University of Michigan Journal of Law Reform

Volume 47

2014

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https://doi.org/10.36646/mjlr.47.3.invading

INVADING THE REALM OF THE DEAD[+]: EXPLORING THE (IM)PROPRIETY OF PUNITIVE DAMAGE AWARDS AGAINST ESTATES

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Punitive damages are traditionally understood, at least in part, as damages designed to punish. It should therefore come as no surprise that, in the majority of states that have decided the issue, courts have chosen not to allow punitive damage awards against the estates of deceased tortfeasors. After all, the tortfeasor can no longer be punished (at least by tort awards). Nonetheless, punitive damages can also serve other purposes, such as deterrence. This Note argues that Michigan, a state which has not yet taken a stance, should adopt the minority position that allows punitive damages to be awarded against estates. Because of Michigan's historically liberal stance on the survival of actions and its unique understanding of punitive damage awards, this Note contends that the minority position is the only position consistent with state law. However, this Note also advocates for legislative action in order to make Michigan's adoption of the minority position absolutely clear. Such clarity would promote stability and predictability for plaintiffs and defendants alike and would ensure results consistent with Michigan's broader history and policies.

Introduction

Death belongs to God alone. By what right do men touch that unknown thing?[1]

When G.J.D. ended her five-year relationship with Darwin Thebes, she may have expected that he would be upset.[2] She may even have expected that he would try to win her back. But one thing she likely did not anticipate was that Thebes had been keeping two secret photographs of G.J.D.—photographs that depicted her partially nude and performing fellatio, respectively.[3] G.J.D. had

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+ This title is drawn from *Hewellette v. George*, 9 So. 885, 887 (Miss. 1891) ("[T]he realm of the dead is not invaded, and punishment visited upon the dead."), *overruled by* Glaskox *ex rel.* Denton v. Glaskox, 614 So. 2d 906 (Miss. 1992). For more context for this quotation, see *infra* Part I.A.

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1. Victor Hugo, Les Misérables, 23 (1887).

2. G.J.D. v. Johnson, 713 A.2d 1127, 1128 (Pa. 1998).

3. *Id.* While the particular photographs at issue in this case were kept hidden from G.J.D. for years before their distribution, Thebes's actions in this case were not entirely out of character. The Court notes that "[t]he dissemination of the materials followed a pattern of behavior whereby Thebes, while residing with G.J.D., physically and psychologically abused

not seen these photographs until they began to emerge all over her community.[4] The photographs, labeled with her contact information and "captions which implied that she was a prostitute," were distributed in a malicious, calculated manner.[5] Thebes carefully planned his distributions so that the photographs would be found by G.J.D.'s family and friends, including her employer and her two minor children.[6] Thebes stopped posting the photographs only after G.J.D. filed suit against him alleging defamation, intentional infliction of emotional distress, false light invasion of privacy, and invasion of privacy by publicity given to private life.[7]

While the facts alleged by G.J.D were sensational, her request for punitive damages might have been rather straightforward had Thebes not committed suicide before trial.[8] After Thebes's suicide, the executrix of his estate was substituted as defendant.[9] A jury awarded G.J.D. and her children a combined $76,500 in punitive damages, but the executrix successfully appealed the damage award all the way to the Pennsylvania Supreme Court.[10] Pennsylvania ultimately upheld G.J.D.'s punitive damage award, but it joined a distinct minority of states in doing so.[11] At that time, fourteen states had legislation explicitly preventing the recovery of punitive damages against estates, and another fourteen had reached the same conclusion judicially.[12] By contrast, Pennsylvania became only the sixth state at that time to allow such a recovery.[13] As of 2011, the number of states allowing such a recovery ("minority jurisdiction" states) had increased to ten, but the number of states prohibiting such a recovery ("majority jurisdiction" states) had held steady at

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her and her children." *Id.* at 1131. Thebes's distribution of the photographs to G.J.D.'s employer could be characterized as an extension of this pattern into economic abuse (the practice of "controlling and limiting the victim's access to financial resources, [such that] a batterer ensures that the victim will be financially limited if he/she chooses to leave the relationship."). NAT'L COAL. AGAINST DOMESTIC VIOLENCE, ECONOMIC ABUSE, *available at* http://www.ncadv.org/files/EconomicAbuse.pdf.

4. *G.J.D.*, 713 A.2d at 1128.

5. *Id.*

6. *Id.*

7. *Id.* G.J.D.'s son and daughter, both minors, were also plaintiffs in the lawsuit. *Id.*

8. *Id.* While cases involving punitive damages claimed against an estate can involve the death of the tortfeasor by suicide or natural causes, many cases involve the death of the defendant from the tortious conduct itself. For example, *Shirley v. Shirley*, 73 So.2d 77, 79 (Ala. 1954), involved the death of the defendant in the car accident at issue in the case.

9. *G.J.D.*, 713 A.2d at 1128. The executrix of Thebes's estate was his sister, Geraldine Johnson. *Id.*

10. *Id.* at 1128–29 & n.2. The plaintiffs were also awarded $21,015 in compensatory damages, which was not appealed. *Id.*

11. *Id.* at 1130.

12. *Id.* at 1129 & n.3.

13. *Id.* at 1129–30.

twenty-eight,[14] making it difficult to discern any trend toward either outcome.[15]

Michigan has not officially adopted a position on the survival of punitive damages, but there is only one solution that is fully consistent with its laws in other areas. This Note argues that Michigan courts must adopt the minority position as a result of the State's broadly-worded survival statute,[16] history of allowing the liberal survival of damages, and unique approach to punitive damages. While courts would be obliged to adopt the minority position under the current legal framework, this Note argues that the legislature should act affirmatively in order to make the position of the State absolutely clear.

It is not superfluous to ask the legislature to clarify the issue. First, the divide between jurisdictions regarding the recovery of punitive damages against an estate is not merely a technical one. Rather, it reflects disagreements about principles that reach the very heart of tort law: the goals of damage awards in general, the effectiveness and relative importance of deterrence, and the meaning of compensation.[17] Michigan's stance on this issue has the potential to either illuminate or hopelessly confuse the State's position on central issues of tort jurisprudence. Second, the issue is likely to create confusion in the lower courts. Because the proper position for Michigan largely depends on factors unique to the state, it would be easy for some courts to be led astray by the logic of the majority position, which might well lay out the best solution for other states. Furthermore, any inconsistency in the lower courts has the potential to damage their perceived legitimacy. Punitive damage awards can be extremely large.[18] If neighboring courts disagree on whether such damages could survive the death of a defendant, an extraordinary sum of money might hinge on the town that a plaintiff happened to live in or the judge that a plaintiff happened to be assigned. This has the potential to create a sense of perceived

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14. This count includes the District of Columbia. *See infra* note 15.

