The Constitutionality Of State Allocation Of Punitive Damage Awards

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I. INTRODUCTION

The perceived liability insurance crisis of the nineteen-eighties produced an enormous amount of legislation designed to reduce awards that were seen as crippling industry.\(^1\) In 1986 alone, forty-one states passed tort reform statutes intended to control spiralling insurance rates.\(^2\) Punitive damages represented one of the prime targets of the tort reformers.\(^3\) A perception developed among the public and among influential legal commentators that punitive damages were simply a windfall for greedy plaintiffs that was getting increasingly out of control.\(^4\) At the same time, commentators increasingly speculated that punitive damages could not survive a direct constitutional attack.\(^5\)

Many state legislatures responded to this type of criticism by restricting or otherwise altering punitive damages.\(^6\) At least partly due to tort reform legislation, insurance rates stabilized by the end of the decade.\(^7\) In addition, in a string of cases from 1986 through 1991, the United States Supreme

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2. Id.


6. See GHIARDI & KIRCHER, supra note 3, § 21.15 (discussing tort reform statutes). Most tort reform statutes addressing punitive damages simply place a cap on the amount that a plaintiff can recover. Id.


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Court considered and rejected several constitutional challenges to punitive damages. These factors could have rendered further discussion of punitive damages reform superfluous. However, the emotional nature of the debate over the policy questions underlying punitive damages has maintained interest in the subject, and legislatures continue to address it.

The most novel approach to punitive damage reform has taken the shape of state allocation of punitive awards. Under a state allocation scheme, the state takes a portion, often a significant portion, of every punitive damage award. At least ten states have now passed statutes giving the state a percentage of punitive awards. The legislatures of at least three

8. See infra notes 21-26 and accompanying text (discussing recent Supreme Court cases considering constitutionality of traditional punitive awards).
10. In August of 1991, Vice-President Dan Quayle announced to the American Bar Association (ABA) the proposals for civil justice reform formulated by the President's Council on Competitiveness. See Douglas Jehl, Administration Calls for Wide Legal Reforms, L.A. Times, Aug. 14, 1991, at A1 (discussing Bush administration proposals for justice reform). Quayle's proposal played a key role in maintaining public interest in tort reform generally and punitive damages reform in particular. See Andrew Blum, Quayle's Proposals Still Making Waves, Nat'l L.J., Sept. 16, 1991, at 3, 28 (noting that ABA speech generated more public reaction than any issue involving Quayle up to that time); Marcia Coyle & Fred Strasser, Quayle Unveils "Justice Reform" Legislation, Nat'l L.J., Feb. 17, 1992, at 5, 5 (noting that mail Quayle received after ABA speech supported his position by ratio of 100-1).

The package Quayle unveiled to the ABA, titled the "Agenda for Civil Justice in America," called for, among other things, strict limits on punitive damages and the transfer from juries to judges of the power to set such penalties. See Jehl, supra, at A1 (discussing Bush administration proposals for justice reform). However, these aspects of the proposal were omitted from the related legislation submitted to Congress. S. 2180, 102d Cong., 2d Sess. (1992); H.R. 4155, 102d Cong., 2d Sess. (1992). The proposed legislation focused primarily on the so-called "English" or "loser pays" rule. Id. Instead of including punitive damages reform in the federal legislation, the Bush administration planned to incorporate its suggested reforms of punitive damages into a proposed model state tort reform bill. See Coyle & Strasser, supra, at 5 (discussing proposed justice reform legislation).

11. For purposes of this Note, the term "state allocation" is used to describe the practice whereby a state receives a portion of a punitive damage award. Other commentators have used the term "state extraction" to describe this practice. See James D. Ghiardi, Punitive Damages: State Extraction Practice Is Subject to Eighth Amendment Limitations, 26 Tort & Ins. L.J. 119, 120 (1990) (referring to state's receipt of share of punitive award as "state extraction"); Samuel E. Klein et al., Punitive Damages, in Libel Litigation 1990, at 297, 337 (PLI Pats., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. 338, 1992) (same). Because this Note argues that the state has a legitimate and constitutional interest in a share of a punitive award prior to the vesting of the award in the plaintiff, the Note substitutes the term "allocation" for the more pejorative "extraction."

12. See, e.g., ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd 1987) (giving trial court discretion to apportion award among plaintiff, plaintiff's attorney, and state). Some states receive a portion of punitive awards only in certain types of cases. E.g., IOWA CODE ANN. § 68A.1 (West 1987) (allocating to state 75% of punitive awards in cases where defendant's conduct was not aimed specifically at plaintiff).

13. See infra Appendix (citing and describing state allocation statutes).
other states currently have punitive damages allocation bills under consideration.\textsuperscript{14}

State allocation has gained favor among tort reformers because it resolves many of the public policy criticisms of punitive awards.\textsuperscript{15} It erases much of the greedy plaintiff stigma by diverting the proceeds of a punitive award to the government, which can put the money to some public benefit. It may also reduce the incidence of such awards by reducing the incentive to sue for punitive damages.\textsuperscript{16}

However, the entry of the state into private litigation to receive a share of a punitive award presents several novel and complex issues of constitutional law. First, by appropriating a share of a civil award, the government may effect an unconstitutional taking of the plaintiff's property. On the other hand, the recovery of a punitive award by the government may trigger criminal constitutional protections in favor of the defendant, primarily through the Excessive Fines Clause and the Double Jeopardy Clause.

Which constitutional issues apply depends largely on the characterization of the government's interest in the award. Neither legislatures nor courts have resolved conclusively the related questions of when the government's interest attaches and how, or whether, that interest fits into traditional mechanisms of government appropriation.\textsuperscript{17} If the government's interest does not attach until after the entry of judgment, it appears that the state appropriates a portion of the plaintiff's property. Under that approach, the action resembles either a taking, in the constitutional sense, or a tax.\textsuperscript{18} If,
however, the government's interest attaches prior to or simultaneously with the entry of judgment, it appears that the government becomes a judgment creditor of the defendant, with a property right in its share enforceable against the defendant. Under that approach, the government's allocation of a portion of the award resembles a civil penalty.

This Note analyzes state allocation in light of these differing approaches. The constitutional analysis of Part II begins with a discussion of Takings Clause issues presented by the former "appropriation" approach. This section suggests some flaws in that approach and some reasons why courts might mistakenly adopt it. Part II then examines the criminal law protections embodied in the Excessive Fines and Double Jeopardy Clauses and evoked by the latter "civil penalty" approach. Next, Part III argues for specific statutory adoption of the civil penalty approach and discusses the practice and policy issues that that approach presents. Finally, an Appendix cites and summarizes each state allocation statute.

II. CONSTITUTIONAL ISSUES

In a series of recent cases, the Supreme Court has considered the constitutionality of traditional punitive damage awards in private civil litigation. Those cases culminated in the 1991 decision in Pacific Mutual

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that justice be administered without "sale, denial or delay." E.g., COLO. CONST. art. II, § 6; FLA. CONST. of 1968, art. I, § 21. A tax on the recovery of damages might constitute "sale" in violation of those provisions.

A court that categorized existing state allocation statutes as taxes might invalidate them per se. Most state constitutions include clauses limiting each bill to one subject, and holding void any subject not included in the title. E.g., COLO. CONST. art. V, § 21; GA. CONST. art. III, § 7, para. 4; IDAHO CONST. art. 3, § 16; IND. CONST. art. 4, § 19; MICH. CONST. art IV, § 24. State allocation statutes arise in code sections dealing with torts or civil procedure. If the state legislature passed them as bills under those titles, the allocation sections may be void as taxes. See McBride v. General Motors Corp., 737 F. Supp. 1563, 1578 (M.D. Ga. 1990) (holding Georgia allocation statute unconstitutional under Georgia constitutional provision limiting bills to one subject).

19. See GA. CODE ANN. § 51-12-5.1(2) (Michie 1987) ("Upon issuance of judgment in [an allocation] case, the state shall have all rights due a judgment creditor . . . and shall stand on equal footing with the plaintiff . . . ").


21. See Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (denying constitutional challenge to punitive damages); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 78 (1988) (same); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986) (same). In Browning-Ferris the Supreme Court held that the Excessive Fines Clause of the Eighth Amendment does not apply to punitive damage awards. Browning-Ferris, 492 U.S. at 275. The Court refused to hear a due process challenge because the appellant had not raised that issue in either the district court or appellate court. Id. at 277. In Crenshaw the Court similarly failed to reach a due process challenge to a punitive award because that issue had not been raised in state court. Crenshaw, 486 U.S. at 78. In Lavoie due process and Eighth Amendment challenges were properly raised, but the Court did not reach those challenges because its resolution of another issue made resolution of those constitutional issues unnecessary. Lavoie, 475 U.S. at 828.
Life Insurance Co. v. Haslip, 22 in which the Court announced its boldest affirmation yet of the common-law method of assessing punitive damages. 23 Coupled with the decision in Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc., 24 in which the Court held that the Eighth Amendment Excessive Fines Clause does not apply to punitive damages, 25 Haslip firmly established the constitutionality of traditional punitive damage awards. 26 However, these decisions did not address situations in which the government receives part of a punitive damage award.

