

Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?

by Stephen J. Shapiro*

I. INTRODUCTION

There is a general agreement that the primary purpose of tort law is to compensate parties injured by the wrongful conduct of another.¹ Typically, a prevailing plaintiff is awarded compensatory damages.²

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1. See RESTATEMENT (SECOND) OF TORTS § 901 (1979). The Restatement (Second) of Torts states that “the purpose[] for which actions of tort are maintainable . . . are: (a) to give compensation, indemnity[,] or restitution for harms.” *Id.*; see also *United States ex rel. Jones v. Rundle*, 453 F.2d 147, 150 n.11 (3d Cir. 1971) (explaining that “[t]he underlying philosophy of tort law . . . is that the plaintiff should be compensated for the harm he has suffered”); *Seattle First Nat’l Bank v. Shoreline Concrete Co.*, 588 P.2d 1308, 1312 (Wash. 1978) (stating that “[t]he cornerstone of tort law is the assurance of full compensation to the injured party”); Walter H. Beckham, Jr. et al., *Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law*, 1984 A.B.A. SPECIAL COMMITTEE ON THE TORT LIABILITY SYSTEM 4-29 (naming compensation as “one of the main announced goals of tort law”); E. ALAN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 113 (1983) (explaining that “[t]he essential purpose of the law of torts is compensatory”); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 20 (5th ed. 1984) (stating that “[a] recognized need for compensation is . . . a powerful factor influencing tort law”).

2. See FARNSWORTH, *supra* note 1, at 113. Compensatory damages, also referred to as actual damages, see BLACK’S LAW DICTIONARY 445 (9th ed. 2009), are the most common form of damages in the tort-law system. Thomas C. Galligan, Jr., *Disaggregating More-*

The main purpose of tort law is to make the plaintiff whole, to the extent possible, in order to put the plaintiff in the same financial situation the plaintiff would have been in absent the defendant's actions.³ A prevailing plaintiff, however, will not normally be made whole by the award of a reasonable amount of compensatory damages.⁴ The primary reason for this insufficiency is that the plaintiff will have to pay her attorney out of the money received in the award.⁵

A secondary purpose of tort law is to deter wrongful, potentially harmful conduct.⁶ This purpose is especially pertinent to intentional conduct.⁷ A party will be less willing to engage in intentional tortious conduct if he knows he will have to pay for the harm; therefore, to the extent that a defendant can engage in tortious conduct and not be held fully accountable financially, the maximum deterrent effect of the law is not being realized.

Just as compensatory damages might not be adequate to compensate plaintiffs completely, they may also be insufficient to adequately deter intentional tortious conduct. Since not all injured parties can, or will,

Than-Whole Damages in Personal Injury Law: Deterrence and Punishment, 71 TENN. L. REV. 117, 119 (2003). These damages are awarded to restore the plaintiff to his or her position prior to commission of the tortious act and may include damages for pain and suffering, emotional distress, permanent injury, loss of enjoyment of life, medical expenses, lost wages, and impairment of earning capacity. *Id.*

3. Galligan, *supra* note 2, at 119. "The cornerstone of tort law is the assurance of full compensation to the injured party." *Seattle First Nat'l Bank*, 588 P.2d at 1312; *see also* *Francisco v. United States*, 267 F.3d 303, 316 (3d Cir. 2001) (quoting *United States v. Burke*, 504 U.S. 229, 235 (1992)) (internal quotation marks omitted) (stating that "one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff fairly for injuries caused by the violation of his legal rights"). Courts have long recognized that in some instances, a plaintiff cannot be made whole in the absence of an interest award. *See* *Gen. Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654-56 (1983); *Waite v. United States*, 282 U.S. 508, 508-09 (1931); *Miller v. Robertson*, 266 U.S. 243, 257-59 (1924).

4. *See* RESTATEMENT (SECOND) OF TORTS § 914 & cmt. a.

5. *See id.* Other reasons why compensatory damages do not make a plaintiff whole include the lack of pre-judgment interest to compensate for delay in payment and other collateral expenses of litigation. *See infra* text accompanying note 38.

6. DAN B. DOBBS, *THE LAW OF TORTS* 19 (2000) ("Courts and writers almost always recognize that another aim of tort law is to deter certain kinds of conduct by imposing liability when that conduct causes harm.") As to deterring negligent conduct, *see* *Travelers Indem. Co. v. PCR, Inc.*, 889 So. 2d 779, 795 (Fla. 2004) (stating that "an equally basic aim of imposing liability for compensatory damages resulting from negligent conduct is to deter such conduct"); *see also* *Villaman v. Schee*, Nos. 92-15490, 92-15562, 1994 WL 6661, at *4 (9th Cir. Jan. 10, 1994) (stating that "Arizona tort law is designed in part to deter negligent conduct within its borders").

7. For a discussion of how tort damages are more effective at deterring intentional conduct, as opposed to negligent conduct, *see infra* text accompanying notes 52-54.

successfully bring suit, the maximum amount of compensatory damages faced by a defendant will often be significantly less than the damage the defendant has caused and, in some cases, less than the benefits the defendant has reaped. In those cases when tortfeasors hope to gain more than they expect to pay in damages, the deterrent effect may fail.⁸ Several mechanisms exist in American law to help alleviate the problem: punitive damages, awards of attorney fees, and multiple-double or treble-damages.

Punitive damages were developed under the common law to punish and deter particularly egregious tortious conduct.⁹ For this reason, punitive damages have very little effect—either compensatory or deterrent—on intentional behavior that does not rise to this very high level of wrongfulness. Even in regard to the truly despicable conduct that punitive damages were designed to deter, a high level of proof, wide jury discretion, and other factors have led to sporadic success and have made these damages less than effective.¹⁰ In addition, the occasional imposition of excessively high awards has led the Supreme Court of the United States and some state legislatures to significantly cut back on the availability of such awards.¹¹

Awarding attorney fees to the prevailing party is another possibility for addressing the situation. Awarding fees to both prevailing plaintiffs and prevailing defendants under similar standards, however, would have the negative effect of discouraging plaintiffs from bringing meritorious claims for fear of financial ruin if they were to lose.¹² There are a large number of federal and some state statutes that award attorney fees routinely to prevailing plaintiffs but to defendants only if the plaintiff's case was frivolous.¹³ These statutes have proven to be a very effective way to facilitate the bringing of private lawsuits to help further public goals, such as combating discrimination and consumer fraud.¹⁴

When public goals are not implicated, however, such one-way attorney-fees statutes generally have not been used to help compensate plaintiffs.¹⁵ It might also be inappropriate to extend these statutes to a broad range of intentional torts. In addition, one-way attorney-fees

8. *See id.*

9. *See infra* text accompanying notes 64-65.

10. *See infra* text accompanying notes 101-03.

11. *See infra* text accompanying notes 78-92.

12. *See infra* text accompanying notes 125-27.

13. *See infra* text accompanying notes 133-46.

14. *See infra* text accompanying notes 147-49.

15. *See id.*

statutes generate considerable extra litigation over the fees themselves.¹⁶

Statutory multiple damages are already being used by the federal government as well as state governments to deter many kinds of wrongful, intentional conduct.¹⁷ Multiple damages are also intended to provide additional compensation to plaintiffs, which facilitates the ability of more deserving plaintiffs to file suit and helps to fully compensate those who do so and prevail.¹⁸ While most attorneys are aware of a handful of federal statutes that provide for treble damages, most notably in the antitrust area, there are also a very large number of state statutes that allow double or treble damages.¹⁹ Taken as a whole, these cover a broad range of tortious activity, but within any one state, they are so narrow and scattered in their application that they have little overall impact.²⁰

This Article advocates that states' statutes make greater and more systematic use of multiple damages by extending them to a much broader range of intentional, wrongful conduct. Part II of this Article will explain why extra-compensatory relief is called for when tortious conduct is intentional or malicious. Part III will compare punitive damages, attorney fees, and treble or other multiple damages as possible sources of additional relief. Part IV will focus on multiple damages. The Article will examine the range of existing state statutes and discuss why and how those statutes might be extended to a broader range of wrongful behavior.

II. UNDER-COMPENSATION AND UNDER-DETERRENCE IN INTENTIONAL TORT CASES

A. *Under-Compensation*

The primary goal of tort law is to compensate the plaintiff for any injuries or losses caused by the defendant's actionable conduct,²¹ and an important secondary goal is to deter and discourage such conduct by others who might cause harm.²² The normal result of a successful tort

16. See *infra* text accompanying notes 154-57.

17. See *infra* text accompanying notes 161-70.

18. See *infra* text accompanying note 169.

19. See *infra* text accompanying notes 189-230.

20. See *id.*

21. See sources cited *supra* note 1.

22. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1150 (1992). Saks proclaims that “[t]he substantive rules of tort law exist to serve certain social purposes. The most

lawsuit is an award of compensatory damages,²³ which are intended to make the plaintiff whole, to the extent possible, and put the plaintiff in as good a position as before the tort was committed.²⁴ For example, compensatory damages may include an amount meant to serve as reimbursement for out-of-pocket expenses, such as medical bills in a personal injury case.²⁵ These damages may also include an amount to compensate for economic losses, such as loss of income—and potential income—in a personal injury case,²⁶ loss of the value or use of property in a conversion or trespass case,²⁷ or loss of work opportunities in a libel case.²⁸ Finally, compensatory damages may include an amount meant to compensate for noneconomic harm, such as pain and suffering in a personal injury case,²⁹ damage to reputation in a libel case,³⁰ or emotional suffering in a case of negligent infliction of emotional distress.³¹

However compensatory damages are measured, the damages are supposed to compensate the plaintiff entirely for his injury and loss.³² For several reasons, however, even when the damages awarded are an amount adequate to equal the plaintiff's injuries, the plaintiff will not be fully compensated in the end. The primary reason plaintiffs are

prominent among these are compensating innocent victims for injury and deterring behavior that presents risks that exceed their social value." *Id.*

23. See Galligan, *supra* note 2, at 119.

24. See sources cited *supra* note 3.

25. DOBBS, *supra* note 6, at 1049 ("The injured plaintiff is entitled to recover reasonable medical and other expenses proximately resulting from tortious injury and those that will probably result in the future."); see also 22 AM. JUR. 2D *Damages* § 167 (2003).

26. DOBBS, *supra* note 6, at 1048 (footnotes omitted) ("If the plaintiff is wholly or partly unable to carry out gainful activity as a result of tortiously inflicted injury, she is entitled to recover for actual wages and fringe benefits lost or that will be lost in the future."); see also 22 AM. JUR. 2D, *supra* note 25, §§ 141-142.

27. 22 AM. JUR. 2D, *supra* note 25, § 252. ("[W]hen one is entitled to a judgment for the conversion of a chattel or the destruction or impairment of any legally protected interest in land or other thing, he or she may recover the value of the subject matter or of his or her interest in it.")

28. *Id.* at § 251 ("Damages for injury to one's reputation, commercial credit and financial or business standing are recoverable in such actions as libel[] [and] slander.")

29. DOBBS, *supra* note 6, at 1050 (footnotes omitted) ("The plaintiff is entitled to recover for all forms of suffering proximately caused by tortious injury, including future suffering. The pain for which recovery is allowed includes virtually any form of conscious suffering, both emotional and physical."); see also 22 AM. JUR. 2D, *supra* note 25, § 200.

30. 22 AM. JUR. 2D, *supra* note 25, § 251.

31. See 38 AM. JUR. 2D *Fright, Shock, and Mental Disturbance* §§ 12-15 (2010).

32. See *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 588 P.2d 1308, 1312 (Wash. 1978), *superseded by statute on other grounds*, Act of Apr. 4, 1986, ch. 305, 1986 Wash. Sess. Laws 1354, *as recognized in* *Kottler v. Washington*, 963 P.2d 834 (1998).

generally not fully compensated is that they must pay their attorney fees out of their recovery.³³ Under the “American Rule,” each party to a lawsuit pays its own legal fees,³⁴ unlike in most other countries where the losing party pays the winning party’s fees.³⁵ The majority of tort cases are brought on a contingent fee basis, in which attorney fees are usually determined by contract.³⁶ This amount is often approximately one-third of the recovery but can vary depending on how far the lawsuit has progressed before termination.³⁷

A second reason that successful plaintiffs are under-compensated is that in many jurisdictions plaintiffs are not entitled to prejudgment interest.³⁸ That is, they are not compensated for the additional loss

33. DOBBS, *supra* note 6, at 38 (“[T]he plaintiff who prevails in the litigation may not be fully compensated after she deducts the costs of attorney fees and other litigation expense.”). In describing “full” compensation for an antitrust victim, an ABA report determined that it would include the following: “the amount of the economic detriment suffered; the costs of recovering the award, including both legal fees expended and the value of employee time and other resources expended for the litigation.” ABA Antitrust Section, Monograph No. 13, *Treble-Damages Remedy* 44 (1986).

34. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975). In *Alyeska Pipeline*, the Court stated, “In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.” *Id.* The notion articulated in *Alyeska Pipeline* “is known as the ‘American rule’ (as opposed to the English rule, which routinely permits fee-shifting) and derives from court-made law.” HENRY COHEN, CONG. RESEARCH SERV. REPORT FOR CONGRESS, 94-970, *AWARDS OF ATTORNEYS’ FEES BY FEDERAL COURTS AND FEDERAL AGENCIES* 1 (2008). See *infra* text accompanying notes 120-21 for a more in-depth discussion of the American rule and its exceptions.

35. RICHARD H. FIELD, BENJAMIN KAPLIN & KEVIN M. CLERMONT, *CIVIL PROCEDURE* 187 (9th ed. 2007). According to Field, “[i]n most of the rest of the Western world, including England, the losing party also pays the attorney’s fees of the prevailing party. Indeed, the so-called American rule against fee-shifting might be better termed the ‘American exception.’” *Id.*

36. DOBBS, *supra* note 6, at 38 (“[P]laintiffs’ attorneys accept most tort cases on a contingent, percentage fee.”).

37. ABA Antitrust Section, *supra* note 33, at 46. Plaintiffs’ attorney fees are “often a contingent fee of one-third or more of the total amount recovered.” *Id.* “The percentage is fixed or limited in some states, but not in others. It may vary from a low of around 25% to a high of about 50%; most are probably between these figures.” DOBBS, *supra* note 6, at 38. One study of insurance settlement practices referred to a commonly used measure of pain and suffering of three times the special damages “as allocating one-third to the lawyer, one-third to the physician, and one-third to the claimant.” Jeffrey O’Connell, *A Proposal to Abolish Defendants’ Payment for Pain and Suffering in Return for Payment of Claimants’ Attorneys’ Fees*, 1981 U. ILL. L. REV. 333, 351 (1981) (internal quotation marks omitted).

38. See DOBBS, *supra* note 6, at 1061-62. “The common law rule denied prejudgment interest altogether except for claims that were liquidated or ascertainable. . . . Most tort damages were not considered liquidated or ascertainable. Thus prejudgment interest was denied on personal injury claims, even if they arose under a statute.” *Id.* at 1061. For

they have suffered by not having the use of the money from the time of the injury until the time of the judgment. While this may be a lesser amount than that lost to attorney fees, it can be significant in some cases when plaintiffs have to wait years after their injuries to settle a case or receive a judgment. Finally, successful plaintiffs are not compensated for the collateral costs of the litigation itself, such as time spent away from work to prepare for and attend depositions and trial.³⁹

This might suggest that if states were serious about fully compensating plaintiffs, there should be an additional award above and beyond the amount of the compensatory damages, either in the form of a damage multiplier or by requiring losing defendants to pay successful plaintiffs' attorney fees and pre-judgment interest. In the overwhelming majority of tort cases, however, this has never been the law.⁴⁰

The reason why the law generally does not provide for a damage multiplier in most tort cases probably rests on a sense of fairness. Although it seems fair to require a negligent defendant to pay for the plaintiff's injuries and losses, it does not seem fair to have them pay an amount higher than that. Defendants already have to pay their own attorney fees and litigation expenses.⁴¹ Furthermore, American litigation can often be slow and expensive.⁴² It would seem unfair to require defendants, even losing defendants, when their actions were unintentional, to shoulder the financial burden of the system themselves.⁴³

Another reason why tort defendants are not generally required to pay more than the amount of compensatory damages is fear of over-deterrence.⁴⁴ Although that topic will be discussed more fully in the next section,⁴⁵ the fear of over-deterrence stems from the fact that, although the law is meant to deter negligent conduct, it is not meant to discourage worthwhile kinds of conduct that might be performed

certain types of claims, "[s]ome states have now enacted statutes modifying the common law rule against prejudgment interest." *Id.* at 1062.

