Spilt-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses

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NOTES

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INTRODUCTION

The rate of tort litigation and the aggregate cost of the civil justice system in the United States grew rapidly in the 1980s. One of the most startling manifestations of this growth was an increase in the size of punitive damage awards. As Justice O'Connor observed in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 
"[a]wards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. Since then, awards more than thirty times as high have been sustained on appeal."
The dramatic growth in tort litigation and recoveries resulted in calls for tort reform. Two fundamental problems caused reformers to focus their efforts on punitive damages. First, punitive damages sometimes excessively penalize defendants, especially in mass tort cases where one defendant might be subject to multiple punitive damage awards for a single course of conduct. Second, punitive damages create a windfall for the plaintiff, who in theory has already been fully compensated by an award of compensatory damages. Many state legislatures and courts responded to these two problems of punitive damages by restricting the availability of punitive damage awards.

Some state legislatures, seeking to limit the recovery of punitive awards by plaintiffs, enacted a new type of remedy: "split-recovery" statutes. These statutes require plaintiffs to share a percentage of punitive damage awards with the general public. Some allocate the

with a contract affirmed after it was reduced from $3 billion), cert. dismissed, 485 U.S. 994 (1988); Thomas S. Mulligan & Michael Parrish, Exxon Ordered to Pay $5 Billion for Oil Spill, L.A. Times, Sept. 17, 1994, at A1 (reporting that a federal jury in Alaska recently awarded $5 billion in punitive damages against Exxon Corp. for its role in the 1989 Exxon Valdez oil spill). Indeed, courts have tolerated not only large punitive damage awards, but also punitive awards that have become increasingly disproportionate to actual damages. See, e.g., TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) (affirming a $10 million punitive award, which was 526 times actual damages).

The perceived abuse of punitive damages and continued growth in the size of individual awards has led to recurring appeals to the United States Supreme Court to address the constitutional limits of punitive damages. See, e.g., id.; Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2341-42 (1994) (Due Process Clause of the Fourteenth Amendment requires judicial review of the size of punitive damage awards).

6 See, e.g., David Margolick, Address by Quayle on Justice Proposals Irks Bar Association, N.Y. Times, Aug. 14, 1991, at A1 (reporting on then-Vice President Dan Quayle's proposals for reforming the civil litigation system).

7 See, e.g., Jeffries, supra note 3 (arguing that repetitive punitive awards for a single course of conduct could be unconstitutional as an excessive fine or in violation of due process). Cf. Dunn v. HOVIC, 1 F.3d 1371 (3d Cir. 1993) (Weis, J., dissenting) (arguing that punitive damages should not be allowed in asbestos litigation because repetitious claims against the same defendant may violate due process and bankrupt the defendant, making it impossible for future claimants to receive compensatory damages).


9 See Janie L. Shores, A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls, 44 ALA. L. REV. 61, 84-89 (1992) (comprehensively outlining the limits that many states have placed on punitive damage awards).

10 This Note adopts the rather appropriate name for these statutes first appearing in Recent Cases, 106 HARV. L. REV. 1691 (1993).

11 Although split-recovery statutes are relatively new phenomena, the judiciary has long recognized their theoretical justification. See, e.g., Bass v. Chicago & N.W. Ry., 42 Wis. 654, 672 (1877) ("It is difficult on principle to see why, when the sufferer by a tort has been fully compensated for his suffering he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they
state's share to the state treasury, while others distribute it to special funds created for the purpose of compensating accident or crime victims. By 1993, ten states had already enacted split-recovery statutes\(^\text{12}\) and the legislatures in four additional states were considering enacting their own split-recovery regimes.\(^\text{13}\) In addition, the recent congressional debates over health care reform included at least one serious federal split-recovery proposal.\(^\text{14}\)

Split-recovery statutes have not gone unchallenged. Opponents have attacked the statutes under the Takings and Excessive Fines Clauses,\(^\text{15}\) and the courts that have considered these challenges have reached conflicting conclusions. Three state supreme courts have held that their respective statutes are not unconstitutional under the Takings Clause,\(^\text{16}\) while the Colorado high court has ruled that Colorado's split-recovery statute works unconstitutional takings.\(^\text{17}\) The courts have reached similarly conflicting results with respect to excessive fines challenges. Three courts have held that the Excessive Fines Clause does not apply to punitive damage awards under split-recovery statutes,\(^\text{18}\) while a federal court in Georgia has declared the Georgia statute unconstitutional under the Excessive Fines Clause.\(^\text{19}\)


\(^{13}\) California, Indiana, New Jersey, Texas. See Blum, supra note 12, at 3, 35 (reporting on the Indiana, New Jersey, and Texas bills); New Bills, RECORDER, Jan. 19, 1993, at 22 (California bill).

\(^{14}\) See Senate Mainstream Coalition's "Proposed Agreement" on Health Care Reform, Dated Aug. 22, 1994, 1994 Daily Rep. For Exec. (BNA) No. 162, at d57 (Aug. 24, 1994). In an apparent attempt both to reform the tort liability system and to find additional funding for health care, the Senate Mainstream Coalition proposed requiring 75% of punitive damage awards in health care malpractice actions to be paid to the state in which the action is brought to fund licensing, disciplinary, and quality assurance programs. Id.

\(^{15}\) The Fifth Amendment provides: "No person shall be... deprived of... property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.


This Note examines split-recovery statutes under the principles of the Takings and Excessive Fines Clauses of the Federal Constitution. Part I outlines the split-recovery statutes that states have enacted in efforts to control punitive damage awards, and explores the role that the punitive remedy plays in American tort law. Part II discusses the opinions of those courts that have considered how the Takings and Excessive Fines Clauses relate to split-recovery statutes. Part III analyzes the Supreme Court's current takings and excessive fines jurisprudence. It argues, first, that a split-recovery statute giving the state a prejudgment interest in punitive damage awards does not constitute a taking if it limits the plaintiff's interest to a portion of the punitive award. Second, Part III contends that statutes giving the state a prejudgment interest in the award—those statutes least susceptible to takings challenges—are the very statutes to which the Excessive Fines Clause is most likely to apply under the Supreme Court's most recent excessive fines cases. Thus punitive damage awards in jurisdictions having split-recovery statutes are likely to be subject to constitutional review for excessiveness. Finally, Part III suggests that although a legislature could draft a split-recovery statute that is not subject to the limitations of the Takings or Excessive FinesClauses, such an objective is undesirable for policy reasons and poses serious practical difficulties.

This Note concludes that properly drafted split-recovery statutes are not only an obvious and appealing solution to the plaintiff-windfall problem of punitive damages, but also an answer to the problem of excessiveness. Since the Excessive Fines Clause limits the amount of pecuniary punishment that the government can levy, it also should limit punitive damage awards in cases where the government is an intended beneficiary and the plaintiff sues on the government's behalf.

I
PUNITIVE DAMAGE REFORM & THE STATUS OF PUNITIVE DAMAGES IN AMERICAN LAW

The rapid expansion of tort litigation in the 1980s and the public perception of abuse of the civil litigation system led to calls for tort reform, including limits on the availability of punitive damages. The state legislatures and courts reacted by initiating various reform measures designed to restrict the availability or amount of punitive damages that litigants could receive. This Part first outlines state punitive

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20 See Gastel, supra note 1 (reporting that a recent Insurance Information Institute public opinion survey reveals that only 15% of Americans believe that more than half of the lawsuits filed in the United States are justified, compared with 24% in 1984).

21 See, e.g., Margolick, supra note 6, at A1 (reporting on then-Vice President Dan Quayle's proposals for reforming the civil litigation system).
damage reforms through split-recovery statutes. It then explores the underlying tort policy supporting punitive damages and how that policy relates to split-recovery statutes.

A. State Reform of Punitive Damages: Split-Recovery Statutes and Other Measures

States have pursued various types of punitive damage reform. Some state legislatures and state courts have outlawed punitive damages altogether. Some have placed caps on all punitive damage awards or punitive damage awards in certain types of actions. Other states have limited the availability of punitive damages by increasing the burden of proof to a "clear and convincing" or "beyond a reasonable doubt" standard. Still others have provided for a bifurcated trial procedure requiring the jury to determine punitive damages in a separate proceeding following the determination of


24 See, e.g., COLO. REV. STAT. § 13-21-102(1) (a) (1987 & Supp. 1994) (prohibiting punitive damages from exceeding the amount of compensatory damages awarded); CONN. GEN. STAT. ANN. § 52-240b (West 1991 & Supp. 1994) (limiting punitive awards to twice compensatory damages); NEV. REV. STAT. § 42.005 (1991) (capping punitive damage awards at $300,000 in cases where compensatory damages are less than $100,000 and to three times the amount of compensatory damages in cases where compensatory damages exceed $100,000); N.D. CENT. CODE § 32-03.2-11(4) (Supp. 1993) (limiting punitive damages to the greater of twice compensatory damages or $200,000); TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (West Supp. 1995) (limiting punitive damages to the greater of four times actual damages or $200,000); see also GHIARDI & KIRCHNER, supra note 22, § 21.15 (discussing legislative limitations on the dollar amounts that plaintiffs can recover in punitive damages litigation).

25 See, e.g., KAN. STAT. ANN. § 60-3402(d) (Supp. 1993) (limiting punitive damages in medical malpractice cases to the lesser of 25% of the defendant's highest gross annual income during the five years preceding the wrongful act or $3 million) (determined to be unconstitutional in Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988)); see also GA. CODE ANN. § 51-12-5.1(e)(1) (Supp. 1994) (limiting punitive damages to one award against any one defendant for the same act or omission in products liability cases) (upheld as constitutional under challenges that it violates equal protection in Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635 (Ga. 1993); held to violate equal protection in McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990)).

26 See GHIARDI & KIRCHNER, supra note 22, § 21.13; Victor E. Schwartz & Mark A. Behrens, Punitive Damages Reform — State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip, 42 AM. U. L. REV. 1365, 1381 & nn.98-99 (1993) (reporting that 26 states have enacted a clear and convincing standard either by statute or judicial decision).

Finally, ten states have enacted split-recovery statutes.28 This Note is concerned solely with split-recovery statutes. The basic premise of all split-recovery statutes is the same: the plaintiff must share the defendant's punitive fine with the state. However, there is some dispute over whether the split-recovery statutes in force in the various states have achieved this goal. Some sources suggest that states have collected little money under split-recovery statutes, either because the states simply have not enforced the statutes or because the statutes fail to define clearly the mechanism through which the money is to be transferred to the state.29 The evidence indicates, nevertheless, that the split-recovery statutes in several states have resulted in substantial punitive funds making their way into public hands.30 For

28 See, e.g., CAL. CIV. CODE § 3295(d) (West Supp. 1995); MONT. CODE ANN. § 27-1-221(7) (1993); see also 2 GHIARDI & KIRCHNER, supra note 22, § 21.21 (discussing legislative reforms requiring bifurcated trials to determine punitive damages). The rationale for bifurcation procedures is to prevent evidence which may be relevant only to the issue of punitive damages, such as the net worth or profits of the defendant, from reaching the jury during its calculation of compensatory damages. See Schwartz & Behrens, supra note 26, at 1382 & nn.104-105 (citing 2 AMERICAN LAW INST., REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 255 n.41 (1991)).

29 See infra notes 33-51 and accompanying text. Judges are unlikely to achieve a split-recovery result on their own absent an enabling statute. See Smith v. States Gen. Life Ins. Co., 592 So. 2d 1021 (Ala. 1992), where a trial judge awarded half of a $250,000 punitive damage award to the Alabama affiliate of the American Heart Association. The Alabama Supreme Court ruled that the allocation of half of the punitive damages to an entity other than the plaintiff was inappropriate, holding that it infringed upon the jury's "constitutional authority to determine what amount, if any, of punitive damages is necessary to punish a defendant for wrongful conduct and to deter future conduct of a like nature." Id. at 1025 (quoting Fuller v. Preferred Risk Life Ins. Co., 577 So. 2d 878 (Ala. 1991)). The Smith court focused on a trial judge's lack of authority to reduce a plaintiff's valid punitive damage award, and did not address the question whether the legislature has the power to do so. 592 So. 2d at 1025. However, the Alabama Supreme Court did address that question in a more recent case, indicating that it would probably hold any split-recovery statute that the Alabama legislature might pass to be unconstitutional. See Henderson v. Alabama Power Co., 627 So. 2d 878, 893-94 (Ala. 1993) (striking down an Alabama statute capping punitive damage awards at $250,000 under the state constitutional right to jury

30 See Blum, supra note 12, at 35 (quoting a 1992 survey by the American Tort Reform Association noting that many states declined to enforce or did not have the funds to enforce split-recovery allocation mechanisms); Sharon G. Burrows, Comment, Aportioning a Piece of a Punitive Damage Award to the State: Can State Extraction Statutes Be Reconciled with Punitive Damage Goals and the Takings Clause?, 47 U. MIAMI L. REV. 437, 443 (1992) (noting that "the manner in which the money is to be directed to the state fund is not clear in most of these statutes"); Laura Duncan, Courts Not Sharing Punitive Awards with Disabled Under 7-Year-Old Law, CHICAGO DAILY L. BULL., Feb. 28, 1994, at 1 (suggesting that lack of awareness and poor enforcement have caused the Illinois courts to award the state Department of Rehabilitation Services part of a punitive recovery only once since the Illinois split-recovery statute went into effect in 1986).

31 See Blum, supra note 12, at 35 (noting that by early 1993 the Florida statute had raised $627,373 since 1988 and that the New York law had raised as much as $75,000 since its enactment in 1992).
example, the Iowa Civil Reparations Trust Fund and the Oregon Criminal Injuries Compensation Account stand to receive significant sums as their respective shares of two recent punitive damage awards.²²

Beyond the basic premise of sharing punitive awards with the public, the specific attributes of split-recovery statutes vary among the states. The percentages of the “split,” the types of actions in which the statutes apply, and the destination of the state’s share differ from state to state.

1. Statutes Applying to All Punitive Damage Awards

The majority of state legislatures that have enacted split-recovery statutes have made their laws applicable to all punitive damage awards. The Colorado, Utah, and New York statutes fall within this group, allocating their shares to their states’ general revenue funds.²³ Colorado claims a third of all punitive awards and Utah claims fifty percent.²⁴ New York claimed twenty percent of all punitive recoveries prior to the expiration of its statute on April 1, 1994.²⁵

Oregon and Missouri likewise have made their statutes applicable to all punitive damage awards.²⁶ Their statutes both deduct attorney fees and expenses from punitive damages and split the remainder

²² See Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 864, 868-69 (Iowa 1994) (Civil Reparations Trust Fund to receive 75% of that portion of $1.5 million punitive damage award against Owens-Corning remaining after payment of costs and fees); Tenold v. Weyerhaeuser Co., 873 P.2d 413, 415, 423-24 (Or. Ct. App. 1994) (Criminal Injuries Compensation Account to receive one half of $1.5 million punitive award after deduction of attorney fees).