The government's entry into the litigation, either as an appropriator of the plaintiff's award or as a judgment creditor of the defendant, may alter the character of the proceeding to such a degree that a previously acceptable practice could become constitutionally suspect. 27 The predominant challenges

23. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991). In Haslip a group of insureds sued their insurer alleging fraud. Id. at 1036. The jury found for the plaintiffs and awarded damages, including a punitive award of four times the amount of compensatory damages. Id. at 1037. The Supreme Court held that the punitive damage award did not violate the Due Process Clause of the Fourteenth Amendment. Id. at 1044. The Court cautioned that unlimited jury or judicial discretion in fixing awards could raise the possibility that extreme awards might violate due process. Id. at 1043. However, the Court specified that the procedural protections used by the Alabama court in the case at bar vindicated due process. Id. at 1045-46.
26. By approving the Alabama courts' procedures for assessing and reviewing awards, the Haslip Court implicitly established a standard for evaluating state methods of awarding traditional punitive damages. Haslip, 111 S. Ct. at 1044-46. The Haslip Court noted with approval the jury instructions, the trial court's post-trial review, and the appellate review as methods of protecting the due process rights of punitive damages defendants. Id. The Court stressed that the jury instructions properly informed the jury that the purpose of punitive damages was retributive and deterrent and that the award of punitive damages was not compulsory. Id. at 1044. The Court then commended the procedures for post-trial review laid out by the Alabama Supreme Court in Hammond v. City of Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986). Haslip, 111 S. Ct. at 1044. The "Hammond test," as expanded by the Alabama Supreme Court in subsequent cases, provides for consideration of: (1) the relationship between the punitive award and the harm, both actual and potential, resulting from the defendant's conduct; (2) the reprehensibility and duration of the conduct and the defendant's culpability for the conduct; (3) the profitability of the conduct; (4) the defendant's financial position; (5) the costs of litigation; (6) the imposition of criminal sanctions; and (7) the imposition of other civil awards. Id. at 1044-45. Finally, the Supreme Court recognized Alabama's procedures for appellate review, which require the higher courts to ensure that punitive awards do not exceed the amount necessary to achieve society's goals. Id. at 1045.
27. See Boyd v. United States, 116 U.S. 616, 634 (1986) (noting that civil proceeding may operate in "substance and effect" as criminal proceeding, thereby triggering criminal law procedural due process protections). In Haslip the Supreme Court affirmed against a due process challenge the general common-law method for assessing punitive damages in civil cases between private parties. 111 S. Ct. at 1044. Because the government's entry into the litigation as a recipient of a punitive award gives a proceeding a more criminal flavor, state allocation may further implicate due process. See infra part II.B-C (discussing analogy of state allocation to criminal punishment). Analogous civil actions may provide insight into the level of process
to state allocation to date have rested on Fifth Amendment Takings Clause 
grounds. In addition, in Browning-Ferris, the Supreme Court specifically 
held open the possibility that punitive damage awards might violate the 
Excessive Fines Clause of the Eighth Amendment if the government were a 
party to the action.28 Finally, in United States v. Halper,29 the Supreme 
Court suggested that punitive awards could violate the Double Jeopardy 
Clause of the Fifth Amendment if the government were a party to the 
action.30

A. The Takings Clause

The Fifth Amendment prohibits the government from taking private 
property for public use without just compensation.31 Challenges to state 
allocation have rested primarily on the ground that under these statutes, 
the state government takes the plaintiff's property—her punitive damage 
award—in violation of the Fifth Amendment.32 Plaintiffs have raised Fifth

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text (analyzing Halper).
31. U.S. CONST. amend. V.
32. In addition to prohibiting takings, the Fifth Amendment also prohibits the government 
from depriving a person of property without due process of law. The decisions in Gordon v.
Amendment challenges in three states: Colorado, Florida, and Iowa. Of these challenges, only the one in Colorado succeeded.

The delineation of “property” lies at the core of Takings Clause jurisprudence. In the context of state allocation, the key determination is the point at which a punitive damage award becomes property of the plaintiff. A person generally has a “right” to redress for a legally recognizable injury in the form of compensatory damages. Many state constitutions guarantee this right. Logically, if a person has a right to...
compensatory damages after suffering an injury, and this right is property, the person must have a property right in the damages even before the entry of judgment. If this is the case, the state would effect a taking if it appropriated a share of a compensatory award at any time.

In contrast to the right to compensatory damages, a person generally does not have a right to punitive damages. Instead, many states allow a plaintiff to ask for punitive damages, after showing an actual injury, in certain circumstances determined either by statute or by common law. This

764, 767 (Tex. Ct. App. 1954) (stating that right to recover damages for personal injuries is property right); see also Creighton v. Pope County, 50 N.E.2d 984, 987 (Ill. App. Ct. 1943) (stating that vested right of action is property in same sense in which tangible things are property); Kuhn v. Kuhn, 389 N.E.2d 319, 320 (Ind. Ct. App. 1979) (stating that choses in action are personally); Mueller v. Rupp, 761 P.2d 62, 66 (Wash. Ct. App. 1988) (stating that chose in action is property).


43. See GHIARDI & KIRCHER, supra note 3, §§ 4.02-06 (noting confusion in some states about compensatory or punitive nature of awards). Connecticut, Michigan, and New Hampshire allow recovery of awards above actual damages, but treat these awards as compensatory. Id. In these states an effort by the legislature to recover a portion of such an "aggravated" award prior to entry of judgment could violate the Takings Clause if the plaintiff actually has a pre-existing property right in a compensatory award. That question is most likely to arise in Georgia, which has a state allocation statute. GA. CODE ANN. § 51-12-5.1(2) (Michie 1987). Georgia at one time treated aggravated damages as at least partially compensatory. See GHIARDI & KIRCHER, supra note 3, § 4.04 (discussing history of Georgia punitive damages). The legislature amended the code in 1987 to specify that punitive damages do not serve a compensatory purpose. Id. § 4.04 (1991 Supp.). However, that amendment only applies to causes of action arising after July 1, 1987. Id. An attempt to apply the state allocation statute to a case involving a cause of action arising prior to that date might evoke Takings Clause questions.

Similar questions could arise in any state that does not explicitly provide, either by statute or in case law, that punitive damages serve purely retributive and deterrent functions. Some commentators have argued that punitive damages in fact serve the compensatory end of restitution for wounded dignity, mental anguish, or other intangible harms. See KENNETH R. REDDEN, PUNITIVE DAMAGES §§ 2.2.B-C (1980) (discussing conflicting views of purpose of punitive damages). Some case law supports that interpretation. See, e.g., Stuart v. Western Union Tel. Co., 18 S.W. 351, 353 (Tex. 1885) (arguing that punitive damages serve partly compensatory ends). If a court finds that punitive damages in fact serve compensatory ends, it might also find that a plaintiff has a pre-existing property right in a punitive award.

44. See Seaward Constr. Co. v. Bradley, 817 P.2d 971, 975 (Colo. 1991) (holding that plaintiff has no right to punitive damages unless and until trier of fact awards them); DAN B. DOBBS, LAW OF REMEDIES § 3.9 (1973) (noting that punitive damages are not given as of right in any state).

45. See Oliver v. Raymark Indus., Inc., 799 F.2d 95, 97 (3d Cir. 1986) (noting prerequisite of actual damages for recovery of punitive damages); Breech v. J.C. Penney Co., 698 F.2d 352, 356 (8th Cir. 1983) (same); GHIARDI & KIRCHER, supra note 3, § 6.16 (same).

46. See GHIARDI & KIRCHER, supra note 3, § 5.01 (discussing general principles behind punitive damages). Generally, in order to recover punitive damages, a plaintiff must show some level of scienter on the part of the defendant. Id. States vary widely on the level of scienter required. Typically plaintiffs must show "malice," "willful and wanton conduct," "fraud," or "reckless disregard." Id.
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limited "right" to sue for punitive damages is not property. Logically, then, the plaintiff has no property right in a punitive award prior to entry of judgment. Thus, the Takings Clause can apply to state allocation of punitive damages only if the state takes its share subsequent to entry of judgment.

In Kirk v. Denver Publishing Co., the Colorado Supreme Court held that Colorado's punitive damages allocation statute violated the Takings Clause of the Fifth Amendment. In resolving the issue of when the government's interest attached, the court emphasized a provision of the statute that disavowed any interest on the part of the state in the damages or in the litigation prior to "payment becoming due." The court interpreted this provision to mean that the entire award vested in the plaintiff, and that the government had no interest in the award until after the entry of the judgment.

47. See Ross v. Gore, 48 So. 2d 412, 414 (Fla. 1950) (stating that right to punitive damages is not property); Osborn v. Leach, 47 S.E. 811, 813 (N.C. 1904) (same). Few courts have ruled on the question of property rights in punitive damages, probably because it is accepted that a plaintiff has no right to receive punitive damages until the jury awards them. See supra note 44 (noting that plaintiff has no right to receive punitive award).


49. See Smith, 147 N.E.2d at 325 (holding plaintiff has no property right in expected punitive award). But see supra note 43 (discussing confusion over punitive or compensatory nature of aggravated awards in some states).


51. Kirk v. Denver Publishing Co., 818 P.2d 262, 265 (Colo. 1991). In Kirk, the plaintiff, Kirk, distributed newspapers published by the defendant, Denver Publishing Company (DPC). Id. at 264. When their relationship ended, DPC filed suit alleging that Kirk had not paid a balance due. Id. Kirk countersued alleging breach of contract and received substantial actual and punitive damages. Id. After entry of judgment, Kirk filed a post-trial motion requesting the district court to invalidate the Colorado statute requiring him to pay one-third of the punitive damage award to the state. Id. The district court denied the motion, and Kirk appealed claiming the statute violated the Takings Clause of the Fifth Amendment and other provisions of the United States and Colorado Constitutions. Id.

52. See Colo. Rev. Stat. Ann. § 13-21-102(4) (West 1987) ("Nothing in this subsection (4) shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due."). Both the Colorado statute and the Colorado Supreme Court refer not to "punitive damages" but to "exemplary damages." These terms are interchangeable. See Richard L. Blatt et al., Punitive Damages § 1.3(A)(1) (1991) (noting no difference in legal meaning between terms "punitive damages" and "exemplary damages").

53. Kirk, 818 P.2d at 267. The court apparently concluded that the judgment for punitive damages vested in its entirety and that the statute acted to disturb that judgment. Id. at 268. The court stated that "[w]here a private property interest emanates directly from a final judgment, ... such a property interest cannot be diminished by legislative fiat ... ." Id.

In his dissent, Chief Justice Rovira partially addressed the majority's inference that the statute acted to disturb an existing judgment. Id. at 274. He argued that the entire award never vested in the plaintiff because the plaintiff could receive no more than the statute granted. Id. at 275. He noted that although the state could not modify an existing judgment, it could condition damages the right to which existed only through a statutory grant. Id.
Having found that the government’s interest attached after the entry of judgment, the court addressed the question of whether the judgment constituted property. The court found that a judgment for punitive damages is property, stating that “[b]ecause the term ‘property’ includes a ‘legal right to damage for an injury,’ it necessarily follows that the term ‘property’ also includes the judgment itself.” From this analysis, the court concluded that the plaintiff had a property right in the punitive damages before the government’s interest attached.