39. See RESTATEMENT (SECOND) OF TORTS § 914 & cmt. a.

40. *But see Gen. Motors Corp.*, 461 U.S. at 655, 657; *Miller*, 266 U.S. at 258. The three major exceptions are punitive damages, attorney fees awards, and treble damages, all of which will be discussed in this Article. See *infra* Part III.

41. See RESTATEMENT (SECOND) OF TORTS § 914 & cmt. a.

42. See DOBBS, *supra* note 6, at 32.

43. Posner uses the spring gun cases (in which innocent trespassers have been injured in a trap designed to keep out larcenous intruders) as an example of how tort law is often the search for "the proper accommodation of two legitimate activities." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 205 (Vicki Been et al. eds., 7th ed. 2007).

44. See *id.* at 206.

45. See *infra* Part II.B.

negligently.⁴⁶ Most negligent tortious conduct takes place while the defendant is engaged in worthwhile activities that are necessary to the economy, such as running a business, driving a car, or owning a home.⁴⁷ If damages are set too high, defendants could be discouraged from conducting some of these activities entirely.⁴⁸

Nevertheless, the unfairness of having the defendant pay more than the amount of the plaintiff's damages to make the plaintiff whole does not apply when the defendant's harmful actions are wrongful and intentional rather than merely negligent.⁴⁹ Compare, for example, an incident when a pedestrian is injured because a driver, in a moment of inattentiveness, goes through a stop sign with an incident in which the victim suffers exactly the same injury after being intentionally struck by an enraged driver. It may be a reasonable decision (although not the only one) for the law to leave the injured victim less than fully compensated rather than have the negligent driver pay more than the amount of harm the driver caused. However, in the case of the defendant who intentionally injures another, it seems more appropriate to "overcharge" the wrongdoer than to under-compensate the victim.⁵⁰

B. Under-Deterrence

The present system of having defendants pay only the amount of damages they cause also results in under-deterrence, especially in the

46. See, e.g., C. Gregory Ruffennach, *Free Markets, Individual Liberties and Safe Coal Mines: A Post-Sago Perspective*, 111 W. VA. L. REV. 75, 105 & n.179 (2008) (discussing coal mining operations and whether penalties have any effect on "ordinary negligence" involved in coal mining).

47. See, e.g., *Francis Co. v. United States*, 267 F.3d 303, 305 (3d Cir. 2001) (plaintiff sought damages for personal injuries sustained in a car wreck); *Kottler*, 963 P.2d at 439-40 (plaintiff-passenger injured in wreck when rental van was negligently driven off a roadway); *Seattle First Nat'l Bank*, 588 P.2d at 1311 (employee injured while working for construction company).

48. See POSNER, *supra* note 43, at 206.

49. See DOBBS, *supra* note 6, at 1047.

50. POSNER, *supra* note 43, at 206. Posner states,

We know that in a strict liability case punitive damages would lead to overdeterrence. Less obviously, the same thing is true in a simple negligence case. [If punitive damages are added in negligence cases] potential injurers will be induced to spend more than *B* on accident prevention, and that is inefficient. But [in] intentional tort case[s], the danger of deterring socially valuable conduct by making the damages award greater than *L* is minimized and other policies come to the fore, such as making sure that the damages award is an effective deterrent by resolving all doubts as to the plaintiff's actual damages in his favor; this can be done by adding a dollop of punitive damages to the estimate of his actual damages.

Id.

case if intentional torts.⁵¹ First, it should be recognized that the deterrent effect of damages will be stronger on most intentional actions than on negligent actions.⁵² While actors can be encouraged to be more careful through the imposition of damages, deterrence should be much stronger in cases when the tortfeasor is making a conscious decision whether to act. This deterrent effect is especially true in the case of intentional torts undertaken for financial gain. A defendant company contemplating fraud, an unfair business practice, or leaving a harmful product on the market in order to increase profits, may be encouraged to do so if the defendant believes that the economic gain will exceed any damages it might have to pay.⁵³ As the amount of damages increases, the incentive to perform the conduct decreases.⁵⁴

There are a number of reasons why the current system produces less than adequate deterrence of many intentional torts. There may be many tort victims who are not even aware that they have been injured or are unable to identify the party who has caused the injury.⁵⁵ Additionally,

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

52. See *Ruffennach*, *supra* note 46, at 105. There are many statements by both courts and commentators that one of the purposes of tort damages is to deter negligent conduct by defendants. See sources cited *supra* note 6. Others, however, have recognized that damages work better to deter intentional conduct. See, e.g., *Cotita v. Pharma-Plast, U.S.A., Inc.*, 974 F.2d 598, 600 (5th Cir. 1992) (“The courts determined that the imposition of comparative negligence would not deter acts that were the result of momentary neglect or inattention.”); Calum Anderson, *Insurance Coverage for Employment-Related Litigation: Connecticut Law*, 18 W. NEW ENG. L. REV. 199, 244 (1996) (“The basis for such decisions is that, while punitive damages may serve to deter persons from engaging in intentionally harmful behavior, these courts believe that it is purely speculative whether the prohibition of coverage for punitive damages would deter reckless or grossly negligent conduct.”); *Ruffennach*, *supra* note 46, at 105 (“While penalties might be presumed to deter intentional conduct, it is questionable whether penalties can effectively deter the ‘ordinary negligence’ that characterizes most MSHA violations.”).

53. See G. Robert Blakey, *Of Characterization and Other Matters: Thoughts About Multiple Damages*, 60 LAW & CONTEMP. PROBS. 97, 116 (1997). As Blakey states,

If society authorizes the recovery of only actual damages for deliberate antisocial conduct engaged in for profit, it lets perpetrators know that if they are caught, they must return the misappropriated sums. If they are not caught, they may keep the money. Even if they are caught and sued, they may be able to defeat some part of the damage claim or at least compromise it. In short, single damage recovery provides insufficient economic disincentive to those who would intentionally engage in such conduct.

Id.

54. See *POSNER*, *supra* note 43, at 206 (“I must not be allowed to be indifferent between stealing and buying my neighbor’s car. The damages award must therefore be made greater than the value of the car, so that I don’t consider conversion an acceptable substitute for purchase.”).

55. See *Saks*, *supra* note 22, at 1183.

various studies have shown that only a small percentage of tort victims even consult a lawyer to attempt to file suit.⁵⁶ Of the victims who do consult a lawyer, many do not have their cases accepted, even if they are meritorious.⁵⁷ Furthermore, plaintiffs may lose their cause of action due to the statute of limitations or may not be able to produce sufficient proof of a valid claim.⁵⁸

Traditional punishment theory embraces the concept that multiple damage awards are necessary to provide sufficient punishment to deter illegal behavior.⁵⁹ According to Keith N. Hylton and Thomas J. Miceli,

The notion that damages should be multiplied to make up for uncertainty in punishment has been around at least since Bentham (1781). The traditional account of the optimal multiplier is straightforward: if p is the probability of liability, the $1/p$ is the multiplier that should be applied to the damage judgment. If damages are multiplied by $1/p$, then the injurer's expected damage judgment will internalize the social loss due to his conduct.⁶⁰

If one believes there is systematic under-compensation of plaintiffs and under-deterrence of defendants (and not everyone does),⁶¹ this belief

56. *See id.* (citing several studies showing that only 6% to 10% of negligently injured plaintiffs filed medical malpractice actions); *see also* Debra Pogrud Stark & Jessica M. Choplin, *Does Fraud Pay? An Empirical Analysis of Attorney's Fees Provisions in Consumer Fraud Statutes*, 56 CLEV. ST. L. REV. 483, 490 (2008) (providing that only 2.4% of consumers who filed complaints for consumer fraud with the FTC consulted with a lawyer). Many claims cannot be brought because the amount of the claim would not justify the legal expenses in bringing them. *See id.* at 490 n.15 ("The median losses to victims who reported experiencing one or more of the types of fraud investigated by the FTC lost \$220.")

57. Saks, *supra* note 22, at 1191 ("Attorneys may turn cases away for a variety of reasons. The plaintiff may be thought to be too unsympathetic or unappealing to juries, the evidence may contain ambiguities, or the attorney may lack the needed experts or expertise.")

58. *See id.* at 1186, 1191.

59. *See, e.g.*, Keith N. Hylton & Thomas J. Miceli, *Should Tort Damages be Multiplied?*, 21 J.L. ECON. & ORG. 388, 388 (2005); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Methuen & Co., Ltd. 1982) (1789).

60. Hylton & Miceli, *supra* note 59, at 388. For modern applications of this formula in the civil context, see Mithcell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998).

61. *See, e.g.*, Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate Over Tort Reform*, 26 CAP. U. L. REV. 701, 701 (1997). There is not complete agreement in the legal community that plaintiffs are generally under-compensated. *See id.* at 701, 702 n.6. Much discourse on tort reform has focused on a number of cases involving victims that seem grossly over-compensated. *See id.* at 701. Greenlee states, Stories about frivolous lawsuits have become a staple of our media culture. A \$3.4 billion verdict against CSX for a railroad accident in which no one was seriously

leads to the conclusion that at least with some, if not most or all, intentional torts, defendants should have to pay plaintiffs something more than the actual amount of compensatory damages. There are three ways that the law currently provides for such additional payment, at least in some cases: punitive damages, multiple (usually treble but sometimes double) damages, and payment of the opponent's attorney fees.⁶²

The next section of this Article will examine in what situations these alternatives are available, to what extent their use has ameliorated the problems identified above, whether their use could be increased or modified to provide additional benefits, and how their use could be modified.

III. EXTRA-COMPENSATORY ALTERNATIVES

A. Punitive Damages

For tort plaintiffs, the oldest form of recovery for “extra-compensatory” damages is punitive damages.⁶³ The ability of juries to award punitive damages, in addition to compensatory damages, dates back to British common law and is a part of the jurisprudence of almost every state.⁶⁴ The purpose of punitive damages is twofold: (1) to punish the defendant

hurt, a \$4 million verdict against BMW for a bad paint job, and a \$2.9 million verdict against McDonald's over spilled coffee are just a few of the more prominent examples of the cases cited by the media as evidence of a legal system run amok. These stories have altered public perception of the legal system and influenced legislative initiatives to change our tort laws.

Id. (footnotes omitted).

In fact, most recent tort reform efforts have focused on preventing “over-compensation” of some victims rather than “under-compensation” of many. *See infra* text accompanying notes 76-92, 114-17. These efforts include damage caps on pain and suffering, especially in medical malpractice cases, and statutory and constitutional restrictions on punitive damage awards. *Id.* Most likely, both problems—under-compensation and over-compensation—exist in the system. Accordingly, “[s]ome victims are greatly over-compensated, while others are hardly compensated at all.” Hon. William A. Dreier, *Reform of the Personal Injury Damages Delivery System*, 48 RUTGERS L. REV. 799, 799 (1996). Nothing in this Article is inconsistent with examining, and correcting if necessary, the over-compensation of some victims. Instead, the Article focuses on a separate problem, the under-compensation of many other victims.

62. *See* Galligan, *supra* note 2, at 121, 125.

63. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15-16 (1991).

64. *See* Haslip, 499 U.S. at 15. In *Haslip* the Supreme Court of the United States noted that “[p]unitive damages have long been a part of traditional state tort law.” *Id.* (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)) (internal quotation marks omitted).

for serious misconduct resulting in harm and (2) to deter the defendant and others from engaging in such conduct.⁶⁵ Punitive damages are not awarded for all intentional misconduct; only when the tortfeasor has engaged in truly reprehensible conduct “that constitutes an extreme departure from lawful conduct” are punitive damages awarded.⁶⁶ Usually, an antisocial mental state is required of the defendant who engaged in that conduct, such as malice, intent to injure, or other evil motive.⁶⁷

The only recognized purposes of punitive damages have been to deter and punish, not to provide additional compensation to the plaintiff.⁶⁸ The Supreme Court has intimated that punitive damages may not constitutionally be used for compensatory purposes.⁶⁹ It is true that plaintiffs in cases involving punitive damages may receive extra compensation, but this has been considered a “windfall” and a side effect of the punitive award, not its purpose.⁷⁰ The awarding of damages to one private party to punish and deter another has always been controversial,⁷¹ especially in cases in which the windfall may be many

65. DOBBS, *supra* note 6, at 1063 (“Courts usually emphasize that punitive damages are awarded to punish or deter”); *see also* BMW v. Gore, 517 U.S. 559, 568 (1996) (“Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”).

66. DOBBS, *supra* note 6, at 1064 (internal quotation marks omitted); *see also* David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 730 (1989).

67. Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 649-50 (Md. 1992).

68. *Haslip*, 499 U.S. at 19-20. In approving the jury instructions given for the award of punitive damages in *Haslip*, the Supreme Court took note of the fact that the jury had been instructed that “the purpose of punitive damages [was] ‘not to compensate the plaintiff for any injury’ but ‘to punish the defendant’ and ‘for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future.’” *Id.* (second alteration in original).

69. *See id.*; *see also* Steven Plitt & Christie L. Kriegsfeld, *The Punitive Damages Lottery Chase is Over: Is There a Regulatory Alternative to the Tort of Common Law Bad Faith and Does it Provide an Alternative Deterrent?*, 37 ARIZ. ST. L.J. 1221, 1234 (2005) (“Therefore, because compensatory damages . . . make the plaintiff whole, punitive damages should only be awarded if the defendant’s conduct ‘is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.’”). *But see* DOBBS, *supra* note 6, at 1063 n.4 (citation omitted) (“Courts have also sometimes considered punitive damages as a source of funds to aid in financing costly litigation . . . and as a sum added when it is difficult to be sure that the compensatory award was sufficient and the defendant’s conduct has no redeeming value.”).

70. *See Haslip*, 499 U.S. at 19-20; *see also* DOBBS, *supra* note 6, at 1063.

71. *See Haslip*, 499 U.S. at 8 n.4 (explaining the arguments, dating back to 1872, for and against the propriety of allowing juries to award punitive damages). *Compare, e.g.*, *Luther v. Shaw*, 147 N.W. 18, 19-20 (1914), *with* *Fay & Ux v. Parker*, 53 N.H. 342, 382 (1872) (“The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.”). In *Luther* Justice Timlin

times larger than the compensatory damages award.⁷² This has led some states to enact statutes requiring that some or all of the punitive damages awards be paid to the state as a fine, rather than to the plaintiff.⁷³ The perception that many punitive damages awards were grossly excessive led the Supreme Court to impose constitutional restrictions on the size of punitive damages awards.⁷⁴

Until recently, punitive damages awards had been solely a matter of state law, not subject to any federal constitutional scrutiny.⁷⁵ However, in the late 1980s, some Justices on the Supreme Court expressed their perception that both the number and size of punitive damages awards were “skyrocketing” and required better judicial oversight.⁷⁶ Then, in a line of cases in the 1990s, the Supreme Court imposed constitutional restrictions on the awarding of punitive damages.⁷⁷

In *Pacific Mutual Life Insurance Co. v. Haslip*,⁷⁸ the Supreme Court, although reaffirming that punitive damages did not violate either the Eighth Amendment Excessive Fines Clause⁷⁹ or the Fourteenth

explained,

Speaking for myself only in this paragraph, . . . giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to, and confidence in, the courts of law by those wronged or oppressed by acts or practices not cognizable in, or not sufficiently punished, by the criminal law.

147 N.W. at 19-20.

72. See, e.g., *BMW*, 517 U.S. at 565. In *BMW* the jury awarded \$4 million in punitive damages, 1000 times the compensatory damages of \$4000. *Id.* In her dissenting opinion in *Haslip*, Justice O’Conner cited Alabama verdicts awarding punitive damages of \$10 million, \$25 million, and \$50 million, referring to the fact that in one nine month period in 1990, “there were no fewer than six punitive damages awards of more than \$20 million.” 499 U.S. at 47, 61 (O’Connor, J., dissenting).

