ should be imposed after a civil trial, the penalty should go to the state, not to the plaintiff—who by hypothesis is fully compensated.” Yet, under this theory, if taking money away from the defendant were the only purpose, why not treat the money like contraband and burn it? Even with split recovery, states

101. For more information about damage caps in tort cases, see Rustad & Koenig, supra note 58, at 1277-83.

102. See, e.g., CAL. CIV. CODE § 3294.5(a) (West 2006) (repealed July 1, 2006) (“Extraordinary and dire budgetary needs have forced the enactment of this extraordinary measure.”); see also Tom Murray Interview, supra note 11.


104. Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. CAL. L. R. 1, 11 (1982). Professor Ellis asserted:

If wealth is taken from a defendant to achieve retribution or deterrence or for other reasons, we must do something with the money. It could be destroyed as is often done with confiscated contraband, deposited in the public treasury as are fines, donated to an object of our benevolence, or randomly distributed. That none of these uses has been chosen may reflect society’s decision that the best use of the wealth acquired through punitive-damages the use that will result in the greatest increase in welfare, utility, or happiness—is to compensate plaintiffs for losses or attorney’s fees.

Id.
still recognize that it is important to allow the plaintiff to personally collect some amount of the award.

In the mid-1980s, several states began adopting split-recovery statutes. Currently, Alaska, Indiana, Missouri, and Oregon have laws that require all plaintiffs to split their punitive award with the state. Georgia, Iowa, and Illinois require plaintiffs in specific actions to split their award. Two states, Ohio and Alabama, have had unique, judicially-created solutions for allocation of punitive damages. Meanwhile, four states, California, Florida, Kansas, and New York have allowed their statutes to sunset, and Colorado has declared its split-recovery statute unconstitutional. Most recently, Utah declared the older version of its split-recovery statute unconstitutional.

1. States that Require General Split Recovery. On August 16, 2004, California became the latest state to enact

106. IND. CODE § 34-51-3-6 (2006).
109. GA. CODE ANN. § 51-12-5.1 (West 2007).
111. 735 ILL. COMP. STAT. 5/2-1207 (2007).
112. See Dardinger v. Anthem Blue Cross & Blue Shield, 98 Ohio St. 3d 77, 2002-Ohio-7113, 781 N.E.2d 121, 146 (holding that a special cancer fund should be created from a portion of the punitive damages).
113. See Life Ins. Co. of Ga. v. Johnson, 684 So.2d 685, 698 (Ala. 1996), overruled by 701 So.2d 524 (Ala. 1997) (holding, and then overruling, that a portion of punitive damages from all actions, except for wrongful death, should be apportioned to Alabama's general fund).
114. CAL. CIV. CODE § 3294.5 (West 2006) (repealed July 1, 2006).
a split-recovery statute. The statute allowed the State of California to keep 75 percent of all punitive damages awarded until the statute's sunset quickly took effect less than two years later on July 1, 2006. In the original plan, California allowed attorneys to take their contingency fee from the 25 percent of the award that was given to plaintiffs. Critics of this plan argued that "[l]imiting an attorney to a share of only 25 percent amounts to a taking . . . . It forces the attorney to work for free." However, before the enactment of the law, the proposal was amended to allow the attorney to take a contingency fee from the entire amount awarded. At its inception, critics noted that this law, like other states' split-recovery laws, "may lead to the odd result of a lawyer receiving a greater recovery than his or her client—making the lawyer the primary beneficiary of the award."

California's split-recovery statute was clear about its budget-padding intent. The statute's preamble stated, "extraordinary and dire budgetary needs have forced the

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122. CAL. CIV. CODE § 3294.5(i) (West 2006) (repealed July 1, 2006) ("This section shall remain in effect until July 1, 2006, and as of that date is repealed, unless a later enacted statute extends or deletes that date."). In 2005, Senator Perata introduced Senate Bill 832 which, when amended, sought to revise and extend § 3294.5 until June 30, 2011. See S.B. 832, 2005-2006 (Cal. 2006), available at http://info.sen.ca.gov/pub/05-06/bill/sen/sb_08010850/sb_832_bill_20060824_amended_asm.pdf. However, Governor Schwarzenegger refused to sign the bill, noting that "[w]hile I have been supportive of the policy in the past . . . this bill was amended late in the legislative session and did not provide an opportunity for sufficient hearings to determine whether this policy has been effective or not." Press Release, Governor Arnold Schwarzenegger, Governor's Veto Message (Sept. 30, 2006), available at http://info.sen.ca.gov/pub/05-06/bill/sen/sb_08010850/sb_832_vt_20060930.html. Split recovery may once again be a reality in California as Governor Schwarzenegger added, "I encourage the author to reintroduce the bill next year and allow a full debate on the effectiveness of the policy." Id.


125. Id.
enactment of this extraordinary measure . . . .”126 Interestingly, more than a decade before split recovery became a reality for California, commentators advocated for split recovery as a cure for California’s “pressing [deficit] problem.”127 Oddly, due to the sunset provision in the law, split recovery was only operational for two years.128 However, many commentators speculate that several states may follow in California’s “trend-setting” footsteps.129

In Evans v. State,130 Alaska defended its split-recovery statute, enacted in 1997, which allows the State to take half of a plaintiff’s punitive award.131 The Supreme Court of Alaska upheld both the split-recovery statute and a cap placed on punitive damages.132 However, as the Supreme Court of Utah explained, “Evans is without precedential value because the court was evenly divided, with two justices voting to affirm the trial court and two voting to reverse. In Alaska, a split opinion results in an affirmance of the trial court’s decision, but such affirmances have no precedential effect.”133

Similar to Alaska, the State of Missouri is authorized by statute to retain half of the plaintiff’s punitive damages award.134 The funds are deposited into the State’s “tort victims’ compensation fund”135 and from there, 26 percent of the award is deposited into the “Legal Services for Low-

126. CAL. CIV. CODE § 3294.5(a) (West 2006) (repealed July 1, 2006).
129. Schwartz, Behrens & Silverman, supra note 124, at 20.
130. 56 P.3d 1046 (Alaska 2002).
131. See ALASKA STAT. § 09.17.020(j) (2007). (“If a person receives an award of punitive damages, the court shall require that 50 percent of the award be deposited in the general fund of the state.”).
132. See Evans, 56 P.3d 1046.
135. MO. REV. STAT. § 537.675(3) (2007) (“The state of Missouri shall have a lien for deposit into the tort victim’s compensation fund to the extent of fifty percent of the punitive damage final judgment which shall attach in any such case after deducting attorney’s fees and expenses.”).
CURATIVE DAMAGES

Income People Fund."136 In 1997, Missouri's split recovery statute was challenged in Fust v. Attorney General For Missouri.137 Upholding Missouri's split-recovery statute, the court followed other jurisdictions in holding that, among other things, the plaintiffs had no property interest in the punitive award because it did not vest.138

Oregon limits both the collection of punitive damages by the plaintiff and the collection of attorney's fees.139 Its split-recovery statute further blurs the line between criminal and civil law by requiring 60 percent of punitive awards to be paid into the "Criminal Injuries Compensation Account."140 In 2002, the Supreme Court of Oregon upheld this statute, determining that plaintiffs have no right to collect punitive damages.141

In Indiana, a state that does not allow punitive damages recovery if the defendant is exposed to criminal liability,142 plaintiffs are only entitled to 25 percent of their punitive damages award.143 This statute was challenged in 2003 after a woman's ex-husband posted nude and sexually explicit photos of her around their small town.144 Despite the fact that the nude photos depicted her and not state officials, the Supreme Court of Indiana held that she had no property right to the punitive damages and allowed the state to keep $75,000 of her $100,000 punitive damages award. In granting the state's right to take, the court