15. *See* Timothy R. Robicheaux & Brian R. Bornstein, *Punished, Dead or Alive: Empirical Perspectives on Awarding Punitive Damages Against Deceased Defendants*, 16 PSYCHOLOGY, PUB. POL'Y, AND L. 393 (2010); *see also G.J.D.*, 713 A.2d at 1129. See the Appendix for a complete description of this Note's categorization of jurisdictions adopting the majority and minority approaches.

16. MICH. COMP. LAWS § 600.2921 (2004).

17. *See infra* Part I.A–B.

18. *See* Thomas B. Colby, *Clearing the Smoke From* Phillip Morris v. Williams*: the Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 397–400 (2008) (explaining that multimillion-dollar punitive damage awards were "commonplace" before Phillip Morris v. Williams, 549 U.S. 346 (2007), but that such extremely large awards may be less common now).

injustice. By making the state's position on the topic absolutely clear, the Michigan legislature can avoid such problematic inconsistencies and, more importantly, ensure that all future decisions on the subject are consistent with Michigan's unique laws and history.

Part I begins by exploring the decisions of other states. It shows that majority-jurisdiction and minority-jurisdiction states differ primarily in their perception of the purposes and effectiveness of punitive damages. Part II first explains Michigan's unique viewpoint on the justification of punitive damages. In particular, it notes that Michigan disfavors traditional "punitive" damages but, in many of the situations in which other states award punitive damages, instead awards compensatory "exemplary damages." Part II then discusses Michigan's broadly worded survival statute and its history of allowing causes of action to survive the death of a defendant unchanged. Part III argues that Michigan's unique approach to punitive damages shows that the minority position is not only sound policy, but that Michigan's survival statute actually requires its adoption. This Note concludes that, although there is a legitimate national debate regarding punitive damage awards against estates, such a policy debate is more appropriately held in the legislature than in the courts, and that Michigan's legislature should adopt the minority position.

I. THE SURVIVAL OF PUNITIVE DAMAGES IN OTHER STATES

Majority-jurisdiction and minority-jurisdiction states differ primarily in the way they characterize the purposes of punitive damages. Majority-jurisdiction states tend to emphasize the importance of punishment. To the extent that they view deterrence as an important goal of punitive damages, they view punitive damages against an estate as ineffective at deterring similarly-situated, living tortfeasors.[19] Minority-jurisdiction states, on the other hand, tend to view deterrence as a central goal of tort awards and believe that punitive damages against estates are effective in furthering that goal.[20]

19. *See infra* Part I.A.

20. *See infra* Part I.B and notes 30–39.

A. Majority-Jurisdiction Reasoning

Majority-jurisdiction states generally view punishment as one of the most important goals of awarding punitive damages.[21] If the offender is dead, further earthly punishment is impossible, and punitive damages are not warranted. The Mississippi Supreme Court eloquently summarized this perspective:

> Our statutes have modified the common law to the extent of permitting a recovery against the representative of the deceased wrong-doer to an amount sufficient to compensate for the actual damage sustained by the injured party; but the realm of the dead is not invaded, and punishment visited upon the dead.[22]

Not only is it impossible to punish the dead, but allowing even a pecuniary punishment to fall upon the innocent may be contrary to the underlying goals of punishment.[23] Under a retributive theory of punishment, levying punitive damages against innocent parties is inherently disturbing.[24] As much as the law might want to reach into the grave, punishing the estate of a dead man cannot "balance the scales," or satisfy our sense that those who have committed moral wrongs should be punished. Even the appearance of having punished the wrong party could be harmful to the perceived legitimacy of a state's courts. Taken far enough, such perceived illegitimacy could dilute the social or moral force of court decisions.

Majority-jurisdiction states are also quick to point out that punishment is closely linked to deterrence, another central goal of

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21. Kraft Power Corp. v. Merrill, 981 N.E.2d 671, 684–85 (Mass. 2013); Lohr v. Byrd, 522 So. 2d 845, 847 (Fla. 1988); Thompson v. Estate of Petroff, 319 N.W.2d 400, 408 (Minn. 1982); Braun v. Moreno, 466 P.2d 60, 62–63 (Ariz. Ct. App. 1970).

22. Hewllette v. George, 9 So. 885, 887 (Miss. 1891), *overruled by* Glaskox *ex rel.* Denton v. Glaskox, 614 So. 2d 906 (Miss. 1992).

23. *Cf.* Doe v. Colligan, 753 P.2d 144, 145 (Alaska 1988) ("Several courts take the position that the exemplary purpose of punitive damages is not well served by imposing damages on anyone other than the actual wrongdoer."); Evans v. Gibson, 31 P.2d 389, 395 (Cal. 1934) ("[P]unitive damages by way of example to others should be imposed only on actual wrongdoers.").

24. *Cf.* IMMANUEL KANT, THE PHILOSOPHY OF LAW, PART II (W. Hastie trans., T & T Clark 1887) (1796) (explaining Kant's retributivist theories of punishment).

punitive damage awards.[25] If the defendant is dead, the goal of specifically deterring the wrongdoer is moot.[26] Further, if one cannot punish the wrongdoer directly, then even the general deterrent effect of the punishment becomes more speculative.[27] One wonders if men like Thebes, despite their seeming imperviousness to earthly punishment, would be swayed by the prospect that their heirs might be forced to pay additional damages upon their death.

Because punishment and deterrence are two central goals of punitive damage awards,[28] majority jurisdiction states conclude that awarding punitive damages against estates would either be purposeless or serve too attenuated a purpose to justify the imposition.[29]

B. Minority-Jurisdiction Reasoning

Minority-jurisdiction states—those that allow punitive damages against estates—cite a variety of theoretical and statutory rationales to justify their position. These states are more likely to see general, rather than specific, deterrence as a central goal of tort theory; they are also more likely to believe that punitive damages against an estate could be effective for this purpose.[30] In other words, they tend to believe that levying a punitive damage award might deter other, similarly-situated defendants. According to minority-jurisdiction states, this general deterrence justifies punitive damages against estates, even though the specific defendant in question can no longer be deterred.[31]

In addition to believing that punitive damages continue to have some deterrent value even after a defendant has died, minority-jurisdiction states may also suggest that punitive damages are valuable for other reasons. For example, Arizona has held that punitive damages retain their inherent value as a signal of societal disapproval

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25. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Maidment, 761 P.2d 446, 449 (N.M. 1968); *see also* RESTATEMENT (SECOND) OF TORTS § 901 (1979) (listing deterrence as one of the central purposes of tort damages); BLACK'S LAW DICTIONARY 450 (9th Ed. 2009) (defining a deterrent as "[s]omething that impedes; something that prevents").

26. *See, e.g.*, Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 940 (D.C. 1995); *Doe*, 753 P.2d at 145–46 (Alaska 1988).

