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Social Interests Versus Plaintiffs' Rights: The Constitutional Battle over Statutory Limitations on Punitive Damages

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Social Interests Versus Plaintiffs' Rights: The Constitutional Battle over Statutory Limitations on Punitive Damages

*Janet V. Hallahan**

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I. INTRODUCTION

In the late 1980s, state legislatures enacted statutory restrictions on awards of punitive damages in response to the tort crisis in America.¹

1. This Article assumes for the sake of argument that punitive damages are increasing in both size and incidence; however, there is an ongoing dispute on whether there is a tort crisis at all. Compare, e.g., Andrew Blum, *Debate Still Rages on Torts*, NAT'L L.J., Nov. 16, 1992, at 1, 32-33 (discussing the varying reports about whether there is indeed a tort crisis and stating that studies may be biased) and Robert A. Clifford, *Tort Reform is Based on False Assumptions*, NAT'L L.J., Oct. 19, 1992, at 12 (noting that studies have shown that punitive damages awards are very rare, only 355 given over the past 25 years) and Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1277 (1993) (questioning whether there is a tort crisis, noting that punitive damages are necessary to insure corporate responsibility) and Jimmie O. Clements, Jr., Comment, *Limiting Punitive Damages: A Placebo For America's Ailing Competitiveness*, 24 ST. MARY'S L.J. 197, 213-21 (1992) (stating that punitive damages are not out of control and will not decrease competitiveness; caps will impact on safety and quality, and deprive punitive damages of purpose) with *Pacific Mut. Ins. Co. v. Haslip*, 499 U.S. 1, 8-9 n.4, 18 (1991) (asserting that punitive damages have run wild; numerous amicus briefs filed both in support of and against restrictions on punitive damages) and *id.* at 50-51 (O'Connor, J., dissenting) (comparing wide range of awards in Alabama for similar torts) and *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1567 (M.D. Ga. 1990) (examining Georgia legislative history concerning the Tort Reform Act of 1987, noting that authoritative sources disagreed about the existence of a tort crisis) and Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 564-65 (1992) (maintaining that unrestricted punitive damages awards discourage settlement because plaintiffs receive larger awards unrelated to actual injury) and Charles D. Stewart & Philip G. Piggott,

Not surprisingly, plaintiffs challenged the constitutionality of these statutes, contending that the legislation restricted their common-law right to receive the full award.² But are plaintiffs fighting a losing battle? Their lost causes litter the constitutional battlefield, for both state and federal courts consistently have upheld the constitutionality of the statutes.³ This growing judicial trend acknowledges the legislative power to subordinate the public interest in awarding plaintiffs punitive damages to other increasingly compelling societal goals.⁴ Nevertheless, plaintiffs continue to fight the restrictions, and the war rages on.

While the statutory regulation of punitive damages has had somewhat limited exposure in courts, commentators have identified it as fertile ground for the next constitutional challenges to punitive damages.⁵ Most articles and case law have focused primarily on whether state procedures to determine punitive damages awards violate defendants' rights, or whether statutory caps on non-economic damages violate plaintiffs' federal and state constitutional rights.⁶ A secondary,

Punitive Damages Since Pacific Mutual Life Ins. Co. v. Haslip, 16 AM. J. TRIAL ADVOC. 693, 697 (1993) (declaring that jury awards are increasing at rate where corporate America will not be able to compete in today's marketplace). See *infra* notes 27-36 and accompanying text for a discussion of the evolution of the tort reform movement.

2. See *infra* notes 9-20 and accompanying text for a discussion of plaintiffs' constitutional challenges to statutory restrictions; see also *infra* app. A for a listing of those cases.

3. See, e.g., *Wackenhut Applied Technologies Ctr., Inc. v. Sygnatron Protection Sys., Inc.*, 979 F.2d 980 (4th Cir. 1992) (finding statute constitutional); *Gordon v. State*, 608 So. 2d 800 (Fla. 1992) (per curiam) (same), *cert. denied*, 113 S. Ct. 1647 (1993); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635 (Ga. 1993) (same); *State v. Moseley*, 436 S.E.2d 632 (Ga. 1993) (all concurring) (same), *cert. denied*, 114 S. Ct. 2101 (1994); *Bagley v. Shortt*, 410 S.E.2d 738 (Ga. 1991) (same); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612 (Iowa 1991) (same); *Smith v. Printup*, 866 P.2d 985 (Kan. 1993) (same). See *infra* notes 83-109 and accompanying text for a discussion of these cases. Only a handful of courts has found a statute unconstitutional, and these decisions are of questionable validity. See *infra* notes 110-44 and accompanying text for a discussion of these cases and their uncertain precedential value.

4. See *infra* notes 209-26 and accompanying text for a discussion of this trend.

5. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 140 n.239 (1993); see also 1 DAN B. DOBBS, *LAW OF REMEDIES* § 3.11(12) (2d ed. 1993) (noting that restrictions raise constitutional issues, which few courts have addressed).

6. See *Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331, 2341 (1994) (stating that due process requires post-verdict judicial review of punitive damages awards assessed against defendant absent other procedures to ensure fairness); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2723 (1993) (finding that West Virginia's post-verdict review and meaningful jury instructions protect due process rights of defendants); *Haslip*, 499 U.S. at 18 (pronouncing that due process places limits on the amount of punitive damages that can be awarded against defendants); see also 2 DOBBS, *supra* note 5, § 8.8 (discussing constitutional questions arising under caps for personal

somewhat hidden theme implicit in court decisions concerns whether the limitations have impermissibly gutted the original deterrent purpose of punitive damages.⁷

The net effect of state statutory restrictions on punitive damages is that plaintiffs receive less of a punitive damages award than they would under the common law.⁸ In their quest to eliminate this new limit on their recoveries, plaintiffs have attacked the constitutionality of these statutes on three fronts: (1) that the statutory regulation violates their due process rights under the federal and state constitutions; (2) that it violates their equal protection rights under these constitutions; or (3) that it violates their right to a trial by jury under the state constitution.⁹

injury damages); JAMES D. GHIARDI & JOHN J. KIRCHNER, *PUNITIVE DAMAGES LAW AND PRACTICE* § 3.03 (1981 & Supp. 1994) (discussing tort caps); Samuel E. Klein et al., *Punitive Damages*, in *LIBEL LITIGATION 1994* (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 64-3922, 1994) (discussing constitutional challenges raised by defendant, although listing state statutory restrictions); Nancy L. Manzer, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 *CORNELL L. REV.* 628, 647 (1988) (statutory caps on compensatory damages indicate legislative distrust of juries and undermine right to trial by jury); Leonard J. Nelson, *Tort Reform in Alabama: Are Damages Restrictions Unconstitutional?*, 40 *ALA. L. REV.* 533, 552-64 (1989) (discussing constitutional challenges to Alabama's compensatory damages cap, and predicting that post-verdict review of punitive damages will raise constitutional challenges). Few commentators or courts have addressed whether statutory regulation of the size of punitive damages violates the plaintiff's constitutional rights. See Amelia J. Toy, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 *EMORY L.J.* 303, 304, 312 (1991) (arguing that statutory caps may fail to make defendants pay full social costs of their wrongful acts); E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 *S. CAL. L. REV.* 839, 845-55 (1993) (discussing the need for statutes that require payment of punitive damages award into state fund). *But see* Rustad & Koenig, *supra* note 5, at 140 n.239 (discussing the constitutionality of punitive damages restrictions).

7. See *infra* notes 209-15 and accompanying text.

8. See *infra* notes 37-57, 65, 67, 75, 79, 94, 101, 103, 109, 119, 122, and accompanying text for a discussion of these statutes. See also *infra* app. A for a summary of the constitutional challenges raised by plaintiffs.

9. See 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, *PUNITIVE DAMAGES* § 3.12 (2d ed. 1989) (due process and equal protection challenges most often arise under either the federal or state constitution); see also *Henderson v. Alabama Power Co.*, 627 So. 2d 878, 884 (Ala. 1993) (plaintiff arguing that the statute limiting punitive damages awards violates the state right to a trial by jury).

A rarely made and largely unsuccessful argument also raised by plaintiffs is that these statutes violate the separation of powers between the judiciary and the legislature. See *McBride*, 737 F. Supp. at 1567, 1580 (relating the plaintiff's argument that the statutory cap contravenes separation of powers doctrine in state constitution, an argument court does not address); *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 265 n.3 (Colo. 1991) (en banc) (same). Earlier case law, prior to the enactment of tort reform statutes, examined this question and upheld the statutes as constitutional. For example, in *Smith v. Department of Ins.*, 507 So. 2d 1080, 1092 n.10 (Fla. 1987), the plaintiff

Due process challenges arise under one of two alternative grounds. In some instances, plaintiffs argue that statutes restricting punitive damages awards represent an unconstitutional taking under the Fifth and Fourteenth Amendments to the United States Constitution, as well as the corresponding state constitutional provision.¹⁰ The punitive damages award represents a constitutional or common law property right, and accordingly cannot be taken away absent due process of law.¹¹ Alternatively, where the parties agree that a punitive damages award involves no constitutionally protected rights, plaintiffs argue that the statutory restriction bears no reasonable relation to a legitimate governmental purpose.¹² Few courts have found a state statute regulating punitive damages unconstitutional on the grounds that plaintiffs have a per se right to punitive damages awards, although a handful have found that punitive damages awards trigger other constitutionally protected rights.¹³ Only one court has found that a statute bears no rational relation to the legislative purpose.¹⁴

Equal protection claims can arise when the statute provides for a separate treatment of one group of defendants over another. Plaintiffs challenge these statutes under the Equal Protection Clause of the Fourteenth Amendment and the corresponding state constitutional provision

argued that sections 51 and 52 of the Florida Code, which dealt with the availability and amount of recovery for punitive damages, violated the separation of powers provision of Article II, section 3 of the Florida Constitution. *Id.* at 1092 (noting that the plaintiff also challenged other sections that did not deal with punitive damages). The Florida Supreme Court affirmed the trial court ruling that these sections did not violate the Florida Constitution, holding that they were part of a substantive statutory scheme and that any procedural provisions of these statutes were tied to the definition of the substantive rights. *Id.* Nevertheless, some courts implicitly rely on the separation of powers issue, although stating a different ground for their decision. See *infra* notes 209-24 and accompanying text for a discussion of the underlying separation of powers issue in courts' decisions.

10. See *infra* part IV.

11. See *Kirk*, 818 P.2d at 267-68 (stating that private property, such as a judgment for punitive damages, shall not be taken for public use without just compensation). In state courts, the Fifth Amendment applies to the states by virtue of the Fourteenth Amendment of the Constitution. *Id.* at 267. A constitutionally protected right, however, is more than a mere expectation based on an anticipated continuation of the right: it must rest on title to the present or future enjoyment of the property. *Id.* at 275 (Rovira, C.J., dissenting).

12. See *Wackenhut*, 979 F.2d 980 (upholding Virginia statutory cap because it rationally relates to legitimate legislative purpose). Under *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83 (1978), economic regulation is presumed constitutional unless it fails to bear a rational relation to the legislative purpose.

13. See *infra* notes 60-82, 121-44, and accompanying text for a discussion of these cases.

14. *McBride*, 737 F. Supp. at 1579. See *infra* notes 63-72 and accompanying text for a discussion of *McBride*.

on the grounds that the statutes discriminate unfairly between similarly situated parties.¹⁵ Although most courts acknowledge that the statute does classify groups, they recognize that the classification bears a fair and substantial relation to the object of the legislation.¹⁶

Plaintiffs increasingly have argued that the statutes violate their right to a trial by jury.¹⁷ According to this argument, the plaintiff has a common-law right to have the jury determine the amount of punitive damages, as the jury has traditionally fulfilled this function.¹⁸ Until recently, however, no court examining this question agreed.¹⁹ Instead, courts held either that plaintiffs had no such right, or that they actually did receive a jury trial on the amount to which they were entitled.²⁰

The constitutional war over punitive damages is far from over. Nonetheless, this Article contends that the current trend in both state and federal courts is to uphold the constitutionality of the statutes—a trend which signals judicial acceptance of the power of legislatures to prioritize other societal interests over the traditional purposes of punitive damages.²¹ This Article first examines these traditional and

15. See, e.g., GA. CODE ANN. § 51-12-5.1 (Supp. 1994) (capping punitive damages awards at \$250,000, but not for suits alleging intent to harm or product liability). Compare *McBride*, 737 F. Supp. at 1569 (stating that § 51-12-5.1 violates equal protection) with *Mack Trucks*, 436 S.E.2d at 639 (finding no equal protection violation).

16. See, e.g., *Mack Trucks*, 436 S.E.2d at 638-39 (finding that Georgia statutory scheme bears rational relation to legislative purpose of economic regulation).

17. See, e.g., *Henderson*, 627 So. 2d at 884 (plaintiff arguing state statute violates right to trial by jury); *Printup*, 866 P.2d 985 (same).

18. *Henderson*, 627 So. 2d at 893. A related issue concerns the plaintiff's access to courts, where the limitation on damages arguably prevents those that are seeking such damages from relief in the court. No court, however, has agreed. For example, in *Moseley*, the Supreme Court of Georgia held that GA. CODE ANN. § 51-12-5.1(e)(2), which restricted the amount of the punitive damages award that the plaintiff would receive, did not violate the state constitution's access to courts provision. 436 S.E.2d at 634. It reasoned that the constitutional provision was not intended to provide an expansive right of access to the courts, but instead, to give a party the right to choose between self-representation and representation by an attorney. *Id.*

19. See *Henderson*, 627 So. 2d at 893 (holding that the punitive damages statutory cap violates the plaintiff's state constitutional right to trial by jury since the jury traditionally determined punitive damages awards at the time of adoption of the state constitution). See *infra* notes 129-44 and accompanying text for a discussion of why the Alabama court incorrectly decided *Henderson*.

