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Apportioning a Piece of a Punitive Damage Award to the State: Can State Extraction Statutes Be Reconciled with Punitive Damage Goals and the Takings Clause?

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I. INTRODUCTION

Since the beginning of our nation's history, the common law of most jurisdictions in the United States has established that a plaintiff has a right to recover punitive damages in a civil suit.[1] However, the apparently dramatic increase in the number and dollar amount of punitive damage awards over the last several decades has fueled a

1. Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 6-7 (1990); Thomas C. Galligan, *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 31 n.110 (1990).

debate over the propriety of allowing punitive damages.[2] Opponents of punitive damages blame excessive awards by passionate and unsophisticated juries for more expensive and less available goods and services.[3] Although proponents of punitive damages challenge the existence of a punitive damage crisis,[4] state legislatures have attempted to take the reins by instituting statutes that reduce the availability of punitive damage awards to plaintiffs.[5]

Nine states recently enacted legislation that allocates a portion of a punitive damage award to a state fund.[6] Cases challenging these state extraction statutes are now beginning to appear in the courts and indicate a divergence of opinion regarding their constitutional validity.[7] One of the more intriguing issues these cases raise is whether the allocation of a punitive damage award to the state constitutes an improper taking of private property under the Fifth and Fourteenth

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2. Daniels & Martin, *supra* note 1, at 3-4.

3. *See, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part, dissenting in part); Daniels & Martin, *supra* note 1, at 21 (1990); Neil K. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23, 55-56, 61 (1990).

4. *See, e.g.*, Daniels & Martin, *supra* note 1.

5. MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS § 40.02, at 40-6 (1991).

6. COLO. REV. STAT. § 13-21-102(4) (1989) (one-third of all reasonable exemplary damages collected in civil actions went to state's general fund); FLA. STAT. ch. 768.73(2) (West Supp. 1993) (Thirty-five percent of a punitive damage award is paid to the Public Medical Assistance Trust Fund if the cause of action is personal injury or wrongful death; in all other civil actions, 35% of a punitive damage award is paid into the state's General Revenue Fund. Florida's statute previously required that 60% of a punitive damage award go to the state. *See* FLA. STAT. ch. 768.73(2) (West Supp. 1992). The statute was amended in 1992 and the state portion was reduced to 35%.); GA. CODE ANN. § 51-12-5.1(e)(2) (Michie Supp. 1991) (75% of punitive damage award in products liability cases went to Fiscal Division of the Department of Administrative Services); ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd Supp. 1991) (trial court has discretion to determine how much of punitive damage award will be apportioned to state); IOWA CODE § 668A.1 (1987) (if defendant's conduct was directed specifically at plaintiff, then the plaintiff collects the full amount of damages awarded by the jury; if defendant's conduct was not directed specifically at plaintiff, then at least 75% of punitive damage award is paid into a civil reparations trust fund); KAN. STAT. ANN. § 60-3402(e) (Supp. 1990) (50% of punitive damages in medical malpractice case is payable into State Health Care Stabilization Fund); MO. ANN. STAT. § 537.675 (Vernon 1988) (50% of punitive damages in tort action is payable into state's Tort Victims' Compensation Fund); OR. REV. STAT. § 18.540 (Supp. 1992) (50% of punitive damage award is payable into state's Criminal Injuries Compensation Account); UTAH CODE ANN. § 78-18-1(3) (1992) (50% of any punitive damage award over $20,000 is payable into state's General Fund).

7. To date, only four courts have heard direct challenges to the constitutional validity of these statutes. *See* Burke v. Deere & Co., 780 F. Supp. 1225 (S.D. Iowa 1991) (upholding IOWA CODE § 668A.1(2)); McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990) (striking down GA. CODE ANN. § 51-12-5.1(e)(2)); Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991) (striking down COLO. STAT. § 13-21-102(4)); Gordon v. State, 608 So. 2d 800 (Fla. 1992) (upholding FLA. STAT. ch. 768.73(2), which, at the time the cause of action arose, apportioned 60% of a punitive damage award to the state).

Amendments of the United States Constitution.[8] Recent United States Supreme Court decisions clearly uphold the awarding of punitive damages against constitutional challenges by defendants;[9] however, the Court has never been presented with the issue of whether a plaintiff has a constitutionally protected property right to collect a full punitive damage award. Although the Florida Supreme Court held that there is no such right,[10] the Supreme Court of Colorado[11] decided that such an extraction statute constitutes an unconstitutional taking of private property.

This Comment critically explores the rationales and implications of state extraction statutes. Part II cautions that state extraction statutes must be viewed skeptically as an element of the highly politicized tort reform movement. Part III demonstrates that, contrary to the claims of the defenders of state extraction statutes, these statutes undermine, rather than further, the goals of punitive damages. Part IV analyzes recent United States Supreme Court cases regarding punitive damages and their impact upon state extraction statutes. The Court's strong support for the traditional common law regime of punitive damages suggests that the Court would look critically upon a statute that undermines this tradition in favor of a system that allocates funds to the state. Part V explores the takings issue and establishes that a plaintiff has a constitutionally protected property right in a full punitive damage award as set by the jury and approved by the court as reasonable. This Comment further suggests that notions of fairness and justice, which are the fundamental principles of the Takings Clause, are the proper focus of the takings inquiry as applied to state extraction statutes. Application of Supreme Court takings cases and notions of fairness and justice suggest that a state extraction statute constitutes an unconstitutional taking unless it provides a quid pro quo for the limitation on recovery or is reasonably related to the costs incurred by the state in administering the civil justice system for the particular litigation before the court. Part VI concludes that current state extraction statutes effect unconstitutional takings and sug-

8. The Fifth Amendment of the United State Constitution, in pertinent part, states: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Fifth Amendment Takings Clause is made applicable to the states through the Fourteenth Amendment. *See, e.g.*, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980). Of the four courts that have heard challenges to state extraction statutes, only *Kirk* directly addressed the takings issue.

9. *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); Silkwood v. Kerr-McGee, 464 U.S. 238 (1984).

10. *See Gordon*, 608 So. 2d at 802.

11. *See Kirk*, 818 P.2d at 273.

gests guidelines for reformulating these statutes to comport with the Takings Clause.

II. THE MOVEMENT TO REFORM PUNITIVE DAMAGES

The effort to reform the traditional regime of punitive damages is only one component of the general effort of the past decade to reform the American tort system.[12] This tort reform crusade is a legislative response to the fear that tort liability has expanded too far.[13] Critics have attacked punitive damages in particular as an unregulated and growing menace to our economy and our civil justice system.[14] These critics contend that punitive damage awards have increased rapidly in size and frequency since the 1970s.[15] Critics emphasize the threat created to small- and medium-sized businesses by enormous damage awards and the temptation these large awards create for potential plaintiffs and their attorneys to bring frivolous law suits.[16]

A growing number of legal scholars question the existence of a punitive damage crisis. They maintain that punitive damages are not routinely awarded and are moderate in amount when given.[17] These

12. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 1-2 (5th ed. 1984 & Supp. 1988); Daniels & Martin, *supra* note 1, at 3; Komesar, *supra* note 3, at 23, 25-26. Other components of the tort reform movement include statutes that cap damages or modify attorney fees and statutes that narrow tort liability by limiting particular claims, broadening defenses, and limiting joint and several tort liability. KEETON ET AL., *supra*, at 1-2 (Supp. 1988).

13. KEETON ET AL., *supra* note 12, at 1 (Supp. 1988).

14. MINZER ET AL., *supra* note 5, § 40.03, at 40-7.

15. *See, e.g.*, Daniels & Martin, *supra* note 1, at 4 & n.11.

16. MINZER ET AL., *supra* note 5, § 40.03, at 40-7.

17. *See* Richard L. Abel, *The Real Tort Crisis—Too* Few *Claims*, 48 OHIO ST. L.J. 443, 459 (1987) ("punitive damage awards remain rare"); Stephen D. Sugarman, *Taking Advantage of the Tort Crisis*, 48 OHIO ST. L.J. 329, 350 (1987) (noting that only "a very small percentage of cases attract punitive damages"). A study of state trial court judgments from a variety of regions across the country established a pattern indicating that: (1) punitive damages are not routinely awarded; (2) dollar amounts of punitive damage awards are not staggering; and (3) jury awards of punitive damages are infrequent and in modest dollar amounts. Daniels & Martin, *supra* note 1, at 43. Furthermore, a review of data regarding awards of punitive damages in accident and personal injury cases leads to the conclusion that punitive damages are not an "overwhelming concern" in accident cases and are "uncommonly rare" in personal injury cases. Galligan, *supra* note 1, at 78-79. Even when punitive damages are granted by the jury, the judge may reduce or even overturn the jury's assessment of punitive damages if she deems it to be unreasonable. *See, e.g.*, *Dazzling Verdicts Can Face Reversal*, NAT'L L. J., Jan. 20, 1992, at S4 (providing an overview of cases from 1990 and 1991 in which large punitive damage awards have been overturned or set aside). The considerable reduction or complete reversal of punitive damage awards granted by juries in 1991 may be attributable to the Supreme Court's decision in Pacific Mutual Life Insurance Co. v. Haslip, 111 S. Ct. 1032 (1991). *Reductions Often Slash Significant Jury Awards*, NAT'L L. J., Jan. 20, 1992, at S15. In *Haslip*, the Supreme Court approved the common law tradition of juries assessing punitive damages, but cautioned that reasonableness of the amount and guidance from the court should

scholars attribute the perceived punitive damage crisis to a highly politicized power struggle between interest groups during the 1980s.[18] Insurance and business groups caught the attention of the Reagan administration.[19] This resulted in legislative reforms in over half the states.[20] It is no coincidence that virtually all of this tort reform legislation heavily favors defendants.[21] Consumer groups were overpowered by wealthy business groups and were most adversely affected by the tort reforms.[22]

Critics of tort reform charge that reformers paint an exaggerated picture of an out-of-control punitive damage system by appealing to the fears and emotions of the public and by distorting the realities.[23] First, they note that media attention focuses only on the multi-million dollar awards and peculiar cases.[24] For example, although the general public is apt to hear about the half million dollar punitive damage award received by a robber when he fell through a skylight, they are less likely to be told that the "robber" was really a teenage boy who was never charged and was injured when he fell from a roof that the

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"properly enter into the constitutional calculus." *Haslip*, 111 S. Ct. at 1043. Some judges have interpreted *Haslip* to give judges "greater latitude in striking down what they consider to be excessive punitives." *Reductions Often Slash Significant Jury Awards*, *supra*, at S15. For further discussion of *Haslip*, see *infra* notes 83-85, 91-96 and accompanying text.