137. 947 S.W.2d 424 (Mo. 1997).
138. See id.
Upon the entry of a verdict including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled . . . the punitive damage portion of an award shall be allocated as follows: (a) Forty percent shall be paid to the prevailing party. The attorney for the prevailing party shall be paid out of the amount allocated under this paragraph . . . (b) Sixty percent shall be paid to the Criminal Injuries Compensation Account . . . .
140. Id.
141. See DeMendoza v. Huffman, 51 P.3d 1232 (Or. 2002).
reasoned that punitive damages are a common-law outgrowth, and therefore the legislature is free to eliminate or restrict their recovery.\textsuperscript{145}

As seen in Indiana and other states, many issues surrounding split recovery hinge on when the plaintiff's interest in collecting punitive damages vests as a property right. If a state takes its share of a split recovery before a plaintiff does, then the state's share cannot be considered plaintiff's property.\textsuperscript{146} But an early, automatic taking by the state may invoke other concerns. For example, a state's taking of money not considered to belong to a plaintiff could implicate the tax code. If the state's take did not ever belong to, or fall under the control of the plaintiff, then the plaintiff never "earned" it and should not have to pay taxes on it.\textsuperscript{147} The current debate over the taxing of attorney contingent fees provides useful insight into how this issue might create a situation whereby the state could take its share, but then tax a plaintiff for the full amount of the award as if the plaintiff had discretion over its disposition.\textsuperscript{148} Even if the alternate view should prevail that "[t]here is no statutory requirement that the state pay any legal fees related to its share of the punitive damage award,"\textsuperscript{149} courts would have to wrestle with Eighth Amendment considerations.\textsuperscript{150} When a state takes a cut of a payment that it did not earn or that a defendant has not forfeited through criminal activity, has the state exacted an undeserved punishment on that defendant?

2. \textit{States that Require Limited Split Recovery.} Some states modify punitive damages by limiting their availability to certain torts. For example, Georgia established a split-recovery statute that requires 75 percent

\textsuperscript{145} Id. at 472.

\textsuperscript{146} But see id. at 477 (Dickson, J., dissenting) ("A person's property interest in a judgment vests upon the entry of that judgment by the trial court, not upon the eventual payment of the judgment by the judgment debtor.").


\textsuperscript{149} Cheatham, 789 N.E.2d at 477.

\textsuperscript{150} For a discussion of Eighth Amendment implications see infra Part III.A.4.
of punitive damages that arise from product liability cases to be turned over to the state treasury. The statute was first challenged in federal court in 1990. In *McBride v. General Motors Co.*, the court found the product-liability split-recovery statute unconstitutional and determined that the State should not take punitive damages away from the plaintiffs. The court based its holding on the fact that the statute discriminates between product liability plaintiffs and other tort plaintiffs and that the statute was "not rationally related to a legitimate state interest." On this point, the court reasoned that "there can be no legitimate purpose for a state to involve itself in the area of civil damages 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." 

However, the Supreme Court of Georgia, not bound by the district court’s decision in *McBride*, upheld the constitutionality of the statute in *Mack Trucks, Inc. v. Conkle*. In that case, plaintiff Daniel Conkle was injured when the truck he was driving overturned after the truck’s frame rail broke. Mr. Conkle was awarded punitive damages after the jury learned that Mack Trucks could have fixed a defect in their trucks with a part that cost $103.00, but chose not to do so. The Supreme Court of Georgia upheld the split-recovery statute, reasoning that it was better to "not allo[w] the first plaintiff to reach the courthouse with a product liability lawsuit to reap a windfall from the punitive damages," instead requiring "that three-quarters of the punitive damages awarded be

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151. *See* GA. CODE ANN. § 51-12-5.1(e)(1-2) (West 2006) (“In a tort case in which the cause of action arises from product liability ... [s]eventy-five percent of any amounts awarded under this subsection as punitive damages ... shall be paid into the treasure of the state through the Office of Treasury and Fiscal Services.”).


153. *Id.* at 1576.

154. *Id.* at 1579.


156. 436 S.E.2d 635 (Ga. 1993).

157. *See id.* at 640.
paid to the state treasury for the benefit of all Georgia citizens." Three years later, the Supreme Court of Georgia once again upheld Georgia's split-recovery statute in *Ford v. Uniroyal Goodrich Tire Co.*

Illinois' legislature left split-recovery apportionments to its judiciary. The split-recovery statute merely states that the "trial court may also in its discretion, apportion the punitive damage award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Human Services." In order to make that determination, the statute instructs, "[i]n apportioning punitive damages as provided in this Section, the court shall consider, among other factors it deems relevant, whether any special duty was owed by the defendant to the plaintiff."

In Iowa, if the tortious conduct was directed specifically at the plaintiff, the split-recovery statute is not activated. However, in a case like *Moore*, where Conrail did not specifically intend to kill three teenagers, the split-recovery statute would activate. Thus, after all of the attorney's fees and costs are paid, the plaintiff can collect 25 percent and the remainder goes to fund Iowa's "civil reparations trust." That fund does nothing to correct the problem that gave rise to the action.

3. Judicial Split Recovery. In a strange outgrowth of the push for split recovery, the judiciaries in two states took the law into their own hands and crafted their own brand of split recovery. In Alabama, after the State Supreme Court ruled that split recovery was necessary, it did an about-face following a ruling from the United States Supreme Court.

158. *Id.* at 638.
159. 476 S.E.2d 565 (Ga. 1996).
160. 735 ILL. COMP. STAT. 5/2-1207 (2007).
161. *Id.*
162. *See Iowa Code § 668A.1(2)(a) (2006) (“If the answer to [whether the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived], is affirmative, the full amount of the punitive or exemplary damages awarded shall be paid to the claimant.”).*
163. *See supra* Introduction.
164. *Iowa Code § 668A.1(2)(b) (2006).*
In *Life Insurance Co. of Georgia v. Johnson*, the Alabama Supreme Court heard a case involving Daisey Johnson. Ms. Johnson was a senior citizen with a third grade education who had been a customer of the insurance company, Life of Georgia, for over twenty-five years. Heeding the company's unofficial policy to "Get the money," her agent used fear to sell her a useless medical policy. When Ms. Johnson found out that she had been paying almost one-third of her entire fixed income for a worthless policy, the eighty-four-year-old took to physically chasing insurance agents off of her property when they came to collect payments. The Supreme Court upheld $5 million in punitive damages and stated, "we now hold that a part of punitive damages awarded in future cases (excluding cases based on wrongful death) shall be paid into the state general fund." The court reasoned that "this practice will strengthen the public's confidence in our civil justice system, because, under this procedure, wrongdoers can be appropriately discouraged from inflicting harm upon others without inappropriately rewarding the victim."

Yet split recovery was not to be in Alabama. That case, along with several other Alabama cases, were granted certiorari by the Supreme Court of the United States. After judgment in the *Johnson* case was vacated and remanded to the Alabama Supreme Court, the landscape of punitive damages had changed. The Supreme Court of the United States decided *BMW of North America, Inc. v. Gore*, and set forth a three-prong test to determine

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166. Id. at 687.
169. Id. at 688, 690.
170. The jury had assessed damages of $12.5 million.
171. Johnson, 684 So. 2d at 698.
172. Id. at 698-99.
whether a punitive award was considered excessive.\textsuperscript{175} Therefore, on remand, the Supreme Court of Alabama overruled its one-year-old proposal and held, "the principled approach to the question of excessive punitive damages, required by the Supreme Court of the United States in BMW, will keep plaintiffs from receiving windfalls in punitive damages, and ... there is no longer any reason for diverting some of the punitive damages to the State."\textsuperscript{176} Just as quickly as split recovery came to be in Alabama, it was gone.