20. See, e.g., *Moseley*, 436 S.E.2d at 634 (finding that the jury determined the amount to punish defendant; plaintiffs received jury trial on amount to which they were entitled); *Gordon*, 608 So. 2d at 802 (statute requiring a percentage of punitive award to be paid to the government did not violate right to trial by jury). See *infra* notes 87-91 and accompanying text for a discussion of *Gordon*.

21. See *infra* part V.A.

controversial purposes.²² It then discusses recent statutory limitations on punitive damages which, by limiting the amount that plaintiffs can receive, have created the battlefield for the constitutional conflict.²³ Next, this Article examines the shift from early decisions, in which the judiciary initially rejected the legislatures' ability to regulate punitive damages, to more recent case law where the courts have upheld the constitutionality of these statutes.²⁴ This Article predicts that future courts, including the United States Supreme Court, are likely to continue to uphold these statutes under both federal and state constitutions.²⁵ Accordingly, by deferring to the legislatures, courts will effectively force plaintiffs into an uneasy truce, if not a full surrender.²⁶

II. THE LONG-STANDING CONTROVERSY OVER PUNITIVE DAMAGES

As many commentators and courts are fond of pointing out, punitive damages have existed since the time of Hammurabi, and served the purpose then, as they do today, of punishing defendants and deterring them and others from similar behavior in the future.²⁷ Punitive

22. See *infra* part II.

23. See *infra* part III.

24. See *infra* parts IV-V.

25. See *infra* part VI. In addition, defendants also may have valid constitutional challenges to these same statutes. This Article suggests, however, that they will be unlikely to bring these challenges, as the statutes actually work in the defendants' favor. See *infra* part VI.A.3.

26. See *infra* part VII.

27. See *Pacific Mut. Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) (stating that punitive damages are a long-standing part of state tort law); see also *id.* at 25 (Scalia, J., concurring) (noting that punitive damages are a long-standing part of Anglo-American law); 1 DOBBS, *supra* note 5, § 3.11(3) (noting that deterrence has been long-recognized as one reason for punitive awards); GHIARDI & KIRCHNER, *supra* note 6, §§ 4.14-4.16 (examining declared punitive damages purposes of deterrence and punishment); JACOB A. STEIN, DAMAGES AND RECOVERY, PERSONAL INJURY AND DEATH ACTIONS § 183 (1972 & Supp. 1990) (noting that punitive damages originated because courts refused to grant new trials on account of excessive behavior); Rustad & Koenig, *supra* note 1, at 1298-99 (discussing the reluctance of nineteenth century courts to award punitive damages); *id.* at 1285 (explaining that punitive damages date to the time of Hammurabi); *id.* at 1290 (noting that punitive damages have been available in the United States since 1784).

Commentators agree on the purposes of punitive damages. See James D. Ghiardi, *The Case Against Punitive Damages*, FORUM 412 (1972) (noting that most states grant punitive damages as an "enhancement of compensatory damages because of the wanton, reckless, malicious or oppressive" character of defendant's behavior; as a punishment to defendant; and as both a sanction to defendants and deterrent to all); Rustad & Koenig, *supra* note 1, at 1318 (stating the purposes are punishment and deterrence). However, punitive damages can serve other purposes besides punishment and deterrence, although these goals are the most common and fundamental. See Rustad & Koenig, *supra* note 1,

damages have never been popular, however, largely because they serve no compensatory function.²⁸ Many jurisdictions have statutorily limited punitive damages in many causes of action.²⁹ Nevertheless,

at 1320 (noting that the *Haslip* Court cited retribution as one of the purposes of punitive damages); *id.* at 1321 nn.268-69 (noting that punitive damages serve as compensation to the plaintiff); *id.* at 1322-23 nn.273 & 276 (noting that punitive damages serve as encouragement for plaintiffs to bring suit); Toy, *supra* note 6, at 307-08 (noting that other purposes of punitive damages include economic efficiency to ensure the distribution of appropriate deterrents and deserts among a variety of persons); Grube, *supra* note 6, at 846-47 (stating that the purpose of punitive damages is to make defendants pay the full social cost in order to ensure that they will discontinue this conduct).

28. Ghiardi, *supra* note 27, at 412. Most courts believe that damages only compensate the plaintiff, since the public has no defensible interest in extracting a further pound of flesh from the defendant. *Id.* Consequently, in most jurisdictions, punitive damages serve no compensatory purpose, and because they are awarded in addition to compensation, their net effect is that of a windfall to the plaintiff. Courts almost universally agree, noting that punitive damages are not a right and are awarded or withheld at the discretion of the jury. *See, e.g.,* Chadima v. National Fidelity Life Ins. Co., 848 F. Supp. 1418, 1421 n.1 (S.D. Iowa 1994) (stating that the rationale behind legislation requiring payment of a portion of punitive damages awards to the state is that the plaintiff is a fortuitous beneficiary of award simply because no one else is around to receive it). As a result, an award of punitive damages overcompensates the plaintiff for a harm that is fully compensated by an award of actual damages. Ghiardi, *supra* note 27, at 412. Where the defendant acted with malice or intent, however, courts may award punitive damages to punish that behavior and deter the defendant and others from engaging in this behavior. *Id.*

29. For example, many jurisdictions forbid an award of punitive damages altogether, *see, e.g.,* N.H. REV. STAT. ANN. § 507:16 (Supp. 1994) (outlawing punitive damages); others permit them only if the defendant has acted with malice or intent, *see, e.g.,* Miller v. Solaglas Cal., Inc., 870 P.2d 559, 568 (Colo. Ct. App. 1993), *cert. denied*, 1994 LEXIS 294 (Colo. Apr. 4, 1994) (prohibiting punitive damages except for cases of fraud, malice, or willful or wanton conduct); still others require a higher standard of proof, *see, e.g.,* ALASKA STAT. § 09.17.020 (1994) (prohibiting punitive damages unless supported by clear and convincing evidence). In fact, Congress and state legislatures have limited the recovery of punitive damages for certain causes of action. For example, in the Warsaw Convention Treaty, Congress imposed a statutory limitation on the size of punitive damages that may be awarded against an airline after an air crash. *See* 2 DOBBS, *supra* note 5, § 8.8 (discussing the statutory restriction on the amount of punitive damages under worker's compensation laws); GHIARDI & KIRCHNER, *supra* note 6, §§ 4.0-4.16, tbl. 4.1 (discussing the positions of individual states); STEIN, *supra* note 27, § 183 (noting that punitive damages are not allowed in wrongful death cases even under those provisions that permit "full value"); *see also, e.g.,* ARK. CODE ANN. § 16-64-130 (Michie 1987) (banning punitive damages against banks, savings and loans, and credit unions unless personal injuries or property damage occurs).

Legislatures also restrict the availability of punitive damages by requiring double or triple compensatory damages for specific causes of action, effectively limiting the amount of punitive damages that could be recovered. 2 DOBBS, *supra* note 5, § 8.1(6). This type of specific cap is outside the scope of this Article, but some of the material within may be relevant to issues involving specific caps.

Most jurisdictions did not, and do not recognize a separate cause of action for punitive damages, but consider them incidental to another cause of action. Arvin Maskin & Peter

most commentators and courts agree that punitive damages awards are increasing in both size and incidence, giving rise to the "tort crisis" in the United States.³⁰ In the late 1980s, state legislatures enacted statutes to reduce punitive damages, resulting in smaller awards assessed against defendants or awarded to plaintiffs.³¹

At almost the same time that state legislatures implemented limitations on the availability and amounts of punitive damages awards, the United States Supreme Court decided *Pacific Mutual Insurance Co. v. Haslip*.³² *Haslip* held that punitive damages awards assessed without adequate procedural safeguards could violate the Due Process Clause of the United States Constitution.³³ Commentators analyzing

Antonucci, *Developments in the Law of Punitive Damages*, C837 A.L.I.-A.B.A. 541, 563-64 (1993) (noting that punitive damages are available in breach of contract claims where there are elements of tort); *see also Henderson*, 627 So. 2d at 885-86 (reasoning that punitive damages do not arise as a separate cause of action, but instead at the jury's discretion). Some legislatures, courts, and commentators have stated that the punitive damages award should be taken out of the jury's hands altogether. *See KAN. STAT. ANN.* § 60-3702 (a) (1994) (mandating that the amount of punitive damages is to be assessed by the judge, not a jury); *Smith v. Printup*, 866 P.2d 985, 998 (Kan. 1993) (changing from jury to judge the responsibility to assess punitive damages does not affect the common law right of the plaintiff, common law cause of action by the plaintiff, or a remedy at common law); *Quayle, supra* note 1, at 564-65 (arguing that punitive damages should be taken out of jury's hands).

30. *See Haslip*, 499 U.S. at 62 (O'Connor, J., dissenting) (asserting that punitive awards are increasingly granted in breach of contract claims); *see also* 1 DOBBS, *supra* note 5, § 3.11(1) (noting punitive damages are increasingly awarded in civil rights, dignitary harms, and libel cases where they are traditionally regulated); *Maskin & Antonucci, supra* note 29, at 563 (stating that punitive damages are available in breach of contract claims where there are elements of tort); *Rustad & Koenig, supra* note 1, at 1303-05 (explaining that punitive damages, once awarded only for malice or intent, are now available for negligence).

31. The tort reform movement focused on the increase in punitive damages awards and the resulting detrimental impact on insurance rates and coverage. *See* 1 DOBBS, *supra* note 5, § 3.11(1). Former-Vice-President Quayle developed a tort reform proposal to limit, *inter alia*, punitive damages awards to the amount of compensatory damages awards. *See MODEL STATE PUNITIVE DAMAGES ACT* (Office of Vice-President 1992) (discussed in *Rustad & Koenig, supra* note 1, at 1277-84); *see also* David G. Owen, *Deterrence and Desert in Tort*, 73 CAL. L. REV. 665, 672 n.43 (1985) (proposing caps on punitive damages awards). Courts generally do not inform juries of limitations on punitive damages, so that juries continue to perform their traditional function of weighing the harm against the cost of deterrence. *See* Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip*, 42 AM. U. L. REV. 1365, 1380 (1993) (noting that the court should not inform the jury of cap because the jury might use it as a guideline, not a ceiling). In addition, few agree whether the tort crisis actually exists. *See supra* note 1.

32. 499 U.S. 1 (1991).

33. *Id.* at 18. In *Haslip*, the defendants argued that due process subjects punitive awards to some kind of procedural protection. *Id.* at 7; *see also id.* at 8 n.4, 9 (examining case law and amicus briefs debating propriety of punitive damages). While

Haslip have been quick to argue that legislatures, not courts, should establish constitutionally acceptable punitive damages procedures.³⁴ Following *Haslip*, some legislatures and courts adapted the purposes of the statutes to also provide procedural safeguards to protect defendants' new *Haslip* due process rights.³⁵ The result: the apparent subordination of the goals of deterrence and retribution to the goals of economic regulation and fairness to the defendant.³⁶ The next Part describes the legislative effort to restrict punitive damages.

III. BATTLE LINES DRAWN: STATUTORY RESTRICTIONS ON PUNITIVE DAMAGES AWARDS

Regardless of their ultimate purpose, state statutes regulating punitive damages fall generally into two categories: (1) statutes that impose a cap on the amount of punitive damages awarded against defendants;³⁷ and (2) statutes that limit the amount of the award that plaintiffs can receive.³⁸ Legislatures have often enacted both restric-

the Court refused to adopt a mathematical bright line ratio or to provide specific procedures that would meet due process minimums, it implied in *Haslip* that adequate guidelines would include guidance to the jury from the court and post-trial procedures to ensure the fairness of the jury award. *Id.* at 18-19; *see id.* at 19-23 (stating that Alabama jury instructions and post-trial review by courts protect the due process rights of defendants). Later Court decisions have confirmed *Haslip*. *See* *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2342-43 (1994) (stating that due process requires that judges perform post-verdict review); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2723 (1993) (explaining that objective criteria, including meaningful jury instructions and post-verdict review, protect due process). *See infra* notes 160-68, 174, and accompanying text for a discussion of these cases.

34. *See, e.g.*, Schwartz & Behrens, *supra* note 31, at 1372-74 (arguing that the legislature, not the courts, should determine the due process limits of punitive damages). Moreover, most of the Supreme Court Justices agree that punitive damages could be limited by statute. *See infra* notes 160-68, 174, and accompanying text.

35. *See* *General Chem. Corp. v. De La Lastra*, 815 S.W.2d 750, 759-60 (Tex. Ct. App. 1991) (finding the statute enacted to reform punitive damages is a procedural safeguard sufficient to protect the defendant's due process rights as required by *Haslip*), *rev'd in part on other grounds*, 852 S.W.2d 916 (Tex.), *cert. dismissed*, 114 S. Ct. 490 (1993); *see also* Anthony Gnoffo, Jr., *Lawmaker Singles Out State Tort System for Reform: It Works Fine, Say Trial Lawyers, But a State Senator Wants to End What He Calls Frivolous, Greedy Suits*, PHILA. INQUIRER, Sept. 25, 1994, at B1, B5 (stating that the purpose of proposed New Jersey statutory punitive damages cap is to ensure fairness).

36. *See infra* notes 209-26 and accompanying text for a discussion of these competing goals.

37. *See infra* notes 41-50 and accompanying text for a discussion of these statutes; *see also infra* apps. A and B for a listing of the statutes and the constitutional challenges made against them.