18. Daniels & Martin, *supra* note 1, at 10-11; Sugarman, *supra* note 17, at 329, 338; *see also* Andrew Blum, *Debate Still Rages on Torts*, NAT'L L. J., Nov. 16, 1992, at 1. Referring to the perceived tort crisis, Blum states that "Vice President Dan Quayle took a then-dense, minutae-filled issue and made it political fodder and front page news by attacking lawyers and the legal system." *Id.* The Senate's recent rejection of a bill that sought to "limit the ability of consumers to collect punitive damages" supports the position of critics of the punitive damage crisis and consumer groups, which contended that "there was little evidence that juries had awarded plaintiffs unreasonable damages in such suits." *Senate Kills Liability Limit*, N.Y. TIMES, May 15, 1992, at C10. This article describes the power struggle between manufacturers and other business groups, who lobbied for ten years to pass this liability limitation, and consumer groups, who opposed the limitation. *Id*; *see also infra* notes 71-76 and accompanying text.

19. *See* Daniels & Martin, *supra* note 1, at 10-11, 24-26; Sugarman, *supra* note 17, at 329.

20. Over half the states have instituted some form of punitive damage reform legislation. This legislation ranges from a change in the burden of proof needed to establish punitive damages to a complete abolition of punitive damages. JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 21.12 (1989 & Supp. 1992).

21. Sugarman, *supra* note 17, at 329, 350.

22. *Id.*; Daniels & Martin, *supra* note 1, at 10-11.

23. *See, e.g.*, Daniels & Martin, *supra* note 1, at 20; Sugarman, *supra* note 17, at 333; *see also* Blum, *supra* note 18. Blum argues that "[t]he [tort reform] debate has gotten clouded — with anecdotes, horror stories and subsequent denials. The public is getting a mixed message." *Id.* Blum concludes that opponents of tort reform may be right in their assertion that their has been no litigation explosion or tort crisis. Other authors note that exaggeration often fuels the debate. *See, e.g.*, Gail Diane Cox, *Tort Tales Lash Back*, NAT'L L. J., August 3, 1992, at 1. Cox recounts stories of tort victims, claiming that "[o]utrageous anecdotes fueled tort reform, but it's a game two can play." *Id.*

24. Abel, *supra* note 17, at 445; Sugarman, *supra* note 17, at 336-37.

defendant school district knew was dangerous.[25] The more common cases where no punitive damages are awarded also rarely make the headlines.[26] "Courts should not be taken in by parades of horribles or the bandwagon of commentators who present only part of the institutional picture."[27]

Second, critics contend that the conclusions reached by the reformers are based upon a scanty data base and questionable interpretations of the statistics.[28] The release of "press kits" presenting statistics of reformers in a "scientific format" lent an illusion of objectivity to the reformers' contentions; however, the reformers neither provided contextual information nor an explanation of the data base source or the method of analysis.[29] The reformers relied upon the data "to create a state of mind in the furtherance of a political agenda and should be interpreted accordingly."[30] In fact, data from a recent study on the frequency and magnitude of punitive damages shows that punitive damage awards are indeed rare in frequency and moderate in amount.[31] This particular study is significant because it included data from Cook County, Illinois, the same county from which most reformers derived their statistics to "prove" the existence of a punitive damage crisis.[32] Although the researchers on both sides studied the same geographical region for the same time periods, their conclusions drastically contradicted each other.

The debate over whether or not a punitive damage crisis truly exists is attributable to more than the intentional skewing of statistics.

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25. Sugarman, *supra* note 17, at 337 & n.45.

26. Abel, *supra* note 17, at 445.

27. Komesar, *supra* note 3, at 77.

28. Daniels & Martin, *supra* note 1, at 4. For example, heavy criticism has been directed at the mode of data analysis used by reformers to support their contention that the dollar amount of punitive damages has skyrocketed. Reformers use the mean of punitive damage awards, rather than the median. Use of the median measure is generally preferred when, as is the case with punitive damages, the data contains several extreme values. The median represents the "middle" figure when the awards are listed in order from lowest to highest. On the other hand, use of the mean (or mathematical average) skews the result up towards the high end because the mean is sensitive to extreme values. Thus, use of the mean supports the reformers' claim of skyrocketing punitive damage awards, while use of the more appropriate median does not. *Id.* at 39-42.

29. *See id.* at 14-28.

30. *Id.* at 27.

31. *Id.* at 43. The authors' conclusions were derived from an extensive study of trial court judgments from a variety of regions across the nation. The data analyzed was from the same time period as that of the research of the reformers, most notably presented in a report and updates by the Department of Justices' Tort Policy Working Group during the Reagan administration. The authors' impressive study also included data from Cook County, Illinois, which was the focus of the Working Group's research data. *Id.* at 36, 43.

32. *Id.* at 36.

A viable explanation for the divergent conclusions may be the existence of several distinct types of tort litigation, each with its own particular legal dynamics.[33] Misconceptions result when a researcher either looks at the system as a whole and ignores distinct subgroups or when the researcher assumes that trends in one area generalize to other areas.[34] For example, large punitive damage awards resulting from serious injury and "high stakes" litigation, such as medical malpractice, may be improperly generalized to the more common "ordinary accident litigation," thereby creating an illusion of a widespread and unpredictable punitive damage crisis.[35] Although this insight does not conclusively establish the absence of a genuine crisis, it does counsel skepticism in response to the reformers' insinuations of a nationwide, out-of-control crisis.

Nevertheless, state legislatures responded to the perceived crisis. Nine states passed state extraction statutes that apportioned a percentage of a punitive damage award to the state. Two of these statutes were struck down and two were upheld. The remaining statutes have not yet been challenged.[36] The amount of the punitive damage award extracted ranges from one-third to seventy-five percent.[37] All of these statutes are vague as to the specific use of the collected money or the precise purpose of the benefitted state funds. Although the manner in which the money is to be directed to the state fund is not clear in most of these statutes, the general trend indicates that it is the function of the court to order the appropriate amount to be paid to the designated state fund.[38]

III. POLICY CONSIDERATIONS: DO STATE EXTRACTION STATUTES FURTHER THE GOALS OF PUNITIVE DAMAGES?

The policy rationales underlying the theory of punitive damages provide much of the substance for the defense of the state extraction

33. Deborah R. Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice Research*, 48 OHIO ST. L.J. 478, 480 (1987).

34. *Id.* at 493; *see also* Daniels & Martin, *supra* note 1, at 27 (expressing concern over the tendency of reformers to generalize from limited case studies to nationwide trends).

35. Hensler, *supra* note 33, at 495.

36. *See supra* notes 6–7 and accompanying text.

37. *See supra* note 6 and accompanying text.

38. *See, e.g.*, FLA. STAT. ch. 768.73(2) (West Supp. 1993) (clerk of the court must send copy of jury verdict to State Treasurer and court shall order percentage of award to state); GA. CODE ANN. § 51-12-5.1(e)(2) (Michie Supp. 1991) (apportionment of award to state is duty of clerk of court); ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd Supp. 1991) (trial court shall apportion award to state fund); MO. ANN. STAT. § 537.675 (Vernon 1988) (circuit clerk to notify attorney general).

statutes. Therefore, these factors must be considered when examining the validity of these statutes.

A. *Deterrence and Punishment*

Traditionally, courts have awarded punitive damages to plaintiffs as a form of recovery beyond compensatory damages when the defendant has engaged in behavior that is intentional, malicious or outrageous.[39] The rationales most often asserted to justify punitive damages are deterrence and punishment.[40] The imposition of punitive damages punishes the defendant for committing some socially undesirable act, while discouraging similar conduct in the future by the defendant and others.

These are the precise policy considerations upon which the Florida Supreme Court relied in upholding Florida's extraction statute in *Gordon v. State*.[41] At the time the cause of action arose, chapter 768.73 of the Florida Statutes provided for the payment of forty percent of a punitive damage award to the plaintiff and sixty percent to the state.[42] Because the defendant must still pay the full amount of the punitive damage award, the provisions of the statute appear not to reduce the level of punishment and deterrence that the defendant would receive were the money to go to the claimant rather than the state. This appearance is illusory, however, because the attainment of deterrence and punishment depends on the success of other goals of punitive damages that are directly impaired by the apportionment of a percentage of a punitive damage award to the state.