In Ohio, Justice Pfiener, who offered praise for the Moores and upheld the punitive award in the Wightman case, created his own blend of split recovery and curative damages. In Dardinger v. Anthem Blue Cross Blue Shield,\textsuperscript{177} Robert Dardinger, as executor of his wife's estate, sued her medical insurance company for breach of contract and bad faith denial. His wife, Esther, had cancerous tumors in her brain.\textsuperscript{178} Despite the severity of her disease, she was showing improvement on intra-arterial chemotherapy.\textsuperscript{179} The improvement was marked enough that she was able to lead a relatively normal life and even go on a vacation where she hiked with her husband and children.\textsuperscript{180} However, after several treatments, her insurance company, Anthem, using a review panel consisting of one doctor who was not apprised of her success with the treatment, denied further intra-arterial treatments, deeming them experimental.\textsuperscript{181} Knowing the cost of the treatment would bankrupt her family, Mrs. Dardinger chose to try a different treatment while her appeal was pending.\textsuperscript{182} While Anthem deliberately lengthened the appeal process, Esther's condition declined

\textsuperscript{175} See id. at 574-75 ("[T]he degree of reprehensibility . . . the disparity between the harm or potential harm suffered . . . and [the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.").
\textsuperscript{177} 98 Ohio St. 3d 77, 77 2002-Ohio-7113, 781 N.E.2d 121.
\textsuperscript{178} See id. at 77.
\textsuperscript{179} See id. at 78.
\textsuperscript{180} See id. at 80.
\textsuperscript{181} See id. at 79.
\textsuperscript{182} See id. at 81.
The day after her funeral, Anthem’s rejection of her appeal arrived in her mailbox.\textsuperscript{184} Shocked by the callousness Anthem displayed, Justice Pfieler wrote in his scathing opinion that: “[Anthem] created hope, then snatched it away. They took a dignified death from Esther Dardinger and filled her last days with frustration, doubt, and desperation. And every minute of additional pain suffered by Esther Dardinger was a natural outgrowth of the defendant’s practiced powerlessness, their active inactivity.”\textsuperscript{185} Then, Justice Pfieler did something unprecedented. Citing the “philosophical void” between the reasons punitive damages are awarded and how they are distributed,\textsuperscript{186} Pfieler praised the curative damages in the \textit{Wightman} decision and awarded a large portion of the punitive damages to a cancer research fund the court created especially for Esther Dardinger’s award.\textsuperscript{187}

This decision shocked many people, including the victim’s husband who was essentially “ordered to make a $20 million charitable donation.”\textsuperscript{188} In this way, the judicial allocation of an award to charity was not true to the concept of curative damages because the court took autonomy away from the victim. Mr. Dardinger, who had already decided to set up a foundation in memory of his wife,\textsuperscript{189} was reportedly disturbed by the court’s decision because he “worr[ie]d that the controversy over the ruling [would] overshadow the

\begin{footnotes}
\textsuperscript{183} See id. at 82, 85.
\textsuperscript{184} See id. at 85.
\textsuperscript{185} Id. at 98.
\textsuperscript{186} See id. at 104.

\textsuperscript{187} The jury awarded $49 million to Dardinger. The Supreme Court reduced the amount to $30 million and allowed Robert Dardinger to collect $10 million, his attorneys to collect their fees from the entire amount, and allocated the remainder to the Esther Dardinger Fund and the James Cancer Hospital and Solove Research Institute at The Ohio State University. See id. at 105.

\textsuperscript{188} Adam Liptak, \textit{Court Dictates How to Spend Award}, N.Y. TIMES, Dec. 28, 2002, at A12.

\textsuperscript{189} See Peter Page, \textit{Court Creates Charity Funded by Punitives: Damages from a Big Case Are Diverted to the Fund}, NAT’L L.J., Jan. 6, 2003, at A4. (“Palmer, the plaintiff’s counsel, said that while it was novel for the court to order creation of a memorial charity in Esther Dardinger’s name, it was what his client had intended to do with any punitive award he would have received.”).
\end{footnotes}
court's rebuke of Anthem."\textsuperscript{190} But more than that, Mr. Dardinger did not feel that the trust created by the court fit the problem he wanted to see solved. He told the media that "[h]e would have preferred to help people with cancer, too,"\textsuperscript{191} noting that "[t]here ought to be some kind of safety net . . . for people in the same situation as my wife and I, where medical procedures are needed but denied by the insurance company."\textsuperscript{192}

However, it appeared that once the court-created trust was in place, Mr. Dardinger supported the decision. In a press release issued by the newly created Dardinger Neuro-Oncology Center, Mr. Dardinger was quoted as saying, "by using this money to establish the Esther Dardinger Neuro-Oncology Center . . . we will help achieve the result my wife hoped for. While undergoing treatment, she expressed the belief that, regardless of the outcome of her fight, if doctors could learn from her treatment, some good might come from her situation."\textsuperscript{193}

Beyond the court-created trust, Mr. Dardinger used his portion of punitive damages as curative damages.\textsuperscript{194} He became a major benefactor of his alma mater, and set up funds and scholarships not only in his wife's name, but also in the name of his twin brother who was killed in a college airplane accident.\textsuperscript{195}


\textsuperscript{191} Liptak, supra note 188, at A12.

\textsuperscript{192} Id. (quoting Robert Dardinger).


\textsuperscript{194} "Curative damages" is used loosely here, as it would be most beneficial if Mr. Dardinger had the opportunity to donate his award to help people with cancer who were denied treatment, state his intent in court, and bind these donations as part of the litigation.

After the decision, many commentators both praised and condemned the court's action. This decision fueled the controversy over split recovery. One commentator asserted that while legislatures have the right to limit split recovery, the judiciary does not.\textsuperscript{196} Meanwhile, another commentator contended that courts, along with plaintiffs, should be allowed to assign punitive damages, not the legislature.\textsuperscript{197} And while Justice Pfeifer stood by his decision,\textsuperscript{198} constitutional questions brought about by split recovery, both legislatively-created and judicially-created, were renewed.

4. Split Recovery Is Unfair to the Plaintiff and Does Not Comport with the Constitution. Split recovery, whether statutorily or judicially-created, does not reform punitive damages. It merely pads states' budgets while eviscerating the plaintiff's autonomy. This creates a skewed result whereby, "the State did nothing to earn its [monetary] share of the punitive damage award; and a nexus between deterrence and the forced contribution from the injured person is absent."\textsuperscript{199} Moreover, the state "has not only done nothing to advance the litigation, but has not protected the public from [the harm] and will not be obliged to use the windfall to benefit those damaged by the same [harm]."\textsuperscript{200}

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Marshall University, From Tragedy to Triumph: Dardingers Join MU's Pathway of Prominence (Sept. 9, 2005), available at http://www.marshall.edu/ucomm/RELEASE/2005/pr090705.htm. The plane accident that claimed Mr. Dardinger's twin brother's life was recently the focus of the major movie release We Are Marshall (Warner Bros. Pictures, 2006).


198. See Leonard, supra note 35, at C2. ("Pfeifer said the establishment of a special fund works only for large awards. 'The whole purpose of punitive damages is to punish the defendant enough so it changes the bad conduct . . . . These cases don't come along all that often. I think we exercised good judgment here.').