38. *See infra* notes 51-57 and accompanying text for a discussion of these statutes; *see also infra* apps. A and B for a listing of the statutes and the constitutional challenges made against them.

tions together, so that a state may have a flat cap on punitive damages at a certain dollar amount, and also divert a certain percentage of that award into a state fund.³⁹ Some statutes have distinguished between certain groups of defendants, imposing these restrictions on some groups, but not on others.⁴⁰

A. Restrictions on Awards Against Defendants

Restrictions on awards against defendants either place an absolute cap on the amount of punitive damages awards or require the award to stand in some fixed ratio to actual damages. Seven states have flat statutory caps limiting any punitive damages award to a specific amount.⁴¹ Alabama provides a typical example, where the state legislature has limited awards of punitive damages to \$250,000.⁴² In most jurisdictions, the statute provides exceptions to the mandatory cap, most often when the defendant acts with actual malice or intent to harm.⁴³ Virginia is the only state which applies the statutory cap to all causes of action without exception.⁴⁴

39. See, e.g., GA. CODE ANN. § 51-12-5.1 (Supp. 1994) (capping punitive damages awards for actions not alleging product liability or intent to harm at \$250,000 and requiring 75% of product liability punitive damages awards to be paid into a state fund).

40. See Klein et al., *supra* note 6, at H(1) (listing various types of statutory restrictions by state); see also *infra* notes 55-57 and accompanying text.

41. See, e.g., ALA. CODE § 6-11-21 (1993) (implementing \$250,000 cap on punitive damages, with certain enumerated exceptions); GA. CODE ANN. § 51-12-5.1 (\$250,000 cap); KAN. STAT. ANN. § 60-3702(e) (capping punitive damages awards at the lesser of \$5 million or the highest annual gross income earned by the defendant over the past five years, with exceptions assessed by the judge); NEV. REV. STAT. ANN. § 42.005 (Michie Supp. 1993) (\$300,000 cap when actual damages are less than \$100,000); N.D. CENT. CODE § 32-03.2-11(4) (Supp. 1993) (twice the compensatory damages or \$250,000, whichever is greater); TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.007, .008 (West Supp. 1995) (four times the actual damages or \$200,000, whichever is greater, with exceptions for damages arising from intentional torts); VA. CODE ANN. § 8.01-38.1 (Michie 1992) (capping all punitive damages at \$350,000 without exception). Montana once had a statutory cap at one percent of the defendant's net worth, but this has been repealed. See Owen, *supra* note 31, at 672 n.43 (discussing Montana's punitive damages statute limiting the award to \$25,000 or one percent of defendant's net worth); see also MONT. CODE ANN. § 27-1-221(6)(b) (1985) (prescribing cap at \$25,000 or one percent of the defendant's net worth, whichever is greater), *amended by* MONT. CODE ANN. §§ 27-1-221(6)-(7) (1987) (prescribing the procedure which trier of fact must use to determine punitive damages award, omitting mention of a cap). Plaintiffs have attacked this type of statute on four occasions: unsuccessfully three times, and successfully once. See *infra* notes 105-09, 121-44, and accompanying text.

42. ALA. CODE § 6-11-21.

43. See, e.g., *id.*

44. VA. CODE ANN. § 8.01-38.1. The Court of Appeals for the Fourth Circuit upheld the constitutionality of this statute in Wackenhut Applied Technologies Ctr., Inc. v. Sygnatron Protection Sys., Inc., 979 F.2d 980 (4th Cir. 1992). See *infra* notes 108-09 and accompanying text for a discussion of this case.

The second category of statutory caps requires that the award be no more than a fixed percentage of actual damages, codifying a prevalent common law rule.⁴⁵ Four states have passed such legislation, generally requiring that the award be no more than actual damages, or two times the amount of actual damages.⁴⁶ These statutes generally have no exceptions and are accordingly more rigid.⁴⁷

Legislatures have enacted both types of statutory caps as economic regulation, usually as a part of the tort reforms of the 1980s.⁴⁸ For example, many legislatures enacted the caps to strike a balance between the societal benefits of punishment or deterrence and the resultant costs imposed on a state's economy.⁴⁹ In addition, some courts have expanded the original legislative purpose of the caps to now include the

45. Although common-law limitations on punitive damages awards are outside the scope of this Article, many jurisdictions already require punitive damages to bear some relationship to actual damages under the common law, although few have defined that relationship. *See, e.g.*, 30 OHIO JURISPRUDENCE 3d *Damages* § 161 n.66 (1981 & Supp. 1994); *see also* *Pacific Mut. Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) (stating that punitive damages that bear some relation to compensatory damages could be constitutional); *Maskin & Antonucci, supra* note 29, at 575 (stating that punitive damages must bear a reasonable relation to actual damages). Not all agree, however, that punitive damages need bear any relationship to actual damages. *See, e.g.*, *Aldrich v. Thomson McKinnon Sec., Inc.*, 756 F.2d 243, 249 (2d Cir. 1985) (finding that punitive damages need bear no exact relationship to compensatory damages); *Kirkbride v. Lisbon Contractors*, 555 A.2d 800, 803 (Pa. 1989) (holding that Pennsylvania law expressly forbids that punitive damages stand in relation to compensatory damages); *see also* *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 741 (3d Cir. 1991) (declining to resolve the "thorny issue" presented by the conflict between *Kirkbride*, which refused to require a proportion between actual and punitive damages, and the Supreme Court's decision in *Haslip*, which suggested that due process requires such proportion).

46. *See, e.g.*, COLO. REV. STAT. ANN. § 13-21-102 (West 1989) (limiting the award to actual damages with exceptions, and plaintiff must prove that the defendant acted with malice); CONN. GEN. STAT. ANN. § 52-240b (West 1991) (limiting the award to twice actual damages in product liability suits); FLA. STAT. ANN. § 768.73 (West Supp. 1995) (limiting the award to three times compensatory damages with exceptions); OKLA. STAT. ANN. tit. 23, § 9 (West 1987) (requiring the plaintiff to prove oppression, fraud, or malice before receiving punitive damages and limiting the award to amount of compensatory damages with exceptions). No plaintiff has challenged this type of statute.

47. *See* *Rustad & Koenig, supra* note 1, at 1281 n.67 (noting that statutes requiring that punitive awards stand in some fixed ratio to the actual damages are much stricter than those with a flat cap and exceptions).

48. *See, e.g.*, *Wackenhut*, 979 F.2d at 984-85 (stating that the statute is economic regulation); *see also* *Henderson v. Alabama Power Co.*, 627 So. 2d 878, 880 (Ala. 1993) (relating that the statutory restrictions are part of the 1987 tort reform package); Robert D. Hunter, *Alabama's Tort Reform Legislation*, 18 CUMB. L. REV. 281 (1988) (giving the history of tort reform legislation).

49. *See* *Wackenhut*, 979 F.2d at 985 (noting that the purpose of VA. CODE ANN. § 8.01-38.1 is to eliminate jury discretion by determining appropriate balance between the deterrence of defendants and the burden on the state economy).

goal of reasonableness, a procedural requirement under *Haslip*.⁵⁰

B. Restrictions on Awards Received by Plaintiffs

One of the most litigated statutory restrictions on punitive damages awards limits the amount of punitive damages awards that plaintiffs may receive. Nine states have enacted this type of statute, which generally redirects a certain percentage of the punitive damages award into a state fund.⁵¹ For example, Florida claims thirty-five percent of a punitive damages award for its general state funds; Iowa, seventy-five percent.⁵² Numerous state legislative bills also have proposed similar legislation.⁵³ Moreover, many legal groups, including the American

50. See *General Chem. Corp.*, 815 S.W.2d at 759-60 (holding that the statute enacted to reform punitive damages is a procedural safeguard sufficient to protect the defendant's due process rights as required by *Haslip*); Gnoffo, *supra* note 35, at B1, B6 (stating the proposed bill to limit punitive damages awards at five times actual damages is intended to keep punitive awards "reasonable"). After *Haslip*, "general concerns of reasonableness . . . properly enter into the constitutional calculus." *Haslip*, 499 U.S. at 18. Legislatures may also regulate punitive damages in order to protect corporate existence and competitiveness. See *Smith v. Department of Ins.*, 507 So. 2d 1080, 1086 (Fla. 1987) (stating that the purpose of such legislation is to protect corporations from going out of business as a result of enormous punitive damages awards that insurance companies will not insure); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 867-68 (Iowa 1994) (stating that the purpose of the caps is to protect corporate existence, discussing an asbestos suit and noting that corporations suffering undue punitive damages overkill may raise that as a factor in limiting punitive damages).

51. See, e.g., COLO. REV. STAT. ANN. § 13-21-102(4) (placing one-third of punitive damages awards into state fund); FLA. STAT. ANN. § 768.73(2)(b) (placing 35% of punitive damages awards into state funds); GA. CODE ANN. § 51-12-5.1(e)(2) (placing 75% of punitive damages awards for product liability into state treasury); ILL. COMP. STAT. ANN. ch. 735, § 5/2-1207 (West 1992 & Supp. 1994) (giving the trial court discretion to apportion the award to the Department of Rehabilitation); IOWA CODE ANN. § 668A.1(2)(b) (West 1987) (placing 75% of the punitive damages awards into a civil fund when the defendant's actions are not specifically directed at the plaintiff); MO. ANN. STAT. § 537.675(2) (Vernon 1988) (granting 50% of punitive damages awards to the Tort Victims' Compensation Fund); N.Y. CIV. PRAC. L. & R. § 8701 (McKinney Supp. 1995) (expired on April 1, 1994) (making 20% of punitive damages awards payable to the state); OR. REV. STAT. § 18.540(1)(c) (Supp. 1994) (making 50% of punitive damages awards payable to the Criminal Injuries Compensation Account, after attorney fees); UTAH CODE ANN. § 78-18-1(3) (1992) (placing 50% of punitive damages in excess of \$20,000 payable to the General Fund). Plaintiffs' first two challenges against these statutes proved successful; the remainder have failed. See *infra* notes 60-109 and accompanying text; see also *infra* apps. A and B.

52. FLA. STAT. ANN. § 768.73(2)(b); IOWA CODE ANN. § 668A.1(2)(b). This type of statute raises legislative drafting concerns, including whether the state must be a party to the litigation, or whether the state has an interest in the action. See GHIARDI & KIRCHNER, *supra* note 6, § 21.16, which discusses these and other drafting concerns.

53. See, e.g., Ariz. H.B. 2570, 41st Legis. (1994) (proposing that punitive damages in excess of actual damages would be paid into a victim assistance fund); Minn. S. 989, 78th Legis. (1993) (proposing depositing a portion of medical malpractice punitive damages into a state fund). But see Cal. A.B. 147, 1993-94 Reg. Sess. (1994)

Bar Association, support this type of statute.⁵⁴

The purpose of these statutes differs from the purpose of those that restrict the amount of punitive damages awards assessed against defendants. In many jurisdictions, since the plaintiff is the fortuitous beneficiary of the punitive award, the legislature intended to divert part of the award to a public benefit.⁵⁵ Other legislatures have targeted certain behaviors and restrict plaintiffs' recovery of punitive damages awarded against defendants for this behavior. For example, the Georgia punitive damages cap diverts seventy-five percent of punitive damages awards in product liability actions into a civil fund, because the risk of the defendant's actions in these cases falls not only on the plaintiff, but equally on society at large.⁵⁶ Still other legislatures have intended to decrease litigation by inhibiting the plaintiff's incentive to sue, or by depriving the plaintiff of the financial ability to sue.⁵⁷

(proposing that 90% of punitive damages awarded to plaintiffs in certain actions be paid into a Victim-Witness Assistance Fund) (defeated due to constitutional provisions).

54. See Grube, *supra* note 6, at 861-63. Grube discusses this type of statute at length, arguing that courts should find it constitutional. *Id.* at 867-74.

55. *Chadima v. National Fidelity Life Ins. Co.*, 848 F. Supp. 1418, 1421 n.1 (S.D. Iowa 1994) (citing *Spaur*, 510 N.W.2d at 869 and *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991)). *Chadima* held that a punitive damages award could be regulated by the state. *Id.* at 1421. The court reasoned that plaintiffs were the fortuitous beneficiaries of a windfall for deterrence that benefited society because they traditionally received the award simply because there was no one else to receive it. *Id.* at 1421 n.1. The statute advanced the legislature's goal to ensure that society would benefit from that award, and § 668A.1 of the Iowa Code was designed to divert a portion of the resulting punitive damages award to a public purpose. *Id.*; see also *Owen*, *supra* note 31, at 666-67 (stating that the awards can be put to public purpose); *Rustad & Koenig*, *supra* note 1, at 1323 n.275 (stating that the public benefit justifies fee shifting by redirecting portion of the award to the state); Grube, *supra* note 6, at 842-54 (stating that the plaintiff has no right to punitive damages, which can be put to better use). In fact, some legislatures view the payment of a portion of the award to the plaintiff as sufficient to reward the "public-spirited plaintiff." See *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 460 & n.1 (Miss. 1983) ("The policy underlying our rule on award of punitive damages obviously contemplates rewarding public spirited plaintiffs who will endure the slings and arrows of litigation to bring a wrongdoer to account."). But see 2 DOBBS, *supra* note 5, § 8.1(6) (stating that the caps may seriously undermine a plaintiff's ability to sue, and yet may leave the defendant sufficient profit to continue the harmful activity). See *infra* notes 212-26 and accompanying text for a discussion of the impact of these statutes on the purposes of punitive damages.

56. GA. CODE ANN. § 51-12-5.1(e)(2); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 638 (Ga. 1993).

57. 1 DOBBS, *supra* note 5, § 3.11(12) (discussing, in part, the de facto caps resulting from distributing a portion to a state fund). Compare *Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992) (per curiam) (stating that the deterrence of plaintiffs bringing punitive damages claims is a legitimate goal) with *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) (reaching the opposite conclusion).