Although deterrence and punishment are the most commonly cited justifications for punitive damages, many legal scholars and courts also recognize other valid goals of punitive damages. These goals include providing an incentive for tort victims to sue by rewarding successful plaintiffs with punitive damages[43] and compensating tort victims for expenses or injuries not fully recoverable under

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39. KEETON ET AL., *supra* note 12, § 2; James D. Ghiardi, *Punitive Damages: State Extraction Practice is Subject to Eighth Amendment Limitation*, 26 TORT & INS. L.J. 119, 120 (1990).

40. MINZER ET AL., *supra* note 5, § 40.01, at 40-5; Galligan, *supra* note 1, at 27.

41. 608 So. 2d 800, 802 (Fla. 1992).

42. *See* FLA. STAT. ch. 768.73(2) (Supp. 1986). The statute was recently amended to reduce the state's portion to 35% and increase the plaintiff's portion to 65%. *See* FLA. STAT. ch. 768.73(2) (West Supp. 1993).

43. *See, e.g.*, MINZER ET AL., *supra* note 5, § 40.12[2], at 40-46 to 40-47; Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 70 (1985-86). At least six highest state courts have explicitly recognized this incentive as a proper role for punitive damages. MINZER ET AL., *supra* note 5, § 40.12[2] at 40-46 n.51.

compensatory damages.[44] Although the *Gordon* court and other proponents of punitive damage reform have ignored or rejected these secondary goals, their existence must be acknowledged in analyzing the soundness of state extraction statutes because the diminution of these secondary goals threatens the attainment of punishment and deterrence, the primary goals upon which our punitive damage system is based.[45]

B. *Incentive to Sue*

The *Gordon* court's policy reasoning echoes the rhetoric of the tort reformers. The court looked to the legislative objectives behind Florida's state extraction statute to find that one of its purposes was to "discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney."[46] A legislative determination that enactment of a statute was necessary for this purpose presupposes a tort crisis where plaintiffs and their attorneys are greedy wealth seekers who put forth frivolous claims in an effort to receive a windfall in punitive damages. This plays right into the hands of the punitive damage reformers.[47] As previously discussed, this type of reasoning must be viewed skeptically in light of the highly politicized debate over punitive damages. Studies report that tort victims in fact underclaim.[48] Societal pressures discourage tort victims

44. *See, e.g.*, GHIARDI & KIRCHER, *supra* note 20, § 4.02 (noting that in several states the practice of awarding punitive damages is actually compensatory in nature, even though stated policy may only recognize punishment and deterrence rationales). Several states explicitly recognize punitive damages as a means of making plaintiff whole financially or emotionally due to the extreme offensiveness of the injurer's behavior. *See* MINZER ET AL., *supra* note 5, § 40.06, at 40-19 to 40-20, § 40-12, at 40-37, § 40.12[3], at 40-47 to 40-48. In addition, several states recognize compensation as a reason to grant punitive damages. *See* Tina Hughes, *Current Constitutional Challenges to the Administration of Punitive Damages*, 14 OKLA. CITY U. L. REV. 421, 426 (1989).

45. Although the Supreme Court recently stated that deterrence and retribution are reasons for imposing punitive damages, the Court did not suggest that these are the only permissible goals. *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1044 (1991); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989). The Court simply recognized the arguments advanced by the states in each of these cases. The Court accorded a great amount of deference to our strong history and tradition of allowing and assessing punitive damages. *Haslip*, 111 S. Ct. at 1041-44; *Browning-Ferris*, 492 U.S. at 273-76.

46. Gordon v. State, 608 So. 2d 800, 802 (Fla. 1992).

47. For example, reformers insinuate that claimants are cheating the system in a manner analogous to that of "welfare cheats." *See* Abel, *supra* note 17, at 447. The reformers' campaign is founded on images of promoting the public good. This image is in sharp contrast to the alleged greed of the injured claimants and their attorneys. *See* Daniels & Martin, *supra* note 1, at 21.

48. Abel, *supra* note 17, at 448-450; *see also* Komesar, *supra* note 3, at 62 (noting that the number of successful claims by victims of product and service accidents is significantly lower than the number of injuries arising from such accidents).

from bringing suit; therefore, potential claimants are generally reluctant to sue, rather than overeager.[49] As one reform critic explains, "successful tort claims do not *create* liability costs, they merely *shift* them from victims to tortfeasors. It is the *tortfeasors* who create liability costs by injuring victims. . . . If liability costs are high, it is because injuries are frequent and serious."[50]

In contrast to our state-controlled criminal justice system, private actors drive our civil tort system.[51] The tort system depends upon tort victims to bring suit against their injurers. In a very real sense, plaintiffs are asked to play the role of private prosecutors.[52] "The system depends on these actors to bring and prosecute cases, and if they do not act, the system will not function. To an appreciable extent, the incentives for this action lie in the expected damage awards."[53] Without the incentive of punitive damages, the "emotional and financial stress" of suing may prevent many tort victims from bringing suit.[54]

Society should encourage lawsuits against those who injure others or commit socially undesirable acts because such suits are society's primary vehicle for enforcing legal and community norms and deterring wrongdoers.[55] If the judicial system discourages a potential plaintiff from suing, the tortfeasor will not be deterred from engaging in the harmful activity because he will not be made to pay for his actions.[56] Thus, it is particularly important to protect punitive damages when actual damages are nominal because this is precisely when the claimant must have an incentive to bring such "petty outrages into court."[57] This argument is especially strong where many are injured, but the harm to each is slight. If there is no incentive for the

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49. Abel, *supra* note 17, at 448-50. Abel rejects the contention that many lawsuits are frivolous and unnecessary. *Id.* at 465.

50. *Id.* at 446.

51. Komesar, *supra* note 3, at 27.

52. *Id.*; Pamela B. Fort et al., *Florida's Tort Reform: Response to a Persistent Problem*, 14 FLA. ST. U. L. REV. 505, 519, 525 (1986).

53. Komesar, *supra* note 3, at 27.

54. Ausness, *supra* note 43, at 75.

55. *Id.* at 5; MINZER ET AL., *supra* note 5, § 40.12[2], at 40-46 to 40-47; Abel, *supra* note 17, at 460.

56. Underclaiming impairs the deterrence effect and encourages unreasonable risk taking by potential tortfeasors. *See* Abel, *supra* note 17, at 447.

57. KEETON ET AL., *supra* note 12, § 2. The argument may be made that statutes limiting punitive damages to an amount equal to or less than a given multiple of compensatory damages also defeat the incentive to sue when actual damages are nominal. For example, FLA. STAT. ch. 768.73(1)(a) (West Supp. 1993) provides that punitive damages may not exceed three times the amount of compensatory damages. Although such statutes may reduce the incentive to sue for a tort victim with nominal damages, these statutes nonetheless provide an incentive. Even where damages are only nominal, three times that amount may be sufficient to

injured to sue, the injurer will continue to harm many because it is economically efficient. He is not compelled to take into account all the costs of his conduct, such as defending a lawsuit and paying damages.[58] The tortfeasor is not punished and future tortfeasors will not be deterred. Therefore, state extraction statutes not only greatly minimize an injured victim's incentive to sue, but they also indirectly undermine the role of punitive damages in our civil justice system by largely defeating the roles of punishment and deterrence.

C. *Compensation*

Historically, punitive damages compensated an injured party for unrecoverable damages.[59] Many such harms are now compensable under an enlarged concept of actual damages. Yet, actual damages alone still significantly undercompensate the plaintiff for serious injuries in many instances.[60] Therefore, compensation survives as an important justification for punitive damages.[61] The compensation theory encompasses two components: compensation for litigation related expenses and compensation for the additional mental anguish caused by the malicious nature of the defendant's actions.

As a result of our civil litigation system's method of assessing costs and its policy not to award attorney's fees, "[m]ost successful claimants incur a loss."[62] Typically, more than one-third of a plaintiff's recovery goes to pay attorney's fees, "usually leav[ing] the victim in worse financial condition than before his injury."[63] Punitive damages serve an important function in easing the burden associated with the great deal of money and effort expended in bringing a law suit.[64]

Courts and legal scholars widely recognize that compensation for degradation and humiliation is a valid reason for granting an injured plaintiff punitive damages. Malicious conduct by injurers creates a strong sense of violation and outrage within victims.[65] The manner in which a tortfeasor inflicts an injury generates the additional harm that

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compensate the tort victim for expenses or injuries not covered by a compensatory damage award. *See* discussion *infra* part III.C.

58. Galligan, *supra* note 1, at 39.

59. *Id.* at 39 n.146.

60. Komesar, *supra* note 3, at 62-63.

61. Hughes, *supra* note 44, at 423-25. In fact, some states still explicitly recognize compensation as the sole, or one of several, reasons to allow punitive damages. GHIARDI & KIRCHER, *supra* note 20, Table 4-1; MINZER ET AL., *supra* note 5, § 40.12[3], at 40-47 to 40-49.

62. GHIARDI & KIRCHER, *supra* note 20, § 21.17.

63. Ausness, *supra* note 43, at 68.

64. *Id.* at 67-68.

65. Abel, *supra* note 17, at 455.

punitive damages target. Punitive damages play an important role in "assuaging the enormous outrage victims may legitimately feel when they are deliberately injured."[66] Receipt of punitive damages restores the plaintiff's peace of mind[67] and emotional equilibrium,[68] giving the injured plaintiff a sense of justice.[69]

To ignore the compensatory aspects of punitive damages is to assume that the injured party is being fully compensated in the current compensatory damages system. The above discussion indicates serious flaws in this assumption. Punitive damages compensate for injuries that fall through the cracks of the compensatory damages system. By making punitive damage claims "less remunerative to the claimant,"[70] the state extraction statutes frustrate this compensatory function of punitive damages. In addition, by failing to recognize the compensatory function of punitive damages, these statutes necessarily fail to acknowledge the role that punitive damages play in an injured party's decision to bring suit. Furthermore, because the primary goals of punitive damages, punishment and deterrence, will not be fully realized if plaintiffs have a diminished incentive to bring suit against an egregious injurer, the state extraction statutes undermine the foundation of our punitive damage tradition.

