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# ESSAYS

## WHY DON'T PUNITIVE DAMAGES PUNISH OR DETER? BEYOND THE CONSTITUTION TOWARD AN ECONOMIC SOLUTION

Paige Griffith\*

*[T]o best advance the State's interest in deterrence, juries must be given unbridled discretion to render awards that are wildly unpredictable.*

—Justice Harry A. Blackmun<sup>1</sup>

### I. INTRODUCTION

In 2014, two Montana district court judges declared Montana Code Annotated § 27–1–220(3) unconstitutional.<sup>2</sup> In May 2015, another district court declared Montana's punitive damages statute unconstitutional.<sup>3</sup> Two months later, on July 1, 2015, the Montana Supreme Court issued an order regarding the appeal in *Masters Group International, Inc. v. Comerica*

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1. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991).

2. *Butte Local Dev. Corp. v. Masters Grp. Int'l, Inc.*, No. DV-11-372, 2014 WL 2895577 (Mont. Dist. March 25, 2014) (“This case is an example of the capricious nature of the cap. While 3% or \$10 million may be an effective deterrent to similar conduct to some defendants, to a party like Comerica with its substantial wealth, \$10.5 million is a minuscule amount and likely provides minimal deterrent or none at all.”); *Olsen v. Hyundai Motor Co.*, No. DV 11-304, 2014 WL 5040001 (Mont. Dist. Sept. 19, 2014).

3. Order, Findings of Fact, Conclusions of Law, and Entry of Final Judgment, *Kelly Logging, Inc., v. First Interstate Bank*, No. DV-12-928, 2015 Mont. Dist. LEXIS 82, at \*39–40 ((Mont. Dist. Apr. 21, 2015) (the district court judge upheld a jury verdict of 58:1 punitive damages to compensatory damages, with \$16,760,000.00 in punitive damages valued above the statutory limitation)).

*Bank*<sup>4</sup>—which included a constitutional question on Montana’s punitive damages cap—but, due to a choice-of-law conflict, remanded the case back to the district court to apply Michigan law. Thus, the Court rendered no opinion on Montana’s punitive damages statute.<sup>5</sup> Without any interpretation of the statute from Montana’s highest Court, the constitutionality of Montana’s punitive damages cap continues to be an issue for future litigants.

This article will analyze recent scholarly arguments for and against punitive damages, discuss how those arguments specifically relate to exemplary awards in Montana, and extend the analysis to address the economic deterrence effect. First, the paper will give a brief history on punitive damages and examine the basic constitutional interpretations concerning punitive damages. Next, broadening the perspective to other states’ punitive damages statutes, the paper will analyze the legal and economic rationality of different statutory limits on punitive damages. Looking specifically at Montana, the paper will turn to Montana Code Annotated § 27–1–220(3) and explain the inefficiency of Montana’s punitive damages cap. The paper will then examine the economic theory of deterrence and explain why economic deterrence is critical to consider when drafting punitive damages statutes.

Finally, the paper hypothesizes a potential economic solution that offers a more simplified equation for adjudicators to use to determine an optimal punitive damages award on a case-by-case basis. This economic solution achieves three advantages over the current state of punitive damages: first, it emulates the current United States Supreme Court precedent and constitutional doctrine concerning punitive damages while eliminating the nebulous post-verdict review of each individual award; second, it allows for defendants to easily predict what liability they may face; and, third, it proposes an ideal remedy if the Montana punitive damages statute is declared unconstitutional.

## II. BACKGROUND OF PUNITIVE DAMAGES

### A. *Brief History of Punitive Damages*

In civil law, compensatory damages are paid from a defendant to a plaintiff to compensate the plaintiff for loss, injury, or harm from the defen-

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4. 352 P.3d 1101, 1116, 1124 (Mont. 2015).

5. *Id.* at 1118 (“In sum, we conclude that had the District Court applied Michigan law, Masters’ tort claims of constructive fraud, intentional interference with prospective economic advantage, and deceit would not have been permitted to go to the jury as stand-alone tort claims. The District Court therefore erred in allowing these claims to go to the jury. The additional conclusion follows that we must vacate the jury’s award of \$10.5 million in punitive damages. After the tort claims leave, the only claims remaining are contractual in nature. Contract claims do not provide an avenue for punitive damages.”).

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dant's misconduct.<sup>6</sup> Sometimes, even nominal damages are included in an award to recognize a technical harm or loss rather than an actual one.<sup>7</sup> But punitive damages are exemplary. These special damages serve a broader societal interest in the world of civil litigation by punishing wrongdoers and deterring future misconduct.<sup>8</sup> Punitives, as derived from the word "punishment," are issued to punish the defendant.<sup>9</sup>

Punitive damages have been a part of the American civil system since 1784.<sup>10</sup> Historically, punitive damages were "rarely assessed" and often very miniscule.<sup>11</sup> When punitive damages were awarded they were comparable to compensatory damages, or slightly above the compensatory amount.<sup>12</sup> Yet, beginning in the 1960s and into the 1970s, punitive damages took a leap from trivial to excessive.<sup>13</sup> This was primarily due to courts turning away from the "historical 'intentional tort' moorings of punitive damages" and allowing exemplary awards for unintentional conduct, such as at issue in product liability cases.<sup>14</sup> By the late 1970s and 1980s, punitive damages increased exponentially and awards were given in "unprecedented numbers."<sup>15</sup> Juries awarded as much as 2,500 times the compensatory amount.<sup>16</sup>

### B. *The Constitutionality of Punitive Damages*

Within the past quarter-century, after the height of punitive awards, vast exemplary damages have become a controversial topic within the legal community. Challengers confronted the courts with the constitutionality of

6. Lynda A. Sloane, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 473 (1993); *Philip Morris USA v. Williams*, 549 U.S. 346, 358 (2007) (explaining that "compensatory damages are measured by the harm the defendant has caused the plaintiff").

7. Sloane, *supra* note 6, at 473.

8. *Id.* at 473-474.

9. *Philip Morris USA*, 549 U.S. at 359 ("There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages."); Sloane, *supra* note 6, at 473.

10. Jacqueline Perczek, *On Efficiency, Punishment, Deterrence, and Fairness: A Survey of Punitive Damages Law and A Proposed Jury Instruction*, 27 SUFFOLK U. L. REV. 825, 825 (1993).

11. Mark A. Behrens et. al., *Calculating Punitive Damages Ratios with Extracompensatory Attorney Fees and Judgment Interest: A Violation of the United States Supreme Court's Due Process Jurisprudence?* 48 WAKE FOREST L. REV. 1295, 1297 (2013) (citing Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2-3 (1982)).

12. *Id.* at 1298.

13. John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 141-142 (1986).

14. Behrens, *supra* note 11, at 1298 (quoting Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1008 (2000)).

15. *Id.* (quoting Schwartz, *supra* note 14, at 1009).

16. *Aetna Life Ins. v. LaVoie*, 475 U.S. 813, 816 (1986).

punitive damages under the Eighth and Fourteenth Amendments.<sup>17</sup> At first, the United States Supreme Court upheld the constitutionality of punitive damages under the Excessive Fines Clause of the Eighth Amendment.<sup>18</sup> Then, the seminal *Pacific Mutual Life Insurance Co. v. Haslip*<sup>19</sup> decision in 1991 placed procedural due process safeguards and substantive due process restrictions on excessive punitive awards.<sup>20</sup>

In *Haslip*, the Court assessed punitive damages to an insurance company for misappropriating insureds' premium payments.<sup>21</sup> Although *Haslip* drew no specific bright line, the United States Supreme Court intended to limit "grossly excessive" punitive damages awards because they violated notions of fundamental fairness.<sup>22</sup> Specifically, the Court held that "general concerns of reasonableness" played the most crucial role in determining whether a punitive damages award was constitutional.<sup>23</sup> Focusing mostly on procedural due process, the Court concluded that the trial court's punitive award of four times the compensatory amount was not unconstitutional due to the complete procedural protections in place at the trial level.<sup>24</sup> The Court added that punitive damages awards "skirt[ing] the periphery of due process" were likely unjustified and left the door open to constitutional challenges.<sup>25</sup>

Within the next few years, two additional cases contributed to the debate on due process and punitive damages: *TXO Production Corp. v. Alliance Resources Corp.*<sup>26</sup> and *BMW of North America, Inc. v. Gore*.<sup>27</sup> In *TXO*, the Court found that a ratio of compensatory to punitive damages of

17. Perczek, *supra* note 10, at 833 (citing *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 75–76 (1988)).

18. *United States v. Halper*, 490 U.S. 435, 447–450 (1989), *abrogated by* *Hudson v. United States*, 522 U.S. 93 (1997); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259–60 (1989).

19. 499 U.S. 1 (1991)

20. *Haslip*, 499 U.S. at 1; Behrens, *supra* note 11, at 1298.

21. *Haslip*, 499 U.S. at 4–7.

22. *Id.* at 18, 55 ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.")

23. *Id.* at 18 ("We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.")

24. *Id.* at 23 ("Pacific Mutual thus had the benefit of the full panoply of Alabama's procedural protections. The jury was adequately instructed. The trial court conducted a post-verdict hearing that conformed with *Hammond*. The trial court specifically found that the conduct in question "evidenced intentional malicious, gross, or oppressive fraud," App. to Pet. for Cert. A14, and found the amount of the award to be reasonable in light of the importance of discouraging insurers from similar conduct, *id.*, at A15. Pacific Mutual also received the benefit of appropriate review by the Supreme Court of Alabama. It applied the *Hammond* standards and approved the verdict thereunder. It brought to bear all relevant factors recited in *Hornsby*.").

25. Perczek, *supra* note 10, at 834.

26. 509 U.S. 443 (1993).

27. 517 U.S. 559 (1996).

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1:526 was constitutional.<sup>28</sup> Echoing *Haslip*, the Court held no mathematical formula would suffice across the board for determining the reasonableness of a punitive damages award.<sup>29</sup> Each case had to be decided on its own facts and circumstances.<sup>30</sup> Then came *Gore*. *Gore* finally gave clear guidance on the excessiveness of a jury's award of punitive damages. Punitive damages were only to be "imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."<sup>31</sup> The Court provided a three-part guideline for trial courts to determine if the jury's punitive damages award was overly excessive:

- (i) the degree of reprehensibility;
- (ii) the disparity between the harm suffered and the punitive damage award;
- and
- (iii) the difference between this remedy and civil penalties authorized in comparable cases.<sup>32</sup>

The Court further offered direction of a substantive due process violation in *State Farm Mutual Automobile Insurance Co. v. Campbell*<sup>33</sup>—the most notorious punitive damages case, found in all law school tort casebooks. In *Campbell*, the plaintiffs brought a bad faith action against State Farm, which resulted in a jury verdict of \$2.6 million in compensatory damages and \$145 million in punitive damages.<sup>34</sup> Focusing on the deterrent and retributive nature of punitive awards, the Court concluded that the \$145 million punitive damages award was presumptively inappropriate given the facts of the case.<sup>35</sup> Specifically, the Court noted that the reprehensibility of the defendant's conduct was the most important factor in determining the reasonableness of a particular award.<sup>36</sup> Aligning with its precedent, the Court held "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."<sup>37</sup> Extrapolating a broader standard from the facts of *Campbell*,

28. *TXO Prod. Corp.*, 509 U.S. at 462.

29. *Id.* at 458 (citing *Haslip*, 499 U.S. at 18).

30. *Id.* at 457 ("[A] jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it.").

31. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

32. *Id.* at 574–583.

33. 538 U.S. 408, 416–417 (2003) ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.") (citing *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 (2001); *Gore*, 517 U.S. at 574).