Additionally, split-recovery statutes impermissibly blur the line between criminal law and civil law.\textsuperscript{201} "[T]he effect of a civil judgment for punitive damages is not the same as that of a fine imposed after a conviction for a crime, since the successful plaintiff and not the state is entitled to the money . . . ."\textsuperscript{202} In essence, split recovery downplays the plaintiff's role in civil litigation.\textsuperscript{203} Accordingly, "the party who brings a civil suit in a court of law"\textsuperscript{204} is no longer the party entitled to benefit from that suit. Many commentators fear that allowing the state to become "free riders"\textsuperscript{205} on the backs of the plaintiffs, will limit plaintiffs' abilities to secure representation and to be afforded justice.\textsuperscript{206}

There are also strong constitutional arguments why states should not have the right to reallocate punitive damages. If civil fines are diverted from plaintiffs to the state, both plaintiffs' and defendants' constitutional rights are jeopardized. The Fifth Amendment protects against unjust takings, yet split-recovery statutes wrongly take a plaintiff's property. If the courts determine that the award

\textsuperscript{201} Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 297 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Punitive damages are private fines levied by civil juries."); Evans v. State, 56 P.3d 1046, 1078 (Alaska 2002) (Bryner, J., dissenting) ("[T]he tort system allows individual litigants to resolve disputes involving private harms between themselves, without calling on the state to intervene on behalf of either party."); Town of Hopkinton v. B.F. Sturtevant Co., 189 N.E. 107, 108 (Mass. 1934) ("It is to be remembered that the main purpose of civil litigation is to do justice between the parties.").

\textsuperscript{202} \textit{RESTATEMENT (SECOND) OF TORTS} § 908 cmt. a. (1979).

\textsuperscript{203} See Editorial, \textit{Unfair Taking; Punitive Damages: State Should Keep its Greedy Mitts Off}, SALT LAKE TRIB., Dec. 6, 2005, at A14. ("The state does not assume any of the burden of filing the lawsuit or suffering through the emotionally excruciating months or years of depositions, testimony and legal wrangling while the wheel of justice grinds slowly.").

\textsuperscript{204} See the definition of "plaintiff" in \textit{BLACK'S LAW DICTIONARY} 1171 (7th ed. 1999).

\textsuperscript{205} Schwartz, Behrens & Silverman, \textit{supra} note 96, at 526.

\textsuperscript{206} See Patrick White, \textit{Note, The Practical Effects of Split-Recovery Statutes and Their Validity as a Tool of Modern Day Tort Reform,}, 50 DRAKE L. REV. 593, 604 (2002) ("Of the two options of who should get the money, the plaintiff who endures the hardship of litigation or the government who does nothing, the plaintiff is the deserving party."); \textit{The Roundtable Responds to H.B. 1741's Changes in Punitive Awards}, THE IND. LAW., MAY 17-30, 1995 at 1, 7 ("Why should complainant go to trial to expose the wrongdoer when the potential punitive damage reward is so modest?").
is not the property of the plaintiff, then Eighth Amendment protection kicks in. The Eighth Amendment protects against excessive fines, yet split recovery unlawfully takes money from a defendant and gives it to a state.

Indeed, two states have found split recovery unconstitutional. As recently as December 2005, the Supreme Court of Utah struck down the 1989 version of Utah’s split-recovery law in Smith v. Price Development Co. The attorney for the plaintiff declared that, “[i]t’s a remarkable day for justice in the country . . . [i]t’s a remarkable day for the little man and justice.” Additionally, in 1995, in Kirk v. Denver Publishing Co., the Supreme Court of Colorado determined that Colorado’s split-recovery statute “effectuates a forced taking of the judgment creditor’s property interest in the judgment . . . .” Similarly, Florida, Kansas, and New York have all repealed their split-recovery statutes.

Despite these criticisms and rulings, the Supreme Court of the United States, while aware of the concept of

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207. 125 P.3d 945 (Utah 2005).
208. Geoffrey Fattah, High Court Says Utah Can’t Take 50% of N.M. Couple’s Award, DESERET MORNING NEWS, Dec. 3, 2005 (quoting Robert Campbell); see also UTAH CODE ANN. § 78-18-1 (2006). But see Editorial, supra note 203, at A14. (“Because the Supreme Court did not rule on the latest version of the law, in which the state still confiscates 50 percent of the amount of punitive damages in excess of $20,000, its constitutionality remains an open question.”).
210. Id. at 264. However, several jurisdictions have declined to follow Colorado’s reasoning because it was based on the wording of the statute which, unlike some other states, vested the property interest of the judgment to the plaintiff first, before the state was allowed to take. However, while the Supreme Court of Colorado’s reasoning was largely based on the technicality of vesting, the court also noted that, “an exemplary damages award is not totally devoid of any and all reparative elements.” Id. at 270.
211. FLA. STAT. ANN. § 768.73(2) (1993) (repealed 1995); see also FLA. HOUSE OF REP., HOUSE OF REP. STAFF ANALYSIS, H.B. 775, 6 (1999) (“On July 1, 1995, the provision which required a split of punitive damage awards was repealed . . .”).
213. N.Y. C.P.L.R. 8701 (McKinney 1992) (repealed 1994) (“In any civil action resulting in an award of punitive damages to a private party, other than an award rendered against the state, upon expiration of the time to appeal or the exhaustion of available appeals, twenty percent of such punitive damage award shall be payable to the state . . . .”).
split recovery, has never made a ruling on its constitutionality. In *Cooper Industries, Inc. v. Leatherman Tool Group*,\(^{214}\) 60 percent of the punitive damages awarded to Leatherman were put into Oregon's Criminal Injury Compensation Account as part of that state's split-recovery statute.\(^{215}\) While this was noted in the decision, no comment was made nor was this an issue in the case. Similarly, in *BMW of North America, Inc. v. Gore*,\(^{216}\) Justice Ginsburg attached an appendix to her dissent explicating the regulations that each state puts on punitive damages. Split-recovery statutes were listed under the heading "Allocation of Punitive Damages to State Agencies."\(^{217}\)

If the Supreme Court of the United States should ever review split recovery, Fifth Amendment "taking" concerns may take a backseat to Eighth Amendment "excessive fines" problems.

In 1989, the Supreme Court decided an Eighth Amendment case in a way that appears to raise questions about the constitutionality of split recovery. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,\(^{218}\) a garbage disposal company tried to put a former employee's new company out of business. There, the Court rejected the argument that the Eighth Amendment applied because civil litigation is between two parties and does not benefit the government. The court stated that it need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.\(^{219}\)

Additionally, in finding that the Eighth Amendment's Excessive Fines Clause was not applicable to punitive damages, the Court reasoned, "[Excessive Fines] concerns


\(^{215}\) Id. at 429.


\(^{217}\) Id. at 616-18 (Ginsburg, J., dissenting).


\(^{219}\) Id. at 263-64 (emphasis added).
are clearly inapposite in a case where a private party receives exemplary damages from another party, and the government has no share in the recovery.”220 Thus, there is dicta to support the notion that split recovery statutes do not comport with the Constitution.

B. Other Attempts to Reform Punitive Damages

There have been several attempts and suggestions on how to reform punitive damages. A plan has been proposed to divide punitive damages between the plaintiff and the non-profit sector.221 As part of this plan, the plaintiff is empowered to choose the non-profit organization to which the allocation will be made, subject to approval by the court. The challenge with this model is that the division still constitutes a taking222 because the plaintiff does not have complete autonomy over the funds. If the plaintiff wanted to give half of the proceeds to a controversial cause, the court may prevent her or him from doing so. Additionally, the plaintiff may be precluded from giving the funds to an entity that is not construed as a charity, such as a political candidate that may bring about some type of needed reform. Most of all, forced giving does little to effectuate positive change for the plaintiff. Rather than the plaintiff having a vested interest in seeing the money do good, giving becomes a mandatory obligation.

