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To Caesar What is Caesar's: An Audacious Claim for Punitive Damage Reform in Patent Law

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COMMENT

TO CAESAR WHAT IS CAESAR'S: AN AUDACIOUS CLAIM FOR PUNITIVE DAMAGE REFORM IN PATENT LAW

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I. INTRODUCTION

Fueled by advances in the fields of computer technology, pharmacology, and mechanical engineering, the United States has experienced a "patent explosion" over the last thirty years.[1] As defensive patenting, patenting for litigation, and patents for cross licenses are becoming the norm,[2] the volume of litigation in patent claims has doubled in the last two decades.[3] In response to this rise in litigation, Congress initiated legislative reform in an attempt to curb litigation trends, without significant success.[4] But these patent claims cannot be considered in a vacuum. At their heart, patent claims are no more than tort claims enforced through federal statutory protection. Accordingly, it is appropriate to consider tort reform measures when seeking solutions to prevent excessive patent litigation.

In general, tort reform—particularly in the area of damages—has sparked much legal debate by academics, judges, and legislators in the last half century.[5] Frequent large punitive damages awards, increased frequency of punitive damages in general, and the constant enticement of a potential punitive windfall have caused growing concern in the legal community about the structure and application of punitive damage awards.[6] This

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1. Bronwyn H. Hall, *Exploring the Patent Explosion* 1, 4-5, 17, 19 (Nat'l Bureau of Econ. Research, Working Paper No. 10605, 2004).

2. *Id.* at 3, 4, 9.

3. *See* Matthew Sag, *IP Litigation in United States District Courts: 1994 to 2014*, 101 IOWA L. REV. (forthcoming 2016) (manuscript at 4-5), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570803. While not a violent "explosion," the number of patent law cases has been steadily and significantly increasing, doubling in the 16 years between 1994 and 2010. *Id.* (manuscript at 16).

4. *See, e.g.*, *id.* (manuscript at 18) (describing the 2011 America Invents Act, which—rather than curbing litigation trends—resulted in a surge of new patent infringement claims).

5. *See* Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U.L. REV. 1573, 1574 (1997).

6. *Id.*

Comment offers a possible alternative to the continued and non-productive grant of punitive damages as a plaintiff's windfall. But that is not to say that punitive damages themselves are improper. It is clear that punitive damages are, and will always be, an important part of civil litigation.[7] They impose additional punishment on intentional, willful, and wanton tortfeasors by making an example of them to the public, and by providing sufficient, quasi-criminal punishment to deter the offender from committing the offense in the future. What is unclear—and what has been increasingly questioned of late[8]—is whether plaintiffs should be granted those awards. The damages are levied for the purpose of reforming or deterring an offender, and are only so imposed in cases where the offender's conduct merits their use. Technically, the plaintiff is already made whole by a compensatory damages award. Should the plaintiff be awarded a windfall? Would that windfall serve as a significant incentive to other potential plaintiffs (and their lawyers) to bring causes of action that they would not otherwise undertake? Can the damages be given to a more deserving entity and still serve the interests of justice?

This Comment seeks to answer these questions, and to show that a split-recovery system for punitive damages—if adopted by the Federal Patent Code—would be best suited to serve the interests of justice in patent claims and to help allay the disturbing upward trend in punitive damage awards in American courts.[9]

Part II will provide the background of punitive damages as a whole; the history of compensatory damages in general and in patent law; and the history of punitive damages in general and in patent law. Part II will also demonstrate that punitive damages are by their very nature special damages and historically have been used infrequently—and then only in cases of extreme or wanton misconduct. Further, Part II will discuss how in the last half-century, these damages have been used with significantly increased frequency, both in tort law generally and in patent law specifically. Finally, the section will outline the need for reform in patent law damages.

Part III will take a focused look at the need for reform both in punitive damages in general, and in patent law punitive damages in particular. It

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7. *See* discussion *infra* Part II.

8. *See* discussion *infra* Part III.

9. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 500-01 (1993) (O'Connor, J., dissenting) ("As little as 30 years ago, punitive damages awards were "rarely assessed" and usually "small in amount." Recently, however, the frequency and size of such awards have been skyrocketing. One commentator has observed that "hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." And it appears that the upward trajectory continues unabated." (internal citations omitted)).

will examine the split-recovery system, implemented by six states and several countries as part of the tort reform movement, and argue that such a system should be implemented in the exclusively federal world of patent law.

Part IV will examine the difficulties and concerns with implementing a split-recovery system in patent law punitive damages and seek to allay those fears. This Comment will show that proper application of split-recovery, while certainly a legal measure that is sure to offend the plaintiff's bar, will best serve the interests of justice and judicial economy in the federal courts.

Part V will recommend the application of a split-recovery system to 35 U.S.C. § 284, and will suggest several possible destinations for recovered funds.

II. BACKGROUND

Since the earliest days of American jurisprudence, punitive damages have been a source of great debate between judges, legislators, lawyers, and American citizens.[10] While these damages do serve a vital role in deterring wrongdoing, they can also serve as a powerful incentive for creative plaintiffs—and creative plaintiffs' lawyers—to invent and pursue claims with potentially high damages awards. The debate over punitive damages, and tort reform in general, is one that has consumed a great deal of thought, printed text, and scholarly study.[11] Some states, concerned that punitive damages create the potential for unjust windfalls for prospective plaintiffs, have imposed split-recovery systems in which punitive damage awards are split between the plaintiff and some entity of the state.[12] This Comment will demonstrate that the characteristics of patent law[13] make patent infringements uniquely social in harm. As such, it is fitting to take punitive damages and use them for the benefit of society, instead of allowing them to serve as a windfall for already-compensated plaintiffs.

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10. *See* discussion *infra* Part III.

11. *See, e.g.*, David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 371 (noting that in the face of "routine" punitive damage awards, commentators and courts have created a number of measures to reform damage awards).

12. *See* discussion *infra* Part III.

13. Namely, that (1) patent law is exclusively a creature of federal statute, (2) that patent protection provides for both social harm and social utility, and (3) that patent statutes both create and enforce a property right at the expense of social advancement.

A. Patent Law: A Brief History and Overview

The Copyright Clause, found in Article I, Section 8 of the U.S. Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."[14] In short, the clause gives Congress the power to distribute and regulate copyrights[15] and patents,[16] a power that Congress has exercised since the founding of this nation. This section will focus on Congress's patent legislation and activity throughout American history, as well as judicial interpretations of patent statutes.

The Patent Statute of 1790 was the first patent statute passed by the United States Government.[17] It created a national patent system using an examination structure, which required that at least two members of a three-member panel (comprised of the Secretary of War, the Secretary of State, and the Attorney General) approve all patent applications and determine whether the work was "sufficiently useful and important to cause letters patent to be made out in the name of the United States . . . ."[18] Needless to say, this system was not designed for a large volume of patent claims. During the three-year period that the 1790 Patent Statutes existed, the committee issued approximately fifty patents.[19] Commentators suggest that this figure was likely considerably less than the demand for patents at the time, which prompted the swift legislative change.[20] It is unsurprising, then, that Congress amended the Code in 1793, in part to accommodate a larger volume of claims.[21]

The 1793 Act introduced the practice of the federal patent claim, which required that each applicant provide a written description "in such full, clear and exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in the art . . . to make, compound, and use the same."[22] Early patent infringement cases began to apply a

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14. U.S. CONST. art. I, § 8.

15. *See* 17 U.S.C. §§ 101-1332 (2012) (the modern day copyright statute).

16. *See* 35 U.S.C. §§ 1-390 (2012) (the modern day patent statute).

17. Andrew P. Morriss & Craig Allen Nard, *Institutional Choice & Interest Groups in the Development of American Patent Law: 1790-1865*, 19 SUP. CT. ECON. REV. 143, 149 (2011).

18. Patent Act of 1790, ch. 7, 1 Stat. 109-112 (Apr. 10, 1790) (under this act, patents were only valid for a term not exceeding fourteen years).

19. Morriss & Nard, *supra* note 17, at 150.

20. *Id.* at 151.

21. *See id.* at 150.

22. Patent Act of 1793, ch. 11, 1 Stat. 318-323 (Feb. 21, 1793); *see* Morriss & Nard, *supra* note 17, at 151.

"substantial identity" test for infringement.[23] Furthermore, in the Patent Act of 1793, all patent infringement damages were required to be enhanced at least threefold.[24]

Between 1793 and 1922, Congress continued to amend the Patent Act.[25] Among the notable changes were: the reissue practice in the 1832 Act;[26] the expansion of the Patent Office in the 1836 Act;[27] the re-institution of the examination system in the 1836 Act;[28] the common law requirement of "more ingenuity and skill" than the ordinary mechanic;[29] and the judicially imposed doctrine of non-literal infringement from *Winans v. Denmead*.[30]

Today, patent law is governed by Title 35 of the United States Code (the "Modern Patent Act") and approximately two hundred years of case law.[31] The statute outlines the functions of the patent office and its employees,[32] patent applications,[33] patentable inventions and patentability requirements,[34] patent protection and remedies,[35] and the patent cooperation treaty.[36] The modern patent system continues to grant patents based on an examination system—albeit with more robust infrastructure than the original three member board in 1790.[37] Each year, the U.S. Patent and Trademark Office grants approximately 300,000 patents,[38] and approximately 6,000 patent infringement claims are filed in federal court.[39]

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23. *See* Morriss & Nard, *supra* note 17, at 152.