73. E.g., IOWA CODE § 668A.1 (2009), available at <http://www.legis.state.ia.us/IowaLaw.html> (75% or more of a punitive damage award to a state agency except when the tort is “directed at” the plaintiff); OR. REV. STAT. § 31.735 (2009), available at <http://www.leg.state.or.us/ors/031.html> (60% of a punitive damage award to a state agency).

74. See *infra* text accompanying notes 78-92.

75. See, e.g., *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259-60 (1989).

76. *Id.* at 282-83 (1989) (O’Conner, J., concurring in part and dissenting in part).

77. See *infra* text accompanying notes 78-92.

78. 499 U.S. 1 (1991).

79. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). As to the excessive fines clause, the Supreme Court in *Haslip* reaffirmed the earlier holding in *Browning-Ferris* that “the Eighth Amendment did not apply to a punitive damages award in a civil case between private parties.” 499 U.S. at 9 (citing *Browning-Ferris*, 492 U.S. at 259-60).

Amendment Due Process Clause,⁸⁰ decided that due process did impose some procedural restrictions on such awards.⁸¹ First, the jury must be instructed that the only purpose of punitive damages is to punish and deter,⁸² and second, states must provide post-trial review of the awarding and amount of punitive damages to make sure they are commensurate with the reprehensibility of the defendant's conduct.⁸³ The Supreme Court determined that the Alabama jury instructions provided sufficient guidance on punitive damages and that the Alabama procedures for judicial review of the reasonableness of punitive damages awards was sufficient to comply with due process.⁸⁴ Therefore, the Court upheld the punitive damages award, which was four times the amount of the compensatory damages.⁸⁵ However, the Court did indicate that an award of four times the compensatory damages may have come close to violating due process.⁸⁶

In *BMW v. Gore*,⁸⁷ the Supreme Court made clear that excessive punitive damages awards violated due process, even if proper procedures had been followed.⁸⁸ The plaintiff sued an auto maker for repairing and selling cars that had been damaged by acid rain without informing customers of the damage and repair. The plaintiff was originally awarded \$4 million in punitive damages, but the award was subsequently lowered by the Alabama Supreme Court to \$2 million, which was approximately 500 times larger than his compensatory damages.⁸⁹

80. U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."). The Supreme Court noted that "the common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted." *Haslip*, 499 U.S. at 17. The Supreme Court also determined that "every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process." *Id.* The Supreme Court held that the common-law method of assessing punitive damages was not "so inherently unfair as to deny due process and be *per se* unconstitutional." *Id.*

81. *Id.* at 12, 19-21.

82. *Id.* at 19-20.

83. *Id.* at 20-21 ("This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.")

84. *Id.* at 22-24 ("Pacific Mutual thus had the benefit of the full panoply of Alabama's procedural protections.")

85. *Id.* at 23-24. The general verdict for the plaintiff of \$1,040,000 "contained a punitive damages component of not less than \$840,000." *Id.* at 6 & n.2.

86. *Id.* at 23-24. ("We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, . . . [and even though it] may be close to the line, . . . it does not cross the line into the area of constitutional impropriety.")

87. 517 U.S. 559 (1996).

88. *Id.* at 585-86.

89. *Id.* at 563 & n.1, 565, 567.

The Supreme Court held that the award was “grossly excessive” and that the punitive damages were therefore unconstitutional.⁹⁰ The Supreme Court stated that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”⁹¹ The Supreme Court announced three guideposts that state courts must follow to determine whether punitive damages awards are unconstitutionally excessive: (1) “the degree of reprehensibility” of the defendant’s conduct; (2) “the disparity between the harm or potential harm suffered by [the claimant] and [the amount of the] punitive . . . award; and (3) the difference between [the punitive award] and [any] civil [or criminal] penalties authorized or imposed in comparable cases.”⁹² The overall effect of the line of Supreme Court punitive damages cases has been to constitutionally limit the awarding of punitive damages to cases involving truly reprehensible conduct.⁹³ These cases have also limited the size of punitive damages awards to virtually never more than ten times the amount of compensatory damages, although the punitive awards are usually no more than four times the compensatory amount.⁹⁴

The Supreme Court may have been right that some state punitive damages awards have been excessive and may also have been correct in putting limits on the size of such awards. However, for the purposes of the problems addressed in this Article (under-compensation and under-deterrence in the majority of intentional tort cases), the issue of excessive awards is not particularly relevant. Although some awards may have been excessive, there have been many more victims of intentional torts who have received no—or at least very modest—punitive damages awards.⁹⁵

Much of the evidence cited by those who argue that punitive damages awards have gotten out of control is anecdotal.⁹⁶ Although some

90. *Id.* at 585-86.

91. *Id.* at 574.

92. *Id.* at 574-75.

93. *See, e.g., id.* at 575, 580.

94. *See, e.g., id.* at 581-82.

95. *See, e.g.,* Van Eaton v. Thon, 764 S.W.2d 674, 676-77 (Mo. Ct. App. 1988) (awarding plaintiff only \$500 in punitive damages awards).

96. Saks, *supra* note 22, at 1159-62. As Saks noted, “The use of anecdotal evidence has been unusually popular in discussions about the nature of the litigation system. Anecdotes about undeserving plaintiffs are intriguing or outrageous and have been repeated often in the media. Consequently, people readily believe that the category of undeserving plaintiffs dominates the system.” *Id.* at 1159, 1161 (footnotes omitted).

awards have certainly been grossly excessive, virtually every systematic study of the issue found that punitive damages awards were made in a very small percentage of cases.⁹⁷ In cases when punitive damages were awarded, the overwhelming majority of the awards were modest in amount, usually not more than one or two times the compensatory damages.⁹⁸ Michael J. Saks points out that

according to Justice O'Connor: "Awards of punitive damages are skyrocketing." Brief after amicus brief submitted to the Supreme Court in a recent punitive damages case asserted that punitive damages are more frequent, more extreme, and more outlandish. . . . But every empirical study of the question has reached conclusions that, to say the least, fail to support these beliefs [that the number and size of punitive damages awards have increased greatly]. In Rand's research on accidental personal injury trials in Cook County, Illinois, and San Francisco, the proportion of cases in which punitive damages were awarded was small and had risen little in the twenty-five years from 1960 to 1984.⁹⁹

The fact is that punitive damages have never been an effective remedy for the vast majority of intentional tort victims, and in fairness, they were never intended to be. These damages apply only when the defendant's conduct is truly reprehensible and deserving of punishment, not when it was merely intentional and blameworthy.¹⁰⁰ In most cases, the plaintiff who has been injured by intentional and wrongful actions that do not rise to the high level of wrongfulness required for punitive damages will receive no help from this remedy. Even when the injured plaintiff alleges conduct by the defendant that would be deserving of punitive damages, the plaintiff must often prove this allegation by the heightened standard of clear and convincing evidence.¹⁰¹ In addition, the jury is instructed that even if they find the

97. See, e.g., *id.* at 1254-55, 1257-59 (discussing studies by Stephen Daniels and Joanne Martin as well as William M. Landes and Richard A. Posner, to name a few); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 161-62 (discussing studies by the RAND Corporation, the Bureau of Justice Statistics, and the national Center for State Courts, among others).

98. Saks, *supra* note 22, at 1260-61.

99. *Id.* at 1254 (footnotes omitted); see also Robbennolt, *supra* note 97, at 159 ("Archival research examining overall patterns of awards find that punitive damages are infrequently awarded, moderate in size, awarded in response to outrageous conduct, and often reduced post-trial.")

100. Robbennolt, *supra* note 97, at 111.

101. See, e.g., *Omni Ins. Co. v. Foreman*, 802 So. 2d 195, 196 (Ala. 2001); *Brandner v. Hudson*, 171 P.3d 83, 85 (Alaska 2007); *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d

defendant's conduct reprehensible, deserving of punishment, and needing deterrence, the award is still discretionary—the jury can still decline to impose punitive damages.¹⁰² Further, all evidence seems to show that these restrictions on awarding punitive damages have an impact in a tiny percentage of all torts, including a comparably small percentage of intentional torts, leading to any punitive award at all.¹⁰³

It may be that in the past, punitive damages—or the threat of them—had the most widespread effect in settlement negotiations.¹⁰⁴ Defendants who feared their conduct could be viewed as reprehensible by the jury had a strong incentive to settle the case. If the case went to trial, a defendant was taking the risk of having the jury make a very large punitive damages award. Thus, the threat of a possible punitive award many times the amount of the plaintiff's damages might have served as a strong incentive to settle such cases at a level close to the actual damages. Although the risk remains, it is a much less dangerous choice to go to trial and will be less of a settlement incentive now that virtually all punitive awards will be less than four times the amount of the actual damages.¹⁰⁵

675, 681 (Ariz. 1986).

102. See *Smith's Food & Drug Ctrs., Inc. v. Bellegarde*, 958 P.2d 1208 (Nev. 1998) (asserting that even if the jury finds malice, they are not required to assess punitive damages), *overruled on other grounds* by *Countrywide Home Loans, Inc. v. Thitchener*, 192 P.3d 243 (Nev. 2008); DOBBS, *supra* note 6, at 1062 (footnote omitted) (“In the great majority of states, the common law rule permits but does not require juries to assess punitive damages in special cases.”).

103. See Robbennolt, *supra* note 97, at 159.

104. See Saks, *supra* note 22, at 1286-87. Saks argues,

Where a deterrence system directly touches only a fraction of the cases it is intended to have impact upon, it needs to find a way to make up for the reduced probability that any potential injurer will feel its effects. One obvious solution would be to multiply penalties so that the cost of doing harm discounted by the probability of being held to account for that harm still amounts to a deterrent—if you are not going to hit often, hit hard. But the data strongly suggest that our tort system hits infrequently and lightly. Yet, it has nevertheless somehow succeeded in frightening a great many potential defendants, who seem to go to considerable lengths to avoid becoming actual defendants. Somehow people have come to overestimate vastly the tort system's vigilance and the magnitude of its sanctions.

Id. (footnotes omitted).

105. At first blush, it may seem unfair for a defendant to settle a case, perhaps at a figure closer to compensatory damages, out of fear of an excessive punitive damages award. But if a defendant's conduct is reprehensible enough for the defendant to be worried about a huge punitive damage award, it is likely that at the very least, the defendant would or should be responsible for paying the plaintiff's compensatory damages.

Since one of the main purposes of punitive damages is to deter unlawful conduct, one would expect that these damages would be more effective at deterrence than at compensating plaintiffs. Yet even in this regard, there are several reasons why punitive damages might not be as effective as one would hope. First, since they are directed only at truly reprehensible conduct, punitive damages do nothing to deter unlawful behavior that does not rise to this level. For example, the threat of punitive damages might deter an auto maker from saving money by knowingly installing cheaper, inferior brakes, knowing that a small number of the brakes might fail, causing injury or death to drivers. Even if the auto maker determined that the cost savings would exceed the amount of actual injury that would be caused, the auto maker could be deterred by the possibility of much higher punitive damages. However, if the auto maker determined it could save money by installing a cheaper, inferior part (although the part would not cause injury or death), which might lead to expensive repair bills, it might conceal the use of the part from consumers if it believed paying for damages would cost less than installing a better part. That might be the case if the auto makers determined that this conduct was not sufficiently reprehensible to warrant punitive damages.

Law and economy theory might say that there is nothing wrong with this result. An “efficient” tort system should not force the auto maker to make corrective changes that would cost more than the costs of not fixing the problem.¹⁰⁶ This theory may be true if the only consideration is overall cost to the system, without consideration of fairness and morality. This is somewhat obvious when it comes to the example involving the brakes. As a society, we might—and probably should—decide to force manufacturers to make changes that will avoid serious injuries and death, even if the cost of these changes is greater than the cost of compensating the victims of the dangerous product.¹⁰⁷

106. See POSNER, *supra* note 43, at 168 (“This example shows that expected accident costs . . . must be compared at the margin, by measuring the costs and benefits of small increments in safety and stopping investing in more safety at the point where another dollar spent would yield a dollar or less in added safety.”).

107. See *id.* at 27 (admitting that “there is more to justice than economics”). Posner further states, “Since economics does not answer the question whether the existing distribution of income and wealth is good or bad, just or unjust . . . , neither does it answer the ultimate question whether an efficient allocation of resources would be socially or ethically desirable.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 14 (4th ed. 1992) (footnote omitted). Another scholar contends, “[E]conomic analysis says little about ethics beyond pricing. In short, economic analysis often knows the price of everything and the value of nothing.” Blakey, *supra* note 53, at 98 (footnote omitted).

The unfairness is not quite as obvious in the example when the harm is only economic, and the cost of repairing the failed part is lower than the cost of making one that doesn't fail. While the total cost of the repairs versus the cost of the pre-sale fix might be lower, it comes down to a question of who is saddled with the cost. Although this method is cost-efficient, the question is whether it is fair to pass the cost of fixing the problem from the manufacturer to the consumers, especially if the defect has been hidden from them. Although the company might have to reimburse the consumers in some cases, either through warranty work, suits, or threats of suits, there will also be many consumers who might be stuck with the cost of the fix if they do not realize the company should be responsible.

This is not to advocate a tort system that requires a zero failure rate manufacturing product. But when a company makes efforts to conceal actual defects, hoping to pass the cost on to consumers, the company's conduct rises to the level of fraud or deceit, and extra-compensatory damages are justified as deterrence. This kind of behavior, however, will not normally result in punitive damages.

It is possible that sufficient deterrence may result from the fact that there is at least some risk that a jury will consider such willful concealment of defects worthy of punitive damages. In fact, one could argue that this was the result in *BMW* when the jury imposed significant punitive damages for the company's failure to disclose the damage and repair of the vehicles.¹⁰⁸ Forgetting for a moment that because of the result in *BMW*, such a large punitive award would no longer be available, even under pre-*BMW* law, the threat of punitive damages might not have been sufficient to deter such conduct (namely, wrongful, and perhaps fraudulent, conduct).

The somewhat remote threat of a very large punitive damages award suffers from a similar problem as the death penalty in regards to its deterrent effect.¹⁰⁹ Most psychological research shows that smaller but more certain punishment has a higher deterrent value than harsher but

108. 517 U.S. at 565.

109. See POSNER, *supra* note 43, at 225 ("Common sense suggests that if it were routinely imposed, capital punishment would indeed deter because of people's dread of death. . . . But partly because of procedural restrictions imposed by the Supreme Court, capital punishment is so rarely imposed that the prospect of it is unlikely to deter."). No rational criminal should be deterred by the death penalty because the punishment is too distant and unlikely to merit much attention. STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* 112 (2006).

infrequently imposed punishment.¹¹⁰ In addition, since *BMW*, whatever in *terrorem* effect the possibility of huge punitive damages awards had on defendants' behavior has been mostly removed.¹¹¹

It is also very unlikely that any state would be willing to expand the law of punitive damages to cover a broader range of intentional torts that do not rise to the level of reprehensible behavior. Even after excessive awards have been reigned in by the *BMW* line of cases, punitive damages remain unpopular politically.¹¹² The trend has been to restrict punitive awards in both amount and scope rather than to increase them.¹¹³ Some states have enacted caps on punitive damages¹¹⁴ or required that part or all of the damages be paid to the state.¹¹⁵ Other states have made it harder to obtain an award in the

110. See, e.g., John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL'Y 189, 200-01 (2005). Darley points out,

As Jeremy Bentham noted, the deterrent weight of punishment is a complex function of the severity of the punishment, the probability of receiving the punishment, and, finally, the anticipated delay between the act and the receipt of the punishment. Psychological research in the last decades has demonstrated that the anticipation of rewards and punishments in the future has startlingly little effect on human behavior when compared to rewards and punishments in the present. To a drug addict, the threat of a future prison sentence is less of a concern when compared to the desire for the "rock" of cocaine that the robbery will pay for. Other governmental regimes, realizing this, have traded off due process concerns for regimes of summary punishment—immediate executions of those caught in the process of (what might or might not be) a crime. It is to the credit of our legislatures that they generally have not chosen this option. But the cost of that choice is this: the threat of punishment is greatly attenuated by being mentally represented as taking place far in the future.

Id.

