Dardinger v. Anthem Blue Cross & Blue Shield: Judicial Redistribution of Punitive Damage Awards

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I. INTRODUCTION

Punitive damages have long been considered an anomaly in tort law.[1]

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1. Fay v. Parker, 53 N.H. 342, 382 (1873) ("The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law."); *see* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9 (4th ed. 1971) (referring to punitive damages as anomalous).

The sole purpose of civil action is to compensate plaintiffs for the damages they suffer at the hands of wrongdoers.[2] Punitive damages, however, cannot be said to serve a proper compensatory function.[3] Instead, the doctrine of punitive damages permits plaintiffs in civil lawsuits to recover damages beyond those that would compensate their losses when the defendants' conduct is determined to have been reprehensible.[4] As the name implies, punitive damages are a form of punishment designed to deter future misconduct by the defendant and other potential wrongdoers.[5] In this regard, punitive damages are more akin to criminal sanctions, for which proceedings are brought on behalf

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2. PROSSER, *supra* note 1, § 2, at 7 (footnote omitted).

3. *See* James A. Breslo, *Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis*, 86 NW. U. L. REV. 1130, 1138 (1992) ("If some plaintiffs are undercompensated by the tort system, that problem should be addressed directly, not through the indirect, arbitrary method of punitive damages."); Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 1005 (1989) ("[N]o one today seriously argues that the function of punitive damages is the damages function: compensation for loss."); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic that Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1164–66 (1984); *see also id*. at 1122 ("The legal rationale that punitive damages serve a compensatory function . . . has ceased to exist.").

4. *See* Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 42–43 (1983); Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 69 & nn.55–57 (1992). Dean Prosser summarized the typical conduct that warrants punitive damage assessment in this way:

> Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton. Lacking this element, there is general agreement that mere negligence is not enough, even though it is so extreme in degree as to be characterized as "gross," an unhappy term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify punitive damages. Still less, of course, can such damages be charged against one who acts under an innocent mistake in engaging in conduct that nevertheless constitutes a tort.

PROSSER, *supra* note 1, § 2, at 9–10 (footnotes omitted); *see also* Sales & Cole, *supra* note 3, at 1130–38 (discussing the various standards of conduct that warrant punitive damages).

5. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("[Punitive damage awards] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."). Ohio Jury Instruction 23.71 states in part: "The purposes of punitive damages are to punish the offending party and to make the offending party an example to discourage others from similar conduct." 1 OHIO JUDICIAL CONFERENCE, OHIO JURY INSTRUCTIONS § 23.71 (2002). But for an interesting analysis of why punishment and deterrence is not accomplished in the advent of insurance against punitive damage awards, see Sales & Cole, *supra* note 3, at 1163–64.

of the public "to protect and vindicate" its interests.[6] Indeed, as early as 1873, courts asked the following:

> How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, . . . not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant?[7]

These questions have since been debated frequently, yet inconclusively.[8]

Perhaps the most compelling and remediable anomaly of the punitive damage concept is the apparent philosophical void between the rationale for punitive damages—deterrence and punishment—and the way punitive damages are distributed—as a windfall to the individual plaintiff. Put differently, "If punitive damages are intended to convey the community's condemnation of a defendant's actions, then why should the money go to a single plaintiff instead of the community at large?"[9] The Ohio Supreme Court's recent attempt to address this seemingly inconsistent aspect of punitive damages has come under intense criticism.[10]

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6. PROSSER, *supra* note 1, § 2, at 7.

7. Fay v. Parker, 53 N.H. 342, 382 (1873); *see also* Bass v. Chi. & N.W. Ry. Co., 42 Wis. 654, 672 (1877).

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

Id.

8. *See, e.g.*, L.S. (Bob) Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57, 58 (1975); James D. Ghiardi, *The Case Against Punitive Damages*, 8 FORUM 411 (1972); John Dwight Ingram, *Punitive Damages Should Be Abolished*, 17 CAP. U. L. REV. 205, 205–06 (1988); Sales & Cole, *supra* note 3, at 1164–65. Perhaps the most compelling argument in support of the punitive damages doctrine was introduced by Angela P. Harris. Harris argues that the conventional analysis that the law of tort is private and compensatory, whereas criminal law is public and punitive, is inherently flawed, and that punitive damages more properly represent the synergy of the private and public spheres. Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079, 1079–82 (1989).

9. Scott Hiaasen, *Court Took New Power with Split of Punitive Award, Critics Say Justices Can Now Aid Pet Causes*, PLAIN DEALER, Jan. 5, 2003, at A1.

10. *See* Terry Carter, *Parsing Punitives: Ohio Supreme Court Directs Part of Damage Award to Charity*, 2 A.B.A. J. E-REPORT 1, Jan. 10, 2003, at 2 ("It sounds like judicial tort reform. They're creating social policy or public policy and doing financial planning for the plaintiff. It's unprecedented, and it's ex post facto, case by case." (quoting Michael L. Rustad, Professor, Suffolk University Law School)); *id.* ("It is perhaps the greatest case of judicial lawmaking in the past two decades. Such formulas are to be devised by legislatures, and the issue of using punitive damages to create this charity wasn't even argued to the court." (quoting Victor Schwartz, a Washington, D.C.-

In *Dardinger v. Anthem Blue Cross & Blue Shield*,[11] the Ohio Supreme Court reduced a $49 million punitive damage award to $30 million.[12] But as a condition of remittitur, the court ordered nearly $20 million of the award to be used to create a cancer research fund at Ohio State University.[13] Many critics are up in arms over the decision, calling it "judicial activism at its height"[14] and claiming that the court granted itself the power to aid pet causes.[15]

This Casenote defends the judiciary's right to award damages to third party beneficiaries without the expressed consent of the legislature, but recommends adjustments in the reallocation procedure. Part II of this Casenote provides a brief glimpse of the history and current status of the punitive damages doctrine. Part III introduces the facts and holding of the *Dardinger* case, and Part IV analyzes and addresses the implications of the decision. Finally, Part V provides recommendations for a future course of action.

II. PUNITIVE DAMAGES: AN OVERVIEW

The concept of punitive damages is not new. The book of Exodus provides, "If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep."[16] One may

based tort reform lawyer-lobbyist who argues that laws splitting punitive damages with states creates conflicts of interest for lawyers who will be more likely to settle if punitive damages are not available. *See generally* Victor E. Schwartz et al., *I'll Take That: Legal and Public Policy Problems Raised by Statutes that Require Punitive Damage Awards to Be Shared with the State*, 68 MO. L. REV. 525, 544–45 (2003)).

11. Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121 (Ohio 2002).

12. *Id.* at 145.

13. *Id.* at 146.

14. Adam Liptak, *Court Orders Donation from Damages: Plaintiff in Dispute over Insurance Told to Give $20 Million*, CHI. TRIB., Dec. 28, 2002, at 2 (quoting Robert Peck, Attorney, Ohio); *see also supra* note 10.

15. Hiaasen, *supra* note 9 ("It's really a potentially dangerous decision. The court has left itself to pick and choose how money won in the court should be spent." (quoting Robert Strassfeld, Professor, Case Western Reserve University Law School)).

16. *Exodus* 22:1 (King James); *see also Exodus* 22:4 ("If the theft be certainly found in [the thief's] hand alive, whether it be ox, or ass, or sheep; he shall restore double."); *Exodus* 22:9.

> For all manner of trespass, *whether it be* for ox, for ass, for sheep, for raiment, *or* for any manner of lost thing, which *another* challengeth to be his, the cause of both parties shall come before the judges; *and* whom the judges shall condemn, he shall pay double unto his neighbour.

Id. The doctrine of punitive damages has been traced back to civilizations that predate the *Bible*. The Code of Hammurabi, created as early as 2000 B.C., is thought to have been the first system to incorporate punitive damage awards. 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 1.0, at 3 (2d ed. 1989) (noting the existence of multiple damages documented as early as 2000 B.C.). Punitive damage awards were also permitted in the Hittite law in 1400 B.C. and in the Hindu Code of Manu in 200 B.C. *Id*. § 1.1, at 3–4.

conclude from the castigatory nature of this provision that it was intended to punish and deter.[17] These dual purposes remain the heart of the American punitive damages doctrine.[18]

In 1784, the South Carolina Supreme Court decided *Genay v. Norris*,[19] the first reported American punitive damages case. In *Genay*, the court permitted the jury to award vindictive damages to a plaintiff who had been injured when the defendant secretly spiked his drink.[20] Where the defendant intentionally caused serious injury, the plaintiff was entitled to "very exemplary damages."[21] Seven years later, in *Coryell v. Colbaugh*,[22] the New Jersey Supreme Court identified the twin aims of punishment and deterrence when it awarded exemplary damages for the breach of a promise to marry.[23] The jury was encouraged "not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example's* sake, to prevent such offenses in the future."[24]

These early cases demonstrate the judiciary's willingness to act on its own accord to shape social policy. By creating the punitive damages doctrine, courts and not legislators were forcing rational actors to reexamine the costs of wrongdoing. These cases formed the foundation upon which the deeply rooted tradition of using civil damage awards to deter egregious conduct was forged. But this foundation has not gone untested by harsh criticism and attempts to eradicate punitive damage awards from the courts' arsenal.[25]

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17. *See* Shores, *supra* note 4, at 63.

18. *See* JAMES D. GHIARDI & JOHN H. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 4.14 & n.1 (1999) (citing cases and statutes from thirty-six states and the District of Columbia acknowledging punishment and deterrence as the main objectives of the punitive damages doctrine).

19. 1 S.C.L. (1 Bay) 6 (1784).

20. *Id*. The plaintiff and defendant were quarreling and had agreed to settle their conflict with dueling pistols. At the last moment, the defendant proposed that they set aside their differences and drink a reconciliation toast. The defendant then slipped a large dose of cantharides into the plaintiff's wine glass, causing the plaintiff excruciating pain. *Id.* at 6–7.

21. *Id.* at 7.

22. 1 N.J.L. 77 (1791).

23. *Id.*

24. *Id*.

25. *See* John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 140 (1986) (suggesting that punitive damage awards may be unconstitutional); Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 559–69 (1992) (advocating the significant reduction of punitive damage awards through procedural hurdles); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269,

The punitive damages doctrine has been heavily criticized during its lengthy tenure.[26] Commentators have argued that punitive damage awards are premised on an "antibusiness bias"[27] and jeopardize American industry,[28] result in overdeterrence,[29] increase insurance costs,[30] and grant the jury inappropriate and unauthorized discretion.[31] Others claim that punitive damage awards are unconstitutional violations of the Eighth Amendment's Excessive Fines Clause,[32] and of substantive and procedural due process.[33] The Supreme Court, however, has consistently

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1298–1304 (1993); Sales & Cole, *supra* note 3, at 1154–64 (providing a rationale for abolishing punitive damages).

26. *See supra* note 8 (listing several commentators who advocate abolishing punitive damages).

27. Sales & Cole, *supra* note 3, at 1123.

28. *Id.* at 1154–56; *see id*. at 1154 (stating that the punitive damages doctrine "erodes the economic stability of society").

29. *See, e.g.*, John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 978–79 (1984) (stating that ambiguity as to the appropriate legal standards for levying punitive damage awards results in overdeterrence); Ellis, *supra* note 3, at 988 (stating that unpredictability as to the potential size of punitive damage awards "induces overinvestment in liability avoidance, or worse, suppresses innovation"); *see also* Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("The threat of such enormous awards has a detrimental effect on the research and development of new products.").

30. Sales & Cole, *supra* note 3, at 1153–54 (stating that punitive damage awards are "a windfall to the plaintiff at the expense of innocent consumers who must pay increased premium rates for their insurance policies").

31. This criticism dates back to 1861, when the court, in *Pike v. Dilling*, 48 Me. 539 (1861), questioned:

> Now, is there not a striking inconsistency and absurdity, in holding, that, while a traverse jury is not permitted in a *criminal prosecution* to determine the penalty to be inflicted on the delinquent for a *public wrong*, and the Court are restricted, by the Legislature, within certain limits, in the punishment it may inflict for such *public wrong*; yet it is prudent, wise and just to confer on the jury, in a *civil prosecution* for the *private injury* connected with the same *public wrong*, the unlimited power of inflicting upon the delinquent, in addition to full compensation for the private injury, such further punishment by way of public example, to deter others from committing similar wrongs, whatever pecuniary mulct the jury, in their uncontrolled caprice, may see fit to give . . . ?

Id. at 541.