Constitutional challenges to statutory restrictions on punitive damages essentially did not exist before 1987, although legislatures had often limited punitive damages awards in some way.⁵⁸ With the enactment of state tort reform statutes, however, constitutional challenges against limits on punitive damages increased.⁵⁹ As the following sections indicate, however, while early courts held that these statutes violated the federal or state constitutions, later courts have almost uniformly disagreed.

IV. THE INITIAL ATTACK: PUNITIVE DAMAGES RESTRICTIONS ARE UNCONSTITUTIONAL

Although initial forays by plaintiffs into the constitutional arena against statutory restrictions proved successful, later decisions indicated that these early victories would be short-lived.⁶⁰ Plaintiffs in these earlier cases, as in later ones, raised constitutional due process and equal protection challenges.⁶¹ The first two of these cases arose under statutes that claimed a percentage of punitive damages awards for a state fund; both courts held these statutes unconstitutional.⁶²

The first court, in *McBride v. General Motors Corp.*,⁶³ held not only that the plaintiff had a constitutional right to the award, but also that the effect of the statute bore no rational relation to its purpose.⁶⁴ In *McBride*, the plaintiffs argued that the Georgia statutory scheme violated their due process and equal protection rights under the state and federal constitutions.⁶⁵ The United States District Court for the

58. See *McBride*, 737 F. Supp. at 1564-65, 1566 (noting that the challenge to punitive damages restrictions in the Georgia Tort Reform Act was a matter of first impression, and the first and only such challenge then pending before any state or federal court). See *supra* note 29 and accompanying text for a discussion of the statutes enacted prior to the tort reforms of the late 1980s, which effectively capped the amount of punitive damages awards that could be assessed against defendants.

59. Plaintiffs brought at least 10 challenges against punitive damages restrictions. See *infra* notes 63-144 and accompanying text for a discussion of these cases.

60. See *infra* notes 83-109, 200-05, and accompanying text for a discussion of later cases that rejected the plaintiffs' challenges.

61. See *supra* notes 9-20 and accompanying text for a discussion of the constitutional challenges raised by plaintiffs.

62. For a discussion of these cases, see *infra* notes 63-82 and accompanying text.

63. 737 F. Supp. 1563 (M.D. Ga. 1990) (opinion and declaratory judgment).

64. *Id.* at 1579.

65. *Id.* at 1566-67. The plaintiffs successfully raised other constitutional challenges as well: that the statute violated the Georgia constitutional provision requiring that the title of the statute adequately describe the contents of the statute, *id.* at 1578, 1579 (citing GA. CONST. art. 3, § 5, para. 3); that subsection (e)(1) of § 51-12-5.1, concerning the limitation of one award per defendant action, violated equal protection and due process, *id.* at 1579; that § 51-12-5.1(e)(2) violated the Double Jeopardy Clause

Middle District of Georgia agreed and issued a declaratory judgment.⁶⁶ Section 51-12-5.1(e)(2) of the Georgia Code diverted seventy-five percent of each punitive damages award for product liability claims into a state fund, and also limited punitive damages awards in non-product liability cases to \$250,000.⁶⁷ The *McBride* court applied Georgia law on compensatory damages to establish that a plaintiff had a property right in punitive damages.⁶⁸ Accordingly, the court held that the legislature could not interfere with the punitive award, since, as compensation, it represented a property right protected by the due process clauses of both constitutions.⁶⁹

of the Fifth Amendment of the Federal Constitution, *id.*; and that the statute violated the Excessive Fines Clause of the Eighth Amendment of the Federal Constitution, *id.* While the questions of double jeopardy and excessive fines concern the defendants' rights, rather than the plaintiffs' rights, state statutes requiring payment to a state fund may well resurrect these claims on behalf of a defendant. See *infra* notes 184-94 and accompanying text for a discussion of the implications of these statutes on the prohibitions against double jeopardy and excessive fines under the Federal Constitution.

66. *McBride*, 737 F. Supp. at 1569. The *McBride* court examined, and found unconstitutional, the same statutory provision that the Supreme Court of Georgia later upheld in *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635 (Ga. 1993); *State v. Moseley*, 436 S.E.2d 632 (Ga. 1993) (all concurring); and *Bagley v. Shortt*, 410 S.E.2d 738 (Ga. 1991). See *infra* notes 95-110 and accompanying text for a discussion of these cases.

67. *McBride*, 737 F. Supp. at 1565. See also GA. CODE ANN. § 51-12-5.1(e)(2), which reads in pertinent part:

(2) Seventy-five percent of any amounts awarded under this subsection as punitive damages, less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge, shall be paid into the treasury of the state through the Office of Treasury and Fiscal Services. Upon issuance of judgment in such a case, the state shall have all rights due a judgment creditor until such judgment is satisfied and shall stand on equal footing with the plaintiff of the original case in securing a recovery after payment to the plaintiff of damages awarded other than as punitive damages. A judgment debtor may remit the state's proportional share of punitive damages to the clerk of the court in which the judgment was rendered. It shall be the duty of the clerk to pay over such amounts to the Office of Treasury and Fiscal Services within 60 days of receipt from the judgment debtor. This paragraph shall not be construed as making the state a party at interest and the sole right of the state is to the proceeds as provided in this paragraph.

Id. Because the plaintiffs in *McBride* brought suit against the automobile manufacturer for injuries and deaths sustained as a result of defective rear-seat lap belts in General Motors' automobiles, the action was a product liability action and governed by § 51-12-5.1(e)(1) & (2). *McBride*, 737 F. Supp. at 1565-66.

68. See *McBride*, 737 F. Supp. at 1572-73 (citing *Shessel v. Stroup*, 316 S.E.2d 155 (Ga. 1984), and *Jones v. Jones*, 376 S.E.2d 674 (Ga. 1989), for the proposition that a plaintiff has a vested property right in damages). Neither *Shessel* nor *Jones* addressed this issue: *Shessel* held unconstitutional a statute of limitations for a medical malpractice cause of action, and *Jones* held unconstitutional an interspousal immunity doctrine on equal protection grounds. See *id.*

69. *Id.*

Moreover, according to the *McBride* court, the purposes of containing liability insurance, creating revenue, or protecting business did not rationally relate to the statute's focus on product liability.⁷⁰ Instead, the court found that the legislation discouraged plaintiffs from suing corporations, in the court's eyes an illegitimate goal.⁷¹ The court held that the statute failed on equal protection grounds as well, because the statute arbitrarily discriminated between plaintiffs seeking punitive damages under product liability causes of action, who could retain only twenty-five percent of a punitive damages award, and other plaintiffs with no similar restriction.⁷²

The only state court decision to find unconstitutional a statute requiring payment of a portion of a punitive damages award to a state fund occurred in 1991, subsequent to *McBride*. The Colorado Supreme Court, in *Kirk v. Denver Publishing Co.*,⁷³ held that because punitive damages served a compensatory function, they vested entirely in the plaintiff upon entry of judgment, and could not be subsequently regulated by the legislature.⁷⁴ Section 13-21-102(4) of the Colorado Code redirected one-third of any exemplary damages award into a state general fund, expressly disavowing any state interest in the award prior to judgment.⁷⁵ According to the court, the statute represented a

70. *Id.* at 1569-70.

71. *Id.*

72. *Id.* at 1565, 1569. The court held that the provision requiring a percentage to be paid to the state arbitrarily discriminated between parties, thereby violating Article III, section V, paragraph III of the Georgia Constitution. *Id.* at 1569. The court also stated that the provision violated the Equal Protection Clause of the Federal Constitution, yet provided no additional reasoning. *Id.* at 1579.

73. 818 P.2d 262 (Colo. 1991) (en banc).

74. *Id.* at 265. The jury awarded Kirk \$288,000 in aggregate compensatory damages and exemplary damages of \$160,500 under his claim for malicious prosecution, which the court apportioned according to the Colorado statute. *Id.* at 262, 264. Plaintiff Kirk raised other constitutional challenges that the court did not reach, alleging that the statute: (a) violated procedural and substantive due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution and Article II, section 25 of the Colorado Constitution; (b) impaired the obligation of Kirk's contingency fee contract with his attorney and violated the constitutional proscription against the impairment of contracts under Article I, Section 10 of the United States Constitution and Article II, section 11 of the Colorado Constitution; and (c) contravened the separation of powers doctrine set forth in Article III of the Colorado Constitution. *Id.* at 265 n.3. In addition, because some of the plaintiff's claims arose after the effective date of § 13-21-102(1)(a) and § 13-21-102(3), which provided that the amount of exemplary damages could not exceed the amount of actual damages except under exceptional circumstances, the court held that part of the statute did not apply. *Id.* at 264 n.2.

75. See COLO. REV. STAT. ANN. § 13-21-102(4). This statute reads in pertinent part:

One-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund. The remaining two-thirds of such damages

taking of the plaintiffs' property without just compensation, a violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, section 15 of the Colorado Constitution.⁷⁶ Although the court recognized that Colorado permitted punitive damages only by statute, and only to punish malicious or wanton behavior,⁷⁷ the court explained that punitive damages awards also compensate plaintiffs for the time, effort, and expense of obtaining and actually collecting the judgment.⁷⁸ Because the statute asserted no interest in the award prior to judgment, the state could not claim that only two-thirds of the judgment actually vested in the plaintiff.⁷⁹ Instead, the entire award became the plaintiff's property at judgment, protected by the due process clauses of both constitutions.⁸⁰

No court subsequent to *Kirk* and *McBride* has held any statute regulating punitive damages unconstitutional on due process or equal protection grounds. Later Georgia case law explicitly rejected the federal district court's decision in *McBride*.⁸¹ Other courts have refused to apply the reasoning in *Kirk*, despite the similarity in the statutes requiring payment to state funds.⁸² The following Part explores the growing number of courts that reject the reasoning in *Kirk* and *McBride*, and examines their reasoning.

collected shall be paid to the injured party. 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.

Id.

76. *Kirk*, 818 P.2d at 263-64, 273.

77. *Id.* at 265-66 & n.4. Similarly, compensatory awards "perform[] the secondary function of discouraging 'a repetition of [the defendant's] wrongful conduct.'" *Id.* at 265 (citation omitted).

78. *Id.* at 265-67. See also *supra* note 75 for the Colorado statutory provision allocating the amount of punitive damages to the injured party.

79. *Kirk*, 818 P.2d at 266-67, 272. The court stated that "[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings . . . but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases." *Id.* at 268 (citation omitted) (quoting *McCullough v. Virginia*, 172 U.S. 102 (1898)). The court drew a parallel to a United States Supreme Court decision from 1898, which held that a judgment validating certain coupon bonds held by the plaintiff could not be invalidated because the statute giving rise to that award was later repealed. *Kirk*, 818 P.2d at 268 & n.7 (discussing *McCullough*, 172 U.S. 102). Although that decision involved the retroactivity of a statute's effect, and not the question of the state's power to regulate an award of punitive damages, the *Kirk* court found the early decision controlling. *Id.* at 267-68 & n.7.

80. *Id.* at 273.

81. See *infra* notes 87-110 and accompanying text for a discussion of these cases.

82. See *infra* notes 104, 111, 117-20, and accompanying text.

V. THE TIDE TURNS: PUNITIVE DAMAGES RESTRICTIONS ARE CONSTITUTIONAL

After *Kirk* and *McBride*, the judiciary began to defer to the legislative will, and at least seven subsequent courts upheld the constitutionality of statutory restrictions.⁸³ Although the threshold issue concerned whether the plaintiff had a vested or constitutional right to receive punitive damages, post-*McBride* and *Kirk* courts agreed that no such right existed.⁸⁴ Instead, courts more carefully examined the legitimacy of the purposes of the legislation or the procedure by which the legislature restricted the award.⁸⁵

A. Plaintiffs Forced to Yield Ground

As in *Kirk* and *McBride*, most of the challenges during this time focused on statutes that diverted a percentage of the punitive damages award to the state.⁸⁶ Typical of the case law which decided that the plaintiff had no cognizable right to punitive damages was the 1992 decision by the Supreme Court of Florida, *Gordon v. State*.⁸⁷ In *Gordon*, the court held that section 768.73(2)(b) of the Florida Code, which provided that the state had an interest in sixty percent of the punitive damages awards in personal injury or wrongful death causes of action, did not violate the plaintiff's due process rights.⁸⁸ The court

83. See *Wackenhut Applied Technologies Ctr., Inc. v. Sygnatron Protection Sys., Inc.*, 979 F.2d 980 (4th Cir. 1992) (finding the Virginia statute constitutional); *Gordon v. State*, 608 So. 2d 800 (Fla. 1992) (per curiam), cert. denied, 113 S. Ct. 1647 (1993) (finding the Florida statute constitutional); *Mack Trucks*, 436 S.E.2d 635 (finding the Georgia statute constitutional); *Moseley*, 436 S.E.2d 632 (finding the Georgia statute constitutional under the Takings Clause, the right to jury trial, and the right of access to the courts); *Bagley*, 410 S.E.2d 738 (finding the Georgia statute constitutional); *Shepherd Components, Inc. v. Petrides-Donohue Assocs., Inc.*, 473 N.W.2d 612 (Iowa 1991) (finding the Iowa statute constitutional); *Smith v. Printup*, 866 P.2d 985 (Kan. 1993) (finding the Kansas statute constitutional). But see *infra* notes 121-42 and accompanying text for a discussion of *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993), the only case after *Kirk* and *McBride* to find a statute regulating punitive damages unconstitutional.

84. See *infra* notes 87-110 and accompanying text.

85. See, e.g., *Wackenhut*, 979 F.2d at 985 (stating the parties stipulated that the statute is economic regulation); *Mack Trucks*, 436 S.E.2d at 638 (determining that receipt of punitive damages is not a right of plaintiff). See *infra* part VI.A.2 for a discussion of rational relation analysis.