34. *Id.* at 415. On post-verdict review, the trial court reduced the award to \$1 million in compensatory damages and \$25 in punitive damages.

35. *Id.* at 429.

36. *Id.* at 419 ("[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.") (quoting *Gore*, 517 U.S. at 575).

37. *Id.* at 416.

the Court also held “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”<sup>38</sup> Thus, any ratio higher than 1:9 would be presumptively unconstitutional.

### C. Achieving Deterrence and Retribution

Effectively balancing the objectives of retribution and deterrence in a punitive damages award is no easy feat. General deterrence is the “effect that the prospect of having to pay damages will have on the behavior of similarly situated parties in the future.”<sup>39</sup> The focus of deterrence is to discourage morally repugnant—or simply economically inefficient—conduct by a civil sanction, punitive damages. On the other hand, retribution satisfies the social need to punish wrongdoers beyond the cost imposed by compensatory damages.<sup>40</sup> The retributive mechanism punishes the defendant outright “when adequate criminal sanctions are not readily available.”<sup>41</sup> It also helps to restore public views that business behavior should observe the same moral social norms as individuals.<sup>42</sup> Deterrence and retribution are often referred to as the “twin goals” of punitive damages.<sup>43</sup> Yet, putting the two goals together into an effective award on a case-by-case basis is virtually impossible.

A jury does not allocate a proportion of a punitive damages award to retribution and another to deterrence; it is merely a lump sum amount. Thus, assigning a number to deterrence and another to retribution is an im-

38. *Id.* at 425.

39. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 877 (1998).

40. Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 39 (1985) (“[I]t is better to use the term ‘retribution’ instead of ‘punishment’ to distinguish between the vindictive function of punitive damages and deterrence or other utilitarian objectives”).

41. Ausness, *supra* note 40, at 5.

42. *Id.* at 39.

43. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266–267 (1981) (“Punitive damages . . . are . . . intended to . . . punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (“[Punitive damages] are . . . private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.”); *Exxon Ship. Co.*, 554 U.S. at 493 (“[J]uries are customarily instructed on twin goals of punitive awards.”); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 867 (Iowa 1994) (explaining that the “‘aggregate award of punitive damages against [the defendant] has been sufficient to meet the twin goals of punishment and deterrence’ for the entirety of the wrongful conduct”) (quoting *Dunn v. Hovic*, 1 F.3d 1371, 1390 (3rd Cir. 1993)); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 419 (Pa. Super. 2004) (“[A] reasonable relationship must exist between the amount of the punitive damage award and the twin goals of punishment and deterrence.”); Douglas G. Harkin, *BMW of North America, Inc. v. Gore: A Trial Judge’s Guide to Jury Instructions and Judicial Review of Punitive Damage Awards*, 60 MONT. L. REV. 367, 371–372 (1999) (citing Sabrina C. Turner, *The Shadow of BMW of North America, Inc. v. Gore*, 1998 WIS. L. REV. 427, 429–431).

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perfect calculation. Consequently, when evidence is presented to a jury, attorneys focus on either deterrence or retribution and play to the emotions of the jury in order to increase the amount of the award. Depending on whether deterrence or retribution is more significant to the jury in a certain case, each juror may weigh deterrence and retribution differently.

Take two highly publicized cases as examples.<sup>44</sup> In 1978, Ford Motor Company recalled 1.5 million of its Pinto automobiles due to the safety of the car's fuel system: the rear gas tank had a tendency to explode in rear-end collisions.<sup>45</sup> In 1968, during the car's design stage, Ford conducted a cost-benefit analysis on whether to fix the rear gas tank issue.<sup>46</sup> Ford calculated that a human life was worth \$200,000, but altering the gas tank design of every vehicle at the cost of an additional \$11 per vehicle was too high.<sup>47</sup> In 1972, the Ford Pinto's exploding gas tank killed Lilly Gray and severely injured and burned 13-year-old Richard Grimshaw in an accident.<sup>48</sup> Gray's estate and Grimshaw sued Ford and the jury awarded over \$3 million compensatory damages and \$125 million punitive damages.<sup>49</sup> Ford moved for a new trial, and as a condition of the denial of the motion, Grimshaw remitted most of the punitive damages, reducing the punitive award to \$3.5 million.<sup>50</sup>

The facts of *Grimshaw v. Ford Motor Co.*<sup>51</sup> are incredibly important because the plaintiffs' attorneys were able to focus on the retributive function of a punitive damages award. Ford was aware of the design defect before production began but decided against changing the design based on a cost-benefit calculation. With that analysis, Ford determined the risk of losing human lives was cheaper than the cost of redesigning the Pinto. Thus, throughout the trial, the plaintiffs' attorneys could ask the jury to punish Ford for its failure to redesign the Pinto's gas tank at the expense of human lives—exemplifying the retributive function of punitive damages.

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44. These cases are used as examples only to illustrate the deterrence and retribution functions of a punitive damage award. The author's use of these cases in no way represents the actual arguments of the trial attorneys in these cases and is not reflective of their thoughts.

45. GAIL D. BAURA, *ENGINEERING ETHICS: AN INDUSTRIAL PERSPECTIVE*, at 45–46 (Elsevier Academic Press 2006).

46. *Id.* at 45.

47. *Id.* Ford valued this amount as of 1968. As a reference, the corollary in 2015 dollars is roughly \$1,362,166.67 according to the Consumer Price Index. See Bureau of Labor Statistics, *CPI Inflation Calculator*, U.S. DEP'T OF LAB., <https://perma.cc/52N8-KYHW> (last visited Jan. 21, 2016).

48. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 359 (Cal. App. 4th Dist. 1981).

49. *Id.* at 358. Grimshaw was awarded \$2,516,000 in compensatory damages and \$125 million punitive damages, and the Grays were awarded \$559,680 in compensatory damages.

50. *Id.*

51. 174 Cal. Rptr. 348 (Cal. App. 4th Dist. 1981).

Another example is *Malcolm v. Evenflo Company*,<sup>52</sup> where the parents of a child killed in a rollover car accident brought a strict products liability action against Evenflo, the manufacturer of child safety seat, alleging defective design. In 1995, Evenflo's internal testing indicated that the child seat production model was prone to failure of both the plastic seat belt hooks and the adjacent plastic shell.<sup>53</sup> For years, Evenflo received various customer complaints about the defective car seat, which it chose to ignore.<sup>54</sup> In 2000, Jessica Malcolm received this particular model of the Evenflo car seat from a friend and called Evenflo to ask if the seat was safe to use. Evenflo told her the seat was not subject to any of their recalls and that her specific model was safe.<sup>55</sup> Despite the company's assurances, Malcolm's infant child, Tyler, died in a rollover accident while riding in the Evenflo car seat.<sup>56</sup> The child seat's seatbelt hook broke off during the rollover, causing Tyler to be ejected from the vehicle while still strapped into the car seat.<sup>57</sup>

The facts of the *Evenflo* case are horrific. An infant died due a manufacturer's design defect, and the manufacturer knew the design had significant flaws. Evenflo not only chose to ignore the customer complaints about the car seat, but also blatantly lied to the plaintiff when she asked the company about the seat's safety. These facts show how deterrence can be manipulated as an effective argument for punitive damages to a jury. Attorneys could argue that society must prevent infant deaths and hammer throughout the trial the importance of deterring shoddy product design. Thus, if the jury awards large punitive damages, it would deter Evenflo from similar future conduct and keep babies safe.

While deterrence and retribution were likely both argued at trial in these two cases, the critical facts of *Grimshaw* and *Evenflo* indicate how juries can be more persuaded toward one of the twin goals of punitive damages when determining the proper amount of a punitive award. Consequently, because a jury award does not precisely allocate the amounts to deterrence and retribution, the final punitive damages award necessarily conflates the twin goals.

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52. 217 P.3d 514, 518–519 (Mont. 2009).

53. *Id.* at 518.

54. *Id.* at 517.

55. *Id.* at 518.

56. *Id.*

57. *Id.*

### III. HOW TODAY'S COURTS AND STATE LEGISLATURES COPE WITH LARGE PUNITIVE DAMAGES VERDICTS

The American civil system provides various ways for punitive damages awards to be assessed and reviewed. Bifurcation is used in numerous jurisdictions to separate the determination of punitive damages from the liability portion of trial.<sup>58</sup> However, following *Campbell*, in all jurisdictions the judge must review the jury's punitive award after trial for constitutional due process violations.<sup>59</sup> On top of bifurcation and post-verdict review, the judge must also abide by state statutes limiting a punitive damages award, which varies substantially from state to state.<sup>60</sup> Ultimately, this leaves a plaintiff at the complete mercy of a particular court on how it copes with large punitive awards in post-verdict review.

#### A. Bifurcation

Bifurcation of the liability phase and punitive phase of a trial helps ensure a jury determines liability first, without unduly prejudicing a defendant by introducing its financial status.<sup>61</sup> Many states have adopted bifurcation.<sup>62</sup> Bifurcation is also mandatory upon request of either party in these jurisdictions.<sup>63</sup>

Montana requires bifurcated trials.<sup>64</sup> Montana Code Annotated § 27-1-221(7)(a) describes the nature of the bifurcated jury trial when punitive damages are determined. In the first trial, when the jury decides whether a defendant is guilty of the claims against him, the jury also determines whether the defendant is liable for punitive damages.<sup>65</sup> Then, if the jury determines that the defendant is liable for punitives, the bifurcated punitive damages proceeding immediately follows the first trial.<sup>66</sup> During the second proceeding, the plaintiffs may present evidence on the defendant's

58. See, e.g., N.J. STAT. ANN. § 2A:15-5.13 (2015); S.C. CODE ANN. § 15-32-520 (2015); OHIO REV. CODE ANN. § 2315.21 (West 2015); MONT. CODE ANN. § 27-1-221(7) (2015); W. VA. CODE § 55-7-29 (2015); MO. REV. STAT. ANN. § 510.263 (2015).

59. Lindsay J. Efting, Punitive Damages: Will the Courts Still Punish the Wrongdoer After State Farm Mutual Automobile Insurance Co. v. Campbell, 49 S.D. L. REV. 67, 102 (2003).

60. See generally *BMW*, 517 U.S. at 614-619 (O'Connor, J., dissenting) (listing state statutes limiting punitive damages awards).

61. Harkin, *supra* note 43, at 374.

62. See, e.g., N.J. STAT. ANN. § 2A:15-5.13 (2015); S.C. CODE ANN. § 15-32-520 (2015); OHIO REV. CODE ANN. § 2315.21 (West 2015); MONT. CODE ANN. § 27-1-221(7) (2015); W. VA. CODE § 55-7-29 (2015); MO. REV. STAT. ANN. § 510.263 (2015).