The Kirk court next addressed whether the state had “taken” the plaintiff’s property in violation of the Fifth Amendment. In determining when a state appropriation of a money judgment constitutes a taking, the court relied on the United States Supreme Court’s decision in United States v. Sperry Corp. In Sperry the Supreme Court found that a one and one-half percent deduction from an arbitration award did not constitute a taking under the Fifth Amendment because that deduction was a reasonable user fee. The Colorado Supreme Court interpreted Sperry to require that any such appropriation of a judgment bear a reasonable relationship to the government services provided. The Colorado court determined that the statute at issue in Kirk failed that test, and therefore effected a taking, because the statute appropriated a percentage too great to qualify as a valid property tax, excise tax, or user fee.

Chief Justice Rovira dissented in Kirk. He focused on the majority’s characterization of the entire judgment as a vested property interest. He stated that “a claim for [punitive] damages is a statutory right which may be conditioned by the legislature and thus the entire judgment never vested in the plaintiff.” He reasoned further that, because the legislature could abolish punitive damages entirely, it could place conditions on their recovery. He argued that the plaintiff knew of those conditions and thus took

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54. Id. at 267 (quoting Rosane v. Senger, 149 P.2d 372, 375 (Colo. 1944)).
55. Id.
56. Id.
58. United States v. Sperry Corp., 493 U.S. 52, 62 (1989). In Sperry, a federal statute required the Federal Reserve Bank of New York to deduct one and one-half percent from the first five million dollars of an arbitration award entered by the Iran-United States Claims Tribunal. Id. at 54. The purpose of the provision was to reimburse the government for the administrative costs of the arbitration procedure. Id. at 57. The Supreme Court held that the statute did not effect an unlawful taking under the Fifth Amendment because it constituted a valid user fee. Id. at 62.
60. Id. at 270-72; see supra note 18 (discussing implications of categorizing state allocation as tax).
62. Id. at 274.
63. Id.
64. Id.
the punitive award subject to them. Finally, he concluded that the plaintiff received a property interest only in the one-third share of the award that the statute allocated to him, and that, therefore, the state could not have taken his property.

Courts in other states have reached conclusions similar to Chief Justice Rovira's. In *Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc.*, the Iowa Supreme Court rejected a Fifth Amendment challenge to the Iowa punitive damages allocation statute. In *Shepherd*, a building owner whose building partially collapsed during excavation of a sewer brought suit against the engineering firm and excavating contractor performing the project. The jury awarded the building owner compensatory and punitive damages, and the trial court allocated seventy-five percent of the punitive award to the state in keeping with Iowa's state allocation statute. The building owner appealed claiming the allocation statute unconstitutionally deprived him of his property. In an extremely cursory analysis, the Iowa Supreme Court found that the state took its share before the plaintiff had any vested right in the damages, and that therefore the statute did not violate the Fifth Amendment.

In *Gordon v. State*, the Florida Supreme Court rejected a Fifth Amendment challenge to the Florida state allocation statute. Like the Iowa statute, the Florida statute did not mention at what point the state took its

65. *Id* at 275.
66. *Id*.
68. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991). The Iowa court couched its decision in due process rather than takings language. However, its resolution of the property interest question speaks equally to Takings Clause as to Due Process Clause challenges.
69. *Id.* at 614.
70. *Id.*. The Iowa state allocation statute diverts to the state's Civil Reparations Trust Fund 75% of every punitive damage award in cases in which the defendant's conduct was not aimed specifically at the plaintiff. *Iowa Code Ann.* § 668A.1 (West 1987).
71. *Shepherd*, 473 N.W.2d at 614.
72. *Id.* at 619. The Iowa statute contains no provision like the one in the Colorado statute disavowing the state's interest until "payment becomes due." *See infra Appendix* (citing and describing state allocation statutes); *see also supra* note 53 and accompanying text (discussing *Kirk* court's analysis of Colorado disavowal provision).
74. *Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992), *cert. denied*, 61 U.S.L.W. 3568 (U.S. Mar. 29, 1993) (No. 92-1328). The Florida Supreme Court never specifically discussed the Takings Clause. It focused on due process, and also denied challenges based on equal protection, the right to trial by jury, and several state constitutional provisions. *Id.* The dissent did specifically address the takings issue. *Id.* at 803 (Shaw, J., dissenting). Leaning for support on the Colorado Supreme Court's decision in *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991), the dissent argued that the plaintiff had a vested property right before the state intervened and that therefore the statute effected an unconstitutional taking. *Gordon*, 608 So. 2d at 802-04 (Shaw, J., dissenting).
interest. The statute provided only that the state’s portion of the award “shall be payable” to the state. The Florida court found that the plaintiff had no property interest in the full award.

The *Gordon* court emphasized that the legislature has the power to condition or even abolish punitive damages, and that a plaintiff has no vested property right in a punitive award prior to entry of judgment. The plaintiff receives a property interest in the award because of the allocation statute. The court reasoned that, because the legislature created the plaintiff’s property right in the award, and the legislature placed a condition on the recovery of that award, the plaintiff took the award subject to the allocation condition. Therefore, the court implicitly held that the plaintiff received no property interest in the portion of the award allocated to the government.

The dissent in *Kirk* and the majorities in *Shepherd* and *Gordon* share the approach that the state’s interest arises prior to or simultaneously with the plaintiff’s. These opinions emphasize that the plaintiff has no property right in a punitive damage award prior to entry of judgment, and that the plaintiff receives any property interest only due to the statute.

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75. FLA. STAT. ANN. § 768.73 (West 1986); see infra Appendix (citing and describing state allocation statutes).

76. FLA. STAT. ANN. § 768.73 (West 1986).

77. *Gordon*, 608 So. 2d at 801.

78. *Id. Gordon* was a per curiam decision. The Fifth Amendment portion of the decision consists almost entirely of two quotes, one from the appellate court’s decision, 585 So. 2d 1033, 1035-36 (Fla. Dist. Ct. App. 1991), and one from a prior Florida Supreme Court decision. See *Ross v. Gore*, 48 So. 2d 412, 414 (Fla. 1950) (holding that right to punitive damages is not property). Other than citing these quotes with approval, the Supreme Court did no analysis of its own. *Gordon*, 608 So. 2d at 801.

79. *Gordon*, 608 So. 2d at 801.

80. *Id.*

81. *Id.* The appellate decision contains a more detailed discussion of the property issue and thus may be more illuminating than the Supreme Court decision. The appellate court stated that “[w]here an 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*, 585 So. 2d at 1036. In effect then, the appellate court did not conclude that the state took its share of the award before the plaintiff took his. Cf. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d 612 (Iowa 1991) (holding plaintiff received vested interest at entry of judgment only in share allocated to him). Instead, the appellate court concluded that the plaintiff took the entire award subject to the state’s prior claim. See *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 275 n.2 (Colo. 1991) (Rovira, C.J., dissenting) (analyzing characterizations of plaintiff’s property interest in award). In a footnote to his dissent in *Kirk*, Chief Justice Rovira recognized that the transaction could be seen as the plaintiff taking the entire award subject to the state’s prior claim. *Id.* He stated that “[e]xpressed alternatively, a plaintiff’s property right in a judgment for punitive damages is intrinsically subject to partial defeasance upon collection . . . .” *Id.*


83. See *Kirk*, 818 P.2d at 274 (Rovira, C.J., dissenting) (stating that legislature can condition recovery of punitive damages); *Gordon*, 608 So. 2d at 801 (same). These opinions intimate that the legislature has virtually unlimited power to condition the recovery of punitive
argue, either implicitly or explicitly, that the statute grants the plaintiff a limited "right" to request punitive damages, but subjects any such award to a prior claim by the state. Because, under this rationale, the plaintiff receives his property interest after the government takes its, this approach insulates state allocation from Takings Clause challenges.

The Kirk majority held the Colorado statute unconstitutional largely on the basis of the statute's provision disavowing any government interest in the litigation or the punitive award until "payment becom[es] due." The court interpreted that provision to vest the entire punitive award in the plaintiff before any government interest attached. Any interpretation that gives the plaintiff a property interest in the entire award before the government takes its share likely will doom state allocation on Takings Clause grounds. However, the disavowal provision of the Colorado statute is unique among state allocation statutes. In the absence of that type of ambiguous and misleading language, courts probably will adopt the approach of the Shepherd and Gordon courts.

awards. In fact, some questions may arise about the exact power of state legislatures to abridge common-law "rights" and causes of action. The Colorado Constitution guarantees every person "a speedy remedy afforded for every injury to person, property or character." Colo. Const., art. II, § 6. Courts have held that this section does not prevent the legislature from changing laws which create rights, O'Quinn v. Walt Disney Prods., Inc., 493 P.2d 344 (Colo. 1972), and does not preserve pre-existing common-law remedies from legislative change. Shoemaker v. Mountain States Tel. & Tel. Co., 559 P.2d 721 (Colo. Ct. App. 1976). In other states, the constitutional requirements may vary. For example, the Florida constitution guarantees every person "redress of any injury." Fla. Const. of 1968, art. I, § 21. Florida courts have interpreted this clause to prohibit the legislature from altering a common-law cause of action unless a substitute remedy exists. Johnson v. R.H. Donnelly Co., 402 So. 2d 518 (Fla. Dist. Ct. App. 1981). However, courts have held that no substitute remedy is required where legislation reduces but does not destroy a cause of action. Alterman Transp. Lines, Inc. v. State, 405 So. 2d 456 (Fla. Dist. Ct. App. 1981).

84. Kirk, 818 P.2d at 275; Shepherd, 473 N.W.2d at 619; Gordon, 608 So. 2d at 801; see United States Fidelity & Guar. Co. v. Department of Ins., 453 So. 2d 1355, 1361 (Fla. 1984) (holding that plaintiff gets no vested right to entire award if award is subject to prior claim). U.S. Fidelity involved a statute that provided that insurers had to return to policyholders all profits in excess of 5%. Id. at 1357-58. The Florida Supreme Court held that when a statute provides that a percentage of the money recovered under it is subject to a prior claim in the form of a refund order, the recipient does not get a vested right to the excess. Id. at 1361.