27. *State Farm*, 761 P.2d at 449; *see also Woodner*, 665 A.2d at 940.

28. RESTATEMENT (SECOND) OF TORTS § 908 (1979).

29. *See, e.g.*, *Woodner*, 665 A.2d at 939–40 & n. 16 (noting the views of other jurisdictions).

30. *See, e.g.* Penberthy v. Price, 666 N.E.2d 352, 355–57 (Ill. App. Ct. 1996); Tillett v. Lippert, 909 P.2d 1158, 1162 (Mont. 1996).

31. *See, e.g.*, G.J.D. v. Johnson, 713 A.2d 1127, 1131 (Pa. 1998).

even after the defendant has died.[32] Other states view such awards as similar to a debt of the estate, rather than as punishment of innocent heirs.[33] Finally, some state courts base their decisions not on theoretical concerns but on their interpretation of specific state statutes.[34]

Courts in the minority believe that the prospect of a punitive damage award against a person's estate may deter him from committing a dangerous tort.[35] While not all minority-jurisdiction states hold that the general deterrent effect of an award against an estate is *equally* effective as an award against the tortfeasor in deterring tortious behavior,[36] many have nonetheless found that it is effective enough to warrant such awards.[37] The threat of a punitive damage award against one's estate may not send the same chill up one's spine as the threat of life after paying a large damage award, but the incremental effect could still be intimidating enough to give one pause. As the court in *Haralson v. Fisher Surveying Inc.* emphasized, "where general deterrence, as here, is a prime factor . . . [the defendant] must recognize that the decision to drive in that condition [of intoxication] may result in placing *everything* on the line, even if solely as a reminder to others so tempted."[38] This logic leads to the straightforward conclusion articulated in *Shirley v. Shirley*: if "the purpose is to prevent homicides," then the law should authorize

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32. Haralson v. Fisher Surveying, Inc., 31 P.3d 114, 117 (Ariz. 2001) ("[W]e conclude that there are situations in which it would be appropriate, and perhaps even necessary, to express society's disapproval of outrageous conduct by rendering such an award against the estate of a deceased tortfeasor.") (internal quotation marks omitted).

33. *See G.J.D.*, 713 A.2d at 1131.

34. *See, e.g.*, *Tillett*, 909 P.2d at 1162 (interpreting MONT. CODE ANN. § 27-1-220, which allowed "punitive damages for the sake of example" as allowing punitive damages against an estate). The persuasiveness of any reasoning based on state statutory authority is obviously limited outside the state in question. Nonetheless, the arguments are worth noting in light of Michigan's unique statutory backdrop, discussed in detail in Part II, *infra*.

35. *See, e.g.*, *Haralson*, 31 P.3d at 117–18; *G.J.D.*, 713 A.2d at 1131; Shirley v. Shirley, 73 So.2d 77, 85 (Ala. 1954).

36. The court in *G.J.D.* took the more extreme view that "the deterrent effect on the conduct of others is no more speculative in [cases where the tortfeasor has died] than in those cases where the tortfeasor is alive." 713 A.2d at 1131.

37. *See, e.g.*, Penberthy v. Price, 666 N.E.2d 352, 356–57 (Ill. App. Ct. 1996) (authorizing punitive damages against an estate for the sake of example to others similarly situated); *Tillet*, 909 P.2d at 1162.

38. *Haralson*, 31 P.3d at 120 (Jones, Vice C.J., specially concurring) (emphasis added). Vice Chief Justice Jones's opinion is also useful in that it points out the apparent inconsistency in refusing to award punitive damages against an estate given that, "had [the defendant] survived the crash with full, permanent mental disability, he would be 'alive' but unable to function." *Id.* If specific deterrence and punishment were the *only* factors motivating punitive damage awards, such a result would be absurd.

"the fixation of a sum which will have a tendency to prevent such homicides."[39]

Just as punitive damage awards against a living defendant may have value apart from deterrence, at least one state has argued that there may be inherent worth in awards against the deceased.[40] In *Haralson*, the Arizona Supreme Court held that punitive damages in that state exist not only to punish the defendant but also to "express society's disapproval of outrageous conduct."[41] The court listed "terrorist attacks or bombings, mass murders, and serial killings" as examples of situations where "the assets of those who perpetrate such atrocities and then die" should not be protected.[42] Thus, expressing societal disapproval and reinforcing social norms could have inherent symbolic value even when the deterrent effect is unclear.

In addition to arguing that punitive damage awards against estates have value by making an example of the dead, some minority-jurisdiction states also argue that such awards do not punish the living. These courts point out that, because the assets of the deceased will be encumbered by an award, the innocence of the tortfeasor's heirs is irrelevant.[43] From this perspective, punitive damages function as a debt to an involuntary creditor.[44] Allowing a tort victim to collect punitive damages against an estate is no more problematic than permitting voluntary creditors to collect fully against the estate, and no more unjust in its effects on the decedent's heirs.[45] As the Arizona Supreme Court noted in *Haralson*,

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39. *Shirley*, 73 So.2d at 85.

40. *Haralson*, 31 P.3d at 117. This deontological assertion of the worthiness of setting an example closely parallels the desire for punishing living defendants in much the same way that the consequentialist argument in favor of general deterrence parallels the role of specific deterrence.

41. *Id.* (quoting Hawkins v. Allstate Ins. Co., 733 P.2d 1073, 1080 (Ariz. 1987)).

42. *Id.* at 117. That particular case, however, involved an intoxicated driver, suggesting that the court contemplated awards in less extreme cases.

43. *See Haralson*, 31 P.3d at 118; *see also*, G.J.D. v. Johnson, 713 A.2d 1127, 1131 (Pa. 1998) ("To allow a tortfeasor's estate to escape payment of punitive damages would be comparable to the injustice of allowing a defendant to transfer his wealth to his prospective heirs and beneficiaries prior to the trial of a case in which punitive damages are sought against him.")

44. This is consistent with the general practice of referring to tort victims as "involuntary creditors," *see, e.g.*, Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1895 n.36 (1994), and with the treatment of punitive damages as a form of debt when an action is brought against an "innocent" successor corporation after a merger. *See, e.g.*, Joel Slawotsky, *The Impropriety of Levying Punitive Damages on Innocent Successor Corporations*, 38 DUQ. L. REV. 49, 52 n.28 (1999). In both cases, treating the tort victim as an involuntary creditor suggests that the victim should be allowed to recover against the defendant's assets, even if those assets would otherwise be transferred to an innocent party. *But cf. id.* (arguing that punitive damages should not be levied against innocent successor corporations).

45. *G.J.D.*, 713 A.2d at 1131.