63. *Id.*

64. MONT. CODE ANN. § 27-1-221(7)(a).

65. *Id.*

66. *Id.*

net worth and finances, and the jury considers that net worth when determining the punitive award.<sup>67</sup>

Bifurcation is an important solution to take money out of the equation during the trial's liability phase. Remember, punitive damages cannot be awarded in the absence of liability and compensatory damages. In the first phase, juries can determine whether the defendant is liable for the harm caused based solely on the facts underlying the injury at issue. Not only does the process allow for a more just decision on liability, it furthers the "twin goals" of punitive damages. When the defendant's net worth is admitted in the second phase, the jury is allowed to determine both the appropriate amount the defendant can handle and the best amount that would actually punish the defendant enough to deter the conduct and serve as a retributive sanction. Bifurcation also helps a court separate the standards of proof for liability and punitive damages. In Montana, liability for compensatory damages requires a preponderance of the evidence (at least 51% of the evidence), while liability for punitive damages requires clear and convincing evidence (substantially more probable than not).<sup>68</sup> Most states also follow this standard of proof.<sup>69</sup>

There are a few unresolved issues with bifurcation. Among these are the effect on the size of punitive awards, juror selection due to bifurcation, and "juror recognition of and reaction to the contingent 'blindfolding' they experienced when important aspects of the case were kept from them until they made preliminary decisions."<sup>70</sup> Commentators on these issues focus on the narrowing of the jury's role in the process and how bifurcation inevitably asks jurors "to resolve narrow questions of fact without ever considering the broader issues of law and policy underlying the dispute."<sup>71</sup> Furthermore, according to an early empirical assessment of bifurcation, bifurcation likely reduces average trial length and favors defendants because it increases the likelihood of defense verdicts.<sup>72</sup>

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67. *Id.*

68. MONT. CODE ANN. §§ 27-1-202, 27-1-221(5); *see also* Lawrence v. Westlake, 73 P. 119, 120 (Mont. 1903) ("[I]n civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of the evidence.").

69. The only states that require only a preponderance of evidence for liability of punitive damages are: Connecticut, Illinois, Louisiana, Massachusetts, New Mexico, Vermont, Virginia, West Virginia. Colorado requires evidence beyond a reasonable doubt. Wyoming has no clear standard of proof.

70. Stephan Landsman et. al, *Be Careful What You Wish for: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 301 (1998). These issues with bifurcation are beyond the scope of this paper and will not be addressed further.

71. *Id.* at 300.

72. Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1610-1612 (1963).

*B. Post-verdict review*

Ever since *Campbell*, trial courts are required to review the jury's verdict. This is referred to as the "post-verdict review" stage and both parties are allowed to submit briefing in support of or opposition to the jury's punitive damages verdict.<sup>73</sup> As stated in *Campbell*, a court's task in reviewing the constitutionality of a punitive damages award is to identify the "outermost limit of the due process guarantee," not to choose a number the court regards as suitable given the facts of the case.<sup>74</sup> However, besides looking at the Supreme Court's factors of reasonableness under *Gore*, a court must also examine the particular state's statutes for guidance on post-trial review. The result is a two-step process: first, determine whether the award is consistent with state law; and second, determine whether it violates due process, as analyzed by the United States Supreme Court in *Gore* and *Campbell*.

In Montana, when a court weighs a punitive damages award, Montana Code sets forth the factors the judge is to use:

- (i) the nature and reprehensibility of the defendant's wrongdoing;
- (ii) the extent of the defendant's wrongdoing;
- (iii) the intent of the defendant in committing the wrong;
- (iv) the profitability of the defendant's wrongdoing, if applicable;
- (v) the amount of actual damages awarded by the jury;
- (vi) the defendant's net worth;
- (vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;
- (viii) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and
- (ix) any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages.<sup>75</sup>

The statute allows for an increase or decrease in the amount of punitive damages, but does not allow for the reversal of the jury's finding on liability for punitive damages.<sup>76</sup> A court must clearly state the reasons for altering a jury's punitive award by analyzing the factors.<sup>77</sup> A district court's discretion to increase or decrease an award of punitive damages should be consistent with the findings implicit in the jury's verdict.<sup>78</sup> Finally, the

73. Sandra L. Nunn, *The Due Process Ramifications of Punitive Damages, Continued: TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), 63 U. CIN. L. REV. 1029, 1053 (1995).

74. *Campbell*, 538 U.S. at 425.

75. MONT. CODE ANN. § 27-1-221(7)(b).

76. See *DeBruycker v. Guar. Nat. Ins. Co.*, 880 P.2d 819, 822 (Mont. 1994).

77. MONT. CODE ANN. § 27-1-221(7)(b).

78. *Marie Deonier & Assocs. v. Paul Revere Life Ins. Co.*, 101 P.3d 742, 749 (Mont. 2004).

amount of the jury's verdict should be affirmed if it is supported by substantial evidence.<sup>79</sup>

### 1. *Ratio-balancing test*

When post-trial review occurs, the *Campbell* ratio-balancing test lingers in the background. Under the ratio-balancing test, no compensatory damages award to punitive damages award should be higher than 1:9, respectively. Applying the *Campbell* test falls within the court's discretion during post-trial review of punitive damages. But, since the *Campbell* decision in 2003, most courts agree that this single-digit test is not the bright-line rule.<sup>80</sup> A double-digit punitive damages multiplier is appropriate in cases of serious physical harm or in cases where malice aforethought is pervasive.<sup>81</sup> Thus, even when the harm incurred leads to low compensatory damages, if the harm caused is not sufficiently penalized, the defendant will lack motivation to take remedial measures to protect other victims.

The Montana Supreme Court has rejected this single-digit ratio approach. In *Marie Deonier & Associates v. Paul Revere Life Insurance Co.*,<sup>82</sup> a 2004 case issued after *Campbell*, the Montana Supreme Court stated: "We have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award."<sup>83</sup> Yet, in *Seltzer v. Morton*,<sup>84</sup> the Montana Supreme Court held that the highest single-digit multiplier was proper in a case involving non-physical harm, in absence of evidence that the misconduct was driven by significant profit motive, and in a situation where the wrongdoing was the result of an isolated incident.<sup>85</sup> However, the court expressly allowed for larger punitive damages awards as long as the defendant did "not have a history of this kind of misconduct and its conduct was not driven by any significant profit motive" and agreed that in these instances "a double-digit multiplier would undoubtedly comport with due process."<sup>86</sup>

79. *Cartwright v. Equitable Life Assur. Soc. of U.S.*, 914 P.2d 976, 993 (Mont. 1996); *Deonier*, 101 P.3d at 749.

80. *See, e.g.*, *Estate of Schwarz ex rel. Schwarz v. Philip Morris Inc.*, 235 P.3d 668, 672, 677 (Or. 2010), *adhered to on reconsideration*, 246 P.3d 479 (Or. 2010) (ratio of 148:1); *White v. Ford Motor Co.*, 500 F.3d 963, 971–974 (9th Cir. 2007) (ratio of 23:1); *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003) (ratio of 74:1); *Swinton v. Potomac Corp.*, 270 F.3d 794, 818–819 (9th Cir.2001) (28:1).

81. *Gore*, 517 U.S. at 582.

82. 101 P.3d 742, 749 (Mont. 2004) (quoting *Gore*, 517 U.S. at 582 (emphasis omitted)).

83. *Id.* (borrowing the language directly from the United States Supreme Court in *Gore*, 517 U.S. at 582).

84. 154 P.3d 561 (Mont. 2007).

85. *Id.* at 614.

86. *Id.*

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In summary, if the defendant's conduct was extremely reprehensible, occurred multiple times, or was driven primarily by a profit motive, a high punitive damages award will likely be upheld. As stated best by the Seventh Circuit, "The judicial function is to police a range not a point."<sup>87</sup> Clearly, that range is subject to variation depending on the facts of each case.

## 2. *State limits on punitive damages awards*<sup>88</sup>

Many states have enacted legislation imposing limits on the magnitude of punitive damages awards.<sup>89</sup> Some states agree that reviewing a defendant's wealth is appropriate when determining the value of punitive damages.<sup>90</sup> But, states and attorneys disagree about the relevance of the wealth of the defendant in determining a punitive award.<sup>91</sup> Regardless of whether the defendant's wealth is admissible or relevant to the award's deterrence and retribution objectives, states have backed away from the defendant's wealth being the sole factor of the reasonableness of the award. Instead, a growing number of jurisdictions have enacted statutory limitations on the amount of the award. These monetary restrictions consist of eight different approaches toward limiting, or not limiting, punitive damages: (1) capping at a multiple of compensatory damages or a specified amount, whichever is greater; (2) capping at only a multiple of compensatory damages; (3) capping at some specified amount; (4) distinguishing between non-physical and physical harm; (5) capping based on the defendant's finances and/or net worth and a specified amount; (6) diverting a portion of the punitive dam-

87. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) (analyzing *Gore* and *TXO*).

88. This section only discusses statutory caps or other limitations on the amount of punitive damages that may be awarded and does not include particular circumstances that various states restrict punitive damages. See Appendix 1. This is an alphabetical state-by-state table of punitive damages limitations.

89. See *infra* Appendix 1.

90. *Haslip*, 499 U.S. at 21–22 (concluding that the financial position of the defendant is one factor that could be taken into account in assessing punitive damages); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1384 (5th Cir. 1991) ("The corporate size of [defendant] is another factor that supports the award of punitive damages against it."); see also *infra* Appendix 1.

91. Compare Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1317–1318 (1993) (endorsing the scaling of punitive damages to defendants' wealth because larger sanctions are required to influence the rich than the poor), with Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 415 (1989) (concluding that a "defendant's wealth is irrelevant to the goal of deterring socially undesirable conduct and is an improper consideration in assessing the basis for retribution"), and Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1191 (1931) (noting that evidence of a defendant's wealth, "instead of aiding the jury to assess a proper verdict, may prejudice them against the defendant and prevent an impartial judgment").

ages to a state fund; (7) no punitive damages cap; and (8) completely abolishing punitive damages.<sup>92</sup>

C. *Where does Montana's punitive damages statute fall?*

Montana allowed for punitive damages starting in 1987 “for the sake of example and for the purpose of punishing a defendant.”<sup>93</sup> The statute disallows punitives in contract or breach of contract cases and for claims against the State.<sup>94</sup> However, it expressly states that punitives are allowed in products liability cases, whether or not part of a contract.<sup>95</sup> Punitive damages are also recoverable in employment discrimination actions, environmental liability claims, insurer’s bad faith claims, and professional liability actions.<sup>96</sup>

In Montana, reasonable punitive damages may be awarded when the defendant has been found liable for actual fraud or actual malice.<sup>97</sup> All elements of a claim for punitive damages must be proved by clear and convincing evidence, meaning there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.<sup>98</sup> At trial, liability for punitive damages is to be determined by the trier of fact, whether judge or jury.<sup>99</sup> Furthermore, as stated above, evidence of a defendant’s financial affairs, financial condition, and net worth are admitted only during the second proceeding immediately following the trial if the trier of fact finds the defendant liable for punitive damages.<sup>100</sup>

Montana’s statutory and common law does not mandate any relationship between compensatory and punitive damages awards. Punitive damages may be awarded even where the plaintiff is granted nominal damages

92. See *infra* Appendix 2. This table breaks the eight forms of limitations into categories and notes the states that follow those approaches.

93. MONT. CODE ANN. § 27–1–220.

94. MONT. CODE ANN § 2–9–105 (2015); MONT. CODE ANN § 27–1–220(2)(a)(ii). However, the Montana Supreme Court has allowed recovery of punitive damages in tort actions with underlying contracts, i.e., tortious interference with business relations, conversion or fraud or breach of its implied covenant of good faith. See *Daniels v. Dean*, 833 P.2d 1078, 1084 (Mont. 1992); *Lane v. Dunkle*, 753 P.2d 321, 324 (Mont. 1988); *Purcell v. Auto. Gas Distrib., Inc.*, 673 P.2d 1246, 1250 (Mont. 1983); *Firestone v. Oasis Telecomms., Data, & Records, Inc.*, 2003 WL 25960323 (Mont. Dist. 2003).