²³ In State v. Moseley, 436 S.E.2d 632 (Ga. 1993), cert. denied, 114 S. Ct. 2101 (1994), the Georgia Supreme Court upheld the State of Georgia’s claim to $75 million as its share under the Georgia split-recovery statute of a $101 million punitive damage award against General Motors in a products liability action. Id. at 633-34; The Purpose of Punitive Damages, ATLANTA J. & CONST., Nov. 28, 1993, at F4. However, the state did not receive its $75 million share because the Georgia Court of Appeals reversed the judgment in favor of the Moseleys, including the punitive award, in the underlying products liability action for evidentiary errors. See General Motors Corp. v. Moseley, 447 S.E.2d 302 (Ga. Ct. App. 1994). Nevertheless, Georgia may yet share in a multimillion dollar punitive judgment in the Moseley case, since the Moseleys will likely seek a new trial. See Bill Rankin, Couple Will Seek a New Trial of GM Suit, ATLANTA J. & CONST., June 14, 1994, at D1.


evenly between the claimant and state-established victims' compensation funds.\textsuperscript{37}

The Florida statute, also applying to all punitive damage awards, takes a variable approach on the destination of the state's share. It allocates sixty-five percent of the award to the plaintiff, with the remaining thirty-five percent payable to a Public Medical Assistance Trust Fund if the cause of action was based upon personal injury or wrongful death.\textsuperscript{38} Otherwise, the remaining thirty-five percent goes to the state's General Revenue Fund.\textsuperscript{39}

In addition to these six states, the New Jersey,\textsuperscript{40} Indiana,\textsuperscript{41} California,\textsuperscript{42} and Texas\textsuperscript{43} legislatures have considered enacting split-recovery statutes that would apply to all punitive damage awards.

2. Statutes Applying to Punitive Damages in Only Certain Kinds of Actions

Georgia's split-recovery statute applies only in products liability cases.\textsuperscript{44} It deducts the prevailing party's litigation costs from the punitive award and allocates seventy-five percent of the remainder to the state's general fund.\textsuperscript{45}

\textsuperscript{37} Or. Rev. Stat. § 18.540(1) (1991 & Supp. 1993) (awarding 50% of punitive damages after deduction of attorney fees to the state Criminal Injuries Compensation Account, unless the prevailing party is a public entity, in which case the prevailing party keeps 100%); Mo. Ann. Stat. § 537.675(2) (Vernon 1988 & Supp. 1994) (awarding 50% of punitive damages after deduction of attorney fees and expenses to the state Tort Victims' Compensation Fund).

The Court of Appeals of Oregon has ruled that the Excessive Fines Clause does not apply to punitive damages awarded under the Oregon statute. See Tenold v. Weyerhaeuser Co., 873 P.2d 413 (Or. Ct. App. 1994).


\textsuperscript{39} Id. The Florida Supreme Court has upheld Florida's statute under a takings challenge. See Gordon v. State, 608 So. 2d 800 (Fla. 1992) (per curiam) (upholding the 60%-state/40%-plaintiff split that ch. 768.73(2) had mandated before it was amended to its present form in 1992), cert. denied, 113 S. Ct. 1647 (1993).

\textsuperscript{40} See Russ Bleemer, Limiting Damages Again, N.J. L.J., Feb. 15, 1993, at 6 (would allocate 75% of punitive awards to a state run trust fund to help pay for the care of indigent hospital patients); Blum, supra note 12, at 3.

\textsuperscript{41} See Blum, supra note 12, at 3 (would allocate 75% of punitives to the state Victim and Witness Assistance Program).

\textsuperscript{42} See New Bills, supra note 13, at 22 (would make 90% of punitive damage awards payable to the state Victim-Witness Assistance Fund).

\textsuperscript{43} See Blum, supra note 12, at 3 (would allocate 50% of punitive awards to the state treasury).

\textsuperscript{44} Ga. Code Ann. § 51-12-5.1(2) (Supp. 1994).

The Kansas statute applies only to medical malpractice actions. It requires plaintiffs in those actions to share fifty percent of punitive damages with a state-created health care stabilization fund.

3. **Statutes Taking an Intermediate Approach: A Special Duty to the Plaintiff?**

Iowa's statute applies to all punitive damages, but allocates seventy-five percent of the punitive damage award to a civil reparations trust fund only in cases where the defendant's outrageous conduct was not directed specifically at the claimant. Otherwise, the claimant keeps the entire punitive damage award.

The Illinois statute gives the court discretion to decide whether to apportion punitive damages among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Rehabilitation Services. However, in deciding whether to apportion punitives, judges must consider whether the defendant owed a special duty to the plaintiff.

B. **The Role of Punitive Damages in Tort Law: Split-Recovery Statutes as Consistent with Tort Goals**

1. **The Purpose of Punitive Damages**

The distinction between compensatory and punitive damages is clear in the law. Compensatory damages are that measure of recovery necessary to return the plaintiff to the plaintiff's preinjury condition. Punitive damages, on the other hand, are not intended to compensate the plaintiff for injury. Instead, punitive damages generally serve the goals of punishment and deterrence. This clear dis-

47 Id. § 60-3402(e).
51 Id. The requirement in Illinois' statute that the trial judge consider whether the defendant owed a special duty to the plaintiff appears to reflect the normative judgment also implicit in the Iowa statute, see supra notes 48-49 and accompanying text, that the plaintiff should receive the entire punitive award where the outrageous conduct was directed specifically at the plaintiff, rather than at society as a whole. Cf. infra notes 64-71 and accompanying text (discussing the plaintiff's windfall from punitive damages litigation).
52 James A. Henderson, Jr. & Richard N. Pearson, The Torts Process 201 (3d ed. 1988); see also Black's Law Dictionary 390 (6th ed. 1990) ("Compensatory damages are such as will compensate the injured party for the injury sustained, and nothing more.").
53 See Ghiardi & Kirchner, supra note 22, §§ 2.01, 18.08; James D. Ghiardi, Punitive Damages: State Extraction Practice Subject to Eighth Amendment Limitations, 26 Tort & Ins. L.J.
tinction between the purposes of compensatory and punitive damages is entrenched in state tort law. The vast majority of states recognize punishment and deterrence as the exclusive purposes of punitive damages.54

This emphasis on deterrence and punishment is consistent with the type of conduct required to sustain a claim for punitive damages. Although definitions differ from state to state, incorporating such terms as “outrageous” or “malicious” behavior, states generally allow punitive damages for only two types of conduct.55 The defendant must either intend to cause harm, or act recklessly or in conscious disregard of the probability of causing harm.56

Moreover, the retributive and deterrent purposes of punitive damages make them very similar to criminal fines.57 Indeed, it is in this sense that punitive damages serve useful social goals. First, they are “necessary as a civil form of punishment because they serve as a method of punishing behavior that society condemns, but which is not punishable in the criminal system.”58 In addition, “[p]unitive damages can be a useful tool for deterring the wrongdoer and others

119, 121 (1990); Shores, supra note 9, at 69-70; Leo M. Stepanian II, Comment, The Feasibility of Full State Extraction of Punitive Damages Awards, 32 DUQ. L. REV. 301, 303 (1994); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1973) (characterizing punitive damages as “private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence”); RESTATEMENT (SECOND) OF TORTS § 908(2) cmt. a (1977) (“The purposes of awarding punitive damages . . . are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future.”).


55 See 1 GHARDI & KIRCHNER, supra note 22, §§ 5.01, 5.04.

56 Id. § 5.04.

57 See Ghiardi, supra note 53, at 121.

58 Shores, supra note 9, at 70.
who are similarly situated from engaging in intentional or willful conduct that may injure others."  

One commentator argues, nevertheless, that punitive damages serve to compensate the injured party for litigation-related expenses and mental anguish caused by the outrageous nature of the defendant's actions. This argument not only cuts against the well-established doctrine of punitive damages in the vast majority of states, but overlooks more equitable solutions to these problems as well. For example, a system of reimbursing the litigation costs of all prevailing parties would be less arbitrary than merely allowing plaintiffs who prevail on punitive damage claims to receive compensation for litigation costs. In addition, correctly assessing the level of damages necessary to compensate the plaintiff fully would be a more equitable solution to problems of undercompensation than relying on an extraordinary punitive measure.

2. The Plaintiff's Windfall from Punitive Damage Litigation and the Split-Recovery Solution

As a corollary to the generally recognized view that punitive damages do not serve to compensate, legal scholars have long recognized that plaintiffs reap a windfall from punitive awards and that such awards should thus be shared with the public. In Smith v. Wade, for example, Justice Rehnquist noted that

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

Like Rehnquist, other authorities recognize that plaintiffs do not have a personal right to punitive damages. Rather, punitive damages are more similar to a public good than a private right because they serve the dual public goals of punishment and deterrence. Accordingly, punitive recoveries should be rewarded to the general public, not private plaintiffs.

59 Id. at 69.
60 See Burrows, supra note 30, at 447.
61 See supra notes 52-54 and accompanying text.
62 See Breslo, supra note 8, at 1136.
63 Id. at 1138.
65 See, e.g., Samsel v. Wheeler Transp. Servs., Inc., 789 P.2d 541, 555 (Kan. 1990) ("An individual does not . . . have a vested right in the common-law rules governing negligence actions."); Shores, supra note 9, at 91 ("[P]laintiff[s] [have] no constitutional right to punitive damages.") (citation omitted).
66 See Massey, supra note 8, at 1270.
One commentator has argued that windfalls resulting from punitive damages lead to economic inefficiencies. Determining that the amount of the economic windfall is that amount by which punitive damages exceed the plaintiff's litigation costs, this commentator concludes that punitive damage windfalls provide inefficient compensation, encourage plaintiffs to engage in inefficient risk-seeking behavior, and misallocate legal resources.

Thus, the windfalls from punitive damage awards distort the tort system by offering plaintiffs potentially greater recoveries than they need to be fully compensated for the losses they have suffered. Society may be injured by actions that form the basis of a claim for punitive damages. Yet, plaintiffs and their attorneys seek to keep the entire punitive “fine” for themselves. This may not only be inequitable where the punitive award is more than enough to compensate the plaintiff for inconvenience and for bringing the punitive claim, but may also lead to overly aggressive plaintiff behavior.

Confronted with similar criticisms, the American Bar Association's Action Commission to Improve the Tort Liability System proposed a compromise solution to the plaintiff-windfall problem in 1987: “After deducting costs and expenses, the court should deter...
mine what is a reasonable portion of the punitive damages award to compensate the plaintiff and counsel for bringing the action and prosecuting the punitive damages claim, with the balance of that award allocated to public purposes.”

This proposal acted as an invitation to state legislatures, many of which enacted split-recovery statutes in the late 1980s.

3. Preserving the Optimal Retributive and Deterrent Value of Punitive Damages

Split-recovery statutes are consistent with the goals and policies of tort law. These laws address the plaintiff-windfall problem without eliminating or restricting the deterrent and punishment value of punitive damages. Consequently, they are a solution that ameliorates the plaintiff-windfall problem more efficiently than other punitive damage reform measures.

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73 The ABA proposal suggested that the courts should determine how the punitive award should be allocated. Only Illinois enacted a statute leaving the allocation to court discretion. See Ill. Ann. Stat. ch. 735, para. 5/2-1207 (Smith-Hurd 1992). Janie Shores, a Justice on the Alabama Supreme Court, argues that the ideal split-recovery arrangement is one that leaves the determination of how to allocate punitive damages to court discretion. See Shores, supra note 9, at 62. Schwartz and Behrens, on the other hand, contend that legislatures are in a much better position to carry out tort reform. See Schwartz & Behrens, supra note 26, at 1373-74. That all states, except Illinois, which have enacted split-recovery statutes have not left the allocation of the punitive award to court discretion, despite the ABA proposal, indicates that legislators may find the ABA proposal to be an unworkable and unenforceable solution. State legislators, it appears, do not wish to rely upon the flexible discretion of trial judges to carry out the allocation of punitives between plaintiffs and the state. Thus, it appears that the majority of state legislators have sided with Schwartz and Behrens.

74 See Grube, supra note 71, at 841-55 (arguing that there is no good policy reason why punitive damages should go to the plaintiff); Lynda A. Sloane, Note, The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages, 28 Val. U. L. Rev. 473, 490 (1993) (noting that split-recovery statutes maintain the beneficial retributive function of punitive damages while eliminating plaintiffs’ windfalls); Note, supra note 8, at 1900 (arguing that punitive awards are a windfall to the plaintiff and that the plaintiff therefore should not be allowed to keep the entire punitive award). But see Burrows, supra note 30, at 443-50 (arguing that split-recovery statutes do not promote the goals or purposes of punitive damages).

75 But see Grube, supra note 71, at 862 (arguing that a split-recovery system does not totally eliminate the plaintiff’s windfall and proposing an alternative system in which the plaintiff receives none of the punitive award, but the plaintiff’s attorney is compensated).

76 There is, of course, another obvious solution to the plaintiff-windfall problem that would leave the punishment and deterrent value of punitive damages intact. A state legislature might levy a special tax on all punitive awards to eliminate the plaintiff’s windfall without curtailing the availability of the punitive sanction. This taxation solution, however, is inferior to the split-recovery solution because a special tax would be more susceptible to challenges under the Takings Clause than a split-recovery statute.

Although states “have broad powers to impose and collect taxes,” Allegheny Pittsburgh Coal Co. v. County Comm’n, 488 U.S. 336, 344 (1989), the Constitution restricts their taxing power. State attempts to accomplish indirectly through a selective tax those func-
For example, a system in which plaintiffs share punitive awards with the general public is more efficient than one in which the legislature simply caps all punitive damage awards. As Judge Shores argues, "Capping punitive awards at a specific monetary limit is an inefficient way to deter harmful conduct, because each defendant's economic situation is different. . . . To operate efficiently, the civil justice system must be particularized to specific defendants. A legislative cap may
over-deter some and under-deter others.” Unlike a system of caps on punitive damages, a split-recovery regime allows the jury to deter each defendant to the extent it deems appropriate.

A split-recovery system is also more efficient than one in which punitive damages are outlawed. While eliminating the punitive sanction is a solution to the inefficiencies of the plaintiff-windfall problem, it creates new inefficiencies of equal or greater magnitude by also eliminating the retributive and deterrent effect of punitive damages. In a system lacking punitive damages, defendants will not experience optimal levels of punishment and deterrence and, accordingly, will not curb their outrageous behavior to socially efficient levels.

Finally, a split-recovery system, while not directly restricting the amount of punitive awards, offers incidental benefits to defendants since “it reduces the artificially high incentives of some plaintiffs to sue.” Thus, split-recovery statutes serve the overriding policies of punitive damages—retribution and deterrence—and ameliorate one of the biggest dilemmas of the current punitive damages system—the plaintiff-windfall problem. In addition, as the cases in the following Part illustrate, a split-recovery regime may solve another pressing problem of the current punitive damages regime—the problem of excessive punitive sanctions.