"The tortfeasor's estate is entitled only to what the law affords—nothing more. Whatever the heirs may hope to inherit is generally contingent upon the obligations incurred by the deceased during his or her lifetime."[46] To the extent that this fear of harming "innocent" heirs is part and parcel of a larger fear of unjust awards, the jury, if properly instructed on the death of the defendant, should act as a check on improper awards, just as it does with living defendants.[47]

Finally, some minority-jurisdiction courts draw on their own states' survival statutes to determine whether or not punitive damages are properly awarded against estates. The conclusions that courts have drawn from these statutes are as diverse as the statutes themselves. Illinois interpreted its survival statute to allow the continuation of punitive damage actions against estates based on statutory claims or certain equitable circumstances but not on common law.[48] Montana interpreted its statutes regarding punitive damages and the survival of actions to allow punitive damages to survive the death of the tortfeasor in all cases.[49] Arizona, on the other hand, used its *lack* of a statute to conclude that there was no reason to believe that punitive damages should be extinguished by the death of a tortfeasor.[50] While the interpretations of these particular statutes shed little light on the issue of punitive damages more generally, they give good reason to believe that Michigan's survival statute, in conjunction with its established stance on punitive damages, would be paramount in finding a solution suited to the state.

II. PUNITIVE DAMAGES AND MICHIGAN'S SURVIVAL STATUTE

Michigan law regarding punitive damages is unique in two relevant respects. First, while Michigan courts have historically upheld

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46. *Haralson*, 31 P.3d at 118.

47. *G.J.D.*, 713 A.2d at 1131; *Haralson*, 31 P.3d at 119. For an empirical study of the effect of defendant death on jury awards, see generally Robicheaux & Bornstein, *supra* note 15, at 415. The study found that the injury or death of a defendant did not significantly affect the level of punitive damages awarded by mock juries. *Id.* This could mean that juries are unresponsive to instructions on the death of a defendant or fail to understand the differences between specific and general deterrence. Alternatively, it could simply mean that juries place a high value on general deterrence rather than on specific deterrence, in which case awarding punitive damages after the death of a defendant would simply be more in line with the typical citizen's values. Note also that the respect for juries in American jurisprudence may be based on other values than their effectiveness as an empirical matter.

48. *See, e.g.*, Penberthy v. Price, 666 N.E.2d 352, 355 (Ill. App. Ct. 1996).

49. Montana has an extremely liberal punitive damages statute. *See* Tillet v. Lippert, 909 P.2d 1158, 1162 (Mont. 1996).

50. *Haralson*, 31 P.3d at 118.

awards of "punitive" or, more commonly, "exemplary" damages in a manner functionally equivalent to other states' punitive damages, the Michigan Supreme Court has held that such damages must be compensatory in nature.[51] Second, the survival of causes of action in Michigan has historically been determined by a relatively liberal survival statute, rather than by the common law.[52] Any argument about the possible survival of exemplary damages must account for this history. The majority-jurisdiction solution therefore appears entirely ill-suited to Michigan law.[53]

A. Exemplary Damages in Michigan

In most states, punitive damages are understood to be "damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."[54] While there is debate about both the degree to which punitive damages are designed to punish rather than deter and under what conditions such damages have maximum deterrent effect, most states accept that deterrence and punishment are the general goals of punitive damages.[55]

Michigan courts award nominally "punitive" damages only when expressly authorized by statute[56] and almost never in the sense used by the Restatement and majority-jurisdiction states. That is, Michigan disfavors damage awards explicitly designed to punish.[57]

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51. *See infra* Part II.A. Michigan sometimes labels these damages as "punitive," despite noting that they are not punitive in nature. Unless otherwise specified, this Note will use the term "exemplary damages" to refer to punitive damages as they are understood in Michigan case law, regardless of how they are labeled, and "punitive damages" to refer to punitive damages as they are commonly understood.

52. *See infra* Part II.B.

53. *See infra* Part IV.

54. RESTATEMENT (SECOND) OF TORTS § 908 (1979). The rationale adopted by the Restatement reflects the doctrine in many states. For more information on majority-jurisdiction states adopting this rationale, see *infra* Part IV, which contrasts majority-jurisdiction supreme court cases adopting this rationale with the law of Michigan.

55. For a sampling of the views of state courts, see *supra* Part I. For a useful discussion of the purposes of punitive damages from a more scholarly standpoint, see, for example, Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 421–22 (1998) (discussing the debate regarding whether punitive damages should aim for "complete deterrence" by eliminating the morally disfavored gain of the average offender, or "optimal deterrence," forcing the defendant to internalize the costs of his action only to the degree that doing so benefits society at large).

56. Gilbert v. DaimlerChrysler Corp., 685 N.W.2d 391, 400 (Mich. 2004).

57. LORI S. NUGENT & ROBERT W. HAMMESFAHR, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 7:50 (2011 ed.).

However, "exemplary" damages, which are purportedly compensatory in nature, are available in many of the same situations in which other states award punitive damages.[58] Rather than aiming to punish or deter the defendant, however, exemplary damages in Michigan instead compensate the plaintiff for the increased injury to his or her feelings caused by malicious, willful, and wanton conduct.[59] As Justice Wiest famously illustrated in *Wise v. Daniel*:

> If a cow kicks a man in the face the consequent physical hurt may equal that from a kick in the face with a hob-nailed boot, but the 'cussedness' of the cow raises no sense of outrage, while the malicious motive back of the boot kick adds materially to the victim's sense of outrage. If a man employs spite and venom in administering a physical hurt, he must not expect his maliciousness to escape consideration when he is cast to make compensation for his wrong.[60]

Justice Wiest might have said, in plainer terms, simply that context matters when calculating how to compensate an injured person. A farm employee who gets kicked while milking cows might be embarrassed, and might even require stitches, but he would not have his view of the world or his place within it fundamentally shaken. Someone who is pushed to the ground in a public square and has her face stomped on, however, would face an injury far greater than the number of stitches required. She might feel humiliated, outraged, and helpless. Her sense of security in the world might be deeply shaken. Even if she faced exactly the same physical injury as the farm employee, she would face additional psychological damage which is not readily measurable.

In Michigan, actual damages compensate for the sort of injuries that may as well have been caused by the kick of a cow, while exemplary damages compensate the plaintiff for the "incremental injury to feelings attributable to the sense of indignation and outrage" that might reasonably accompany a particularly outrageous or malicious attack.[61] For this reason, both actual damages and exemplary damages may be awarded without being duplicative.[62]

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58. *Id.*; *see also, e.g.*, Peisner v. Detroit Free Press, Inc., 364 N.W.2d 600, 601 (Mich. 1984); 7 MICHIGAN CIVIL JURISPRUDENCE *Damages* §§ 161–62 (2009).

59. 7 MICHIGAN CIVIL JURISPRUDENCE *Damages* §§ 161–62 (2009).