24. Patent Act of 1793, ch. 11, § 5.

25. *See, e.g.*, Patent Act of 1832**,** 4 Stat. 577 (1832); Patent Act of 1836, 5 Stat. 117 (1836); Patent Act of 1842, 5 Stat. 543 (1842); Patent Act of 1865, 13 Stat. 533 (1865); Patent Act of 1922, 42 Stat. 392 (1922).

26. *See* Patent Act of 1832, 4 Stat. 577 (1832).

27. *See* Patent Act of 1836, 5 Stat. 117 (1836).

28. *Id.*

29. *See* Hotchkiss v. Greenwood*,* 52 U.S. (11 How.) 248, 267 (1850).

30. Winans v. Demead, 56 U.S. (15 How.) 330, 337 (1853).

31. *See generally* 35 U.S.C. §§ 1-390 (2012).

32. *Id.* at §§ 1-33.

33. *Id.* at §§ 111-23.

34. *Id.* at §§ 100-05.

35. *Id.* at §§ 251-99.

36. *Id.* at §§ 351-76.

37. *See* Patent Act of 1790, 1 Stat. 109-112 (Apr. 10, 1790).

38. Patent Technology Monitoring Team (PTMT), *U.S. Patent Statistics Chart Calendar Years 1963–2014*, U.S. PAT. & TRADEMARK OFF. (Jun. 2015), http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm.

39. Brian C. Howard, *2014 Patent Litigation Year in Review*, LEX MACHINA (Mar. 26, 2015), http://pages.lexmachina.com/rs/lexmachina/images/2014%20Patent%20Litigation%20Report.pdf.

B. Damages in Patent Law

Patent law is a creature of statute.[40] Contained within 390 sections of the Modern Patent Act is the whole of the United States's statutory protection for patented material.[41] Of these sections, only section 284 authorizes damages.[42] This section mirrors common tort law in that it provides for—but does not directly name—two distinct types of damages: compensatory and punitive.[43]

1. Compensatory Damages: An Overview

Compensatory damages, while not the focus of this article, provide the framework for understanding this article's position. As often noted by commentators, compensatory damages are a fairly easy legal *concept*, but much more difficult to properly *approximate*.[44]

a. Compensatory damages in general

The purpose of compensatory damages in civil cases is to replace by monetary approximation the fair market value of what a person has lost because of an offender's actions.[45] A plaintiff may suffer and be compensated for any type of injury caused by wrongful conduct that can be reasonably valued such as destroyed property; loss of use of property or

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40. Crown Die & Tool Co. v. Nye Tool & Mach. Works, 261 U.S. 24, 40 (1923) ("Patent property is the creature of statute law and its incidents are equally so and depend upon the construction to be given to the statutes creating it and them, in view of the policy of Congress in their enactment.").

41. *See id.*

42. *See* 35 U.S.C. § 284 (2012) ("Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court. When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed. Increased damages under this paragraph shall not apply to provisional rights under section 154(d). The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances.").

43. *Id.*

44. *See* Deborah F. Buckman, Annotation, *Award of compensatory damages under 42 U.S.C.A. § 1081a for violation of Title VII of Civil Rights Act of 1964*, 154 A.L.R. FED. 347 (1999).

45. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (citing Restatement (Second) of Torts § 903 (1979), which states, in relevant part, that compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.").

chattel; medical expenses; loss of work; psychological injuries; financial injuries; or physical harms.[46]

While compensatory damages can be difficult to calculate, especially when factoring intangible losses or future losses, they must be approximated at the time of the action and they are paid in full to the victim at the conclusion of the action.[47] According to the Supreme Court, compensatory damages are distinct from punitive damages because compensatory damages are given in every civil action in which it is necessary to make the plaintiff whole—and they are given *for the purpose* of making the plaintiff whole—while punitive damages are given for the purpose of making an example of, or deterring the offender from future misconduct.[48]

b. Compensatory damages in patent law

Title 35 of the United States Code states that,

> [u]pon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court. When the damages are not found by a jury, the court shall assess them.[49]

In theory, compensatory damages are a simple concept: replace what was lost. However, in the context of patent law, "what was lost" is the right to exclusive ownership of an idea. Courts have long struggled with the appropriate way to value the exclusive possession of an idea.[50] Suffice it to say, this is not an easy task. Countless hours of discovery, argument, and testimony are generally required in order for a court to make a reasonable

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46. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986); Akouri v. Fla. Dep't of Transp., 408 F.3d 1338, 1345 (11th Cir. 2005); Randall v. Prince George's Cty, Md., 302 F.3d 188, 208 (4th Cir. 2002); Coleman v. Rahija, 114 F.3d 778, 786-87 (8th Cir. 1997).

47. *See* DONALD S. CHISUM, CHISUM ON PATENTS § 20.03 (Matthew Bender 2015).

48. *See, e.g.*, *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 415–23 (discussing the standards for awarding punitive damages established by Cooper Indus. v. Leatherman Tool Grp., 532 U.S. 424, 432 (2001)).

49. 35 U.S.C. § 284.

50. *See, e.g.*, Peter S. Menell et al., *Patent Case Management Judicial Guide* § 7.3.4.7 (2009) ("One of the most vexing issues in patent law today relates to the proper measure of damages."); Daralyn J. Durie & Mark A. Lemley, *A Structured Approach to Calculating Reasonable Royalties*, 14 LEWIS & CLARK L. REV. 627, 628 (2010) ("The calculation of patent damages has become one of the most contentious issues in all of intellectual property (IP) law.").

approximation of a party's losses.[51] While the task is no easy one, this author (and, more importantly, the U.S. Government) is confident that the adversarial system is capable of producing a fair and just value for loss of patent exclusivity.

c. Punitive damages: An overview

Courts and legal systems have utilized punitive damages, in one form or another, since the earliest days of the law.[52] In stark contrast to compensatory damages, punitive damages are extra-compensatory: they provide monetary compensation beyond the value of harm incurred.[53] Furthermore, unlike compensatory damages, punitive damages are directed towards the offender as additional reproof.

(1) The history of punitive damages

The doctrine of punitive damages—only recently named—is not a newcomer to the law, nor is it unique to the United States.[54] In fact, the use of private damages as punishment can be traced back to the earliest origins of man-made law.[55] In nearly all historical instances, the doctrine (prescribing multiple damages—or damages in excess of actual damages) serves three purposes: (1) to provide the courts with a means of increased punishment for behavior, (2) to provide an increased deterrent for certain

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51. *See* Am. Intellectual Prop. Law Ass'n, *2013 Report of the Economic Survey: Overview*, http://www.ipisc.com/custdocs/2013aipla%20survey.pdf (last visited Jan. 15, 2016) (showing that where the amount in question in a patent claim is between $1 million-$25 million, defending the claim costs an average of $1.7 million at the end of discovery and $2.8 million after trial).

52. *See supra* Part II.

53. *Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Although compensatory damages and punitive damages are typically awarded at the same time by the same decision-maker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as 'quasi-criminal,' operate as 'private fines' intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injuries is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation . . . .") (citation omitted).

54. Francis Scott Baldwin, *Punitive Damages Revisited*, INT'L ACAD. OF TRIAL LAW., http://www.iatl.net/files/public/93_punitive_i4a.pdf ("The doctrine of punitive damages is not a 'Johnny come late' to the law. It has been known for centuries. It is a doctrine that evolved largely to protect the little person against the wrongs of the economically strong and powerful.").

55. David L. Walther & Thomas A. Plein, *Punitive Damages: A Critical Analysis:* Kink v. Combs, 49 MARQ. L. REV. 369, 370 (1965-1966).

types of tortious activity, and (3) to provide a necessary remedy against the abuse of power by economic elites.[56]

The Mosaic Law, for example, provided for special damages using a system of fines.[57] In cases involving chattel, the Mosaic Law set forth that, "[w]hen someone steals an ox or a sheep and slaughters or sells it, he shall restore five oxen for the one ox, and four sheep for the one sheep."[58] In the setting of intentional torts, the Mosaic Law states that, "[w]hen men have a fight and hurt a pregnant woman, so that she suffers a miscarriage, but no further injury, the guilty one shall be fined as much as the woman's husband demands of him, and he shall pay in the presence of the judges."[59]

Similarly, the Babylonian Hammurabi Code and the Hindu Code of Manu both contain provisions for multiple damages and awards in excess of actual loss.[60] By the time of Plato, compensation had been distinguished from punishment:

> [w]hen any one commits any injustice, small or great, the law will admonish and compel him either never at all to do the like again, or never voluntarily, or at any rate in a far less degree; and he must in addition pay for the hurt.[61]

Roman law also provided for multiple damages, often to constrain the actions of wealthy elites.[62]

Commentators generally agree[63] that the modern doctrine of punitive damages can trace its origins to two English cases from 1763: *Huckle v. Money*[64] and *Wilkes v. Woods*.[65] In *Wilkes* and *Huckle*—cases arising out of

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56. *See* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1287-90 (1993).