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77 Shores, supra note 9, at 87.
78 See Note, supra note 8, at 1914. For similar reasons, a split-recovery regime is also a better reform measure than one which gives the entire punitive award to the state. Split-recovery statutes encourage plaintiffs to prosecute punitive claims against dangerous tortfeasors by allowing the plaintiff to keep a portion of the punitive award. A system in which the state receives 100% of punitive awards would discourage plaintiffs from bringing punitive claims, allowing some outrageous defendant behavior to go unpunished unless the state itself prosecuted punitive actions. Cf. supra note 66.
79 See Note, supra note 8, at 1914. Calculating the optimal level of retribution and deterrence, of course, presupposes a workable method for computing wealth maximization. Nevertheless, a completely accurate method for calculating the most efficient level is not necessary to conclude that a split-recovery regime is more efficient than the traditional system of punitive damages. A system that leaves the punitive remedy intact but also limits the excessiveness of punitive awards will more closely approximate optimal levels of punishment and deterrence than one that eliminates punitive damages altogether. In the latter regime defendants would theoretically pay the same amount of damages for any specific injury they caused regardless of how reckless and potentially dangerous their actions were.
80 Id. at 1912.
81 Excessive punitive awards are also inefficient. If an award is excessive, it will over punish and over deter the defendant, very likely leading to social inefficiencies as the defendant and potential defendants become overly cautious.

As the cases in part II.B, infra, indicate, and this Note in part III.B.2, infra, argues, punitive damages in a split-recovery system are subject to the constitutional limitations of the Excessive Fines Clause. Since plaintiffs in such a system bring punitive actions on behalf of the state, and the state shares in the punitive award, the punitive remedy meets the Supreme Court’s definition of sanctions that are subject to constitutional review for excessiveness. See infra part III.B.2.
The Constitutional Implications of Split-Recovery Statutes Under the Takings & Excessive Fines Clauses—The Cases

As one commentator has suggested, "split-recovery statutes face two horns of a constitutional dilemma." Plaintiffs and defendants each have one primary constitutional "horn" with which to attack these laws. Plaintiffs—those having to share their punitive awards with the state—generally challenge the facial constitutionality of the statutes under the Takings Clause. On the other hand, defendants—those having to pay the punitive awards—argue that the statutes subject punitive damage recoveries to constitutional limits on excessiveness under the Excessive Fines Clause.

The cases in this Part illustrate the interplay and interaction of the Takings and Excessive Fines Clauses in split-recovery regimes. The drafting of the statutes, specifically the extent of the state's prejudgment interest in the punitive award, influences the courts' takings and excessive fines analyses. The cases illustrate an intriguing relationship between the two clauses. Drafting to give the state a prejudgment interest in the inchoate punitive award avoids takings problems, but may open the door to excessive fines challenges. Drafting to deprive the state of any prejudgment interest, on the other hand, leads to takings challenges but no excessive fines problem.

A. Takings Challenges to Split-Recovery Statutes

1. Punitive Damages as a Public Good, Not a Private Right: State Courts Upholding Split-Recovery Statutes

The Supreme Court of Georgia recently upheld that state's split-recovery statute under takings challenges in two companion cases,

Recent Cases, supra note 10, at 1694.


GA. CODE ANN. § 51-12-5.1(e)(2) (Supp. 1994).
Mack Trucks, Inc. v. Conkle and State v. Moseley. The court outlined its reasoning on the issue in Mack Trucks, stressing the claimant’s lack of a vested property right in a punitive award and the public’s corresponding interest in punitive damage recoveries.

Mack Trucks involved a tort plaintiff’s products liability claims against a truck manufacturer. The jury awarded $184,082 in compensatory damages and two million dollars in punitive damages. As part of the judgment, the trial court declared Georgia’s split-recovery statute unconstitutional, and the state appealed.

The Georgia Supreme Court began its takings analysis with the premise that plaintiffs have no vested property right in an award of punitive damages. To the contrary, under Georgia law punitive damages serve the public purpose of punishing and deterring the defendant, not the private purpose of providing a windfall to the individual plaintiff. The court emphasized the public nature of punitive awards:

As the risk and harm are distributed between the individual plaintiff and all citizens of Georgia, the legislature has seen fit to distribute a portion of the damages awarded to those at potential risk—all citizens of the state. ... [T]here is no compelling reason to allow the

86 436 S.E.2d 635 (Ga. 1993).
87 436 S.E.2d 632 (Ga. 1993), cert. denied, 114 S. Ct. 2101 (1994). Moseley involved a products liability action against General Motors in which the jury awarded $101 million in punitive damages to the plaintiffs. 436 S.E.2d at 633. The trial court held that Georgia’s split-recovery statute violated the Takings Clause, and the state appealed. Id. at 633-34. On appeal, the Georgia Supreme Court reversed, ruling that the state of Georgia could constitutionally apportion 75% of the punitive recovery to the state’s general revenue fund. Id. at 634. However, the state did not receive its $75 million share because the Georgia Court of Appeals subsequently reversed the judgment in favor of the plaintiffs, including the punitive award, in the underlying products liability action for evidentiary errors. See General Motors Corp. v. Moseley, 447 S.E.2d 302 (Ga. Ct. App. 1994).
88 See Mack Trucks, 436 S.E.2d at 638-39. The plaintiff in Mack Trucks also challenged the Georgia split-recovery statute, which applies only in products liability actions, see Ga. Code. Ann. § 51-12-5.1(e)(1) (Supp. 1994), under the Equal Protection Clause. The Georgia Supreme Court, upholding the statute, discussed the differences between plaintiffs seeking punitive damages in products liability actions and those seeking punitive damages in other kinds of tort actions. 436 S.E.2d at 639. The court noted that products liability torts harm society as a whole, while torts where the defendant acted with specific intent to harm the plaintiff place only the plaintiff at risk. Id. Thus, the court concluded that the statute does not violate equal protection, because plaintiffs seeking punitive damages in products liability actions and those seeking punitives in other actions are not similarly situated. Id.
89 See Mack Trucks, 436 S.E.2d at 636.
90 Id. at 637.
91 Id.
92 Id. at 638.
93 Id.
only plaintiff permitted to litigate the punitive damages issue in court to retain all [of] the punitive damages award . . . 94

Thus, the court concluded that the legislature may lawfully regulate punitive damages awards, including apportioning a percentage to the state, without violating the Takings Clause. 95

Like the Georgia court, the Florida Supreme Court has upheld Florida’s split-recovery statute96 against a tort plaintiff’s takings challenges. Gordon v. State97 involved a claim for damages for false imprisonment and battery in which the plaintiff received $72,500 in compensatory damages and $512,600 in punitive damages.98 After entry of final judgment, the State of Florida intervened to assert its sixty percent interest in the punitive damages award.99 The plaintiff objected that the statute was unconstitutional under the Takings Clause. On appeal, the Florida high court, like the Mack Trucks court, addressed the nature of the plaintiff’s property right in a claim for punitive damages as well as the public’s interest in punitive damage recoveries.

The court placed great emphasis on the nature of a plaintiff’s property interest in punitive damages and the legislature’s authority to regulate punitive awards. It reasoned that plaintiffs had

no cognizable, protectable right to the recovery of punitive damages at all. Unlike the right to compensatory damages, the allowance of punitive damages is based entirely upon considerations of public policy. Accordingly, it is clear that the very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature. In the ex-

94 Id. at 639. Under the court’s reasoning, this statement applies especially to punitive damages in products liability cases, but not where the defendant acted with specific intent to harm the plaintiff. Id. The court developed this explanation to defend Georgia’s split-recovery statute, which applies only in products liability cases, against an equal protection challenge. However, the Iowa and Illinois legislatures apparently followed similar reasoning in drafting their split-recovery statutes, which take into account whether the defendant owed a special duty to the plaintiff in allocating a portion of punitive damages to the state. See supra notes 48-51 and accompanying text.

95 See Mack Trucks, 496 S.E.2d at 639. The drafting of the Georgia statute supports the court’s interpretation of its constitutionality under the Takings Clause. The statute gives the state of Georgia all the rights of a judgment creditor upon entry of judgment, see Ga. Code Ann. § 51-12-5.1(e)(2) (Supp. 1994), supporting the view that the claimant never has a property right in the entire punitive award. Cf. discussion of Kirk v. Denver Publishing Co., infra notes 118-21 and accompanying text.


97 608 So. 2d 800 (Fla. 1992) (per curiam), cert. denied, 113 S. Ct. 1647 (1993).

98 Id. at 801.

99 Id. The Florida legislature amended § 768.73(2) in 1992 to reduce the state’s interest in punitive damage awards to 35%. See supra note 39.
exercise of that discretion, it may place conditions upon such a recovery or even abolish it altogether.\textsuperscript{100}

Thus, the court concluded that plaintiffs have no prejudgment vested right in any claim to punitive damages and that the split-recovery arrangement had therefore not impaired any property right of the plaintiff.\textsuperscript{101}

The \textit{Gordon} court went on to identify the legislative objectives of the split-recovery statute: "to allot to the public weal a portion of damages designed to deter future harm to the public and to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney."\textsuperscript{102} Thus, the court recognized that punitive damages are a public good, and that it is in the public's interest not to give plaintiffs too great an incentive to sue for punitive damages.

The Iowa Supreme Court addressed the constitutionality of that state's split-recovery statute under the Takings Clause as well. In \textit{Shepherd Components, Inc. v. Brice Petrides-Donohue \& Assocs.},\textsuperscript{103} the plaintiff sued a contractor and an engineering firm after excavation work they were undertaking on property adjacent to the plaintiff's led to the collapse of a wall of the plaintiff's cinder block building.\textsuperscript{104} The trial court entered judgment against the contractor for punitive damages and allocated seventy-five percent of the punitive award, excluding attorney fees, to the state civil reparation trust fund pursuant to the Iowa split-recovery statute.\textsuperscript{105} The plaintiff appealed the allocation, asserting that the statute effected an unconstitutional taking of his property.\textsuperscript{106}

Taking a position similar to that of the \textit{Mack Trucks} and \textit{Gordon} courts, the Iowa court noted that "punitive damages are not allowed as a matter of right and are discretionary. . . . [P]unitive damages are not intended to be compensatory and . . . a plaintiff is a fortuitous beneficiary of a punitive damage award simply because there is no one else to receive it."\textsuperscript{107} Accordingly, the court concluded that the allocation of punitive damages to the state was not unconstitutional because

\textsuperscript{100} \textit{Gordon}, 608 So. 2d at 801 (quoting \textit{Gordon v. State}, 585 So. 2d 1033, 1035-36 (Fla. Dist. Ct. App. 1991) (citations omitted)).

\textsuperscript{101} \textit{Id.} at 801-02.

\textsuperscript{102} \textit{Id.} at 802.

\textsuperscript{103} 473 N.W.2d 612 (Iowa 1991).

\textsuperscript{104} \textit{Id.} at 614.

\textsuperscript{105} \textit{Id.; Iowa Code Ann. § 668A.1(2)(b) (West 1987)}.

\textsuperscript{106} \textit{See Shepherd Components, 473 N.W.2d at 614, 619. The plaintiff also asserted that the Iowa law violated the Due Process and Equal Protection Clauses. Id. at 619. The court, however, did not address these additional arguments. Id.}

\textsuperscript{107} \textit{Id.} (citations omitted).
the plaintiff had no vested property right in the punitive award before the entry of judgment.\(^{108}\)


The Supreme Court of Colorado reached a different conclusion. It ruled that Colorado's split-recovery statute\(^{110}\) was unconstitutional, because it effected a taking of private property without just compensation.\(^{111}\)

In *Kirk*, a newspaper publisher sued its distributor for the balance allegedly owed on a contract.\(^{112}\) The distributor counterclaimed, later adding a claim for malicious prosecution.\(^{113}\) The distributor eventually received a judgment of $118,980 in punitive damages on the malicious prosecution claim, and filed a post-trial motion challenging the constitutionality of the Colorado split-recovery statute requiring claimants to pay a third of punitive damage judgments to the state general fund.\(^{114}\)

The *Kirk* court noted that a punitive damages judgment is a property interest under Colorado law.\(^{115}\) It then reviewed the Supreme Court's takings jurisprudence and concluded that a governmental appropriation of a significant part of a money judgment can withstand a takings challenge only if it bears "a reasonable relationship to the governmental services provided to civil litigants in making use of the judi-

\(^{108}\) *Id.*


\(^{110}\) COLO. REV. STAT. ANN. § 13-21-102(4) (West 1987).

\(^{111}\) *Kirk*, 818 P.2d at 273.

\(^{112}\) *Id.* at 264.

\(^{113}\) *Id.*

\(^{114}\) *Id.*

\(^{115}\) *Id.* at 267. The best interpretation of the *Kirk* court's ruling is not that a plaintiff has a right to an inchoate award of punitive damages under Colorado law, but that a plaintiff has a right to receive the entire amount of the judgment that a judge has entered in the plaintiff's favor. The Colorado split-recovery statute disavows any prejudgment state interest in the punitive action. See COLO. REV. STAT. ANN. § 13-21-102(4) (West 1987). In analyzing the statute's effect, the court noted that it "contemplates the entry, and the actual collection, of a final judgment" before the state receives its one-third interest. 818 P.2d at 266. Thus, the *Kirk* court's characterization of a punitive damages judgment as a property interest appears more strongly to support the proposition that all final judgments are property than the proposition that an inchoate award of punitive damages is a property interest to which a plaintiff has a vested claim.

At any rate, *Kirk*'s recognition of the property interest under Colorado law reflects a fundamental aspect of any takings analysis of punitive awards—courts must look to state law to determine whether a punitive award qualifies as a property interest. While federal law may control the application of the principles of the Fifth and Fourteenth Amendments, state law creates and defines the property interest that is the subject of constitutional review. See *infra* part III.A.1 & 3. Consequently, a reviewing court's analysis of any takings challenge necessarily includes a review of state law, as well as federal constitutional jurisprudence.
cial process for the purpose of resolving the civil claim resulting in the judgment." The court found that one-third of the punitive award, which the state sought to collect under the split-recovery statute, was grossly disproportionate to any services that the government had made available to the claimant in using the courts.

The *Kirk* court, however, did not base its decision on this ground alone. The Colorado split-recovery statute provides that the state has no interest in the claim for punitive damages at any time before the judgment becomes payable. The court found this "statutory disavowal . . . of any state interest" before collection to indicate that the statute in this case effected unconstitutional takings, since the disavowal was "an implicit legislative acknowledgement of the property interest" that the claimant has in the judgment.

Thus, a factor distinguishing the result reached in *Kirk* was the drafting of the Colorado split-recovery statute, which disclaimed any prejudgment government interest in the punitive award. The result might have been different in *Kirk* had the statute not included this provision. As the majority noted, "[t]he legislature may well abate or diminish a pending civil action, but when that claim ripens into judgment 'the power of the legislature to disturb the rights created thereby ceases.'" Consequently, the distinguishing factor in *Kirk* is that the state sought to take what had already matured into a full property interest.