111. See Plitt & Kriegsfeld, *supra* note 69, at 1223 ("The recent pronouncements of the United States Supreme Court in the area of punitive damages has called into question the continued vitality of punitive damages as a mechanism of deterrence to insurance company misconduct.")

112. See, e.g., Hans von Spakovsky, *Punitive Damages and the Tax Code: Punishing Business and the Economy*, THE HERITAGE FOUNDATION (Nov. 15, 2010), <http://www.heritage.org/research/reports/2010/11/punitive-damages-and-the-tax-code-punishing-business-and-the-economy>.

113. See *infra* text accompanying notes 114-17.

114. See, e.g., COLO. REV. STATS. ANN. § 13-21-102 (2010), available at <http://www.michie.com/Colorado/lpext.dll?f=templates&fn=main-h.htm&cp=> (not more than amount of compensatory damages depending on the situation); N.J. STAT. ANN. 2A:15-5.14 (West 2000 & Supp. 2010) ("five times the liability . . . for compensatory damages or \$350,000, whichever is greater").

115. See sources cited *supra* note 73.

first place by either raising the substantive standard¹¹⁶ or by raising procedural hurdles.¹¹⁷

Another problem with the use of punitive damages for deterrent effect is that since these awards apply only to truly reprehensible conduct, in many cases such conduct would already subject the defendant to criminal penalties or at least civil fines.¹¹⁸ Therefore, punitive damages are often applicable in cases when the law already provides significant deterrent effect, and any additional deterrent they provide is likely to be marginal.

In summation, punitive damages do provide some deterrent effect on truly reprehensible conduct. They also provide additional compensation for at least some victims of the worst kind of behavior as well as some settlement leverage for those victims. However, they do very little to deter wrongful conduct that does not rise to this level of heinousness, and they do not provide much in the way of compensation for victims in such cases.

B. Attorney Fees

In American jurisprudence, all parties normally pay their own attorney fees.¹¹⁹ As stated by the Supreme Court in the 1975 case *Alyeska Pipeline Service Co. v. Wilderness Society*,¹²⁰ “In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.”¹²¹ This procedure is called the “American Rule” and differs from the “English Rule,” which normally provides for fee-shifting.¹²² Since one of the main reasons plaintiffs are not fully compensated in successful tort suits is that they must pay a significant portion of their recovery in attorney fees, one way to

116. See, e.g., *Owens-Illinois*, 601 A.2d at 652. In *Owens-Illinois*, the Maryland Court of Appeals reversed a line of cases that had allowed punitive damages in cases of implied malice and held that plaintiffs in all cases must prove “actual malice.” *Id.* at 652. The court of appeals explained that in products liability cases, the defendant must have knowledge of the defect and show conscious or deliberate disregard of the foreseeable harm resulting from the defect. *Id.* at 653. Merely having constructive knowledge—“should have known”—of the conduct is not sufficient. *Id.* (internal quotation marks omitted).

117. See, e.g., *Darcars Motors of Silver Spring, Inc. v. Borzym*, 841 A.2d 828, 838 (Md. 2004) (internal quotation marks omitted) (requiring that proof of the elements of punitive damages must be “by ‘clear’ and convincing evidence”); see also *supra* text accompanying note 101.

118. See *infra* note 236 (examples of state statutes providing multiple damages for actions which would constitute criminal violations).

119. RESTATEMENT (SECOND) OF TORTS § 914 & cmt. a.

120. 421 U.S. 240 (1975).

121. *Id.* at 247.

122. See COHEN, *supra* note 34, at 1.

remedy that under-compensation would be to reject, in whole or in part, the American Rule and allow for fee-shifting. Fee-shifting can be either two-way (in which both prevailing plaintiffs and defendants are normally entitled to fees—the British Rule)¹²³ or one-way (in which prevailing plaintiffs are normally entitled to fees, but prevailing defendants may only recover if the lawsuit was frivolous or brought in bad faith).¹²⁴

A true two-way fee-shifting statute would be “incompatible with the policy of affording good faith plaintiffs unencumbered access to the civil remedy system.”¹²⁵ Plaintiffs with good faith, meritorious claims would be discouraged from bringing those claims for fear of financial ruin if they lost. At least one empirical study has shown that both consumers and attorneys were less willing to bring even “a strong meritorious case” under a consumer protection statute that permitted the court, in its discretion, to award attorney fees to prevailing defendants.¹²⁶ Most efforts to adopt a two-way “loser pays” rule have come from conservative politicians who claim that the rule is necessary to discourage frivolous or fraudulent suits.¹²⁷

The other, more common type of fee-shifting statute is a one-way fee-shifting statute that regularly awards fees to a prevailing plaintiff but to a prevailing defendant only if the suit was frivolous or brought in bad faith.¹²⁸ This system promotes the goal of providing access to the courts for plaintiffs with meritorious cases while discouraging frivolous

123. Gregory A. Hicks, *Statutory Damage Caps Are an Incomplete Reform: A Proposal for Attorney Fee Shifting in Tort Actions*, 49 LA. L. REV. 763, 795 (1989).

124. See Stark & Choplin, *supra* note 56, at 516.

125. Hicks, *supra* note 123, at 790.

For example, an essential characteristic of the American tort litigation system, one that is relevant to the choice of an appropriate fee shifting system for personal injury litigation, is its strong preference in favor of unencumbered access to remedies by good faith plaintiffs. The American tort system is designed to compensate injuries and to reduce the risk of injuries caused by legally responsible actors. To accomplish these goals, the system must encourage plaintiffs' actions that may prove to be unsuccessful. . . . Although a satisfactory fee shifting system must include some mechanism for promoting just settlements, deterring frivolous claims, and eliminating abusive trial tactics by plaintiffs and defendants alike, the system should accomplish these goals in a way that allows the plaintiff to undertake good faith litigation of uncertain outcome.

Id. (footnote omitted).

126. Stark & Choplin, *supra* note 56, at 516.

127. See, e.g., COHEN, *supra* note 34, at 1. A “loser pays” rule was included in the Bush Administration's tort-reform legislation in 1992, and in “The Common Sense Legal Reforms Act,” which is part of the ‘Contract With America’ proposed by . . . Republican House Members in 1994.” *Id.*

128. See Stark & Choplin, *supra* note 56, at 516.

or fraudulent litigation.¹²⁹ Such a one-way statute might appear to treat defendants unfairly and accord plaintiffs a favored status. As stated by one commentator, however,

Two-way indemnity systems rest upon the assumption that prevailing plaintiffs and prevailing defendants have an equal entitlement, as winners, to compensation for the expenses of successful litigation. The injury-compensation orientation of modern American tort law, however, is at odds with this assumption and supplies a rationale for distinguishing between winning plaintiffs' fee claims and winning defendants' fee claims.¹³⁰

Although one-way fee-shifting statutes have the effect of increasing plaintiffs' net compensation if they prevail, the primary purpose of most one-way statutes has been to facilitate bringing the lawsuit in the first place by helping prospective plaintiffs find competent attorneys in cases in which they might otherwise be hard to attract.¹³¹ Such cases could include situations when the amount of damages is very low—or low in comparison to the resources needed to bring suit—or when the primary relief sought is injunctive.

Starting in the 1970s, the federal government and many states began enacting attorney fees statutes based on a private attorney general doctrine.¹³² This concept provides that a plaintiff "should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further[ing] the necessity and financial burden of private enforcement are such as to make the award essential."¹³³

Although the Supreme Court disallowed court-imposed fee-shifting when there was no statutory authorization in *Alyeska*,¹³⁴ in *Newman v. Piggie Park Enterprises, Inc.*,¹³⁵ the Court approved the use of the private attorney general theory when used as the basis of statutory fees.¹³⁶ In *Newman* the Supreme Court stated,

129. *See id.* One empirical study showed that even such a one-way statute discouraged lawyers from bringing meritorious claims involving a good-faith extension of the law for fear that it would be deemed frivolous. *Id.*

130. Hicks, *supra* note 123, at 795.

131. *See, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968); *see also* COHEN, *supra* note 34, at Summary, 1.

132. *See, e.g.*, *La Raza Unida v. Volpe*, 57 F.R.D. 94, 98 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *overruled by* *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991).

133. *Id.*

134. 421 U.S. at 247.

135. 390 U.S. 400 (1968).

136. *Id.* at 402.

If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief under Title II.¹³⁷

At present there are approximately two hundred federal fee-shifting statutes¹³⁸ and numerous such state statutes.¹³⁹ Most of these

were generally enacted to encourage private litigation to implement public policy. Awards of attorneys' fees are often designed to help to equalize contests between private individual plaintiffs and corporate or governmental defendants. Thus, attorneys' fees provisions are most often found in civil rights, environmental protection, and consumer protection statutes.¹⁴⁰

Many of these statutes—including the civil rights statutes—were written in language that would appear to make them discretionary, two-way fee-shifting statutes providing that the court may allow fees to prevailing parties but making no distinction between plaintiffs and defendants.¹⁴¹ The Supreme Court, however, has recognized that the purpose of most fee-shifting statutes is to enable deserving plaintiffs to bring suit¹⁴² and has established different standards for awards to plaintiffs¹⁴³ and defendants.¹⁴⁴ Prevailing plaintiffs ordinarily recover fees “unless special circumstances would render such an award unjust,”¹⁴⁵ whereas prevailing defendants recover fees only upon a showing that the “action was frivolous, unreasonable, or without foundation.”¹⁴⁶

Fee-shifting statutes have been a successful, accepted way of furthering important government policies in areas such as civil rights,

137. *Id.*

138. COHEN, *supra* note 34, at Summary, 64-114; 1 ROBERT L. ROSSI, ATTORNEYS' FEES 6-23 to 6-24 (3d ed. 2002).

139. 2 ROBERT L. ROSSI, ATTORNEYS' FEES 11-9 & n.8 (3d ed. 2002).

140. COHEN, *supra* note 34, at Summary.

141. *See, e.g.*, Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (2006) (“[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.”). *But see* 15 U.S.C. § 15(a) (2006) (providing attorney fees in antitrust cases only to prevailing claimants).

142. *See, e.g.*, *Newman*, 390 U.S. at 402; *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978).

143. *See, e.g.*, *Newman*, 390 U.S. at 402; *Christiansburg*, 434 U.S. at 416-17 (quoting *Newman*, 390 U.S. at 402).

144. *Christiansburg*, 434 U.S. at 421.

145. *Newman*, 390 U.S. at 402.

146. *Christiansburg*, 434 U.S. at 421.

environmental harms, and consumer protection.¹⁴⁷ These statutes have generally not been used in other private disputes involving a broader range of intentional wrongdoing.¹⁴⁸ The one-sided nature of the provisions necessary to make fee-shifting statutes useful to plaintiffs might be viewed as unfair if used in truly private disputes, in which no important governmental interests are at stake.¹⁴⁹ However, this view would limit the use of these statutes in ameliorating the problem of general under-compensation and under-deterrence in a wide range of intentional torts addressed in this Article.

Defendants have challenged one-way fee-shifting statutes as unconstitutional, violating equal protection and due process, and as susceptible to attack as being “class” or “special” legislation.¹⁵⁰ Although the majority of these challenges have been unsuccessful,¹⁵¹ a number of states have held at least some fee-shifting statutes unconstitutional.¹⁵² In upholding one-way fee-shifting statutes, courts often cite the strong public interest behind them.¹⁵³

147. See, e.g., Securities Exchange Act of 1934, 15 U.S.C. § 78i(e) (2006); Truth in Lending Act, 15 U.S.C. § 1640(a) (2006); Consumer Product Safety Act, 15 U.S.C. § 2060(c) (2006); Toxic Substances Control Act, 15 U.S.C. § 2618(d) (2006); Endangered Species Act, 16 U.S.C. § 1540(g)(4) (2006); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (2006). For a complete list of federal fee-shifting statutes, see COHEN, *supra* note 34, at 64-114.

148. See *Annotation, Validity of Statute Allowing Attorney's Fee to Successful Claimant but not to Defendant, or Vice Versa*, 73 A.L.R. 3d 515, 522 (1976).

149. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). In *Fogerty* the Supreme Court distinguished statutes “in the civil rights context,” which regularly award attorney fees to “impecunious ‘private attorney general’ plaintiffs,” from cases of copyright, patent, and trademark infringement, in which fee awards are “party-neutral” and often limited to “exceptional cases.” *Id.* at 524, 525 n.12. The Supreme Court noted that in such cases, “defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.” *Id.* at 527.

150. 73 A.L.R.3d, *supra* note 148, at 521-22.

151. *Id.*

152. *Id.* at 535. The greatest number of such cases were those holding statutes unconstitutional that provided for attorney fees to plaintiffs for successfully establishing mechanics liens. See, e.g., *Builders' Supply Depot v. O'Connor*, 88 P. 982, 983 (Cal. 1907); *Becker v. Hopper*, 138 P. 179, 179, 182 (Wyo. 1914). Other statutes were ruled unconstitutional for allowing fees to plaintiffs that successfully sued railroad companies for \$50 or less for services rendered, damages, freight overcharges, or livestock killed by trains. See, e.g., *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 150, 166 (1897). Other unconstitutional statutes include those for any plaintiff suing for compensation for services rendered. See, e.g., *Chicago, R.I. & P. Ry. Co. v. Mashore*, 96 P. 630, 633 (Okla. 1908).

153. See 73 A.L.R.3d 515, *supra* note 148, at 522. Courts upholding such statutes often noted

There are some additional problems with extending the use of fee-shifting statutes. They generate an enormous amount of litigation concerning the propriety and amount of attorney fees in individual cases.¹⁵⁴ Fee-shifting statutes also are not designed to serve as a deterrent to improper conduct by defendants.¹⁵⁵ They do have some deterrent effect by allowing more plaintiffs to bring suit; however, the extent of payment by the defendant is not based upon the harm inflicted by the defendant's behavior but on the extent of the litigation.¹⁵⁶ In cases with small amounts of damages in which the attorney fees could greatly exceed the amount of harm, fee-shifting statutes should provide a deterrent effect. Defendants, for better or worse, are at least partially in control of the amount of the extra award by choosing how vigorously they defend the suit. This control can have the positive aspect of encouraging settlement but also the negative aspect of reducing the deterrent value of fee-shifting statute by allowing defendants to minimize the amount of the additional award, and therefore the deterrent effect of that award, by settling. In fact, fee-shifting statutes may be better at deterring over-litigation by defendants than deterring the original harmful behavior.¹⁵⁷

There is an additional problem with extending attorney fees beyond the private attorney general theory into broader tort litigation. Under most federal fee-shifting statutes, fees are not calculated as a percentage

that many of the particular types of statutes relate to activities in which the state has a strong public policy interest, so that requiring the unsuccessful defendant to pay the plaintiff's attorneys' fees in litigation between the parties also aids the state in enforcement of statutes enacted under the police power of the state[s].

Id. The number of cases holding fee-shifting statutes unconstitutional is small, and many of them are quite old. *Id.* at 535-36. This might indicate that extending attorney fees statutes into areas not involving strong public interest might not be viewed today as unconstitutional; however, they still might be viewed as unfair.

154. See Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 489 ("The present fee-fixing process is not a very good one. Arriving at an accurate and reasonable fee award requires much time and effort. Thus after the first litigation comes a second, with added costs and fee awards of its own."); see also THEODORE EISENBERG, *CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS* 611 (5th ed. 2004) ("Much civil rights litigation is about calculating attorneys' fees."). One civil rights hornbook devotes almost thirty pages to discussing hundreds of federal cases interpreting the awarding of attorney fees in civil rights cases. HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *CIVIL RIGHTS LAW AND PRACTICE* 341-68 (2d ed. 2004).

155. See Dobbs, *Awarding Attorney Fees Against Adversaries*, *supra* note 154, at 444.

156. See *id.* at 462, 478, 480-81.

157. See Hicks, *supra* note 123, at 786 ("[A]wards of attorneys' fees could be more effective . . . at causing defendants to move promptly towards reasonable settlements. Unreasonable delays could result in increased plaintiff's legal fees, placing a premium on prompt resolution of disputes and attaching a cost to unreasonable delay.").

of the plaintiff's recovery but as a "lodestar" of hours reasonably spent on the successful claims, multiplied by the market rate for attorneys of similar skill and experience in that area.¹⁵⁸ This calculation sometimes results in fee awards that are much larger than the compensatory award to the plaintiff.¹⁵⁹ Courts have been willing to accept large attorney fees awards in cases in which important federal rights are being enforced.¹⁶⁰ Such awards, however, might be viewed as excessive if made in more "run-of-the-mill" intentional torts cases.