60. Wise v. Daniel, 190 N.W. 746, 747 (Mich. 1922).

61. *Id.*

62. *Id.* Some cases have held that exemplary damages are inappropriate in situations where the extent of the injury is capable of exact calculation. 7 MICHIGAN CIVIL JURISPRUDENCE *Damages* § 162 (2009). This might provide an alternative ground for distinguishing between actual damages, awarded where the injury to a plaintiffs feelings is calculable, and

Michigan therefore awards exemplary damages much like other states award punitive damages. That is, Michigan awards such damages only in cases in which the defendant has acted in a particularly reprehensible manner and gives the jury considerable latitude in assessing these recondite damages.[63] Unlike other states, however, Michigan views these damages not as *punishment* to the defendant, but rather as *additional compensation* to the plaintiff for the incremental increase in injury caused by intentional, egregious conduct. For example, one might imagine that G.J.D. and her children would suffer humiliation and outrage beyond that normally attributed to the distribution of such a photograph due to the egregious nature of the *malicious* distribution of secret photographs with the intent of shocking the children.[64]

While Michigan's unique approach to exemplary damages does not fit neatly into either the minority-jurisdiction or majority-jurisdiction framework, it seems most logically consistent with the former.[65] If Michigan truly views exemplary damages as a form of compensation, rather than punishment, it seems illogical to tie such damages to the life of the defendant. Even if the Michigan Supreme Court decides to deviate from its traditional approach to exemplary damages on practical grounds, it will have to operate within (or give good reason for deviating from) the framework created by Justice Wiest.

B. Michigan's Survival Statute and Wrongful Death Act

Just as Michigan's approach to exemplary damages differs from other states' views of punitive damages, so too does its approach to the survival of damages and causes of action following the death of either party. The Michigan Survival Statute, Michigan Compiled Laws (MCL) section 600.2921, is a short yet sweeping statement that "[a]ll actions and claims survive death."[66] Michigan courts have made clear that this provision applies both to the death of the

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exemplary damages for feelings of "rage" or "humiliation," which may not be readily quantified.

63. *See* NUGENT & HAMMESFAHR, *supra* note 57.

64. *See* G.J.D. v. Johnson, 713 A.2d 1127, 1128 (Pa. 1998); discussion *supra* Part I. Note that, in Michigan, G.J.D. and her children might have been awarded both damages for the emotional damages that would naturally follow from the distribution of such a photograph, as well as exemplary damages for the additional injury caused by the egregious nature of the intentional distribution and pattern of abuse.

65. This argument will be discussed further *infra* Part IV.

66. Mich. Comp. Laws § 600.2921 (2004).

plaintiff and to the death of the defendant.[67] The Survival Statute is often read in conjunction with Michigan's Wrongful Death Act, MCL section 600.2922, which elaborates on damages in the case of the death of the plaintiff.[68]

Because no sections of the code separate these two distinct provisions, case law surrounding the statute can easily be misread. While MCL sections 600.2921 and 600.2922 speak explicitly to the award of appropriate damages in the event of the death of the *plaintiff*, both sections are entirely silent as to the award of damages following the death of the *defendant*. Nonetheless, case law interpreting the Survival Statute, which applies to the death of either party, frequently involves the interpretation of both the Survival Statute and the Wrongful Death Act.[69] For this reason, understanding the Wrongful Death Act may help to elucidate the meaning of the Survival Statute.

Michigan designed and amended both statutes to abrogate a significant body of common law, and the statutory history supports a broad reading of the statute's purpose.[70] Under the common law, all causes of action were extinguished at the death of either party.[71] In the early nineteenth century, Michigan's legislature passed two separate statutes to address the survival of actions upon a party's death.[72] The first, the Wrongful Death Act (WDA) provided a cause of action in the limited set of circumstances where a plaintiff was killed by a defendant's tortious conduct.[73] The Survival Statute, in contrast, did not create a new cause of action but instead preserved certain actions beyond the death of one of the parties.[74] The result

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67. The death of the defendant does not bar recovery, and actions can proceed against the representatives of the estate. 1A MICH. PLEADING & PRACTICE § 12:6 (2d ed. 2006); MICH. CT. R. 2.202(A) (providing for the substitution of parties in the event of the death of either party).

68. MICH. COMP. LAWS § 600.2922 (2004).

69. *See* Mich. Comp. Laws § 600.2921 (2004) (referring to "the next section," Mich. Comp. Laws § 600.2922 (2004)); *see also, e.g.*, Jenkins v. Patel, 684 N.W.2d 346, 356 (Mich. 2004); McNitt v. Citco Drilling Co., 230 N.W.2d 318, 321 (Mich. Ct. App. 1975).

70. *See* Hawkins v. Reg'l Med. Lab., P.C., 329 N.W.2d 729, 731–34 (Mich. 1982) (detailing the statute's history, including the significant body of common law it abrogated).

71. At common law, causes of action did not survive the death of the plaintiff and no cause of action accrued to the family. Bowen E. Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114, 114 (1924). A trend towards allowing claims to survive by abrogating the common law statutorily began in the United States after England passed an early survival statute, Lord Campbell's Act, in 1846. *Id.* at 115.

72. *Hawkins*, 329 N.W.2d at 731.

73. *Id.* at 731–32.

74. *Id.* In 1939, both acts were amended to form what are now MCL sections 600.2921 and 600.2922. Act No. 297, 1939 Mich. Pub. Acts 687 (codified as amended at MICH. COMP. LAWS §§ 600.2922, 2921). This act was technically an amendment to the Wrongful Death Act

is that courts read causes of action to survive the death of the defendant under what is now MCL section 600.2921, while reading the current MCL section 600.2922 to provide certain benefits to the estates of plaintiffs who were killed as a result of tortious conduct, including additional damages and a stay of the statute of limitations.[75]

While Michigan's jurisprudence surrounding the death of a plaintiff is not directly relevant to the question at hand, it is useful in understanding the Survival Statute as it relates to punitive damages. MCL sections 600.2921 and 600.2922 are closely connected not only by their history but also by a series of internal cross-references. MCL section 600.2921 explicitly provides that, in the event of the death of a plaintiff, a failure to properly amend a claim under MCL section 600.2922 may amount to a waiver of certain damages. For this reason, MCL section 600.2921 is often read *in pari materia* with MCL section 600.2922.[76]

While the Michigan Supreme Court has referred to the Wrongful Death Act as creating a "filter,"[77] the logic of MCL sections 600.2921 and 600.2922 suggests that the term "pipeline" might be more appropriate. The so-called "filter" removes nothing, and may in fact add additional damages. The Michigan Supreme Court has held that "[t]he mere fact that our legislative scheme requires that suits for tortious conduct resulting in death be filtered through the so-called 'death-act,' MCL section 600.2922, MSA 27A.2922, does not change the character of such actions *except to expand the elements of damage available*."[78] Causes of action thus survive the "filter" almost entirely unchanged. For example, Michigan courts have held that statutory caps on medical malpractice claims survive the death of the plaintiff, because the malpractice suit maintains its character as a malpractice suit even after the plaintiff's death.[79] Likewise, a claim

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that repealed inconsistent provisions of the Survival Statute. Courts, however, later determined that those portions of the Survival Statute that were consistent with the new statute continued to be valid, and "[i]t cannot be doubted that causes of action continue to survive." *See Hawkins*, 329 N.W.2d at732–34. The amendments actually made few substantive changes, except to clarify that causes of action for wrongful death were to be brought under the WDA instead of the Survival Statute. *Id.*

75. *Hawkins*, 329 N.W.2d at 735–36.