32. U.S. CONST. amend. VIII ("[E]xcessive fines [shall not be] imposed."). In *Browning-Ferris*, the Supreme Court decided in a limited holding that punitive damage awards *between private parties* in civil lawsuits were not subject to the Excessive Fines Clause. 492 U.S. at 275–76. The Court explained that "the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purposes of civil damages." *Id.* at 266; *see* discussion *infra* Part IV.C (analyzing whether allocation to a state entity would violate the Excessive Fines Clause).

33. *See* Ellis, *supra* note 3, at 990 ("[The] process for imposing a punitive damage sanction is so lacking in fundamental fairness as to deny defendants . . . the due process guaranteed by the fifth and fourteenth amendments."). *But see* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 17 (1991) ("[W]e cannot say that the common-law method for

upheld the constitutionality of the punitive damages doctrine,[34] and the dual objectives of punishment and deterrence continue to be the basis upon which forty-six states and the District of Columbia authorize punitive damage awards as a function of common law.[35]

This Casenote accepts the necessity of punitive damage awards to deter wrongdoing and limits its analysis to the question of how states should address the issue of distribution so as to mitigate the "windfall effect"[36] of punitive damage awards. Using the Ohio Supreme Court's decision as a jump-off, the remainder of this Casenote concentrates on the means by which states can develop congruency between the purposes of punitive damage awards and the ways in which they are distributed.

III. THE *DARDINGER* DECISION

Robert Dardinger received Anthem's letter denying his wife lifesaving treatment on November 11, 1997, the day after her funeral.[37] This final insult capped six months of "frustration, doubt, and desperation" caused by Anthem's "practiced powerlessness, their active inactivity."[38]

In October 1996, plaintiff Robert Dardinger's wife, Esther, was diagnosed with metastatic brain tumors.[39] In April 1997, upon the recommendation of her doctor and the Ohio State University Neuro-Oncology Tumor Board, Esther began intra-arterial chemotherapy (IAC)

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assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional."). The Court explained that jury instructions which place "reasonable constraints" on the jury, "meaningful and adequate" post-trial procedures for trial court review of the award, and appellate review protects defendants from awards that are "grossly out of proportion to the severity of the offense." *Id.* at 2.

34. *See Browning-Ferris Indus.*, 492 U.S. at 275–76 (holding that punitive damage awards in civil lawsuits do not violate the Excessive Fines Clause); *Pac. Mut. Life Ins. Co.*, 499 U.S. at 17 (holding that punitive damages do not violate the Due Process Clause).

35. *See* GHIARDI & KIRCHER, *supra* note 18, tbl. 4.1. Only Louisiana, Massachusetts, Nebraska, and Washington prohibit the recovery of punitive damages under the common law. *See, e.g.*, McCoy v. Ark. Natural Gas Co., 143 So. 383, 384–86 (La. 1932); City of Lowell v. Mass. Bonding & Ins. Co., 47 N.E.2d 265, 272 (Mass. 1943); Abel v. Conover, 104 N.W.2d 684, 688 (Neb. 1960); Kammerer v. W. Gear Corp., 635 P.2d 708, 711 (Wash. 1981).

36. Punitive damage awards have long been considered a windfall for plaintiffs. *See* Fay v. Parker, 53 N.H. 342, 382 (1873); Breslo, *supra* note 3, at 1133 (arguing that "punitive damage awards amount to a windfall for plaintiffs"); Sales & Cole, *supra* note 3, at 1158–60.

37. Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121, 130 (Ohio 2002).

38. *Id*. at 140.

39. *Id.* at 124.

treatment to shrink the tumors.[40] Anthem, Esther's medical insurance carrier, approved the twelve-treatment program.[41] The tumors had shrunk significantly after only two treatments, and Esther did not manifest any side effects.[42]

The Dardingers' nightmare began after Esther's third IAC treatment, when Anthem informed them that they would no longer pay for her treatments.[43] The Dardingers appealed immediately.[44] On July 24, Anthem revived the Dardingers' hopes by informing them that Esther's treatments had been approved.[45] Three weeks later, Anthem snatched hope away,[46] claiming they had erred and that the treatments were not in fact approved.[47]

On August 5, the Dardingers submitted their second appeal, which delayed Esther's scheduled IAC treatment.[48] Days and weeks slipped by as Anthem offered a litany of reasons for the denial of Esther's claim: the treatment was too experimental, it should have been an outpatient procedure, the therapy was not "recognized as safe and effective for the treatment of metastatic brain cancer" (despite the MRI results showing significant reduction of the tumors).[49] When asked about the appeal status, Anthem responded that they had 120 days to resolve the appeal and displayed no sense of urgency.[50] But an Anthem internal e-mail entitled, "URGENT: Esther Dardinger," showed their clear understanding of the gravity of the situation and instructed Anthem employees: "DO NOT discuss details of the info in the following messages, only that it is in review . . . . This could/probably will end up in a suit."[51] In a separate e-mail, an Anthem employee acknowledged that Anthem's bureaucratic intransigence had created a "sad and embarrassing situation."[52]

On September 17, worried about the cost of IAC treatments (which could have exceeded $100,000) and unable to wait out Anthem's appeal

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40. *Id.* "IAC delivers chemotherapy to brain tumors by means of an arterial catheter threaded through whichever artery is feeding the area of the brain where the tumor is located and into the brain." *Id.* at 124–25. This allows doctors to administer a much higher dose of chemotherapy specifically to the affected area without subjecting other organs to the lethal toxicity of the drugs. *Id.* at 125.
41. *Id.*
42. *Id*.
43. *Id.*
44. *Id.*
45. *Id.* at 126.
46. *Id.* at 140.
47. *Id.* at 126.
48. *Id.* at 127.
49. *Id.* at 125–26, 129.
50. *Id.* at 127.
51. *Id.* at 128.
52. *Id.* at 129.

process, Esther underwent intravenous chemotherapy.[53] The sweeping toxicity of the chemotherapy "burned out her bone marrow," and Esther never recovered.[54] Justice Pfeifer, writing for the majority, summarized Anthem's actions:

> Anthem had worn them down as surely as the cancer had. Like the cancer, Anthem relentlessly followed its own course, uncaring, oblivious to what it destroyed, seeking only to have its way. The ruination of a life was just a side effect.
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> . . . "[T]he jury could easily find that a pervasive corporate attitude existed with the defendants to place profit over patients" and . . . "the defendants disregarded the rights of their insured[s] in an effort to obtain higher profits."[55]