57. *Id.* at 1285 n.81.

58. *Exodus* 21:37 (New American Bible Revised Edition).

59. *Exodus* 21:22 (New American Bible Revised Edition).

60. Rustad & Koenig, *supra* note 56, at 1285; James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119 (1984) (noting that statutes providing for awards in excess of actual damages existed in Hindu Code of Manu and Code of Hammurabi).

61. PLATO, LAWS IX (Benjamin Jowett trans., 360 B.C.), http://classics.mit.edu/Plato/laws.9.ix.html.

62. Rustad & Koenig, *supra* note 56, at 1286 ("One Lucius Veratius used to amuse himself by striking those whom he met in the streets in the face, and then tendering them the legal amends, from a wallet which a slave carried after him for that purpose.").

63. Jeff Duncan Brecht, *Oregon's Procedural Due Process and the Necessity of Judicial Review of Punitive Damage Awards:* Honda Motor Co. v. Oberg*: "Stop the insanity*!" 15 N. ILL. U. L. REV. 377, 381 (1995).

64. Huckle v. Money, (1763) 95 Eng. Rep. 768.

the same events—agents of the King arrested Wilkes and Huckle, both English citizens, during a raid on Wilkes's home conducted in a search for the author and distributor of "North Briton," a pamphlet that disparaged the monarch.[66] Huckle had no connection to the pamphlet, but was detained along with Wilkes for a number of hours.[67] Like the Greeks and Romans before them, the English considered it imperative that the poor have some means to prevent the oppression of social elites. Accordingly, the English courts granted both Wilkes and Huckle damage awards in excess of their actual damages (which were minimal).[68] Lord Camden, author and presiding justice in *Huckle*, stated:

> [T]hey [the jury] saw a magistrate over all the King's subjects exercising arbitrary power, violating Magna Charta [sic], and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages.[69]

Together, these two cases formed the legal foundation for punitive damages in England, a doctrine that opens the door to additional damages in cases of intentional and aggravated misconduct to serve as punishment on the defendant where the actual damages do not serve as an adequate deterrent.[70] This doctrine, then called "exemplary damages," was adopted by the judiciary of a fledgling nation just across the ocean.[71]

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65. Wilkes v. Wood, (1763) 98 Eng. Rep. 489. Of note, commentators consider *Wilkes v. Wood* to be the legal foundation for the United States Fourth Amendment. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 (1994).

66. *Wilkes*, 98 Eng. Rep at 489.

67. *Huckle*, 95 Eng. Rep. at 769.

68. *Wilkes*, 98 Eng. Rep. at 489; Linda J. Guss, *Punitive Damages Under Uninsured Motorist Coverage—Oregon's Probable Approach,* 24 WILLAMETTE L. REV. 933, 938 (1988). Wilkes brought an action for trespass, and Huckle sought damages for trespass and false imprisonment. *Id.* Oddly enough, not only was Huckle left, by and large, unscathed by the event, fed "beefsteake [sic] and beer" and treated well during his brief imprisonment, he was awarded "300 pounds in damages, which was nearly 300 times his weekly wages." *Id.* at 938 n.32

69. *Huckle,* 95 Eng. Rep. at 769.

70. *See* THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES, § 355, at 687, 701 (Arthur G. Sedgwick & Joseph H. Beale eds., 9th ed. 1912) ("In actions of tort, when gross fraud, wantonness, malice, or oppression appears, the jury [is] not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment

(2) Punitive damages in the United States: a brief history

American courts adopted the doctrine of exemplary damages soon after the doctrine's birth in England. In 1784, the first reported American case involving such damages was decided in *Genay v. Norris*.[72]

In *Genay v. Norris*, the Supreme Court of South Carolina awarded punitive damages to a plaintiff because of injuries that he received after he drank wine that was secretly tainted by the defendant.[73] In *Genay*, the plaintiff and defendant, who were both intoxicated, planned to settle a quarrel between them with a duel.[74] Shortly before the duel was to take place, the defendant, a physician, proposed a toast of reconciliation.[75] Contrary to the apparent gesture of goodwill, the defendant secretly spiked the wine with a large dose of cantharides, poisoning the plaintiff.[76] The court awarded the plaintiff what it termed "very exemplary damages" against the physician-defendant for intentionally causing him "extreme and excruciating pain."[77] The court instructed the jury that "a very serious injury to the plaintiff . . . entitled him to very exemplary damages, especially from a professional character, who could not plead ignorance of the operation, and powerful effects of this medicine."[78]

So from the beginning, punitive damages in the United States have been used to protect the weak and powerless from the aggression of the powerful—either economic, intellectual, or social—by allowing courts to exact from them greater monetary punishment for intentional wrongdoing.

In *Coryell v. Colbaugh*, shortly after *Genay*, the New Jersey Supreme Court followed its sister court in awarding punitive damages, this time against a defendant who breached his promise to marry the plaintiff.[79] In *Coryell*, the jury awarded additional damages to make an example of the defendant, after being instructed by the judge "not to estimate the damages

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on the defendant, and hold him [or her] up as an example to the community. It might be said, indeed, that the malicious character of the defendant's intent does, in fact, increase the injury, and the doctrine of exemplary damages might thus be reconciled with the strict notion of compensation; . . . [T]he idea of compensation is abandoned and that of punishment introduced.").

71. *See* Brecht, *supra* note 63, at 382.
72. Genay v. Norris, 1 S.C.L. 6 (1 Bay 6) (1784).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 7.
79. Coryell v. Colbaugh, 1 N.J.L. 90, 91 (1791).

by any particular proof of suffering or actual loss; but to give damages for *example's sake*, to prevent such offenses in [the] future."[80]

Coryell illustrates a second important principle of punitive damages: to serve as an example and warning to others that certain types of behavior will not be tolerated by civilized society. Unlike the defendant in *Genay*, the defendant in *Coryell* was actually a poor man.[81] Nonetheless, the Chief Justice held,

> [t]hat the defendant's poverty ought not to prevent exemplary damages; that poverty was no justification or extenuation of a crime like this, and it was their duty to measure the injury he had done, and not the purse of the defendant; that it would be better to treat him in this manner than, by giving small damages, to countenance an idea that a man, because poor, should be let loose on society.[82]

Punitive damages thus serve the important purpose of imposing a greater degree of punishment on an offender when typical damages do not suffice. Not only do these damages serve to make the defendant an example for others, an express goal of the Chief Justice in *Coryell*, they also give additional incentive to the defendant to forswear his behavior.[83] *Coryell* gives a clear example of how punitive damages may be used as a "quasi-criminal punishment" in a civil case.[84] Since *Coryell*, commentators, judges, and legislators alike have struggled with this apparent overlap of legal

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80. *Id.*

81. *Id.* The level of poverty was especially acute when compared with the physician-defendant in *Genay*.

82. *Id.*

83. *Id.* ("He concluded by observing that it was a serious matter—involved in it the protection of innocence, the prevention of disgrace to families, and the punishment of offences too common, and too often lightly treated.").

84. *See supra* Part II; *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting) (describing punitive damages as "quasi-criminal punishment"); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989) ("[P]unitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law . . . ."); Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (explaining that punitive damage awards are "quasi-criminal"); Owen, *supra* note 11, at 1259-60 (detailing the purpose of punitive damages in products liability litigation); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problem of Fairness, Efficiency and Control,* 52 FORDHAM L. REV. 37, 43 (1983-1984) (addressing quasi-criminal nature of punitive sanctions).

discipline.[85] Since defendants in civil cases are not given the same procedural protections as criminal defendants, can they constitutionally be required to pay quasi-criminal sentences without these protections?

In 1851, in *Day v. Woodworth*, the Supreme Court stated that the doctrine of punitive damages was supported by "repeated judicial decisions for more than a century," and gave in depth explanation of the function and purpose of the doctrine.[86] In *Woodworth*, the owners of a mill dam brought suit against the owners of the adjacent mill for forcibly taking down part of the dam after alleging that it was damaging the mill.[87] Justice Grier, writing for the majority, stated that:

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. . . . [W]here the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.' This has been always left to the discretion of the jury . . . It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit.[88]

Justice Grier stated that the jury may inflict punitive damages (synonymous with exemplary damages) in order to punish the delinquency more

85. *See generally* Janice Kemp, *The Continuing Appeal of Punitive Damages: An Analysis of Constitutional and Other Challenges to Punitive Damages, Post-Haslip and Moriel*, 26 TEX. TECH L. REV. 1, 26 (1995).

86. Day v. Woodworth, 54 U.S. 363, 371 (1851).

87. *Id.* at 363-64.