95. MONT. CODE ANN § 2–9–105; MONT. CODE ANN § 27–1–220(2)(a)(ii).

96. *Owens v. Parker Drilling Co.*, 676 P.2d 162, 163, 165 (Mont. 1984); *Ferguson v. Town Pump*, 580 P.2d 915, 921 (Mont. 1978), *overruled on other grounds by Bohrer v. Clark*, 590 P.2d 117 (Mont. 1978); *Bostwick v. Foremost Ins. Co.*, 539 F. Supp. 517, 520 (D. Mont. 1982); *Gibson v. W. Fire Ins. Co.*, 682 P.2d 725, 731 (Mont. 1984); MONT. CODE ANN. § 27–1–221.

97. MONT. CODE ANN. § 27–1–221; *Crystal Springs Trout Co. v. First State Bank of Froid*, 732 P.2d 819, 827 (Mont. 1987); see also *Kiefer v. McCafferty*, No. 78478, 1994 LEXIS 611, at \*8–9 (Mont. Dist. March 15, 1994).

98. MONT. CODE ANN. § 27–1–221(5); *Cartwright*, 914 P.2d at 976.

99. MONT. CODE ANN. § 27–1–221(6).

100. *Id.* § 27–1–221(7)(a).

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or where no value has been assigned to the actual damages.<sup>101</sup> Without a finding of actual damages, however, exemplary damages are improper in Montana.<sup>102</sup> Finally, all punitive damages are payable to the plaintiff.<sup>103</sup>

Montana limits the amount of punitive damages in any non-class action claim to \$10 million or 3% of a defendant's net worth, whichever is less.<sup>104</sup> Montana is one of four states to limit an award based on the defendant's net worth.<sup>105</sup> Kansas does not base its limitation on the entire net worth of the defendant *per se*, but instead limits the award to the lesser of the highest annual gross income earned within the preceding five years, or \$5 million.<sup>106</sup> However, the statute further reads that:

if the court finds that the profitability of the defendant's misconduct exceeds or is expected to exceed the limitation [of highest gross income over five years or \$5 million], the limitation on the amount of exemplary or punitive damages which the court may award shall be an amount equal to one and a half times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct.<sup>107</sup>

Thus, unlike Montana, there is a caveat in Kansas's limitation for courts to go beyond the statutory cap and allow for punitives in wake of a defendant's profitability from her conduct.

On the other hand, Mississippi takes into consideration the entire net worth of the defendant and then caps at a monetary amount depending on the defendant's financial situation.<sup>108</sup> Mississippi's scheme seems very particular but, in reality, simply limits the award to about 2% of a defendant's net worth. Remarkably, the way the statute is written, if a defendant falls under the same subsection category, defendants with a larger net worth ac-

101. Weinberg v. Farmers St. Bank of Warden, 752 P.2d 719, 732 (Mont. 1988).

102. Doll v. Major Muffler Ctrs., Inc., 687 P.2d 48, 55 (Mont. 1984).

103. MONT. CODE ANN. § 27-1-221. There is no statute in Montana that diverts a portion of the plaintiff's total punitive damages award to the State or another entity.

104. *Id.* § 27-1-220(3).

105. See *infra* Appendix 2.

106. KAN. STAT. ANN. § 60-3701(e).

107. *Id.* § 60-3701(f).

108. MISS. CODE ANN. § 11-1-65(3)(a) ("In any civil action where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed the following: (i) Twenty Million Dollars (\$20,000,000.00) for a defendant with a net worth of more than One Billion Dollars (\$1,000,000,000.00); (ii) Fifteen Million Dollars (\$15,000,000.00) for a defendant with a net worth of more than Seven Hundred Fifty Million Dollars (\$750,000,000.00) but not more than One Billion Dollars (\$1,000,000,000.00); (iii) Five Million Dollars (\$5,000,000.00) for a defendant with a net worth of more than Five Hundred Million Dollars (\$500,000,000.00) but not more than Seven Hundred Fifty Million Dollars (\$750,000,000.00); (iv) Three Million Seven Hundred Fifty Thousand Dollars (\$3,750,000.00) for a defendant with a net worth of more than One Hundred Million Dollars (\$100,000,000.00) but not more than Five Hundred Million Dollars (\$500,000,000.00); (v) Two Million Five Hundred Thousand Dollars (\$2,500,000.00) for a defendant with a net worth of more than Fifty Million Dollars (\$50,000,000.00) but not more than One Hundred Million Dollars (\$100,000,000.00); or (vi) Two percent (2%) of the defendant's net worth for a defendant with a net worth of Fifty Million Dollars (\$50,000,000.00) or less.").

tually are capped at a lower percentage of their net worth compared to those defendants with a lower net worth. For example, under Mississippi Code Annotated § 11–1–65(3)(ii), a company worth \$750 million is limited to an award of \$15 million, or is at risk of 2% of its net worth. However, any company above \$750 million in net worth up to \$1 billion is also limited to \$15 million, which puts it at risk below 2%.<sup>109</sup> This scheme is quite flawed in this respect.

Finally, Alabama carves out a limitation for punitive awards against small businesses.<sup>110</sup> For any small business with a net worth less than \$2 million, Alabama caps the award at \$50,000 or 10% of the small business's net worth, whichever is less.<sup>111</sup> Mathematically speaking, this means that any small business with a net worth of \$500,000 to \$2 million would only be liable for punitives up to \$50,000, and any business with \$500,000 or less in net worth would be liable up to 10% of its total net worth. These calculations show that the defendant's net worth does not play a factor unless it is a very small business—below \$500,000 in net worth.

All three of these states' punitive damages limitations are arbitrary. The statutes only place subjective monetary caps on punitive awards based off a defendant's net worth. Montana is particularly capricious in this respect because it places all defendants in the same scheme, no matter what their net worth may be. Montana's punitive limitation lies somewhere between Kansas's and Mississippi's caps. The \$10 million serves as a strict monetary cap and the defendant's net worth is taken into consideration if 3% of the defendant's net worth is below \$10 million. As the statute reads, it is the *lesser* of the two amounts. So, if a large corporation is sued in Montana state court and becomes liable for punitive damages, \$10 million may be a drop-in-the-bucket if the company is worth over \$333 million.<sup>112</sup> While multi-million dollar corporations may not be the usual defendants sued in Montana and subject to the Montana punitive damages cap, the statute still mandates a subjective cap that is economically inefficient based on the net worth of the defendant.

109. For example, if a defendant's net worth is \$750 million and is limited to a \$15 million punitive damage award, it is at risk 2%. However, a defendant with a net worth of \$950 million falls under the same category and is also subject to the \$15 million cap, which puts that company at risk only 1.58%. While the difference between 2% and 1.57% seems miniscule, it is a difference of millions of dollars for a multi-million dollar company.

110. ALA. CODE § 6–11–21(b)-(c) (2016).

111. *Id.*

112. By solving for \$10 million to be exactly 3% of a defendant's net worth, one reaches the solution of \$333,333,333.33.

$$x = \frac{10 \text{ million}}{.03} = \$333,333,333.33$$

#### IV. THE INEFFECTIVE ARGUMENT: THE CONSTITUTIONALITY OF MONTANA'S PUNITIVE DAMAGES CAP

In Montana, there is no constitutional right to punitive damages, and as such, the legislature has plenary power over punitive damages.<sup>113</sup> The legislature has allowed limited punitive damages.<sup>114</sup> The arbitrary cut-off of \$10 million dollars is an inconsequential penalty for large net-worth defendants and serves no meaningful deterrent or retributive effect. To combat this problem, Montana practitioners have relied on arguing the unconstitutionality of the statute under the right to a jury trial, the right to equal protection of the laws, and substantive due process.

##### A. *The cap violates the right to trial by jury*

First, one can argue the statutory cap violates the Montana Constitution's right to a jury trial, a right which must remain "inviolate." Montana's punitive damages cap of \$10 million per defendant conflicts with Montana's Constitution because its application undermines the original trial by jury the framers deemed fundamental. Article II, Section 26, of the Montana Constitution provides that "[t]he right of trial by jury is secured to all and shall remain inviolate."<sup>115</sup> The Montana Constitution guarantees that right "in the class of cases in which the right was enjoyed when the constitution was adopted."<sup>116</sup> Punitive damages are a component of the civil action and within the purview of Article II, Section 26.<sup>117</sup> The legislature recognized this by requiring that punitive damages be determined by "the trier of fact."<sup>118</sup>

As Montana Supreme Court Justice Nelson observed, the "constitutionally guaranteed right of a jury trial is 'fundamental' and, therefore, deserving of the highest level of court scrutiny and protection."<sup>119</sup> When a legislative act interferes with a fundamental right, courts must apply strict scrutiny, the most stringent standard.<sup>120</sup> Strict scrutiny requires that legisla-

113. *Meech v. Hillhaven W.*, 776 P.2d 488, 493–495, 500 (Mont. 1989).

114. MONT. CODE ANN. § 27–1–220.

115. MONT. CONST. art. II, § 26.

116. *Matter of C.L.A.*, 685 P.2d 931, 933 (Mont. 1984).

117. *Finstad v. W.R. Grace*, 8 P.3d 778, 781 (Mont. 2000) (holding "the portion of § 27–1–221(6), MCA, requiring an award of punitive damages to be unanimous as to liability and amount directly conflicts with Article II, Section 26 of the Montana Constitution.").

118. MONT. CODE ANN. § 27–1–221(6).

119. *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 12 (Mont. 2002) (Nelson, J., concurring) (citations omitted); *Assoc. Press Inc. v. Mont. Dep't of Revenue*, 4 P.3d 5, 15 (Mont. 2000) ("In the words of the framers, Article II of the Constitution, contains the 'fundamental principles and rights guaranteed to the people by their government.'") (citing 2 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 579 (1979) [hereinafter 2 CONSTITUTIONAL CONVENTION TRANSCRIPT]).

120. *Gulbrandson v. Carey*, 901 P.2d 573, 579 (Mont. 1995).

tive acts intruding upon fundamental rights must be supported by a compelling state interest that is narrowly tailored to effectuate only that compelling state interest.<sup>121</sup> It must also be shown that “the choice of legislative action is the least onerous path that can be taken to achieve the state objective.”<sup>122</sup>

The jury is in the best position to determine the proper amount of punitive damages because it has objectively heard all the evidence at trial. The framers of the Montana Constitution also believed trial by jury was so important it “shall remain inviolate.”<sup>123</sup> Today, trial by jury is still as important and each plaintiff has the constitutional right to the punitive damages award the jury deems appropriate. The Montana statutory cap usurps the jury’s duty to assess damages appropriate to punish and deter egregious conduct.

### B. *The cap violates equal protection*

Second, one could argue that the punitive damages cap violates Montana’s constitutional equal protection guarantee. Article II, Section 4, of the Montana Constitution provides:

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Further, neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

There are three levels of scrutiny that courts must use under the Montana Constitution’s Equal Protection Clause: strict scrutiny, middle-tier scrutiny, and the rational basis test.<sup>124</sup> The punitive damages cap fails under strict scrutiny, which inevitably means it fails all of the tests.

The punitive damages cap improperly classifies plaintiffs into favored and disfavored classes. Pursuant to Montana Code Annotated § 27–1–220(3), the favored class consists of class action plaintiffs. The statute provides “[t]his subsection does not limit punitive damages that may be awarded in class action lawsuits.”<sup>125</sup> The disfavored class consists of plaintiffs who seek damages individually. Similarly, § 27–1–220(3) also arbitrarily creates a favored class of plaintiffs who sue less wealthy defendants. These plaintiffs can achieve punishment and deterrence through a \$10 million punitive damages verdict. The disfavored class of plaintiffs who sue vastly wealthy defendants can never achieve punishment and deterrence if the \$10 million cap on punitive damages is applied. Consequently, juries

121. *Mont. Env’tl. Info. Ctr. v. Dep’t of Env’tl. Quality*, 988 P.2d 1236, 1245 (Mont. 1999).