85. Kirk, 818 P.2d at 267; see Colo. Rev. Stat. Ann. § 13-21-102(4) (West 1987) (disavowing state's interest in litigation). Although the Florida allocation statute has no such disavowal provision, the dissent in Gordon v. State, 608 So. 2d 800 (Fla. 1992), argued for adoption of the Kirk court's approach. Gordon, 608 So. 2d at 803. The Gordon dissent, apparently arguing from a policy perspective, emphasized that the state had done nothing to earn its share of the award. Id.

87. See Gordon v. State, 608 So. 2d 800, 803 (Fla. 1992) (Shaw, J., dissenting) (arguing for adoption of Kirk approach and invalidation of allocation statute).
88. See infra Appendix (citing and describing state allocation statutes).
89. See, e.g., McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990). In McBride a federal district court held the Georgia allocation statute unconstitutional on
B. The Excessive Fines Clause

While it insulates state allocation from Takings Clause challenges, the civil penalty approach raises other constitutional questions. Under that approach, the government recovers a share of a punitive award against a civil defendant. The recovery by the government of a punitive award may implicate several constitutional provisions designed to protect individuals from arbitrary government punishments. Foremost among these is the Eighth Amendment's prohibition of excessive fines.

The Excessive Fines Clause has virtually no history of application. As a result, its position in American jurisprudence is the subject of substantial

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90. No matter what approach to the property issue a court takes, state allocation could raise Equal Protection Clause questions if the statute gives the government a share of the award only in certain cases. See Ga. Code Ann. § 51-12-5.1(2) (Michie 1987) (giving state 75% of punitive awards in products liability actions only); Iowa Code Ann. § 668A.1 (West 1987) (giving state 75% of punitive awards in cases in which defendant's conduct was not aimed specifically at plaintiff); Kan. Stat. Ann. § 60-3402 (1987) (giving state 50% of punitive awards in medical malpractice cases only).

In McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990), a federal district court held that the Georgia allocation statute violates the Equal Protection Clause of the Fourteenth Amendment. Id. at 1569. The court held that the statute discriminates on its face between products liability plaintiffs and other tort plaintiffs. Id. The court found that the statute does not rationally further the state's purported interest in raising revenue because the court found no reason to divert awards from products liability plaintiffs only, instead of from all tort plaintiffs. Id. at 1569-70. The court also noted due process, excessive fines, and double jeopardy infringements in striking down the statute. Id. at 1579.

McBride represents a shocking aberration from accepted equal protection jurisprudence. Unless the class being discriminated against is a suspect or quasi-suspect class, a category which certainly does not include product liability plaintiffs, the state need show only a rational basis for the different treatment of that class. See John E. Nowak & Ronald D. Rotunda, Constitutional Law § 14.3 (4th ed. 1991) (summarizing equal protection analysis). Traditionally, under the rational basis test of a state's interest, courts have given almost unlimited deference to the judgment of the state legislature. E.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). The decision in McBride, therefore, may have little or no precedential value.

Equal protection questions can also arise if a classification burdens a fundamental right. See Nowak & Rotunda, supra, § 14.3 (summarizing equal protection analysis). Plaintiffs might argue that state allocation denies them the fundamental right to recover a punitive award. However, these challenges seem unlikely to succeed given the wide latitude that states have to alter and abridge common-law causes of action. See supra note 83 (discussing power of legislatures to alter causes of action).

91. U.S. Const. amend. VIII. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Id.

92. See Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 262 (1989) (noting that Supreme Court has never considered case applying Excessive Fines Clause); Robert B. Dunham, The Cruel and Unusual Punishment and Excessive Fines Clauses, 26 Am. Crim. L. Rev. 1617, 1617 (1989) (stating that "the 'excessive fines' clause has been moribund").
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93 Commentators have argued about many facets of the clause, including the application of the clause in contexts other than traditional criminal prosecutions, the application of the clause to the states through the Fourteenth Amendment, and the proper measure of excessiveness. Each of these questions must enter the equation in analyzing the applicability of the Excessive Fines Clause to state allocation of punitive damages.

The Supreme Court resolved some of these questions in its 1989 decision in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.* The Court held that the Excessive Fines Clause does not apply to punitive damage awards in civil cases between private parties. Still, the Court specifically left unresolved many of the ambiguities surrounding the relationship of the clause to punitive damages. The Court said, "we now decide only that [the Excessive Fines Clause] does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." As a result of the Supreme Court's reticence, questions remain about whether the government's involvement in the litigation implicates the clause, whether the clause applies to the states, and the appropriate measure of excessiveness.

In concluding that the punitive award at issue did not implicate the Eighth Amendment, the *Browning-Ferris* Court distinctly implied that if the government had received a share of the award, the Excessive Fines Clause would apply. The Court said that "[h]ere the government of Vermont has not . . . used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." Under a state allocation scheme, the state does use the courts to extract payments


94. See, e.g., Massey, supra note 93, at 1270-73 (arguing that Excessive Fines Clause should apply to punitive damages). Professor Massey, writing before *Browning-Ferris*, argued that the Excessive Fines Clause applies to civil as well as criminal penalties, that the clause applies to the states, and that the clause requires statutory limits on the size of awards. Id.

95. *Browning-Ferris* Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989). In *Browning-Ferris* two waste disposal companies competed for business in Burlington, Vermont. *Id.* at 260-61. Browning-Ferris attempted to put Kelco out of business by waging a price war. *Id.* Kelco brought suit alleging violations of the Sherman Act and violations of Vermont contract and tort law. *Id.* at 261. The jury found for Kelco and awarded substantial compensatory damages and $6 million in punitive damages. *Id.* at 262. Browning-Ferris appealed, claiming the punitive award violated the Excessive Fines Clause. *Id.* at 262. The Court of Appeals for the Second Circuit held that even if the Excessive Fines Clause applied, the punitive award was not excessive. *Id.*

96. *Id.* at 260.

97. *Id.* at 264.

98. *Id.* at 275.
for the purpose of raising revenue or disabling an individual. In her dissent, Justice O'Connor recognized the implication of the majority's argument. She used the Florida allocation statute as an example of a government recovery of an award that might trigger the clause.  

Because the Excessive Fines Clause has so little precedential history, its companion provision, the Cruel and Unusual Punishments Clause, may provide some useful guidance about when and if the Excessive Fines Clause applies in civil cases. The Supreme Court has held, in the context of a case centering on the Cruel and Unusual Punishments Clause, that the entire Eighth Amendment applies only to criminal or quasi-criminal cases. Following that reasoning, the Court has developed a test for determining when a remedy recovered by the government in a purportedly civil action renders the action quasi-criminal for purposes of the Cruel and Unusual Punishments Clause. The factors the Court has emphasized, such as whether the remedy requires a showing of scienter, whether it traditionally has been regarded as punishment, and whether it has a purpose other than punishment, strongly suggest that punitive damages should fall under the Eighth Amendment rubric when the government recovers a portion of an award.

99. Id. at 298-99 (O'Connor, J., dissenting).
100. See supra note 92 (noting absence of Excessive Fines Clause litigation).
101. See U.S. CONST. amend. VIII (prohibiting cruel and unusual punishments).
102. See LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 3.6 (2d ed. 1989) (discussing quasi-criminal nature of punitive damages).
103. Ingraham v. Wright, 430 U.S. 651 (1977). In Ingraham the Court held that the Cruel and Unusual Punishments Clause did not apply to the infliction of corporal punishment at a public school. Id. The Court left open the possibility that the clause could apply in civil cases involving persons held in mental or juvenile institutions. Id. at 699 n.37. The Court in Browning-Ferris specifically stated that Ingraham does not control in Excessive Fines cases because it involved an application of the Cruel and Unusual Punishments Clause. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 263 n.2 (1989). However, the Browning-Ferris Court did note that the Ingraham decision was instructive. Id.
105. Id. In Kennedy v. Mendoza-Martinez the Supreme Court enunciated a seven part test for determining when a civil action by the government becomes criminal. The Court considered:

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69. Each of these criteria, with the possible exception of the first, militates toward characterizing punitive awards as criminal penalties within the context of the Eighth Amendment. See Jeffries, supra note 5, at 150-51 (arguing that Mendoza-Martinez factors mandate application of Eighth Amendment to traditional punitive awards). The Supreme Court had no
In one of the few specific analyses of state allocation, Professor James Ghiardi argued persuasively that the Excessive Fines Clause does limit the government's recovery of punitive awards. Professor Ghiardi initially noted the Supreme Court's implication in *Browning-Ferris* that the recovery of a punitive award by the government would subject the procedure to Excessive Fines Clause scrutiny. Then, extrapolating from the Court's decisions applying other criminal protections in ostensibly civil cases, Professor Ghiardi concluded that state allocation of a punitive award would trigger the Excessive Fines Clause. He reasoned that punitive damages "serve to punish through the civil law conduct which might otherwise go unpunished under the criminal law," and that "[s]tates which collect part of a punitive damage award in cases they did not prosecute are simply exacting a punishment." Professor Ghiardi concluded that when states exact punitive measures, constitutional restraints should apply.

In *McBride v. General Motors Corp.*, a United States district court held that the Excessive Fines Clause applied to Georgia's state allocation statute. In a decision that seems suspect on several levels, the court held Georgia's state allocation statute unconstitutional on due process, equal protection, excessive fines, and double jeopardy grounds. Relying primarily on the Supreme Court's *Browning-Ferris* dictum hinting that state allocation might implicate the Eighth Amendment, the district court held that the statute triggered the Excessive Fines Clause. The court then

reason to apply this test to punitive damage awards in *Browning-Ferris* because the Court concluded that the framers of the Eighth Amendment did not intend the Eighth Amendment protections to apply in cases of damages between private parties. *Browning-Ferris*, 492 U.S. at 275. The Court emphasized that the Eighth Amendment "places limits on the steps a government may take against an individual." *Id.* State allocation may thus trigger *Mendoza-Martinez* analysis because the government in part extracts a punitive award against an individual. Under that analysis, these punitive awards seem clearly to implicate Eighth Amendment protections.