76. *See supra* note 69.

77. *Hawkins*, 329 N.W.2d at 735.

78. *Id.* (emphasis added).

79. Jenkins v. Patel, 684 N.W.2d 346, 350–51 (Mich. 2004) (noting that "a wrongful death action grounded in medical malpractice is a medical malpractice action" for the purposes of applying a statutory noneconomic damages cap).

in a civil suit to exclude a defendant's illegally obtained blood sample, although personal to the defendant, survived his death.[80]

The Survival Statute thus provides a pipeline through which causes of action ordinarily pass unchanged, save for the possible addition of some damages in the event of the death of the plaintiff.[81] Michigan courts have been unequivocal that "the statutory language leads to the inescapable conclusion that the intervention of death neither limits nor precludes the type of damages that could have been recovered by the person."[82]

If Michigan's Supreme Court were to adopt the majority rule and hold that exemplary damage claims do not survive the death of the defendant, it would be deviating from its normal practice of allowing causes of action to pass unchanged through the pipeline created by MCL section 600.2921. There is no basis for such a differentiation in the plain language of the statute, which, after stating that "all actions and claims survive death," goes on to address only the death of the plaintiff in detail. The plain meaning of this short, simple statement is that a claim should pass through the statute's pipeline without any change to the damages available, regardless of the identity of the deceased party. Indeed, the fact that the statute goes on to elaborate on the availability of additional damages following the death of certain plaintiffs suggests that, had the legislature intended to adjust the damages available in other situations, it would have done so. Further, the utility of any policy rationale or gesture toward the common law would be limited by

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80. McNitt v. Citco Drilling Co., 230 N.W.2d 318, 321 (Mich. Ct. App. 1975) ("[T]he personal representative of a deceased who asserts a cause of action on behalf of a deceased stands in the deceased's place for all purposes *incident to the enforcement of that claim, including rights and privileges personal to the deceased in his lifetime*.").

81. *See, e.g.*, Wesche v. Mecosta Cnty. Rd. Comm'n, 746 N.W.2d 847 (Mich. 2008); Hardy v. Maxheimer, 416 N.W.2d 299, 306 (Mich. 1987) (holding that the language of section 600.2921 is "sweeping and unambiguous" and that the wrongful death act does not create a cause of action, but merely permits causes of action to "survive by law" and allows additional damages).

It is true that MICH. COMP. LAWS § 600.2922, authorizes only the recovery of "*reasonable* medical, hospital, funeral and burial expenses for which the estate is liable; *reasonable* compensation for pain and suffering . . . undergone by the deceased . . . and damages for the loss of financial support and the loss of society and companionship of the deceased." *Id.* (emphasis added). It is also true that this may be interpreted as limiting the damages created by the act to compensatory damages only. *See* French v. Mitchell, 140 N.W.2d 426 (Mich. 1966). However, these provisions apply only to the additional damages authorized by the act. If noncompensatory damages were authorized by the underlying cause of action, the language qualifying those provisions would not limit the survivability of *previously authorized* damages in the event of the death of the *defendant*. *See* Thorn v. Mercy Mem'l Hosp. Corp., 761 N.W.2d 414, 423 (Mich. Ct. App. 2008) ("[T]he damages listed in § 600.2922(6) cannot be construed as exhaustive.").

82. *Thorn*, 761 N.W.2d at 424.

Michigan's unique approach to exemplary damages. Part III will assess the reasoning used by both majority- and minority-jurisdiction courts in light of Michigan's unique history.

III. MICHIGAN IS FORECLOSED FROM ADOPTING THE MAJORITY POSITION BOTH BY STATUTE AND BY POLICY

As Part I.A demonstrated, many states have declined to award punitive damages against estates precisely because the primary purpose of such damages—punishment—has been negated. Persuasive though this argument may be in Mississippi, Alaska, or New York, it is entirely ill-suited to Michigan. The policy rationale underlying the majority position relies in large part on the majority's understanding of punitive damages as punishment, a view not shared by Michigan courts.[83]

Even if the majority's reasoning was persuasive for Michigan courts, the Survival Statute and Wrongful Death Act do not provide any mechanism for disallowing damages after the death of a defendant if such damages would have been permitted had the defendant survived.[84] In fact, interpreting either statute to disallow exemplary damages against estates would require overturning a significant body of precedent that interprets the statutes as a pipeline through which causes of action pass unchanged.[85] As such, there are two alternative grounds, each sufficient on its own, for concluding that the majority position is unsuited to the state of Michigan.

A. The Majority Position is Inappropriate for Michigan as a Matter of Policy

While majority-jurisdiction states generally view punishment as one of the central goals of punitive damages,[86] Michigan views exemplary damages as special compensation for the incremental damages caused by a particularly malicious crime.[87] As a policy matter, this makes the majority position less appealing in Michigan.

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83. *See supra* Part II.A.

84. MICH. COMP. LAWS §§ 600.2921–2922 (2004).

85. *See supra* Part II.B.

86. *See, e.g.*, Kraft Power Corp. v. Merill, 981 N.E.2d 671, 679 (Mass. 2013); Lohr v. Byrd, 522 So. 2d 845, 847 (Fla. 1988); Thompson v. Estate of Petroff, 319 N.W. 2d 400, 409 (Minn. 1982); Braun v. Moreno, 466 P.2d 60, 62–63 (Ariz. Ct. App. 1970).

87. *See, e.g.*, Wise v. Daniel, 190 N.W. 746, 747–48 (Mich. 1922); Peisner v. Detroit Free Press, Inc., 364 N.W. 2d 600, 601 (Mich. 1984).

Because Michigan's exemplary damages law focuses on the harm to the plaintiff rather than the wrong by the defendant, Michigan's rationale for awarding such damages survives the death of the defendant entirely unchanged.[88] Even among minority jurisdictions, this is rare. Most minority jurisdictions acknowledge that, while it is no longer possible to punish a tortfeasor, "the death of the tortfeasor does not *completely* thwart the purposes underlying the award of punitive damages."[89] While general deterrence might provide *sufficient* grounds for allowing punitive damages to survive in the eyes of some courts, no other state has the additional focus on the plaintiff which allows the rationale for such damages to survive the death of a defendant *completely*.[90] In Michigan's case, it is not that the death of the tortfeasor fails to entirely undermine the purposes of punitive damages, but rather that—because exemplary and punitive damages in Michigan are designed to compensate rather than to punish[91]—it does not undermine their purposes at all.