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116 *Kirk*, 818 P.2d at 270.
117 *Id*. at 273.
118 See COLO. REV. STAT. ANN. § 13-21-102(4) (West 1987) ("Nothing in this subsection shall be construed to give the general fund any interest in the claim for exemplary damages . . . at any time prior to payment becoming due") (emphasis added).
119 *Kirk*, 818 P.2d at 267, 273. The *Kirk* court also found the lack of any nexus between the government interest in punishing and deterring outrageous tortious conduct and the allocation to the state of a portion of the injured person's punitive award to indicate that the statute effected unconstitutional takings. *Id*. at 273. The court, however, overlooked the fact that the plaintiff had already been fully compensated by the award of compensatory damages. It appears to have viewed punitive damages as something to which the plaintiff is entitled, rather than a public good. Had it interpreted punitive damages as most authorities do, as private fines designed to punish the wrongdoer and protect society from similar outrageous conduct in the future, see *supra* notes 53-54 and accompanying text, it would be difficult to understand why it found no nexus between the public interest served by punitive damages and the allocation of part of the punitive fine to the state.
120 *Kirk*, 818 P.2d at 272 (quoting McCullough v. Virginia, 172 U.S. 102, 123-24 (1898)).
121 See Note, *supra* note 8, at 1916 (arguing that the constitutional infirmity in the Colorado statute could be overcome by altering the statutory language); see also infra part III.A.3 (discussing how a split-recovery statute should be drafted to avoid constitutional infirmity under the Takings Clause).
B. Split-Recovery Statutes and the Excessive Fines Clause

1. The Supreme Court's Position: Browning-Ferris Industries v. Kelco Disposal, Inc.¹²²

In *Browning-Ferris* the United States Supreme Court was presented with the question of whether the Excessive Fines Clause of the Eighth Amendment¹²³ applies to punitive damages. The Court reviewed the history and origins of the Excessive Fines Clause¹²⁴ and held that the Clause does not restrict the size of punitive sanctions in civil suits "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."¹²⁵ The Court reasoned that the historical purposes of the Excessive Fines Clause were to place limits on the power of the sovereign. This concern is not present in cases where only private parties receive punitive damages from other parties and the government receives no share of the punitive sanction.¹²⁶ However, the majority explicitly left open "the question whether a qui tam action, in which a private party brings suit in the name of the [government] and shares in any award of damages, would implicate the [Excessive Fines] Clause."¹²⁷

Accordingly, the *Browning-Ferris* decision opened the debate on whether the Excessive Fines Clause limits the size of punitive damage awards in jurisdictions where the state shares in those judgments by virtue of a split-recovery statute. As Justice O'Connor observed in *Browning-Ferris*, "[B]y relying so heavily on the distinction between governmental involvement and purely private suits, the Court suggests... that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity."¹²⁸ The following cases analyze split-recovery statutes in light of *Browning-Ferris*.¹²⁹

¹²³ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.
¹²⁴ See *Browning-Ferris*, 492 U.S. at 264-73.
¹²⁵ Id. at 263-64.
¹²⁶ Id. at 271-72.
¹²⁸ *Browning-Ferris*, 492 U.S. at 298-99 (O'Connor, J., concurring in part and dissenting in part) (citing Florida's split-recovery statute as an example).
¹²⁹ The Supreme Court again left open the question of whether the Excessive Fines Clause applies in qui tam actions in a more recent case. See *Austin v. United States*, 113 S. Ct. 2801, 2804 n.3 (1993). *Austin* makes the argument for applying the Excessive Fines Clause to split-recovery punitive awards more compelling, since it holds that the Clause may apply in civil cases where the government exercises its power to punish. Id. at 2805-06. Ruling on the applicability of the Clause to civil forfeitures, the Court held that "the question is not... whether forfeiture... is civil or criminal, but rather whether it is punish-
2. Does the Destination of the State’s Share of the Punitive Recovery Make a Difference?

Four courts have analyzed split-recovery statutes under the Excessive Fines Clause, reaching conflicting results. Three of the courts reached their conclusions based upon whether the statute allocated the state’s share of the punitive recovery to a public fund separate from the rest of the state government. The fourth, however, concluded that punitive damage awards in a split-recovery regime are not subject to the limits of the Excessive Fines Clause without taking into account the possible effects of dedication to an independent public fund.

In *McBride v. General Motors Corp.*130 a federal court considered the constitutionality of Georgia’s split-recovery statute131 in a declaratory judgment action brought by tort plaintiffs.132 The court held that the statute was unconstitutional under the Excessive Fines Clause.133

In reaching this conclusion, the court first considered the Supreme Court’s statements in *Browning-Ferris.*134 Noting that the Georgia law provided for the payment of seventy-five percent of the punitive damage award directly to the state, the court reasoned that the law “converts the civil nature action of the prior Georgia punitive damages statute into a statute where fines are being made for the benefit of the State, contrary to the constitutional prohibitions as to excessive fines.”135 Thus, for the *McBride* court, the fact that Georgia’s

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131 GA. CODE ANN. § 51-12-5.1(e) (2) (Supp. 1994).
133 Id. at 1577-78. The court also ruled that the statute was unconstitutional under the Due Process and Equal Protection Clauses, and the Georgia Constitution. *Id.* These holdings do not bear on split-recovery statutes in general, since the Georgia law is limited in application to products liability cases, unlike most split-recovery statutes. *But see Kan. Stat. Ann.* § 60-3402(a), (e) (Supp. 1992) (limited in application to medical malpractice cases).
135 Id. at 1578. The court’s remedy for the statute’s violation of the Excessive Fines Clause—declaring the statute facially unconstitutional—is inconsistent with the Clause. Unlike the Cruel and Unusual Punishments Clause, which categorically outlaws certain kinds of punishment, the Excessive Fines Clause outlaws excessive fines, not the existence of fines as a sanction. The Georgia statute merely enables punitive damages; it does not set them at a level that will be excessive in every case. Excessiveness will depend on the amount of the punitive sanction as applied under the facts of the case, not the mere existence of a civil fine. See Grube, *supra* note 71, at 871; Recent Cases, *supra* note 10, at 1896.

The *McBride* court concluded that the Georgia statute’s allocation of part of the punitive award directly to the state violated the Double Jeopardy Clause as well. U.S. Const. amend. V. 737 F. Supp. at 1579. However, this could only be true if the state had previously prosecuted the defendant criminally for the same act for which the defendant now had to pay punitive damages to the state under the split-recovery arrangement. See United States v. Halper, 490 U.S. 435 (1989) (Double Jeopardy Clause of the Fifth Amendment
statute allocated seventy-five percent of punitive awards directly to the state treasury was the deciding factor in its excessive fines analysis.

In *Burke v. Deere & Co.*, a different federal court considered the constitutional status of punitive damages awarded under Iowa's split-recovery statute. *Burke* involved a products liability action brought by a farm worker who was injured when he attempted to clean out an auger shaft on a John Deere Titan series combine. The jury awarded the plaintiff fifty million dollars in punitive damages after finding that the defendant had acted with willful and wanton disregard for the safety of another. In post-trial motions to the trial court, the defendant, relying on *McBride*, argued that the punitive damage award was subject to the limitations of the Excessive Fines Clause because the state was to receive seventy-five percent of the award pursuant to the Iowa split-recovery statute.

The court disagreed, distinguishing *McBride*. The court noted that under Iowa law the state's seventy-five percent share was to go to a civil reparations trust fund to be administered by the courts, and reasoned that the law therefore did not give the state any interest in the punitive recovery. Examining the differences between the Georgia and Iowa statutes, the court concluded that "[a] clear distinction can be made between funds that are to be placed into the state treasury and those funds that are to be placed into a civil reparations trust fund to be administered by the courts." Accordingly, the court held that the Excessive Fines Clause did not apply to the Iowa statute because a separate public fund, not the state government itself, was the recipient of the public's punitive share.

places limits on the amounts that the Federal Government may recover in a civil action after the defendant already has been punished through the criminal process).


137 IOWA CODE ANN. § 668A.1(2) (b) (West 1987).


139 *Id.* at 1230. The trial court found this award to be excessive and reduced punitive damages to $28 million, or about one percent of the defendant's net worth. *Id.* at 1238.

140 *Id.* at 1242; IOWA CODE ANN. § 668A.1(2) (b) (West 1987).

141 See *Burke*, 780 F. Supp. at 1242.

142 *Id.*

143 *Id.* The *Burke* court appears to have reached the wrong result in light of the Supreme Court's current test for determining when the Excessive Fines Clause applies. See *infra* part III.B.2.

On appeal, an Eighth Circuit panel reversed and dismissed the punitive damages award and remanded for a new trial on liability, causation and actual damages. *Burke v. Deere & Co.*, 6 F.3d 497 (8th Cir. 1993), cert. denied, 114 S. Ct. 1063 (1994). The panel did not directly address the excessive fines issue, nor did it discuss Iowa's split-recovery statute. However, it held that it was reversible error for the trial court to allow the plaintiff's counsel to argue to the jury that 75% of the punitive damage award would go into a civil reparations fund. *Id.* at 513. As the panel reasoned, the defendant was prejudiced since "the size of the verdict leads us to conclude that the jury indeed sought to create some sort of injury
The Supreme Court of Iowa recently followed Burke's analysis and concluded, like Burke, that the Excessive Fines Clause does not apply to punitive damage awards under Iowa's split-recovery statute. In Spaur v. Owens-Corning Fiberglas Corp., an Iowa jury assessed $1.5 million in punitive damages against Owens-Corning in an asbestos suit. The trial court entered judgment, and Owens-Corning appealed, arguing that the punitive award was unconstitutional under the Excessive Fines Clause.

Owens-Corning contended that the fact that the government shared in punitive awards under Iowa's split-recovery statute triggered excessive fines protections under Browning-Ferris. However, the supreme court disagreed, relying as had Burke on the fact that the state's share of the punitive award is allocated to the separately administered Iowa Civil Reparations Trust Fund, rather than to the general state treasury. Accordingly, the court concluded that the state's interest in the public share of punitive damage awards is too limited to invoke the protection of the Excessive Fines Clause.

The Court of Appeals of Oregon has also recently considered whether the Oregon split-recovery statute subjects punitive damage awards in that state to the restrictions of the Excessive Fines Clause. Like Iowa's statute, the Oregon statute allocates the state's share of punitive awards to a separate public fund, the Oregon Criminal Injuries Compensation Account. Nevertheless, in Tenold v. Weyerhaeuser Co., the Oregon court did not consider what impact, if any, this fact might have on the excessive fines analysis.

"fund or to improperly engage in a social reallocation of resources for the benefit of parties not properly before the court." Id. Some split-recovery statutes mandate that the jury not be informed of their distributive effects, see, e.g., Fla. Stat. Ann. ch. 768.73(8) (Harrison Supp. 1993), or have been judicially construed to require that the jury not learn of their effects. See Honeywell v. Sterling Furniture Co., 797 P.2d 1019 (Or. 1990).

510 N.W.2d 854 (Iowa 1994).

Id. at 857.

Id. at 868. Owens-Corning also challenged the award under the Double Jeopardy and Due Process Clauses. Id. at 865. However, the Iowa Supreme Court ruled against Owens-Corning on these challenges as well. Id. at 865-69.

Id. at 868.

Id. at 868-69. The court noted that awards within the fund are not commingled with general state revenues and may be disbursed only for specific statutory purposes. Id.

Id. at 869. Like Burke, Spaur very likely would have come out differently had the court been sensitive to the Supreme Court's current test for the application of the Excessive Fines Clause. See infra part III.B.2.


Id. § 18.540(1)(c). However, if the prevailing party is a public entity, the statute provides that the public entity shall take the whole award to the exclusion of the Criminal Injuries Compensation Account. Id.

Tenold involved a claim for malicious prosecution, intentional infliction of emotional distress, and defamation. The jury awarded over $1.5 million in punitive damages against the two defendants, and they appealed arguing that the award violated the Eighth Amendment's prohibition on excessive fines. Although the court recognized that the "government becomes a beneficiary" of punitive damage awards under the Oregon statute, it ruled nevertheless that the Excessive Fines Clause did not apply. The court emphasized the lack of governmental involvement in the award, noting that a private party had initiated the claim and the jury had imposed the judgment. Accordingly, it concluded that applying the Excessive Fines Clause in the split-recovery context would not further the purposes of the Eighth Amendment discussed in Browning-Ferris.

The chief consistency that one can draw from these four cases appears to be that the degree of governmental involvement in the punitive award may determine the outcome of the excessive fines analysis. The Tenold court was willing to recognize inadequate governmental involvement based solely upon the fact that a private party initiated the claim and a jury decided the defendants' punishment. The other courts seem more likely to find sufficient governmental involvement to satisfy the Excessive Fines Clause, and distinguish instead on the basis of whether the state shares directly in the punitive award. This Note will take up these issues further in part III.B.2.

III
SPLIT-RECOVERY STATUTES & THE TAKINGS & EXCESSIVE FINES CLAUSES—CONSTITUTIONAL INTERPLAY

A. Split-Recovery Statutes Do Not Effect Unconstitutional Takings Because of the Limited Extent of the Plaintiff's Property "Right" in a Future Punitive Damage Award

The Supreme Court's takings jurisprudence is muddled because the Court has not clearly delineated what takings tests apply to what kinds of property. Nevertheless, the Court does have some per se takings rules, and different considerations apply depending on the na-

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153 Id. at 415.
154 Id. at 415, 423. The defendants also asserted that the award violated their due process and state constitutional rights. Id. at 423.
155 Id. at 424.
156 Id.
157 Id. Like Burke and Spaur, Tenold also very likely would come out differently under a more sensitive analysis of the Supreme Court's excessive fines jurisprudence. See infra part III.B.2.
158 See Burrows, supra note 30, at 461.
ture of the property involved. Thus, it is necessary to define the nature of the plaintiff's property interest in an inchoate award of punitive damages in order to fully analyze takings challenges to split-recovery statutes.

1. The Nature of the Plaintiff's Property Right in a Claim to Punitive Damages

Plaintiffs generally have a right to compensatory damages as redress for a legally cognizable injury. By contrast, tort policy and the laws of most of the states indicate that a plaintiff has no inherent right to an award of punitive damages. Thus, a punitive recovery beyond a plaintiff's litigation costs is a windfall to the plaintiff. Many legal authorities have argued that it is anomalous that punitive damages—a windfall—should ever go to a plaintiff.

Consistent with the view that plaintiffs have no vested property right in an inchoate award of punitive damages, states may constitutionally cap or eliminate punitive damages. State legislatures may eliminate punitive damages because they have the constitutional power to abrogate common-law and statutory rights of action. Sev-

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159 See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (total diminution of all economic value and not a use already prohibited by common law nuisance is a taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (permanent physical occupation is always a taking).

160 See Paul F. Kirgis, Note, The Constitutionality of State Allocation of Punitive Damage Awards, 50 WASH. & LEE L. REV. 843, 849 (1993). Courts often characterize the right to an award of compensatory damages as property. Id. Thus, if a state were to allocate a portion of a compensatory award to itself, the allocation would probably be invalid under the Takings Clause. Id. at 850.

161 See, e.g., Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 638-39 (Ga. 1993); Gordon v. State, 608 So. 2d 800, 801-02 (Fla. 1992), cert. denied, 113 S. Ct. 1647 (1993); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc., 473 N.W.2d 612, 619 (Iowa 1991); Smith v. Printup, 866 P.2d 985, 994 (Kan. 1993); see 1 GHIARDI & KIRCHNER, supra note 22, § 5.01; Kirgis, supra note 160, at 850-51; cf. supra note 54 and accompanying text (authorities holding that punitive damages serve the exclusive goals of punishment and deterrence).

162 See Note, supra note 8, at 1906 (arguing that the windfall should be calculated by subtracting the plaintiff's litigation costs). There is, however, a valid argument that the entire punitive award, including an amount equal to the plaintiff's litigation costs, is a windfall to the plaintiff, since American law traditionally does not award attorney fees to prevailing parties.