C. Multiple (Double or Treble) Damages

A third option would be to provide for multiple damages in some or all cases in which defendants acted intentionally and wrongfully. Multiple damages are not a new concept, with origins dating back to the laws of ancient Greece and Rome: "The earliest multiple damage provision in Anglo-American law was the Statute of Cloucester in 1278."¹⁶¹ There are many modern examples of multiple damage statutes, the most well-known of which provides for treble damages for violations of federal antitrust laws.¹⁶²

158. *Blum v. Stenson*, 465 U.S. 886, 888, 895 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Dobbs, Awarding Attorney Fees Against Adversaries*, *supra* note 154, at 467.

159. *See, e.g., City of Riverside v. Rivera*, 477 U.S. 561 (1986). In *Rivera* the Supreme Court approved a fee award of more than \$245,000 in a civil rights case in which only \$33,350 had been awarded in total damages. *Id.* at 564-67. Although the Court noted that the amount of damages awarded under the Civil Rights Attorneys Fees Awards Act is relevant to the amount of attorney fees, it is only one factor to be considered, and the fees need not be proportionate to the amount of damages. *Id.* at 574. The Court explicitly distinguished civil rights actions from "a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Id.*

160. *See, e.g., Rivera*, 477 U.S. at 564-65, 567 (award of over \$245,000 in attorney fees for plaintiffs suing for civil rights violations).

161. *Blakey, supra* note 53, at 99-101.

162. Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 115 (1993) ("Everybody 'knows' that antitrust violations lead to mandatory treble damages and attorneys' fees."). Congress has provided that a private plaintiff "injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained." 15 U.S.C. § 15(a). Additionally, the plaintiff is entitled to recover "the cost[s] of [the] suit, including a reasonable attorney's fee." *Id.* Some other federal treble damages statutes include the following: trademark violations, 15 U.S.C. § 1117 (2006); copyright infringement, 17 U.S.C. § 504 (2006); racketeering (RICO), 18 U.S.C. § 1964 (2006); failure to disclose lead-paint hazard, 42 U.S.C. § 4852d (2006); and odometer tampering, 49 U.S.C. § 32710 (2006).

Multiple damages are similar to punitive damages in one basic way: they both impose additional damages on the defendant for certain kinds of wrongdoing, in part to deter the defendant and others from that wrongdoing.¹⁶³ However, they are different in several significant ways. Whereas punitive damages have always been a common-law remedy,¹⁶⁴ multiple damages are entirely statutory.¹⁶⁵ Unlike punitive damages, which are awarded at the discretion of the jury,¹⁶⁶ multiple damages are often, though not always, mandatory upon a finding that the defendant has violated the multiple damages statute.¹⁶⁷ Multiple damages awards that are discretionary are determined by the judge, rather than the jury.¹⁶⁸ Another important difference is that many courts, including the Supreme Court, have recognized that multiple damages may serve not only to punish and deter defendants but also to help compensate plaintiffs.¹⁶⁹

163. *Compare, e.g.,* Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575-76 (1982) (stating that treble damages are a form of deterrence), *with* BMW, 517 U.S. at 568 (explaining that punitive damages serve as a form of deterrence).

164. *See Haslip*, 499 U.S. at 15-16.

165. 25 C.J.S., *Damages* § 218 (2010) (“Multiple damages are allowed only when expressly authorized by statute.”).

166. *See Haslip*, 499 U.S. at 15-16.

167. *See infra* text accompanying note 250-80. For a discussion of mandatory versus permissive multiple damage provisions, see *infra* text accompanying notes 250-80.

168. *Id.*

169. *See, e.g., Hydrolevel Corp.*, 456 U.S. at 575-76. The Supreme Court has recognized that in antitrust cases, the purposes of treble damages include punishment, deterrence, and compensation. *Id.* at 575. In *Hydrolevel Corp.*, the Supreme Court stated, “[T]he antitrust private action was created primarily as a remedy for the victims of antitrust violations. Treble damages ‘make the remedy meaningful by counter-balancing ‘the difficulty of maintaining a private suit’ under the antitrust laws.” *Id.* (citations omitted) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977)). The Court further stated, “Since treble damages serve as a means of deterring antitrust violations and of compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold ASME liable for the acts of agents committed with apparent authority.” *Id.* at 575-76.

In the case of patent infringement, in which federal law provides discretionary treble damages, one noted commentator stated that “[w]hether the purpose of an increased damage award should be exemplary . . . or compensatory . . . is a longstanding controversy in the law. Perhaps the best view is that increased awards combine both purposes.” 7 DONAL S. CHISUM, CHISUM ON PATENTS: A TREATISE ON THE LAW OF PATENTABILITY, VALIDITY AND INFRINGEMENT § 20.03(4)(b)(iii) (2010) (footnote omitted).

One state court allowed insurance coverage for treble damages, distinguishing them from punitive damages in which insurance coverage was not allowed because “the statute reflects as much a concern for employees’ welfare as it does a desire to punish employers.” *Wojciak v. N. Package Corp.*, 310 N.W.2d 675, 680 (Minn. 1981).

Taking a closer look at the reasons behind the treble damages provision of the antitrust laws and comparing them to the broader range of intentional torts that are the subject of this Article is instructive. Antitrust cases are particularly well suited for treble damages for a number of reasons, many of which apply to at least some intentional torts.¹⁷⁰

Since antitrust violations are not only intentional but are usually a planned and thought-out strategy for financial gain (as opposed to intentional yet impulsive activity), they are particularly susceptible to deterrence. Many intentional torts fit this model—for example, fraud, most unfair business practices, and knowingly failing to fix a dangerous condition or product. Intentional torts—which may not be thoroughly planned in advance or may not be undertaken for financial gain, such as libel or battery—thus would not be as susceptible to deterrence.

Another reason advanced in support of treble damages for antitrust violations is that these violations often go undetected or take years to detect.¹⁷¹ Since defendants would benefit from not paying damages for undetected violations, single damages are insufficient to provide optimum deterrence, and treble damages are necessary to account for undetected violations.¹⁷² Some intentional torts, especially those with multiple victims, such as toxic torts, are more difficult to detect than torts directed at a single victim or a small number of victims.¹⁷³

The fact that antitrust cases are difficult to prove and expensive to bring also contributes to the need for multiple damages, as even detected cases may lead to extended or unsuccessful litigation.¹⁷⁴ Although

170. See Lande, *supra* note 162, at 173. Robert Lande has argued for the continuation of treble damages for antitrust violations, stating that “[w]hile some of the factors this Article has analyzed are relatively unique to antitrust, others are not, including the adjustments for lack of prejudgment interest, statute of limitations problems, attorneys’ fees, corporate costs for plaintiffs to pursue the case, and costs to the judicial system.” *Id.* (footnote omitted).

171. See *id.* at 115, 171 (“Antitrust damage awards should be significantly greater than the actual damages caused by these violations to account for detection problems, proof problems, and risk aversion.”).

172. See *id.* at 115-16 & n.1.

173. See *id.* at 115-16 (“Price fixing and bid rigging, for example, are difficult to detect and unquestionably anticompetitive. . . . Other antitrust violations, however, including those associated with large mergers and joint ventures, are relatively simple to detect.”). The fact that not all intentional torts are hard to detect does not fully distinguish them from antitrust violations. Some types of antitrust cases, such as price fixing, are more likely to go undetected. *Id.* Others, such as anti-competitive mergers, are easier to detect. *Id.* Yet they all can result in treble damages. *Id.*

174. See *id.* at 129-58 (discussing factors that support the need for multiple damages, including time and success of litigation).

many intentional torts might not be as difficult to prove, some, such as toxic torts or fraud, can also be difficult and expensive to bring. Many intentional torts, however, may be difficult for victims to bring for other reasons, such as when the low dollar amount of an injury may not make litigation feasible. Multiple damages in such cases might allow more potential plaintiffs to bring suit, providing greater deterrence.¹⁷⁵

Treble damages and an award of attorney fees in antitrust suits also provide additional compensation to plaintiffs to make up for attorney fees, lack of prejudgment interest, and other litigation costs.¹⁷⁶ The need for such compensation might be somewhat greater for antitrust cases than many intentional tort cases because the complexities of antitrust suits tend to make them particularly long and difficult.¹⁷⁷ However, other kinds of cases such as products liability lawsuits, can also take years of litigation to resolve.¹⁷⁸

Treble damages in antitrust cases remain controversial with critics calling for their elimination or restriction, citing the dangers of unfair overpayment by defendants.¹⁷⁹ Yet one study has shown that in antitrust cases, “plaintiffs who sue successfully probably receive an award that is approximately equal to their actual damages,” making them “much closer to single damages than to treble damages.”¹⁸⁰ If

175. Although, if damages are very low, then even trebling them will not make individual lawsuits more viable. In such situations, an award of attorney fees would be more effective in facilitating plaintiffs' claims. There will be some cases, however, when plaintiffs' damages are significant but still do not justify bringing the litigation. In these cases, trebling the damages might tip the scales.

176. See Lande, *supra* note 162, at 118 (listing the need for treble damages in antitrust cases due to “the lack of prejudgment interest[,] plaintiffs' attorneys fees and costs[,] [and] other costs to plaintiffs pursuing cases”).

177. *Id.* at 130-34. That may be one reason why *both* treble damages and attorney fees are awarded to successful antitrust plaintiffs, whereas most extra-compensatory statutes provide either one or the other but usually not both.

178. See DOBBS, *supra* note 6, at 969.

179. Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 779-80, 792-93 (1987); see also Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445 (1985).

While the desirability of the mandatory treble damages remedy has been challenged from time to time since 1890, scholars did not seriously focus on antitrust remedies until the 1970s. In the last decade, mandatory trebling has come under intense attack from economists and legal scholars. The debate has broadened, and the detrebling movement has gathered momentum.

Cavanagh, *supra*, at 779-80 (footnotes omitted).

180. Lande, *supra* note 162, at 166.

that is true, treble damages would be too low to provide proper deterrence and compensation.¹⁸¹

IV. EXTENDING MULTIPLE DAMAGES TO A BROAD RANGE OF INTENTIONAL TORTS

Of the various ways of providing additional compensation and deterrence in a broad range of cases involving intentional harm, multiple damages might be the most reasonable and practicable. Unlike punitive damages, multiple damages are not subject to the unguided discretion of juries.¹⁸² This fact reduces both the problem of excessive awards and the lack of awards in many deserving cases. Juries would merely have to make a specific factual finding of intent—or in some cases, malice or knowledge—to bring double or treble damages into effect. In many cases, such as intentional infliction of emotional distress, fraud, or battery, this state-of-mind requirement would be inherent in finding the defendant liable for the tort. In some cases, however, the jury would have to be asked to make an additional finding. For example, in a products liability case, the jury would be asked whether the defendant had knowledge of the dangerous defect in the product, or in a libel case, the jury would be asked whether the defendant had knowledge of the falsity of the statement.

That this solution is possible as a practical matter is evidenced by the fact that multiple damage statutes already exist at both the federal¹⁸³ and state levels.¹⁸⁴ These statutes exist not only in antitrust cases but also in a fairly wide range of torts.¹⁸⁵ Since there is very little that has been written about this, many lawyers would probably be surprised to learn that every state already provides multiple damages for at least some discreet, intentional torts.¹⁸⁶ There are, however, wide variations

181. *See id.* at 118 (“[W]hen viewed correctly, antitrust damages awards are approximately equal to, or less than, the actual damages caused by antitrust violations.”)

182. *See infra* text accompanying notes 250-80.

183. *E.g.*, 15 U.S.C. § 1117 (2006); 17 U.S.C. § 504 (2006); 18 U.S.C. § 1964 (2006).

184. *E.g.*, O.C.G.A. § 16-14-6(c) (2007) (Georgia); N.C. GEN. STAT. 75D-8(c) (2009) (North Carolina).

185. *See infra* Part IV.A.

186. *See infra* note 189. Based on a LexisNexis search performed by the Author, it appears that the majority of law review articles concerning multiple damages focus on federal antitrust laws or other federal statutes such as RICO. *See, e.g.*, Cavanagh, *supra* note 179; Easterbrook, *supra* note 179; Lande, *supra* note 162. In a search on LexisNexis of twenty-seven law review articles whose titles indicated that they concerned multiple damages, eighteen were about federal statutes (including eleven antitrust and five RICO articles), and only seven concerned state statutes.

from state to state,¹⁸⁷ perhaps even wider than other variations of tort laws. There seems to be little rhyme or reason as to what torts are covered by each state. There are also huge deficiencies within the laws of most states in that multiple damages are not available for some torts that clearly deserve them more than other torts that are covered.

A. A Review of State Law

Although most attorneys are familiar with the fact that treble damages are available in federal antitrust suits (and a handful of others, such as RICO, copyright, and trademark infringement suits),¹⁸⁸ most would probably be surprised at both the number and breadth of multiple damages provisions that exist under state law. Every state has at least a few statutes that provide for multiple damages for particular kinds of wrongful conduct, and some states have a fairly large number of these provisions.¹⁸⁹ Perhaps not surprisingly, California has the largest number of multiple damage statutes at sixty-five, but at least fifteen states have twenty or more such statutes.¹⁹⁰ All but fifteen states have at least ten multiple damages provisions.¹⁹¹ The states vary

187. See *infra* Part IV.A.

188. *E.g.*, 15 U.S.C. § 1117 (trademark violations); 17 U.S.C. § 504 (copyright infringement); 18 U.S.C. § 1964 (RICO).

189. This list represents an approximation of the number of multiple damages actions for each state. It was obtained by doing a LexisNexis search of all state statutes containing words such as “double,” “treble,” “two times,” or “three times,” along with the words “compensate,” “compensatory,” “damage,” or “harm,” followed by a review of the index of each state’s statutory compilation. It is likely that this methodology may have missed some statutes; therefore, the search may have resulted in a number for each state that is lower than the actual number of such statutes. It is not necessary that this survey result in an accurate number of multiple damages statutes. The survey was designed to identify the breadth of the use of such statutes, both as to the number and kinds of actions covered. The point of the survey can be proven even if slightly under-inclusive.

Based on the Author’s survey, the *minimum* number of multiple damages statutes for each of the fifty states is as follows: Alabama (8); Alaska (5); Arizona (3); Arkansas (3); California (65); Colorado (21); Connecticut (17); Delaware (14); Florida (12); Georgia (16); Hawaii (3); Idaho (28); Illinois (28); Indiana (4); Iowa (17); Kansas (8); Kentucky (13); Louisiana (13); Maine (19); Maryland (19); Massachusetts (32); Michigan (28); Minnesota (32); Mississippi (12); Missouri (8); Montana (24); Nebraska (4); Nevada (23); New Hampshire (9); New Jersey (16); New Mexico (10); New York (27); North Carolina (15); North Dakota (12); Ohio (10); Oklahoma (18); Oregon (20); Pennsylvania (12); Rhode Island (8); South Carolina (9); South Dakota (9); Tennessee (33); Texas (16); Utah (17); Vermont (130); Virginia (9); Washington (22); West Virginia (11); Wisconsin (20); Wyoming (4).