86. See *infra* app. A for a summary of these cases.

87. 608 So. 2d 800 (Fla. 1992) (per curiam), cert. denied, 113 S. Ct. 1647 (1993).

88. *Id.* at 801. In *Gordon*, a K-Mart employee falsely imprisoned and battered the plaintiff; the plaintiff received a jury verdict against K-Mart for \$72,500 in compensatory damages and \$512,600 in punitive damages. *Id.* The court affirmed the awards. *Id.* The Florida Supreme Court quoted FLA. STAT. ANN. § 768.73(2)(b) (Supp. 1986), which read:

drew a distinction between compensatory and punitive damages, noting that while plaintiffs have a constitutional right to compensatory damages, they have no cognizable, protected right to punitive damages.⁸⁹ Absent that right, a plaintiff could not assert a property interest in punitive damages until after a judgment was rendered, and the legislature could regulate or place conditions on the recovery.⁹⁰ Because the statute bore a rational relation to the legislative purpose of allotting to "the public weal a portion of damages designed to deter future harm to the public and to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney," the court found it constitutional.⁹¹

Other courts agreed with *Gordon*. For example, the Supreme Court of Iowa held, in *Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates*,⁹² that the distribution of seventy-five percent of a punitive damages award into a civil reparation fund pursuant to section 668A.1(2)(b) of the Iowa Code did not amount to an unfair taking under either the Fourteenth Amendment of the United States Constitution or the Iowa Constitution.⁹³ Like *Gordon*, the *Shepherd Components* court held that the plaintiff had no right to punitive damages until entry of the judgment.⁹⁴ Furthermore, in *Mack Trucks*,

If the cause of action was based on personal injury or wrongful death, 60 percent of the [punitive damages] award shall be payable to the Public Medical Assistance Trust Fund . . . ; otherwise 60 percent of the award shall be payable to the General Revenue Fund.

Id. (amended 1994). This statute was enacted as part of the Tort Reform and Insurance Act of 1986. *Gordon*, 608 So. 2d at 801. The statute was subsequently amended to permit the state to divert 35% of the award into state funds. FLA. STAT. ANN. § 768.73(2)(b).

89. *Gordon*, 608 So. 2d at 801-02.

90. *Id.*

91. *Id.* at 802.

92. 473 N.W.2d 612 (Iowa 1991).

93. *Id.* at 619.

94. *Id.*; see also IOWA CODE ANN. § 668A.1(2)(a) & (b), which reads in pertinent part:

a. If the answer or finding pursuant to subsection 1, paragraph "b", is affirmative [that the act was directed at the plaintiff], the full amount of the punitive or exemplary damages awarded shall be paid to the claimant.

b. If the answer or finding pursuant to subsection 1, paragraph "b", is negative [that the act was not directed specifically at the plaintiff], after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator. Funds placed in the civil reparations trust shall be under the control and supervision of the executive council, and shall be disbursed only for purposes of indigent civil litigation programs or insurance assistance programs.

*Inc. v. Conkle*⁹⁵ and *State v. Moseley*,⁹⁶ the Supreme Court of Georgia held constitutional the similar section 51-12-5.1 of the Georgia Code.⁹⁷ The court stated that plaintiffs had no vested right in the award, and whether or not they received the full award was insignificant.⁹⁸ As in *Gordon*, the real question concerned whether the statute bore a rational relation to its purpose.⁹⁹ Since the clearly stated purpose of the statute was to punish and deter the defendant, and not to provide compensation or a windfall to an individual plaintiff, the legislation bore a reasonable relation to its legitimate purpose, and the court upheld it as constitutional.¹⁰⁰

Challenges that claimed the statutes violated plaintiffs' equal protection and trial by jury rights fared no better. For example, although the Georgia Supreme Court in *Mack Trucks* agreed with the plaintiff that a statutory classification had indeed occurred under section 51-12-5.1 of the Georgia Code, it held the statute constitutional, stating that the statute treated all similarly situated parties equally.¹⁰¹ That same

Id. In *Shepherd Components*, the trial court entered a judgment against one of two co-defendants for \$26,000 in punitive damages, and allocated 75% of that award to the civil reparation trust fund pursuant to § 668A.1(2)(b). *Shepherd Components*, 473 N.W.2d at 618. The court stated that the statute did not violate the plaintiff's due process rights, for the plaintiff had no vested right in a particular measure of damages or to any portion of the damages prior to the entry of a judgment. *Id.* at 619 (citing *American Bank & Trust Co. v. Community Hosp.*, 683 P.2d 670, 676 (Cal. 1984); *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 504 (Mont. 1989); *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656, 660-61 (Mo. 1986)); *see also* *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 868 (Iowa 1994) (affirming *Shepherd Components*' reasoning).

95. 436 S.E.2d 635 (Ga. 1993).

96. 436 S.E.2d 632 (Ga. 1993) (all concurring), *cert. denied*, 114 S. Ct. 2101 (1994).

97. *Mack Trucks*, 436 S.E.2d at 637-39; *Moseley*, 436 S.E.2d at 634. Prior to these decisions, the federal district court in *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990), held this section unconstitutional. *See supra* notes 63-72 and accompanying text for a discussion of *McBride*.

98. *Mack Trucks*, 436 S.E.2d at 638-39.

99. *See, e.g., id.* at 638-39 (holding the statute bore a reasonable relation to its purpose). Like the Supreme Court of Florida's decision in *Gordon*, the *Mack Trucks* court reasoned that the plaintiff had no vested property right in the amount of punitive damages, and as a result, the legislature could lawfully limit the amount of punitive damages awarded. *Id.* Moreover, the *Mack Trucks* court stated that because the plaintiff had no right to punitive damages, the statute need pass only the rational relation test and rest "upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 638 (quoting *Allrid v. Emory Univ.*, 285 N.E.2d 521 (Ga. 1982)).

100. *Id.* at 639.

101. *Id.* at 639. Under § 51-12-5.1, the state would receive 75% of punitive damages awards assessed against product liability defendants. *See* GA. CODE ANN. § 51-12-5.1. *See supra* note 67 for the text of § 51-12-5.1(e)(2). The *Mack Trucks* court reasoned that the risk of the defendants' actions fell not only on the plaintiff, but on society at large, and by placing the restriction on product liability defendants, the legislature distributed

day, in *Moseley*, the court again upheld the constitutionality of section 51-12-5.1, this time holding that it did not violate the plaintiffs' right to a trial by jury.¹⁰² According to the *Moseley* court, the jury determined the amount it believed would punish the defendant, and the statute entitled the plaintiffs to twenty-five percent of that award; thus, the plaintiffs received a jury trial on the amount to which they were entitled.¹⁰³ Similarly, the Supreme Court of Florida in *Gordon* summarily disposed of the plaintiff's claim that the restriction on his receipt of the award violated his constitutional right to a trial by jury, finding it sufficient to say that the statute was constitutional.¹⁰⁴

Attacks on statutory caps, although relatively rare, also faced defeat. The Supreme Court of Georgia initially held, in *Bagley v. Shortt*,¹⁰⁵ that the plaintiff did not have a right to receive punitive damages, and that if the legislature could constitutionally eliminate punitive damages, it could constitutionally limit them as well.¹⁰⁶ Two years later, in *Mack Trucks*, the Georgia Supreme Court confirmed *Bagley* in dicta, adding that public policy reasons dictated that a cap be placed on punitive damages.¹⁰⁷ The Fourth Circuit Court of Appeals implicitly agreed with *Bagley* in its 1992 decision, *Wackenhut Applied Tech-*

the punitive damages to all citizens of the state because they were all at equal risk. *Mack Trucks*, 436 S.E.2d at 638; see also *Shepherd Components*, 473 N.W.2d at 619 (holding that the Iowa statute did not violate equal protection).

102. *Moseley*, 436 S.E.2d at 634.

103. *Id.* Furthermore, even if the plaintiff had a common-law right to have a jury determine the size of the punitive damages award, the General Assembly could abrogate that right. *Id.* (citing *Teasley v. Mathis*, 255 S.E.2d 57 (Ga. 1979)). The plaintiff also argued that § 51-12-5.1(e)(2) interfered with the right to access to the court under the Georgia Constitution, but the *Moseley* court again disagreed, holding that the constitutional provision was not created to provide an expansive right of access to the courts, but only to provide a "right of choice" (between self-representation and representation by counsel.)" *Id.* (quoting *Nelms v. Georgian Manor Ass'n*, 321 S.E.2d 330, 333 (Ga. 1984)).

104. *Gordon*, 608 So. 2d at 802. The dissent in *Gordon* argued that the payment to a state fund would violate the plaintiff's right to a trial by jury granted by the Florida Constitution. See *id.* at 804 (Shaw, J., concurring in part & dissenting in part). At least one court has held that the plaintiff does not even have a right to have a jury consider the question of punitive damages at all. See *infra* notes 200-05 and accompanying text for a discussion of *Printup*, 866 P.2d 985.

105. 410 S.E.2d 738 (Ga. 1991).

106. *Id.* at 739 (citing *Teasley*, 255 S.E.2d 57, which held that the elimination of exemplary damages under no-fault insurance law did not violate the plaintiff's rights to due process, equal protection, and access to the courts). Accordingly, § 51-12-5.1(g) of the Georgia Code, which capped punitive damages at \$250,000 against defendants who were not defending a product liability action, did not violate the plaintiffs' equal protection rights. See *id.* at 739.

107. *Mack Trucks*, 436 S.E.2d at 639.

nologies Center, Inc. v. Sygnatron Protection Systems, Inc.,¹⁰⁸ in which it upheld the constitutionality of Virginia's statutory punitive damages cap.¹⁰⁹

B. *Kirk and McBride Fall by the Wayside*

The numerous decisions subsequent to *McBride* and *Kirk* undermine the precedential value of these early decisions. For example, in *Bagley, Mack Trucks*, and *Moseley*, the Supreme Court of Georgia completely rejected the district court's reasoning in *McBride*, finding the Georgia punitive damages cap constitutional in each case.¹¹⁰ *Kirk*,

108. 979 F.2d 980 (4th Cir. 1992).

109. *Id.* at 985. The *Wackenhut* court held that § 8.01-38-1 of the Virginia Code, which placed an absolute \$350,000 cap on the amount of punitive damages that could be awarded against a defendant, did not violate the due process guarantees of the Virginia and United States Constitutions. *Id.* Instead, the punitive damages cap limited the jury's discretion, thus effectuating the legislature's purpose of ensuring that punitive damages awards struck a balance between punishing and deterring defendants and preventing awards that would burden the state's economy. *Id.* Since the parties stipulated that the legislature enacted the statutory cap as an economic regulation, the court examined it under the rational relation test, and the issue of a plaintiff's right to punitive damages never arose. *Id.* The court additionally noted that other courts have routinely rejected substantive due process challenges to statutory caps regulating non-economic or punitive damages awards. *Id.* See VA. CODE ANN. § 8.01-38.1, which reads in pertinent part:

In any action accruing on or after July 1, 1988, including an action for medical malpractice under Chapter 21.1 (§ 8.01-581.1 et seq.), the total amount awarded for punitive damages against all defendants found to be liable shall be determined by the trier of fact. In no event shall the total amount awarded for punitive damages exceed \$350,000. The jury shall not be advised of the limitation prescribed by this section. However, if a jury returns a verdict for punitive damages in excess of the maximum amount specified in this section, the judge shall reduce the award and enter judgment for such damages in the maximum amount provided by this section.

Id.

One of the issues in *Wackenhut* concerned whether the statute applied to unintentional as well as intentional causes of action. 979 F.2d at 984. The plaintiff, which supplied security systems to government and commercial clients, sued De La Rue and Sygnatron for breach of contract and a number of tortious interferences with its business relationships. *Id.* at 983. The jury awarded \$100,000 in compensatory damages and \$1,000,000 in punitive damages to the plaintiff. *Id.* On the defendant's motion, the court reduced the punitive damages award to \$350,000 pursuant to the Virginia Code. *Id.* On appeal, the plaintiff argued that the legislature intended this section to apply only to unintentional torts. *Id.* at 984. The court held, however, that the statutory language "in any action" meant exactly that, and the cap applied to this case. *Id.*

110. See *supra* notes 95-103, 105-07, and accompanying text for a discussion of why *Bagley, Mack Trucks*, and *Moseley* disagreed with *McBride*; see also *supra* notes 63-72 and accompanying text for a discussion of *McBride*. Although the district court in *Chadima v. National Fidelity Life Ins. Co.*, 848 F. Supp. 1418, 1421 n.1 (S.D. Iowa 1994), attempted to harmonize these cases by stating that *McBride* and *Mack Trucks* decided different constitutional issues, this is not quite true. The *Chadima* decision

although still good law in Colorado, is of questionable persuasive authority in other jurisdictions in light of later case law interpreting similar statutes.¹¹¹

Kirk and *McBride* incorrectly found a right to punitive damages—where none existed under the common or statutory law—by impermissibly drawing a parallel between compensatory and punitive damages. For example, the *Kirk* court reasoned that because the plaintiff had a constitutional right to compensation, and because punitive damages served a compensatory function, the punitive damages award became a property right of the plaintiff upon judgment, like compensatory damages.¹¹² This interpretation clearly contravened not only the intent of the Colorado General Assembly, but also the court's own previous interpretation of the purposes of punitive damages.¹¹³ *McBride* also confused the question whether the plaintiff had a property interest in a punitive damages award.¹¹⁴ It, like *Kirk*, misapplied compensatory damages concepts to punitive damages awards: "awarding *compensation* for human pain and suffering and the *economic losses* associated with such injuries . . . [for the purpose of] *remedying* . . ."¹¹⁵

states that *McBride* examined the statute under the Excessive Fines Clause of the Constitution. *Id.* Actually, the *McBride* court examined a multitude of constitutional challenges including those raised in *Mack Trucks*. See *supra* notes 63-72 (discussing *McBride*); see also *Pulla v. Amoco Oil Co.*, No. 4-91-CV-90085, 1994 WL 622135 (S.D. Iowa Nov. 9, 1994) (apparently relying on *Chadima* for the same unclear proposition).