On April 22, 1998, Robert Dardinger sued Anthem for breach of contract, bad faith, and punitive damages.[56] At trial, the jury returned a verdict awarding Dardinger $1350 for the breach of contract claim, $2.5 million in compensatory damages for the bad faith claim, and $49 million in punitive damages.[57]

The Ohio Supreme Court granted certiorari to "address the issue of whether [the punitive damage] award was 'grossly excessive' and thus violated the federal Due Process Clause, whether it was excessive under Ohio law, and whether remittitur is appropriate."[58] First, the court applied the factors enunciated in *BMW of North America, Inc. v. Gore*[59]

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53. *Id*. at 127.
54. *Id.* at 127–28.
55. *Id.* at 142 (quoting trial court).
56. Dardinger v. Anthem Blue Cross & Blue Shield, Nos. 99-CA-127, 99-CA-136, 2001 WL 575129, at *3 (Ohio Ct. App. May 22, 2001), *rev'd*, *Dardinger*, 781 N.E.2d 121. Dardinger also alleged intentional infliction of emotional distress and wrongful death claims, which were dismissed prior to jury deliberation. *Id*. It is a miracle that the Dardingers were able to bring this case. Most health plans offered by employers are governed by a federal law that bans most damage awards. An exemption to the current law allows lawsuits by employees of churches and public agencies. Because Dardinger got his insurance through his work as a schoolteacher, he was able to sue Anthem and ask for punitive damages.
57. *Dardinger*, 781 N.E.2d at 134.
58. *Id.* at 140. The court was also asked to determine whether Anthem had waived its possible contract defense to Dardinger's claim. *Id.* at 135. The Dardingers' insurance carrier was Community Insurance Company, which did business under the name Anthem Blue Cross and Blue Shield. *Id.* at 124. Community Insurance Group was the wholly owned subsidiary of Anthem Insurance Companies, Inc. *Id.* The court refused Anthem's attempts to distinguish the separate entities and avoid greater liability. *Id.* at 136–40.
59. 517 U.S. 559 (1996). The three guideposts set out by the Court in the *BMW* case are the following: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of the punitive damage award to the actual harm inflicted on the plaintiff, and

and found that the jury's $49 million punitive damage judgment "was not grossly excessive under the federal Constitution and did not violate [Anthem's] due process rights."[60] Nevertheless, the court found that "the punitive damages award in this case was excessive under Ohio law."[61] It noted that the largest punitive damage award previously allowed by the court was $15 million.[62] While acknowledging that Anthem deserved a "historic punitive damages award,"[63] the court was hesitant to approve an award that would "create its own overriding problems."[64] In a somewhat conclusory manner, the court determined that doubling the previous highest punitive award would have been appropriate under Ohio law, but tripling the award violated the Ohio Constitution.[65] Finally, the court addressed the issue of remittitur, and held: "We are imposing a remittitur of $19 million, so that the total punitive damages award is $30 million. *We also have another condition*."[66] It is this additional condition which has become the focus of much controversy.[67]

In ordering the conditional remittal of the $49 million jury award, the court attempted to bridge the philosophical void between the objectives and application of the punitive damages doctrine.[68] The court ordered that the jury's award be reduced to $30 million plus postjudgment interest, which was thought to be around $9 million in this case.[69] From that corpus of approximately $39 million, the court and attorneys' fees would be extracted.[70] The court ruled: "The amount of attorney fees should be determined by the contract between Dardinger and his attorney, and should be based upon the amount originally in the corpus, $30 million plus statutory interest."[71] Dardinger would receive $10 million.[72] The court held that the

(3) comparable criminal penalties for comparable misconduct. *Id.* at 575–85.

60. *Dardinger*, 781 N.E.2d at 140, 143.
61. *Id.* at 144.
62. *Id.*
63. *Id.*
64. *Id*.
65. *Id.* at 144–45.
66. *Id.* at 145 (emphasis added).
67. *See* Carter, *supra* note 10.
68. In referring to this philosophical void, the court sardonically noted: "The community makes the statement, while the plaintiff reaps the monetary award." *Dardinger*, 781 N.E.2d at 145.
69. *Id.* at 146; Darrel Rowland, *Verdict Restored; Insurer Chastised*, COLUMBUS DISPATCH, Dec. 21, 2002, at A1 (noting that postjudgment interest would be in the neighborhood of $9 million).
70. *Dardinger*, 781 N.E.2d at 146.
71. *Id.*
72. *Id.*

remaining amount, somewhere between $17 to 20 million,[73]

> should go to a place that will achieve a societal good, a good that can rationally offset the harm done by the defendants in this case. Due to the societal stake in the punitive damages award, we find it most appropriate that it go to a state institution. In this case we order that the corpus of the punitive damages award go to a cancer research fund, to be called the Esther Dardinger Fund, at the James Cancer Hospital and Solove Research Institute at the Ohio State University.[74]

IV. ANALYSIS

The Ohio Supreme Court justified its reallocation of the punitive damages award by noting: "At the punitive-damages level, it is the societal element that is most important. The plaintiff remains a party, but the de facto party is our society, and the jury is determining whether and to what extent we as a society should punish the defendant."[75] Thus, it follows that society, as the de facto party, should receive the benefit of the punitive damage award. This concept is not novel. In fact, since 1985 twelve states have enacted split-recovery statutes.[76] Such "split-recovery statutes" allocate a portion of the punitive damages award to

73. If we assume a 30% contingency fee, the attorneys would be entitled to $11.7 million. Dardinger would take his $10 million, leaving $300,000 to cover the court costs of extended litigation; this would leave $17 million for allocation to the Esther Dardinger Cancer Research Fund. *Id.* at 146.

74. *Id.*

75. *Id.* at 145.