D. *Revenue for the State and Viability of Businesses*

When the traditional rationales for punitive damages fail to justify state extraction statutes, the highly politicized motives behind these statutes are revealed. For example, in *McBride v. General Motors Corp.*,[71] the state admitted that its interest in collecting a portion of a punitive damage award was to promote the viability of businesses in the state and to generate revenue, "even though the business may have erred in one of its products."[72] The *McBride* court found

66. Sugarman, *supra* note 17, at 360; *see also* Abel, *supra* note 17, at 455 (recognizing the need to compensate victims for the sense of outrage and violation experienced as a result of malicious actions).

67. Ausness, *supra* note 43, at 39.

68. Hughes, *supra* note 44, at 425; *see also* Ausness, *supra* note 43, at 68.

69. Abel, *supra* note 17, at 456.

70. Gordon v. State, 608 So. 2d 800, 802 (Fla. 1992).

71. 737 F. Supp. 1563 (M.D. Ga. 1990).

72. *Id.* at 1568. The court quoted the following from the State's Brief:

> The state interest in question is the viability of Georgia businesses continuing their operation and continuing to bring income to the State of Georgia even though the business may have erred in one of its products. . . . The Act rationally furthers another governmental interest of generating revenue. [R]evenue will come directly from 75 percent of the award for punitive damages authorized under O.C.G.A. § 51-12-5.1(e)(2).

Id. at 1568.

that Georgia's extraction statute was "a thinly disguised arbitrary restraint in favor of business seeking to deter punitive damage actions against egregious business practices by reducing incentives for injured plaintiffs to take action to punish and deter such practices."[73] The court based its reasoning for this conclusion upon a distinction that Georgia's statute made between punitive damages awarded for products liability claims and those awarded for non-products liability claims. In a products liability case, twenty-five percent of the award was given to the plaintiff while the remaining seventy-five percent of the award went to the state. However, in a non-products liability tort case, the plaintiff retained one-hundred percent of a punitive damage award.[74] This distinction reveals that the true intent of this state extraction statute was the protection of businesses, which would suffer more from product liability suits than from non-product liability tort suits.

Although the direct challenges to other state extraction statutes have not clearly delineated what interests those states assert in collecting a portion of a punitive damage award,[75] it is rational to assume that these other states had motives similar to those of Georgia in passing their respective statutes. The research and commentary of the tort reform critics bolster this view that the motives underlying state extraction statutes are highly politicized and strongly favor busi-

73. *Id.* at 1570. The Supreme Court of Colorado reached a similar conclusion in finding that Colorado's state extraction statute evidenced no reasonable relationship between the state's alleged goal of punishment and deterrence and the forced contribution imposed upon the injured plaintiff. Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991). In *Gordon*, the dissent adopted this position of the *Kirk* court. 608 So. 2d at 803 (Shaw, J., concurring and dissenting); *see also infra* notes 202-09 and accompanying text.

74. *McBride*, 737 F. Supp. at 1569.

75. *See* Burke v. Deere & Co., 780 F. Supp. 1225 (S.D. Iowa 1991); Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991); Gordon v. State, 608 So. 2d 800 (Fla. 1992). In *Kirk* and *Gordon*, the courts suggested possible state interests, including punishing the tortfeasor, deterring future harm and discouraging punitive damage claims. The *Kirk* court concluded that statutorily allocating a portion of a plaintiff's punitive damage award to the state did not reasonably relate to "any arguable [state] goal" of punishment or deterrence. Rather, the "statute's obvious purpose was to produce revenue for the state general fund." 818 P.2d at 270. In contrast to *Kirk*, the *Gordon* court concluded that there was a rational relationship between the state extraction statute and possible state interests in deterrence and discouraging punitive damage claims. 608 So. 2d at 802. However the *Gordon* court failed to explain how the forced contribution from the plaintiff promoted the state's alleged interest in deterrence. *See* 608 So. 2d at 803 (Shaw, J., concurring and dissenting). Furthermore, the legitimacy of the goal of discouraging punitive damage claims should be viewed skeptically in light of the politicization of the tort reform movement. *See supra* notes 46-50 and accompanying text. In fact, the two state interests espoused by the *Gordon* court appear to be at odds with each other. Discouraging punitive damage claims diminishes the incentive for an injured party to sue. Therefore, the tortfeasor is not punished and future tortfeasors will not be deterred. *See supra* notes 51-58 and accompanying text.

nesses.[76] This suggests again that extraction statutes do not promote the goals of punitive damages, but rather are aimed at generating revenue for the state and discouraging plaintiffs from bringing suit.

IV. ASSESSING THE SUPREME COURT'S POSITION ON PUNITIVE DAMAGES AND ITS IMPLICATIONS FOR STATE EXTRACTION STATUTES

United States Supreme Court cases spanning the past several decades show strong support for the regime of punitive damages. In 1975, in *Curtis Publishing Co. v. Butts*,[77] the Court reiterated its traditional commitment to allow punitive damages by noting that "the Constitution presents no general bar to the assessment of punitive damages in a civil case."[78] The Court subsequently maintained this position when faced with specific constitutional challenges by defendants against the imposition of punitive damages.[79] The Court never directly addressed a plaintiff's right to receive the full amount of a punitive damage award, as set by the trier of fact. Yet, the spirit of the Court's decisions leads one to conclude that the Court would be likely to uphold this right in cases where the award is neither excessive nor the product of passion or prejudice.

In *Curtis*, public figures brought a libel suit and were awarded punitive damages.[80] The defense contended that punitive damages were not proper in a libel suit because "an award of general damages compensates for any possible pecuniary and intangible harm."[81] The Court rejected this argument and recognized that punitive damages may have a compensatory function in restoring a plaintiff's dignity.[82] Similarly, in *Pacific Mutual Life Insurance Co. v. Haslip*,[83] the Court recently approved a method of determining punitive damages that allows the fact finder to consider the effect of the defendant's conduct upon the plaintiff, rather than limiting the inquiry to the nature of

76. *See supra* notes 17-32 and accompanying text; *see also* ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd Supp. 1991). The Historical and Practice Notes referring to this extraction statute state that its primary purpose is to discourage plaintiffs from seeking punitive damages, thereby remedying the problem of increased cost and decreased availability of liability insurance.

77. 388 U.S. 130 (1967), *reh'g denied*, 389 U.S. 889 (1967), *overruled on other grounds by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

78. *Curtis*, 388 U.S. at 159.

79. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (upholding punitive damages against due process challenge); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (upholding punitive damages against excessive fines challenge).

80. *Curtis*, 388 U.S. at 133-39.

81. *Id.* at 160.

82. *Id.* at 160-61.

83. 111 S. Ct. 1032 (1991).

defendant's conduct.[84] In assessing the constitutional validity of punitive damages, the *Haslip* Court determined the propriety of looking beyond the punishment and deterrence justifications of punitive damages.[85] Taken together, these cases show that the Court's vision of punitive damages is broad. Therefore, the Court would be likely to reject the tort reformers' argument that punitive damages are always an undeserved windfall to the plaintiff.

In *Duke Power Co. v. Carolina Environmental Study Group*,[86] Justice Stewart postulated a protectable, state-created Fifth Amendment property right in the "*recover*[y] [of] *full compensation* for tort injuries."[87] Justice Stewart maintained that the government's limitation on a plaintiff's ability to fully recover for a tort injury infringes upon this property right.[88] The district court in *McBride v. General Motors Corp.*[89] found this reasoning persuasive in striking down Georgia's state extraction statute. The *McBride* court logically assumed that "full compensation" encompassed punitive damages as well as compensatory damages and noted that "adequate remedies for persons injured have included both compensatory and punitive damages throughout the history of the common law."[90]

The Supreme Court also called upon this rich tradition of granting punitive damages in the recent case of *Pacific Mutual Life Insurance Co. v. Haslip*.[91] *Haslip* involved a due process challenge to the common law tradition of jury determination of punitive damages. The Court considered the argument that unlimited jury discretion may result in excessive awards and a windfall to the plaintiff.[92] However, the Court "[could] not say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional."[93] The Court reasoned that the assessment of how much a plaintiff will receive in punitive damages

84. *Id.* at 1045.

85. *Id.* at 1044 (noting that the state's goals of retribution and deterrence alone do not provide answer to due process challenge against punitive damages); *see also* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989) (finding that state's goals of punishment and deterrence are not enough to invoke Excessive Fines Clause against punitive damages in civil litigation between private parties).

86. 438 U.S. 59 (1978).

87. *Id.* at 94 (Stewart, J., concurring) (emphasis added).

88. *Id.*

89. 737 F. Supp. 1563 (M.D. Ga. 1990).

90. *Id.* at 1573-74, 1576.

91. 111 S. Ct. 1032 (1991); *see also* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984) ("Punitive damages have long been a part of traditional state tort law.").

92. *Haslip*, 111 S. Ct. at 1040.

93. *Id.* at 1043.

has always been the function of the jury or trier of fact.[94] Absent a showing of unreasonableness or inadequate instruction to the jury, the jury has final discretion.[95]

A traditional practice, entrenched in the common law of most jurisdictions across the nation for hundreds of years, requires a strong constitutional mandate to uproot it.[96] Given the controversy over the existence of a punitive damage crisis and the need for massive tort reforms, the Supreme Court would probably scrutinize carefully a state extraction statute that undermines the jury's role in granting punitive damages to the plaintiff and emasculates a form of recovery that is deeply rooted in our civil justice system.