111. See *supra* notes 87-100 and *infra* notes 119-20 and accompanying text for a discussion of those cases that have disagreed with *Kirk*; see also *supra* notes 73-80 and accompanying text for a discussion of *Kirk*.

112. *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 267 & n.7, 272 (Colo. 1991) (en banc).

113. See *Frick v. Abell*, 602 P.2d 852, 853-54 (Colo. 1979) (en banc) (stating that punitive damages are to punish and deter) (citing *Arkansas Valley Alfalfa Mills, Inc. v. Day*, 263 P.2d 815 (Colo. 1953)); see also *Malandris v. Merrill Lynch*, 703 F.2d 1152, 1177 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983) (stating that Colorado recognizes that the purpose of punitive damages is to punish and deter). At one time, punitive damages were awarded under the common law of Colorado, but the Supreme Court of Colorado struck down this rule in 1884, forbidding punitive damages awards altogether. *Kirk*, 818 P.2d at 266 & n.5 (citing *Murphy v. Hobbs*, 5 Pa. 119 (1884)). The Colorado General Assembly reacted to *Murphy*, however, by enacting legislation which permitted punitive damages where defendants acted with "fraud, malice or insult, or a wanton and reckless disregard for the party's rights and feelings." *Id.* (quoting 1889 Colo. Sess. Laws 64-65). Presumably, if the court could abolish punitive damages, then the award could not represent constitutionally protected compensation.

114. *McBride*, 737 F. Supp. at 1574-75. However, the court never seriously looked at whether a quid pro quo existed. See *id.* at 1575 (examining examples of other quid pro quos, and simply dismissing the state's proffered explanation).

115. See *id.* at 1579 (emphasis added). The *McBride* court erroneously refused to apply the Georgia Supreme Court decisions *Kelly v. Hall*, 12 S.E.2d 881 (Ga. 1941) and *Teasley*, 255 S.E.2d 57. *McBride*, 737 F. Supp. at 1573-74; see also *id.* at 1574-76

Neither Colorado nor Georgia had previously recognized a compensatory role for punitive damages, however, and the courts' reasoning simply misinterpreted those jurisdictions' laws.¹¹⁶

Alternatively, *Kirk* may be an aberration simply because of semantics, rather than evidence of any constitutional right to receive punitive damages. The language in section 13-21-102(4) of the Colorado Code disclaimed any interest in a punitive damages award until after the entry of judgment.¹¹⁷ The *Kirk* court determined that the legislature could not step in after judgment, as the statute provided, since the entire award vested in the plaintiff at the time of judgment.¹¹⁸ By contrast, the Florida statute held constitutional in *Gordon* simply stated that a portion of the award "shall be payable" to the State of Florida, and did not specify that the state had no interest prior to judgment.¹¹⁹

(rejecting *Teasley*). Later Georgia courts agreed with the defendant, however, relying on *Kelly* to establish the general rule that there is no vested right in a claim for damages until the court enters judgment. See *Mack Trucks*, 436 S.E.2d at 639. Moreover, both *Mack Trucks* and *Bagley* cited *Teasley* for the proposition that if the legislature can eliminate punitive damages, it can certainly regulate them. See *id.* at 638 (*Teasley* stands for proposition that there is no constitutional right to punitive damages); *Bagley*, 410 S.E.2d at 739 (arguing that *Teasley* stands for proposition that if the legislature can eliminate punitive damages it can also regulate them); see also *Teasley*, 255 S.E.2d at 58-59 (holding that the elimination of exemplary damages under no-fault insurance does not violate due process, equal protection, or right of access to the courts). *McBride* distinguished *Teasley* on the grounds that the Georgia no-fault act at issue in that case provided the plaintiff with a quid pro quo absent in the punitive damages statute: no-fault liability. *McBride*, 737 F. Supp. at 1575.

116. See *supra* notes 113 and 115 for a discussion of the case law in Colorado and Georgia that establishes that plaintiffs have no right to punitive damages. See also *Kirk*, 818 P.2d at 274-75 (Rovira, C.J., & Lohr, J., dissenting) (arguing that although two remedies are interrelated, exemplary damages are unique and subject to statutory restrictions).

117. See *infra* note 119 for the text of this statute and the comparison of similar language held constitutional in a Florida statute.

118. *Kirk*, 818 P.2d at 267 & n.7, 270-71.

119. *Gordon v. State*, 608 So. 2d 800, 801 (Fla. 1992). Compare FLA. STAT. ANN. § 768.73(2)(b) (Supp. 1986) (amended 1994, see *supra* note 88):

If the cause of action was based on personal injury or wrongful death, 60 percent of the award shall be payable to the Public Medical Assistance Trust Fund created in § 409.2662; otherwise, 60 percent of the award shall be payable to the General Revenue Fund.

Id. (emphasis added) with COLO. REV. STAT. ANN. § 13-21-102(4), which reads in pertinent part:

One-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund. The remaining two-thirds of such damages collected shall be paid to the injured party. 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.

Id. (emphasis added).

Quite possibly, had the Colorado legislature not disclaimed any interest in the award prior to judgment, the *Kirk* court might not have found a constitutional violation.¹²⁰

C. *Henderson v. Alabama Power Company: The Recent
Think in the Legislative Armor*

Only one court since *McBride* and *Kirk* has found a statute regulating the award of punitive damages unconstitutional. In *Henderson v. Alabama Power Co.*,¹²¹ the Alabama Supreme Court held that section 6-11-21 of the Alabama Code, which placed a flat cap on punitive damages at \$250,000, violated the plaintiff's common-law right to a trial by jury.¹²² In *Henderson*, a jury awarded punitive damages of \$500,000 against a defendant, in addition to compensatory damages.¹²³ The trial court reviewed the jury award and determined that it was not excessive.¹²⁴ The court nevertheless reduced the punitive

120. However, the dispute may instead concern whether the entire award vests in the plaintiff, or whether only a portion of the award does so. If the court believed that the entire award vests in the plaintiff, then the *Kirk* decision is difficult to square with the later decisions such as *Gordon* or *Mack Trucks*, which held that the entire award never vests in the plaintiff, but rather only that portion to which the plaintiff is entitled. See *supra* note 52 for a discussion of the difficulty in drafting these statutes.

More recently, in *Finley v. Empiregas Inc.*, 28 F.3d 782 (8th Cir. 1994), the Court of Appeals for the Eighth Circuit compared § 537.675(3) of the Missouri Code against § 768.73(2)(b) of the Florida Code to determine if Missouri had a present interest in collecting its percentage of the punitive damages award. *Id.* at 785. The court did not reach the constitutional issue because it found the language of the statute dispositive. The court drew a distinction between the Florida language, which stated that a portion of the award "shall be payable" to the State of Florida, and § 537.675(2) of the Missouri Code, which stated that a portion of the punitive damages award "shall be deemed rendered in favor of the state of Missouri." *Id.* (emphasis in *Finley*). According to the Eighth Circuit, the term "deeming" had no procedure in federal court for execution. *Id.* Therefore, the State of Missouri had no present interest of record in the underlying judgment upon which to execute. *Id.* The plaintiff in *Finley* argued that the state statute could not be applied in federal court because of the Supremacy Clause, but the court did not reach this issue because it found that the Missouri legislature did not intend its statute to apply in federal court. *Id.* It is possible, therefore, that the *Kirk* court could have held the statute unconstitutional simply because the legislature had worded it incorrectly by specifically interfering with a post-judgment award.

121. 627 So. 2d 878 (Ala. 1993).

122. *Id.* at 893-94. See ALA. CODE § 6-11-21 (reading in pertinent part: "An award of punitive damages shall not exceed \$250,000, unless it is based upon one or more of the following [exceptions]: . . .").

123. *Henderson*, 627 So. 2d at 880. At trial, the plaintiff, a child who had suffered burns while climbing on a transmission tower, brought suit against the Alabama Power Company on negligence and wantonness claims. *Id.*

124. *Id.* Alabama law requires post-verdict review by the trial and appellate courts, a practice approved by the Supreme Court in *Pacific Mut. Ins. Co. v. Haslip*, 499 U.S. 1 (1991). See ALA. CODE § 6-11-23 (requiring trial court to conduct post-verdict hearing

damages award to the \$250,000 statutory cap.¹²⁵

On appeal, the Alabama Supreme Court held that although the plaintiff had no constitutional right to punitive damages under the Alabama Constitution, he did have the common-law right to have a jury determine the amount of punitive damages—a right that had existed since the adoption of that constitution.¹²⁶ Furthermore, the court reasoned that this historical, constitutionally preserved function could not be taken away by the legislature, but only by an amendment to the constitution itself.¹²⁷ Accordingly, the statutory cap limiting recovery to \$250,000 violated the plaintiff's right to a trial by jury.¹²⁸

Despite this apparent return to the *Kirk* and *McBride* camp, *Henderson* makes no sense. For example, the *Henderson* court failed to explain why the trial judge could reduce a jury award without violating the jury's function, while the legislature could not.¹²⁹ This post-verdict reduction of jury awards by judges, termed a remittitur, does the very thing that the *Henderson* court found unconstitutional: it changes the jury award to what a third party believes fair.¹³⁰ Ac-

concerning punitive damages and to adjust or decrease award if appropriate in light of all evidence).

125. *Henderson*, 627 So. 2d at 880. See *supra* note 122 for the text of Alabama's statute limiting punitive damages.

126. *Henderson*, 627 So. 2d at 884, 888-89. The Alabama Constitution provides "[t]hat the right of trial by jury shall remain inviolate." *Id.* at 884 (quoting ALA. CONST. of 1901 art. I, § 11). Even though Alabama law permitted punitive damages only by statute, the majority noted that once punitive damages were available, it was exclusively the jury's discretion whether they would award punitive damages and if so, what amount. *Id.* at 886-87; see also *id.* at 901 (Maddox, J., concurring in part & dissenting in part) (noting that the legislature has the power to remit punitive damages in light of the Supreme Court and the Alabama courts' concern regarding excessive verdicts); *id.* at 905 (Houston, J., dissenting) (stating that the legislature was empowered by the constitution to enact a statute regulating punitive damages awards). Just as a trial court could not insist that a given jury "should" award punitive damages under Alabama law, the legislature could not prohibit juries from awarding an amount commensurate to the wrongdoing shown by the evidence in a particular case. *Id.* at 886-87. Alternatively, the court implied that any statute which *required* a punitive damages award would violate the *defendant's* right to a trial by jury. See *id.* at 886.

127. *Id.* at 891, 893.

128. *Id.* at 893-94.

129. See *supra* notes 122-28 and accompanying text for a discussion of the Alabama statute. The Alabama Supreme Court exacerbated this dilemma in its subsequent decision, *Bozeman v. Busby*, 639 So. 2d 501 (Ala. 1994), where it held that the plaintiff's right to a trial by jury forbids a trial judge from increasing an award, although the provision did not forbid the judge from reducing the award. *Id.* at 502.

130. Remittitur is a common practice; courts have traditionally reduced jury awards that they believe are excessive. See *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335-38 (1994) (acknowledging that courts will reduce jury awards that appear excessive); *Haslip*, 499 U.S. at 20-22 (approving Alabama's post-verdict mechanism to reduce jury awards that appear excessive). See generally Irene D. Sann, *Remittiturs (and Additurs) in*

cordingly, *Henderson* stands in stark contrast to the court's judicial procedures to reduce unfair jury awards.¹³¹

Apparently recognizing this dichotomy, the Alabama Supreme Court stated, in *Bozeman v. Busby*,¹³² that trial judges could reduce jury awards because they traditionally had done so.¹³³ The *Bozeman* court's reasoning, of course, implied that the legislature never had this traditional power. But legislative restrictions on punitive awards also existed at the time of the adoption of the Alabama Constitution.¹³⁴ Because of the historical ability of both the judiciary and legislature to change or limit a punitive damages award, it is difficult to find merit in the court's decision that tradition prohibited the legislature from regulating punitive damages awards, but not the judiciary.¹³⁵

In fact, the issue in *Henderson* may well be a question concerning the separation of powers between the legislature and the judiciary, and not a question of the constitutional rights of the plaintiff at all. The Alabama Supreme Court decided *Henderson* after the United States Supreme Court decided *Haslip*,¹³⁶ in which the Court held that Alabama's post-verdict scheme adequately protected the due process rights of defendants.¹³⁷ It is quite possible that the *Henderson* court,

the Federal Courts: An Evaluation With Suggested Alternatives, 38 CASE W. RES. L. REV. 157 (1987) (discussing the history and usage of remittitur, by which courts reduce jury awards that appear irrational or unfair); Irene D. Sann, Note, *Remittitur Practice in the Federal Courts*, 76 COLUM. L. REV. 299 (1976) (same).

131. Compare *Henderson*, 627 So. 2d at 884, 888-89 (stating that a statutory cap violates a trial by jury) and *Bozeman*, 639 So. 2d at 502 (finding that additur violates trial by jury) with ALA. CODE § 6-11-23 (declaring that judge is to adjust award if excessive) and *Haslip*, 499 U.S. 1 (approving a post-verdict review to adjust awards downward). Despite the *Henderson* court's assumption that the Alabama practice was constitutional, the Supreme Court has never examined whether the Seventh Amendment allows remittitur. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 n.25 (1989).