76. The twelve states that enacted split-recovery statutes are Alaska, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Missouri, Iowa, New York, Oregon, and Utah. But the statutes were repealed in Colorado, Florida, Kansas, and New York. Act of May 9, 1997, ch. 26, § 10, 1 Alaska Sess. Laws 8 (codified by ALASKA STAT. § 09.17.020 (Michie 2002)); Act of May 16, 1986, ch. 106, § 1, 1986 Colo. Sess. Laws 675 (repealed by Act of March 9, 1995, ch. 6, § 1, 1995 Colo. Sess. Laws 14); Act of June 26, 1986, ch. 160, § 52, 1986 Fla. Laws 749 (repealed 1997); Tort Reform Act of 1987, No. 672, 1987 Ga. Laws 915 (codified as amended at GA. CODE ANN. § 51-12-5.1 (Supp. 2000)); Public Act 84-1431, Art. 3, § 1, 1986 Ill. Laws 3740 (codified by 735 ILL. COMP. STAT. ANN. 5/2-1207 (West Supp. 2003)); Act of March 6, 1998, § 47, 1998 Ind. Acts 317 (codified at IND. CODE ANN. § 34-51-3-6 (Michie 1998)); Act of May 22, 1986, ch. 1211, § 42, 1986 Iowa Acts 313 (codified as amended at IOWA CODE ANN. § 668A.1 (West 1998)); Act of April 26, 1985, ch. 197, § 2(e), 1985 Kan. Sess. Laws 951, 953 (repealed 1988); 1996 Mo. Laws 869 § C (codified by MO. ANN. STAT. § 537.675 (West Supp. 2000)); Act of April 10, 1992, ch. 55, § 393, 1992 N.Y. Laws 162 (also set April 1, 1994 as date of repeal, Act of April 10, 1992, ch. 55, § 427(dd), 1992 N.Y. Laws 162); Act of July 17, 1987, ch. 774, § 3, 1987 Or. Laws 1570 (codified as amended at OR. REV. STAT. § 18.540 (2001)); An Act Relating to Punitive Damages, ch. 237, § 1, 1989 Utah Laws 717 (codified by UTAH CODE ANN. § 78-18-1 (Supp. 2002)).

the state in an attempt to allay the windfall effect.[77] But much to the chagrin of several commentators, Ohio became the first state to order such an allocation by judicial decree.[78] Critics argue that the *Dardinger* decision is (1) an unprecedented legislative power grab, (2) a judicial grant to aid their own pet causes, (3) an excessive fine in violation of the Eighth Amendment,[79] (4) a violation of the Fifth Amendment's Takings and Due Process Clauses, and (5) "fraught with unintended and undesirable consequences,"[80] such as robbing plaintiffs of incentive to prosecute their suits and increasing already mammoth punitive damage awards.[81] The remainder of this Casenote analyzes these criticisms and offers recommendations for improving punitive damage distribution.

A. Separation of Powers

Chief Justice Moyer's dissent in *Dardinger* argued that "the legislative branch is better equipped to establish a uniform mechanism for alternative distribution."[82] Moyer's concern centered on the lack of "standards or guidelines" available to courts charged with the task of distributing punitive damage awards.[83] Exactly what constitutes a legislative issue, as opposed to a judicial issue, is a debate that has raged since the 1700s. For instance, in *Alyeska Pipeline Service Co. v. Wilderness Society*,[84] the United States Supreme Court addressed the issue of whether a court, as opposed to Congress and in the absence of directive legislation, could direct a party to pay its opponents' attorneys' fees.[85] The Court held that only Congress, and not the courts, could authorize an exception to the general "American rule" that attorney fees are not ordinarily recoverable by a prevailing litigant in the absence of

77. *See, e.g.*, Charles F.G. Parkinson, Note, *A Shift in the Windfall: An Analysis of Indiana's Punitive Damages Allocation Statute and the Recovery of Attorney's Fees Under the Particular Services Clause*, 32 VAL. U. L. REV. 923, 943–44 (1998) (describing split-recovery statutes).

78. Lee Leonard, *Ruling Highlights Court's Split: Punitive Damages Given to New Fund*, COLUMBUS DISPATCH, Jan. 3, 2003, at C1 ("As far as I can tell, there is no other state Supreme Court in the country that has awarded punitive damages in this fashion." (quoting Richard Mason, Ohio Academy of Trial Lawyers)).

79. While the Supreme Court has not specifically ruled whether the Excessive Fines Clause applies to the states, most commentators agree that, like the other provisions of the Eighth Amendment, it would. *See* James D. Ghiardi, *Punitive Damages: State Extraction Practice Is Subject to Eighth Amendment Limitations*, 26 TORT & INS. L.J. 119, 125 n.57 (1990) (arguing that the Excessive Fines Clause applies to the states); Jeffries, *supra* note 25, at 148 (same).

80. *Dardinger*, 781 N.E.2d at 147 (Moyer, C.J., dissenting).

81. *See* discussion *infra* Part IV.A–E.

82. *Dardinger*, 781 N.E.2d at 148.

83. *Id*. at 147.

84. 421 U.S. 240 (1975).

85. *Id.* at 241.

statutory authorization.[86] But in reaching that conclusion, the Court relied almost solely on the fact that Congress had always considered fee awards within their province.[87] Specifically, it held the following:

> Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of [statutory authority], those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party . . . .[88]

In contrast, punitive damages arose from the common law in forty-six states, and only eight states modify punitive damage awards through split-recovery statutes.[89] Justice Pfeifer, writing for the majority in *Dardinger*, relied heavily on this point to provide the court with the authority to divert the punitive damage award: "In Ohio, punitive damages are an outgrowth of the common law. Therefore, Ohio's courts have a central role to play in the distribution of punitive damages."[90] Indeed, as one commentator notes: "Broad power to shape and effectuate remedies is deeply rooted in the common law system. For centuries, courts have prescribed remedies requiring continuing supervision of various enterprises; thus, there is nothing new in the notion that courts have such authority."[91]

Not only do courts have the authority to shape remedies, but they also are often better suited to do so than the legislature. In the words of Justice Pfeifer: "It's humanly impossible for the legislature to sit down and imagine all the permutations. The courts, on a case-by-case basis, are equipped to handle these things."[92] Judges enjoy a unique perspective that neither the legislature nor the jury can appreciate. The legislature can only paint with broad strokes the landscape of tort reparations; the jury is only privy to the individualized details of the case before them. But judges can decipher the fine detail of individual circumstances within the bigger picture. Judges are acutely aware of what tort reformers refer to as the "tort crisis," and yet are also in tune with the particular

86. *Id.* at 269–71.
87. *Id.* at 247–48 (citing the Federal Judiciary Act of Sept. 24, 1789, § 35, ch. 20, 1 Stat. 73).
88. *Id*. at 269.
89. *See supra* note 76.
90. Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121, 145–46 (Ohio 2002) (citations omitted).
91. Shores, *supra* note 4, at 91 (footnote omitted).
92. Leonard, *supra* note 78, at C1.

harms involved in the cases before them. It is for this reason that Justice Pfeifer held: "Punitive damages awards should not be subject to bright-line division but instead should be considered on a case-by-case basis, with those awards making the most significant societal statements being the most likely candidates for alternative distribution."[93]