106. Ghiardi, *supra* note 11, at 120.
107. *Id.* at 126.
108. *See supra* note 105 and accompanying text (discussing application of Cruel and Unusual Punishments Clause in civil cases); *see also* United States v. Halper, 490 U.S. 435 (1989) (applying Double Jeopardy Clause in civil case). For a complete analysis of *Halper* and its application of criminal constitutional protections in purportedly civil cases, see *infra* part II.C.
110. *Id.* at 121.
111. *Id.* at 124.
112. *Id.* at 129.
115. *See supra* note 90 (discussing questionable equal protection analysis in *McBride*).
116. McBride, 737 F. Supp. at 1578. The *McBride* court held the Georgia allocation statute unconstitutional on several state constitutional grounds, including violation of the provision limiting bills to one subject. *Id.*
117. *Id.*
inexplicably concluded that the mere application of the clause, without any consideration of excessiveness, rendered the statute unconstitutional.\textsuperscript{118}

Critically related to the question of whether the Excessive Fines Clause applies when the government receives a civil punitive award is the question of whether the clause applies to the states through the Fourteenth Amendment. In her dissent in \textit{Browning-Ferris}, Justice O'Connor argued that it does.\textsuperscript{119} She noted that the Supreme Court regularly had applied the Eighth Amendment’s prohibition on cruel and unusual punishment to the states, and that the Court had assumed that the Excessive Bail Clause applied to the states.\textsuperscript{120} She concluded that she could find no reason “to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation.”\textsuperscript{121}

Because most state constitutions have an excessive fines provision similar or identical to the federal one,\textsuperscript{122} state courts generally do not apply the federal Excessive Fines Clause.\textsuperscript{123} At least one state court has held that the Excessive Fines-Clause does not apply to the states.\textsuperscript{124} However, another state court has more recently held that the clause does apply to the states.\textsuperscript{125} Most commentators have argued that the clause applies to the states.\textsuperscript{126} Because the other provisions of the Eighth Amendment do apply to the states, and Justice O’Connor has argued that the Excessive Fines Clause

\begin{enumerate}
\item The decision by the \textit{McBride} court that the statute violates the Excessive Fines Clause seems especially odd because no damages as yet had been awarded. The plaintiffs sought only a declaratory judgment on the constitutional questions. \textit{Id.} at 1564. The court said simply, “the Act . . . converts the civil nature action of the prior Georgia punitive damages statute into a statute where fines are being made for the benefit of the State, contrary to the constitutional prohibition] as to excessive fines . . . .” \textit{Id.} at 1578.
\item \textit{Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.,} 492 U.S. 257, 284 (1989) (O’Connor, J., dissenting). Justice O’Connor noted that the Cruel and Unusual Punishments provision of the Eighth Amendment has been applied to the states at least since the Court’s decision in \textit{Robinson v. California}, 370 U.S. 660 (1962), reversing a state narcotics conviction because the penalty constituted a cruel and unusual punishment. \textit{Browning-Ferris}, 492 U.S. at 284 (O’Connor, J., dissenting). She also noted that the Court has assumed, without ever holding, that the Excessive Fines Clause also applies to the states. \textit{Id.}
\item \textit{Browning-Ferris}, 492 U.S. at 284 (citing Schilb v. Kuebel, 404 U.S. 357 (1971)).
\item \textit{Id.} at 284 (O’Connor, J., dissenting).
\item \textit{E.g.,} KAN. CONST., Bill of Rights, § 9 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel & unusual punishment inflicted.”).
\item People v. Elliot, 112 N.E. 300, 303 (Ill. 1916).
\item \textit{See} People v. Ingham, 453 N.Y.S.2d 325, 328 (CT. Cl. 1982) (holding federal Excessive Fines Clause applies to states). In \textit{Ingham} the defendant had been arrested for driving while intoxicated, an offense carrying a maximum $350 fine. \textit{Id.} at 326. The court applied the New York state constitution excessive fines provision and assumed that the United States Constitution Excessive Fines Clause applied as well. \textit{Id.} at 328. The court held that, because the defendant had no income, a $350 fine was excessive. \textit{Id.} at 329.
\item \textit{See, e.g.,} Ghiardi, supra note 11, at 125 n.57 (arguing that Excessive Fines Clause applies to states); Jeffries, supra note 5, at 148 (1986) (same); Massey, supra note 93, at 1272 (same).
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applies to the states, it seems likely that the Supreme Court would conclude that it does.

Assuming that the Excessive Fines Clause does apply when a state allocates a portion of a civil punitive damage award, the final question involves the determination of excessiveness. The common-law procedure for assessing punitive damages has generally provided for judicial review of awards, with reduction or remittitur if the court determines the award is excessive. However, no specific standards for evaluating excessiveness have emerged. One traditional test for determining the excessiveness of punitive awards is whether the award "shocks the conscience of the court." Courts often use the same type of vague "shock the conscience" test to determine when a criminal fine is excessive. Neither of these standards provides much guidance for either practitioners or courts. Because legislatures fix criminal penalties, the issue of excessiveness of criminal fines seldom arises. In cases involving discretionary punitive damage awards, the Eighth Amendment provides little guidance for evaluating excessiveness.

In her dissent in Browning-Ferris, Justice O'Connor recognized this implicit problem. O'Connor argued that reviewing courts should adopt a balancing approach similar to the one used when applying the Cruel and Unusual Punishments Clause. The test she proposed would compare the

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128. Significantly, the appellate court in Browning-Ferris held that the Eighth Amendment might apply to punitive damage awards, but that an award of six million dollars did not violate the Excessive Fines Clause in a case in which actual damages amounted to only fifty thousand dollars. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 845 F.2d 404, 410 (2d Cir. 1988).
129. See Ghiardi & Kircher, supra note 3, § 18.02 (discussing judicial procedures for review of excessive awards). Generally a court will set aside an award only if it was based on prejudice, passion, or bias, if it was based on a mistake of law or fact, if it lacks evidentiary support, or if it shocks the conscience of the court. Id. In cases in which the court finds the award excessive, the court will give the plaintiff the option of asking for a new trial on damages or of remitting the part of the award that the court finds excessive. Id.
130. See id. § 18.05-.07 (noting absence of consistent standards for excessiveness of punitive awards).
131. See id. § 18.02 (describing procedures for review of punitive awards).
132. See State v. Wipke, 133 S.W.2d 354, 359 (Mo. 1939) (stating that criminal fine is excessive if it "would shock the mind of every man possessed of a common feeling").
133. See Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 262 (1989) (noting that Supreme Court never had considered case applying Excessive Fines Clause); see also Sawyer v. Barbour, 300 P.2d 187, 193 (Cal. Ct. App. 1956) (stating that "[t]he courts will not hold a fine excessive within the constitutional prohibition unless there is a conflict between the enactment of the Legislature and the [state] Constitution").
134. Browning-Ferris, 492 U.S. at 300 (O'Connor, J., dissenting) (acknowledging difficulty of determining when punitive award is excessive).
135. Id. at 300-01. Some state courts already have implemented a balancing approach when applying a state constitutional excessive fines prohibition. See State v. Scherer, 721 P.2d 743, 750 (Kan. Ct. App. 1986). In Scherer the Kansas court held that, in determining when a court imposed sentence violates the state's excessive fines clause, a court should consider the nature of the offense, a comparison of punishments for other offenses in the same jurisdiction, and a comparison of punishments for the same offense in other jurisdictions. Id.
civil punishment with the criminal punishments imposed for comparable behavior. This test frequently would prove unworkable because many of the civil violations, such as breach of contract, that can result in punitive awards have no criminal counterpart. Probably, then, courts will rely on existing procedures as providing enough protection against excessiveness.

C. The Double Jeopardy Clause

The civil penalty approach to the property interest question may implicate the Double Jeopardy Clause of the Fifth Amendment in addition to the Excessive Fines Clause. The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The Supreme Court has interpreted this clause to provide two distinct protections. First, the clause protects a defendant who has been prosecuted for an offense, whether convicted or acquitted, from a subsequent prosecution for the same conduct. Second, the clause protects

136. Browning-Ferris, 492 U.S. at 301 (O'Connor, J., dissenting). O'Connor stated that in applying the balancing test courts should take into account prison time when comparing criminal penalties with civil penalties. Id. That comparison would raise additional problems for courts in determining what amount of money would compare with a given prison sentence.

137. Punitive damages remain relatively rare in cases other than personal injury and products liability. However, over the last quarter century, punitive damages have grown most in the areas of contracts and business torts. See Michael C. Maher, Torts Debate: Reformers’ Position Disputed, NAT'L L.J. July 30, 1990, at 15, 15 (citing Rand Corporation study describing growth of punitive damages). State allocation will affect these awards in the same way that it affects punitive awards in personal injury cases.

138. But see Bittle, supra note 93, at 1455-71 (analyzing methods of determining excessiveness of punitive awards). The author argues that existing standards for determining excessiveness of punitive damage awards are inadequate under the Eighth Amendment. Id. at 1455-57. He argues against using the defendant's wealth as a measure of proportionality because that information may bias jurors. Id. at 1457-58. He also argues against using subjective measures of the "wrongfulness" of the defendant's conduct. Id. at 1462. He argues against tying punitive awards to the size of compensatory awards because this measure can be arbitrary and can ignore the cost to society of the defendant's conduct. Id. at 1465. Instead of these procedures, he proposes adoption of a proportionality test similar to the one outlined in Solem v. Helm, 463 U.S. 277, 290-92 (1983), for review of punishments under the Cruel and Unusual Punishments Clause. Bittle, supra note 93, at 1449. That test involves comparisons of punishments for similar offenses in the other jurisdictions, and of different offenses in the same jurisdiction. Solem, 463 U.S. at 290-92.

However, courts have endorsed the standards that he criticizes when determining excessiveness of criminal fines. See People v. Ingham, 453 N.Y.S.2d 325, 326-27 (Ct. Cl. 1982) (arguing that defendant's wealth is central factor in determining excessiveness); State v. Staub, 162 So. 766, 768 (La. 1935) (same); Burlington, C. R. & N. R. Co. v. Dey, 48 N.W. 98, 105-06 (Iowa 1891) (same). Additionally, in Browning-Ferris, Justice O'Connor suggested that the defendant's wealth and the gravity of the defendant's conduct should be taken into account in determining excessiveness. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 300 (1989) (O'Connor, J., dissenting).