122. *Id.*

123. MONT. CONST. art. II, § 26.

124. *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 449–450 (Mont. 2004).

125. MONT. CODE ANN. § 27–1–220(3).

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cannot achieve punishment and deterrence against major corporations and companies with billions of dollars.

The \$10 million cap fails under strict scrutiny because there is no narrowly tailored, compelling state interest that justifies treating individual plaintiffs differently from class plaintiffs. Nor is there any compelling state interest that justifies treating plaintiffs who sue wealthy defendants differently from plaintiffs who sue companies that would be punished and deterred by a \$10 million punitive damages verdict. Application of the cap here precisely shows how unreasonable the distinction is—the \$10 million cap *only* benefits and protects major corporations. While local Montana companies are subject to pay 3% of their net worth in punitive damages, massive corporations would pay a much lower percent.

The \$10 million cap further fails under middle-tier scrutiny. Middle-tier scrutiny is used in limited situations and “requires the state to demonstrate that its classification is reasonable and that its interest in the classification is greater than that of the individual’s interest in the right infringed.”<sup>126</sup> The punitive damages cap fails under middle-tier scrutiny because it is unreasonable to apply the arbitrary \$10 million cap on punitive damages to individual plaintiffs but not to class plaintiffs. It is unreasonable that plaintiffs who sue defendants with vast wealth are arbitrarily precluded from punishing and deterring wrongdoers, whereas a plaintiff who sues a less wealthy defendant is not similarly precluded. The State has no interest in classifying plaintiffs on the basis of arbitrary distinctions (i.e. class action plaintiffs) and that distinction is in no way more important than the fundamental reason for punitive damages—a plaintiff’s right to punish and deter wrongdoers.<sup>127</sup>

Furthermore, the statute capping punitive damages at \$10 million is not rationally related to a governmental interest. “The rational basis test requires the government to show (1) that the statute’s objective was legitimate, and (2) that the statute’s objective bears a rational relationship to the classification used by the legislature.”<sup>128</sup> “Stated another way, the statute must bear a rational relationship to a legitimate governmental interest.”<sup>129</sup>

The Montana Supreme Court has repeatedly used the rational basis test to strike down laws creating arbitrary classifications without a legitimate

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126. *Davis v. Union P. R. Co.*, 937 P.2d 27, 31–32 (Mont. 1997).

127. Understandably, the state’s interest in classifying class action plaintiffs differently is likely judicial efficiency. However, if the class action claim is still against one defendant, that defendant should still be accountable for the same amount of punitive damages as any other defendant not under a class action lawsuit.

128. *Henry v. State Comp. Ins. Fund*, 982 P.2d 456, 462 (Mont. 1999).

129. *Id.*

state interest.<sup>130</sup> When applying the rational basis test, it is important to note cost-control alone cannot justify discrimination.<sup>131</sup> Furthermore, a statute cannot pass the rational basis test when it creates arbitrary classes on the sole mechanism a claimant has to enforce the legislature's stated goal.<sup>132</sup>

### C. *The cap violates substantive due process*

Attorneys further argue the punitive damages statutory cap violates the substantive due process clause of the Montana Constitution. "The theory underlying substantive due process reaffirms the fundamental concept that the due process clause contains a substantive component which bars arbitrary governmental actions regardless of the procedures used to implement them, and serves as a check on oppressive governmental action."<sup>133</sup> Applying the one-size-fits-all \$10 million cap on punitive damages is arbitrary, capricious, and not rationally related to the stated objective of punitive damages. Montana statute provides that punitive damages are "for the sake of example and for the purpose of punishing a defendant" and "must be determined by the trier of fact."<sup>134</sup> By applying the cap, however, the legislature would effectively strip the jury of its ability to set an example of and punish defendants appropriately, depending on the size of the defendant. That is the entire reason a defendant's financial status is admissible in the bifurcated trial.

### D. *District Court Opinions Have Declared Montana's Punitive Damages Limits Unconstitutional*

In 2014, Montana's Second Judicial District Court ruled the punitive damages cap unconstitutional. In *Masters Group International, Inc. v. Comerica Bank*,<sup>135</sup> a Michigan bank and a Delaware furniture and equipment manufacturer disputed a contract that facilitated the purchase of an

130. See, e.g., *Davis v. Union Pac. R.R. Co.*, 937 P.2d 27, 34 (Mont. 1997) ("There is no rational basis for treating tort victims injured by nonresident corporate tort-feasors differently than tort victims injured by all other nonresident tort-feasors."); *Henry*, 982 P.2d at 460 ("In sum, we can see no rational basis for treating workers who are injured over one work shift differently from workers who are injured over two work shifts."); *Oberson v. U.S. Dep't of Agric.*, 171 P.3d 715 (Mont. 2007) (holding a statute relieving snowmobile area operators of certain forms of liability unconstitutional); *Brewer v. Ski-Lift Inc.*, 762 P.2d 226, 230 (Mont. 1988) (holding a series of statutes purportedly intended to protect ski area operators from liability arising from risks allegedly "inherent" in the sport were "needlessly over broad" because they went "far beyond the stated purposes of the statutes").

131. *Heisler v. Hines Motor Co.*, 937 P.2d 45, 52 (Mont. 1997) ("Heisler argues that cost-control alone cannot justify discrimination. We agree.").

132. See *Henry*, 982 P.2d at 463.

133. *Newville v. Dep't of Fam. Servs.*, 883 P.2d 793, 799 (Mont. 1994).

134. MONT. CODE ANN. § 27-1-220(1); MONT. CODE ANN. § 27-1-221(6).

135. 352 P.3d 1101, 1104-1109 (Mont. 2015).

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office products business and established its headquarters in Butte, Montana.<sup>136</sup> The two initiated the high-stakes contract—a forbearance agreement—during the American economic crisis.<sup>137</sup> Even though the defendant, Comerica, received Troubled Asset Relief Program funds from the federal government, none of the funds reached Masters, and it defaulted on the loan.<sup>138</sup> Applying Montana law, the jury awarded \$5.4 million for wrongful offset, \$20 million for lost future profits, \$16.5 million for other consequential damages, and \$10.5 million in punitive damages.<sup>139</sup> In the post-verdict review of the punitive damages award, the district court held the punitive damages statute unconstitutional and upheld the punitive damages award.<sup>140</sup> On July 1, 2015, the Montana Supreme Court issued an order on the case, but, due to the choice-of-law conflict, remanded the case back to the district court to apply Michigan law and, thus, did not offer an opinion on the constitutionality of Montana's punitive damages cap.<sup>141</sup>

A few months later in the Montana Twentieth Judicial District Court, in *Olson v. Hyundai Motor Co.*,<sup>142</sup> a jury held the defendants, Hyundai Motor Company and Hyundai Motor America, liable for killing two teenagers due to a defective steering knuckle that failed while driving on a Montana highway. Evidence showed Hyundai chose to place profit ahead of safety when it did not address the previous Hyundai customer complaints indicating similar knuckle issues with Hyundai vehicles.<sup>143</sup> Instead of recalling approximately 5 million cars to replace the knuckles, which would have likely cost over a billion dollars, Hyundai decided to do nothing and, in turn, put society at risk.<sup>144</sup> At trial, the jury awarded a total of \$8.1 million in compensatory damages and \$240 million in punitive damages against Hyundai—a ratio of 1:29.6.<sup>145</sup> After the trial, the district court reviewed the award pursuant to § 27-1-221(7) and declined to reduce the award to the statutory cap of \$10 million.<sup>146</sup> Instead, based on the fact Hyundai had over \$46 billion in net worth, and interpreting the degree of reprehensibility of the defendant's conduct, the court concluded that only the highest single-

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136. *Masters Grp Int'l.*, 352 P.3d at 1105.

137. *Id.* at 1107–1108.

138. *Id.* at 1109.

139. *Id.*

140. *Comerica Bank v. Mont. Second Jud. Dist. Ct.*, No. DV 2011-372, 2014 WL 2895577 (Mont. Dec. 30, 2013).

141. *Masters Grp. Int'l.*, 352 P.3d at 1118–1119.

142. Order on Plaintiffs' Joint Motion for Review of Punitive Damages and Entry of Judgment, *Olson v. Hyundai Motor Co.*, No. DV 11-304, 2014 Mont. Dist. LEXIS 35, at \*2–9 (Mont. Dist. Ct. Sept. 19, 2014).

143. Entry of Judgment, *supra* note 163, at \*24.

144. *Id.*

145. *Id.* at \*24–25.

146. *Id.* at \*35–39.

digit multiplier would be appropriate.<sup>147</sup> This amounted to a reduction of the punitive damages award from \$240 million to \$72 million—a ratio of 1:9, compensatory damages to punitive damages.<sup>148</sup> Furthermore, the court declared the Montana cap on punitive damages unconstitutional because it violated the guaranteed right to trial by jury, the right to equal protection, the right to due process of the law, and the judge further explained that the \$10 million limit did not serve the purposes of punishment and deterrence.<sup>149</sup>

About one year later, in *Kelly Logging, Inc. v. First Interstate Bank*,<sup>150</sup> the Montana Fourth Judicial District Court upheld a jury verdict with a 1:58 ratio of punitive damages to compensatory damages and again declared the Montana punitive damages cap unconstitutional. In this case, Kelly Logging claimed First Interstate took \$762,000 out of its checking account to pay off a note that was current, was not due, and had not matured.<sup>151</sup> The jury found First Interstate liable for all the claims against it and awarded \$16.7 million in punitive damages for misconduct and \$290,000 in compensatory damages.<sup>152</sup> The court reiterated that the “single digit test” was not a bright-line rule and believed the jury accurately considered First Interstate’s \$838 million net worth by awarding only 2% in punitives. In terms of constitutionality, the court held the punitive damages cap unconstitutional because it violated the right to trial by jury, the right to equal protection, and substantive due process.<sup>153</sup>

#### V. USING ECONOMICS TO CREATE EFFICIENT PUNITIVE DAMAGES AWARDS

The issue with relying on arguments regarding the constitutionality of Montana’s punitive damages statute is that even if the Montana Supreme Court found the statute unconstitutional, it would leave a void for an actual solution to the problem. Consequently, the determination of an appropriate punitive damages award would revert back to post-verdict review. Under the United States Supreme Court’s constitutional standards discussed above, a lower court must ask itself a multitude of questions to determine the constitutionality of a punitive award: Does the punitive damages verdict

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147. *Id.* at \*28–33.

148. *Id.* at \*31.

149. MONT. CONST. art. II, § 4; MONT. CONST. art. II, § 17; MONT. CONST. art. II, § 26; Entry of Judgment, *supra* note 163, at \*31–38.

150. *Kelly Logging, Inc. v. First Interstate Bank*, 2015 Mont. Dist. LEXIS 82, at \*14, 36–37 (Mont. Dist. Ct. April 21, 2015) (awarding punitive damages at 2% of First Interstate’s \$838,000,000 net worth).

151. *Id.* at \*6.

152. *Id.* at \*1–2.

153. *Id.* at \*9–10, 24, 36–38.

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achieve the goals of deterrence and retribution? Is the award grossly excessive? How reprehensible was the defendant's conduct? Is the award fundamentally fair and reasonable with the facts of the case? This is no simple task for a trial court and the process misallocates scarce judicial resources. Since juries have already taken the facts under consideration and determined a punitive damages award, the post-verdict stage is merely repeating the same process from a court's standpoint. This current constitutional doctrine governing punitive damages is flawed and undermines one of the critical twin goals of punitive damages by preventing courts from achieving optimal deterrence.