88. *Id.* at 371.

adquately.[89] Furthermore, wanton, malicious, gross, or outrageous conduct is prerequisite to these increased damages.[90]

In sum, punitive damages in this nation are modeled after exemplary and multiple damages doctrines that have been used throughout the world's history. More specifically, they exist as legal measures that are directed in all respects toward the offender in an action. Their goal—quite unlike compensatory damages—is not to compensate the plaintiff for any actual harm suffered, but rather to punish or reform the offender by requiring that they pay substantially more for their offense.

(3) Punitive damages in patent law

Patent law is a creature of statute.[91] So too are its damages. The modern version of the patent statute allows for the possibility of treble damages for willful infringement.[92] But this possibility did not always exist. Before the modern patent statute, punitive damages were available only under common law—and infrequently given.

Boston Manufacturing Co. v. Fiske was one of the first patent claim cases in America to involve punitive damages.[93] In *Fiske*, a case involving patent infringement that was analogous to a previously decided admiralty case, Justice Story, writing for the majority, stated:

> [I]t is far from being uncommon in the admiralty to allow costs and expences, and to mulct the offending parties, even in exemplary damages, where the nature of the case requires it. . . . Courts of admiralty allow such items, not technically as costs, but on the same principles, as they are often allowed damages in cases of torts, by courts of common law, as a recompense for injuries sustained, as exemplary damages, or as a remuneration for expences incurred, or losses sustained, by the misconduct of the other party.[94]

Like *Coryell*, the *Fiske* Court treated punitive damages in patent claims under the common law in largely the same as they were in all other civil claims.[95]

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89. *Id.*

90. *Id.*

91. *See* 35 U.S.C. §§ 1-390 (2012).

92. *Id.* at § 284.

93. Boston Mfg. Co. v. Fiske, 3 F. Cas. 957 (C.C.D. Mass. 1820) (No. 1681).

94. *Id.* at 957.

95. *See* Coryell v. Colbaugh, 1 N.J.L. 90, 91 (1791) (allowing punitive damages in the setting of willful, wanton, or malicious conduct).

Since that time, and through the multiple iterations of the Patent Act,[96] Congress has more thoroughly addressed patent damages. Today, Title 35 of the United States Code addresses all available forms of damages in patent actions, including punitive damages.[97] Punitive damages—though only called "increased damages"[98] in the section—are found along with compensatory damages in 35 U.S.C. § 284:

> Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court. When the damages are not found by a jury, the court shall assess them. *In either event the court may increase the damages up to three times the amount found or assessed.* Increased damages under this paragraph shall not apply to provisional rights under section 154(d).[99]

Under this section, a court may award exemplary damages up to three times the actual damages.[100] This additional amount, if assessed, is awarded to the plaintiff in the action.[101]

Clearly, § 284 is a short section that does not answer every question about damages in patent actions. Here, like in most other legal fields, a bevy of case law serves to flesh out the statute. Despite the frequency of punitive damages awarded in patent claims, however, the Supreme Court has considered punitive damages in patent law only rarely.[102] Where damages are awarded, the Court has typically required a degree of willful or wanton conduct as a prerequisite. The imposition of these damages, however, was considerably more in flux.

In *Seymour v. McCormick*, an 1854 case involving the patent of a grain-harvesting machine, the Court upheld a change to the Patent Act of 1836 that limited the power to assess punitive damages to the court—instead of the jury.[103] The Court stated that:

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96. *See supra* Part II.

97. 35 U.S.C. § 284. Section 284 has been in its current form since 2009, when it underwent small edits from the Leahy-Smith America Invents Act.

98. *Id.* While perhaps little more than a semantic quibble, commentators and courts agree that despite being called "increased damages" in the section, that these are in fact punitive damages.

99. 35 U.S.C. § 284 (emphasis added).

100. *Id.*

101. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

102. CHISUM, *supra* note 47, at § 20.03.

103. Seymour v. McCormick, 57 U.S. (16 How.) 480 (1853).

> there is no good reason why taking a man's property in an invention should be trebly punished, while the measure of damages as to other property is single and actual damages. It is true, where the injury is wanton or malicious, a jury may inflict vindictive or exemplary damages, not to recompense the plaintiff, but to punish the defendant. In order to obviate this injustice, the Patent Act of 1836 confines the jury to the assessment of "actual damages." The power to inflict vindictive or punitive damages is committed to the discretion and judgment of the court within the limit of trebling the actual damages found by the jury.[104]

This holding, one of the first under the modern patent era, established that the Court holds the power to inflict punitive damages on a plaintiff.

Since that time, the Court in *Clark v. Wooster* and in *Topliff v. Topliff* continued to expand and clarify the definitions of patentable terms, damage perquisites, damage calculations, and exemplary damages.[105]

(4) The "increased damages" in 35 U.S.C. § 284 are punitive damages

As a final preliminary matter, it is important—albeit relatively straightforward—to establish that the treble damages provided for in 35 U.S.C. § 284 are, in fact, punitive damages. While there are some who argue that treble damages do not fall within the technical definition of punitive damages,[106] this reasoning is untenable for two reasons.

First, treble damages are punitive because, like punitive damages, they are generally premised on willful infringement or bad faith.[107] Treble damages are provided for in only a limited number of places in the U.S. Code. Of these, three areas are most notable: (1) for civil remedies against

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104. *Id.* at 488-89.

105. *See* Topliff v. Topliff, 145 U.S. 156 (1892); Clark v. Wooster, 119 U.S. 322 (1886).

106. *See, e.g.*, Robert S. Murphy, *Arizona Rico, Treble Damages, and Punitive Damages: Which One Does Not Belong?*, 22 ARIZ. ST. L.J. 299 (1990) (suggesting a differentiation between treble damages and punitive damages in the setting of the federal RICO statute); Charles A. Sullivan, *Breaking Up The Treble Play: Attacks On The Private Treble Damage Antitrust Action,* 14 SETON HALL L. REV. 17, 56 (1983) (arguing that treble damages are not punitive); Lawrence Vold, *Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory,* 28 KY. L. J. 117, 119 (1940) (arguing that in the context of antitrust litigation, treble damages should be seen as compensatory, not punitive).

107. *See* Yarway Corp. v. Eur-Control USA, Inc., 775 F.2d 268, 277 (Fed. Cir. 1985) ("It is well-settled that enhancement of damages must be premised on willful infringement or bad faith.").

commerce and trade monopolies,[108] (2) for civil remedies against racketeering,[109] and (3) for damages in patent infringement.[110] In these sections, as well as in the common law, "enhancement of damages must be premised on willful infringement or bad faith."[111] According to the Federal Circuit in *Sensonics, Inc. v. Aerosonic Corp.*, "[e]nhancement is not a substitute for perceived inadequacies in the calculation of actual damages, but depends on a showing of willful infringement or other indicium of bad faith warranting punitive damages."[112] Therefore, enhanced damages are punitive in nature because they are applied only when there is bad faith warranting extra punitive measures.

Second, the circuits have treated enhanced damages, including the treble damages of 35 U.S.C. § 284, as punitive.[113] As the Federal Circuit elaborated in *Beatrice Foods Co. v. New England Printing and Lithographing Co.*, enhancement of damages under § 284 requires a showing of "willful infringement or bad faith"—language that mirrors that of punitive damages.[114] Section 284's increased damages, therefore, are by nature punitive.

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108. *See* 15 U.S.C. § 15 (2012) ("Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").

109. *See* 18 U.S.C. § 1964 (2012) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.").

110. *See* 35 U.S.C. § 284.

111. *Yarway Corp.*, 775 F.2d at 277.

112. Sensonics, Inc. v. Aerosonic Corp., 81 F.3d 1566, 1574 (Fed. Cir. 1996).

113. *See* Shatterproof Glass Corp. v. Libbey-Owens Ford Co., 758 F.2d 613, 628 (Fed. Cir. 1985) (stating that absent willful infringement, enhanced damages are usually not warranted).

114. Beatrice Foods Co. v. New England Printing & Lithographing Co., 923 F.2d 1576, 1578 (Fed. Cir. 1991) (quoting Yarway Corp. v. Eur–Control USA, Inc., 775 F.2d 268, 277 (Fed. Cir. 1985)).

III. PUNITIVE DAMAGES IN PATENT LAW: A CALL FOR REFORM

A. A Punitive Controversy

It is no secret that punitive damages have been the cause of much controversy in recent years.[115] Commentators, judges, legislators, and—perhaps most importantly—the public have all become increasingly aware of the growing frequency and size of punitive damage awards in civil cases and have grown increasingly alarmed at the trend.[116] Kimberly A. Pace quotes Justice O'Conner in describing this trend:

> As little as 30 years ago, punitive damages awards were "rarely assessed" and usually "small in amount." Recently, however, the frequency and size of such awards have been skyrocketing. One commentator has observed that "hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." And it appears that the upward trajectory continues unabated.[117]

Ms. Pace continues to argue that, "[a]n increase in the magnitude and frequency of punitive damage awards, however, necessitates a reconsideration of the doctrine and precipitates the need for safeguards to protect the tort system from abuse."[118] She opines that punitive damage reform must be forthcoming to deal with the many shortcomings of the doctrine, namely,

> that punitive damages cause unnecessary litigation; are unjustified and excessive; far exceed statutory penalties for similar conduct; subject defendants to multiple punishments for the same conduct; overcompensate plaintiffs; are detrimental to

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115. *See Punitive Damages Reform*, AM. TORT REFORM ASS'N, http://www.atra.org/issues/punitive-damages-reform (last visited Oct. 28, 2015).