139. U.S. CONST. amend. V.


141. Id.
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a defendant from multiple punishments arising from a single offense.\textsuperscript{142} State allocation of punitive damage awards may violate one or both of these prohibitions.\textsuperscript{143} The Supreme Court has held that the Double Jeopardy Clause does not bar the government from pursuing both civil and criminal actions against a defendant in regard to a single offense.\textsuperscript{144} The Court has also held that the government can share in a civil remedial award recovered by a private plaintiff against defendants who have already been criminally prosecuted for the conduct in question. In \textit{United States ex rel. Marcus v. Hess},\textsuperscript{145} the Court held that a previous prosecution did not bar the government from recovering part of a civil award in a \textit{qui tam} action.\textsuperscript{146} The \textit{Hess} Court argued that only a criminal punishment, as opposed to a civil remedy, could trigger double jeopardy protections.\textsuperscript{147} The Court stressed the distinction between punitive intent and remedial intent in determining the criminal or civil character of an action.\textsuperscript{148} The Court found that the civil award in \textit{Hess} served primarily a remedial purpose, and that, therefore, the action did not implicate double jeopardy.\textsuperscript{149}

\textsuperscript{142} \textit{Id.}
\textsuperscript{143} See Benton V. Maryland, 395 U.S. 784, 796 (1969) (holding Double Jeopardy Clause applies to states through Fourteenth Amendment).
\textsuperscript{144} Helvering v. Mitchell, 303 U.S. 391 (1938). In \textit{Mitchell} the Supreme Court held that imposition of a 50% penalty for taxpayer fraud did not violate the Double Jeopardy Clause when the defendant taxpayer had been acquitted of criminal willful attempt to evade taxes. \textit{Id.} at 402-04. The Court stated that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." \textit{Id.} at 399. The Court said that a sanction would be criminal if it did not serve a remedial purpose, but rather was intended as punishment. \textit{Id.} at 398.
\textsuperscript{145} 317 U.S. 537 (1943).
\textsuperscript{146} United States \textit{ex rel.} Marcus v. Hess, 317 U.S. 537, 553 (1943). \textit{Hess} involved several contractors to a Public Works Administration project who had previously been prosecuted for fraud of the government. \textit{Id.} at 545. They had pleaded nolo contendere and been fined $54,000. \textit{Id.} Subsequently, in a \textit{qui tam} action brought under a federal statute, petitioner Marcus successfully brought a civil suit against them also alleging fraud against the government. \textit{Id.} at 539. Pursuant to the statute, Marcus took one half of the civil award and the government took the other half. \textit{Id.} at 540. The appellate court reversed, holding that the fraud did not fall under the statute. \textit{Id.} The Supreme Court reversed the appellate court on that issue, and further held that the civil action brought subsequent to the criminal prosecution did not violate the Double Jeopardy Clause. \textit{Id.} at 552-53.
\textsuperscript{147} \textit{Id.} at 548-49.
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.} at 550. Although in \textit{Hess} the Supreme Court found that the civil action served a remedial, as opposed to punitive, purpose, the Court hinted strongly that the government could have recovered purely punitive damages. \textit{Id.} The Court stated that "[p]unitive or exemplary damages have been held recoverable under a statute like this which combines provision for criminal punishment with others which afford a civil remedy to the individual injured. The law can provide the same measure of damage for the government as it can for an individual." \textit{Id.} at 551.
Hess held that the Double Jeopardy Clause does not bar the government from recovering remedial civil damages from a defendant who has been criminally prosecuted. Historically, the prohibition against double jeopardy has not barred a private plaintiff from recovering punitive civil damages from a defendant who has already been criminally prosecuted or may be subject to criminal prosecution for the conduct in question. In Hansen v. Johns-Manville Products Corp., the United States Court of Appeals for the Fifth Circuit held that the imposition of multiple punitive awards in private civil litigation does not violate the Double Jeopardy Clause because the proceedings are not "essentially criminal." The Fifth Circuit emphasized that double jeopardy protections apply only in criminal proceedings.

Hansen suggests that civil punitive awards between private parties will not trigger double jeopardy protections. Hess implies that the government can recover an award substantially above its actual damages against a defendant already prosecuted for the conduct in question. However, these cases also indicate that when a sanction is intended as punishment and a proceeding is essentially criminal in nature, double jeopardy protections will apply. The question remains whether state allocation of punitive civil awards fits into that category.

In its decision in United States v. Halper, the Supreme Court for the first time held that the imposition of punitive damages in a civil suit may violate the Double Jeopardy Clause. In Halper, the government brought

150. Id. at 550.
151. See, e.g., Eddy v. McGinnis, 523 N.E.2d 737, 741 (Ind. 1988) (allowing punitive award against defendant who had been criminally prosecuted for same conduct); Tuttle v. Raymond, 494 A.2d 1353, 1357-58 (Me. 1985) (same); Wittman v. Gilson, 520 N.E.2d 514, 515 (N.Y. 1988) (same).
152. 734 F.2d 1036 (5th Cir. 1984), cert. denied, 470 U.S. 1051 (1985).
153. Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036, 1042 (1984), cert. denied, 470 U.S. 1051 (1985). In determining that double jeopardy protections apply only to proceedings which are "essentially criminal," the Fifth Circuit relied on the Supreme Court's holding to that effect in Breed v. Jones, 421 U.S. 519 (1975). Hansen, 734 F.2d at 1042. In Breed the Supreme Court established several factors for determining when a proceeding is "essentially criminal," including the purpose of the proceeding, the potential consequences, and the fact that the action was brought by the state. 421 U.S. at 528. In Hansen, the Fifth Circuit found that those factors did not apply in a civil action awarding punitive damages because the action was not brought to determine whether the defendant had violated a criminal law, the consequences of the action did not carry the stigma associated with a criminal prosecution, and the government did not bring the action. Hansen, 734 F.2d at 1042.
154. Hansen, 734 F.2d at 1042.
155. See also United States v. Halper, 490 U.S. 435, 451 (1989) (stating that Double Jeopardy Clause protections are not triggered by litigation between private parties).
156. See supra note 149 (discussing Hess implication that government can recover punitive award without violating Double Jeopardy Clause).
157. See supra note 153 and accompanying text (describing method for determining when proceeding is criminal for double jeopardy purposes).
158. United States v. Halper, 490 U.S. 435 (1989). In Halper, the manager of a medical laboratory had been previously convicted of filing false claims with the government. Id. at 437. The district
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a civil action under the False Claims Act against a defendant who had been criminally convicted of submitting false Medicare claims. The Supreme Court remanded the case for a determination of the government's actual damages, holding that if in the subsequent civil action the government recovered damages unrelated to its actual damages, that action constituted "punishment" and thus subjected the defendant to double jeopardy. The Court hinted strongly that double jeopardy protections would apply in any action in which the government recovered a purely punitive award.

The Halper Court de-emphasized the distinction between the labels "criminal" and "civil" in determining when an action exacts punishment for double jeopardy purposes. The Court stated that "[t]he notion of punishment, . . . , cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." The Court held that if the trial court found that the civil action served primarily a punitive purpose, the action would constitute double jeopardy.

court granted summary judgment for the defendant on the ground that the imposition of the statutorily required civil penalty, which the court determined was punitive in nature, subjected the defendant to double jeopardy. Id. at 439. The Supreme Court affirmed the district court's reasoning but remanded for a determination of whether the penalty was actually punitive. Id. at 452.

161. Id. at 449-50. The decision in Halper exemplifies the confusion surrounding the application of the Double Jeopardy Clause. See Martin L. Friedland, Double Jeopardy 199 (1969) (noting confusion of courts in distinguishing two prongs of double jeopardy). The twin components of double jeopardy are designed to protect two separate interests. The prohibition against successive prosecutions insures finality of judgments. See Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 25.1 (2d ed. 1992) (discussing policy behind double jeopardy protection). The prohibition against multiple punishments insures that the court does not exceed its legislative authorization by imposing more than one punishment for a single offense. Brown v. Ohio, 432 U.S. 161, 165 (1977). In general, the multiple punishment prong applies in the context of a single prosecution. Id. Typically, multiple punishment questions arise when the government prosecutes a defendant, in one proceeding, for two offenses, one of which is a lesser, included offense of the other. See, e.g., Jeffers v. United States, 432 U.S. 137, 157-58 (1977) (holding that Double Jeopardy Clause bars imposition, in one proceeding, of cumulative punishments for "same offense"). A defendant punished in separate, successive actions should be protected by the successive prosecution prong.

Halper confuses the two interests and the two prongs of double jeopardy by prohibiting successive punishments in separate proceedings. The case is, in actuality, a successive prosecution case. By restricting double jeopardy protections to criminal actions—prosecutions—prior Supreme Court decisions on double jeopardy questions in civil cases had held firm to the successive prosecution approach. See United States ex rel. Marcus v. Hess, 317 U.S. 537, 548-49 (1942) (arguing that only criminal punishment can trigger double jeopardy). Had the Halper Court followed those decisions, it would have subjected civil penalties to double jeopardy analysis only if it determined that a nominally civil action was in fact criminal.

162. Halper, 490 U.S. at 448-49.M
163. Id. at 447.
164. Id. at 447-48.
165. Id. at 449-50.
The decision suggests that state allocation of punitive awards may implicate double jeopardy. The Court stated specifically that "[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties." However, the Court stressed that when the government seeks to extract a civil penalty that bears no relation to its actual damages, double jeopardy protections apply. While specifically declining to resolve the issue, the Halper Court noted its belief that the Hess Court had assumed that double jeopardy protections apply in qui tam actions. Under a state allocation statute the state receives part of a purely punitive civil award, and such an action resembles a qui tam action in that the government and a civil plaintiff share an award, so it seems likely that the Halper Court would find that state allocation triggers double jeopardy.