190. *Id.*

191. *Id.*

quite widely, not only in the number of wrongful actions covered but also in their subject matter.¹⁹²

Most state multiple damages provisions involve statutorily created torts, such as racketeering¹⁹³ or phishing.¹⁹⁴ Several provisions also create a treble damages remedy for a small, specially targeted sub-class of what already might have constituted a broader common law tort, such as specific kinds of fraud¹⁹⁵ or trespass.¹⁹⁶ Very few multiple damages provisions extend the treble damages remedy to the entirety of a single common-law intentional tort, the only widespread example being the tort of waste.¹⁹⁷ Although some multiple damages statutes seem

192. See *infra* text accompanying notes 193-230.

193. *E.g.*, ARIZ. REV. STAT. ANN. § 13-2314 (2010), available at <http://www.azleg.state.az.us/FormatDocument.asp?format=print&inDoc=/ars/13/02314.htm&Title=13&DocType=ARS> (Arizona); O.C.G.A. § 16-14-6 (Georgia); NEV. REV. STAT. § 207.470 (2009), available at <http://www.leg.state.nv.us/NRS/NRS-207.html> (Nevada); N.M. STAT. ANN. § 30-42-6 (2010), available at <http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0> (New Mexico); N.C. GEN. STAT. § 75D-8 (North Carolina); N.D. CENT. CODE § 12.1-06.1-05 (2009), available at <http://www.legis.nd.gov/cencodelt121c061.pdf> (North Dakota); R.I. GEN. LAWS § 7-15-4 (2009), available at <http://www.rilin.state.ri.us/Statutes/TITLE7/7-15/7-15-4.HTM> (Rhode Island); WASH. REV. CODE § 9A.82.100 (2010), available at <http://apps.leg.wa.gov/rew/default.aspx?cite=9A.82.100> (Washington).

194. *E.g.*, CAL. BUS. & PROF. CODE § 22948.3 (West 2008) (California); 740 ILL. COMP. STAT. ANN. 7/15 (West 2010) (Illinois); LA. REV. STAT. ANN. § 51:2024 (Supp. 2010) (Louisiana); N.Y. GEN. BUS. LAW § 390-b (McKinney Supp. 2010) (New York); OKLA. STAT. ANN. tit. 15, § 776.11 (West Supp. 2009) (Oklahoma); TENN. CODE ANN. § 47-18-5204 (Supp. 2009) (Tennessee).

195. *E.g.*, DEL. CODE ANN. tit. 6, § 2734 (2010), available at <http://delcode.delaware.gov/title6/c027/sc04/index.shtml> (in Delaware, misleading a consumer in the sale of a product); FLA. STAT. ANN. § 668.704 (West Supp. 2010) (in Florida, fraudulent use of another's identity).

196. *E.g.*, N.H. REV. STAT. ANN. § 539:3 (2009), available at <http://www.gencourt.state.nh.us/rsa/html/lv/539/539-3.htm> (in New Hampshire, willful trespass and leaving open or damaging any fence or gate); N.Y. PUB. LANDS LAW § 9 (McKinney Supp. 2010) (in New York, "trespass upon Indian lands").

197. See, *e.g.*, KY. REV. STAT. ANN. § 381.400 (West 2006) (Kentucky); ME. REV. STAT. tit. 14, § 7505 (2010), available at <http://www.mainelegislature.org/legis/statutes/14/title14sec7505.html> (Maine); MASS. GEN. LAWS ch. 242, § 4 (2010), available at <http://www.malegislature.gov/Laws/GeneralLaws/PartIII/TitleIII/Chapter242/Section4> (Massachusetts); MINN. STAT. § 561.17 (2010), available at <http://www.revisor.mn.gov/statutes/?id=561.17> (Minnesota); MO. REV. STAT. § 537.420 (2010), available at <http://www.moga.mo.gov/statutes/c500-599/5370000420.htm> (Missouri); NEV. REV. STAT. § 40.150 (2009), available at <http://www.leg.state.nv.us/NRS/NRS-040.html#NRS040Sec150> (Nevada); N.J. STAT. ANN. § 2A:65-6 (West 2000) (New Jersey); N.C. GEN. STAT. § 1-538 (2009) (North Carolina); N.D. CENT. CODE § 32-17-22 (2009), available at <http://www.legis.nd.gov/cencode/t32.html> (North Dakota); OR. REV. STAT. § 105.805 (2009), available at <http://www.leg.state.or.us/ors/105.html> (Oregon); S.D. CODIFIED LAWS § 21-7-1 (2010), available at <http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=21=7=1> (South Dakota); VA. CODE

to have been passed for political reasons,¹⁹⁸ because of the lobbying efforts of a particular industry,¹⁹⁹ or to protect the state treasury,²⁰⁰ most of them seem designed to promote one or both of the two aims identified in this Article: deterring particularly harmful conduct and fully compensating tort victims.²⁰¹

The sheer number of multiple damages statutes is very large—more than one thousand overall—and except for a few causes of action passed by a large number of states, there is little overlap (meaning there are numerous different actions subject to multiple damages).²⁰² This shows that state legislators know about and are quite willing to use multiple damages as an important tool when regulating intentional, wrongful conduct. However, because many of the statutes are so narrow (for example, a statute imposing penalties for disposing of trash in a charitable receptacle for clothes)²⁰³ and vary so widely, they are not yet an adequate, over-all solution to the problems discussed in this Article.

Many of the multiple damages statutes fall into one of several categories: (1) protection of particularly vulnerable victims, such as the disabled, elderly, or children;²⁰⁴ (2) economic torts such as restraint of trade,²⁰⁵ unfair business practices,²⁰⁶ racketeering,²⁰⁷ and trade-

ANN. § 55-216 (2007) (Virginia).

198. See, e.g., OKLA. STAT. ANN. tit. 21, § 684 (West 2002) (in Oklahoma, receiving a partial birth abortion).

199. See, e.g., COLO. REV. STAT. § 18-4-702 (2010), available at <http://www.michie.com/Colorado> (in Colorado, theft of cable services).

200. See, e.g., CAL. PUB. RES. CODE § 6224.2 (West 2001) (in California, converting minerals owned by the state); FLA. STAT. ANN. § 68.082 (West Supp. 2010) (in Florida, presenting false claims against the state).

201. See *infra* notes 204-12.

202. See *infra* text accompanying notes 203-30.

203. WASH. REV. CODE § 9.91.130 (2010), available at <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.91.130>.

204. E.g., W. VA. CODE § 5A-3C-2 (2010), available at <http://www.legis.state.wv.us/WVCODE/ChaperEntire.cfm?chap=05a&art=3C§ion=2#03C> (West Virginia).

205. E.g., ME. REV. STAT. tit. 10, § 1104 (2010), available at <http://www.mainelegislature.org/legis/statutes/10/title10sec1104.html> (Maine); MASS. GEN. LAWS ch. 93, § 9 (2010), available at <http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXV/Chapter93/Section9> (Massachusetts); MINN. STAT. § 325D.57 (2010), available at <http://www.revisor.mn.gov/statutes/?id=325D.57> (Minnesota); MONT. CODE ANN. § 30-14-222 (2009), available at <http://data.opi.mt.gov/bills/mca/30/14/20-14-222.htm> (Montana); UTAH CODE ANN. § 13-5-14 (2010), available at http://le.utah.gov/~code/TITLE13/htm/13_05_001400.htm (Utah); VA. CODE ANN. § 59.1-9.15 (2006) (Virginia); W. VA. CODE § 5A-3C-12 (2010), available at <http://www.legis.state.wv.us/WVCODE/ChapterEntire.cfm?chap=05a&art=3C§ion=12#03C> (West Virginia).

206. E.g., CAL. BUS. & PROF. CODE § 17082 (West 2008); COLO. REV. STAT. § 6-2-111 (2010), available at <http://www.michie.com/colorado/lpext.dll/cocode/1/9a3a/9a5e/alf2/a29d?f=templates&fn=main-h.htm&cp=> (Colorado); CONN. GEN. STAT. ANN. § 42-110g (West

mark infringement,²⁰⁸ (3) a response to new high-tech torts, such as identity theft,²⁰⁹ phishing,²¹⁰ and eavesdropping,²¹¹ and (4) consumer protection.²¹²

It is very likely that the seemingly haphazard distribution of these statutes may be attributed to some random variable, such as how recently the statute was passed or whether its sponsors thought about adding treble damages, than to any reluctance to extend the remedy more broadly. For example, California has more than sixty-five causes of action subject to multiple damages.²¹³ Some are quite reasonable and laudable, such as claims of human trafficking²¹⁴ and the release

2007) (Connecticut); LA. REV. STAT. ANN. § 51:300.13 (2003) (Louisiana).

207. See sources cited *supra* note 193.

208. *E.g.*, TENN. CODE ANN. § 47-25-514 (2001) (Tennessee); UTAH CODE ANN. § 13-40-402 (2010), available at http://le.utah.gov/~code/TITLE13/htm/13_40_040200.htm (Utah); WYO. STAT. ANN. § 40-1-112 (2010), available at <http://michie.lexisnexis.com/wyoming/lpext.dll?f=templates&fn=main-h.htm> (Wyoming).

209. *E.g.*, ALA. CODE § 13A-8-199 (LexisNexis 2005 & Supp. 2009) (Alabama); FLA. STAT. ANN. § 668.704 (West 2010); O.C.G.A. § 16-9-130 (2007) (Georgia); MO. REV. STAT. § 570.223 (2009), available at <http://www.moga.mo.gov/statutes/c500-599/5700000223.htm> (Missouri); 42 PA. CON. STAT. ANN. § 8315 (West 2007) (Pennsylvania); TENN. CODE ANN. § 47-18-2104 (2001) (Tennessee).

210. See sources cited *supra* note 194.

211. *E.g.*, CAL. PENAL CODE § 637.2 (West 2010) (California).

212. *E.g.*, ALA. CODE § 8-19D-2 (2002) (in Alabama, deceptive sweepstakes); COLO. REV. STAT. § 42-9-113 (2010), available at <http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp=> (in Colorado, failure to make promised motor vehicle repairs); DEL. CODE ANN. tit. 6, § 2533 (2010), available at <http://delcode.delaware.gov/title6/c025/sc03/index.shtml> (in Delaware, deceptive trade practices); 815 ILL. COMP. STAT. ANN. 505/2W (2008) (in Illinois, deception in radon reduction services); LA. REV. STAT. ANN. § 51:1409 (2003 & Supp. 2010) (in Louisiana, causing loss by deceptive acts); ME. REV. STAT. tit. 10, § 1322 (2010), available at <http://www.mainelegislature.org/legis/statutes/10/title10sec1322.html> (in Maine, violating fair credit reporting laws); N.M. STAT. ANN. § 57-12-6 (2010), available at <http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0> (in New Mexico, fraudulent used car sales); N.Y. GEN. BUS. LAW § 350-e (McKinney Supp. 2010) (in New York, any unlawful consumer practice). The most common consumer protection statutes address odometer tampering. See, e.g., CONN. GEN. STAT. ANN. § 14-106b (West 2006) (Connecticut); 625 ILL. COMP. STAT. ANN. 5/3-112.1 (West 2008) (Illinois); MASS. GEN. LAWS ch. 266, § 141 (2010), available at <http://malegislature.gov/Laws/GeneralLaws/PartIV/TitleI/Chapter266/Section141> (Massachusetts); MO. REV. STAT. § 407.546 (2009), available at <http://www.moga.mo.gov/statutes/c400-499/4070000546.htm> (Missouri); NEV. REV. STAT. § 484D.340 (2009), available at <http://www.leg.state.nv.us/NRS/NRS-484D.html> (Nevada); N.C. GEN. STAT. § 20-348 (2009) (North Carolina); VA. CODE ANN. § 46.2-112 (2010) (Virginia).

213. See *infra* notes 214-17. For an explanation and analysis of how the Author determined the number of multiple damages statutes in California, see *supra* note 189.

214. CAL. CIV. CODE § 52.5 (West 2007).

of hazardous substances,²¹⁵ whereas others seem more trivial, such as a claim against a dating service for failure to inform customers of their right to cancel.²¹⁶ It is clear that the California legislature is willing and able to apply multiple damages to a large array of wrongful behavior.

California allows multiple damages, however, for vandalism at a construction site but not for other acts of vandalism.²¹⁷ It does not make sense not to cover other acts of vandalism—such as vandalism of a school—or even all acts of vandalism. The decision to include vandalism only at a construction site was most likely not a conscious decision to exclude others but merely a positive response to a specific request in a specific bill. One would guess that if someone were to champion a multiple damages remedy for school vandalism, it would have a good chance of passage. Based on the Author's research, it does not appear that any state has done a systematic review of state tort law for the purpose of determining in which causes of action multiple damages should be allowed. Clearly, however, many state legislatures are amenable to allowing multiple damages in a large number of circumstances to protect citizens from harmful conduct.²¹⁸

Approximately half of state multiple damages statutes are mandatory,²¹⁹ meaning that treble damages must be awarded if the tort is committed²²⁰ or if the tort is committed with a particular state of mind—knowingly,²²¹ intentionally,²²² willfully,²²³ or maliciously.²²⁴

215. CAL. HEALTH & SAFETY CODE § 25359 (West 2006).

216. CAL. CIV. CODE § 1694.4 (West Supp. 2010).

217. CAL. CIV. CODE § 1721 (West 2009).

218. See sources cited *supra* notes 204-12.

219. See *infra* notes 225-27.

220. Many of the statutes that provide for mandatory multiple damages do not provide any specific state-of-mind requirement, such as the statutes addressing racketeering and identity theft. See sources cited *supra* notes 193, 209. With a large number of these statutes, the tort in question would clearly require a finding of at least intent, and therefore, no additional state-of-mind requirement in the statute is required. See sources cited *supra* note 193 (racketeering), 209 (identity theft); see also CONN. GEN. STAT. ANN. § 51-247a (West Supp. 2010) (in Connecticut, discharging or threatening to discharge an employee for serving on a jury). However, there are some statutes that provide for mandatory multiple damages but do not contain a state-of-mind requirement and could theoretically require multiple damages upon a showing of mere negligence. *E.g.*, IND. CODE § 6-1.1-35-11 (2010), available at <http://www.in.gov/legislative/ic/code/title6/ar1.1/ch35.html> (in Indiana, unauthorized disclosure of confidential taxpayer information); KY. REV. STAT. ANN. § 61.8745 (West 2006) (in Kentucky, failure to follow standards regarding public records).

221. *E.g.*, ALA. CODE §§ 6-5-601 to -602 (LexisNexis 2005) (Alabama); ARIZ. REV. STAT. § 3-1307 (2010), available at <http://www.azleg.gov/FormatDocument.asp?inDoc=ars/3/01307.htm&Title=3&DocType=ARS> (Arizona); COLO. REV. STAT. § 12-66-103 (2010), available

The language used in these statutes includes the following: the defendant “shall be liable,”²²⁵ the court “shall award,”²²⁶ the plaintiff “shall be entitled to,”²²⁷ or the plaintiff “is entitled to.”²²⁸ Many other statutes, however, make the award of multiple damages subject to the judge’s discretion, using language that includes the following: “the court may”²²⁹ or “damages that the court allows.”²³⁰ Most of these statutes provide no guidance for how the discretion should be exercised, but presumably it would be based on the equities of the situation, including the wrongfulness and intentionality of the defendant’s behavior.

Although taken as a whole across all states, the statutes cover a large number of intentional, wrongful acts, in no single state are these statutes broad enough to cover a significant percentage of all intentional torts. Even in states that have a relatively large number of multiple damages statutes, the statutes are mostly narrow and connected only to

at <http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp=> (Colorado); CONN. GEN. STAT. ANN. § 53a-129a (West Supp. 2010) (Connecticut); W. VA. CODE ANN. § 59-3-7 (2005) (West Virginia); WYO. STAT. ANN. § 36-1-112 (2010), *available at* <http://michie.lexisnexis.com/wyoming/lpext.dll/wycode/1b29f1b2a5/1b302?f=templates&fn=main-h.htm> (Wyoming).

222. *E.g.*, O.C.G.A. § 10-1-399 (Georgia); 625 ILL. COMP. STAT. ANN. 5/3-112.1 (Illinois); WASH. REV. CODE § 4.24.630 (2010), *available at* <http://apps.leg.wa.gov/rew/default.aspx?cite=4.24.630> (Washington).

223. *E.g.*, CONN. GEN. STAT. ANN. § 52-566 (2005) (Connecticut); IOWA CODE § 327D.16 (2009), *available at* <http://www.legis.state.ia.us/IowaLaw.html> (Iowa); WIS. STAT. § 293.89 (2010), *available at* <http://legis.wisconsin.gov/statutes/Stat0293.pdf> (Wisconsin).