In *Dardinger*, the court had the opportunity to make a sizable allocation for public benefit without infringing upon Dardinger's incentive to prosecute the suit. But imagine if the jury had awarded a significantly smaller figure, say $1 million in punitive damages. Dardinger's attorneys still would have been entitled to extract their contingency fee for their efforts to eradicate a social malfeasant, but what then of the paltry remainder? To split the award in the same proportion as in the actual case would so dilute the benefit to the public that it would not likely offset the chilling of Dardinger's incentive to prosecute the suit through trial. Certainly, under such circumstances, it would hardly seem worth Dardinger's investment in prosecuting the case. It is well recognized that punitive damage awards, in addition to punishing defendants and deterring future wrongdoing, also reward plaintiffs' courage in prosecuting claims through to trial. Allocating a portion of the award to the plaintiff is necessary to ensure that plaintiffs will continue to bring punitive damages claims because plaintiffs' time and energy must be compensated to make pursuing the cases worthwhile.[94] Indeed, every state that has enacted a split-recovery statute has recognized this and allocated a portion of the award to the plaintiff.[95]

By avoiding legislatively mandated allocations and looking instead at the totality of the circumstances, courts are able to present plaintiffs, as well as attorneys, with rewards for their courage and diligence. In this manner, courts are able to assess the efforts of the plaintiff to combat social iniquities, appraise the potential public benefit of redistributing the punitive damages award, and order an allocation of the award that will both benefit the public and guarantee the plaintiff's incentive to pursue such claims. The lack of predetermined legislative guidelines that concerned Chief Justice Moyer are in fact exactly what make courts better equipped to redistribute punitive damage awards.

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93. *Dardinger*, 781 N.E.2d at 146; *see also* Shores, *supra* note 4, at 92–93 (arguing that judges should determine an allocation that will best serve the public policy purposes of the punitive damages doctrine).

94. *See* Dede W. Welles, Note, *Charitable Punishment: A Proposal to Award Punitive Damages to Nonprofit Organizations*, 9 STAN. L. & POL'Y REV. 203, 207–08 (1998).

95. *See supra* note 76.

B. Judicial Discretion

Chief Justice Moyer further criticized the majority's decision by saying it "sanctions a judge's unbridled discretion to allocate punitive damages to his or her preferred charity."[96] While acting sua sponte in ordering that the punitive damage award benefit the Ohio State University cancer research institute, the majority never directly confronted the issue of who should determine where the distribution would best serve the public's interest. In fact, the opinion reads, "Plaintiffs themselves might get involved in how the award is distributed."[97] But it is unclear how the court would have plaintiffs go about this. Dardinger had set up four charitable trusts, at least one of which was to benefit the cancer hospital, but never had the opportunity to express his opinion as to where the money would best serve the public's interest.[98]

While some commentators argue that judges are in the best position to pick the most worthwhile cause because they "see community problems in their court rooms on a daily basis [and] can decide what areas of the populace are most deserving,"[99] others articulate concern over granting them such power. One commentator, arguing that plaintiffs and not judges should determine where the funds should be allocated, points out that "[j]udges, like other prominent members of society, often sit on the boards of nonprofit organizations. Given the power to allocate money to the organization of their choice, they might be tempted to award it to a pet charity which would not otherwise be a natural beneficiary."[100] Nevertheless, even this commentator concedes that this alone is not grounds for taking distribution authority away from the judge and is a problem that can be remedied through adherence to the ethical code that all judges are bound by.[101] The more compelling argument is that such involvement by the court may constitute state action and invoke the Eighth Amendment's Excessive Fines Clause.

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96. *Dardinger*, 781 N.E.2d at 147 (Moyer, C.J., dissenting).
97. *Id.* at 146.
98. Leonard, *supra* note 78. Dardinger did express satisfaction with the court's decision, but he also noted that he probably would have allocated some of the money to benefit those fighting cancer as well as for cancer research. Liptak, *supra* note 14.
99. *See, e.g.*, Laura Ritchie et al., *Today's Problems/Tomorrow's Lawyers: Redirecting Punitive Damages*, RECORDER, May 5, 1993, at 8.
100. *See* Welles, *supra* note 94, at 207 (footnotes omitted).
101. *See id*. at 207, 218 n.98.

C. The Eighth Amendment

In the past, punitive damages have been challenged as excessive fines prohibited by the Eighth Amendment.[102] The U.S. Supreme Court rejected that argument where the state was a mere arbiter in civil cases between private parties.[103] In *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, the Court began its analysis by focusing on the definition of the word "fine" and looking to the history and purpose of the Eighth Amendment.[104] It found that the Eighth Amendment, and more specifically the Excessive Fines Clause, was designed to curb potential "governmental abuse of 'prosecutorial' power," and was "not concern[ed] with the extent or purposes of civil damages."[105] After interpreting this to be the Framers' intent, the Court concluded that the Excessive Fines Clause could not be triggered "where a private party receives exemplary damages from another party, and the government has no share in the recovery," because concern for government abuse is nonexistent.[106] The Court, however, explicitly left open the question of whether the Excessive Fines Clause would apply to punitive damages if the government had prosecuted the action or stood to profit from a share of the levied damages award.[107]

The *Dardinger* decision arguably triggers the application of the Eighth Amendment for two reasons. First, granting a portion of the award to a state institution—Ohio State University's cancer research institute—makes the state a beneficiary to the award and reinstates concerns that government will abuse its prosecutorial powers for its own gain. Second, judicial determination of where the damage award is to be distributed may constitute state action, inviting the application of the Excessive Fines Clause.

The Supreme Court's holding in *Browning-Ferris* appears to have imposed two requirements that must be met in order to trigger the

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102. *See, e.g.*, Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).
103. *Id*. at 260.
104. *Id.* at 264–66.
105. *Id*. at 266. "[T]he text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government." *Id.* at 263.

> We think it clear, from both the language of the Excessive Fines Clause and the nature of our constitutional framework, that the Eighth Amendment places limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments. The fact that punitive damages are imposed through the aegis of courts and serve to advance governmental interests is insufficient to support the step petitioners ask us to take.

Id. at 275.
106. *Id.* at 272.
107. *Id*. at 264, 275 n.21.