Another suggestion is to create a system which completely eradicates a plaintiff’s involvement with punitive damages. In that system, a judge evaluates each civil case to determine whether, as a matter of law, the alleged wrong subjects the defendant to a punitive damages claim. If the jury determines punitive damages are appropriate, they will be directly awarded to a state fund.223

220. Id. at 272 (emphasis added).

221. See Dede W. Welles, Note, Charitable Punishment: A Proposal to Award Punitive Damages to Nonprofit Organizations, 9 STAN. L. & POL’Y REV. 203 (1998); see also Miller, supra note 98 (advocating a plan to require victims of medical malpractice to share their punitive awards with charities).

222. Not necessarily a “legal” taking, but a taking nonetheless.

223. See James A. Breslo, Comment, Taking the Punitive Damage Windfall Away From the Plaintiff: An Analysis, 86 NW. U. L. REV. 1130, 1137-42 (1992) (proposing that punitive damage awards be placed into “a special compensation fund for victorious plaintiffs that are unable to collect against insolvent
With this plan, a plaintiff will be allowed to litigate the case up to collecting compensatory damages and then "the state would take responsibility for the litigation of punitive damages since the plaintiff has no stake in the award."224 This model already exists. It is called our criminal justice system. By removing the plaintiff from the litigation as the commentator proposes, it merely transforms a civil lawsuit into a criminal trial whereby the state prosecutes the defendant in an attempt to obtain a guilty verdict replete with a fine. This proposal needlessly blurs the lines between criminal and civil litigation and devalues the plaintiff's initial outlay of emotional energy, financial support, and time put into entering the litigation process, merely to allow a state and unrelated victims to collect the punitive damages.

Lastly, Professor Catherine Sharkey proposes a new class of damages termed "compensatory societal damages."225 She advocates for a bifurcation of trial. If a jury determines, after awarding compensatory damages, that the defendant was indeed reckless, the fact-finder would then hear evidence from other individuals who had been harmed by the defendant. If the fact-finder determines that punitive damages are warranted, all of those harmed by the defendant's conduct are entitled to share in the punitive award.226

As Professor Sharkey concedes, this model may be challenging because not only will it be difficult to sort through false claims, but it is also difficult to determine who has been harmed. For example, in the Moore case, who else would have been able to share in the punitive damages award? Anyone involved in a railroad crossing collision? The passengers in the Moore's car? Anyone injured at that particular crossing? While this model may work well for large cases in which multiple people were identically

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224. Breslo, supra note 223, at 1148.


226. Id. at 405.
harmed, but no class action has occurred,\textsuperscript{227} it does little to effectuate justice for victims who have been privately wronged and may be forced to share their award.

Moreover, in \textit{Philip Morris USA v. Williams},\textsuperscript{228} the Supreme Court of the United States held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . ."\textsuperscript{229} This holding, which attempts to limit punitive damages by not allowing plaintiffs to be reimbursed for wrongs done to "strangers to the litigation,"\textsuperscript{230} abrogates the practicality of "compensatory societal damages."\textsuperscript{231} Under this holding, in order to get a fair trial, the defendant must have an opportunity to defend against each nonparty victim. This would be impractical and impossible in Professor Sharkey's suggested scenario.

\section*{IV. The Benefits of Awarding Plaintiffs Punitive Damages}

While curative damages do not solve the larger questions demanded by critics who fear that litigation has become a lottery, in order for curative damages to be effective, the doctrine of punitive damages must remain intact. Indeed, the doctrine of punitive damages is critical for three key reasons: first, unlike predictable damage caps, punitive damages prevent wealthy corporations from engaging in cost-benefit analysis with people's lives;\textsuperscript{232} second, punitive damages provide an incentive to victims and their attorneys to endure lengthy, draining, and costly litigation; and third, they provide victims the control with which to fix the harm.

\textsuperscript{227} See Fed. R. Civ. P. 23 (explaining class action lawsuits).
\textsuperscript{228} 127 S. Ct. 1057 (2007).
\textsuperscript{229} Id. at 1063.
\textsuperscript{230} Id.
\textsuperscript{231} Sharkey, \textit{supra} note 225, at 389.
A. Why Punitive Damages are Important

Punitive damages play a very significant and important role in our society. Aside from notions of punishment and deterrence, their practicality lies in their ability to generate private law enforcement, encourage attorneys to take cases with limited compensatory damages, and prevent corporations from engaging in cost-benefit analysis with people's lives.

We do not have the governmental resources to publicly police corporations or to uncover every wrongdoing in our society. Additionally, many egregious wrongs are not classified as crimes. Without individuals who are willing to endure years of litigation-related burdens, our society as a whole loses. Products would become dangerous, fraud would proliferate, and wrongful acts could be committed with impunity. Punitive damages are the incentive it takes for many attorneys to take on otherwise costly litigation.

Often referred to as the "private attorney general" incentive, punitive damages give individuals the financial incentive to bring litigation to fruition. The Supreme Court has long recognized their value, noting "[punitive damages] have been defended as a salutary method of discouraging evil motives, as a partial remedy for the defect in American civil procedure which denies compensation for actual expenses of litigation, such as counsel fees, and as an incentive to bring into court and redress a long array of petty cases of outrage and oppression which in practice escape the notice of prosecuting attorneys occupied with serious crime, and which a private individual would otherwise find not worth the trouble and expense of a lawsuit.")

233. See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 11 (4th ed. 1971) ("[Punitive damages] have been defended as a salutary method of discouraging evil motives, as a partial remedy for the defect in American civil procedure which denies compensation for actual expenses of litigation, such as counsel fees, and as an incentive to bring into court and redress a long array of petty cases of outrage and oppression which in practice escape the notice of prosecuting attorneys occupied with serious crime, and which a private individual would otherwise find not worth the trouble and expense of a lawsuit.")

234. See Ellis, supra note 104, at 3.

235. See Editorial, supra note 203, at A14 ("The state does not assume any of the burden of filing the lawsuit or suffering through the emotionally excruciating months or years of depositions, testimony, and legal wrangling while the wheel of justice grinds slowly.").

236. See Life Ins. Co. of Ga. v. Johnson, 684 So. 2d 685, 693 (Ala. 1996), overruled by 701 So. 2d 524 ( Ala. 1997) ("Attorneys . . . usually bear all of the expense of the litigation and carry all of the risk of failure. They are reimbursed only if the victim recovers from the wrongdoer. The lawyer takes a significant risk in such cases.").

237. For a discussion of the "private attorney general" function of punitive damages see Rustad & Koenig, supra note 58, at 1322-26.
encourages private lawsuits seeking to assert legal rights."\textsuperscript{238} Without this bounty, it often will not be financially feasible for victims to sue.

More importantly, punitive damages punish defendants in accordance to the potential harm they cause, not necessarily for actual damage. In a famous example cited by the Supreme Court,\textsuperscript{239} a commentator illustrates how compensatory damages can bear little, if any, relation to the size of the harm: "the grossly negligent hunter may shoot into a crowd of people and only break a ten-dollar pair of eye glasses. The admonition meted out to him should be the same as though he had killed or injured someone."\textsuperscript{240}

Punitive damages have the ability to measure the wrongdoing so that potential defendants cannot engage in cost-benefit analysis with human lives. This flexibility is critical, as punitive damages are "one of the few effective social control devices used to patrol large powerful interests unimpeded by the criminal law."\textsuperscript{241} One of the worst examples of this type of deadly cost-benefit analysis was performed by a major automobile manufacturer. Even after it became aware of a serious defect in one of its car's bumpers, which could lead to death, it decided it was less expensive to ignore the problem and be sued by a few plaintiffs, rather than to fix the dangerous defect.\textsuperscript{242} The California Court of Appeals admonished the company and allowed punitive damages, noting that "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and

\begin{footnotes}

\footnotetext[238]{\textsuperscript{238} Smith v. Wade, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting); see also Grimsaw v. Ford Motor Co., 174 Cal. Rptr. 348, 388 (Ct. App. 4th 1981) ("[Punitive damages] provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so which can be considerable and not otherwise recoverable.").}\footnotetext[239]{\textsuperscript{239} TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 459-60 (1993) (citing Garnes v. Fleming Landfill, Inc. 413 S.E.2d 897, 909 (W. Va. 1991)).}\footnotetext[240]{\textsuperscript{240} Clarence Morris, \textit{Punitive Damages in Tort Cases}, 44 HARV. L. REV. 1173, 1181 (1931).}\footnotetext[241]{\textsuperscript{241} Rustad & Koenig, \textit{supra} note 58, at 1296.}\footnotetext[242]{\textsuperscript{242} See id. at 1313 ("The company balanced the cost of installing $11 rubber bladders in 11 million cars and 1.5 million light trucks against paying for the actual damages attributable to 180 burn deaths, 180 serious burn injuries, and 2100 burned vehicles.").}\end{footnotes}
distribution of defective products."243 Thus, punitive damages have the effect of deterring even the most powerful corporations and individuals from attempting to circumvent justice by paying out meaningless amounts.