163 See supra notes 64-71 and accompanying text; see also Mack Trucks, 436 S.E.2d at 638-39.

164 See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 39 (concurring opinion) ("State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages.").

165 See, e.g., Teasley v. Mathis, 255 S.E.2d 57, 58-59 (Ga. 1979) (no-fault statute eliminating punitive damages).
eral courts have reasoned that this power also enables legislatures to constitutionally cap punitive awards.¹⁶⁶

Indeed, the purposes of punitive damages, punishment and deterrence,¹⁶⁷ suggest that punitive damages may better qualify as a public good than a private right. Punitive damages serve to punish the defendant and deter her and other potential tortfeasors from acting in ways that might harm society. Indeed, it is anomalous that individual plaintiffs should keep the entire punitive fine when the defendant placed all of society at risk with her conduct.¹⁶⁸ Thus, the punishment extracted from the defendant, the civil punitive sanction, is a public good that should go to the state and not the private plaintiff, much as criminal fines go to the state.¹⁶⁹

Since punitive damages better qualify as a public good than a plaintiff’s inherent private right, the ability to receive punitive damages can best be characterized as a statutory benefit. In creating and tolerating private suits for punitive damages, the state allows private plaintiffs to receive what it could claim in full for itself—the civil punitive sanction. Thus, punitive damages closely resemble traditional entitlements, since the state is in effect giving to private individuals what rightfully belongs to the public.¹⁷⁰ Accordingly, discerning the nature of the plaintiff’s property right in an award of punitive damages requires the analyst to look to the Supreme Court’s entitlements jurisprudence, as a supplement to its takings jurisprudence, to understand


¹⁶⁷ See supra notes 53-54 and accompanying text.

¹⁶⁸ Cf. Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 639 (Ga. 1993) (arguing that it is reasonable for society to receive the punitive sanction where society as a whole is placed at risk, for example by products liability torts).

¹⁶⁹ See Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting); Massey, supra note 8, at 1270 (noting that the theoretical justification for punitive damages indicates that they should go to the state, not private plaintiffs). It is important to recognize, however, that a system that leaves some of the award to the private plaintiff as an incentive for instituting the punitive claim on behalf of the state serves the public interest better than one that allocates 100% of the punitive award to the state. After all, the state relies on private litigants to bring punitive claims on its behalf. See supra note 66.

¹⁷⁰ The Supreme Court has reviewed not only welfare benefits cases but also public sector job cases under entitlements theory. See, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972), overruled on other grounds by Rust v. Sullivan, 500 U.S. 173 (1991). Since the Court has reviewed such varying “benefits” under entitlements theory, it is not a great leap of the imagination to view punitive damage awards as an entitlement.
the constitutional principles bearing on the issue. As the analysis will
demonstrate, the extent of a private property right in a government
benefit depends on the drafting and construction of the state statute
or rules giving rise to that property right.\textsuperscript{171}

2. \textit{Split-Recovery Statutes Do Not Effect Unconstitutional Takings
Under Entitlements Jurisprudence}

Since the right to an inchoate award of punitive damages is not a
vested property right,\textsuperscript{172} but more closely resembles an entitlement, it
is helpful to analyze how the Supreme Court has addressed takings
challenges in entitlements cases.

In \textit{Bowen v. Gilliard}\textsuperscript{173} the Court addressed a takings challenge to
a statutory decrease in benefits under the Aid to Families with Depen-
dent Children (AFDC) program. The decrease resulted from a 1984
amendment that required a family to take into account the income of
all parents, brothers, and sisters living in the same home in determining
the family's eligibility for benefits.\textsuperscript{174} The AFDC program re-
quired that recipients of assistance "must assign to the state any right
to receive child support payments for any member of the family."\textsuperscript{175}
Consequently, one effect of the expanded definition of "family" was to
require some recipients to assign more separate support payments to
the state as a condition to receiving benefits.\textsuperscript{176}

The plaintiffs in \textit{Gilliard} contended that the net decrease in their
overall family benefits resulting from the expanded definition of "fam-
ily" was a taking. They also argued that the new definition, which al-
lowed the state to take part of one child's separate support payments,
effected a taking of that child's separate support.\textsuperscript{177} The Supreme
Court dismissed the argument that a net decrease in the benefits was

\textsuperscript{171} \textit{See Roth}, 408 U.S. at 577. The supreme courts of Florida and Georgia appear to
have used similar reasoning in holding that their states' split-recovery statutes are not un-
constitutional under the Takings Clause. In \textit{Gordon v. State}, 608 So. 2d 800 (1992), \textit{cert.}
denied, 113 S. Ct. 1647 (1993), the Florida high court reasoned that a plaintiff's right to
punitive damages depends on the extent and manner in which the legislature creates such
a remedy. \textit{Id.} at 801. The court continued: "[I]t is clear that the very existence of an
inchoate claim for punitive damages is subject to the plenary authority of . . . the legisla-
ture. . . . [I]t may place conditions upon such a recovery or even abolish it altogether." \textit{Id.}
The Georgia Supreme Court similarly reasoned that the legislature may constitutionally
regulate the amount of a plaintiff's punitive damage recovery. \textit{Mack Trucks}, 436 S.E.2d at
639.

\textsuperscript{172} \textit{See, e.g.}, \textit{Mack Trucks}, 436 S.E.2d at 638-39; \textit{Gordon}, 608 So. 2d at 801-02; \textit{Shepherd
Components, Inc. v. Brice Petridades-Donohue & Assocs., Inc.}, 473 N.W.2d 612, 619 (Iowa

\textsuperscript{173} 483 U.S. 587 (1987).

\textsuperscript{174} \textit{Id.} at 589.

\textsuperscript{175} \textit{Id.} at 591-92.

\textsuperscript{176} \textit{Id.} at 594.

\textsuperscript{177} \textit{Id.} at 604-06.
itself a taking, since the claimants had "no protected property rights to continued benefits at the same level." Then, to determine whether the statutory assignment of child support benefits was a taking of the child's support payments, the Court applied the three-factor test of *Penn Central Transportation Co. v. City of New York*: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interfered with distinct investment-backed expectations; and (3) the character of the governmental action." Applying these factors, the Court concluded that there had been no taking of the child's separate support payments.

The Court's analysis in *Gilliard* is instructive for a takings analysis of split-recovery statutes for several reasons. First, *Gilliard* involves a takings challenge to a decrease in government benefits, which is closely analogous to the enactment of a split-recovery statute, by which the state diminishes a plaintiff's "punitive benefits." Second, it addresses takings claims about two kinds of property—the family's general AFDC payments and the child's specific separate support payments. If a potential future award of punitive damages is more like an outright statutory benefit, the Supreme Court's analysis in *Gilliard* indicates that courts should summarily dismiss takings challenges to split-recovery statutes, since individual tort plaintiffs, like the AFDC recipients, have no protected property right in a future "benefit." On the other hand, if an inchoate punitive award is more like the child's separate support payments, *Gilliard* indicates that courts should apply the *Penn Central* test to determine if the change in the benefits package has worked a taking.

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178 Id. at 605.
180 *Gilliard*, 483 U.S. at 606 (quoting *Penn Central*, 438 U.S. at 124); see also *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993) (same test applied to statutorily increased liability for withdrawal from retirement plan—no taking).
181 *Gilliard*, 483 U.S. at 609.
182 Id. at 605.
184 Since the punitive award does not come directly from the state, but only indirectly through the state's tolerance of the plaintiff's pursuit of it, there is an argument for an analogy to the assignment of the child's separate support payments in *Gilliard*. Those payments came directly from an independent source, the noncustodial spouse, but indirectly from the state because the state welfare benefits supplemented the family's income.

On the other hand, there is perhaps an even stronger argument for analyzing the punitive awards in a split-recovery regime simply as outright statutory benefits. Like the family in *Gilliard*, plaintiffs have no protected property right to a future benefit, i.e. a future punitive award. *See supra* notes 64-66 and accompanying text (plaintiffs have no inherent right to an award of punitive damages). A plaintiff's claim to an inchoate punitive judgment is thus more similar to a simple statutory benefit than to a court-granted child
Applying the *Penn Central* test to split-recovery statutes demonstrates that they do not work a taking if drafted or construed to give the state a prejudgment interest in the punitive award. First, because the plaintiff receives only part of the total punitive award under a split-recovery statute, there is some economic impact. However, the impact is eased since punitive damages are a windfall to the plaintiff. Second, there is no investment-backed expectation since plaintiffs cannot plan on receiving a punitive award before the cause of action arises. Moreover, once the punitive claim does arise, plaintiffs should know that any possible punitive recovery is limited because they are put on notice by the statutes. Finally, the character of the government action does not indicate that a taking occurs. As the *Gilliard* Court wrote in a statement applicable to split-recovery statutes, "This is by no means an enactment that forces 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Split-recovery statutes, especially those that first deduct the costs of litigation before calculating the state's share, still leave the plaintiff with a windfall.

Some commentators argue, nevertheless, that there must be a "quid pro quo"—that the state must give something in return for the

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186 *See supra* notes 64-66 and accompanying text.

187 Of course, plaintiffs cannot rely on any inchoate punitive recovery, since plaintiffs do not have a right to receive a judgment of punitive damages. *See supra* notes 64-66 and accompanying text.


189 *See Note, supra* note 8. The plaintiff could, of course, lose on the punitive claim. Nevertheless, even in such a case, the plaintiff's litigation costs are not the type of cost that the public as a whole should share. Several reasons support this conclusion. First, the plaintiff voluntarily brought the punitive action, knowing that defeat in court was possible. Thus, the expected value of the future punitive award, after allocation of the state's share and reduction for litigation costs, must have been great enough to offer the plaintiff a sufficient incentive to proceed with the punitive claim. Moreover, society benefits from punitive actions in jurisdictions not having split-recovery statutes by virtue of the retributive and deterrent value of the punitive lawsuit, yet it need not compensate plaintiffs who lose for their litigation costs. Consequently, the same rule should apply in split-recovery regimes, since split-recovery states do not force plaintiffs to bring punitive claims any more than do other states.
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curtailment—before the state can constitutionally enact legislation limiting common-law remedies. This argument assumes that punitive damages are unlike statutory entitlements, in which claimants have no protected property rights, because no "quid pro quo" is necessary for the reduction or limitation of government benefits. However, even accepting that punitive damages are unlike statutory entitlements, and that a quid pro quo thus is necessary to curtail a punitive award, split-recovery laws nevertheless do offer a quid pro quo. They offer at least as much quid pro quo as no-fault statutes, which eliminate punitive damages, but in exchange lead to quicker compensation. Plaintiffs still keep a portion of the punitive damage award under split-recovery regimes—there is still a windfall. In addition, those states that assign their portion of the punitive recovery to public compensation funds offer the potential availability of compensation through the fund as consideration to all potential plaintiffs for the curtailment of the punitive award.

Furthermore, other commentators have argued for viewing the "quid pro quo" more broadly. Raymond R. Coletta, for example, argues for an expansive view of average reciprocity of advantage, in which society as a whole, even the claimant, benefits from regulatory takings. Under this view, the plaintiff also benefits when part of the punitive damage award is allocated to the state, whether it be through reduced taxes or increased public services.

Split-recovery regimes present facts dissimilar to those of Webb's Fabulous Pharmacies v. Beckwith, a case in which the Supreme Court held that a county could not keep the interest that had accrued on an interpleader fund, where a separate fee was charged for court services, without effecting an unconstitutional taking. The interpleader fund was a compensatory award, and thus any interest accruing on it

190 See Burrows, supra note 30, at 463.
191 See, e.g., Teasley v. Mathis, 255 S.E.2d 57 (Ga. 1979) (no-fault statute eliminating punitive damages).
192 See supra notes 36-37, 46-49 and accompanying text (discussion of the state statutes allocating the state's share to a public fund). Moreover, even those statutes that allocate the state's share of the punitive judgment to the state's general revenue fund still offer benefits to the average citizen in the form of either increased public services, reduced taxes, or both.
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should go to the party who receives the interpleader funds. Punitive damages, unlike an interpleader fund, do not serve to compensate the individual plaintiffs, but rather serve the public purposes of retribution and deterrence. Accordingly, the Court would probably not view limits on punitive damages as a taking.

The Court's takings doctrine, however, is not always clear. Yet, the theories at its foundation support the view that a split-recovery regime does not run afoul of the Takings Clause. For example, Glynn S. Lunney argues that the essential takings inquiry is whether "the individual, rather than the community, should have control of the property." In the case of punitive damages, which authorities widely regard as a windfall to the plaintiff, the answer is clear: the community should control the punitive award both because the defendant put the community as a whole at risk through his misconduct and because the community can make more efficient use of the award.

3. Split-Recovery Statutes and the Supreme Court's Entitlements Jurisprudence: Drafting to Give the State a Prejudgment Interest in the Punitive Award Makes a Difference

The Court has held that a claimant's property interest in an entitlement "must be decided by reference to state law." In the case of a statute creating a property interest, the extent and limits of that interest "can be determined only by an examination of the particular statute or ordinance in question." In Board of Regents v. Roth, the Court considered a Professor's claims that he was entitled to procedural due process protections prior to termination of his employment at a state university because he had a property interest in future employment. In addressing Roth's claims, the Court recognized that property interests "are created and their dimensions are defined by existing rules or understandings that stem from ... state law—rules or understandings that stem from ... state law—rules or understandings that

196 Likewise, a statute that apportioned compensatory damages between private plaintiffs and the state would very likely be unconstitutional under the Takings Clause. See supra note 160 and accompanying text.


199 See supra notes 64-66 and accompanying text.


201 Bishop, 426 U.S. at 345; see also Regents of Univ. of Michigan v. Ewing, 474 U.S. 214 (1985); McCammon v. Indiana Dept. of Fin. Insts., 973 F.2d 1348 (7th Cir. 1992).


203 Id. at 568-69.
secure certain benefits and that support claims of entitlement to those benefits." Concluding that the professor had no property interest in future employment, the court reasoned that his "interest in employment . . . was created and defined by the terms of his appointment," which provided that his employment would terminate on a certain date.

Roth suggests that a takings analysis of split-recovery statutes involves examining the state's statutes governing punitive damages and discerning the boundaries of the property interest that they create. The cases analyzing state split-recovery statutes reaffirm this view. For example, the Colorado Supreme Court held in *Kirk v. Denver Publishing Co.* that the Colorado statute, which disclaims any prejudgment state interest in the punitive award, was constitutionally infirm under the Takings Clause. An entitlements analysis of the Colorado statute reveals that it creates a rather expansive property right in an inchoate award of punitive damages. On the other hand, the supreme courts of Georgia, Florida, and Iowa held constitutional their states' statutes, which do not contain disavowals of any state interest. Here, entitlements analysis indicates that the statutes created only a restricted private property right in an inchoate award of punitive damages, since the plaintiff's recovery is conditioned on the allocation of a percentage of the award to the state. Indeed, the Georgia statute,

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204 *Id.* at 577.
205 *Id.* at 578. In the companion case to Roth, Perry v. Sindermann, 408 U.S. 593 (1972), overruled on other grounds by Rust v. Sullivan, 500 U.S. 173 (1991), the Court held that a teacher at a state college might have a legitimate claim to a property interest in employment and affirmed the Court of Appeals' opinion remanding the case to the District Court for a determination of any possible property interest. 408 U.S. at 602-03. The Court recognized that Sindermann might have a claim to a property interest despite the lack of an explicit understanding that he had tenure. *Id.* at 600-01. Instead, looking to state law to discern the existence of a property interest as it did in *Roth*, *id.* at 602 n.7, the Court concluded that a property interest could also arise out of implicit understandings that justify a claim of entitlement. *Id.* at 601-02.