Excessive Fines Clause. The Court held that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, *and* payable to, the government."[108] The word "and" creates ambiguity as to whether granting a portion of punitive damage awards to the state, even when the action was prosecuted by a private citizen, triggers the Excessive Fines Clause. In *Browning-Ferris*, the Court noted that the government had not "taken a positive step to punish," nor had it "used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual."[109] Many commentators have understood this to mean that punitive damage awards which benefit the state—through judicial allocation or split-recovery statutes—would invoke the Excessive Fines Clause.[110] Indeed, Justice O'Connor's dissent in *Browning-Ferris* reached this conclusion, raising the concern that the Court's ruling would clearly implicate problems for states that had adopted split-recovery statutes.[111] But this understanding seems to read past the critical word "and" in the *Browning-Ferris* holding. While damage awards may be payable to the state in the split-allocation context, they are not "imposed by" the state. The state neither prosecutes nor initiates the civil punitive damages action; it merely referees it. Several states have relied on this distinction in upholding split-recovery statutes.[112] Thus, it is still unclear as to whether distribution to a state entity alone will invoke the Excessive Fines Clause, but as Part V of this Casenote suggests, it may be unnecessary to reach a conclusion on this sticky issue.

As for the question of whether granting the judiciary the power to determine where the punitive damage award should be allocated, it is doubtful that this involvement alone would invoke application of the Excessive Fines Clause. As noted above, the Excessive Fines Clause was

108. *Id*. at 268 (emphasis added).
109. *Id.* at 275.
110. *See* Ghiardi, *supra* note 79, at 125 n.57; Jeffries, *supra* note 25, at 148.
111. *Id.* at 298–99 (O'Connor, J., concurring in part and dissenting in part) ("[B]y relying so heavily on the distinction between governmental involvement and purely private suits, the Court suggests (despite its claim . . . that it leaves the question open) that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity.").
112. *See, e.g.*, Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 868 (Iowa 1994) (finding the Excessive Fines Clause inapplicable to the Iowa split-recovery statute because the state did not prosecute the action); Tenold v. Weyerhaeuser Co., 873 P.2d 413, 424 (Or. Ct. App. 1994) (holding the Excessive Fines Clause inapplicable because "[t]he government of Oregon did not initiate [the] action").

designed to curb government abuse.[113] Allocating the jury-determined award poses no threat of unjust or excessive punishment. Further, were a court to distribute the award to a nonstate-run institution, such as a private nonprofit organization, none of the concerns identified by the Court in *Browning-Ferris* would be present. It therefore appears that application of the Excessive Fines Clause could only be a potential problem if states were to allocate punitive damage awards to state institutions.

D. The Fifth Amendment

The Fifth Amendment prohibits the government from taking private property for public use without just compensation.[114] Thus, assessing when plaintiffs take ownership over punitive damage awards, if ever, is the necessary first step in analyzing whether judicial allocation of punitive damage awards violates the Takings Clause. Unlike compensatory damages, plaintiffs do not have a right to punitive damages.[115] Whereas plaintiffs accrue rights to compensatory damages—via the right of redress—after demonstrating actual injury, they have no right to a punitive damage award until an award judgment has been entered.[116]

In *Dardinger*, the court was careful to assign the plaintiff property rights only in the $10 million it intended to allocate for him.[117] The court specifically conditioned the remittitur on Dardinger's acceptance of the allocation the court devised, making it clear that the interests of the cancer research institute and Dardinger vested simultaneously.[118] By doing so, the court protected itself against a Takings Clause challenge by ensuring that Dardinger never attained property rights in the portion of the award that was allocated elsewhere. So long as courts carefully elucidate that recipients' property interests arise simultaneously, split-allocation of punitive damage awards does not violate the Fifth Amendment's Takings Clause.

Further, redistributing punitive damages awards does not violate the Due Process Clause. In *Pacific Mutual Life Insurance Co. v. Haslip*, the

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113. *See supra* note 105 and accompanying text.

114. U.S. CONST. amend. V.

115. Shores, *supra* note 4, at 90 ("Courts have uniformly held that the plaintiff has no personal right to punitive damages.").

116. *See* Paul F. Kirgis, Note, *The Constitutionality of State Allocation of Punitive Damage Awards*, 50 WASH. & LEE L. REV. 843, 850–51 (1993).

117. Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121, 146 (Ohio 2002) ("[S]hould Dardinger accept this court's remittitur[,] . . . $10 million should go to Dardinger. From the remainder should be drawn an amount for the payment of litigation fees, including attorney fees. . . . The final net amount . . . should go to a place that will achieve a societal good . . . .").

118. *Id.*

Supreme Court held that punitive damage awards did not violate the Due Process Clause per se.[119] There is nothing about distributing punitive damage awards to third party beneficiaries or state entities that would renew this debate. This point is well articulated by Alabama's Justice Janie Shores:

> The plaintiff has no basis for complaint if the trial judge orders the defendant to pay part or all of a punitive damage award to either the state treasury or some other fund, because the plaintiff has no constitutional right to punitive damages. The defendant has no basis for complaint, because the right to trial by jury is not diminished by a post-trial directive from the court to pay a part of the jury verdict to one other than the plaintiff. The defendant is not entitled to a return of any amount of the verdict once a jury has determined the issue of liability and has fixed the amount appropriate to punish the defendant for his actions and to deter the defendant and others from similar conduct in the future. Due process rights are thus not implicated by a directive from the trial court to the defendant to deposit a portion of the amount with the clerk of the court for such disposition as the court may order, consistent with the administration of justice.[120]

E. The Alleged Undesirable Consequences

The most significant of the possible "unintended and undesirable consequences" that the *Dardinger* dissenters may have been referring to are (1) the potential loss of incentive for plaintiffs and their attorneys to prosecute their claim through the trial process, and (2) the possibility that juries, knowing that funds will be diverted to the public sector, will unfairly increase punitive damage awards.[121]

While punishment and deterrence are the most frequently cited justifications for punitive damages, courts and legislators would be remiss to ignore the importance of providing tort victims an incentive to pursue their claims. Without a reward for the courage and endurance plaintiffs exhibit in prosecuting social wrongs, the "emotional and financial stress" of suing may discourage many tort victims from bringing suit or from rejecting premature settlement offers.[122] Punitive damages are necessary to deter the types of egregious conduct that harm society and violate

119. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 17 (1991) ("[W]e cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional.").

120. Shores, *supra* note 4, at 91 (footnotes omitted).

121. *Dardinger*, 781 N.E.2d at 147 (Moyer, C.J., dissenting).