Although many states have some form of legislation that limits punitive damages, common law awards of punitive damages are still granted in most states.[97] Forty-six states allow punitive damages at common law,[98] including the nine states that have or had extraction statutes.[99] Only two states—Louisiana and Massachusetts—allow punitive damages by statute only.[100] To allow punitive damages only by statute means that they may not be granted "*unless* it be for some particular wrong for which a statute expressly authorizes the imposition of such a penalty."[101] The type of statute that restricts the awarding of punitive damages to certain specified conduct that gave rise to the cause of action differs from a statute that merely establishes the level of maliciousness necessary for the imposition of punitive damages. For example, in Colorado, punitive damages are allowed under the common law. Nonetheless, Colorado's punitive damage statute requires that the injured party show the defendant's tort was accompanied by "fraud, malice, or willful and wanton conduct"[102] as

94. *Id.* at 1042.

95. *Id.* at 1042-43; *see also infra* note 107 and accompanying text. One author notes that "[a]ccording to conventional wisdom, the jury is thought to function as the community's conscience, and its reaction of shock and outrage to the defendant's conduct when punitive damages are awarded is presumably an accurate reflection of societal values." Ausness, *supra* note 43, at 96.

96. *Haslip*, 111 S. Ct. at 1043.

97. *See* GHIARDI & KIRCHER, *supra* note 20, Table 4-1.

98. *Id.* The District of Columbia also allows punitive damages by common law. *Id.*

99. *See supra* note 6.

100. *See* GHIARDI & KIRCHER, *supra* note 20, Table 4-1. Nebraska and Washington are the only states that neither allow punitive damages at common law nor by statute. *See id.*

101. *Id.* § 4.09 (emphasis added) (quoting McCoy v. Arkansas Natural Gas Co., 143 So. 383, 385-86 (La. 1932), *cert. denied*, 287 U.S. 661 (1932)). "An example of a statutory allowance of punitive damages [is] that anyone who wilfully and intentionally destroys or removes any trees growing or lying on the land of another without the permission of the owner shall be liable for [punitive damages]." *Id.* § 4.09.

102. COLO. REV. STAT. § 13-21-102(1)(a) (1989). A careful reading of Florida's statute reveals that similar restrictions are placed upon statutory *limitations* to punitive damages

a prerequisite to a punitive damage award.

The distinction between statutory and common law allowance of punitive damages exposes a weakness in the argument of state extraction proponents that "the legislature is free to condition a claim for [punitive] damages which is allowed *only pursuant to a statutory grant.*"[103] This was the position espoused by the dissent in *Kirk v. Denver Publishing Co.*,[104] in which the majority struck down Colorado's state extraction statute. Similarly, in upholding Florida's state extraction statute, the majority in *Gordon v. State* asserted that the "allowance of punitive damages is based entirely upon considerations of public policy . . . [and therefore the legislature] may place conditions upon such a recovery or even abolish it altogether."[105] These

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rather than *grants* of punitive damages. *See* FLA. STAT. ch. 768.73(1)(a) (West Supp. 1993). Under Florida's system, statutory limitations upon punitive damages are invoked "[i]n any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty, and involving willful, wanton, or gross misconduct." *Id.* Florida's earlier statute, upon which Gordon v. State, 608 So. 2d 800 (Fla. 1992), was based, read substantially the same in pertinent part. *See* FLA. STAT. ch. 768.73 (Supp. 1986). The *Gordon* appellate court apparently misread the statute when it reasoned that "where any existing statute provides that funds recovered under it are subject to a prior claim, a party cannot thereafter obtain a vested right to that claim." Gordon v. State, 585 So. 2d 1033, 1036 (Fla. 3d DCA 1991), *aff'd*, 608 So. 2d 800 (Fla. 1992). In fact, the only apparent condition upon a grant of punitive damages is that there be a "reasonable basis for recovery of such damages." FLA. STAT. ch. 768.72 (West Supp. 1993). The United States Court of Appeals for the Tenth Circuit shares this interpretation. In *Scheidt v. Klein*, the Tenth Circuit noted that chapter 768.73(1) of the Florida Statutes "restricts the permissible amount of punitive damages *only* in 'civil action[s] based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty.' " Scheidt v. Klein, 956 F.2d 963, 970 (10th Cir. 1992) (emphasis added).

103. Kirk v. Denver Publishing Co., 818 P.2d 262, 274-75 (Colo. 1991) (Rovira, C.J., dissenting) (emphasis added). Even if this were true, property rights may attach to state created benefits for purposes of the Fifth and Fourteenth Amendments. *See, e.g.*, Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 745 (1964). Among other constitutional protections of property, Reich suggests that governmental benefits be afforded protection against takings without just compensation. *Id.* at 745. Although state legislatures determine what benefits will be distributed by the state, it is the role of the courts to decide if a benefit has sufficient constitutional protection. *See* Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CAL. L. REV. 146, 146 (1983). Furthermore, constitutional challenges to the elimination of statutory entitlements cannot be settled by resort to the argument that such "benefits" are merely a privilege. Rather a protectable property right may attach to such entitlements. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 & n.8 (1970).

104. 818 P.2d at 274-75.

105. *Gordon*, 608 So. 2d at 801 (quoting *Gordon*, 585 So. 2d at 1035-36). A similar argument may be made that because the statute was in place before the cause of action arose, the plaintiff had no reasonable expectation in recovering the full amount of punitive damages as awarded by the jury. However, in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), the Supreme Court did not find this type of argument dispositive. In that case, a regulation, which required the Nollans to provide an easement to the beach upon building on their property, was in place when the Nollans purchased their property. Therefore, according

arguments fail to appreciate the distinction between a scheme that allows punitive damages only by statute and a scheme in which a statute merely establishes the level of maliciousness required for the imposition of punitive damages. Whether or not state policy may allow the state to abolish the common law tradition of punitive damages altogether is a distinct issue from whether or not the state may allocate to itself a portion of punitive damages that are allowed under the common law. "The fact that a legislative body might choose to eliminate [punitive] damages in civil cases without offending [the Constitution] is not to say that any restriction whatever on [a punitive damage] award will pass constitutional muster."[106] Recent Supreme Court cases suggest that as long as punitive damages are allowed by the common law of a state, a constitutionally protected property right attaches to the jury's reasonable determination of punitive damages so that the state may not confiscate from the plaintiff a piece of the award for itself.[107]

A unique situation deserving of constitutional scrutiny is created whenever the government becomes involved in a civil litigation matter. In *United States v. Halper*,[108] the Supreme Court held that the Double Jeopardy Clause[109] is implicated when the government seeks punitive damages from a defendant who has already been criminally prosecuted and punished.[110] However, nothing "precludes a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment."[111] This distinction between legitimate private party and governmental expectations from a civil suit was reinforced in *Browning-Ferris Industries v. Kelco Disposal, Inc.*[112] In *Browning-Ferris*, the Supreme Court denied a private defendant's Excessive Fines[113] challenge to an award

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to the above argument, the Nollans had a reasonable expectation that their property would be deprived upon building. However, this warning did not prevent the Nollans from receiving due compensation for the deprivation of their property. *Id.* at 841-42.

106. *Kirk*, 818 P.2d at 272; *see also* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1054 (1991) (Scalia, J., concurring).

107. *See, e.g.*, *Haslip*, 111 S. Ct. at 1032; Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), *reh'g denied*, 389 U.S. 889 (1967), *overruled on other grounds by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

108. 490 U.S. 435 (1989).

109. U.S. CONST. amend. V ("[N]nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .").

110. *Halper*, 490 U.S. at 448-49.

111. *Id.* at 451.

112. 497 U.S. 257 (1989).

113. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . .").

of punitive damages.[114] *Browning-Ferris* materially differs from *Halper* because "[in *Halper*] the *Government* was exacting punishment in a civil action, whereas [in *Browning-Ferris*] the damages were awarded to a private party."[115]

The Supreme Court already has suggested that the apportionment of a percentage of a punitive damage award to the state under a state extraction statute would violate the Excessive Fines Clause.[116] When "some governmental entity is seeking to reap the benefits of a monetary sanction"[117] in a private civil suit, governmental abuse can be effectuated surreptitiously. These concerns indicate that the Supreme Court would look critically upon the allocation of a portion of a private damage award to the state.

V. DOES THE ALLOCATION OF A PORTION OF A PUNITIVE DAMAGE AWARD TO THE STATE CONSTITUTE AN UNCONSTITUTIONAL TAKING?

A. *A Plaintiff's Property Right in a Full Punitive Damage Award*

The validity of a state extraction statute for the purpose of takings issues largely turns upon the determination of a plaintiff's property rights in a full punitive damage award.

1. DISTINGUISHING THE RIGHT TO COLLECT THE FULL AMOUNT OF PUNITIVE DAMAGES GRANTED BY THE JURY FROM THE RIGHT TO HAVE PUNITIVE DAMAGES ASSESSED

The general rule in our civil justice system is that the jury, or judge, as trier of fact, *may* award punitive damages if certain burdens of proof are met; however, they are not obligated to do so.[118] The jury "has the final discretion to award these damages and to determine the amount of the awards."[119] Only where the award is grossly excessive or there is a showing of prejudice or passion by the jury will the court reduce an award of punitive damages.[120] Because the awarding of punitive damages is left to the discretion of the trier of fact, many courts and commentators have stated that a plaintiff does not have a

114. *Browning-Ferris*, 497 U.S. at 280.
115. *Id.* at 275 n.21.
116. *Id.* at 298-99 (O'Connor, J., concurring in part and dissenting in part).
117. *Id.* at 298.
118. Hughes, *supra* note 44, at 431-32.
119. *Id.* at 432; *see also* KEETON ET AL., *supra* note 12, § 2; MINZER ET AL., *supra* note 5, § 40.11, at 40-32 to 40-33; Fort et al., *supra* note 52, at 520.
120. Hughes, *supra* note 44, at 432.