*Sindermann* reaffirms the takings analysis of split-recovery statutes that this Note proposes. Although it suggests that implicit understandings can give rise to a property interest, it also looks to state law to determine the extent of any such interest. In the split-recovery setting, it is unlikely that any implicit understandings between the state and potential punitive damages claimants could create a viable property interest in an inchoate punitive award when the explicit understandings indicate that the interest was restricted. If the state drafts its split-recovery statute to indicate clearly the limited nature of a property interest in a prospective punitive award, this explicit definition should act to restrict any potential implicit understandings that a full property interest exists.

206 Although Roth discussed property interests in the due process context, its analysis of the creation and limitation of property interests is applicable in the takings context as well. See Cynthia R. Farina, *Conceiving Due Process*, 3 Yale J.L. & Feminism 189, 206 (1991) (observing that the Court's entitlements doctrine has implications not only for procedural due process, but also for takings analysis and substantive due process; but generally criticizing Roth's positivist approach to defining property interests).
208 See supra notes 92-108 and accompanying text.
which explicitly gives the state all the rights of a judgment creditor,\textsuperscript{209} creates the most limited private property claim to a future award of punitives.

Thus, the manner in which the legislature drafts the statute makes a difference. Courts are most likely to strike down those statutes that disaffirm a prejudgment state interest in punitives because they create an expansive private right to punitive awards. On the other hand, courts are least likely to hold those statutes constitutionally infirm that explicitly give the state a prejudgment interest in the punitive award, since such statutes restrict the plaintiff’s property interest.\textsuperscript{210}

Nevertheless, a properly drafted statute may still be subject to a takings challenge on another ground. Plaintiffs may claim that these statutes impose unconstitutional conditions on the plaintiff’s receipt of a punitive award.

4. Split-Recovery Statutes Do Not Impose Unconstitutional Conditions on the Plaintiff’s Receipt of a Punitive Award

The United States Supreme Court held in \textit{Nollan v. California Coastal Commission}\textsuperscript{211} that it was unconstitutional for a government authority to require a landowner to grant a permanent easement across his beachfront property as a condition to receiving a building permit where the permit condition did not serve the “same governmental purpose” as a complete ban on development. In \textit{Webb’s Fabulous Pharmacies}, the Court similarly struck down an interpleader arrangement that provided for interest on the deposited sum, which the government then took for itself.\textsuperscript{212}

It is unlikely that the Court would scrutinize split-recovery statutes to the same extent as the building permit condition or the interpleader arrangement, given the special public nature of punitive damages\textsuperscript{213} compared with the inherently private nature of a property right in land or interest on a sum earmarked for compensation. Nevertheless, even if the Court were to fully scrutinize split-recovery statutes under its unconstitutional conditions jurisprudence, it is likely that the statutes would meet the nexus test of \textit{Nollan}.\textsuperscript{214} The purposes of split-recovery statutes are closely related to the purposes of punitive

\begin{itemize}
  \item \textsuperscript{209} See GA. CODE ANN. § 51-12-5.1(e)(2) (Supp. 1994).
  \item \textsuperscript{210} See Note, supra note 8, at 1916.
  \item \textsuperscript{211} 483 U.S. 825 (1987).
  \item \textsuperscript{212} 449 U.S. 155 (1980).
  \item \textsuperscript{213} See supra part III.A.1.
  \item \textsuperscript{214} The Supreme Court refined the \textit{Nollan} nexus test in \textit{Dolan v. City of Tigard}, 114 S. Ct. 2309 (1994). \textit{Dolan} considered the degree of nexus required between a permit condition and the legitimate state interest in regulating property. In \textit{Dolan} the Court concluded that there must be some “rough proportionality” (i.e. “related both in nature and extent”)
\end{itemize}
damages in general—achieving optimal levels of punishment and deterrence of malicious or outrageous behavior. Indeed, split-recovery statutes enhance the social value of punitive damages by eliminating windfalls to plaintiffs while maintaining a remedy to deter and punish socially unacceptable conduct.215

Another case addressing unconstitutional conditions deals with facts more analogous to those in a split-recovery system, and indicates that the courts should hold split-recovery statutes constitutional under the Takings Clause. *Dames & Moore v. Regan*,216 the Iranian claims case, involved President Carter’s revocation of conditional attachments that creditors with claims against Iran had obtained against Iranian assets. In the wake of the seizure of the American Embassy and the taking of hostages in Tehran, President Carter froze all Iranian assets subject to the jurisdiction of the United States.217 The Secretary of the Treasury authorized prejudgment attachments against Iranian assets, but made it clear that the attachments were conditional and could be revoked at any time.218 Later, the President revoked and nullified all attachments against Iranian assets pursuant to the agreement with Iran that provided for the release of the American hostages.219 Thus, creditors with claims against Iran no longer had frozen assets against which to satisfy their claims.220 A creditor challenged the nullification of the attachments, claiming that it worked an unconstitutional taking of its property interest.221

The Supreme Court rejected the creditor’s argument. It observed that the creditor “was on notice of the contingent nature of its

between the condition and the legitimate purpose the state seeks to achieve by the regulation. *Id.* at 2319.

It is likely that the restrictions of *Nollan* and *Dolan* would not apply in the split-recovery context. Those decisions concerned adjudicative-type determinations imposing conditions on permits to develop land. Split-recovery statutes, on the other hand, are legislative determinations imposing conditions on the recovery of tort damages.

215 See supra part I.B.3.
217 *Id.* at 662-63.
218 *Id.* at 663. In addition, the President suspended the entry of any judgment in a proceeding against Iran. *Id.*
219 *Id.* at 665. The agreement provided for the establishment of the Iran-United States Claims Tribunal, which would decide all claims between United States nationals and the Government of Iran. *Id.* It also called for the return of all Iranian assets in the United States to Iran, and the dedication of $1 billion of these assets to the creation of a fund to satisfy the judgments of the Claims Tribunal. *Id.*
220 They could, of course, still bring claims before the Claims Tribunal, see supra note 219, but their chances of achieving full recovery were limited in that forum. See *Lawrence H. Tribe, American Constitutional Law* § 9-7 (2d ed. 1988). Consequently, the creditors did suffer a loss when the President revoked the attachments, since a recovery on their claims was no longer secure. As Tribe observes, the revocation left creditors with “unenforceable and essentially worthless claims.” *Id.*
221 See *Dames & Moore*, 453 U.S. at 674 n.6.
interest in the frozen assets."\textsuperscript{222} Deciding the challenge on the basis of the creditor's attenuated property interest, the Court concluded that, because of the President's orders making the attachments conditioned upon revocation at any time, the creditor "did not acquire any 'property' interest in its attachments of the sort that would support a constitutional claim for compensation."\textsuperscript{223}

\textit{Dames \& Moore} demonstrates that it is not unconstitutional for government to condition a right to recovery on some factor related to public policy. It teaches that the positive law may limit a claimant's property interest in certain cases where public policy dictates. Under the rationale of \textit{Dames \& Moore}, it is not unconstitutional for a state to limit a plaintiff's property interest in an inchoate award of punitive damages by conditioning it, in the positive law that creates the punitive cause of action, on the allocation of a portion of the award to the state. Tort law and public policy support this, since punitive damages more closely resemble a public good than a plaintiff's private right.\textsuperscript{224} Moreover, the damages sought in \textit{Dames \& Moore} were for purposes of compensation. Thus, the Court's rationale is even more compelling when applied to a claimed property right to a future punitive award, since a plaintiff's claim to punitive damages is more tenuous than a claim to compensation.\textsuperscript{225}

Professor Tribe's analysis of \textit{Dames \& Moore} is instructive on takings jurisprudence and can equally be applied in the split-recovery context. Tribe observes:

The Court's holding in \textit{Dames \& Moore}—that there was no taking—seems consistent with the broad contours of doctrine under the takings clause: unless the clause is to become a mandate for shackling government to the model of a minimal, night-watchman state, only a highly restricted set of fairly traditional, focused expectations will be protected by the just compensation requirement.\textsuperscript{226}

B. Punitive Damage Awards in a Split-Recovery Regime Are Subject to the Limitations of the Excessive Fines Clause

Legal authorities and scholars have recognized that punitive damages are simply civil fines,\textsuperscript{227} yet the Supreme Court has long suggested that the Excessive Fines Clause does not apply to punitive damages.\textsuperscript{228} The passage of split-recovery statutes, however, added

\textsuperscript{222} Id. at 673.
\textsuperscript{223} Id. at 674 n.6.
\textsuperscript{224} See supra notes 167-69 and accompanying text.
\textsuperscript{225} See supra notes 160-61 and accompanying text.
\textsuperscript{226} TRIBE, supra note 220, § 9-7.
\textsuperscript{227} See supra notes 53-54, 57-59 and accompanying text.
\textsuperscript{228} See Ingraham v. Wright, 490 U.S. 651, 664-68 (1977) (Court has traditionally interpreted the Eighth Amendment as applying primarily to criminal punishments).
new questions to the debate. In split-recovery regimes, the distinctions between civil and criminal sanctions diminish since the state receives part of the civil fine. Moreover, the action is no longer a purely private one because the plaintiff brings the punitive claim, at least in part, on behalf of the state. Thus, the arguments for applying the Excessive Fines Clause to punitive awards are more compelling in jurisdictions that have split-recovery statutes.

1. The Historical Interpretation Argument: The Excessive Fines Clause Originally Applied to Civil Punishment

Various commentators have argued that the Excessive Fines Clause historically applied to civil penalties as well as criminal fines, and that it therefore should apply to restrict the size of all punitive damage awards today, not just those governed by split-recovery statutes. The Supreme Court, however, rejected the argument that the Clause should apply to punitive damages in suits between private litigants in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, concluding that its purpose was to limit the power of the sovereign, not the recoveries of private parties. However, the Court left open the question whether the Clause would apply in a qui tam action—where a private party brings suit on behalf of the government and the government shares in the recovery.

2. The Argument for Application of the Excessive Fines Clause to Punitive Awards in Split-Recovery Regimes

In *Browning-Ferris*, a suit arising between private litigants in Vermont, the Court declined to apply the limitations of the Excessive Fines Clause to a six million dollar punitive award. The majority, in examining the language and history of the Clause, explained why it did not apply in the case at bar: "[T]he government of Vermont has not taken a positive step to punish, ... nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." Thus, the lack of governmental involvement in the punitive action foreclosed the applicability of the Clause in *Browning-Ferris*.

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229 See Ghiardi, supra note 53 (analyzing the applicability of the Excessive Fines Clause to punitive damages in a split-recovery regime).
232 Id. at 271-72.
233 Id. at 276 n.21.
234 Id. at 259-60, 275-76.
235 Id. at 275.
Nevertheless, despite the majority's statement that it was declining to decide whether the Excessive Fines Clause applies in qui tam actions, Justice O'Connor intimated in *Browning-Ferris* that the majority's reasoning makes the Clause applicable to punitive damages in a split-recovery system. She noted that the Court, "by relying so heavily on the distinction between governmental involvement and purely private suits, ... suggests ... that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity." Commentators have persuasively argued likewise.

James D. Ghiardi, for example, has argued that the Excessive Fines Clause should apply to punitive damages in split-recovery regimes under the Court's reasoning in *Browning-Ferris*. He observes that punitive damages are strongly analogous to criminal fines in situations where the state receives part of the punitive award. Ghiardi then draws on the majority's statement that Vermont was not using "the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual," as well as O'Connor's dissent, to conclude that the Supreme Court is moving toward applying the Excessive Fines Clause to punitive awards in split-recovery regimes.

A recent Supreme Court decision makes the argument even more compelling that the Excessive Fines Clause should apply to punitive damages in a split-recovery system. In *Austin v. United States*, a civil forfeiture action, the Court held that the Excessive Fines Clause may apply in civil actions. The Court reasoned that the civil-criminal distinction does not govern the applicability of the Clause. Rather, remarking that "[t]he purpose of the Eighth Amendment ... was to limit the government's power to punish," the Court concluded that the true test for whether the Clause should apply is whether the sanction imposed constitutes punishment in which the government is involved. Defining "punishment," the Court noted that "a civil

236 See supra note 233 and accompanying text.
237 *Browning-Ferris*, 492 U.S. at 298-99 (O'Connor, J., concurring in part and dissenting in part) (citing Florida's split-recovery statute as an example).
238 See Ghiardi, supra note 53; Kirgis, supra note 160; Recent Cases, supra note 10.
240 Id. at 123-24.
241 *Browning-Ferris*, 492 U.S. at 275.
244 Id. at 2812.
245 Id. at 2805 ("The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'") (quoting *Browning-Ferris*, 492 U.S. at 265). In *Austin*, the Court again left open the question whether the Excessive Fines Clause applies in qui tam actions, as it had done in *Browning-Ferris*. 113 S. Ct. at 2804 n.3.
sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrence purposes, is punishment, as we have come to understand the term."246

_Browning-Ferris_ and _Austin_, taken together, construct a two part test for determining whether the Excessive Fines Clause applies to a specific sanction. First, a court must decide on the basis of the parties involved, both named and unnamed, whether the Clause could operate in the _particular action_. Second, if the answer to the first inquiry is affirmative, a court must then determine whether the nature of the _specific sanction_ invokes the protection of the Clause.

The threshold question is whether the Excessive Fines Clause could apply in a _particular action_. This inquiry entails determining whether the government is involved in imposing the sanction by taking "a positive step to punish" or using "the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual."247 Punitive damage actions in a split-recovery regime, where the government is an intended beneficiary of part of the punitive award, pass this test,248 especially in light of the decision in _Austin_ that the Clause may apply in civil actions.