224. *E.g.*, MASS. GEN. LAWS ch. 160, § 225 (2010), *available at* <http://www.malegislature.gov/Laws/GeneralLaw/PartI/TitleXXII/Chapter160/Section225> (Massachusetts); WASH. REV. CODE § 19.122.070, *available at* <http://apps.leg.wa.gov/rew/default.aspx?cite=19.122.070> (in Washington, willfully or maliciously); W. VA. CODE ANN. § 37-7-4 (LexisNexis 2005) (in West Virginia, willfully or maliciously).

225. *E.g.*, CAL. CIV. CODE 1057.3 (West 2007) (California); COLO. REV. STAT. § 12-47.1-527 (2010), *available at* <http://www.michie.com/colorado/lpext.dll?f=templates&fn=mainh.htm&cp=> (Colorado); MISS. CODE ANN. § 77-9-321 (2009) (Mississippi); N.J. STAT. ANN. § 34:8A-10.1 (West 2000) (New Jersey).

226. *E.g.*, CAL. CIV. CODE § 1695.7 (West Supp. 2010) (California); WIS. STAT. § 26.09 (2010) <http://legis.wisconsin.gov/statutes/Stat0026.pdf> (Wisconsin).

227. *E.g.*, FLA. STAT. ANN. § 768.0425 (West 2005) (Florida).

228. *E.g.*, CAL. CIV. CODE § 1716 (West 2009) (California).

229. FLA. STAT. ANN. § 68.082 (Florida); MD. CODE ANN., LAB. & EMPL. § 3-507.1(b) (2010), *available at* <http://www.michie.com/maryland/lpext.d11/mdcode/1a524/1a567/1a682?fn=document> (“may issue”) (Maryland); WIS. STAT. ANN. § 103.96 (2010) *available at* <http://legis.wisconsin.gov/statutes/Stat0103.pdf> (Wisconsin).

230. *E.g.*, MD. CODE ANN., BUS. REG. § 6-509 (2010), *available at* <http://www.michie.com/maryland/lpext.d11/mdcode/2dc1/32ab/3359/3382?fn=document-fn> (Maryland).

statutory, rather than common-law, torts,²³¹ which makes them less than effective at remedying the problems identified in this Article. The sheer number and breadth of multiple damages statutes, however, is an indication that a broader statutory application of treble damages might be a reasonable, feasible, and attainable solution. The next section discusses what such a statutory scheme might look like.

B. Blueprint for Awarding Treble Damages for Intentional Torts

There are several issues that must be addressed in fashioning a system of awarding treble damages in intentional tort cases. Most importantly, should treble damages be (1) routinely awarded for all intentional torts, (2) awarded only in certain broad categories of torts, or (3) awarded only for specified, individual torts? Additionally, once the torts to be covered are determined, should the award be mandatory or discretionary?

1. What Torts Should be Covered? Since most tort victims are under-compensated by compensatory damages, and most intentional tortfeasors are under-deterred,²³² a state would be justified in applying treble damages to all intentionally committed torts. If not already required by the elements of the tort itself, the normal state-of-mind requirement to award treble damages would be “intentionally” or “willfully.” The statute, or the courts in interpreting the statute, could apply different standards of intent in different situations when desirable. For example, with some torts, such as trespass or battery, the intent required should probably be the intent to harm, as opposed to the intent merely to trespass or the intent to touch required by the basic elements of the respective torts. For others, such as manufacturing an unreasonably dangerous product, “knowledge” of the dangerousness might be sufficient. A higher standard could be made applicable to some torts. Libel or slander, for example, could require a “malicious” state of mind to counter First Amendment²³³ concerns. Alternatively, states could decide to exempt these torts from treble damages in order to prevent the chilling of protected speech.²³⁴

231. See *supra* text accompanying notes 193-94.

232. See *supra* Part II.A-B.

233. U.S. CONST. amend. I.

234. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In *Gertz* the Supreme Court held that states did not have to require libel plaintiffs who were not public figures to meet the more demanding “actual malice” standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and could recover actual damages under a negligence standard. 418 U.S. at 342-43, 350. However, the Court held that punitive damages could not be awarded upon any lesser finding than the actual malice standard:

Care should be taken to distinguish breach of contract cases from similar intentional torts. In a breach of contract case, treble damages should not normally be awarded even though the defendant's intentional conduct has injured the plaintiff. For example, an insurance company that has a valid reason to deny coverage would be guilty only of breach of contract and subject to single damages if it were later determined through litigation that they were bound by the contract to pay the claim. If, however, the insurance company wrongfully and intentionally refused to honor a policy without a valid reason, it would be guilty of an intentional tort and subject to treble damages.²³⁵

Subjecting all intentional torts to treble damages might be too radical an approach for most states to take. A more modest—but still very broad—approach would be to authorize treble damages in certain categories of cases. The most likely candidates for such treatment are discussed below.

First, one such category includes instances in which the defendant's conduct was not only intentional and wrongful but also in violation of

[P]unitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

Id. at 350. It is unclear whether the constitutional requirement of actual malice would apply to multiple damages, which have both a compensatory and deterrent purpose, given that the Supreme Court took a broad view of “actual injury.” In any case, whether constitutionally required or not, if any state decides to provide multiple damages for libel, it should—and almost certainly would—require at least an intentional, if not malicious, state-of-mind standard.

235. See *Stevenson v. Louis Dreyfus Corp.*, 811 P.2d 1308 (N.M. 1991). In *Stevenson* the New Mexico Unfair Trade Practices Act, N.M. STAT. ANN. §§ 57-12-1 to -26 (2010), available at <http://www.conwaygreene.com/nmsu/lpext.dll?templates&fn=main-h.htm&2.0>, made “fail[ure] to deliver the quality or quantity of goods or services contracted for” a violation subject to treble damages. *Stevenson*, 811 P.2d at 1310 (internal quotation marks omitted). The New Mexico Supreme Court sensibly read into the statute a requirement that the defendant must have known at the time it contracted that it could not supply what was contracted for. *Id.* The court recognized that failure to do so “would result in every breach of contract case being a violation of the Act.” *Id.*; see also Barry Perlstein, *Crossing the Contract-Tort Boundary: An Economic Argument for the Imposition of Extracompensatory Damages for Opportunistic Breach of Contract*, 58 BROOK. L. REV. 877 (1992) (footnote omitted) (“The common law has traditionally maintained a rigid doctrinal division between two of its subdivisions—tort and contract. Today, courts are increasingly willing to cross the doctrinal demarcation between tort and contract by allowing tort damages for bad faith breaches of contract.”).

state criminal laws.²³⁶ If the state has already decided that the activity deserved punishment and should be deterred, then this would seem to be an ideal situation for adjusting the equities to make sure the plaintiff receives full compensation, even if this means burdening the defendant. It could be argued that adding extra damages to the existing criminal sanction might result in double punishment or over-deterrence. There is certainly some possibility of this, but it is more likely that the criminal may go unpunished,²³⁷ meaning that neither the compensatory nor deterrent function will be adequately filled.

A second category includes torts involving misuse of power for economic gain, such as antitrust violations and unfair business practices. These types of misconduct usually involve calculation on the part of the wrongdoer that the rewards of the misconduct should exceed any possible legal liability; therefore, it makes sense to the wrongdoer, at least from a purely economic standpoint, to engage in the misconduct. Subjecting the activity to treble damages should change the equation sufficiently in many situations so that the misconduct no longer appears to be advantageous economically.

A third category involves any tortious behavior directed at consumers that is grounded in fraud or deceit. The fourth category includes cases involving the willful refusal to make a required payment or refund to consumers, tenants, employees, or insureds without cause or for improper purposes.

Lastly, the final category encompasses any wrongful act taken for the purpose of causing bodily injury or with the knowledge that bodily injury was likely to occur. This category would cover common-law torts such as battery and more modern products liability claims that involve a manufacturer who knows—or perhaps clearly should have known—of the danger of harm.

With most of the existing multiple damage provisions under state law, the multiple damages remedy was not applied to some existing causes of action. Rather, at the time the substantive statutory remedy was created, the decision was made to include the enhanced remedy. Since

236. *E.g.*, MINN. STAT. §§ 609.52 to .53, available at <http://www.revisor.mn.gov/statutes/> (in Minnesota, concealing stolen property); MISS. CODE ANN. § 97-17-1 (in Mississippi, arson); N.H. REV. STAT. ANN. § 202-A:24 (2009), available at <http://www.state.nh.us/rsa/html/XVI/202-A/202-A-24.htm> (in New Hampshire, defacing or destroying any property); S.C. CODE ANN. § 16-13-181 (2003) (in South Carolina, possessing stolen goods); UTAH CODE ANN. § 76-6-412 (2010), available at http://le.utah.gov/~code/TITLE76/htm/76_06_041200.htm (in Utah, theft of property).

237. This may be due to overburdened prosecutors who must concentrate on only the most serious cases. The difficult standard of proof and rules in criminal cases also make it harder to convict.

none of the more widespread approaches above (all categories of intentional torts) are likely to be adopted by a large number of states in the near future, authorizing an enhanced remedy at the time the statutory remedy is created might be the most viable practical approach at this time. Any time a state legislature is considering creating a private statutory damages remedy to redress intentional wrongful action, the legislature should seriously consider awarding multiple damages to a prevailing plaintiff. Given the arguments presented in this Article, multiple damages in such situations should be the norm. Those opposing multiple damages would have the burden of showing why it would be unfair in that particular situation to award more than compensatory damages.

Legislatures should also be encouraged to revisit some specific, existing causes of action to determine whether multiple damages are appropriate. The most obvious candidates for such treatment would be statutory torts for which some, but not all, states already provide multiple damages, such as unfair trade practices.²³⁸ A state could also, however, examine all relevant causes of action—those involving wrongful, intentional action in both statutory and common law—to determine which would be suitable for awarding multiple damages.

There are some arguments against imposing multiple damages for intentional torts. Obviously, anyone who disagreed with the basic premise of this Article—that intentional tort victims are often under-compensated and that defendants are sometimes under-deterred—would be opposed to multiple damages. However, there are additional arguments that might be raised by someone willing to accept this basic premise but who might not believe multiple damages are the best or even an appropriate remedy.²³⁹

First, the possibility of increased damages might provide an incentive to plaintiffs to bring more frivolous lawsuits. This, of course, could also be said of any extra-compensatory remedies, such as punitive damages and attorney fees. The answer to frivolous lawsuits, however, is not to deny an otherwise reasonable remedy to deserving victims. There are other ways of discouraging frivolous litigation, such as the common-law tort of malicious prosecution,²⁴⁰ sanctions under civil procedure rules

238. See sources cited *supra* note 205.

239. This could be because these individuals believe an alternative remedy, such as punitive damages or attorney fees, might be better. It could also be that, although they accept the basic premise, they believe that any additional remedy would end up creating more problems than it could solve.

240. 52 AM. JUR. 2D *Malicious Prosecution* § 8 (2008) (defining malicious prosecution as “the institution or continuation of original judicial proceedings” with “malice” and “lack

such as Federal Rule of Civil Procedure 11,²⁴¹ or a heightened pleading standard.²⁴²

Subjecting a defendant to the possibility of higher damages might also present an added incentive to the defendant to litigate more vigorously, thereby increasing litigation costs. It could, however, *decrease* litigation by encouraging defendants who are in the wrong to settle for an amount closer to the actual damages to avoid the possible imposition of multiple damages. One could also argue that choosing an arbitrary multiplier of two or three might over-compensate some plaintiffs whose litigation costs are low or over-deter some defendants. It would not be practicable, however, to try to measure the actual cost to plaintiffs in each individual case; measuring would only lead to more litigation. Doubling or trebling damages is, of course, a generalized estimate of the appropriate amount of the award. However, these are not numbers plucked out of thin air; they have been the two historic measures of multiple damages.

One recommendation would be to provide for mandatory double damages, along with discretionary treble damages.²⁴³ The double damages would be mostly to compensate plaintiffs for the cost and trouble of litigation. This provision would probably not over-compensate—and would never grossly over-compensate—the plaintiff, such as with some punitive damages awards in the past. The court could then use its discretion, based on the wrongfulness of the defendant's conduct, to increase the award from two to three times the compensatory damages. This would give the court the flexibility to provide an appropriate amount of deterrence. Trebling the damages might unintentionally over-compensate the plaintiff in some cases. However, if trebling was done not for compensatory purposes but to deter particularly wrongful conduct, it would still be justified.

Finally, the same fairness argument that was made earlier in relation to expanding the use of one-way attorney fees statutes²⁴⁴ must be

of probable cause”).

241. FED. R. CIV. P. 11. Rule 11(b) requires the attorney or party bringing a claim to certify that the claim is “warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law” and that “the factual contentions have evidentiary support.” Further, Rule 11(c) provides for monetary sanctions for certain violations.

242. *See, e.g.*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In *Twombly* and *Iqbal*, the Supreme Court tightened up the very liberal pleading standard of Federal Rule of Civil Procedure 8 by requiring the plaintiff to show that the claim was “plausible” and not merely “possible.” *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 570.

243. *See infra* text accompanying notes 279-80.

244. *See supra* text accompanying notes 147-53.

examined to see if it also applies to treble damages statutes. The argument is that the use of one-way attorney fees statutes is justified when plaintiffs act as “private attorneys general” by furthering important governmental interests. However, statutes that regularly award fees to prevailing plaintiffs but not prevailing defendants could be viewed as unfair and unequal treatment if extended to all or most intentional tort cases.

These two remedies have in common the fact that they favor the party seeking and obtaining redress, which is almost always the plaintiff,²⁴⁵ over the party defending the claim, even if it turns out that the defending party prevails. But this disparity exists with every tort remedy, including the normal compensatory damages, which have never been considered unfair on the grounds that they are one-sided. Any enhanced damages will favor plaintiffs because damages in general favor plaintiffs. Although punitive damages have been criticized as unfair,²⁴⁶ this criticism has never been made on the grounds that punitive damages are awarded only to plaintiffs and not defendants.

The awarding of substantive damages to plaintiffs but not defendants (even those who prevail) results from the fact that defendants do not suffer substantive damages. Any harm defendants suffer flows only from defending the lawsuit, and therein lies an important difference between awarding attorney fees versus awarding multiple damages. An award of attorney fees *could* be extended to prevailing defendants but generally is not because doing so would over-deter deserving tort plaintiffs from filing suit for fear of financial ruin if they lost.²⁴⁷ Favoring only plaintiffs with a remedy that could also be applied to defendants would seem to require an important governmental interest in facilitating the bringing of such lawsuits. As with any damages, however, enhanced substantive damages—punitive or multiple—are by definition one-way in that they can be awarded only against the tortfeasor. Therefore, enhanced substantive damages statutes require that they be justified by the tort principles of compensation and

245. See *supra* text accompanying notes 142-46. Under most attorney fees statutes (or at least their interpretation by the courts), fees are routinely awarded only to plaintiffs. *Id.* In the case of intentional torts, defendants as well as plaintiffs might sometimes bring such claims. If they do so successfully, they should be treated equally for the purpose of receiving multiple damages. To simplify the discussion, this section will refer to plaintiffs and defendants as a short hand for the claimant and the party defending the claim.

246. See *supra* text accompanying notes 91-92. It was the unfettered discretion given to juries, which sometimes resulted in excessive awards, that was held so unfair as to violate due process.

247. See *supra* text accompanying note 126.

deterrence, but they do not require a further justification for treating plaintiffs and defendants unequally.²⁴⁸

There are some other differences between attorney fees awards and multiple damages that make the latter better suited for application to a broader range of intentional torts. The amount of a multiple damages award bears a relationship to the harm caused by the defendant, whereas the amount of an attorney fees award is based on the length of the litigation. Although three times the amount of damages caused may not always be the exact amount required for optimal deterrence, it is certainly a closer measure than the costs of litigating.

Both remedies have the effect of (1) facilitating the bringing of the lawsuit, (2) providing additional compensation to successful plaintiffs, and (3) deterring undesirable conduct by defendants.²⁴⁹ Although this statement may be subject to debate, attorney fees statutes seem better suited to facilitate lawsuits, deter wrongdoers, and compensate victims, in that order. Multiple damages, on the other hand, are better suited to compensate, to deter, and to facilitate lawsuits, in that order.