"right" to punitive damages.[121]

Furthermore, whether or not the trier of fact may award punitive damages at all is typically considered to be the state legislature's annunciation of public policy.[122] Florida's Supreme Court in *Gordon v. State*[123] relied upon this type of analysis in upholding Florida's extraction statute against a due process challenge.[124] The court reasoned that because the decision to allow punitive damages at all lies within the legislature's discretion, the legislature may condition or even abolish this form of recovery.[125] The court asserted that "[t]he right to have punitive damages *assessed* is not property."[126] This analysis, however, confuses the right to have a jury *assess* punitive damages with the plaintiff's right to *collect* the full amount of a punitive damage award as calculated by the jury and approved by the court as reasonable.[127] In failing to make this distinction, the *Gordon* court avoided the real constitutional issue raised by extraction statutes. Specifically, does the plaintiff have a property interest in a puni-

121. *See, e.g.*, Kirk v. Denver Publishing Co., 818 P.2d 262, 275 (Colo. 1991) (Rovira, C.J., dissenting) (noting that no vested right in punitive damages exists until final judgment is entered); Gordon v. State, 608 So. 2d 800, 801 (Fla. 1992) (finding "no cognizable, protectable right to the recovery of punitive damages at all") (quoting Gordon v. State, 585 So. 2d 1033, 1035 (Fla. 3d DCA 1991)); KEETON ET AL., *supra* note 12, § 2 (punitive damages are "not a matter of right").

122. *Kirk*, 818 P.2d at 274 (Rovira, C.J., dissenting); *Gordon*, 608 So. 2d at 801; *see also* GHIARDI & KIRCHER, *supra* note 20, § 21.17 (noting that some state legislatures have abolished punitive damages); KEETON ET AL., *supra* note 12, at 2 (Supp. 1988) (noting that some states have statutes that abolish or limit the availability of punitive damages).

123. 608 So. 2d 800 (Fla. 1992).

124. *Id.*

125. *Gordon*, 608 So. 2d at 801. This reasoning ignores the fact that a statutory benefit may be considered a right, not merely a state conferred privilege. Taken to its logical conclusion, this reasoning limits the legislature's discretion to condition or abolish the benefit, even if it is a statutory creation. *See supra* note 103.

126. *Gordon*, 608 So. 2d at 801 (emphasis added) (quoting Ross v. Gore, 48 So. 2d 412, 414 (Fla. 1950)). Although the Florida Supreme Court formally addressed a due process challenge in *Gordon*, the court's analysis of a plaintiff's property right is readily applicable to a takings challenge. In fact, it is not very clear whether the plaintiff's claim was based on a due process argument or a takings argument. Although Florida's Third District Court of Appeal applied a due process analysis, they characterized the plaintiff's claim as an alleged "unconstitutional 'taking' of a property right without due process." Gordon v. State, 585 So. 2d 1033, 1035 (Fla. 3d DCA 1991). Thus the court mixed the common terminology of the two causes of action. This confusion highlights the similarities between the two causes of actions and lends support to the notion that an analysis of the definition of property rights under a due process analysis is readily applicable in an attempt to define property rights under a takings analysis.

127. A similar argument was made in Lira v. Davis, 832 P.2d 240 (Colo. 1992). The Supreme Court of Colorado determined that the terms "assessed" and "awarded" were distinct. "Damages assessed" was found to refer to the pre-reduction amount of compensatory damages as set by the jury. "Damages awarded" was found to refer to the post-reduction amount of compensatory damages after reduction pursuant to Colorado's comparative negligence statute and pro rata liability statute. *Id.* at 245.

tive damage award sufficient to invoke constitutional protection against a state confiscation where the state allows punitive damages to be assessed and where the trier of fact sets a punitive damage award that is approved by the court as a reasonable amount?

2. ESTABLISHING A PROTECTABLE PRE-JUDGMENT PROPERTY INTEREST IN A JURY'S REASONABLE DETERMINATION OF PUNITIVE DAMAGES

Two of the four courts presented with challenges to state extraction statutes determined that a plaintiff does hold a private property right in an award of punitive damages.[128] In *Kirk v. Denver Publishing Co.*,[129] the Colorado Supreme Court examined the Colorado statute, which provided for payment of one-third of punitive damages in all civil actions into Colorado's general fund.[130] The court held that this state extraction provision constituted an unconstitutional taking under the Fifth and Fourteenth Amendments.[131] The court's "conclusion derive[d] from the nature of [a punitive] damages award as a private property right."[132]

Kirk, however, represents the easy case. The Colorado statute specifically denied the state any interest in the punitive damage claim or the litigation until payment of the damages became due.[133] This provision allowed the court to safely rest its decision on the grounds that a vested property right is created by a final judgment because this is when payment becomes due.[134] Because the Colorado statute barred the state from asserting an interest before the entering of a final judgment, the court easily avoided the more difficult question of whether a protectable interest attaches to the trier of fact's reasonable

128. *See* McBride v. General Motors Corp., 737 F. Supp. 1563, 1576 (M.D. Ga. 1990); Kirk v. Denver Publishing Co., 818 P.2d 262, 265 (Colo. 1991).

129. 818 P.2d 262 (Colo. 1991).

130. *Id.* at 263 (examining COLO. REV. STAT. § 13-21-102(4) (1987)). The pertinent provisions of the 1987 version were identical to those in the 1989 version discussed previously. *See, e.g., supra* note 6.

131. *Kirk*, 818 P.2d at 265.

132. *Id.*

133. COLO. REV. STAT. § 13-21-102(4) (1987) (providing that "[n]othing in this subsection (4) shall be construed to give the general fund any interest in the claim for [punitive] damages or in the litigation itself at any time prior to payment becoming due.") Only three of the nine state extraction statutes—Colorado, Georgia and Missouri—have such a provision. The Colorado and Georgia statutes have been declared unconstitutional. *See* McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990); Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991).

134. *Kirk*, 818 P.2d at 266-67; *see also* Gordon v. State, 608 So. 2d 800 (Fla. 1992) (Shaw, J., concurring and dissenting).

assessment of punitive damages, regardless of whether the state is granted an interest before final judgment is entered.

The United States District Court for the Middle District of Georgia provided more guidance on this issue when it addressed a challenge to Georgia's state extraction statute in *McBride v. General Motors Corp.*[135] Georgia's state extraction statute provided for payment of seventy-five percent of any punitive damage award in a products liability case into the state treasury.[136] Georgia's statute, much like the Colorado statute, provided that the state's rights to the punitive damage award accrued only "upon issuance of judgment."[137] In *McBride,* the defendant argued that the plaintiff could not raise a valid constitutional challenge because no right to punitive damages vested before the entering of a final judgment.[138] The Georgia court rejected this rationale because it would immunize from "constitutional challenge [any] legislation affecting tort recovery by a tort victim."[139] The court indicated that a plaintiff has a constitutionally protected property interest in a right of recovery in punitive damages, even where the plaintiff's interest has not yet become a vested property right by means of a final judgment.[140] This interest is analogous to other future interests, which "the law often treats . . . as a presently vested right."[141]

As one basis for its conclusion, the *McBride* court looked to the history of punitive damages and the tradition of providing an injured party with a full recovery of damages.[142] The court relied upon the "rich history of availability of punitive damages at common law."[143] The court's reasoning implied that the strong roots of punitive damages in our society creates an interest in punitive damages that the state cannot easily deny by legislative fiat. The court struck down Georgia's state extraction provision, noting that it "deprive[d] a tort victim of the *right to recover* an element of damages which has been so long and so universally recognized."[144] The court noted that the right

135. 737 F. Supp. 1563 (M.D. Ga. 1990).

136. GA. CODE ANN. § 51-12-5.1(2) (Michie Supp. 1991).

137. *Id.* "Upon issuance of judgment in such a case, the state shall have all rights due a judgment creditor . . . . This paragraph shall not be construed as making the state a party at interest." *Id.*

138. *McBride*, 737 F. Supp. at 1573.

139. *Id.*

140. *Id.*

141. Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1517 (1991).

142. *McBride*, 737 F. Supp. at 1573-74.

143. *Id.* at 1573.

144. *Id.* at 1574 (emphasis added).

to full recovery includes both compensatory and punitive damages.[145] A plaintiff has the same right to receive an award of punitive damages as she does an award of compensatory damages.[146] Although the *McBride* court was responding to a due process challenge, the foundation it laid for the establishment of a protectable pre-judgment property interest in a punitive damage award is readily applicable to a takings challenge.