122. *See* Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 75 (1985–86).

social norms but cannot be remedied by the criminal justice system. The fear of paying compensatory damages alone will not deter defendants who stand to profit from contemptuous behavior.[123]

In *Dardinger*, the Ohio court properly safeguarded its decision by ensuring that plaintiffs and their attorneys retained incentive to bring suits that would benefit the public interest.

> Clearly, we do not want to dissuade plaintiffs from moving forward with important societal undertakings. The distribution of the jury's award must recognize the effort the plaintiff undertook in bringing about the award and the important role a plaintiff plays in bringing about necessary changes that society agrees need be made. Plaintiffs themselves might get involved in how the award is distributed.[124]

The court went on to reward Dardinger's efforts with one-third of the punitive damage award and ensure that Dardinger's attorney received his contractually agreed upon contingency fee in its entirety.[125]

In addition to the monetary recognition of plaintiffs' efforts, allocating a portion of the punitive damage award may help to recast the perception of plaintiffs as greedy wealth seekers to agents acting for the public good.[126] This public recognition of plaintiffs as model citizens, however, could have dire consequences for defendants. Some commentators argue that juries will award astronomical punitive damage awards once they are made aware that such funds benefit the public sector.[127] But this argument ignores the safeguards already instituted to protect against excessive punitive damage awards. Defendants who believe they have been victimized by such awards may petition the court for reduction. Courts are empowered to order remittitur any time "(1) unliquidated damages are assessed by a jury, (2) the verdict is not influenced by

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123. Unlike compensatory damages, punitive damages are unpredictable and unlimited. Thus, rational actors will not be able to view the possibility of punitive fines as a mere business expense. *See* Rustad & Koenig, *supra* note 25, at 1276 (arguing that awarding punitive damages is a necessary remedy against the abuse of power by economic elites); Welles, *supra* note 94, at 208. But readers should be aware that many states permit liability insurance. Liability insurance allows defendants to avoid the punishment and deterrent effects of punitive damage awards by shifting the consequences to a third party insurer. *See* Sales & Cole, *supra* note 3, at 1162–64. In the eyes of many, including the Author, liability insurance is inapposite to the goals of the American tort system and should be abolished.

124. *Dardinger*, 781 N.E.2d at 146.

125. *Id.*

126. *See* Welles, *supra* note 94, at 211.

127. *See id*. at 212 ("Most commentators agree that if jurors are notified of the distribution, they will increase the size of the award."). But not all commentators believe that increased punitive damage awards would be detrimental. *See* E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 850 (1993) (arguing that juries award insufficient punitive damages as a way of counteracting the plaintiff's windfall effect).

passion or prejudice, (3) the award is excessive, and (4) the plaintiff agrees to the reduction in damages."[128] Thus, courts, which are deemed to be above impassioned exuberance, have the ultimate power to determine the appropriateness of punitive damage awards, alleviating any concern that public sentiment will lead to increased punitive damage awards.

V. RECOMMENDATIONS AND CONCLUSIONS

Courts, and not legislators, should take the initiative in distributing punitive damage awards to the public sector. Legislators lack the agility necessary to equitably distribute punitive damage awards in the myriad situations that will arise before courts. Where punishment and deterrence are necessary, but the plaintiff is not worthy,[129] courts have the flexibility to more equitably distribute damage awards so as to disperse the benefits to the public. Courts should not be forced by legislative mandate to distribute a set portion of an award to an undeserving plaintiff, but should have the opportunity of rewarding particularly courageous ones. Indeed, Robert Dardinger was such a plaintiff. From its broader perspective, the judiciary is better equipped to combat social iniquities, appraise the potential benefits of redistributing punitive damage awards, and order the allocation of awards that will both benefit the public and ensure that the twin aims of punishment and deterrence are upheld.

The allocation of punitive damage awards to state entities may trigger the Eighth Amendment's Excessive Fines Clause.[130] While the application of the Excessive Fines Clause to allocations of punitive damage awards to state institutions does not automatically render them unconstitutional, it does entitle defendants to a review for excessiveness.[131] Litigating under the rubric of the Excessive Fines Clause, however, is unnecessary if courts allocate punitive damage awards to nonstate entities. The Supreme Court has made clear that the Excessive Fines Clause does not apply where "the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[132] Thus, courts should avoid the burden of defending constitutional challenges to

128. *Dardinger*, 781 N.E.2d at 145.
129. *See, e.g.*, Welles, *supra* note 94, at 203 (discussing a situation in which an unsympathetic plaintiff only received $50,000 in compensatory damages but profited from a $7 million punitive damage award).
130. *See* discussion *supra* Part IV.C.
131. *See* Welles, *supra* note 94, at 209.
132. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989).

allocations of punitive damage awards by distributing portions of such awards to private nonprofit organizations.[133]

In addition to avoiding application of the Excessive Fines Clause, the distribution of punitive damage awards to nonprofit organizations that are bound by fiduciary duties to act within the bounds of their mission statements ensures that the benefits of the awards are not wasted on bureaucratic lethargy or largess. Instead, monies received from punitive damage awards will be concentrated on eradicating the particular harms caused by the defendants or assisting those who have been victimized by similar conduct. Further, awards could be distributed specifically within the communities affected by the defendants' conduct so as to benefit those most adversely affected and avoid diluting the beneficial impact of the awards.

Finally, courts should allow plaintiffs to have input as to where the funds should be directed. Plaintiffs should be given the opportunity to choose, with court approval, the recipient charitable organization. Judges' authority should be limited to approving recommended beneficiaries instead of selecting beneficiaries. Limiting a judge's authority in this manner stamps out any concerns that judges will abuse their power to aid their own pet causes. Courts could accept amicus briefs to help identify potential problems with the organizations that plaintiffs select, but absent glaring problems, and in the exercise of judicial discretion, judges should give fair deference to the organization of the plaintiff's choice.

In the end, as victims of defendants' egregious conduct, plaintiffs are often well suited to assess the needs of similarly situated victims. The wisdom gained from their experience should not be wasted, but should be considered by the courts. By involving plaintiffs in this process, courts help to rehabilitate injury to plaintiffs' dignity caused by defendants' conduct and bestow upon plaintiffs a sense of civic honor. Plaintiffs can feel proud of their role as private attorneys general and shirk the unwelcome stigma that so often attaches to plaintiffs who seek damage awards.

133. *See* Welles, *supra* note 94, at 205□–06 (defining "nonprofit organization" and establishing guidelines for potential award beneficiaries).