132. 639 So. 2d 501 (Ala. 1994).

133. *Id.* at 502-03. The court reasoned that the trial court reduced jury awards that violated the due process rights of the defendant. *Id.* Interestingly, the United States Supreme Court did not decide that due process required that punitive damages awards be reasonable until 1991. See *Haslip*, 499 U.S. at 18 (holding that due process requires that punitive damages awards be reasonable).

134. *Henderson*, 627 So. 2d at 904-06 (Houston, J., dissenting) (explaining that while trial by jury is a fundamental concept of individual liberty, restrictions on punitive damages awards do not abrogate this right, because the legislature has had power to regulate awards since the inception of Alabama Constitution); see also *Honda*, 114 S. Ct. at 2342 (reporting that judicial review of jury awards existed at the time of the adoption of the Fourteenth Amendment to the United States Constitution).

135. See *Honda*, 114 S. Ct. at 2342 & n.12.

136. 499 U.S. 1 (1991).

137. *Id.* at 23-24. See *supra* notes 32-36 and *infra* note 160, for a discussion of *Haslip*.

knowing that the Supreme Court in *Haslip* had approved of Alabama's common law concerning its assessment of the fairness of punitive damages awards, simply saw no reason to let the legislature take that control out of their own hands.¹³⁸ The *Haslip* Court held only that the Alabama procedure, as it existed then, did not violate the Due Process Clause.¹³⁹ But that opinion also noted that Alabama had passed a statute regulating the awards as well.¹⁴⁰ It is perhaps for this reason that the *Henderson* court so carefully found a right under the state constitution, and not under the federal one.¹⁴¹

Despite the preliminary victories against limitations on punitive damages in *McBride*, *Kirk*, and *Henderson*, courts deciding the constitutionality on due process, equal protection, and trial by jury grounds now generally agree that no general constitutional right to punitive damages exists.¹⁴² Future courts, however, must resolve whether statutory restrictions bear a rational relationship to the purpose of the legislation under either the state or federal constitutional provisions.¹⁴³ In addition, these courts must address whether the statute

138. See *Henderson*, 627 So. 2d at 894, where the court discusses the post-verdict review factors approved by the Supreme Court in *Haslip*, 499 U.S. at 21-22, and justifies its holding that the statute is unconstitutional because the Alabama legislature could not give the particularized verdicts that a jury could give.

139. *Honda*, 114 S. Ct. at 2346-47 (Ginsburg, J., dissenting).

140. *Haslip*, 499 U.S. at 20 n.9; see also *Henderson*, 627 So. 2d at 900-01 (Maddox, J., concurring in part & dissenting in part) (arguing that *Haslip*'s citation to the new statute indicated the Court's approval).

141. See *Henderson*, 627 So. 2d at 885 (deciding the issue under the Alabama Constitution only); see also *id.* at 895 (Maddox, J., concurring in part & dissenting in part) (arguing that the statute concerns federal and state constitutional rights and federal issues should have been decided).

142. See, e.g., *Wackenhut Applied Technologies Ctr., Inc. v. Sygnetron Protection Sys., Inc.*, 979 F.2d 980, 985 (4th Cir. 1992) (citing *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83-84 (1978)) (noting that the parties stipulated that the cap on punitive damages was an economic regulation); *Gordon*, 608 So. 2d at 801-02 (holding that a plaintiff has no right to recover punitive damages, nor a property right until judgment is rendered); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 638 (Ga. 1993) (holding that a plaintiff has no constitutional right to an award of punitive damages). Only *Kirk* recognized a "right" to punitive damages by virtue of the award vesting in the plaintiff. See *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 273 (Colo. 1991) (en banc) (noting that a judgment represents a property right held by the plaintiff as a judgment creditor). Many commentators agree that the plaintiff has no right to punitive damages. See, e.g., Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 292 (1983) (arguing that plaintiffs have no right to punitive damages); Grube, *supra* note 6, at 873-74 (same).

143. See *supra* notes 10-16 and accompanying text for a discussion of the due process and equal protection challenges made by plaintiffs; see *infra* notes 145-97 and accompanying text for a discussion of the probable resolution of this issue in future decisions.

violates a plaintiff's right to a trial by jury.¹⁴⁴ The following Part examines the prospects of future constitutional challenges to statutes restricting the award of punitive damages in both state and federal courts.

VI. THE FUTURE OF THE CAMPAIGN: WILL COURTS CONTINUE TO AVOID CONFLICT WITH STATE LEGISLATURES?

The future of state statutory restrictions on punitive damages depends entirely on whether the courts will continue to defer to state legislatures. Such an alliance will most likely continue for several reasons. First, although plaintiffs continue to raise challenges concerning their "right" to punitive damages, future courts will not seriously entertain them.¹⁴⁵ Second, most statutes regulating punitive damages awards bear a rational relation to a legitimate state goal.¹⁴⁶ Third, although state constitutional guarantees of a trial by jury may appear to provide plaintiffs with a surefire method of bypassing the statutory restrictions, future courts will be reluctant to find the ephemeral right to a jury award of punitive damages.¹⁴⁷ Finally, underpinning each decision lies the courts' implicit recognition of the legislative power to subordinate the traditional purposes of punitive damages to the social need to rein them in.¹⁴⁸

A. *The Federal Constitution Provides Ammunition Against Due Process and Equal Protection Challenges*

Most equal protection and due process challenges to the statutes restricting awards of punitive damages arise under the Fifth and Fourteenth Amendments to the United States Constitution.¹⁴⁹ Courts have held that a plaintiff has no constitutional right to a punitive damages award prior to the entry of judgment, under either the state or the federal constitution.¹⁵⁰ In light of its precedent and current com-

144. See *supra* notes 17-20 and accompanying text for a discussion of the trial by jury challenges made by plaintiffs; see *infra* notes 198-208 and accompanying text for a discussion of the probable resolution of this issue in future decisions.

145. See *infra* notes 149-68 and accompanying text.

146. See *infra* part VI.A.2-3.

147. See *infra* part VI.B.

148. See *infra* part VI.C.

149. See *supra* notes 10-16, 60-101, and accompanying text; see also 1 SCHLUETER & REDDEN, *supra* note 9, § 3.12. Although plaintiffs raising these claims often also do so under the corresponding state constitutional provision, no court considering this challenge in the context of state statutory restrictions apparently has drawn a distinction between the federal and state constitutional protection.

150. See *supra* notes 86-100 and accompanying text; see also Grube, *supra* note 6, at

position, the United States Supreme Court is unlikely to deviate from the reasoning of these lower federal and state courts.¹⁵¹ Instead, the most likely issue in future battles will be the question whether the statute bears a rational relation to a legitimate legislative purpose.¹⁵² Most statutes will easily pass this test, but not all will clear this constitutional hurdle.¹⁵³

1. No Constitutional or Common-Law Right to Punitive Damages

The general consensus of state courts and lower federal courts finding no general constitutional or common-law right to punitive damages comports with two long-standing United States Supreme Court decisions.¹⁵⁴ The earliest decision acknowledging that an entity other than the jury could set punitive damages limitations occurred in *Barry v. Edmunds*,¹⁵⁵ which held that juries can set damages awards only where no precise rule fixes their size.¹⁵⁶ More recently, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,¹⁵⁷ the Court held that it would presume statutory limitations on damages valid as economic regulation, unless the limitations were shown to be arbitrary or irrational.¹⁵⁸ While this case addressed damages restrictions in general, later courts have used it to justify specific restraints on punitive damages awards.¹⁵⁹

Recent decisions suggest that the current Supreme Court will adhere to these prior holdings. For example, *Pacific Mutual Insurance Co. v. Haslip*,¹⁶⁰ *TXO Production Corp. v. Alliance Resources Corp.*,¹⁶¹ and *Honda Motor Co. v. Oberg*¹⁶² each implicitly approved post-verdict

843 (arguing that plaintiffs have neither a moral nor a legal right to punitive damages).

151. See *infra* part VI.A.1.

152. See *infra* part VI.A.2-3.

153. See *infra* notes 174-78 and accompanying text.

154. See *supra* notes 86-100 and accompanying text.

155. 116 U.S. 550 (1886).

156. *Id.* at 565 (cited by *Haslip*, 499 U.S. at 16).

157. 438 U.S. 59 (1978).

158. *Id.* at 83.

159. See, e.g., *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1576 (M.D. Ga. 1990) (citing Justice Stewart's concurrence in *Duke* to support erroneous conclusion that a plaintiff has a property right in punitive damages, arising from the state-created right to compensation for tort injuries); see also 1 SCHLUETER & REDDEN, *supra* note 9, § 3.12 (citing *Duke* as starting point for any constitutional assessment of damages caps).

160. 499 U.S. 1 (1991).

161. 113 S. Ct. 2711 (1993).

162. 114 S. Ct. 2331 (1994).

manipulation of jury awards to protect the due process rights of defendants, underscoring that plaintiffs do not have a constitutional or common-law right to a certain amount of punitive damages.¹⁶³ In fact, most of the Justices, if not all, have agreed implicitly or expressly that the legislature could restrict awards by imposing statutory caps. For example, in *Haslip*, the majority agreed that punitive damages could be regulated by post-verdict judicial review, and, in fact, so required in *Honda*.¹⁶⁴ Justices Brennan and Marshall specifically have stated that state legislatures can restrict the amount of punitive damages awards by statute, implying that this would be the preferable way to protect the due process rights of defendants.¹⁶⁵ In addition, Justice O'Connor, who dissented in *Haslip*, also has argued that state legislatures may restrict the award of punitive damages.¹⁶⁶ Justice Ginsburg, dissenting in *Honda*, supported Oregon's practice of limiting punitive damages awards by a pre-verdict "damage cap" of the amount speci-

163. See, e.g., *id.* at 2340-41 (holding that Oregon's statutory denial of judicial review of punitive damages jury awards violates due process); *TXO*, 113 S. Ct. at 2711 (holding that post-verdict review and meaningful jury instructions provide objective criteria which satisfies due process concerns); *Haslip*, 499 U.S. at 43 (holding that Alabama's objective criteria for assessing punitive damages awards, including post-verdict review and meaningful jury instructions, insulate punitive award from due process challenge). The assertion that due process places limits on the amount of punitive damages awarded against a defendant is not new. See *St. Louis I.M. & S. Ry. v. Williams*, 251 U.S. 63, 66-67 (1919); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915); *Standard Oil Co. v. Missouri*, 224 U.S. 270, 286 (1912); *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78 (1907) (all cited in *TXO*, 113 S. Ct. at 2718, for the proposition that due process places limits on the amount of penalties, although only *Danaher* set aside a verdict as plainly irrational because there was no bad faith on the part of the defendant).

164. See *Haslip*, 499 U.S. at 20 & n.9 (Blackmun, J., joined by Rehnquist, C.J., White, Marshall, and Stevens, JJ.) (citing with apparent approval Alabama's newly enacted statutory cap); *id.* at 16 (citing *Barry* for proposition that a "precise rule of law [could] fix[] the recoverable damages"); *id.* at 20-21 (approving post-trial procedures including comparison to similar awards and post-verdict judicial review); see also *Honda*, 114 S. Ct. at 2340-41 (holding that due process requires post-verdict review to reduce unreasonable punitive damages awards).

165. See *Haslip*, 499 U.S. at 39 (Scalia, J., concurring) ("State legislatures and courts have the power to restrict or abolish the common law practice of punitive damages, and in recent years have increasingly done so.") (citations to statutes omitted); see also *id.* at 42 (Kennedy, J., concurring) (common law principles must suffice until the legislature implements system-wide change; state courts could urge reexamination of punitive damages awards by legislatures).

166. See *id.* at 57 (O'Connor, J., dissenting). In her dissent, Justice O'Connor stated that "state legislatures could establish fixed monetary limits for awards of punitive damages. . . . [Where] the legislatively determined ranges are sufficiently narrow, they could function as meaningful constraints on jury discretion while at the same time permitting juries to render individualized verdicts." *Id.* (O'Connor, J., dissenting).

fied in the complaint.¹⁶⁷ Of all the Justices addressing this issue, each has, in some way, shown approval of statutory damages caps.¹⁶⁸

2. The Weakest Front: Rational Relation to Legitimate State Interests

Because plaintiffs have no cognizable right to punitive damages prior to the entry of judgment, the ultimate constitutional question depends on whether the legislation fairly and rationally relates to a legitimate state purpose.¹⁶⁹ Consequently, the Court will invalidate a statutory restriction on punitive damages only where the legislation is arbitrary or irrational.¹⁷⁰ While most statutory regulations on punitive damages survive this scrutiny, complications may arise where the legislature intended the statute to protect the defendants' due process rights.¹⁷¹

167. *Honda*, 114 S. Ct. at 2344 (Ginsburg, J., dissenting) (citing with approval Oregon's punitive "damage cap," limiting the award to the amount specified in the complaint).