The issues raised by state extraction statutes are novel and the cases few; therefore, it is helpful to consider cases that raise similar issues involving the right to recover punitive damages after the trier of fact has set an amount, but before final judgment is rendered. Recent cases outside the immediate realm of state extraction statutes in a variety of jurisdictions support the notion of a pre-judgment property interest in punitive damages. In *Smith v. States General Life Insurance Co.*,[147] the Alabama Supreme Court considered a method of allocating a punitive damage award that parallels that used in state extraction statutes. *Smith* involved a medical insurance fraud claim, where the insurer promised the insured that the policy would no longer exclude coronary disease after a set time.[148] The jury set punitive damages at $250,000.[149] The trial court then apportioned one-half of the punitive damage award to the American Heart Association,[150] reasoning that the punitive damage award would create a windfall to the plaintiff who had already been compensated by a compensatory damage award.[151] On appeal, the Supreme Court of Alabama determined that the amount of punitive damages to be awarded to the plaintiff must be left to the discretion of the jury, unless there is a showing that the jury's determination was constitutionally flawed.[152] The punitive damages set by the jury may not be apportioned to "an entity other than the plaintiff."[153]

145. *Id.*
146. *Id.* at 1576.
147. 592 So. 2d 1021 (Ala. 1992).
148. *Id.* at 1023.
149. *Id.* at 1022.
150. *Id.*
151. *Id.* at 1023.
152. *Id.* at 1025.
153. *Id.* Justice Shores wrote separately to state her opinion that courts have the authority to allocate a portion of a punitive damage award to the state's general fund or to any other fund which, in the court's estimation, promotes justice. *Id.* at 1025-27 (Shores, J., concurring in part and dissenting in part). Justice Shores had espoused this view the previous year in Fuller v. Preferred Risk Life Insurance Co., 577 So. 2d 878, 886-87 (1991) (Shores, J., concurring specially). Florida's Third District Court of Appeal adopted Justice Shores' *Fuller* opinion to uphold Florida's extraction statute in Gordon v. State, 585 So. 2d 1033 (Fla. 3d DCA 1991), *aff'd*, 608 So. 2d 800 (Fla. 1992).

The United States District Court for the District of Kansas also recognized a property right in the jury's determination of a punitive damage award in *O'Gilvie v. International Playtex, Inc.*[154] *O'Gilvie* involved the death of a woman from Toxic Shock Syndrome after using the defendant's product.[155] The jury awarded the plaintiff husband $10,000,000 in punitive damages for the death of his wife.[156] Although "the jury's assessment of punitive damages, while substantial, was found to be not excessive [and did not] shock the Court's conscience,"[157] the district court later ordered a remittitur of punitive damages to $1,350,000 due to defendant's post-trial conduct in removing its product from the market.[158] The court decided that this latter amount was "intended to represent the *jury's assessment* regarding the element of punishment and is *clearly* the *proprietary right* of the plaintiffs."[159] On appeal, the Tenth Circuit Court of Appeals went even further to delineate a plaintiff's right to receive the full amount of the jury's assessment of punitive damages. The Tenth Circuit reversed the district court's remittitur because it was based upon improper grounds. The court stated that unless an award is excessive or based upon corruption or prejudice, "the jury's determination of the damages is considered inviolate."[160] A similar rationale was employed by the Supreme Court of Colorado in *Seaward Construction Co., Inc. v. Bradley*.[161] *Seaward* involved the validity of a claim for pre-judgment interest on an award of punitive damages.[162] The court denied the claim, holding that the right to punitive damages accrues when "awarded by the trier of fact."[163] Legal scholars also recognize a protectable right in the amount of punitive damages assessed by the jury, absent a flawed jury determination. "Generally, the plaintiff who pleads and proves a case for punitive damages is entitled to the

154. 609 F. Supp. 817 (D. Kan. 1985), *aff'd in part, rev'd in part*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

155. *O'Gilvie*, 609 F. Supp. at 817.

156. *Id.* at 818.

157. *Id.*

158. *Id.* at 819. The court determined that the defendant's post-trial conduct had rendered the original punitive damage award of $10,000,000 excessive. *Id.*

159. *Id.* (emphasis added).

160. O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1449 (10th Cir. 1987) (quoting Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152, 1168 (10th Cir. 1981) (en banc) (plurality opinion)), *cert. denied*, 486 U.S. 1032 (1988).

161. 817 P.2d 971 (Colo. 1991). *Seaward* was decided on the same day as *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991). In *Kirk*, the Colorado Supreme Court struck down that state's extraction statute. *Id.* at 273.

162. *Seaward*, 817 P.2d at 972.

163. *Id.* at 975.

full amount awarded by the trier of fact."[164]

B. *The State of the Supreme Court's Current Takings Doctrine*

1. THE SUPREME COURT'S CONFUSED TAKINGS DOCTRINE

> The American legal community remains perplexed and fascinated by the question of which exercises of governmental power should fall prey to the constitutional ban on uncompensated takings of property. Intense interest stems partly from the Supreme Court's professed inability to provide a general solution to the takings problem and partly from the undeniable appeal of contrasting points of view.[165]

The Court's muddled takings doctrine may be attributed to the Court's failure to delineate rules and guidelines regarding which particular takings test properly applies to a particular type of deprivation of property.[166] Instead, the Court has adopted an ad hoc approach to takings challenges.[167]

2. THE APPEAL OF A FAIRNESS AND JUSTICE INQUIRY

Although the Supreme Court has inconsistently applied takings tests, the Court has consistently maintained that the ultimate goal is to determine whether fairness and justice require that a "taking" by the government be compensated.[168] Whether a governmental taking violates the Constitution is fundamentally rooted in notions of fairness and justice. The Court relies upon this principle, either implicitly or explicitly, throughout the takings cases. In fact, by directly applying notions of fairness, one can often better predict the result of a given Supreme Court takings case than one can by applying the array of takings tests purportedly used by the Court.[169]

Although the Court accords a great deal of deference to state

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164. MINZER ET AL., *supra* note 5, § 40.06, at 40-19; *see also* KEETON ET AL., *supra* note 12, § 2; Ausness, *supra* note 43, at 2.

165. Paul, *supra* note 141, at 1395-96.

166. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1304 (1989).

> For example, although the Court has stated that the "no economically viable use" test applies in the case of a facial challenge, while the *Penn Central* test should be used in the case of an "as applied" challenge, . . . the Court neither has explained why this should be so, nor has it even consistently followed this rule.

Id. at 1304 n.10. Peterson asserts that the Court's takings doctrine is in such disarray, that it presents more of a hindrance than a help to lower courts struggling with takings issues. *Id.* at 1341.

167. Paul, *supra* note 141, at 1430.

168. Peterson, *supra* note 166, at 1304.

169. *Id.* at 1305 n.13.

regulations,[170] the Court recognized as early as 1922, in *Pennsylvania Coal Co. v. Mahon*,[171] that a property regulation that "goes too far" will be considered a taking.[172] The Court explicitly enunciated fairness and justice as a central issue in *Armstrong v. United States*.[173] The Court stated that the purpose of the Fifth Amendment's prohibition against taking private property for public use without just compensation is to prevent "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[174] Similarly, in *Penn Central Transportation Co. v. City of New York*,[175] the Court asserted that whether a compensable taking occurs is ultimately a determination of whether "justice and fairness" require the government to compensate the individual who was deprived of her property.[176]

These cases suggest that an attractive alternative to the jumbled takings tests is a more direct application of notions of fairness and justice.[177] This alternative requires the Court to take into consideration the many interests involved, including those of the individual whose property has been deprived, the governmental entity who has taken the property, and the general public. Although the Court does not now explicitly engage in a balancing of interests, its underlying policy of fairness and justice suggests the presence of an implicit balancing in its reasoning. A more direct fairness and justice inquiry acknowledges that there are conflicting values and that a court must make a choice or compromise between them. Dealing with these values head-on, rather than hiding behind the confusion created by the Court's application of its takings tests, could prove valuable as a means to simplify this perplexing area of the law.

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170. Paul, *supra* note 141, at 1430-31.

171. 260 U.S. 393 (1922).

172. *Id.* at 415 ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). Similarly, the Court held in Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 127 (1978), that compensation is required only for regulations that effect "an unduly harsh impact."

173. 364 U.S. 40 (1960).

174. *Id.* at 49.

175. 438 U.S. 104 (1978).

176. *Id.* at 124.

177. In fact, Peterson suggests that the very reason that the Court's current takings "doctrine is not helpful in deciding whether a taking occurred [is] because it does not address the issue of fairness that the Court tells us is at the heart of every takings case." Peterson, *supra* note 166, at 1341. Although Peterson's approach was basically a descriptive study of Supreme Court cases, she also recognized that fairness notions might provide a promising solution to the current takings jumble.

C. *Application of Supreme Court Takings Cases and Fundamental Considerations of Fairness and Justice to State Extraction Statutes*

1. STATE EXTRACTION STATUTES PROVIDE NO QUID PRO QUO FOR THE LIMITATION ON RECOVERY

When the government statutorily limits the amount of money that may be recovered in a civil action, "[t]he limitation is clearly a partial taking. The critical question is whether the statute affords sufficient implicit in-kind compensation."[178] The Supreme Court applied this type of takings analysis in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[179] even though a due process challenge, not a takings challenge, was formally before the Court.[180] In upholding a federal statute that limited liability for nuclear power plant accidents, the Court relied upon the fact that in return for limited damages, potential victims received a Congressional guarantee of a claims fund and a Congressional commitment to take all appropriate measures to protect the public from nuclear power plant accidents.[181] In applying this analysis, the Court tapped into the fundamental notions of fairness and justice. That is, the Court implicitly asked whether it is fair and just for the government to limit a plaintiff's recovery without providing some benefit in return. *Duke* informs us that it is not. Just compensation must be had in some form.

State extraction statutes provide no such in-kind compensation to plaintiffs. Therefore, these statutes contravene notions of fairness and justice, which require just compensation for governmental takings of private property for public use. The lack of in-kind compensation was a determining factor in *McBride v. General Motors Corp.*,[182] where the court struck down Georgia's extraction statute. The court adamantly rejected the defendant's argument that a state extraction statute is analogous to a workers compensation statute or an automobile insurance no-fault act, which legitimately abolish punitive damages.[183] The distinction between a state extraction statute and a workers compensation statute or an automobile insurance no-fault act lies in the fact that the latter two provide a quid pro quo for the statu-

178. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 243-44 (1985).