That question is, however, by no means settled. The Halper Court emphasized that in a qui tam action the plaintiff sues in the name of the government. In an action under a state allocation statute, the government is not a party even in name. Central to the theory of double jeopardy is the idea that the government should not use its power and resources to subject a defendant to repeated prosecutions. Therefore, a court may find that the mere diversion of money to the government does not by itself distinguish that type of action from a private civil action immune from double jeopardy analysis. Also, Halper and Hess both involved civil...
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The role of punitive damages as ancillary to a compensatory recovery might influence a court to distinguish a punitive award from the civil fine in *Halper*.

The uncertain footing on which *Halper* stands could also temper the expansion of its holding. The *Halper* Court misapplied the double jeopardy protections by prohibiting multiple punishments in successive proceedings. If the decision stands as written, it raises almost insurmountable practical problems. If a criminal prosecution bars a subsequent civil punitive recovery, then a punitive recovery must bar a subsequent criminal prosecution. Because the regulatory branches of the government do not act in concert with the criminal branch, that proposition raises the absurd prospect of a tax penalty imposed by the Internal Revenue Service barring a criminal prosecution for the same conduct. A rule requiring such a result seems unlikely to survive.

Despite its confused logic and problematic holding, however, *Halper* may stand and may apply to state allocation of punitive awards. In the context of state allocation, many of its unanswered questions have even greater import. For example, the decision does not specify a test to determine whether a civil "offense" is the same as a criminal offense for double jeopardy purposes. Nor does it address whether the Double Jeopardy Clause prevents the imposition of multiple civil penalties, such as multiple punitive awards in products liability cases under an allocation scheme.

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(discussing constitutional restraints on punitive awards). The authors note that punitive damages differ significantly from criminal penalties in that they do not carry the possibility of imprisonment and do not stigmatize the defendant to the same degree. *Id.* But see *supra* note 105 (describing Mendoza-Martinez factors for determining when civil action by government becomes quasi-criminal).


175. *Halper*, 490 U.S. at 438.

176. See *supra* note 161 (discussing *Halper* Court's misapplication of double jeopardy).

177. See *supra* note 161 (discussing *Halper* Court's misapplication of double jeopardy).

178. See Jahncke, *supra* note 173, at 114 (noting possible civil-criminal conflicts involving tax, antitrust, and insider trading proceedings, among others).

179. See LAFAYE & ISRAEL, supra note 161, § 17.4 (discussing meaning of "same offense" for double jeopardy purposes). The traditional test for determining whether offenses are the same for double jeopardy purposes is the Blockburger test. *Id.* Under the Blockburger test, two offenses are the same unless one requires proof of a fact which the other does not. *Id.* The Supreme Court never mentioned the Blockburger test in *Halper*, probably because the Court treated *Halper* as a cumulative punishment case. See *supra* note 161 (discussing *Halper* Court's misapplication of double jeopardy). The Supreme Court has held that Blockburger is not controlling in cumulative punishment cases. Albernaz v. United States, 450 U.S. 333, 340 (1981). Because application of double jeopardy to punitive awards really creates a successive prosecution issue, rather than a multiple punishment issue, see *supra* note DJ161 (discussing *Halper* Court's misapplication of double jeopardy), use of some test to determine whether offenses are the same seems necessary.

180. See GA. CODE ANN. § 51-12-5.1(2) (Michie 1987) (allowing only one punitive award...
The resolution of these issues will critically affect the nature and practice of state allocation.

As a practical matter, state allocation could survive even subject to the full extent of double jeopardy protection. For many years Indiana barred a plaintiff from recovering punitive damages against a defendant who was also subject to criminal prosecution for the conduct in question. Though Indiana recently abandoned that rule, called the Taber rule, that principle still could provide a viable method of avoiding double jeopardy challenges to state allocation statutes. However, if incorporated into state allocation statutes unmodified, such a rule might eliminate all beneficial aspects of punitive damages by prohibiting punitive awards against corporations in the most harmful product liability cases. Corporations increasingly are subject to criminal prosecution, and corporations are protected by the Double Jeopardy Clause. In order to remain viable, then, an allocation statute could except corporations from punitive awards only in cases in which the corporation actually has been prosecuted.

in products liability cases). Georgia's “one award” provision would eliminate double jeopardy concerns in regard to products liability cases. Id. From a policy perspective, that sort of provision makes sense because, while no single punitive award is likely to be excessive, an open-ended series of awards certainly could be. However, the district court in McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990), held that the Georgia one award provision violates the Equal Protection Clause by creating an arbitrary and unreasonable classification between products liability plaintiffs and other tort plaintiffs. Id. at 1576. That decision probably has little precedential value, because it clearly departs from the accepted view of equal protection analysis. See supra note 90 (critiquing McBride court's application of Equal Protection Clause).

181. See Taber v. Hutson, 5 Ind. 322, 325 (1854) (disallowing recovery of punitive damages arising from tort that is also subject of criminal prosecution). The Taber court held not that the imposition of punitive awards against defendants subject to criminal prosecution violated the state double jeopardy clause, but only that such a practice was not in “accord with the spirit of our institutions.” Id.

182. See IND. CODE ANN. § 34-4-30-2 (Burns 1986) (providing that criminal prosecution is no defense in action for punitive damages). In Eddy v. McGinnis, 523 N.E.2d 737 (Ind. 1988), the Indiana Supreme Court held that the statute abrogated the Taber rule and that the statute did not violate the state prohibition against double jeopardy. Id. at 738.

183. A rule exempting defendants subject to criminal prosecution from punitive damages would not in itself eviscerate punitive awards. First, punitive awards lose much, if not all, of their validity when directed against defendants subject to the criminal justice system. See Ghiardi & Kircher, supra note 3, § 2.02 (noting that civil punishment is chief rationale for punitive damages). Second, much of the conduct that is subject to punitive awards, such as breach of contract and business tort, is not subject to criminal punishment.

184. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.10(a) (2d ed. 1986) (discussing development of corporate criminal liability). Corporate liability is most common in regard to crimes against property. Id. However, corporations can also be guilty of violent crimes such as manslaughter, and almost certainly murder. Id.


186. A rule excepting corporations from punitive damages only when they have actually been prosecuted might collaterally insulate corporations from criminal prosecution after they
III. PRACTICE AND POLICY

State allocation of punitive awards is a dramatic alteration of an established civil-law procedure. For that reason, state allocation will meet with skepticism and resistance. That resistance may be especially strong because of the historical controversy surrounding punitive damages. However, if properly drafted, state allocation statutes fall squarely within constitutional parameters. Moreover, state allocation does not merely adjust the focus of punitive damages. Instead, it provides a practical reform of punitive damages while maintaining the beneficial aspects of such awards.

Working within the guidelines provided by the constitutional issues presented above, workable state allocation statutes should prove fairly easy to create. Though state allocation generally should survive constitutional scrutiny without these precautions, inclusion of the following provisions will guarantee constitutionality. First, the statute should establish unequivocally the point at which the state's interest attaches by giving the government the rights of a judgment creditor with the same standing as the plaintiff. That type of provision will eliminate the possibility of Takings Clause challenges, which to this point have composed the primary tests of state allocation statutes. Second, as a corollary point, the statute should make clear that punitive damages awarded under it serve purely retributive and deterrent purposes. Such a provision will guarantee that the plaintiff cannot claim a property interest in the award prior to entry of judgment.

Provisions giving the state the rights of a judgment creditor will shift the constitutional focus from the plaintiff to the defendant. States should take precautions to avoid the resulting possible criminal constitutional entanglements. The statute should establish either specific standards for the size of awards or guidelines for determining excessiveness. Many states have incurred punitive damages. Such a result would not prove destructive because the elastic nature of punitive awards almost certainly makes them a more effective deterrent, and therefore a more effective sanction, than static statutory fines. See generally Amelia J. Toy, Comment, Statutory Punitive Damage Caps and the Profit Motive, 40 Emory L.J. 303 (1991) (discussing powerful deterrent effect of flexible punitive damages).

187. See supra note 5 (noting conflicting views about constitutionality of punitive damages).


189. See supra part II.A (discussing Takings Clause challenges). Note that the district court in McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990), held the Georgia allocation statute unconstitutional on due process, equal protection, excessive fines, double jeopardy, and several state constitutional grounds. Id. at 1579. Though clearly eager to strike down the statute, the court did not even mention the Takings Clause. Significantly, Georgia's state allocation statute gives the state the rights of a judgment creditor on an equal footing with the plaintiff. Ga. Code Ann. § 51-12-5.1(2) (Michie 1987).

190. See supra note 43 (discussing potential conflict about compensatory factor in punitive awards).

191. See Toy, supra note 186, at 324-26 (arguing that unpredictability about size of punitive award is essential to deterrence). The author argues that absolute caps and limits tying punitive awards to compensatory awards fail to deter potential defendants who expect to clear a profit greater than the statutorily prescribed amount. Id. at 336.
already cap punitive awards and some cap awards in connection with state allocation statutes.\(^\text{192}\) States that do not choose to cap punitive damages probably can avoid Excessive Fines Clause problems simply by providing guidelines for determining excessiveness.\(^\text{193}\) Those guidelines could take the form of traditional punitive damages standards of evaluation, taking into account the gravity of the defendant’s conduct, the harm to the plaintiff, and the defendant’s wealth,\(^\text{194}\) or the form of the proportionality test common to evaluations of punishments under the Cruel and Unusual Punishments Clause.\(^\text{195}\) Finally, application of the Double Jeopardy Clause may require states to incorporate into the statute a variation of the Taber rule, limiting the imposition of punitive damages against defendants who are subject to criminal prosecution for the conduct in question.\(^\text{196}\)

These guidelines will protect state allocation from constitutional scrutiny. Still, questions remain about the desirability of the practice. Opponents of traditional punitive damages base their criticism on three principal arguments. The first of these asserts that excessive punitive awards are crippling industry by driving up insurance costs.\(^\text{197}\) This argument rests on the widespread belief that in recent years the number and size of punitive awards

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194. See Ghiardi & Kircher, supra note 3, § 18.08 (discussing existing standards for evaluating punitive awards).