An economic analysis of a punitive damages award can create an economically efficient level of punitive damages in an amount which forces a defendant to fully internalize the cost of the harm it imposes on society.<sup>154</sup> At the very least, an economic solution serves to address the deterrence objective of punitive damages.<sup>155</sup> Under this doctrine, "injurers [should be] made to pay for the harm their conduct generates, not less, not more."<sup>156</sup> Therefore, when punitive damages are assessed, defendants should bear all the costs of their decisions.<sup>157</sup> Without an addition to compensatory damages, defendants will often not take enough care to prevent causing harm in the first place.<sup>158</sup> This is because the cost of their actions is borne by third parties instead of the defendant. Economists call these third-party effects externalities.<sup>159</sup> If defendants do not internalize the cost of their potential harm imposed onto society, negative externalities result. This is often called a "spill over" effect, where a defendant's harm injures third parties that are not associated with the economic actor's decision process.<sup>160</sup> Ensuring that the defendant internalizes these negative externalities is how the economic theory of deterrence creates an economically efficient punitive damages award.

The basic economic theory for optimal deterrence originates from welfare economics: a branch of economics that uses microeconomic techniques to evaluate well-being and also establishes guidelines for social policy aiming at the maximization of utility at the aggregate level.<sup>161</sup> The "utility" is

154. Benjamin J. McMichael, *Constitutional Limitations on Punitive Damages: Ambiguous Effects and Inconsistent Justifications*, 66 VAND. L. REV. 961, 969 (2013).

155. For purposes of this paper, the author's contribution regarding the economic theory of deterrence focuses solely on deterrence. Retribution is not implicated by the economic solution based upon the inability to quantify punishment from defendant to defendant.

156. Polinsky & Shavell, *supra* note 39, at 873.

157. HENRY N. BUTLER, CHRISTOPHER R. DRAHOZAL & JOANNA SHEPHERD, *ECONOMIC ANALYSIS FOR LAWYERS* 185 (3d ed. 2014).

158. McMichael, *supra* note 154, at 969.

159. BUTLER, DRAHOZAL & SHEPHERD, *supra* note 157, at 185.

160. *Id.*

161. OXFORD ENGLISH DICTIONARIES, available at <https://perma.cc/XT63-D775>.

the net well-being of an individual. Under welfare economics, the evaluation of society's utility consists of two elements: first, the determination of the utility of each individual; and second, the amalgamation of each individual's utility.<sup>162</sup> The "amalgamation" is the combination of all individual utilities to determine an optimal social utility. Thus, using welfare economics to assess punitive damages awards is appropriate because it organizes the inquiry around how rational defendants will respond to the threat of punitive damages and whether their responses will help or hinder social welfare.<sup>163</sup>

Basic economic theory defines the optimal level of care as that at which the marginal cost of any additional care is equal to the benefit that care will provide.<sup>164</sup> Under a punitive damages perspective, the private marginal cost (PMC) is the cost of producing the conduct, product, or design borne by the defendant. The social marginal cost (SMC) is the harm induced onto society from the defendant placing its product into society. The marginal benefit (MB) is the social benefit derived from the product being available in the market.

The purpose of punitive damages is to provide a sufficient threat to make the private marginal cost equal to both the social marginal cost and the marginal benefit (PMC=SMC=MB).<sup>165</sup> The *care* here is the care needed by the defendant to prevent the harm. Optimizing this level of care is efficient because any additional care forces society to incur more costs than the savings that would result from that care.<sup>166</sup> The problem with this basic economic theory is that, in a punitive damages scenario, a defendant is confronted with a situation where its private marginal cost is much lower than the societal marginal cost. Assuming that the compensatory damages of a plaintiff always equal the social marginal cost, this equation purports that the marginal benefit would also have to equal this amount. Further, since punitive damages are a portion of the private marginal cost of the defendant, inputting punitive damages into the private marginal cost would always result in punitives being only a fraction of the compensatory damages. Clearly, this is not economically efficient because defendants would never take the necessary precautions to reduce their harm onto society when their liability of punitives would only be a fraction of their compensatory liabil-

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162. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 450–451 (2003).

163. Polinsky & Shavell, *supra* note 39, at 873.

164. KENNETH ARROW, *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 623 (1962).

165. STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 243–247 (2004) (describing factors that are not accounted for in compensatory damages that may lead to inadequate incentives to reduce risk).

166. *Id.*

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ity. Consequently, under this approach, defendants would simply account for their cost of potential compensatory liability versus the social cost of their behavior.

To combat this issue, legal and economic scholars have outlined a formula that provides one solution by computing punitive awards as follows:<sup>167</sup>

$$PD + CD = \frac{1}{p} * CD$$

Here, *PD* is the optimal punitive damages award, *CD* is the compensatory award, and *p* is the probability that a court will hold the defendant liable.<sup>168</sup> This analysis assumes that the compensatory award, or *CD*, perfectly represents the harm inflicted on the plaintiff, also known as the social marginal cost. Therefore, the proper level of total damages to impose on a defendant if she is found liable is the harm caused multiplied by the reciprocal of the probability of being found liable. Solving for *PD* alone:

$$PD = \frac{[1 - p]p}{p} * CD$$

The subtlety of this equation explains why it is insufficient to have only a compensatory award. Yet, this equation does not appropriately solve for punitive damages under a welfare economics assessment. It is entirely nonsensical that the greater the probability of the defendant being liable, the lower the punitive damages award. Assuming equal compensatory damages, this equation reasons that a defendant who is 90% likely to be held liable pays less in punitive damages than a defendant who is only 10% likely to be held liable. Consequently, anytime the likelihood of being held liable exceeds 62%, the equation produces a smaller punitive damages award than the basic economic model described above. A defendant should not be disincentivized to enter into socially beneficial behavior the higher its potential liability; the inverse is more accurate.

It is easier to comprehend this situation by way of an example. Say a corporation makes cars and knows that the car has a particular design flaw but is unsure whether to redesign the car. Additionally, the company determines that it is held liable only one quarter of the time harm is caused, which puts the company's probability of being found liability at 25%. If the average harm is worth \$100,000 in compensatory damages at trial, under basic economic theory, the expected marginal cost to the company is only

167. *Id.*; Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 3–4 (2004); McMichael, *supra* note 154, at 971.

168. McMichael, *supra* note 154, at 970–971.

\$25,000 because it is only held liable 25% of the time. Ultimately, basic economic theory shows that the company would not invest more than \$25,000 into the safety of the car because it would rather take the risk of paying the expected cost of \$25,000 and keep inducing the harm.

To persuade the defendant to invest in favorable societal precautions, the optimal level of care equation theorizes that a punitive award must be added to the private marginal cost in order for defendants to internalize their harmful cost to society.<sup>169</sup> Here, with a 25% probability of being held liable and an average compensatory damages award of \$100,000, the optimal punitive award is calculated as follows:

$$PD = \frac{[1 - .25]}{.25} * 100,000 = \$300,000$$

Working through the equation, the optimal punitive damages award under the economic theory of deterrence would be \$300,000. This theory, when used with various values and liability outcomes, induces many illogical ratios of compensatory damages to punitive damages. Inputting *CD* as a constant of \$100,000 and *p* at values of 2.5%, 5%, 10%, 25%, 50%, 75%, and 90%, results in the following *PD* values:

$$PD = \frac{[1 - .025]}{.025} * \$100,000 = \$3,900,000$$

$$PD = \frac{[1 - .05]}{.05} * \$100,000 = \$1,900,000$$

$$PD = \frac{[1 - .10]}{.10} * \$100,000 = \$900,000$$

$$PD = \frac{[1 - .25]}{.25} * \$100,000 = \$300,000$$

$$PD = \frac{[1 - .50]}{.50} * \$100,000 = \$100,000$$

$$PD = \frac{[1 - .75]}{.75} * \$100,000 = \$33,333$$

$$PD = \frac{[1 - .90]}{.90} * \$100,000 = \$11,111$$

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169. *Id.* at 970.

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Therefore, as the defendant's likelihood of being held liable for harm increases, the punitive damages amount decreases. Moreover, a 1:1 ratio will only come about when the liability percentage is perfectly 50%, doubling the compensatory damages amount.<sup>170</sup> This is economically inefficient because the expected value of punitive damages does not appropriately increase as the value of  $p$ , the likelihood of being held liable (or better put, the likelihood the defendant will be liable for its costs onto society), increases and the resulting  $PD$  does not fit the optimum utility equation. If the punitive award decreases while the social marginal cost increases,  $PMC$  will always be less than  $SMC$ . But,  $PMC$  should equal  $SMC$  and  $MB$  ( $PMC=SMC=MB$ ) according to basic economic theory.

There are also other issues with this economic equation. First, it does not require the amalgamation of the individual utilities of all parties in a given scenario. This is an amount necessary to determine the optimal level of social utility. An efficient punitive damages award cannot be computed without ensuring that the costs onto all of society are averaged to determine the requisite social marginal cost. Second, with  $p$  being defined as the probability that the defendant in a particular case will be liable, by definition, the numerator,  $1 - p$ , is the probability that the *same* defendant will not be held liable. Nowhere does this equation have a variable that accounts for the probability that *all other* defendants would not be found liable, nor a variable that a certain portion that will not be found liable. This addition to the equation is needed to account for the negative externalities from other defendants' malicious conduct, which are not subject to litigation in court, but are still placing costs onto society. An equation that addresses these issues may lead us closer to an economically efficient solution to solve for punitive damages in any given scenario.

## VI. REALISTICALLY ACHIEVING AN OPTIMAL PUNITIVE DAMAGES AWARD

In the event an economic solution is provided that complies with welfare economics and the optimal utility equation, the real issue is how unrealistic it is for an adjudicator, judge or jury, to apply. It is impractical to assume that every jury trial will reveal the correct  $p$  value.<sup>171</sup> No defendant

170. For example, if the harm is valued at \$200, with a liability percentage of 50%, the equation reveals that an optimal \$200 punitive damage award equals the compensatory amount of \$200.

$$PD = \frac{[1-.5]}{.5} * \$200 = \$200$$

171. Some scholars have tested whether juries can actually implement deterrence by offering a set of jury instructions to the jurors which directs the jury to consider the probability that a defendant would be held liable for the harm it caused. See CASS R. SUNSTEIN, REID HASTIE, JOHN W. PAYNE, DAVID A. SCHKADE & W. KIP VISCUSI, PUNITIVE DAMAGES: HOW JURIES DECIDE 142–170 (2002). The scholars

will admit it predicted it would be held liable only 30% of the time its harm is caused, so it decided to not take the necessary precautions. So, the court must use its resources to find this probability. Therefore, a simplified equation is needed with a specific way to identify the value of  $p$ .

Pursuant to the optimal level of care theory above,  $p$  is the probability with which a court will hold the defendant liable. Potentially, to account for  $p$ , a court could estimate the total number of potential trials a defendant could face, as well as the number of those trials that would be decided in favor of the plaintiff. The equation would be as follows:

$$p = \frac{\text{Number of potential unfavorable outcomes}}{\text{Total number of potential trials}}$$

Using this equation, a court could gather enough information to determine  $p$ . For example, during the bifurcated punitive phase in Montana, instead of gathering a defendant's net worth, the court could require defendants to submit the total number of times they have been sued regarding manufacturing or design defects over the past ten years.<sup>172</sup> This would give a value for the "total number of potential trials." A court could also require defendants to calculate how many times those lawsuits turned into trials and how often those trials resulted in a finding of liability against the defendant.<sup>173</sup> This would give the "number of potential unfavorable outcomes." While this calculation of  $p$  may not be perfect, if a defendant is required to divulge information about its potential liability, the process could allow an adjudicator to determine the value of  $p$ .