Adopting the minority position could offer additional benefits to Michigan. First, it would avoid the inconsistency of citing principles of compensation and deterrence when allowing exemplary damage awards against living defendants but characterizing those damages as "punishment" when ruling on the availability of such awards against estates. Adopting the majority position would imply agreement with its rationale, yet that rationale is rooted in the belief that punitive damages are designed to *punish*, making it futile to award such damages after death.[92] A court applying the majority position would therefore have to conclude that punitive damages are a form of punishment; this position would be fundamentally at odds with Michigan's present position, which characterizes exemplary damages as compensation.[93] To therefore hold that such damages are designed solely to punish—but only when awarded against estates—would be a strange position indeed. Such inconsistency could damage the reputation of the judiciary.

At first glance, it might appear that awarding punitive damages against estates would produce inconsistencies by contradicting Michigan's restrictive policy of allowing punitive damages only when specifically authorized by statute, but this is not the case.[94] In

88. *See supra* Part II.B.

89. G.J.D. v. Johnson, 713 A.2d 1127, 1131 (Pa. 1998) (emphasis added); *see also, e.g.*, Haralson v. Fisher Surveying, *Inc.*, 31 P.3d 114, 117 (Ariz. 2001).

90. *See supra* Part I.B.

91. *See supra* Part I.A.

92. *See supra* Part I.A.

93. *See supra* Part II.B.

94. *See* NUGENT & HAMMESFAHR, *supra* note 57.

the context of survival of claims, the question is not whether to authorize damages not contemplated by the legislature, but whether to extinguish, based on the death of the defendant, damages that the legislature *did* expressly authorize against a living defendant. Even if the law allowed exemplary damages against estates, Michigan could continue to apply a policy disfavoring such damages in most circumstances and apply a unique rationale when those damages are awarded. Adopting the minority position would not change Michigan's restrictive approach to exemplary damages generally but would ensure that it was applied consistently.

Predictability within the judicial system does more than promote feelings of fairness among litigants. It also allows social actors to structure their behaviors, lawyers to assess incoming cases, and litigants to assess their options, including settlement. The majority position would reduce predictability by tying possible damage awards not to the behavior of the defendant or the choices of the litigants, but to the status of the defendant as alive or dead. This may decrease not only deterrence but also the effectiveness of plaintiffs and their attorneys, who may not be privy to information regarding the defendant's health.

B. The Majority Position is Precluded by Michigan's Survival Statute

Even if Michigan's courts did wish to adopt the majority approach, doing so would be inconsistent with the Wrongful Death Act and the Survival Statute as the courts have traditionally interpreted them. As discussed in Part II.B, Michigan courts have treated the WDA and the Survival Statute as a pipeline through which causes of action pass relatively unchanged. As one court put it:

> The WDA acts as a 'filter' through which the underlying claim proceeds. Thus, any statutory limitations on the underlying claim apply to the wrongful death action . . . . At the same time, *damages that would have been available in the underlying action must be recognized in the wrongful-death claim.*[95]

Although many of the cases involved only the death of the plaintiff, courts have interpreted the Survival Statute, MCL section 600.2921, which applies to the death of either party.[96]

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95. Jago v. Dep't of State Police, No. 297880, 2011 Mich. App. LEXIS 1430, at *12 (Mich. Ct. App. Aug. 2, 2011) (internal citations omitted) (emphasis added); *see also* Thorn v. Mercy Mem'l Hosp. Corp., 761 N.W.2d 414, 421 (Mich. Ct. App. 2008).

96. *See supra* Part II.B.

There is no logical reason to believe that the legislature intended its clear statement that "all actions and claims survive death" to apply differently to plaintiffs and defendants. Adopting the majority position by disallowing punitive damages against estates would thus lead to inconsistency and confusion regarding the proper application of the Survival Statute.

It is true adopting the minority position would mean that—because of the additional damages available under MCL section 600.2922 and the broad survival of actions under MCL section 600.2921—Michigan would allow the modification of damages after the death of a plaintiff, but not after the death of a defendant.[97] While differential treatment in this respect may seem anomalous, it is unlikely to lead to over-deterrence. Allowing damages to be increased in the event that a plaintiff dies merely reflects the fact that an additional undesirable consequence has resulted from the defendant's conduct and holds the defendant responsible for that consequence. But the death of the defendant does not similarly change the external circumstances, as it in no way mitigates the plaintiff's damages. Additionally, to the extent that exemplary damages awarded against an estate *can* deter a potential tortfeasor, that deterrence is desirable, and awarding increased damages in the event of the death of the plaintiff simply recognizes society's increased interest in deterring torts where those torts are likely to lead to a person's death. It is not absurd to suggest that the Michigan legislature intended to allow damages to survive the death of a defendant and also to permit additional damages upon the death of the plaintiff.

If the majority position were so clearly correct that to adopt the minority approach would lead to absurdity, it might be possible for the courts to infer that the legislature intended to allow an exception to the survival of actions into its general statutory language. Likewise, if the statute did not clearly abrogate the common law practice of terminating all actions upon the death of either party, one could imagine that the Michigan Supreme Court might hesitate to infer an abrogation of that aspect of the common law. In this case, however, there is significant controversy over the correct policy approach, and the majority-jurisdiction approach is less compatible with Michigan law. For these reasons, it would be inappropriate to infer that the legislature intended the two situations addressed by the first sentence of MCL 600.2921 to be treated differently. Similarly, the survival of every action, including the

97. *See supra* Part II.B.

survival of every other type of damages, has been read into the statute. There is no reason to believe that the legislature intended this type of damages to be treated differently than the rest.

Adopting the majority position would require Michigan courts to apply a single blanket statement differently for plaintiffs than defendants, as well as to exemplary damages and every other type of damage available. Such different treatment would be contrary to Michigan law.

C. Any Alternative Solution Should be Statutory

There is implicit evidence that the legislature intended the Michigan courts to adopt the minority position. MCL section 600.2922 begins with the far-reaching statement that "all actions and claims survive death." It then proceeds to elaborate in detail on the damages available to an estate in the event of the death of a plaintiff, while remaining completely silent as to the death of the defendant. This suggests that the legislature believed that the general statement that "all actions and claims survive death" was sufficiently comprehensive. Nothing in that language suggests that certain damages should survive while others should not, or that the Statute should act as a pipeline in some cases and a filter in others. Rather, the legislature intended all damages, including exemplary ones, to survive the death of the defendant.