195. See supra note 135 and accompanying text (discussing use of Cruel and Unusual Punishments Clause balancing approach to determine excessiveness). In Browning-Ferris Justice O’Connor argued for adoption of a hybrid approach to excessiveness, using the balancing test factors, such as comparisons of punishments for the same conduct in other jurisdictions, in addition to the traditional factors, such as the defendant’s wealth. Browning-Ferris, 492 U.S. at 300 (O’Connor, J., dissenting).

196. See supra note 181 and accompanying text (describing Taber rule and policy reasons supporting it).

197. See Jehl, supra note 10, at 1 (reporting Vice President Quayle’s assertion that cumbersome American civil justice system puts United States at “competitive disadvantage”). But see Robert E. Litan, The Liability Explosion and American Trade Performance: Myths and Realities, in TORT LAW AND THE PUBLIC INTEREST 127 (Peter H. Schuck ed., 1991) (concluding that growth in liability may hurt innovation but probably does not affect trade balance); Maher, supra note 137, at 15 (arguing that punitive damages crisis is overstated). Mr. Maher notes a study by the Rand Corporation that found that the costs of products liability adds less than one percent to the price of most products and that foreign companies face the same liability costs that American companies face. Id.
PUNITIVE DAMAGES

has skyrocketed. In fact, the evidence suggests that, at least in regard to personal injury cases, the level of punitive awards has remained fairly steady over the past twenty-five years.

Beyond that practical economic argument, critics also focus on traditional ideological concerns. They argue that punitive awards are simply windfalls for greedy plaintiffs who already have been compensated for their injuries. Finally, critics argue that punitive damages subject defendants to arbitrary punishments improperly administered through the civil courts.

State allocation addresses these complaints. First, it addresses the economic criticism, whether or not that criticism is valid, by providing a means by which the state can regulate levels of punitive awards on a state-wide scale. If the legislature concludes that awards have become excessive, it can increase the share the state takes in order to reduce the incentive to sue for punitive damages. Conversely, if the state determines that companies or individuals have become indifferent to public safety, it can decrease

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199. See Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System — And Why Not?, 140 U. PA. L. REV. 1147, 1254-56 (1992) (citing study by Rand Institute for Civil Justice finding punitive damages in personal injury cases have remained steady for past 25 years). Professor Saks notes another study finding that while the number of punitive awards has remained steady, the size of the average award has risen. Id. at 1256. However, he also points out that the rate of increase in the size of the average punitive award has not matched the increase in the wealth of Fortune 500 companies, suggesting that awards may in fact have become less "punitive." Id. at 1256 n.403.

200. See REDDEN, supra note 43, § 3.9 (noting common criticism that punitive damages are windfall to plaintiffs).

201. Id.

202. See Toy, supra note 186 (arguing against caps or proscriptions of punitive damages). In an article heavy with statistical data and probabilities, Ms. Toy argues convincingly that punitive damages serve a valuable deterrent effect. Cf. REDDEN, supra note 43, § 3.8-.9 (asserting lack of evidence of deterrent effect of punitive damages).

203. See Gordon v. State, 608 So. 2d 800 (Fla. 1992), cert. denied, 61 U.S.L.W. 3568 (U.S. Mar. 29, 1993) (No. 92-1328) (discussing state interest in regard to substantive due process challenge). In Gordon the Florida Supreme Court said that the state had a legitimate objective in attempting "to discourage punitive claims by making them less remunerative to the claimant and the claimant's attorney." Id. at 802. The virtual absence of state legislative history makes discovery of a legislature's intent problematic. However, that statement indicates that the state of Florida intends the statute to have a deterrent effect on the filing of punitive claims.

The effect that state allocation has on attorney's fees will affect critically the disincentive aspect of the practice. The Florida statute specifically provides for attorney's fees to be calculated solely on the basis of the plaintiff's share of the recovery. Fla. STAT. ANN. § 768.73(2)(b) (West 1986). Several other states have incorporated provisions into their allocation statutes specifying payment of attorney's fees before allocation of the award. Mo. ANN. STAT. § 537.675 (Vernon 1988); OR. REV. STAT. § 18.540(3) (1988); UTAH CODE ANN. § 78-18-1(3) (1989). That practice will almost certainly reduce the power of the state to regulate awards through allocation because the allocation provision will not in any way affect the amount of money the attorney recovers. For state allocation to provide any disincentive to sue for punitive damages, it must cut into the share the attorney hopes to receive. States that do not specify a treatment of attorney's awards will need to resolve that question.
its portion in order to increase the incentive to sue for damages. Additionally, in cases that are likely to result in punitive damages, state allocation provides an incentive for both parties to settle.\textsuperscript{204}

By putting the share of awards that the state receives into a public benefit fund, state allocation addresses the windfall problem and at the same time serves a valuable public policy function.\textsuperscript{205} It also eliminates concerns about the arbitrary nature of punishments administered through the civil courts, by invoking constitutional protections that have never applied to traditional punitive awards.\textsuperscript{206} Most importantly, by triggering the Excessive Fines Clause, state allocation probably will bring a controversial area of the law under the constitutional mantle and will insure a degree of fairness in a largely subjective procedure.\textsuperscript{207} State allocation may also trigger some degree of double jeopardy scrutiny, thus giving civil defendants the same protection from multiple punishments afforded criminal defendants.\textsuperscript{208}

Central to any policy discussion of state allocation is the question of whether juries should know of the scheme in fixing awards. The prevailing view appears to be that juries should not know of the allocation provision. Of the existing allocation statutes, only the Florida statute addresses that issue specifically, by precluding courts from informing juries of the allocation provision.\textsuperscript{209} The Oregon Supreme Court has held that it is reversible error for a court to instruct the jury that a portion of a punitive award will go to the state.\textsuperscript{210} This approach apparently stems from a fear that, if instructed of the allocation scheme, juries will inflate awards either to make sure the plaintiff gets a certain amount or to benefit whatever public fund receives the state’s share.\textsuperscript{211}

\textsuperscript{204} In cases in which a punitive award is likely, the defendant will have an incentive to settle for one dollar less than the amount of the expected award. The plaintiff will have an incentive to settle for one dollar more than the share of that award that she would get under the allocation scheme. Depending on the probability of recovery of a punitive award, the parties will settle somewhere between those two amounts. Improved guidelines for measuring awards will allow the parties to estimate the size of the expected recovery.


\textsuperscript{206} See supra note 93 (citing commentators arguing for constitutional restraints on punitive damages).

\textsuperscript{207} See supra part II.B (discussing Excessive Fines Clause implications of state allocation).

\textsuperscript{208} See supra part II.C (discussing double jeopardy implications of state allocation).

\textsuperscript{209} See Fla. Stat. Ann. § 768.73(5) (West 1986) (stating that “[t]he jury shall not be instructed, nor shall it be informed, as to the provisions of this section”).

\textsuperscript{210} Honeywell v. Sterling Furniture Co., 797 P.2d 1019, 1021 (Or. 1990).

\textsuperscript{211} See N.Y. Civ. Prac. L. & R. 8701 (McKinney Supp. 1993) (suggesting that jury should not know of allocation statute). The Practice Commentary accompanying the New York statute argues that juries that know of the allocation provision might inflate awards in order to better compensate the plaintiff or increase state revenues. Id.
IV. CONCLUSION

State allocation is a practical, policy-oriented response to the controversial issues surrounding punitive damages. It succeeds in mitigating or eliminating the primary sources of criticism inherent in the doctrine. At the same time, it preserves the valuable deterrent aspect of punitive damages, putting the proceeds to a beneficial public use. The questions confronting the practice of state allocation have revolved around the failure of legislatures or courts to define adequately the state's interest in its share of the award. Resolution of that issue, by giving the state the rights of a judgment creditor upon entry of judgment, will clarify the rule and free it from Takings Clause scrutiny. State allocation will then face the constitutional proscriptions embodied in the Excessive Fines Clause and the Double Jeopardy Clause, which, if applicable, can only strengthen the policy basis for the practice.

PAUL F. KIRGIS
APPENDIX

THE STATE STATUTES

Colorado


Thirty-three percent of every punitive damage award goes to the state general fund. Punitive damages are limited to the amount of compensatory damages except in certain cases. The defendant's wealth is not to be considered in assessing awards.

Florida

FLA. STAT. ANN. § 768.73(2)(b) (West 1986).

In personal injury and wrongful death cases, sixty percent of every punitive damage award goes to the Public Medical Assistance Trust Fund. In all other cases, sixty percent of every punitive damage award goes to the state general fund. Attorney's fees are calculated solely on the basis of the plaintiff's share. The jury is not instructed of the allocation provision. Punitive damages are limited to the amount of compensatory damages except in certain cases.

Georgia

GA. CODE ANN. § 51-12-5.1(2) (Michie 1987).

In products liability cases only, seventy-five percent of every punitive damage award goes to the state treasury. Punitive damages in these cases, though not limited, may only be awarded once. The state has the rights of a judgment creditor on an equal footing with the plaintiff upon entry of judgment.

Illinois

ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd 1987).

The trial court has discretion to apportion every punitive damage award among the plaintiff, the plaintiff's attorney, and the state's Department of Rehabilitation Services.

Iowa

IOWA CODE ANN. § 668A.1 (West 1987).

In cases in which the defendant's conduct was not aimed specifically at the plaintiff, seventy-five percent of every punitive damage award goes to the state's Civil Reparations Trust Fund.

Kansas


In medical malpractice cases only, fifty percent of every punitive damage award goes to the state's Health Care Stabilization Fund. This statute only
applies to causes of action accruing between July 1, 1985 and July 1, 1988. Awards are limited partly on the basis of the defendant’s wealth.

Missouri


Fifty percent of every punitive damage award goes to the state’s Tort Victims Compensation Fund. Attorney’s fees are excluded.

New York


Twenty percent of every punitive damage award goes to the state. This law is effective only until April 1, 1994.

Oregon


Fifty percent of every punitive damage award goes to the state’s Criminal Injuries Compensation Fund. Attorney’s fees are excluded.

Utah


Fifty percent of every punitive damage award goes to the state’s general fund. Attorney’s fees are excluded. The defendant’s wealth is admissible in assessing awards.