116. *Id.*

117. Pace, *supra* note 5, at 1574-76 (quoting TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting)) ("Perhaps most troubling, however, is the fact that although punitive damages are quasi-criminal in nature, they are imposed in the course of civil litigation without many of the procedural safeguards that accompany criminal penalties. The rise in punitive damage awards and the need to implement safeguards have not gone unnoticed by state legislatures, the judiciary, and various other entities. Forty-six states have passed tort reform legislation; there is a new Restatement of Torts; the Supreme Court has rejected a punitive damage award as unconstitutionally excessive; and the National Conference of Commissioners on Uniform State Laws recently approved a Model Punitive Damages Act." (citations omitted)).

118. *Id.* at 1575.

> society because they handicap the competitiveness of American businesses; are responsible for rising insurance costs; and are unconstitutional on a variety of grounds.[119]

Each of these grounds is deserving of discussion, and some have more merit than others. For the purposes of succinctness, this Comment will only address the three most prominent.

First, legal scholars suggest that punitive damages serve as an incentive for unnecessary litigation.[120] It is no secret that the promise of a punitive damages award is a powerful motivator for plaintiffs and plaintiffs' lawyers. Even when the award amounts are constitutionally limited to single digit ratios, as they have been in *BMW Inc. v. Gore*[121] and *State Farm v. Campbell*,[122] the promise of even single digit multiples of actual damages is a very attractive one. In the patent law setting, where the maximum punitive recovery is a three-to-one ratio of punitive to compensatory damages, a favorable verdict can still result in a significant windfall.[123] Proponents of the current doctrine of punitive damages argue that plaintiffs who have suffered legitimate harm at the hands of defendants, in any type of civil action, are more entitled to damages arising out of the action than anyone else.[124] While it is true that the plaintiffs have suffered at the hands of the defendant, they have already been completely made whole by compensatory damages.[125] Commentators argue that in practice, compensatory damages may not always completely compensate the plaintiff, due to multiple factors, including:

> [1] statutory limits on recovery of damages for pain and suffering, [2] statutory limits on recovery of damages in medical malpractice cases, [3] insolvency of responsible parties combined

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119. *Id.*

120. *See* J. Fieweger, *The Need for Reform of Punitive Damages in Mass Tort Litigation:* Juzwin v. Amtorg Trading Corp., 39 DEPAUL L. REV. 775, 816 (1990).

121. BMW of N. Am. v. Gore, 517 U.S. 559, 581-82, 585-86 (1996) (holding that a 500-to-1 ratio of punitive damages to compensatory damages was grossly excessive and violated the due process clause of the Constitution).

122. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (discussing how greater than single-digit ratios of punitive to compensatory damages will almost never be allowed to stand out of due process concerns).

123. 35 U.S.C. § 284.

124. *See* Pace, *supra* note 5, at 1579-80.

125. Jill Wieber Lens, *Honest Confusion: The Purpose of Compensatory Damages in Tort and Fraudulent Misrepresentation*, 59 KAN. L. REV. 231, 231 (2010) ("[I]n tort law, the purpose of compensatory damages is to make the plaintiff whole by putting him in the same position as if the tort had not occurred.").

> with pro rata fault statute, and [4] limitations on the available amount of coverage under insurance policies.[126]

However, these arguments fail to correctly understand the nature of compensatory and punitive damages. If compensatory damages awards are not properly compensating plaintiffs for their losses, this shortcoming must be addressed and remedied in their own right, not compensated for with other, ill-fitting legal remedies. To assume that punitive damages can and should be awarded as a stop-gap to fill the hole left by inadequate compensatory damages makes punitive damages—a measure designed for extraordinary circumstances—dangerously ordinary.

Second, legal scholars suggest that punitive damages overcompensate plaintiffs. This critique also has merit. Commentators have long argued that when punitive damages are awarded to a plaintiff, the plaintiff experiences an unjust windfall.[127] Chief Justice Rehnquist, in his dissenting opinion in *Smith v. Wade*, stated that

> [a] fundamental premise of our legal system is the notion that damages are awarded to compensate the victim—to redress the injuries that he or she actually suffered. . . . [T]he doctrine of punitive damages permits the award of "damages" beyond even the most generous and expansive conception of actual injury to the plaintiff.[128]

Third, legal scholars suggest that punitive damages subject defendants to multiple punishments for the same conduct.[129] Commentators and judges have long been concerned that punitive damages subject defendants to a form of double jeopardy for their actions, since punitive damages are a quasi-criminal punishment.[130] While there is merit to this concern, it has

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126. Lee Katherine Goldstein, *Splitting Punitive Damages with the State*, 38 COLO. LAW. 105 (2009) (arguing that the idea of punitive damages as a windfall is a myth and must be dispelled).

127. Leo M. Stepanian II, *The Feasibility Of Full State Extraction Of Punitive Damages Awards*, 32 DUQ. L. REV. 301, 305-06 (1994) ("Nevertheless, where a plaintiff recovers compensatory damages for the harm he or she suffered and also recovers punitive damages, the plaintiff is overcompensated, and, thus, receives a windfall.").

128. Smith v. Wade, 461 U.S. 30, 57-59 (1983) (Rehnquist, J., dissenting) (stating that punitive damages encourage unnecessary litigation).

129. *See generally* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003).

130. The "quasi-criminal" or penal nature of punitive damages attracted the attention of the United States Supreme Court. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (holding that the Eighth Amendment's prohibition against

little bearing on the purposes of this Comment, because it questions the efficacy of punitive damages in general, not their prospective targets.

Finally, it is important to note that while punitive damage awards are becoming more frequent, they are not necessarily becoming larger or subject to runaway jury sympathies.[131] Judges frequently limit high punitive damages awards before the end of a lawsuit's lifecycle.[132] In a study of punitive damage verdicts, Rustad and Koening found that there was a great difference between punitive damages awarded and punitive damages upheld.[133] They found that forty percent of all cases involving punitive damages were settled prior to appeal, and that "nearly one-third of the verdicts in the sample were ultimately reversed or remitted by appellate panels."[134]

However, the fact that punitive damage awards are neither as outrageous nor as frequent as the media portrays them, does not change the philosophic argument against awarding punitive damages to a fully compensated plaintiff. This concern would be present even if punitive damages were extraordinarily rare—something they are certainly not.[135] Furthermore, while extreme punitive damage awards may be mitigated on appeal, this involves lengthy and costly legal footwork on the part of both plaintiffs and defendants, and greatly encumbers the judicial economy. It is wise, in the setting of potentially extraordinary punitive damage awards that would necessitate mitigation, to remove the incentive for plaintiffs to seek (and juries to award) such exorbitant amounts.

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excessive fines and penalties does not apply to the award of punitive damages in a case between two private parties).

131. *See* Mark Peterson et. al, *Punitive Damages: Empirical Findings*, RAND INST. FOR CIVIL JUSTICE 28 (1987), http://www.rand.org/pubs/reports/R3311.html (reporting results from California punitive damages study); U.S. GEN. ACCOUNTING OFFICE, PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES 46 (1989) (documenting that judges reduced punitive damages awards in 29% of studied product liability cases).

132. *See* Pace, *supra* note 5, at 1587.

133. Rustad & Koenig, *supra* note 56, at 1308 n.187; William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, REGULATION, Sept.-Oct. 1986, at 33-36.

134. Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 55 (1992) (reporting findings from nationwide study of the size, incidence, and characteristics of punitive damages in products liability from 1965-1990).

135. *See* THOMAS H. COHEN & KYLE HARBECK, PUNITIVE DAMAGE AWARDS IN STATE COURTS, 2005 (Office of Justice Programs 2011) (finding that 12% of plaintiffs seek punitive damages and that punitive damages are ultimately awarded in 5% of trials where the plaintiff prevailed).