B. Punitive Damages as Victim Compensation

This Comment does not presuppose that every plaintiff who collects punitive damages is harmed in proportion to the award, or will put the money to good use. Rather, this Comment values the empowerment and sense of vindication that can come with punitive damages.244 For example, in a very high profile criminal case, Californian Scott Peterson was convicted of murdering his wife Laci and their unborn child.245 Despite the fact that Scott Peterson was sentenced to death, Laci’s parents chose to sue their former son-in-law in civil court. When asked what a civil suit could bring her, Laci’s mother Sharon Rocha replied, “satisfaction.”246 This “satisfaction” is what curative damages attempt to capture. They empower the victim and make substantive changes in our society.

When people who have been wronged become plaintiffs, they control the destiny of their case and if liability is found, the defendant is held responsible to no one but them.247 This type of vindication has many positive results. One commentator noted that “[s]triking back publicly obliterates the insult, whether a person is the butt of an


244. See, e.g., Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 8 n.4 (1991) ("[A punitive damage award] discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to and confident in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by the criminal law." (quoting Luther v. Shaw, 147 N.W. 18, 19-20 (Wis. 1914))).


247. See Charles K.B. Barton, Getting Even 1 (1999) ("It is important for victims to have the legal right to a substantial say in how their cases are handled and resolved in the legal justice system.").
office joke or a head of state whose embassy has been bombed. Revenge erases that paralyzing moment of revealed weakness. It enhances honor, shifts dignity back into balance.”248 People who have been victimized deserve a public forum to expose the wrongdoing and seek vindication.249

In our society, victims may speak of their desire to exact vengeance against their wrongdoers in private circles, however, in public, and within our system of justice, it is considered improper to speak this way,250 but vengeance need not be bad. Indeed, “[v]engeance is the original meaning of justice.”251 Yet the theory of just deserts, which promotes the idea that a “person deserves punishment proportionate to the moral wrong committed,”252 is publicly condemned, but nevertheless cited by empirical evidence as a major driving force behind both criminal and civil jury verdicts.253 As one legal scholar notes, “the sense of justice,
properly understood, does have a place in the way we talk—and argue—about matters of justice.”

Society views the concept of revenge as a relic of the past, much like the concept of *Lex Talionis*. There are many reasons for this. The concept of just deserts “evokes a deep unease in modern men and women.” Often our modern society is “more comfortable with the notion of forgiving and forgetting, however unrealistic it may be, than with the private and public reality of revenge, with its unsettling echoes of the primitive and its inescapable reminder of the fragility of human order.” Despite society’s outward contempt for revenge, if administered without bias within an appropriate structure, revenge can lead to positive results.

“[T]he universal human feeling [is] that bad men ought to suffer. It is no use turning up our noses at this feeling, as if it were wholly base.” Instead, it is inherent that we

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255. See Solomon, supra note 251, at 293 (“[T]he Old Testament instruction that revenge should be limited to ‘an eye for an eye, a tooth for a tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.’” (quoting Exodus 21:24-5)).

256. JACOBY, supra note 250, at 1.

257. Id. Jacoby also notes that:

Justice is a legitimate concept in the modern code of civilized behavior. Vengeance is not. We prefer to avert our eyes from those who persist in reminding us of wrongs they have suffered—the mother whose child disappeared three years ago on a New York street and who, instead of mourning in silence, continues to appear on television and appeal for information about her missing son; the young Sicilian who, instead of marrying her rapist as ancient local custom dictates, scandalized the town by bringing criminal charges; the concentration-camp survivors who, instead of putting the past behind them, persist in pointing their fingers at ex-Nazis living comfortable lives on quiet streets. Such people are disturbers of the peace; we wish they would take their memories away to a church, a cemetery, a psychotherapist’s office and allow us to return justice and vengeance to the separate compartments they supposedly occupy in twentieth-century life.

*Id.* at 1-2.

258. See *id.* at 115 (“Retribution per se is an integral component of just as well as unjust legal systems.”).

recognize victims' needs and provide for those needs in a controlled setting. Curative damages do not only provide for the victim's needs. Curative damages take this concept one step further by providing for society as well. Punitive damages do not fix the problem that created the harm. Curative damages do. Much like the goal of the criminal justice system, they also improve the well-being of society.

C. Punitive Damages Further Assist Crime Victims

The distinctions between criminal and civil law have blurred.260 No longer is split recovery the only concept that muddies the waters. In 1984, Congress passed the Federal Victims of Crime Act ("VOCA").261 Among other things, crime victims can seek reimbursement of crime-related expenses.262 For example, in New York State, federal and state funding is pooled to create a reimbursement account for victims of crimes. The state portion of the funding comes directly from the offenders who, by way of mandatory surcharges, pay into the Criminal Justice Improvement Account ("CJIA"). In combination with funds collected through VOCA provisions, the CJIA pays unreimbursed crime-related expenses including replacement of personal property, crime-scene clean-up, and funeral expenses.263 These reparation payments mimic compensatory damages in civil suits.

Additionally, in jurisdictions that allow victim impact statements and restorative justice programs, victims have more say in the cases against their perpetrators, but they still lack the autonomy and empowerment that comes with controlling their own case. In our criminal justice system,
the state decides whether to bring criminal charges, what those charges will be, whether to accept a plea bargain, whether to go to trial, and what the strategy at trial will be, including whether the victim will even testify against the accused... Notably absent from any prescribed role in these proceedings is the victim.264

Because prosecutors, not the victim, control criminal cases, decisions made by district attorneys' offices bind the victims without their say, leaving victims without any legal recourse, other than seeking tort remedies.265 Additionally, many acts of wrongdoing do not rise to the level of a criminal offense, leaving victims without any recourse in the criminal system. Curative damages are the perfect avenue for victims that fall between the cracks and must turn to civil litigation. Curative damages provide healing and empowerment for plaintiffs who may not otherwise obtain justice, while also providing justice for society.

V. CURATIVE DAMAGES

Curative damages smooth over a gaping hole in the doctrine of punitive damages. While punitive damages may provide vindication, curative damages go significantly further to correct the problem that created the harm and provide real healing for the victims. Part of the healing that comes from curative damages is the ability for victims to declare to the courts, and to the public, their charitable intent for the money.266 As Justice Priefefer pointed out, “[t]hose on the outside looking in often think grieving survivors are trying to make a profit off a loved one’s death.