Awarding attorney fees will almost always encourage litigation of valid claims, regardless of the amount of damages, which makes them ideal when the government wants to encourage certain claims. However, trebling damages in cases in which the damages are quite small will have little effect: a plaintiff who cannot find an attorney to bring a suit for one thousand dollars probably will not be able to find one to bring a suit for three thousand dollars. If the primary goal of treble damages is to more fully compensate injured plaintiffs, the fact that no benefits flow to plaintiffs whose damages are so small that they are not worth bringing suit over even if trebled, is not as bothersome as leaving more seriously injured plaintiffs without a remedy. Multiple damages will help fully compensate those who have suffered great loss. These damages should also help others with damages that are significant but not quite at the level that would be necessary for an economically viable suit. If multiple damages accomplish that, they will remedy those cases in which the unfairness of the compensatory damages system is greatest. Individuals with very small amounts of damages will not be helped, but in those cases remedying the un-redressed harm to each individual is, in itself, not cause enough to encourage a lawsuit. Some other govern-

248. The justification of the need for some remedy to rectify under-compensation and under-deterrence in most intentional tort cases was made in Part II of this Article. *See supra* Part II.A-B. Any reader unconvinced by that argument would not favor either attorney fees or multiple damages in most intentional tort cases. This argument only goes to which remedy might be better suited for application to a broad range of intentional torts.

249. *See supra* Part III.B-C.

mental purpose or a very strong desire to deter the defendant's conduct would be needed, and the better remedy in either case would be allowing attorney fees or facilitating class actions.

2. Mandatory v. Discretionary Awards There is great variation among states, and even among statutes in the same state, on whether treble damages should be mandatory or awarded at the judge's discretion. There is also great variation in how the statutes are worded, leading to confusion and litigation over whether some statutes were meant to be discretionary or mandatory. For example, in just one state, California, the following language has been used to indicate mandatory multiple damages: (1) "is entitled to,"²⁵⁰ (2) "shall be subject to,"²⁵¹ (3) "the measure of damages is,"²⁵² (4) "[j]udgment shall be entered for,"²⁵³ (5) "shall be liable,"²⁵⁴ and (6) "is liable."²⁵⁵ The following language has been used to indicate discretionary awards: (1) the court "may impose,"²⁵⁶ (2) a plaintiff "may recover,"²⁵⁷ (3) "may be entered for three times the amount,"²⁵⁸ (4) "may be up to three times,"²⁵⁹ (5) "may . . . award,"²⁶⁰ and (6) "may be awarded."²⁶¹

There is at least one wording used in some statutes in several states that is patently unclear in this regard and should not be used. A statute that read "Plaintiff may bring an action for three times the damages"²⁶² could imply either that the choice is up to the plaintiff as to whether to bring a treble damages action or that it is discretionary with the court as to whether to award the extra damages. One Massachusetts

250. CAL. CIV. CODE § 1716 (West 2009).

251. CAL. CIV. CODE § 1950.8 (West 2010).

252. CAL. CIV. CODE § 3346 (West 1997).

253. CAL. CIV. CODE § 1812.123 (West 2009).

254. CAL. CIV. CODE § 1057.3 (West 2007).

255. CAL. LAB. CODE § 1054 (West 2003).

256. CAL. CIV. CODE § 3345 (West 1997).

257. CAL. CIV. CODE § 1882.2 (West 2010).

258. CAL. CIV. CODE § 1812.94 (West 2009).

259. CAL. CIV. CODE § 1789.35 (West 2009).

260. CAL. CIV. CODE § 1721 (West 2009).

261. CAL. CIV. CODE § 52.5 (West 2007).

262. See, e.g., MD. CODE ANN., COM. LAW § 11-1001(d) (2010), available at <http://www.michie.com/maryland/1pext.d11/mdcode/4572/51c5/5388/5389?fn=document> (in Maryland, "[m]ay sue and recover three times the amount of damages"); MASS. GEN. LAWS ch. 149, § 150 (2010), available at <http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section150> (in Massachusetts, "may . . . institute and prosecute"); MISS. CODE ANN. § 11-7-165 (Supp. 2009) (in Mississippi, "right to bring cause of action . . . to seek"); WIS. STAT. § 100.31 (2010), available at <http://legis.wisconsin.gov/statutes/Stat0100.pdf> (in Wisconsin, "may bring an action . . . to recover").

court faced with this kind of imprecise language held that the award of treble damages was meant to be discretionary:

Any employee claiming to be aggrieved by a violation of section 148 . . . may . . . institute and prosecute in his own name . . . a civil action for injunctive relief and any damages incurred, including treble damages for any loss of wages and other benefits. An employee so aggrieved and who prevails in such an action shall be entitled to an award of the costs of litigation and reasonable attorney's fees.²⁶³

The Supreme Judicial Court of Massachusetts determined that the "use of 'shall['] required the judge to award the plaintiff attorney's fees."²⁶⁴ However, there is nothing in the plain language of the statute that requires an award of treble damages.²⁶⁵ The text of the statute states only that a plaintiff "may" institute a suit for damages that includes a request for treble damages.²⁶⁶ Thus, it is by no means certain that the court was correct. A court would never interpret a statute that read "a plaintiff may institute an action for compensatory damages" as giving the court discretion to deny compensatory damages if the defendant were held liable. In fact, in the Massachusetts statute interpreted by the court, exactly the same language was used in the same sentence for compensatory and treble damages,²⁶⁷ yet the court held that only the treble damages were discretionary.²⁶⁸

Some courts have even interpreted language that was clearly mandatory as being discretionary if the magic "shall" word was absent. The New York landlord-tenant statute provided that if a tenant was ejected in an unlawful manner, "he is entitled to recover treble damages in an action therefore against the wrong-doer."²⁶⁹ The New York Supreme Court, Appellate Division, however, referred to this as "ambiguous language" and held that treble damages were discretionary.²⁷⁰ There is an indication that the court was less concerned with

263. *Wiedmann v. Bradford Group, Inc.*, 831 N.E.2d 304, 312 (Mass. 2005).

264. *Id.* at 312 n.13.

265. *See* MASS ANN. LAWS ch. 149, § 150 (LexisNexis 2006).

266. *Id.*

267. *See id.*

268. *Wiedmann*, 831 N.E.2d at 313.

269. N.Y. REAL PROP. ACTS. LAW § 853 (McKinney 2009).

If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefore against the wrong-doer.

Id.

270. *Lyke v. Anderson*, 541 N.Y.S.2d 817, 823 (N.Y. App. Div. 1989). This holding, although perhaps based on a strained reading of the statutory language, is in accord with

the language than with the harsh result of holding that treble damages were mandatory for all wrongful convictions. To establish liability for wrongful eviction, the tenant need only show the eviction was “by unlawful means.”²⁷¹ The court was concerned that there could be cases in which the means of eviction were unlawful, but unintentionally so, and that it would be unfair to award treble damages.²⁷²

Legislatures can clearly distinguish whether the award is meant to be mandatory or discretionary by using the simple language “the court *shall* award damages of three times” or “the court *may* award up to three times.” The real question is not linguistic but substantive: should statutes providing for treble damages be discretionary or mandatory? Is it unfair to defendants, at least in some cases, to provide for mandatory treble damages? The answer will depend on several factors, including (1) the breadth of the statute providing for multiple damages and (2) the state-of-mind requirements for multiple damages.

Most statutes that allow discretionary awards of multiple damages give no guidance to the trial judge on how to exercise that discretion, even if the statutes do not contain a specific state-of-mind requirement.²⁷³ Appellate courts, even those within the same state, have used different standards to make this determination. One Massachusetts court stated that “treble damages are punitive in nature, allowed only where authorized by statute, and appropriate where conduct is ‘outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.’”²⁷⁴ Unless explicitly stated in the statute, such a high standard should not be imposed. It is wrong to assume that if a legislature provided for multiple damages and did not include a state-of-mind requirement, that legislature would want the award reserved for cases of “outrageous” conduct with “evil motive.” The legislature would know that such conduct could already have led to

the policy advanced in this Article that only knowing or intentional harms should be subject to multiple damages. *See id.* When faced with a statute that appeared to require mandatory multiple damages for even unintentional violations, the court chose to interpret the statute more reasonably, even in the face of relatively clear language. *See id.*

271. N.Y. REAL PROP. ACTS. LAW § 853.

272. *Lyke*, 541 N.Y. S.2d at 823. As the court stated

The Legislature may very well have intended that the Trial Judge should have discretion as to the imposition of the drastic remedy of treble damages. We can envision cases where a tenant is dispossessed by “unlawful means” which are unintentional . . . in which the tenant may not be “entitled” to treble damages.

Id. (citation omitted).

273. *See supra* text accompanying notes 229-30.

274. *Wiedmann*, 831 N.E. 2d at 313 (quoting *Goodrow v. Lane Bryant, Inc.*, 732 N.E.2d 289, 299 (Mass. 2000)).

punitive damages, and unless the legislature thought it was changing the decision-maker for extra damages from the jury to the judge, it probably intended a lesser standard. In a different Massachusetts case, however, the court held that when the statute was silent as to the required state-of-mind, the lesser showing of “willful indifference” was sufficient to trigger multiple damages, and outrageous conduct or evil motive was not required.²⁷⁵

There is, however, a preferable way of distinguishing between intentional and unintentional violations without having a statute containing no state-of-mind requirement and leaving the decision to the judge. The question of whether a party acted with intent or not is a question of fact and should normally be decided by the jury (unless the case is being tried before a judge). Ideally, statutes providing for multiple damages should always contain an appropriate state-of-mind requirement, and the jury should always be instructed about this requirement. In cases in which the same state-of-mind requirement exists for both general liability and treble damages, no separate finding would be required. In cases in which basic liability can be established without such a finding (as in the New York statute for unlawful eviction),²⁷⁶ a separate finding of intent, or whatever the appropriate state-of-mind requirement is, should be required of the jury to award multiple damages.

The central thesis of this Article is that most, if not all, intentional tortious injuries should result in the imposition of multiple damages. Additionally, this Article argues in favor of mandatory damages and against discretionary damages in most cases. It certainly rules out giving the judge unfettered discretion or a discretionary system that places a high burden of proof on the plaintiff. As long as the appropriate state-of-mind requirement is imposed, there should normally be, at the very least, a *presumption* of multiple damages for any designated intentional tort.

The real question, therefore, is whether the imposition of multiple damages should be entirely mandatory or whether the judge should retain some discretion to relieve a defendant of this obligation in some

275. Parow v. Howard, No. 021403A, 2003 WL 23163114, at *4 (Mass. Super. Ct. Nov. 12, 2003). In *Howard* the court was interpreting a statute that provided treble damages if an employer withheld an employee's wages. *Id.* Rather than deciding whether the statute was discretionary or mandatory, the court held the issue irrelevant because “even if discretionary, treble damages are warranted. Although the actions of the Defendants cannot be described as outrageous and stemming from an evil motive, their actions were willfully indifferent to the Plaintiffs' rights.” *Id.*

276. See *supra* text accompanying notes 270-72.

cases. The need for such discretion may depend on how broadly a particular state imposes multiple damages. In states that adopt a narrowly tailored approach of selectively choosing specific conduct (for example, the intentional and unlawful withholding of wages), there may be no need for such discretion. If the legislature determines that certain, specific actions taken with a specific state-of-mind are deserving of multiple damages, then it would be unlikely that a defendant in violation could show that the situation was unusual enough to allow that defendant to be exempted from multiple damages.

If a state adopts a much broader approach, applying multiple damages to all intentional wrongs or to very broad categories of such wrongs, the chances increase that there might be situations, unanticipated by the legislature, when the equities would not call for saddling the defendant with multiple damages. For example, in a state where consent is not a defense to battery, if the plaintiff and the defendant voluntarily engage in a fight, and only the plaintiff is injured, the defendant might be held liable for the plaintiff's injuries for having committed battery. In such a case, however, if the plaintiff has also engaged in the same wrongful behavior, the plaintiff might not deserve to receive multiple damages, and the court should have discretion not to award them.

One answer might be to include the kind of language that the courts have overlaid on the neutrally worded federal Civil Rights Attorney's Fees Awards Act of 1976.²⁷⁷ The Supreme Court has determined that under the statute, prevailing plaintiffs should normally receive a fee award "unless special circumstances would render such an award unjust."²⁷⁸ If the burden of persuasion were placed on the defendants, and if the courts did not allow the exception to swallow up the rule, such a provision would be reasonable.

Several states have taken a novel approach that combines both a mandatory and discretionary award. For example, in California the illegal cutting of timber results in a mandatory doubling of damages with discretionary trebling available if the cutting is willful.²⁷⁹ Massachusetts provides compensatory damages for all violations of the state age discrimination in employment act, including mandatory double damages for knowing violations of the statute and discretionary treble damages depending on the wrongfulness of the defendant's conduct.²⁸⁰

277. 42 U.S.C. § 1988(b) (2006).

278. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) (quoting *EEOC v. Christiansburg Garment Co.*, 550 F.2d 949, 953 (4th Cir. 1977)).

279. CAL. CIV. CODE § 3346 (West 1997).

280. MASS. GEN. LAWS ch. 151B, § 9 (2010), available at <http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter151B/Section9>. The law provides,

This approach is in line with the thesis of this Article: multiple damages serve the dual purposes of fully compensating plaintiffs and sufficiently deterring defendants. As long as the defendant's conduct meets the minimum state-of-mind requirement to make the imposition of multiple damages appropriate, doubling the damages should provide full compensation to the plaintiff. If the defendant's conduct was sufficiently wrongful to warrant deterrence, the court could award additional compensation if it were deemed necessary to deter such conduct.

V. CONCLUSION

In many cases of intentional tortious conduct, an award of compensatory damages to a prevailing tort plaintiff neither fully compensates the plaintiff nor adequately deters the defendant and others from similar conduct. Punitive damages may be available to deter truly outrageous conduct in some cases, but these damages have little effect on intentional wrongdoing of a less malicious nature. Difficulties in obtaining punitive damages, coupled with recent statutory and constitutional restrictions, have rendered this remedy less and less effective. Statutory attorney fees awarded to prevailing plaintiffs have been useful in facilitating litigation by plaintiffs who might not otherwise be able to bring suit and more fully compensating plaintiffs if they are successful. Attorney fees statutes have most commonly been used to encourage suits that further important government interests in areas such as civil rights, consumer and environmental protection, and antitrust. These statutes may not be suitable for use in a broader range of private litigation in which such important government interests are not involved.

An award of multiple damages—double or treble—to prevailing plaintiffs may be the best available remedy to fully compensate victims and more effectively deter a broad range of intentional and wrongful behavior. All states currently allow multiple damages in at least some cases, and many states allow them in a crazy quilt pattern of numerous discreet, narrowly drawn statutes. State legislatures should conduct a comprehensive examination of the use of multiple damages with an eye toward making them available in more cases. Most cases involving malicious, intentional, or extremely reckless wrongdoing that results in harm to a

If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the act or practice complained of was committed with knowledge, or reason to know, that such act or practice violated the provisions of said section four.

Id.

blameless victim should be considered candidates for at least double, and possibly treble, damages. States could do this by allowing multiple damages in all cases of intentional conduct and perhaps carving out some exceptions or giving judges the discretion to deny these damages in exceptional cases when their imposition would result in unfairness to the defendant. Alternatively, states could identify broad categories of wrongful behavior that would normally result in multiple damages. A less effective but possibly more politically realistic alternative would be to extend the remedy to many more discreet wrongs. Many multiple damages statutes are needlessly narrow, allowing them in some very specific situations while not allowing them in other very similar circumstances. Such statutes should be broadened to protect similarly situated plaintiffs and deter similarly situated defendants. At the very least, any time a state legislature is considering creating a new statutory tort, it should consider imposing multiple damages if the behavior being targeted is intentional and deserving of deterrence.

APPENDIX: PROPOSED STATUTE

A court shall impose damages double the amount of compensatory damages in any case of tortious conduct that was taken with the intent to cause harm, with the knowledge that it would cause harm, or in reckless disregard as to whether it would cause harm, unless special circumstances would render the award unjust. In cases of malicious or particularly egregious conduct, the court may award up to three times the amount of compensatory damages. Tortious conduct includes any actions that would subject a defendant to compensatory damages under the common law of torts or for violation of any statute designed to compensate persons harmed by the wrongful conduct of another, whether such statute provides for multiple damages or not.