A recent lower federal court case supports this reasoning. In _United States ex rel. Smith v. Gilbert Realty Co._,249 Judge Newblatt of the Eastern District of Michigan ruled that the Excessive Fines Clause applied to the civil sanction in a qui tam action brought by a private party under the Federal False Claims Act.250 Reviewing the Supreme Court's decisions in _Browning-Ferris, Austin_, and _United States v. Halper_,251 Judge Newblatt reasoned that the Clause applied because the private party instituted the qui tam action on behalf of the government, and the government shared in the judgment.252 This analysis

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246 _Austin_, 113 S. Ct. at 2806 (quoting United States v. Halper, 490 U.S. 435, 448 (1989)).
247 _Browning-Ferris_, 492 U.S. at 275. The fact that punitive damages serve public purposes and that the government provides the forum for litigation alone is not enough to justify application of the Excessive Fines Clause. Id.
248 Id. at 298-99 (O'Connor, J., concurring in part and dissenting in part); Ghiardi, _supra_ note 53.
250 Id. at 74.
251 490 U.S. 435 (1989). The Court ruled in _Halper_ that the Double Jeopardy Clause of the Fifth Amendment, U.S. Const. amend. V, limits the government's power to bring a subsequent civil action against a defendant, who has already sustained a criminal penalty on the basis of the same conduct, to the extent the sanction in the civil action qualifies as "punishment". Id. at 449-50. Similar to the position it would take in _Austin_ and _Browning-Ferris_, see _supra_ notes 233 & 245 and accompanying text, the Court refused to decide in _Halper_ whether the Double Jeopardy Clause would apply if the subsequent civil suit were a qui tam action. Id. at 451 n.11.
seems equally applicable to punitive damages in a split-recovery regime.\textsuperscript{253} It is difficult to contend, for example, that Daniel Conkle did not in substance bring his punitive claim against Mack Trucks on behalf of the State of Georgia, and it is indisputable that the state shared in the two million dollar punitive award after the Georgia Supreme Court upheld the validity of Georgia’s split-recovery statute.\textsuperscript{254}

Once it is settled that the Excessive Fines Clause could apply in a particular action, a court must then consider whether the Clause restricts the\textsuperscript{255} specific sanction. The analyses of the lower federal courts reviewing the Austin opinion indicate that the dispositive question in deciding whether the Excessive Fines Clause limits a specific sanction is whether that sanction serves purely remedial goals or is “in any part punitive.”\textsuperscript{255} For example, money that constitutes the proceeds of a drug sale is contraband and, consequently, its forfeiture is purely remedial, whereas the forfeiture of money merely used to facilitate a drug transaction is punitive at least in part.\textsuperscript{256} The Excessive Fines Clause would apply only in the latter case.\textsuperscript{257}

Punitive damages in a split-recovery regime satisfy the dispositive test of Austin—they are not purely remedial, but serve to punish. Indeed, punitive damages meet the definition of “punishment,” as outlined in Austin,\textsuperscript{258} since they serve retributive and deterrent purposes.\textsuperscript{259} Accordingly, punitive damages in a split-recovery system should be subject to constitutional limitations on excessiveness.\textsuperscript{260}

\textsuperscript{253} Split-recovery statutes in essence give rise to qui tam actions for punitive damages, since plaintiffs in a split-recovery regime bring the punitive claim on behalf of the state and the state shares in the punitive recovery.

\textsuperscript{254} See Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 636-37, 639-40 (Ga. 1993). Georgia’s statute allocated 75% of the award, after deduction of litigation costs, to the state. See GA. CODE ANN. § 51-12-5.1(e) (2) (Supp. 1994).

\textsuperscript{255} United States v. $45,140.00 Currency, 839 F. Supp. 556, at 558 (N.D. Ill. 1993); see Austin, 113 S. Ct. at 2805 (“The purpose of the Eighth Amendment . . . was to limit the government’s power to punish.”) (emphasis added); see also The Supreme Court, 1993 Term—Leading Cases, 107 HARv. L. REV. 144, 207 (1993) (observing that the relevant question in the Austin test is whether the sanction constitutes punishment) [hereinafter Leading Cases]; cf. McNichols v. Commissioner, 13 F.3d 432, 434-36 (1st Cir. 1993) (concluding that tax deficiencies and penalties are remedial, not punitive, and therefore not subject to excessive fines limits; also distinguishing Austin on the grounds that tax penalties are not forfeitures).

\textsuperscript{256} See $45,140.00 Currency, 839 F. Supp. 556, at 558; United States v. $288,930.00 in U.S. Currency, 838 F. Supp. 367, 370 (N.D. Ill. 1993). See also United States v. Mongelli, 2 F.3d 29 (2d Cir. 1993) (fines for civil contempt are purely coercive, not punitive, because they attempt to secure compliance, and the individual can avoid paying by complying).

\textsuperscript{257} See $45,140.00 Currency, 839 F. Supp. at 558-59.

\textsuperscript{258} See Austin, 113 S. Ct. at 2806.

\textsuperscript{259} See supra notes 53-54 and accompanying text.

\textsuperscript{260} Another threshold question is whether the Eighth Amendment’s prohibition on excessive fines applies to the states by virtue of the Fourteenth Amendment. Although the majority of the Supreme Court declined to answer this question in Browning-Ferris, 492 U.S. at 276 n.22, Justice O’Connor reasoned in her dissent that it should be answered affirma-
The *McBride* court reached the same conclusion in interpreting the *Browning-Ferris* dictum.\textsuperscript{261} *McBride*’s remedy, declaring the Georgia split-recovery statute facially unconstitutional, is inappropriate since the Excessive Fines Clause prohibits only excessive fines, not the mere existence of a fine.\textsuperscript{262} Nevertheless, *McBride*’s basic holding is sound: the Excessive Fines Clause applies to limit punitive awards in split-recovery regimes.

The holding of the *Tenold* court, however, raises a crucial issue with respect to the first part of the *Browning-Ferris/Austin* test: what degree of governmental involvement is required for the Excessive Fines Clause to apply in a particular action?\textsuperscript{263} *Tenold* concluded that the fact that a private party brought the punitive claim and that a jury imposed the judgment made governmental involvement in the split-recovery action inadequate for the Excessive Fines Clause to apply.\textsuperscript{264}

*Tenold* reached the wrong conclusion for at least two reasons. First, a court decision to award punitive damages, while by itself insufficient to qualify as governmental involvement in the excessive fines context,\textsuperscript{265} is "an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment."\textsuperscript{266} Second, the State of Oregon has a prejudgment interest in punitive awards under the Oregon split-recovery statute.\textsuperscript{267} This prejudgment interest greatly increases the degree of governmental involvement in the action because it signifies that a part of the sanction must go to the state and makes clear that the plaintiff is suing on behalf of the state. Indeed, the state has an interest in what the plaintiff does in the action. Taken together, the state’s prejudgment interest in the punitive award and the fact that the judgment itself is an exercise of state power build a strong argument for recognizing sufficient governmental involvement. When these two characteristics are present, the degree of governmental involvement is high enough to trigger the Excessive Fines Clause.

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\textsuperscript{264} Id.

\textsuperscript{265} See *Browning-Ferris*, 492 U.S. at 275.

\textsuperscript{266} Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2342 (1994) (emphasis added).

\textsuperscript{267} See OR. REV. STAT. § 18.540(1) (Supp. 1994) ("Upon the entry of judgment ... the Department of Justice shall become a judgment creditor"). A reasonable interpretation of this language is that the interests of the plaintiff and state coexist in the inchoate punitive damage award prior to judgment. Thus, the state can be considered to have a prejudgment interest in the award.
ernmental involvement should be sufficient for the Excessive Fines Clause to apply in the punitive damage action. Accordingly, since governmental involvement was adequate and punitive damages are not purely remedial in Oregon, the Tenold court should have held that the Excessive Fines Clause applied and proceeded to review the award to determine if it was unconstitutionally excessive.

Burke and Spaur, holding that the Excessive Fines Clause does not apply to punitive damages awarded under the Iowa statute because the state's share of the punitive award is allocated to the Iowa Civil Reparations Trust Fund, present questions both with respect to the nature of the sanction and adequate governmental involvement in the action. For the reasoning of Burke and Spaur to stand, either the purpose of the Iowa statute would have to be purely remedial—not punitive in any part, or governmental involvement in the action would have to be so minimal as to fail to satisfy the first part of the test for the applicability of the Clause.

However, the reasoning of Burke and Spaur appears to be flawed under the Browning-Ferris/Austin test. First, although an advocate might argue that the Iowa punitive damages statute serves remedial goals because it allocates awards to a reparations fund, the Iowa statute expresses no purely remedial purpose and punitive damages generally serve to punish and deter under Iowa law. Moreover, the fact that the state's share of the punitive award is allocated to the Civil Reparations Trust Fund does not make governmental involvement insufficient for the Excessive Fines Clause to apply. The fund has a prejudgment interest in the state's share of the award under the Iowa statute, and the fund is administered by the state court administrator. Thus, the state government has some control over the disposition of the state's share of the punitive award. Even such indirect state control over a state-established "separate" public fund should be sufficient governmental involvement to qualify as using "the civil courts to

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270 See supra note 255 and accompanying text; see also Ghiardi, supra note 53, at 128-29 (arguing that the Excessive Fines Clause would not apply to punitive damage awards in a split-recovery regime if the state's share went to a separate fund and the purpose of the statute was solely remedial).
271 See supra note 247 and accompanying text.
273 See Godbersen v. Miller, 439 N.W.2d 206, 208 (Iowa 1989) (noting that the purpose of punitive damages under Iowa law is punishment and deterrence, not compensation).
extract large payments . . . for the purpose of raising revenue or disabbling some individual." This language suggests that proportionality is at the heart of the Clause, since the excessiveness inquiry almost always involves answering the ubiquitous question—"Excessive compared to what?"

Indeed, the Supreme Court's Eighth Amendment jurisprudence encourages proportionality review under the Excessive Fines Clause. Moreover, although the Austin majority declined to establish a standard for determining excessiveness, Justice Scalia's concurrence suggested that proportionality would be in order, at least in the case of monetary sanctions. Indeed, at least two federal courts of appeals have applied proportionality review in excessive fines cases in the wake of Austin.

275 Browning-Ferris, 492 U.S. at 275.
276 See Leading Cases, supra note 255, at 210-11 ("The plain meaning of the Eighth Amendment's language leaves little doubt that a proportionality test is contemplated under the Excessive Fines Clause.").
277 See Bittle, supra note 262, at 1450.
278 See Solem v. Helm, 463 U.S. 277, 292 (1983) (outlining factors to consider when determining proportionality under the Eighth Amendment). The Court has held that proportionality does not generally apply to the Cruel and Unusual Punishments Clause, see Harmelin v. Michigan, 501 U.S. 957 (1991), but has intimated that the Excessive Fines Clause is distinguishable and may require proportionality review. See Alexander v. United States, 113 S. Ct. 2766, 2775 (1993) (noting the distinction between the Excessive Fines Clause and the Cruel and Unusual Punishments Clause, and remanding for the Eighth Circuit's failure to review proportionality under the Eighth Amendment.). Indeed, Justice Scalia indicated in Harmelin that the Excessive Fines Clause raises concerns distinct from those of the Cruel and Unusual Punishments Clause. 501 U.S. at 978 n.9.

Moreover, the Court has required proportionality between bail and the risk of flight under the Excessive Bail Clause of the Eighth Amendment. See Stack v. Boyle, 342 U.S. 1, 5-6 (1951) (suggesting that fines should not be disproportionate under the linguistically related Excessive Fines Clause).
280 Id. at 2814-15 (Scalia, J., concurring in part and concurring in the judgment) ("In the case of a monetary fine, the Eighth Amendment's origins . . . demonstrate that the touchstone is value of the fine in relation to the offense."). Scalia suggested a different, more instrumental standard for in rem forfeiture actions—"the relationship of the property to the offense. . . ." Id. at 2815. This second standard is of little importance in the punitive damages context.
Various commentators have suggested that proportionality is the proper measure of review for determining excessiveness. The starting point for determining exactly what proportionality review entails is the Supreme Court's analysis in *Solem v. Helm*. In *Solem* the Court established three objective criteria by which to judge proportionality: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." These factors stand at the core of Eighth Amendment proportionality review of punishments. Authorities have adopted them not only in civil forfeiture cases, but have proposed them as the foundation for excessiveness review of punitive damages awards as well.

Beyond these three factors, however, questions remain. One is whether to include the defendant's wealth in a determination of proportionality. Lyndon F. Bittle argues for using wealth as an additional factor, albeit with great care because of the potential prejudice involved in determining liability. Gerald W. Boston, on the other hand, contends that consideration of the defendant's wealth is "antithetical to the limitations of the [E]ighth [A]mendment," since a tribunal should, in his view, impose punishment on the basis of the...
seriousness of the defendant's conduct, not on the defendant's wealth.288

Bittle seems to have the better argument for two reasons. First, if punishment in general, and punitive damages in particular, are to serve the goals of both retribution and deterrence,289 then the defendant's wealth is a concern. The same nominal award of punitive damages will have varying deterrent effects on defendants possessing greatly disparate resources. To achieve optimal levels of deterrence, it may be necessary to impose differing punitive awards for the same conduct based on each defendant's wealth. Second, Excessive Bail Clause jurisprudence supports Bittle. The financial means of the defendant are one of the factors considered in fixing proper bail.290

Another question left unanswered by the Solem factors arises in the punitive damage context. The last two criteria of the Solem test suggest comparing the punishment with that imposed on other criminals in the same jurisdiction and in other jurisdictions.291 Yet because punitive damage awards far exceed criminal fines, a comparison of the two may yield little guidance. In the Moseley case, for example, the jury imposed a $101 million punitive award on General Motors.292 It is highly unlikely that any criminal fine in Georgia even approaches $101 million. Consequently, to take the Solem test literally, a reviewing court would have to reduce the award against General Motors to whatever Georgia imposes as a criminal fine on delinquent manufacturers of products. Boston advocates this result, contending that "[w]here a punitive damages award is significantly disproportionate to the possible range of relevant statutory monetary penalties, that fact should be some evidence of constitutional excessiveness."293

In many cases, however, no criminal violation will be comparable to the civil cause of action (such as breach of contract) that gives rise to the punitive award.294 Indeed, as Boston notes, the types of conduct that produce the most punitive awards, for example medical malpractice and products liability, are not subject to criminal sanctions.295

288 See Boston, supra note 230, at 742.
289 See supra notes 53-54, 57-59 and accompanying text.
290 See Stack v. Boyle, 342 U.S. 1, 5-6 & n.3 (1951).
293 Boston, supra note 230, at 740. Boston gives excellent examples of the disparity between punitive damage awards and criminal fines. For example, in Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254 (Miss. 1985), aff'd, 486 U.S. 71 (1988), a $1.6 million punitive sanction was imposed on the defendant insurance company. Had the insurer been convicted in a criminal trial for similar conduct, the maximum fine under Mississippi law would have been $1000. See Boston, supra note 230, at 738.
294 See Kirgis, supra note 160, at 862.
295 See Boston, supra note 230, at 739.
In such cases, only the first Solem criterion, "the gravity of the offense and the harshness of the penalty,"\(^{296}\) remains to guide the proportionality inquiry.

However, in those cases where a punitive award does have a criminal counterpart, the analysis will be more problematic. Solem seems to indicate that the Excessive Fines Clause should limit the punitive award to the level of criminal sanctions. Nevertheless, there may be several ways for a court to escape this narrow interpretation of Solem. First, the court could look only to other punitive damage awards, not criminal awards. Judges should not read Solem's reference to criminals and crime to exclude a comparison to other punitive awards. After all, the Solem test originated in the context of criminal punishment and did not have punitive damage awards in mind. Second, the court may look to both criminal and punitive sanctions, basing its proportionality analysis on the average sanction. Finally, the legislature could come to the rescue by increasing the maximum criminal fines such that courts could impose either punitive damages or criminal fines of the same magnitude for similar conduct.