264. Eisenstat, supra note 249, at 1153-54.

265. Id. at 1144. Of note, while some states bar civil recovery when criminal recovery is available, most do not. See Exxon Valdez v. Hazelwood, 270 F.3d 1215, 1226 (9th Cir. 2001) (“[A] prior criminal sanction does not generally, as a matter of law, bar punitive damages.”); Olmstead v. First Interstate Bank, 449 N.W.2d 804 (N.D. 1989) (affirming that the jury’s verdict of $100,000 in punitive damages was not excessive despite the fact that the defendant was sanctioned $500.00 during criminal proceedings); 25 C.J.S. Damages § 201 (2005) (“As a general rule, the fact that an act is punishable criminally does not of itself authorize or prevent the recovery of exemplary damages in a civil action.”).

266. “In a world in which justice is getting ever more impersonal and statistical, vengeance retains the virtue of being personal.” Solomon, supra note 251, at 302.
How many times have you heard it, or thought it yourself—"the money won't bring them back." Sadly, in our civil system, change cannot be mandated, only dollars can be used to compensate a loss or fix a wrong.

While curative damages were designed within the context of a wrongful death suit, it is applicable to many other types of tort actions. The doctrine of curative damages could be used in actions ranging from product liability cases to toxic torts. Curative damages have the potential to ameliorate a range of societal harms and mitigate the suffering of the plaintiff.

A. Telling Juries About the Beneficiary of the Punitive Award

One of the most controversial aspects of curative damages is the ability to tell the jury where the money is going to go. While it is possible for a plaintiff to donate their punitive damages after trial, presenting this information to the jury during the damages phase of the trial is critical for several reasons. Allowing plaintiffs to inform the court and jury of their intention for the award publicly dispels the notion that they are seeking to profit off of a personal injury or a loved one's death. Also, this information provides a forum to raise awareness of the issue and may even recruit people to support the resulting foundation. Additionally, early studies show that immediately redirecting the plaintiff's energy on the positive outcomes can lessen the impact of the grieving process. Lastly, informing the jury

267. Pfeifer, supra note 34.

268. See, e.g., O'Gilvie v. Int'l Playtex, Inc., 821 F.2d 1438, 1450 (10th Cir. 1987) (holding that a court cannot reduce punitive damages in exchange for an offer to fix the problem, noting "[t]he possibility that other potential defendants would be able to reduce their liability for punitive damages in the same way would encourage them to pursue the very behavior that the punitive award here was intended to deter, and thus would discourage voluntary cessation of injury-causing conduct"); Morris, supra note 240, at 1189 ("The only limitations are that the burden of the defendant's admonition must be confined to a money judgment . . . ."). See generally KENNETH R. FEINBERG, WHAT IS LIFE WORTH? (2005).

269. Dr. Camille Wortman is currently studying the effect of curative damages on grieving families. Initial findings suggest evidence that when a family is focused on preventing the harm from reoccurring, the grieving process is dramatically lessened. Tom Murray Interview, supra note 11.
of the award’s intent at the damages phase provides them with a more concrete framework for determining an appropriate amount of damages.\textsuperscript{270}

Many critics fear that the jury will be unduly prejudiced by learning where the money will go.\textsuperscript{271} In a lengthy dissent in a punitive damages case, Justice O’Connor praised the jury system as a “guarantor of fairness, a bulwark against tyranny, and a source of civic values,”\textsuperscript{272} and from there launched into commentary highlighting the fact that “jurors are not infallible guardians of the public good.”\textsuperscript{273} She argued that “juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from ‘wealthy’ corporations to comparatively needier plaintiffs.”\textsuperscript{274} While she noted that “retribution is a permissible consideration in assessing punitive damages awards,”\textsuperscript{275} she stopped short of acknowledging that punitive damages are awarded against defendants who have committed egregious wrongs. Curative damages, like punitive damages, are not an arbitrary monetary rebalancing tool.

In addition, many courts have weighed in on this issue in the forum of split recovery.\textsuperscript{276} In 1990, the Oregon

\textsuperscript{270} Often one of the most controversial aspects of punitive damages is the lack of concrete award guidelines for juries. According to the standard enumerated in \textit{BMW}, excessiveness of a verdict can be determined by the proportion of the award to the “degree of reprehensibility; . . . the disparity between the harm or potential harm suffered . . . and [the] punitive damages award; and the difference between this remedy and the civil penalties authorized.” \textit{BMW of N. Am., Inc. v. Gore}, 517 U.S. 559, 574-75 (1996); \textit{see also} \textit{Lanzano v. City of New York}, 519 N.E.2d 331, 332 (N.Y. 1988) (noting that juries should be informed when awards are tax-exempt and instructed not to consider tax consequences when formulating their awards).

\textsuperscript{271} \textit{See} McDonough, \textit{supra} note 3, at 25.


\textsuperscript{273} \textit{Id.} at 474.

\textsuperscript{274} \textit{Id.} at 491.

\textsuperscript{275} \textit{Id.} at 483.

\textsuperscript{276} \textit{See, e.g., Ford v. Uniroyal Goodrich Tire Co.}, 476 S.E.2d 565, 570 (Ga. 1996) (“By instructing the jury on the statutory scheme for allocating a punitive damages award, the trial court improperly shifted the jury’s focus from the
Supreme Court heard the case of the Honeywell family, who put a dining room set on a layaway plan in 1979. Due to illness and unemployment, it took the Honeywells eight years to pay off the debt and obtain the furniture. Unbeknownst to the Honeywells, the dining room set they had been scrimping and saving for had been knowingly sold out from under them years before. The jury awarded the Honeywells $1,795 in compensatory damages and $20,000 in punitive damages. However, the defendant appealed the case because the trial judge informed the jury that if they awarded punitive damages,

Oregon law requires that they be distributed as follows: First, the attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party; secondly, one-half of the remainder shall be paid to the prevailing party; third, the other half of the remainder shall be paid to the Criminal Injury Compensation Account ...

The Supreme Court of Oregon found that this instruction constituted a reversible error. It reasoned that this instruction distracted the jury from the “appropriate line of analysis,” which involved the defendant's conduct, not the distribution of the award. The court voiced a belief that the most serious problem that occurred due to these instructions was that they “encouraged the jury to award punitive damages for [the wrong] purpose.” Thus the court reversed the award and remanded the case to the circuit court for a new punitive damages trial.

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278. See id.
279. See id. “Instead of the furniture ordered by plaintiffs, defendant substituted a used or shopworn table and much cheaper and lower quality chairs.” Id.
280. Id. at 1021.
281. Id. at 1020.
282. Id. at 1021.
283. Id. at 1022.
284. Id. at 1023.
Three years later, in *Burke v. Deere*, Clair Burke was awarded $650,000 in compensatory damages and $50 million in punitive damages after he severely injured his hand in a farm accident with a Deere combine. Both awards were reduced by an order of remittitur to $390,000 and $28 million respectively. Deere appealed on several grounds. Despite determining that there was "no evidence of any conduct so egregious as to support an award of punitive damages," the Eighth Circuit Court of Appeals reviewed the fact that the trial court used a verdict form that informed the jury that a portion of the punitive award would go into a trust fund. In this case, the trust fund is actually Iowa's "Civil Reparations Trust." Additionally, the plaintiff's attorney falsely intimated that part of the award would compensate victims of similar farm accidents. This comment appeared more prejudicial in light of the jury's exposure to the testimony of victims of other devastating farm accidents. Thus, the court determined that "the use of evidence of other post-control accidents served to enhance the award of punitive damages," which constituted reversible error.

The *Burke* holding can be easily distinguished from the concept of curative damages. Burke's attorney misled the jury as to the purpose of the trust fund, intimating that the fund would serve people such as those the jury saw who were seriously and permanently damaged in farm accidents.