B. Split-Recovery: a Wise Compromise

In the last half-century, the states have been busy enacting tort reform legislation to combat the increasing frequency of punitive damage awards. To date, thirteen states have enacted split-recovery statutes that redirect punitive damage awards to the public instead of to the individual, eight of which are still in effect.[136] Indeed, even some of the most ardent opponents of punitive damage reform agree that punitive damage awards in some contexts are best given to state for public use. David Owen, professor of tort law at the University of South Carolina, writes in a scholarly piece defending the non-compensatory nature of punitive damages that:

> Since punitive damages are noncompensatory, they provide the plaintiff with an undeserved "windfall," and the public—whose interests are supposedly vindicated by such assessments—is left without any monetary benefit from the penal fine. The "windfall" argument is largely answered above in terms of the important instrumental effect of such "windfalls" in achieving the educative, retributive (or restitutionary), deterrent, compensatory and law enforcement functions of punitive damages. *However, where a plaintiff recovers an enormous verdict*, . . . then it seems appropriate for the "excess" portion to be handed over to the public's representative, perhaps to finance public law enforcement in the future, or for some other public good, preferably to help ameliorate the type of social problem attributable to the type of misconduct engaged in by the defendant.[137]

Even Professor Owen—a staunch supporter of plaintiff's receiving punitive damages[138]—agrees that in certain scenarios, punitive damages are better

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136. *See* Skyler Sanders, *Uncle Sam and the Partitioning Punitive Problem: A Federal Split-Recovery Statute or a Federal Tax*, 40 PEPP. L. REV. 785, 803 (2013). Alaska, California, Illinois, Indiana, Iowa, Missouri, Oregon, and Utah currently retain their split-recovery statutes. See ALASKA STAT. § 09.17.020(j) (2004); CAL. CIV. CODE § 3294.5(b) (West 2006); GA. CODE ANN. § 51-12-5.1(e)(2) (2000); 735 ILL COMP. STAT. ANN. 5/2-1207 (2003); IND. CODE § 34-51-3-6 (1999); IOWA CODE. § 668A.1(2) (1998); MO. ANN. STAT. § 537.675(g) (2005); OR. REV. STAT. § 31.735 (2003); and UTAH CODE ANN. § 78B-8-201 (2004). As discussed *infra* Part III.B., Colorado's statute, COLO. REV. STAT. § 13-21-102(4) (1987), was declared unconstitutional by the Colorado Supreme Court in Kirk v. Denver Publ'g Co., 818 P.2d 262, 266 n.5 (Colo. 1991) (en banc).

137. *See* Owen, *supra* note 11, at 413 (emphasis added).

138. *See id.* at 381 ("[T]he variety of goals served by punitive damages present a powerful case for making them generally available within a system of private law.").

directed towards the public representative than the plaintiff. Nine states agree with Mr. Owen.

In Florida, one of the first split-recovery states, the legislature enacted a measure that, (1) limits punitive damages to three times the award of compensatory damages, unless a plaintiff can demonstrate by "clear and convincing" evidence that a higher award would not be excessive, and (2) requires sixty percent of the award to be paid to the state's General Fund or Medical Assistance Trust Fund.[139]

Iowa's statute, first enacted in 1986, introduces a subtle twist to split-recovery.[140] The statute provides that where the "conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived," any punitive damage award shall be given in full to the claimant.[141] However, if the conduct of the defendant was not directed specifically at the claimant, "twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator."[142]

In Indiana, the approach is more traditional. The Indiana Code provides that twenty-five percent of a punitive damage award is to go the claimant, and the remaining seventy-five percent "to the treasurer of state, who shall deposit the funds into the violent crime victims compensation fund . . . ."[143]

Oregon's split-recovery statute divides punitive damage awards between three entities. Section 31.735 of the Oregon Revised Statutes states that thirty percent of a punitive award is payable to the prevailing party, sixty percent is payable to the Attorney General for deposit in the Criminal Injuries Compensation Account of the Department of Justice Crime Victims Assistance Section, and ten percent is deposited in the State Court Facilities and Security Account.[144]

Four other states follow similar models to the above—though with subtle differences in the amount of recovery or the destination of the funds. This author—following the reasoning of other commentators and states[145]—

139. FLA. STAT. § 768.73.

140. IOWA CODE ANN. § 668A.1(2) (1998).

141. *Id.*

142. *Id.*

143. IND. CODE ANN. § 34-51-3-6 (2007).

144. OR. REV. STAT. § 31.735 (2003).

145. Catherine M. Sharkey, *Punitive Damages As Societal Damages*, 113 YALE L.J. 347, 453 (2003) (stating that "societal damages represent[] both a necessary and feasible reconceptualization of the civil damages landscape."); Meredith M. Thoms, *Punitive Damages in Texas: Examining the Need for A Split-Recovery Statute*, 35 ST. MARY'S L.J. 207

suggests that the federal system of patent law would best serve the interests of justice if it followed the lead of these states and split punitive damages between the plaintiff and the state.

III. CONCERNS ABOUT SPLIT-RECOVERY IN PATENT LAW

This Comment would be incomplete without a thorough discussion and review of the concerns that commentators, judges, and—most vocally—plaintiffs, have raised with respect to split-recovery. These arguments tend to fall within one of five broad categories: (1) that punitive damages—while non-compensatory in theory—are often used by courts as a compensatory tool; (2) that punitive damages do serve a compensatory purpose for plaintiffs who have to pay attorneys fees in civil action; (3) that split remedies represent a "taking" under the Fifth Amendment of the U.S. Constitution; (4) that split-recovery is intrinsically unfair to plaintiffs; and (5) that improper incentive will merely be shifted to the government, and will encourage imposition of high or unnecessary punitive damage awards in order to bolster the federal coffers.

A. Punitive Damages as a Compensatory Tool

Legal commentators have long suggested that punitive damages, while technically wholly extra-compensatory measures intended to punish and discourage reprehensible behavior, are often used by courts and juries in the real world[146] to compensate plaintiffs where traditional compensatory damages are insufficient.[147] It is often the case that damages in tort claims are difficult to calculate. When damages are uncertain, simple compensatory damage calculations are ineffective to justly compensate the plaintiff for the wrong done, and must be augmented.

(2003); Clay R. Stevens, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 PEPP. L. REV. 857 (1994); *see also* discussion, *supra*, Part III.B.

146. *See, e.g.*, Daniel A. Barfield, *Better to Give Than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages?*, 29 VAL. U. L. REV. 1193, 1206 n.66 (1995) ("There is some authority for the proposition that punitive damages are compensatory in nature and merely have an incidental punishing effect. According to this view, punitive damages compensate for intangible losses, such as emotional distress, humiliation, insult, or vexation, which arise from malicious wrongs. However, this function of punitive damages has diminished with the development of awards for pain and suffering, mental distress, and hedonic damages.") (internal citations omitted).

147. *See* Collens v. New Canaan Water Co., 234 A.2d 825, 831 (Conn. 1967) (holding that punitive damages are compensatory in nature and therefore may not exceed plaintiff's litigation expenses, minus taxable costs).

Other scholars argue that the technical definition of punitive damages must be preserved.[148] They argue that even though courts often imperfectly apply legal concepts, that is not grounds for destruction of those concepts.[149] Furthermore, they argue that if punitive damages are treated as compensatory, it would materially prejudice plaintiffs against whom there was no malice or egregious behavior warranting a "compensatory" punitive damage award.[150]

There would be a case for legitimate disagreement on this point if legal scholars were the lone voices in this conversation. They are not. The Supreme Court recently reiterated the principle that "punitive damages are not compensatory" and consequently are not an available remedy to "make good" a harm.[151] In light of this holding, and the Court's stance on punitive damages in the last half century, punitive damages are—and must continue to be—founded primarily on concerns of compensating the plaintiff. If such concerns continue to exist after compensatory damages are awarded, the entitlement should not be to the whole of the punitive award, but to only a part.

B. "Takings" Concerns Under the Fifth Amendment

The tort reform era of the late twentieth century saw a number of limitations on civil remedies, particularly in the sphere of punitive damages. As noted above,[152] since 1985, thirteen states have enacted split-recovery

148. *See, e.g.*, Lisa Benedetti, *What's Past is Prologue: Why the Prison Litigation Reform Act Does Not—And Should Not—Classify Punitive Damages as Prospective Relief*, 85 WASH. L. REV. 131, 155 (2010) ("Subjecting punitive damages to the need-narrowness-intrusiveness standard would debilitate punitive damages by failing to take into consideration the goals of punishment and deterrence when evaluating them for reasonableness, thereby significantly reducing their deterrent and punitive effect. Furthermore, given that a person seeking punitive damages must satisfy the extremely high burden of proving not only that his rights were violated but also that the violation was motivated by malice or callous indifference, reducing or eliminating those awards based on the inapt need-narrowness-intrusiveness standard would cripple a key legal tool available only for the few prisoners who most need it and who can satisfy that high burden.").

149. Sharkey, *supra* note 145, at 449.

150. Benedetti, *supra* note 148, at 154.

151. Barnes v. Gorman, 536 U.S. 181, 189 (2002).

152. *See supra* Part III.

statutes, eight of which remain after legislative action[153] and judicial challenges.[154]

In *Demendoza v. Huffman*, the Oregon Supreme Court considered the constitutionality of Oregon's split-recovery statute.[155] The court determined that the statute,[156] which required the judgment creditor to pay the state a sixty percent share of any punitive damage award, was constitutional under the Fifth Amendment.[157] The court found that "plaintiffs have no underlying right to receive an award that reflects the jury's determination of the amount of punitive damages, nor are those damages necessary to compensate plaintiffs for a loss or injury [to them]."[158] In the opinion, the court cited *Lane County v. Wood* and *Noe v. Kaiser Foundation*, which described punitive damages as a "legal spanking"[159] and "only justified on the theory of determent."[160] The court concluded that the purpose of punitive damages was quasi-criminal—that is, give the *state* the ability to punish the defendant in tort—but not to "give the *plaintiff* revenge."[161] Therefore, plaintiffs have no interest in the award, and cannot assert a Fifth Amendment takings claim.[162] Accordingly, the court upheld Oregon's split-recovery statute, despite the size of the state's appropriation.[163]

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153. *See* Sanders, *supra* note 136, at 804 n.97 (stating that of the states which have not maintained their split-recovery statutes, four allowed the statutes to expire without renewal: California, Florida, Kansas, and New York).