An additional hurdle to constructing an effective framework for evaluating the excessiveness of punitive damage awards exists in split-recovery regimes. The allocation of the punitive award between the state and the plaintiff gives rise to the question of whether the Excessive Fines Clause should apply to only the government's share of the award. A court should answer this question in the negative if the legislature has drafted its split-recovery statute to give the state a prejudgment interest in the punitive award. Where the state has a prejudgment interest, the punitive damages claim truly becomes a qui tam action, one in which a private party sues on behalf of the state and shares the recovery with the state.\(^{297}\) In such a case, the private plaintiff acts as an agent of the state, suing on the public's behalf to recover a punitive judgment for the public. Upon entry of the judgment, the state allows the plaintiff to keep part of the award as an incentive for bringing the punitive claim.\(^{298}\) Thus, since the public is the primary beneficiary of the entire punitive award, the Excessive Fines Clause should apply to the whole judgment, not just the state's share.\(^{299}\)

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\(^{298}\) See supra notes 170-71 and accompanying text (characterizing the plaintiff's interest in an award of punitive damages in a split-recovery regime as an entitlement).

\(^{299}\) Cf. Gilbert, 840 F. Supp. at 74-75 (E.D. Mich. 1993) (applying the Excessive Fines Clause to the entire award in a qui tam action, rather than limiting its applicability to that part of the award that went to the state).
One final question remains. How should a court procedurally apply the Excessive Fines Clause to a punitive judgment that it deems excessive under the proportionality analysis of Solem? First, unlike the approach of the district court in McBride v. General Motors Corp., a court should not declare the underlying statute unconstitutional. There is nothing invalid, in the abstract, about an award of punitive damages in a split-recovery regime. Only an unconstitutionally excessive award is invalid. Second, once a court has found a punitive award excessive under proportionality analysis, the remedy under the Excessive Fines Clause is not to invalidate the entire award, but rather simply to reduce it by the extent to which it is excessive. Thus, in United States ex rel. Smith v. Gilbert Realty Co., the court merely reduced the sanction from $290,000 to $35,000 in order to eliminate the award's excessiveness. Accordingly, the process of reduction for unconstitutional excessiveness is very similar to common-law remittitur.

C. Constitutional Interplay

1. The Dual Dilemma: Facial Invalidity or Limits on Excessive Awards

Split-recovery statutes face two constitutional problems: takings challenges by punitive damage claimants and excessive fines challenges by defendants who must pay the punitive sanctions. The cases considering the constitutionality of these statutes reflect this dual dilemma.

The first problem—the takings problem—involves challenges against the facial constitutionality of the split-recovery statute itself. However, the Supreme Court's takings jurisprudence, especially its entitlements cases, as well as the state cases considering takings challenges to split-recovery statutes, demonstrate that a properly drafted statute will not encounter takings problems. As long as the legislature drafts the statute to give the state a prejudgment interest in the inchoate punitive award, the statute should survive any takings


\[301\] See supra note 135 and authorities cited therein.

\[302\] 840 F. Supp. at 74-75.

\[303\] See 2 GHARDI & KIRCHNER, supra note 22, §§ 18.02-18.03 (discussing the procedures and law governing remittitur).

\[304\] See supra part II.

\[305\] See supra part III.A.2-3.

challenges. By drafting to give the state an interest, the legislature limits at its inception the claimant's interest in a future award of punitive damages. The takings challenge then collapses because the claimant cannot establish a sufficient property interest for the Takings Clause to protect.\textsuperscript{307}

The second problem—the excessive fines problem—does not involve the facial constitutionality of the statute itself, but only the constitutionality of any particular punitive damage award rendered under the statute that might be considered excessive.\textsuperscript{308} Two factors must be present for the Excessive Fines Clause to apply to a particular sanction: the litigation must include sufficient governmental involvement, and the sanction must constitute "punishment."\textsuperscript{309} An analysis of recent Supreme Court decisions and lower court cases interpreting the constitutionality of punitive damages under split-recovery statutes suggests that the Excessive Fines Clause applies to punitive awards in split-recovery systems.\textsuperscript{310}

The two problems are related by the manner in which the particular split-recovery statute is drafted. If the legislature drafts the statute to give the state a prejudgment interest in punitive awards, that interest makes the statute less subject to takings challenges. However, that same interest makes the awards more vulnerable to excessive fines limitations. If the statute clearly expresses,\textsuperscript{311} or is judicially construed to manifest the government’s prejudgment interest in part of the punitive award,\textsuperscript{312} the nexus between punishment and governmental power is much clearer under the test of \textit{Browning-Ferris} and \textit{Austin}.\textsuperscript{313} Thus, the Supreme Court would very likely find punitive damages awarded under such a statute limited by the Excessive Fines Clause.

Conversely, statutes that deprive the state of a prejudgment interest in the punitive award, like the Colorado statute,\textsuperscript{314} attenuate the nexus between the punishment and governmental coercion, making punitive awards less subject to constitutional limitations on excessive-

\textsuperscript{307} Cf. \textit{Dames & Moore v. Regan}, 453 U.S. 654, 674 n.6 (1981) (plaintiff "did not acquire any 'property' interest in its attachments of the sort that would support a constitutional claim for compensation.").

\textsuperscript{308} \textit{See} Ghiardi, \textit{supra} note 53, at 130; Bittle, \textit{supra} note 262, at 1447.

\textsuperscript{309} \textit{See supra} notes 246-56 and accompanying text.


\textsuperscript{311} \textit{See}, e.g., \textit{Ga. Code Ann.} § 51-12-5.1(e)(2) (Supp. 1994).


\textsuperscript{313} \textit{See supra} notes 243-54 and accompanying text.

ness. However, eliminating a prejudgment governmental interest exposes the statute to facial challenges under the Takings Clause.\textsuperscript{315}

An analysis of two very differently drafted split-recovery statutes will clarify the interplay between the two clauses. First, the Georgia statute provides that "[u]pon issuance of judgment in [a split-recovery] case, the state shall have all rights due a judgment creditor . . . and shall stand on equal footing with the plaintiff . . . in securing a recovery after payment to the plaintiff of damages awarded other than as punitive damages."\textsuperscript{316} Although a bit convoluted in its drafting, the meaning of the statute is clear. Priority is given to the plaintiff's recovery of compensatory damages, but when it comes to receiving punitive the State of Georgia has the exact same interest in the judgment as the plaintiff. Consequently, the Georgia statute effectively restricts the plaintiff's property interest in an award of punitive damages, and the Georgia Supreme Court was correct in holding that it did not work a taking.\textsuperscript{317} Moreover, the state's prejudgment interest effectively turns the action for punitive damages into a qui tam action. The nexus is close between governmental involvement and the punishment incorporated in the punitive sanction. Accordingly, punitive awards governed by the statute are subject to excessive fines limitations.\textsuperscript{318}

Standing in bold contrast to the law of Georgia, the Colorado split-recovery statute provides: "Nothing in this subsection . . . shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due."\textsuperscript{319} This statutory disavowal of any prejudgment governmental interest creates a broad plaintiff's property interest in inchoate awards of punitive damages. Accordingly, the statute effects unconstitutional takings, as the Colorado Supreme Court correctly recognized.\textsuperscript{320} Furthermore, the lack of any prejudgment governmental interest in the recovery insulates punitive damages in Colorado from excessive fine limitations. Unlike the Georgia statute, Colorado law does not turn punitive claims, de facto, into qui tam actions. Although punitive damages continue to be "punishment," governmental involvement in the action is limited. The nexus between punishment and government power is attenuated.

\textsuperscript{315} See Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991); \textit{supra} part III.A.3.

\textsuperscript{316} GA. CODE ANN. § 51-12-5.1(e)(2) (Supp. 1994).

\textsuperscript{317} See Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 639 (Ga. 1993).


\textsuperscript{319} COLO. REV. STAT. ANN. § 13-21-102(4) (West 1987).

Thus, states face a dual dilemma—taking challenges or application of the Excessive Fines Clause. In fact, states are likely to face one problem or the other.\footnote{See Kirgis, supra note 160, at 845-46, 873. But see Sloane, supra note 74, at 504-11 (proposing a model split-recovery statute that would purportedly escape both takings and excessive fines challenges); infra part III.C.2.} Since states will have either a takings or an excessive fines problem, legislators must choose which problem they wish to face when drafting their statutes. Legislators should choose the excessive fines problem, since it does not affect the facial constitutionality of the statutes. Moreover, the excessive fines problem has a silver lining in that it provides an answer to the excessiveness dilemma of punitive damages.\footnote{See supra part III.B.2-3.} By drafting to avoid facial unconstitutionality under the Takings Clause, legislatures will create the beneficial effect of making punitive damage awards subject to constitutional review for excessiveness.

2. \textit{An Exercise in Practicality and Policy: A Solution to the Dual Dilemma?}

One daunting question remains. Is it possible to draft or judicially construe a split-recovery statute so that it will be free of both takings and excessive fines scrutiny? Although this Note suggests that such a result is undesirable, given the beneficial value of applying the Excessive Fines Clause to potentially disproportionate punitive awards, the question is worthy of brief inquiry. State policy makers carry the ultimate burden of deciding how to craft the punitive damages regime in their jurisdiction, and they should be aware of the total scope of viable policy options open to them.\footnote{See supra notes 246-56 and accompanying text.}

The key to whether a split-recovery statute may escape the grasp of both the Takings and Excessive Fines Clauses rests in the "triggers" that cause each clause to apply. For the Takings Clause, the triggers are a property interest and inadequate compensation.\footnote{See supra notes 190-93 (on inadequate compensation), 206-09 (on property interest), and accompanying text.} Application of the Excessive Fines Clause also requires two triggers—punishment and governmental involvement.\footnote{780 F. Supp. 1225 (S.D. Iowa 1991), rev'd on other grounds, 6 F.3d 497 (8th Cir. 1993), cert. denied, 114 S. Ct. 1063 (1994).}

The court in \textit{Burke v. Deere \& Co.}\footnote{780 F. Supp. 1225 (S.D. Iowa 1991), rev'd on other grounds, 6 F.3d 497 (8th Cir. 1993), cert. denied, 114 S. Ct. 1063 (1994).} thought it found a way out of the dual dilemma. It ruled that the Excessive Fines Clause does not apply to punitive damage awards subject to a split-recovery statute that allocates the state's share of the sanctions to a separate trust fund ad-
ministered by the state courts.\footnote{327} However, the court's reasoning is unsound in light of both Austin's "punishment test" for determining when the Clause should apply,\footnote{328} and Browning-Ferris' holding that using "the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual"\footnote{329} establishes the governmental involvement requirement. The nexus between punishment and governmental involvement in the underlying action is still fairly close under the facts of Burke, despite the fact that court administrators control the trust fund instead of executive or legislative administrators.

Allocating the state's share of the punitive award to a state trust fund also fails to protect against potential takings challenges if the state had no prejudgment interest in the punitive claim. Despite Judge Benham's suggestion in Mack Trucks, Inc. v. Conkle\footnote{330} that a split-recovery statute is less likely to be unconstitutional under the Takings Clause when it designates a separate trust fund as the recipient of the state's share,\footnote{331} the statute would be unconstitutional nonetheless if the plaintiff had a full property interest in the punitive award. The only argument that supports Benham is that the plaintiff is somehow being compensated for the lost property interest by the availability of the fund for compensation. Although Professor Coletta might agree with Benham's theory,\footnote{332} the truth remains that when the state has no prejudgment interest in the punitive award, the plaintiff has lost a fully matured property interest and received very little in return.\footnote{333}

Accordingly, the most promising schemes for avoiding both clauses involve providing the state with a prejudgment property interest to avoid the Takings Clause, and then attempting to escape the scope of the Excessive Fines Clause. A legislature can attempt this in two ways: by making the punitive damages sanction purely remedial, or by diminishing the level of governmental involvement in the action.

\footnote{327} See Burke, 780 F. Supp. at 1242. See also Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994) (applying similar reasoning).
\footnote{328} See supra notes 244-45, 254 and accompanying text.
\footnote{329} Browning-Ferris, 492 U.S. at 275.
\footnote{330} 436 S.E.2d 635 (Ga. 1993).
\footnote{331} Id. at 642 (Benham, J., dissenting).
\footnote{332} See supra note 193 and accompanying text.
\footnote{333} Of course it would do the legislature that wishes to avoid both the Takings and Excessive Fines Clauses no good in the above hypothetical to give the state a prejudgment property interest in order to avoid the takings challenge. That would implicate the Excessive Fines Clause. See supra notes 247-53 and accompanying text; text accompanying notes 308-10.
Although it sounds appealing and would defeat the *Austin* punishment test, it would be very difficult to strip punitive damages of their retributive and deterrent purpose, the very things that make them "punishment." If a state did characterize punitive damages as purely compensatory, and therefore not "punishment," the state's share of the punitive judgment would have to come out of the plaintiff's compensatory recovery. This observation follows from the notion that requiring the defendant to pay anything beyond compensatory damages would be to "punish" the defendant, since anything beyond compensation must serve the purpose of punishment or deterrence. However, the state may not allocate a portion of the plaintiff's compensatory damages to itself. That would be a taking.

It appears that the only possible way in which a split-recovery statute could escape the scope of both clauses would be to limit governmental involvement in the action. However, this result is difficult to achieve where the state maintains a prejudgment interest in the punitive award, because the plaintiff in such a case essentially sues on behalf of the state. Nevertheless, a split-recovery statute may adequately diminish governmental involvement in the punitive action if it gives the state's share of the award to a nongovernmental entity. For example, if the legislature allocated the state's share to a charity or other organization wholly separate from the government and free of state control, this might break the nexus between punishment and state power.

Thus, a split-recovery statute might overcome both takings challenges and excessive fines challenges. However, the legislator must stop and assess the costs of achieving this result. The state must relinquish control over its share of the punitive award. The more control it maintains, the more likely the Excessive Fines Clause will apply. However, if it relinquishes control, then the recipient of the state's share may employ that money for purposes contrary to the public interest and the state may be helpless to stop the abuse.

Consequently, even if it is possible to draft a split-recovery statute in a manner that eliminates both takings and excessive fines chal-

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334 See supra notes 244-45, 254 and accompanying text.
336 Plaintiffs do have a right to a future award of compensatory damages. See supra note 160 and accompanying text.
337 Cf. Sloane, supra note 74, at 508 (asserting that it is possible to avoid application of the Excessive Fines Clause by drafting into the split-recovery statute a prohibition on prejudgment governmental involvement in the action).
338 But see id. (arguing that the state can maintain the status of judgment creditor without causing the Excessive Fines Clause to apply by drafting a split-recovery statute that prohibits prejudgment governmental involvement in the action).
lenges at the same time, it is undesirable for two reasons. First, the state would lose its control over a public good—the punitive award. Moreover, the state would eliminate the beneficial effect of constitutional limits on excessive punitive awards.

CONCLUSION

Properly drafted split-recovery statutes thus provide an answer to the two problems of punitive damages: the plaintiff-windfall and excessiveness problems. This result is achieved through the interplay of two constitutional provisions, the Takings and Excessive Fines Clauses. By drafting to avoid constitutional infirmity under the Takings Clause, state legislatures make punitive damage awards in split-recovery systems subject to the beneficial limitations of the Excessive Fines Clause. Finally, even though legislatures may be able to avoid both clauses through deliberate drafting in very narrow circumstances, the direct social costs resulting from such a statutory scheme would be high and the problem of excessive punitive awards would persist.

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