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285. 6 F.3d 497 (8th Cir. 1993).
286. See id. at 501.
287. See id.
288. See id.
289. See id. at 511.
290. See id. at 506.
292. See Burke, 6 F.3d at 507. "In closing argument, counsel for Burke argued that seventy-five percent of the punitive damages award 'will go into a civil trust fund to help prevent this sort of thing in a different way.'" Id. at 513.
293. See id. at 505 n.9.
294. See id. at 506.
295. See id.
The dissent offered hope that there may be occasions to inform the jury where the punitive damages would go when Justice Heaney mentioned, "[a]lthough I do not find the present case an appropriate opportunity to resolve the question whether Iowa juries should ever be informed of the destinations of such funds, I do think the erroneous information provided in the present case, along with the argument of counsel, proved prejudicial."296

Indeed, many judges have stated the belief that juries should be informed of the destination of the punitive damages award. As Justice Shaw of the Supreme Court of Florida stated, "[t]he statutory mandate to keep secret from the jury the State's sixty-percent take of the punitive damages award prevents the jury from performing its proper function."297 Even the Supreme Court of the United States has noted that punitive damages determinations have "been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."298 Yet, most split-recovery statutes carry the caveat that the jury must be kept in the dark about the split.299

To pretend that the jury does not consider where the money goes is a myth.300 Empirical evidence exists to show that "juries award the same aggregate amount to plaintiffs

296. Id. at 514 n.1 (Heaney, J., dissenting).


299. See, e.g., CAL. CIV. CODE § 3294.5(g) (West 2006) (repealed July 1, 2006) ("A jury shall not be notified that any portion of a punitive damages award will be paid to a governuent fund . . . . However, nothing in this section shall be construed to affect a punitive damages award if a juror or jurors had independent knowledge that a portion of a punitive damages award will be paid to a government fund."); The Roundtable responds to H.B. 1741's Changes in Punitive Awards, supra note 206, at 1 ("The new law also states that the jury will not be informed of the division of punitive damages. Authors of the measure say that this will prevent any undue influence in the jury's deliberations about punitive damages.").

300. See, e.g., Fattah, supra note 208, at A14 (plaintiff's attorney, Robert S. "Campbell pointed out that when the jury handed down their judgments in 2001, they were taking his clients into account, not the state, in what was justice").
whether or not they seek punitive damages."\textsuperscript{301} Even courts have supported the notion that those harmed more severely deserve more consideration. For example, in Tennessee, Gene M. Nixon was found liable for punitive damages in the amount of $100,000 to a corporate tenant and $450,000 to Florence Gordon, who lost her home adjacent to the building after Nixon commissioned the arson of the corporate building.\textsuperscript{302} In upholding the differential punitive sums, the court reasoned that "[t]he defendant's act was more egregious toward Mrs. Gordon than toward the other plaintiffs. Mrs. Gordon lost all of her personal belongings and was lucky to escape death, a fact of which the defendant was aware. The tenant was a corporation and lost only inventory and supplies."\textsuperscript{303} If the true aim of punitive damages is deterrence and punishment, the jury should have awarded identical sums to both plaintiffs. After all, Nixon's act of arson was exactly the same. Why would the court measure the actual harm done to the individual plaintiffs, rather than punish the defendant's egregious conduct?

While the law needs to limit bias and passion,\textsuperscript{304} basic human decency need not be removed from the equation. Recently, in Ohio, Natalie Barnes, a twenty-four-year-old disabled woman, died when her life-sustaining catheter slipped out of her chest during a routine dialysis treatment. The health aide hired to vigilantly watch Natalie left her unattended. After Natalie's death, her mother Andrea Barnes sank into a "depression so deep she requires assisted-living care."\textsuperscript{305} A jury found in Barnes' favor and awarded $3.1 million in compensatory damages and $3 million in punitive damages.\textsuperscript{306} When interviewed after the

\textsuperscript{301}. Welles, supra note 221, at 212. For information about how juries formulate punitive damage awards, see generally Cass R. Sunstein et al., Punitive Damages: How Juries Decide (2002).

\textsuperscript{302}. See Coppinger Color Lab, Inc. v. Nixon, 698 S.W.2d 72 (Tenn. 1985).

\textsuperscript{303}. Id. at 75.

\textsuperscript{304}. See generally Kristen Hays, Enron Jury Pool Told Not to Seek Vengeance, ABC News, Jan. 30, 2006, available at http://www.abcnews.go.com/Business/print?id=1557283 ("[The Judge] told the pool that the jury box was no place for anyone seeking vengeance.").

\textsuperscript{305}. James F. McCarty, Jury Hands 6.1 Million to Family of Victim; Home Health-Care Firm Must Pay Damage Award, Plain Dealer, May 5, 2005, at B1.

\textsuperscript{306}. Id.
trial, the jurors noted that the fate of Andrea Barnes was a large concern. "Everybody wanted to know how the money would be used' said a woman juror from Cleveland. 'We wanted to make sure Andrea Barnes is going to be taken care of for her pain and suffering because she is sick.'

As the Ohio Court of Common Pleas recognized in the Moore case, it is possible to inform the jury of the destination of the funds without bias toward the defendant. Bifurcating the trial into a liability phase and a damages phase, a common trial procedure that many states already use, can help to eliminate bias. It is not until the damages phase, and after the jury determines the defendant is liable, that the jury will be informed where the punitive damages money is to go. Once this is done, the plaintiff will have to sign a binding stipulation filed with the trial judge to ensure that the money will indeed go to the charitable endeavor presented to the jury.

B. Monitoring Curative Funds

Another concern presented by curative damages is that plaintiffs may falsely claim that funds will be used for a beneficial cause. As one critic stated, "[i]t is severely prejudicial to defendants to have the avowed unbinding potential use of punitive damages before a jury." This concern can be addressed by requiring the use of binding stipulations. Once the plaintiff has stipulated that the award will be given toward a charitable cause or new foundation to ameliorate the harm, the money must be turned over. Therefore, after the liability portion of the trial, but prior to entering the damages phase, the plaintiff

307. Id. (quoting a juror).

308. "Conrail makes no showing that knowledge of a charitable use of punitive damages destroyed the impartial character of the jury. Simply said, the jury was told that the plaintiffs intended to use the punitive damage award for a charitable purpose. Such use created no prejudicial self-interest in the award." Order at 13, Moore v. Consol. Rail Corp., 1995-CV-01196 (Stark County Ct. of Com. Pl. filed July 18, 1995).

309. See sources cited supra note 12.

310. McDonough, supra note 3, at 25 (emphasis added).

311. See BLACK'S LAW DICTIONARY 1427 (7th ed. 1999) (defining a stipulation).
would execute this binding stipulation. Then, and only then, the jury could be informed of the plaintiff's intentions.

Curative damages are also self-selecting. There will be plaintiffs who are not interested in carrying the torch of a particular cause. If a plaintiff is not ready to address the problem, they will not pursue curative damages. A plaintiff must be willing to see the curative damages award to fruition, whether they are creating their own new charity like the Moores and Mrs. Wightman, or giving their money to existing causes as Mr. Dardinger did with the punitive damages that were awarded to him.

CONCLUSION

Curative damages seek to restore plaintiffs and society in a controlled and responsible way. They redistribute resources to those who have suffered losses that cannot be remunerated by a quantitative sum. More so, they punish the defendant in a public way and, unlike split-recovery statutes, allow for plaintiff autonomy.

Given the correct scenario whereby a plaintiff is either the victim or family member of a victim of a serious harm, curative damages can make an enormously positive impact on the victim and society alike. Provided that the jury is carefully instructed, bias is eliminated and replaced with a passion to provide real justice.

Vicky and Denny Moore have proved that good can come from even the most atrocious situation. Their foundation is making a tangible difference each and every day by eliminating the "bad crossings [that] kill good drivers,"312 all while doing something just as important for themselves—healing. Vicky Moore's wish is to make sure that Ryan's death was not in vain: "[w]e're hoping that he knows what we're doing and that he's proud."313