Nonetheless, the legislature should amend Michigan's Survival Statute, MCL section 600.2921, to make the state's position absolutely clear. Presently, the section, in its entirety, reads:

> *All actions and claims survive death.* Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to the next section. If an action is pending at the time of death the claims may be amended to bring it under the next section. A failure to so amend will amount to a waiver of the claim for additional damages resulting from death.[98]

The italicized sentence is the only portion of the statute that addresses the death of the defendant. In contrast, the damages available following the death of the plaintiff are further specified in the next three sentences, as well as in the Wrongful Death Act.[99]

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98. MICH. COMP. LAWS § 600.2921 (2004) (emphasis added).
99. *See id.*; MICH. COMP. LAWS § 600.2922 (2004).

Even though, as discussed in Part II.B, Michigan courts have consistently interpreted the Survival Statute as a pipeline through which causes of action pass unchanged following the death of a defendant, this comparative lack of guidance creates uncertainty. The fact that a majority of states facing the issue have adopted one position increases the chance that a lower court may adopt the majority position. Such a decision, however, would be inconsistent with Michigan's liberal approach to the survival of actions and unique approach to punitive damages and would needlessly confuse the state's tort jurisprudence.

Even if Michigan wished to break with its traditions of allowing the liberal survival of all damages and basing exemplary damage awards on a compensatory rationale, the legislature would be better suited than the courts to make that change. First, the legislature has a freedom, unavailable to the courts, to tailor the statute to meet its policy preferences. This would allow for considered debate about the policy ramifications of allowing punitive damages to survive the death of the defendant without the need to perform analytical backflips to make the exception appear consistent with Michigan's idiosyncratic legal history. Second, adopting the majority position would require breaking with Michigan's lengthy, consistent policy of allowing actions to survive the death of the defendant unchanged. Furthermore, it would require doing so despite the fact that punitive damages are, by definition, only awarded in the most severe cases. Even if Michigan courts wished to limit the survival of damages without express legislative approval, it is hard to imagine a less sympathetic test case than that of the estate of an egregious tortfeasor seeking protection from understandably outraged victims.

A statute would provide the clarity and legitimacy necessary to make a sudden restriction in the damages available in the most outrageous cases appear fair. Even if one believes that the majority position would be preferable, there is good reason for the courts to defer to the legislature in making that judgment.

CONCLUSION

While it would be inappropriate for Michigan courts to adopt any restriction on the availability of punitive damages following the death of a defendant, the Michigan legislature should adopt a statutory amendment to remove any possible ambiguity. Michigan's broad Survival Statute and liberal approach to the survival of actions have traditionally allowed causes of action to pass through the

Survival Statute unchanged. Even if a court wanted to break with history, Michigan's preference for treating exemplary damages as a form of increased compensation undercuts the policy rationale for doing so. Should a case involving the survival of exemplary damages reach the Michigan Supreme Court before the legislature has an opportunity to amend the statute, the Court should permit the damages to survive. Doing so would require the Court to adopt a minority position, but it would also recognize the plain meaning of Michigan's Survival Statute, history of allowing the survival of causes of action unchanged, and unique approach to exemplary damages.

Appendix
Methodology and Inventory of States' Positions

Majority-Jurisdiction States

Majority-jurisdiction States are those in which punitive damage awards are not available against the estates of deceased defendants. A total of twenty-eight states have adopted the majority position. Many states have done so by statute, while in other states the courts have adopted the majority position without being given an explicit legislative directive.

Statutory Adoption

Fourteen states have adopted the majority position by statute. They are:[100]

- California
- Colorado
- Georgia[101]
- Idaho
- Maine
- Massachusetts
- Mississippi
- Nevada
- New York
- Oregon
- Rhode Island
- Vermont
- Virginia
- Wisconsin

Judicial Adoption

Thirteen other states and the District of Columbia have adopted the majority position judicially. Robicheaux and Bornstein produced a table compiling the majority and minority status of court

100. G.J.D. v. Johnson, 713 A.2d 1127, 1129 n.3 (Pa. 1998).
101. *See also* Robicheaux & Bornstein, *supra* note 15, at 397.

decisions by state, level and type of court.[102] For the purposes of this Note, a state is considered to have adopted the majority position judicially if, according to Robicheaux and Bornstein's table, the most recent decision from the highest *state* court listed in a state has adopted the majority position *and* that state was not listed in *G.J.D.* as a state with a survival statute that would have obligated the court to adopt the majority position.[103] This methodology includes Florida in this Note's list of majority jurisdiction states even though Robicheaux and Bornstein's table shows a mixed judicial history for that state.

The fourteen jurisdictions adopting the majority position judicially are:

- Alaska
- District of Columbia
- Florida
- Indiana
- Iowa
- Kansas
- Kentucky
- Minnesota
- Missouri
- New Mexico
- North Carolina
- South Dakota
- Tennessee
- Wyoming

Minority-Jurisdiction States

Minority-jurisdiction states allow punitive damages to be awarded against the estates of deceased defendants. In most minority jurisdiction states, courts have adopted that position without any explicit instructions from the legislature, although a small number of states have adopted the position by statute.

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102. *See id.* at 400–01.

103. *See id.*; *see also G.J.D.*, 713 A.2d at 1129 n.3.

Statutory Adoption

Only two states have adopted the minority position by statute. They are:[104]

- Texas
- Oklahoma

Judicial Adoption

Eight states have adopted the minority position by judicial decision. In this Note, a state is considered to have adopted the minority position judicially if, according to Robicheaux and Bornstein's table, the most recent decision from the highest *state* court listed in a state has adopted the minority position *and* that state does not have a survival statute that would have obligated the court to adopt the minority position.[105] This methodology has led to the inclusion of three states, Arizona, Illinois, and Pennsylvania, in this Note's list of minority jurisdiction states even though Robicheaux and Bornstein's table shows a mixed judicial history.

The eight states adopting the minority position by judicial decision are:

- Alabama
- Arizona
- Hawaii
- Illinois
- Montana
- Pennsylvania
- South Carolina
- West Virginia

Uncategorized State

One state, New Hampshire, is included in Robicheaux and Bornstein's analysis and, under the methodology otherwise used in this Note, would be listed as a minority-jurisdiction state.[106] Despite the

104. Robicheaux & Bornstein, *supra* note 15, at 397.
105. *See id.* at 397, 400–01.
106. *See id.* at 401.

decision referenced in Robicheaux and Bornstein's analysis, however, there is "no consensus among legal scholars" as to whether punitive damages against estates are allowed or not in New Hampshire.[107] Because the majority or minority status of New Hampshire is still debated, it has been omitted from the calculations of this Note.

107. *See G.J.D.*, 713 A.2d at 1129 n.6.