If this type of equation is implemented, it would eliminate the nebulous post-verdict review—the single-digit ratio doctrine and *Gore* guideposts—of each individual award. However, it is in the hands of legislatures to implement this approach. Since there is unquestionably a multitude of ways state legislatures limit punitive damages, an economic solution would provide continuity.<sup>174</sup> Abiding by an economic doctrine would allow for the

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simulated mock trials and instructed the jury to consider the probability of detection—whether and to what degree a corporation factored in the likelihood of detection when deciding to move forward with its risky behavior. The scholars found that even when attorneys presented the jury with various scenarios in which a defendant was held liable with some probability, and giving the jurors tables to aid them with the probability calculations, the juries did not award the optimal level of punitive damages.

172. This equation merely addresses a potential way for courts to determine a defendant's total number of trials in products liability cases. In other cases, such as tortious interference or fraudulent conduct, another method would be needed. Further, this possible solution for  $p$  does not account for the acts of individual defendants against individual plaintiffs. In these limited circumstances, the numerator and denominator would always be 1, so this specific equation would not suffice.

173. This implies that the defendant has some kind of trial history. Understandably, some defendants have no trial history. Thus, another method would be necessary to determine an accurate amount for the value of  $p$ .

174. See *infra* Appendix 2 for the various ways states limit punitive damages awards.

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calculation of punitive damages awards to be the same across the board, no matter what state defendants may be in, and, consequently, defendants could more easily predict what punitive liability they may face.

This author does not suggest that the economic theory of deterrence is the grand solution to solve all problems associated with punitive damages awards. However, if an equation were adopted that complies with the optimal utility equation, it would be a practical solution. Every jury trial opportunity injects subjectivity and arbitrary punitive damages verdicts. Thus, an economic approach allows states minimum flexibility in adopting various measures they determine appropriate for achieving the goals of punitive damages; hence, providing more uniformity for punitive damages across the United States. Accordingly, if the Montana Supreme Court ever finds Montana's punitive damages cap unconstitutional, an economic solution would be the best revision and provide an effective method for courts to evaluate a jury's punitive damages award during the post-verdict review stage.

## VII. CONCLUSION

The Montana Supreme Court held that “[p]unitive damage awards should not be a routine cost of doing business.”<sup>175</sup> Yet, they are. Without a significant revision or a complete elimination of Montana's punitive damages cap, plaintiffs will continue to be treated differently, wealthy defendants will continue to benefit, and juries will have no real impact with their punitive damages awards. Therefore, if Montana's punitive damages cap is ever held to be unconstitutional, modification of the statute should be the legislature's next step.

The potential for being liable for punitive damages is merely an economic formula depending on the jurisdictions to which the defendant is subject. A defendant will commit the wrongful, malicious act if it is more profitable to pay punitive damages than correct the wrong. Thus, an equation is needed that allows for an optimal punitive damages award: one that not only adheres to welfare economics and the optimal utility equation, but one that gives arbitrators the necessary tools to compute the best award using an amount for compensatory damages and an amount for the likelihood a defendant will be held liable. This note suggests that a revision for punitive damages limitations is needed and it should align with the economic theory of deterrence. Computing that economically efficient equation is the next step. The author leaves this to economists, state legislatures, and another paper.

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175. *Seltzer*, 154 P.3d at 597 (quoting *Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63, 78–79 (Cal. 2005)).

APPENDIX 1.

State	Punitive	Limit on Punitive?	Multiple of compensatory	Monetary Cap	Portion to State	Cap at Defendant's Net Worth
Alabama	Yes	YES. ALA. CODE § 6-11-21(a), (d) (2016).	3x or \$500,000, whichever greater, for a non-physical injury. 3x compensatory or 1.5 million, whichever is greater, for physical injury.			
Alaska	Yes	YES. ALASKA STAT. ANN. § 09.17.020 (f).	3x or \$500,000, whichever greater.		50%	
Arizona	Yes	NONE				
Arkansas	Yes	NONE. See ARK. CODE ANN. § 16-55-201(b) (2015), declared unconstitutional.	3x or \$250,000, not to exceed 1 million			
California	Yes	NONE				
Colorado	Yes	YES. COLO. REV. STAT. ANN. § 13-21-102(1)(a) (2015).	1x compensatory			
Connecticut	Yes	NONE				
Delaware	Yes	NONE				
D.C.	Yes	NONE				
Florida	Yes	YES. FLA. STAT. ANN. § 768.73(1)(a)-(b) (2016).	3x compensatory or \$500,000, whichever is higher			
Georgia	Yes	YES. GA. CODE ANN. § 51-12-5.1(g).		\$250,000	75%	
Hawaii	Yes	NONE				
Idaho	Yes	YES. IDAHO CODE ANN. § 6-1604(3).	Greater of: 3x compensatory or \$250,000			

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State	Punitive	Limit on Punitives?	Multiple of compensatory	Monetary Cap	Portion to State	Cap at Defendant's Net Worth
<b>Illinois</b>	Yes	NONE.			Trial court discretion. <i>See</i> 735 ILL. COMP. STAT. 5/2-1207 (2016).	
<b>Indiana</b>	Yes	YES. IND. CODE ANN. § 34-51-3-4.	Greater of: 3x compensatory or \$50,000, greater of.		75%	
<b>Iowa</b>	Yes	None, except for environmental	3x clean up costs for environmental claims. Iowa CODE ANN. § 455B.392.		75%. <i>See</i> Iowa CODE ANN. § 668A.1(2)(b).	
<b>Kansas</b>	Yes	YES. KAN. STAT. ANN. § 60-3701(e).				Lesser of: (1) the highest annual gross income earned by the defendant in past 5 years; or (2) \$5 million.
<b>Kentucky</b>	Yes	NONE				
<b>Louisiana</b>	No	LA. CIV. CODE ANN. ART. 3546 (2015) (unless authorized by the laws of another state were injurious conduct occurred).				
<b>Maine</b>	Yes	None, except environmental.	3x clean up costs in environmental cases. ME. REV. STAT. TIT. 38, § 568(4)(B).			
<b>Maryland</b>	Yes	NONE				
<b>Massachusetts</b>	Yes	None, statutory exceptions. <i>See</i> MASS. GEN. LAWS CH. 258, § 2 (2009).		\$100,000		
<b>Michigan</b>	No	NONE				
<b>Minnesota</b>	Yes	NONE				

State	Punitive	Limit on Punitive?	Multiple of compensatory	Monetary Cap	Portion to State	Cap at Defendant's Net Worth
Mississippi	Yes	YES, MISS. CODE ANN. § 11-1-65(3).				(i) \$20 million for a defendant with a net worth of more than \$1 billion; (ii) \$15 million for a defendant with a net worth of more than \$750 million but not more than \$1 billion; (iii) \$5 million for a defendant with a net worth of more than \$500 million but not more than \$750 million; (iv) \$3.75 million for a defendant with a net worth of more than \$100 million but not more than \$500 million; (v) \$2.5 million for a defendant with a net worth of more than \$50 million but not more than \$100 million; or (vi) Two percent (2%) of the defendant's net worth for a defendant with a net worth of \$50 million or less.
Missouri	Yes	NONE			50% to state. MO. REV. STAT. § 537.675(3).	
Montana	Yes	YES, MONT. CODE ANN. § 27-1-220 (3).				
Nebraska	No	NONE				
Nevada	Yes	YES, NEV. REV. STAT. ANN. § 42.005.	3x compensatory if greater than \$100,000; \$300,000 if less than \$100,000.			Lesser of: \$10 million or 3% of a defendant's net worth.

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State	Punitive	Limit on Punitives?	Multiple of compensatory	Monetary Cap	Portion to State	Cap at Defendant's Net Worth
New Hampshire	No	N.H. REV. STAT. ANN. § 507:16 (2016).				
New Jersey	Yes	YES. N.J. STAT. ANN. § 2A:15-5.14(b).	5 x compensatory or \$350,000, whichever is greater.			
New Mexico	Yes	NONE				
New York	Yes	NONE				
North Carolina	Yes	YES. N.C. GEN. STAT. § 1D-25 (a)-(c) (2015).	3x compensatory damages, or \$250,000, whichever is greater.			
North Dakota	Yes	YES. N.D. CENT. CODE § 32-03.2-11(4).	2x compensatory damages, or \$250,000, whichever is greater			
Ohio	Yes	YES. OHIO REV. CODE ANN. § 2315.21(D)(1), (2)(b).	2x compensatory damages or 10 percent of the employer's or individual's net worth when the tort was committed up to a maximum of \$350,000.			
Oklahoma	Yes	YES. OKLA. STAT. ANN. TIT. 23, § 9.1(B)-(D), called into question by Moody v. Ford Motor Co., 506 F. Supp. 2d 823, 849 (N.D. Okla. 2007).	Category I: \$100,000 or the actual damages awarded (whichever is greater); Category II: or \$500,000, twice the amount of actual damages, or the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff; or Category III: what judge finds reasonable			

State	Punitive	Limit on Punitive?	Multiple of compensatory	Monetary Cap	Portion to State	Cap at Defendant's Net Worth
Oregon	Yes	None, except common law for non-physical harm.	4x compensatory for online non-physical harm. <i>Goddard v. Farmers Ins. Co. of Or.</i> , 179 P.3d 645 (Or. 2008).		60%	
Pennsylvania	Yes	NONE				
Puerto Rico	No	NONE				
Rhode Island	Yes	None, except malicious misappropriation.	Not to exceed twice the actual loss and the unjust enrichment. R.I. GEN. LAWS § 6-41-3.			
South Carolina	Yes	NONE				
South Dakota	Yes	None, only medical malpractice.		Nothing above \$500k for med mal. S.D. CODIFIED LAWS § 21-3-11.		
Tennessee	Yes	NONE				
Texas	Yes	YES. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008.	The greater of: (1) 2x compensatory plus any noneconomic damages found by the jury, not to exceed \$750,000; or (2) \$200,000.			