154. *See* Kirk v. Denver Publ'g Co., 818 P.2d 262 (Colo. 1991) (overturning Colorado's split-recovery statute as unconstitutional under the Fifth Amendment); McBride v. Gen. Motors Corp., 737 F. Supp. 1563, 1579 (M.D. Ga. 1990) (declaring the Georgia split-recovery statute unconstitutional because "there can be no legitimate purpose for a state to involve itself in the area of civil damage litigation between private parties wherein punitive damages are a legitimate item of recovery, where the State, through the legislative process, preempts for itself a share of the award.").

155. Demendoza v. Huffman, 51 P.3d 1232 (Or. 2002).

156. OR. REV. STAT. § 18.540 (1995).

157. *Demendoza*, 51 P.3d at 1248 ("As we explained in the previous section, the distribution of punitive damages is not a matter within a jury's discretion or, even, a matter that it considers. As it has done in other areas of the law, by enacting ORS 18.540 the legislature has established reasonable guidelines for courts to follow in the exercise of their duties.") (internal citations omitted).

158. *Id.* at 1244 (internal citations omitted).

159. Lane County v. Wood, 691 P.2d 473, 479 (Or. 1984) ("Punitive damages are not to compensate an injured party, but to give bad actors a legal spanking.").

160. Noe v. Kaiser Found. Hosp., 435 P.2d 306, 308 (Or. 1967) ("Punitive damages can only be justified on the theory of determent.").

161. *Id*. (quoting Donald Paul Hodel, *The Doctrine of Exemplary Damages in Oregon*, 44 OR. L. REV. 175, 182 (1965)) (emphasis added).

162. *Demendoza*, 51 P.3d at at1243.

163. *Id.* at 1245-46.

In contrast, in *Kirk v. Denver Publishing Co.*, the Colorado Supreme Court found split-recovery to be unconstitutional under the Fifth Amendment.[164] There, the court considered a Colorado statute which required the judgment creditor to pay the state general fund one-third of the judgment for exemplary damages.[165] The Colorado court found that a judgment for exemplary damages was property, and the legislature could not take away property rights vested by a judgment.[166] The court then entered into a lengthy, topic-by-topic analysis of all the possible legal justifications for the statute.[167] The court found that the statute was not any of the following: a valid penalty or forfeiture,[168] an *ad valorum* property tax,[169] a valid excise tax,[170] or a valid user fee.[171] The court concluded by stating that:

> In our view, forcing a judgment creditor to pay to the state general fund one-third of a judgment for exemplary damages in order to fund services which have already been funded by other revenue-raising measures, and without conferring on the judgment creditor any benefit or service not furnished to other civil litigants not required to make the same contribution, amounts to an unconstitutional taking of the judgment creditor's property in violation of the Taking[s] Clause of the United States and the Colorado Constitutions.[172]

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164. Kirk v. Denver Publ'g Co., 818 P.2d 262 (Colo. 1991).

165. *Id.* at 270, 273 ("As we previously observed, while a judgment for exemplary damages is designed to punish the wrongdoer and deter similar conduct by others, it is only available when a civil wrong has been committed under extremely aggravating circumstances and when the injured party has a successful claim for actual damages against the wrongdoer. In that sense, an exemplary damages award is not totally devoid of any and all reparative elements. More importantly, the forced contribution of one-third of the exemplary damages judgment is imposed not on the defendant wrongdoer who caused the injuries but upon the plaintiff who suffered the wrong. It goes without saying that placing the burden of payment on the judgment creditor who suffered the wrong bears no reasonable relationship to any arguable goal of punishing the wrongdoer or deterring others from engaging in similar conduct." (internal citations omitted)).

166. *Id.* at 269 ("Because a judgment for exemplary damages entitles the judgment creditor to a satisfaction out of the real and personal property of the judgment debtor, the taking of a money judgment from the judgment creditor is substantially equivalent to the taking of money itself.").

167. *Id.* at 270-72.

168. *Id.* at 270.

169. *Id.*

170. *Id.* at 271.

171. *Id.*

172. *Id.* at 272.

Accordingly, the Colorado Court struck down the split-recovery statute.[173]

The Colorado court correctly determined that an award of exemplary damages constituted a property interest. However, it erred in determining that either the plaintiff or the judgment creditor had an interest in that award. If a person is to have an interest in property, the imperative question is: what gives rise to that interest? Clearly, the plaintiff has an interest in a compensatory damage award, because that award is designed to remedy some particular loss. A punitive damage award, as discussed by the court in *Huffman*, serves no such function and constitutes a windfall for the plaintiff.[174] Interestingly, while the Colorado court concluded that judgment creditors have no legitimate interest in a punitive damages award, they failed to recognize that that same principle, if applied to plaintiffs, would divest them too.[175]

Like criminals who serve their sentences to repay a "debt to society,"[176] judgment creditors of exemplary damage awards are punished for their egregious or willful misconduct. Such punishment is quasi-criminal,[177] and should be treated like a criminal punishment. In a criminal prosecution, the victim of a crime does not control the prosecution or direct the outcome of a case.[178] Neither should the victim of a tort—patent infringement or otherwise—beyond his interest in being made whole.

C. Fairness Concerns and the Rules of Equity

Opponents of split-recovery statutes also cite to concerns about the fairness of split-recovery.[179] They argue that the government's appropriation of punitive damages—when the harm giving rise to the award was borne by

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173. *Id.* at 273.

174. Demendoza v. Huffman, 51 P.3d 1232, 1237 (Or. 2002).

175. *Kirk*, 818 P.2d at 271.

176. Bearden v. Georgia, 461 U.S. 660, 671 (1983) ("[T]he State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society . . . .").

177. *See, e.g.*, Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 286-87 (1989) (O'Connor, J., concurring in part and dissenting in part) (arguing that punitive damages serve the same purposes as criminal proceedings and that courts should view punitive damages awards as if they were criminal sanctions); Philip Morris USA v. Williams, 549 U.S. 346, 359 n.1 (2007) (Stevens, J., dissenting).

178. Besides the ability to testify in a proceeding and to make a victim impact statement, victims have little to no ability to influence criminal proceedings, and are afforded no benefit—other than the pronouncement of justice—by a conviction.

179. *See* Victor E. Schwartz et al., *I'll Take That: Legal and Public Policy Problems Raised by Statutes That Require Punitive Damages Awards to be Shared with the State*, 68 MO. L. REV. 525 (2003).

the plaintiff—constitutes an unfair taking: *à la* a schoolyard bully at lunchtime. Further, they argue that punitive damages do serve an important compensatory purpose for plaintiffs, as plaintiffs often use them to offset expensive attorney's fees and litigation costs.[180] These arguments are compelling, but ultimately unable to support a doctrine of overcompensation.

First, a taking can only be such if it takes what a person rightfully possesses. While punitive damages have traditionally been given to plaintiffs in actions, tradition alone does not make a practice legally sound, as noted by the Oregon Supreme Court in *Demendoza*.[181] But what about fairness and equity? Are punitive damages not assessed because of egregious and willful wrongdoing? Is that wrongdoing not directed against the plaintiff? Does that not entitle plaintiffs, by extension, to all resulting damages? In short, no. Yes, punitive damages are assessed against egregious and willful conduct. Yes, the wrongdoing is directed against the plaintiff. No, this does not mean that plaintiffs should share in damages that are not intended to make them whole. While plaintiffs are the targets and recipients of the defendant's wrongful behavior, they have been fully compensated for any damage done to them once they receive compensatory damages. To receive additional remunerations, above and beyond the actual loss, strikes against traditional notions of entitlement and fairness.

Second, while plaintiffs often put punitive damages to good use in civil actions—to pay off attorney's fees and fees of court, these plaintiffs are not technically any different from plaintiffs who are not awarded punitive damages. Both have suffered a wrong. They have both been compensated for that wrong. To give them preferential treatment, or to treat the punitive damages as somehow compensatory would create an unfairness as against the plaintiffs not awarded punitive damages. However beneficial the award may be to the plaintiff, the award of punitive damages does not make his one plaintiff's attorneys' fees any more deserving of payment than the ordinary, non-punitive plaintiff.

Some states, like Connecticut, continue to view the primary purpose of punitive damages as compensation for the plaintiff.[182] However, the

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180. *Id.* at 541 (noting that if attorneys are still allowed to receive contingency fees from punitive damage awards, then the number of punitive damage claims is not likely to decrease).