179. 438 U.S. 59 (1978).

180. EPSTEIN, *supra* note 178, at 244.

181. *Duke*, 438 U.S. at 90-91.

182. 737 F. Supp. 1563 (M.D. Ga. 1990). Although the court formally addressed a due process challenge, the analysis of a lack of in-kind compensation is readily applicable to a takings challenge.

183. *Id.* at 1574-76.

tory limitation on recovery. For instance, the quid pro quo of Georgia's no-fault statute was "the elimination of the element of fault and a rapid or prompt payment of no-fault claims in return for a 'serious injury' threshold."[184] The compensation provided to the plaintiff by such a quid pro quo shields a workers compensation statute or an automobile insurance no-fault act from a constitutional takings challenge. The lack of such a quid pro quo should condemn a state extraction statute as an unconstitutional taking.

2. FORCED CONTRIBUTION UNDER STATE EXTRACTION STATUTES IS NOT REASONABLY RELATED TO THE COSTS OF USING THE CIVIL JUSTICE SYSTEM

The United States Supreme Court has recognized that a state may deprive a property owner of its property without violating the Takings Clause if such action furthers the common good and is more than a means of forcing a contribution to the state's general revenues.[185] To achieve this status, a statute must substantially advance a legitimate state goal.[186] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*[187] involved a Florida statute that allowed a county to collect the interest on an interpleader fund deposited with the county court in addition to a fee charged for the court's services in receiving the fund.[188] The Court recognized that the claimants held a protected property right in the interest on the fund even before the award was entered by final judgment.[189] Rejecting the argument that the statute is justified because it "takes only what it creates," the Court held that the statute constituted an unconstitutional taking under the Fifth and Fourteenth Amendments.[190] The Court reasoned that the statute did more than shift economic burdens and benefits in promotion of the general welfare. Instead, "the extraction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts."[191] The statute unconstitutionally placed

184. *Id.* at 1574.

185. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 153, 163 (1980). This suggests that where a state expressly asserts revenue generation as one of the purposes behind a state extraction statute, *see, e.g., McBride*, 737 F. Supp. at 1568, that statute should be scrutinized to ensure that it is really more than a means of forcing a contribution to the state's general revenues. *See supra* notes 71-76 and accompanying text.

186. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834, 837 (1987); *see also Webb's Fabulous Pharmacies*, 449 U.S. at 163.

187. 449 U.S. 153 (1980).

188. *Id.* at 155-56.

189. *Id.* at 162-63.

190. *Id.* at 163-64.

191. *Id.* at 163.

upon plaintiffs in an action a public burden which, "in all fairness and justice, should be borne by the public as a whole."[192]

Webb's Fabulous Pharmacies provides guidance in analyzing state extraction statutes for takings issues. First, it informs us that a protectable property right in an award can accrue before final judgment for purposes of the Takings Clause.[193] The situation in *Webb's Fabulous Pharmacies* is more analogous to the situation created by state extraction statutes than are the cases that concentrate on the right to have the jury *assess* punitive damages. It is reasonable to apply the same logic and find a protectable pre-judgment right in a plaintiff's award of punitive damages after the court has been satisfied that the amount is not excessive. Second, *Webb's Fabulous Pharmacies* informs us that a statute will not evade constitutional scrutiny merely because it "takes only what it creates."[194] This analysis suggests that even if punitive damages are allowed only by statute,[195] the legislature is not free to place any condition whatever on the granting of punitive damages merely because punitive damages are only allowed by statute.[196] Third, *Webb's Fabulous Pharmacies* suggests that a state extraction statute will not withstand a takings challenge unless it is shown that the allocation of funds to the state is "reasonably related to the costs of using the courts."[197]

The Supreme Court recently addressed the same issues as those raised in *Webb's Fabulous Pharmacies* but reached a seemingly opposite result. *United States v. Sperry Corp.*[198] involved a federal statute that apportioned to the United States government a maximum of one and one-half percent of awards granted by the Iran-United States Claims Tribunal.[199] The Court upheld the statute against a takings challenge on the ground that the one and one-half percent allocation was reasonably related to the costs incurred by the government in administering the arbitration tribunal.[200] The *Sperry* Court indicated that a different result might follow from a larger apportionment by the government to itself.[201] Thus, the use of allocated funds and the

192. *Id.* (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

193. *Id.* at 164.

194. *Id.* at 163.

195. Courts have relied upon this argument to support state extraction statutes. *See, e.g.*, Kirk v. Denver Publishing Co., 818 P.2d 262, 274-75 (Colo. 1991); Gordon v. State, 608 So. 2d 800, 801 (Fla. 1992).

196. *See also supra* notes 103-07 and accompanying text.

197. 449 U.S. 153, 163 (1980).

198. 493 U.S. 52 (1989).

199. *Id.* at 54.

200. *Id* at 60, 62.

201. *Id.* at 62.

amount of the award extracted will determine whether such a taking is constitutional. These factors distinguish *Webb's Fabulous Pharmacies* from *Sperry*.

This insight suggests that an analogous distinction among state extraction statutes would determine whether or not a particular state extraction statute effectuates an unconstitutional taking. The Colorado Supreme Court applied this analysis in *Kirk v. Denver Publishing Co.*[202] to strike down Colorado's state extraction statute as an unconstitutional taking. The *Kirk* court found that there was no reasonable nexus between an alleged state interest in punishment or deterrence and "the statutory imposition of the forced contribution on the person injured by the wrongful conduct."[203] In fact, the *Kirk* court adopted the reasoning of the *Sperry* Court in finding that "the governmental appropriation must bear a reasonable relationship to the governmental services provided to civil litigants in making use of the judicial process for the purpose of resolving the civil claim" from which the apportioned award follows.[204] The Colorado statute allocated one-third of an exemplary damage award to the "state general fund."[205] The funds were not designated for any purpose connected with funding the court system or the civil justice system at all.[206] The Colorado statute "exact[ed] a forced contribution in order to provide general governmental revenues and [did] so in a manner and to a degree not reasonably related to the cost of using the courts."[207] The court found it particularly significant that the judgment resulted exclusively from the plaintiff's "time, effort, and expense in the litigation process without any assistance whatever from the state."[208] The court reasoned that a significantly smaller allocation to the state might indeed be defended as reasonably related to the use of the courts, but that a forced contribution of one-third of a plaintiff's punitive damage award was not acceptable.[209]

VI. CONCLUSION

The above analysis suggests that in order to satisfy fundamental

202. 818 P.2d 262 (Colo. 1991). The dissent in *Gordon v. State* adopted the reasoning of *Kirk* in arguing that Florida's state extraction statute is unconstitutional. 608 So. 2d 800, 803-04 (Fla. 1992) (Shaw, J., concurring and dissenting).

203. *Kirk*, 818 P.2d at 273; *see also Gordon*, 608 So. 2d at 803-04 (Shaw, J., concurring and dissenting).

204. *Kirk*, 818 P.2d at 270.

205. COLO. REV. STAT. § 13-21-102(4) (1989).

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

207. *Id.*

208. *Id.* at 272.

209. *Id.* at 265.

notions of fairness and justice, the use of funds extracted by the state from a punitive damage award must be rationally related to the specific litigation in which the award was apportioned. Therefore, those state extraction statutes that give a part of a punitive damage award to the state's general fund effectuate unconstitutional takings. A strict construction of this rule also renders unconstitutional those state extraction statutes that apportion the award to some type of compensation or reparations fund for other plaintiffs.[210] This suggests that not only were the Georgia and Colorado statutes properly struck down, but also that the remaining seven extraction statutes are constitutionally infirm as currently written.[211]

However, the takings cases may serve to guide the states in formulating extraction statutes that will be constitutionally acceptable. A statute that apportions to the state a percentage of a punitive damage award that is reasonably related to the cost of using the civil justice system for that case will probably not be considered an unconstitutional taking. The statute must clearly designate a fund that is established for this specific purpose. The question of what percentage is fair for the state to extract remains unresolved. *United States v. Sperry Corp.*[212] informs us that one and one-half percent is an acceptable percentage. *Kirk v. Denver Publishing Co.*[213] cautions that one-third of a punitive damage award is too excessive to be "reasonably related to the cost of using the courts"[214] in any particular litigation. Because one-third is the least amount apportioned to the state by any of the current extraction statutes,[215] all of these statutes must be revised in order to comport with the Takings Clause and its fundamental principles of fairness and justice.

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210. This suggests that Gordon v. State, 608 So. 2d 800 (Fla. 1992), and Burke v. Deere & Co., 780 F. Supp. 1225 (S.D. Iowa 1991), were decided incorrectly. In *Burke*, the United States District Court for the Southern District of Iowa upheld the Iowa state extraction statute. The court reasoned that the Iowa statute was different from the Georgia statute in that the allocated money went to a "civil reparations trust fund to be administered by the courts" rather than to the state's treasury, as Georgia's statute had provided. *Id.* at 1242. Before it was struck down in *McBride*, the Georgia statute provided for funds to be allocated to the Fiscal Division's Department of Administrative Services. *Id.*

211. *See supra* note 6.

212. 493 U.S. 52 (1989).

213. 818 P.2d 262 (Colo. 1990).

214. *Id.* at 271.

215. The only possible exception is Illinois' statute, which gives the trial court the discretion to determine how much of a punitive damage award will be apportioned to the state. *See* ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd Supp. 1991).