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State	Punitive	Limit on Punitives?	Multiple of compensatory	Monetary Cap	Portion to State	Cap at Defendant's Net Worth
Utah	Yes	YES. Only common law exception: Hall v. Wal-Mart, Inc., 959 P.2d 109, 112 (Utah 1998).	3x compensatory		First \$50,000 to Plaintiff, then Plaintiff and State split equally any amount beyond \$50,000. UTAH CODE § 78B-8-201(3)(a) (2016).	
Vermont	Yes	None, statutory exceptions.				
Virginia	Yes	YES. VA. CODE ANN. § 8.01-38.1. (2015).		\$350,000		
Washington	No	NONE				
West Virginia	Yes	NONE				
Wisconsin	Yes	NONE				
Wyoming	Yes	NONE				

## APPENDIX 2.

<b>Capping at a multiple of compensatory damages or a specified amount, whichever is greater</b>		
<b>Alabama</b>	ALA. CODE § 6–11–21(a), (d) (2016).	3x or \$500,000, whichever greater, for a non-physical injury. 3x compensatory or 1.5 million, whichever is greater, for physical injury.
<b>Alaska</b>	ALASKA STAT. ANN. § 09.17.020 (f).	3x or \$500,000, whichever greater. 50% to a state fund.
<b>Arkansas</b>	ARK. CODE ANN. § 16–55–201(b) (2015).	3x or \$250,000, not to exceed 1 million
<b>Florida</b>	FLA. STAT. ANN. § 768.73(1)(a)–(b) (2016).	3x compensatory or \$500,000, whichever is higher
<b>Idaho</b>	IDAHO CODE ANN. § 6–1604(3).	Greater of: 3x compensatory or \$250,000
<b>Indiana</b>	IND. CODE ANN. § 34–51–3–4.	Greater of: 3x compensatory or \$50,000. Then 75% to state fund.
<b>Nevada</b>	NEV. REV. STAT. ANN. § 42.005.	3x compensatory if greater than \$100,000; \$300,000 if less than \$100,000.
<b>New Jersey</b>	N.J. STAT. ANN. § 2A:15–5.14(b).	5 x compensatory or \$350,000, whichever is greater.
<b>North Carolina</b>	N.C. GEN. STAT. § 1D–25 (a)–(c) (2015).	3x compensatory damages, or \$250,000, whichever is greater.
<b>North Dakota</b>	N.D. CENT. CODE § 32–03.2–11(4).	2x compensatory damages, or \$250,000, whichever is greater
<b>Ohio</b>	OHIO REV. CODE ANN. § 2315.21(D)(1), (2)(b).	2x compensatory damages or 10 percent of the employer's or individual's net worth when the tort was committed up to a maximum of \$350,000.
<b>Oklahoma</b>	OKLA. STAT. ANN. TIT. 23, § 9.1(B)–(D), <i>called into question by Moody v. Ford Motor Co.</i> , 506 F. Supp. 2d 823, 849 (N.D. Okla. 2007).	Category I: \$100,000 or the actual damages awarded (whichever is greater); Category II: or \$500,000, twice the amount of actual damages, or the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff; or Category III: what judge finds reasonable
<b>Texas</b>	TEX. CIV. PRAC. & REM. CODE ANN. § 41.008.	The greater of: (1) 2x compensatory plus any noneconomic damages found by the jury, not to exceed \$750,000; or (2) \$200,000.
<b>Capping at only a multiple of compensatory damages</b>		
<b>Colorado</b>	COLO. REV. STAT. ANN. § 13–21–102(1)(a) (2015).	1x compensatory
<b>Iowa</b>	IOWA CODE ANN. § 455B.392.	3x clean up costs for environmental claims.

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<b>Maine</b>	ME. REV. STAT. TIT. 38, § 568(4)(B).	3x clean up costs in environmental cases.
<b>Oregon</b>	Common law for non-physical harm: <i>Goddard v. Farmers Ins. Co. of Or.</i> , 179 P.3d 645 (Or. 2008).	4x compensatory for online non-physical harm.
<b>Utah</b>	Common law exception: <i>Hall v. Wal-Mart, Inc.</i> , 959 P.2d 109, 112 (Utah 1998).	3x compensatory
<b>Capping at some specified amount</b>		
<b>Connecticut</b>	<i>Hanna v. Sweeney</i> , 78 Conn. 492, 494, 62 A. 785, 786 (1906).	Costs of litigation and attorney's fees.
<b>Georgia</b>	GA. CODE ANN. § 51-12-5.1(g).	\$250,000. 75% to state fund.
<b>Massachusetts</b>	MASS. GEN. LAWS CH. 258, § 2 (2009).	\$100,000 in actions against municipal entities and the State.
<b>South Dakota</b>	S.D. CODIFIED LAWS § 21-3-11.	\$500,000 for medical malpractice claims
<b>Virginia</b>	VA. CODE ANN. § 8.01-38.1. (2015) (Virginia's statutory cap on punitive damages was upheld as constitutional in <i>Wackenhut Applied Techs. Ctr., Inc. v. Sygnatron Prot. Sys., Inc.</i> , 979 F.2d 980, 985 (4th Cir. 1992)).	\$350,000
<b>Distinguishing between non-physical and physical harm</b>		
<b>Alabama</b>	ALA. CODE § 6-11-21(a), (d) (2016).	3x or 500k, whichever greater, for a non-physical injury. 3x compensatory or 1.5 million, whichever is greater, for physical injury.
<b>Oregon</b>	<i>Goddard v. Farmers Ins. Co. of Or.</i> , 179 P.3d 645 (Or. 2008).	4x compensatory for online non-physical harm.
<b>Capping based on the defendant's finances and/or net worth and a specified amount</b>		
<b>Alabama</b>	ALA. CODE § 6-11-21(b)-(c) (2016).	Only for small businesses having a net worth of \$2 million or less at the time of the occurrence. Lesser of: \$50,000 or 10% of defendant's net worth.
<b>Kansas</b>	KAN. STAT. ANN. § 60-3701(e).	Lesser of: (1) the highest annual gross income earned by the defendant in past 5 years; or (2) \$5 million.

<b>Mississippi</b>	MISS. CODE ANN. § 11-1-65(3).	(i) \$20 million for a defendant with a net worth of more than \$1 billion; (ii) \$15 million for a defendant with a net worth of more than \$750 million but not more than \$1 billion; (iii) \$5 million for a defendant with a net worth of more than \$500 million but not more than \$750 million; (iv) \$3.75 million for a defendant with a net worth of more than \$100 million but not more than \$500 million; (v) \$2.5 million for a defendant with a net worth of more than \$50 million but not more than \$100 million; or (vi) Two percent (2%) of the defendant's net worth for a defendant with a net worth of \$50 million or less.
<b>Montana</b>	MONT. CODE ANN. § 27-1-220 (3).	Lesser of: \$10 million or 3% of a defendant's net worth.
<b>Diverting a portion of the punitive damages verdict to a state fund</b>		
<b>Alaska</b>	ALASKA STAT. § 09.17.020(j) (2015).	50%
<b>Georgia</b>	GA. CODE ANN. § 51-12-5.1(e)(2) (2015).	75%
<b>Illinois</b>	735 ILL. COMP. STAT. 5/2-1207 (2015).	The trial court has discretion to apportion punitive damages among the plaintiff, the plaintiff's attorney, and the State of Illinois Department of Human Services.
<b>Indiana</b>	IND. CODE ANN. § 34-51-3-6 (2015).	75%
<b>Iowa</b>	IOWA CODE ANN. § 668A.1(2)(b) (2015).	75%
<b>Missouri</b>	MO. REV. STAT. § 537.675(3) (2016).	50%
<b>Oregon</b>	OR. REV. STAT. § 31.735 (2016).	30% to Plaintiff, 60% payable to the Attorney General for deposit in the Criminal Injuries Compensation Account of the DOJ, and 10% is payable to the Attorney General for deposit in the State Court Facilities and Security Account and may only be used for specific purposes.
<b>Utah</b>	UTAH CODE § 78B-8-201(3)(a) (2016).	First \$50,000 to Plaintiff, then Plaintiff and State split equally any amount beyond \$50,000.
<b>No punitive damages cap</b>		
<b>Arizona</b>	Some statutory exceptions. <i>See, e.g.</i> , ARIZ. REV. STAT. § 12-820.04; Cont'l Nat'l Bank v. Evans, 489 P.2d 15 (Ariz. 1971).	
<b>California</b>	Some statutory exceptions. <i>See, e.g.</i> , CAL. CIV. CODE § 3294 (2010).	
<b>Delaware</b>	Some common law exceptions. <i>See, e.g.</i> , Casson v. Nationwide Ins. Co., 455 A.2d 361, 368 (Del. Super. Ct. 1982).	
<b>Hawaii</b>	Some statutory exceptions. <i>See, e.g.</i> , HAW. REV. STAT. ANN. § 662-2.	
<b>Illinois</b>	Some statutory exceptions. <i>See, e.g.</i> , 745 ILCS 10/2-102.	
<b>Iowa</b>	Some statutory exceptions. <i>See, e.g.</i> , IOWA CODE ANN. § 455B.392 (2015).	

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<b>Kentucky</b>	Some statutory exceptions. <i>See, e.g.</i> , KY. REV. STAT. ANN. §§ 411.184; 411.186.
<b>Maine</b>	Some statutory exceptions. <i>See, e.g.</i> , ME. REV. STAT. TIT. 38, § 568(4)(B).
<b>Massachusetts</b>	Some statutory exceptions. <i>See, e.g.</i> , MASS. GEN. LAWS CH. 258, § 2 (2009) (claims against municipal entities and the State).
<b>Minnesota</b>	Some statutory exceptions. <i>See, e.g.</i> , MINN. STAT. ANN. § 466.04 (limits on punitive damages against municipal entity).
<b>Missouri</b>	Some statutory exceptions. <i>See, e.g.</i> , MO. REV. STAT. ANN. § 537.610 (2015).
<b>New Mexico</b>	Some statutory exceptions. <i>See, e.g.</i> , N.M. STAT. ANN. § 41-4-19(d) (2016).
<b>New York</b>	Some common law exceptions. <i>See, e.g.</i> , <i>Bibeau v. Ward</i> , 645 N.Y.S.2d 107 (N.Y. App. Div. 1996).
<b>Oregon</b>	Some statutory exceptions. <i>See, e.g.</i> , OR. REV. STAT. ANN. § 30.271(2) (2016)
<b>Pennsylvania</b>	Some statutory exceptions. <i>See, e.g.</i> , PA. STAT. ANN. TIT. 35, § 6020.507(c) (2016).
<b>Rhode Island</b>	Some statutory exceptions. <i>See, e.g.</i> , R.I. GEN. LAWS § 6-41-3 (2015) (malicious prosecution claims not to exceed twice the actual loss and the unjust enrichment).
<b>South Carolina</b>	Some statutory exceptions. <i>See, e.g.</i> , S.C. CODE ANN. § 44-56-200(B)(1) (2016).
<b>South Dakota</b>	Some statutory exceptions. <i>See, e.g.</i> , S.D. CODIFIED LAWS § 21-3-11 (2015) (medical malpractice claims).
<b>Tennessee</b>	Some statutory exceptions. <i>See, e.g.</i> , TENN. CODE ANN. § 9-8-307 (a)(3) (2016).
<b>Vermont</b>	Some statutory exceptions. <i>See, e.g.</i> , VT. STAT. ANN. TIT. 12, § 5601(b) (2016).
<b>West Virginia</b>	Some statutory exceptions. <i>See, e.g.</i> , W. VA. CODE ANN. § 55-17-1(a) (2016).
<b>Washington D.C.</b>	Some common law exceptions. <i>See, e.g.</i> , <i>Walch v. Ford Motor Co.</i> , 627 F. Supp. 1519 (D.D.C. 1986).
<b>No punitive damages awarded whatsoever</b>	
<b>Michigan</b>	Generally, no. <i>See</i> <i>Gregory v. Cincinnati Inc.</i> , 538 N.W.2d 325, 334 n.31 (Mich. 1995); <i>Rafferty v. Markovitz</i> , 602 N.W.2d 367 (Mich. 1999); <i>McPeak v. McPeak</i> , 593 N.W.2d 180, 184 (Mich. Ct. App. 1999); <i>Bailey v. Graves</i> , 411 Mich. 510, 515, N.W.2d 166 (1981).
<b>Louisiana</b>	LA. CIV. CODE ANN. ART. 3546 (2015) (unless authorized by the laws of another state were injurious conduct occurred).
<b>Nebraska</b>	NEB. CONST. ART. VII § 5; <i>Distinctive Printing &amp; Packaging Co. v. Cox</i> , 443 N.W.2d 566 (Neb. 1989).
<b>New Hampshire</b>	N.H. REV. STAT. ANN. § 507:16 (2016).
<b>Puerto Rico</b>	<i>Cruz v. Molina</i> , 788 F. Supp. 122, 128 (D. P.R. 1992).
<b>Washington</b>	<i>Dailey v. N. Coast Life Ins. Co.</i> , 919 P.2d 589, 590 (Wash. 1996) (en banc); <i>Barr v. Interbay Citizens Bank</i> , 635 P.2d 441 (Wash. 1981).