181. Demendoza v. Huffman, 51 P.3d 1232, 1246 (Or. 2002).

182. *See, e.g.*, Berry v. Loiseau, 614 A.2d 414, 435 (Conn. 1992) ("[P]unitive damages serve primarily to compensate the plaintiff for his injuries and, thus, are properly limited to the plaintiff's litigation expenses less taxable costs."); Eide v. Kelsey-Hayes Co., 427 N.W.2d 488, 498-99 (Mich. 1988) (allowing punitive damages for compensation purposes rather than

majority of courts have summarily rejected this approach. This author urges that the majority approach should be adopted by the federal system, and by logical extension should be applied to patent law.

D. Potential for Shifting of Improper Incentive

Lastly, some argue that by shifting punitive damages to benefit the state instead of the individual, the temptation of tantalizingly large punitive damage awards will merely shift to the government—a much more powerful and dangerous foe.

If split-recovery systems are inappropriately constructed, this concern might easily be realized. It is not difficult to conceive of an all-powerful, self-feeding judicial machine that extracts punitive damages from every defendant to fuel its own coffers. Dystopian science fiction films have been made from less. However, with proper statutory crafting, this need not be the case. The majority of states that have enacted split-recovery statutes have very specifically directed recovered funds *away* from the judiciary, to limit any improper judicial incentive in damage awards.[183] A recent new extension to split-recovery schemes is the concept of "curative damages," which channel the money to a charity rather than a state cause.[184] In the patent context, this could be easily achieved. By amending 35 U.S.C. § 284 to earmark recovered monies for academic or research purposes, the legislature could easily limit the incentive for a rogue judiciary to act in its own self-interest.

IV. A CALL FOR PUNITIVE REFORM IN PATENT LAW

The majority of this Comment has been dedicated to the practical and philosophical advantages of split-recovery in the setting of punitive damages. What application can this have to punitive damages in the context of patent law? Why should split-recovery be applied here, instead of generally in all civil claims? In short, for two reasons: (1) because patent remedies are tort remedies, and accordingly, can benefit from general tort reforms, and (2) because the legal foundation for patent claims is unique, and distinctively suited to a split-recovery paradigm.

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for punishment). *See also The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1173 (1966) ("When utilized to permit compensation for otherwise non-compensable losses, the law of punitive damages serves its historical function of expanding the law of compensatory damages.").

183. *See* discussion *supra* Part III.B.

184. Brian Bornstein, *Should Society get a share of punitive damage awards?,* 38 MONITOR ON PSYCHOLOGY, vol. 10 (2007).

Legal remedies in patent law are unique in the context of civil claims for four reasons: (1) patent claims are governed entirely by federal statute, and are solely in the purview of the federal government; (2) patent protection arises neither from natural law nor from the American common law; (3) patent claims—and the protection of patents in general—are a social protection on ideas that are meant to protect the public, not merely the patent holder; and (4) protecting patents comes at the expense of social advancement. This author concedes that there is wisdom in limiting the application of split-recovery. In the unique setting of patent violations, however, the split-recovery could be applied, with a correspondingly significant reduction in the concerns against the recovery paradigm.

First, under the Copyright Clause of the U.S. Constitution, the Federal government is granted exclusive power to grant and enforce patents.[185] Changing the patent statute would require the consent of only one governing body. Moreover, absent constitutional takings concerns, Congress has the unfettered authority to determine the wisdom of recovery paradigms in patent cases.

Second, patent claims do not arise out of natural law or common law. In the common law, there was no such thing as a property right in ideas.[186] At least, there was no right that the government would step in to enforce. The Constitution and Congress grant this right. Therefore, the people grant the right. Since the people of the United States uniquely grant this right, the people should benefit wherever possible from its enforcement.

Third, patent laws are designed to protect ideas from conversion, similar to the protections for chattel.[187] Protecting ideas, like the protection of any individual's chattel is a public concern. The primary goal of patent law, therefore, is not the protection of any individual's intellectual property, but rather the protection of society's interest in intellectual innovation.

Fourth, protecting patents—unlike protecting other fundamental rights, such as the right to personal autonomy—comes at a significant cost. When one person is allowed to patent an idea, all of society is restricted from creating objects that fall under the purview of that patent. The free exchange and proliferation of ideas is stunted, because others cannot "stand on the shoulders of giants" until the obstacle of patent protection is

185. U.S. CONST. art. I, § 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

186. Application of McKellin, 529 F.2d 1324, 1333 (C.C.P.A. 1976) ("There being no common law of patents, we should take care to fill the Holmesian interstices of the statute with judge-made law only under the gravest and most impelling circumstances.").

187. *See* Curtis Mfg. Co. v. Plasti-Clip Corp., 888 F. Supp. 1212, 1216 (D.N.H. 1994).

removed. And since the people bear the burden of patent protection at the cost of technological momentum, so too should they receive some benefit when those protections are enforced.

V. SPLIT-RECOVERY: A RECOMMENDATION

In order to balance the scales of justice and equity in patent claims, this author suggests that extraordinary damages awarded under 35 U.S.C. § 284 should be modified to follow a split-recovery paradigm. By awarding the plaintiff with some—but not all—of the funds at Congress's discretion, this solution properly balances the concerns against overcompensating plaintiffs with unearned monies, and the concerns of courts and commentators about the insufficiency of compensatory damages. Here, a portion of the damages fund will go to ensure against under-compensation, while the remaining portion will be channeled back into either charitable or non-judicial, government entities to ensure equity. While this suggestion is conceptually simple, the application is somewhat more difficult.

A. A Proper Formula for Split-recovery

As discussed above, the specific ratio used in split-recovery systems varies widely among the states. While the ratio of governmental to private recovery can be very high or low, this author suggests that extremes are not a wise method to introduce a new damages paradigm under 35 U.S.C. § 284. To cover the costs of litigation and allay commentators' concerns about inadequate compensatory damages, this author suggests an even recovery system, with fifty percent of any "increased damage" award given to the plaintiff in the action, and the other fifty percent placed in trust, to be held for scientific or charitable purposes. Such a system strikes a balance: allowing plaintiffs some funds to help cover costs, but limiting the incentive for future plaintiffs by capping that recovery.

B. A Proper Destination for Recovered Funds

Under a split-recovery system, monies would be recovered from civil verdicts involving punitive damages. But where should the money go? Ultimately, the purpose of this Comment is not to argue for any specific destination for the funds, but rather to suggest that the funds should be sent *somewhere*. Accordingly, the following suggestions are just that: suggestions. Each of these civic organizations are equally distant from the purse of the judiciary (and thus, equally insulated from judicial abuse), and are organizations that help contribute to scientific and technological

advancement in this nation. Each, or all, could be considered by Congress as a proper destination for recovered funds in punitive damages cases.

One organization to consider is the National Science Foundation ("NSF"), an organization created by Congress in 1950 "to promote the progress of science; to advance the national health, prosperity, and welfare; [and] to secure the national defense . . . ."[188] The NSF is dedicated to scientific advancement and discovery, and each year gives out millions of dollars in grant money to fund scientific research and technological studies.[189] Funding the NSF would directly aid scientific advancement and the creation of patentable material—a worthy destination for funds taken from willful violators of patent law.

A second organization to consider is the National Institute of Health ("NIH").[190] Like the NSF, the NIH directly funds and oversees academic and scientific study—including funding 148 Nobel Laureates in the past century.[191] Unlike the NSF, the NIH focuses primarily on the biological sciences. Though more narrowly focused than the NSF, funding the NIH would have direct public impact, both in terms of direct social utility and indirect technological advancement.

Other organizations, such as the American Association for the Advancement of Science, the National Academy of Sciences, the Fulbright Academy of Science and Technology, and the American Education Research Association would all channel recovered funds back into scientific research and advancement—benefiting society and creating new patentable material.

Finally, Congress could create a new fund, specifically dedicated to funding technological innovation. This way, the monies recovered by the government will be used directly to fund new research, new innovation, and new patentable material.

Each of the above would make excellent candidates for money recovered from a split-recovery statute. However, at the end of the day, Congress may choose one, all, or none of these options and still realize the benefits of a split-recovery system. The purpose of this Comment is merely to urge Congress to enact a split-recovery system in the patent code, as equity and justice demand.

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188. *About the National Science Foundation*, NAT'L SCI. FOUND., http://www.nsf.gov/about/ (last visited Oct. 10, 2015).

189. *Id.*

190. *History*, NAT'L INST. OF HEALTH, http://www.nih.gov/about-nih/who-we-are/history (last visited Oct. 10, 2015).

191. *Id.*

VI. CONCLUSION

Patent law has presented, and will continue to present, unique challenges in the area of damages. The speculative nature of damages in patent claims leaves much legal footwork for claimants and the judiciary. In recent years, increased frequency in punitive damage awards, and the constant enticement of a potential windfall to plaintiffs, have caused growing concern in the legal community. This Comment has offered the split-recovery system implemented by a minority of the states for general tort claims as a possible alternative to the federal statutes governing damages in patent cases. Specifically, this Comment suggested that punitive damages be split fifty-fifty between the plaintiffs in patent actions and the state. Proper application of split-recovery, while a measure that is sure to offend the plaintiffs' bar, will best serve the interests of justice and judicial economy in the federal courts.