168. *See supra* notes 164-67. Although he has apparently never squarely confronted the issue whether statutory restrictions on punitive damages are constitutional, the newest Supreme Court Justice, Stephen Breyer, will probably agree that they are. In *Schafer v. American Cyanamid Co.*, 20 F.3d 1 (1st Cir. 1994), he authored an opinion which examined a similar issue concerning whether the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1 to -34 (1991 & Supp. 1994), could prevent parents from recovering damages for injury to their child. *See* 2 DOBBS, *supra* note 5, § 8.8 (noting that the Vaccine Act functions as an indirect cap on punitive damages awards). The Act provided a plaintiff with a choice: a straightforward recovery system, including a statutory cap on the amount of punitive damages that could be awarded, or the unpredictable traditional tort recovery system. *Schafer*, 20 F.3d at 3. The legislative history showed that Congress balanced the need for speedy compensation to victims contracting illnesses from vaccines against the need to reduce insurance and litigation costs for manufacturers. *Id.* at 2. Then-Chief Judge Breyer held that the statute and its history did not specifically preclude parents from recovery, but instead discouraged them from bringing traditional tort actions, which reduced litigation and high insurance costs. *Id.* at 5-7. Since the purpose behind many state statutes limiting the amount of punitive damages is often to reduce litigation and high insurance costs, it is at least arguable that Justice Breyer would support these statutes as well. *See supra* notes 48-50, 55-57, and accompanying text for a discussion of the purpose of such statutory restrictions. In *Schafer*, Justice Breyer, however, advocated examining legislative histories to ensure that interpretation of a statute comports with the legislative intent, and most state statutes apparently have little to no legislative history to assess. *See Schafer*, 20 F.3d at 2, 5-7 (examining legislative histories); *see also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (approving the examination of legislative histories).

169. *Duke Power Co.*, 438 U.S. 83.

170. *Id.* at 83. *See supra* notes 157-59 and accompanying text for a discussion of *Duke*.

171. *Haslip*, 499 U.S. at 18-19 (noting that due process raises concerns of reasonableness and adequate judicial guidance).

On one hand, the Supreme Court, lower federal courts, and state courts will most likely continue to find constitutional those statutes enacted as part of tort reform. In light of the tort crisis, courts should uphold legislative cost-benefit determinations that a certain dollar amount represents the acceptable outer limits of punitive damages.¹⁷² For this same reason, courts should also defer to the legislative purpose to share punitive damages awards with the public for harm that endangers society as a whole.¹⁷³

On the other hand, courts may question the validity of a statute if the legislature enacted it strictly to protect the due process rights of defendants. Bright-line punitive damages restrictions cannot ensure that awards below that limit are indeed fair, absent other constitutional protection required in the Supreme Court's *Haslip-TXO-Honda* trilogy.¹⁷⁴ For example, absent judicial oversight, unreasonable awards could still result from unbridled jury discretion for those awards below the statutory minimum.¹⁷⁵ Even an award capped by the statutory limit may fail to protect the defendant's due process rights, absent other procedural protection to ensure that the award was fair in the first place.¹⁷⁶ Nor do statutes redirecting a percentage of the punitive damages award into a state fund necessarily protect the due process rights of defendants, because they too provide no procedure to ensure the fairness of those awards.¹⁷⁷ Nevertheless, these statutes may re-

172. See *id.* at 7-8 & n.4 (discussing the tort crisis); see *supra* notes 1, 30-31, and accompanying text for a discussion of the tort crisis in the United States. Lower federal and state courts have upheld these purposes of statutory restriction on punitive damages awards. See, e.g., *Wackenhut*, 979 F.2d at 985-87 (upholding the Virginia legislature's goal to cap punitive damages to prevent awards that burden the state's economy); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 638-39 (Ga. 1993) (upholding the legislative intent to not provide a windfall to the plaintiff).

173. See, e.g., *Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992) (*per curiam*), *cert. denied*, 113 S. Ct. 1647 (1993) (approving legislative objectives to "allot to the public weal a portion of damages designed to deter future harm . . . and to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney").

174. See *supra* notes 32-36, 160-68, and accompanying text for a discussion of these cases.

175. See *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1415 n.6 (4th Cir. 1992) (noting that the \$350,000 statutory cap does not necessarily protect the punitive award from due process scrutiny).

176. See *Honda*, 114 S. Ct. at 2340-41 (arguing that the elimination of judicial review by constitutional amendment fails to protect defendants' due process rights).

177. These statutes may not provide *Haslip* protection, because they do not even provide a statutory cap. Instead, their purpose is to divert a portion of the award to a public use, and as a result they focus on the use of the award, rather than the procedure by which the award punishes the defendant. See *supra* notes 51-57 and accompanying text for a discussion of this type of statutory restriction and its purpose.

present one factor insulating a punitive damages award against an attack on unbridled jury discretion.¹⁷⁸

Statutes requiring that a punitive damages award stand in some fixed ratio to actual damages awarded may withstand the arbitrary test, since *Haslip* implicitly approved such a scheme.¹⁷⁹ In fact, commentators have suggested that the fairest procedure is to limit the punitive award to either twice the amount of compensatory damages, or \$250,000, whichever is greater, on the grounds that doing so grants the trier of fact flexibility without being handcuffed to a strict ratio.¹⁸⁰ Nevertheless, standing alone, the ratio requirement may also fail to withstand constitutional muster absent any other procedural protection.¹⁸¹

3. Surprising Allies: Some Statutes May Violate Defendants' Constitutional Rights

Although plaintiffs most frequently challenge the constitutionality of punitive damages restrictions, defendants could also contest them. For example, defendants may argue that a statute fails to protect their due process rights under the *Haslip-TXO-Honda* trilogy, similar to the plaintiffs' challenge that such statutes bear no rational relation to their

178. See *Wackenhut Applied Technologies Ctr., Inc. v. Sygnatron Protection Sys., Inc.*, 979 F.2d 980, 985 (4th Cir. 1992) (noting that a statutory cap may be one factor to insulate punitive damages award from constitutional attack); *Hugo's Skateway*, 974 F.2d at 1415 n.6 (same); see also *Henderson*, 627 So. 2d at 900-01 (1993) (Maddox, J., concurring in part & dissenting in part) (arguing that jury awards without any standards such as punitive damages caps can violate constitutional due process rights of defendants).

179. See *Haslip*, 499 U.S. at 23-24 (approving an award four times the compensatory damages although acknowledging that it may be close to the line). But see *TXO*, 113 S. Ct. at 2721 (approving an award 526 times the amount of compensatory damages because this ratio is only one factor to determine the amount of punitive damages). In fact, some states do not permit a correlation under the common law, and it is difficult to reconcile these cases with *Haslip*. See *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 802-03 (Pa. 1989) (noting that courts may not require that punitive damages bear any relationship to compensatory damages).

180. See, e.g., Schwartz & Behrens, *supra* note 31, at 1378-79. These authors note that the American College of Trial Lawyers and the American Law Institute have approved this approach. *Id.* Some states have adopted similar approaches. See N.D. CENT. CODE § 32-03.2-11(4) (limiting punitive damages to \$250,000 or twice the actual damages, whichever is greater); TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.007 (punitive damages limited to \$200,000 or four times actual damages, whichever is greater).

181. See *TXO*, 113 S. Ct. at 2721 ("[B]oth [West Virginia's and Alabama's] State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages."); see also Schwartz & Behrens, *supra* note 31, at 1380. Schwartz and Behrens point out that this ratio may fail to protect the due process rights of defendants against unreasonable awards, for example, where the defendant is subject to numerous awards for the same act. *Id.*

purposes.¹⁸² Accordingly, statutes that cap damages at a certain amount may not ensure that the awards are reasonable against a specific defendant.

Furthermore, defendants may resurrect excessive fines as well as double jeopardy challenges to statutes which redirect a piece of the punitive pie into a government fund.¹⁸³ The Supreme Court, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,¹⁸⁴ held that the Eighth Amendment's protection against excessive fines did not apply to punitive damages awards between private parties, but instead applied only to fines paid to the benefit of a government.¹⁸⁵ Two years later, however, in *McBride*, the federal district court in Georgia held that the Constitution's prohibition against excessive fines did apply to statutes diverting a portion of the award into a state fund, because the award benefited the government.¹⁸⁶ But *McBride* stands alone, since at least two subsequent courts disagreed with its holding.

In 1994, for example, the Iowa Supreme Court, in *Spaur v. Owens-Corning Fiberglas Corp.*,¹⁸⁷ held that payment of a portion of the punitive damages award to the government did not transform the suit into a governmental prosecution.¹⁸⁸ Consequently, the statute triggered neither the Double Jeopardy nor the Excessive Fines Clauses of the Federal Constitution.¹⁸⁹ The *Spaur* court reasoned that the State neither prosecuted the action nor attempted to extract a large penalty for the purpose of raising revenue.¹⁹⁰ Instead, the state fund stood separate from the state treasury, and used the money for a public purpose: to help indigents, and not to fund the state.¹⁹¹ Because of the distinction between the state interest and the public interest, section 668.1(2)(b) of the Iowa Code did not rise to a criminal or quasi-criminal statute.¹⁹² This holding comports with the District Court for the Southern District of Iowa's earlier interpretation of Iowa law in *Burke v. Deere*,¹⁹³ where it held that payment of a percentage of

182. See *supra* notes 174-81 and accompanying text.

183. See *infra* notes 184-97 and accompanying text.

184. 492 U.S. 257 (1989).

185. *Id.* at 262-64 (Excessive Fines Clause of Constitution does not apply to private actors, only state actors).

186. 737 F. Supp. 1563, 1566-67 (M.D. Ga. 1990).

187. 510 N.W.2d 854 (Iowa 1994).

188. *Id.* at 868-69.

189. *Id.* at 869.

190. *Id.* at 868.

191. *Id.* at 868-69.

192. *Id.* at 869.

193. 780 F. Supp. 1225 (S.D. Iowa 1991), *rev'd on other grounds*, 6 F.3d 497 (8th

punitive damages into a state trust did not raise Eighth Amendment concerns.¹⁹⁴

McBride's holding that payment to the government fund at issue raised excessive fines and double jeopardy issues flows naturally from its premise that the state has no legitimate interest in a punitive damages award, since the award belongs in its entirety either to the plaintiff or the defendant.¹⁹⁵ As *Spaur* and *Burke* indicate, however, where it is not the state that has an interest, but instead the public, the state may require payment into a public fund.¹⁹⁶ Defendants' best chances for victory consequently may lie in due process challenges to the statutes.¹⁹⁷ Nevertheless, most likely few defendants will challenge the statutes on any grounds, since these statutes do, in fact, promote lower awards. Instead, defendants will be more likely to stave off plaintiffs' attacks on the statutes.

B. *Smith v. Printup: The State Constitutional Chink in the Legislative Armor Is Small Indeed*

Because it is unlikely that future courts will find statutory restrictions on punitive damages unconstitutional under equal protection or due process challenges, plaintiffs may increasingly challenge these statutes under the state constitutional provisions, as did the plaintiff in *Henderson*.¹⁹⁸ Nevertheless, it is unlikely that *Henderson*, like *Kirk* or *McBride*, is any more than a slight step back in an ongoing tide of court decisions upholding punitive damage statutes as constitutional.¹⁹⁹

Cir. 1993), *cert. denied*, 114 S. Ct. 1063 (1994).

194. *Id.* at 1242. *But cf. McBride*, 737 F. Supp. at 1573, 1577-78. In *McBride*, the district court held that governmental involvement converted the civil nature of the punitive damages award into a fine for the benefit of the state. *Id.* at 1578. Although one commentator has argued that *McBride* misapplied the Eighth Amendment because the court used it to protect the plaintiff, rather than the defendant, *McBride* issued a declaratory judgment in which it looked at all the constitutional challenges that could be made. See Grube, *supra* note 6, at 866-71 (discussing both *McBride* and *Burke*, and noting that *McBride* protected the plaintiff on Eighth Amendment grounds).

195. See *McBride*, 737 F. Supp. at 1578-79 (holding that punitive damages are a compensatory and an economic right of the plaintiff).

196. See *supra* notes 187-94 and accompanying text.

197. See *supra* notes 174-78 and accompanying text for a discussion of these challenges, which could be made either by the plaintiff or by the defendant.

198. See *Henderson v. Alabama Power Co.*, 627 So. 2d 878, 893 (Ala. 1993) (prioritizing plaintiff's right to a trial by jury over legislative power); see also Manzer, *supra* note 6, at 647 (arguing that restrictions on non-economic punitive damages violate the right to trial by jury).

199. *McBride* and *Kirk* are the only cases other than *Henderson* which have found a statute restricting the award of punitive damages unconstitutional. See *supra* notes 63-82 and accompanying text for a discussion of these cases.

Henderson stands alone as the only court to find that a statute violates the plaintiff's right to a trial by jury. Post-*Henderson* courts discount its reasoning entirely. In 1994, the Kansas Supreme Court specifically disagreed with *Henderson* when it upheld a statute in *Smith v. Printup*²⁰⁰ that not only limited the punitive damages award but also took it out of the hands of the jury entirely.²⁰¹ According to the *Printup* court, section 60-3701 of the Kansas Code, which required that a judge, not a jury, determine the amount of a punitive damages award, did not impair the plaintiff's right to a trial by jury under the Kansas Constitution.²⁰² Disagreeing with the reasoning of the majority in *Henderson*, the *Printup* court held that Kansas had always drawn a distinction between compensatory and punitive damages, and that a plaintiff had only a right to compensatory damages.²⁰³ Moreover, the right to compensation did not include either a constitutional or common-law right to have a jury determine the amount of punitive damages awards.²⁰⁴ Consequently, the legislature could regulate the award, either by a statutory cap or other restriction, or by requiring the judge to determine the award.²⁰⁵

The United States Supreme Court would most likely agree with *Printup*, rather than *Henderson*, since the Court has long stated that to hold all procedural changes unconstitutional would "deny every quality of the law but its age, and . . . render it incapable of progress or improvement."²⁰⁶ More recently, in *Honda*, the Court elevated the need for reasonable punitive damages awards over the right to a trial

200. 866 P.2d 985 (Kan. 1993).

201. *Id.* at 998.

202. *Id.* The court also held that the statute did not violate the plaintiff's due process or equal protection rights under the Fourteenth Amendment of the United States Constitution. *See id.* at 991-92, 998-99. The court exhaustively examined the case law concerning statutory caps, including most of the cases cited within. *See id.* at 992-98.

203. *Id.* at 997. The court agreed instead with the *Henderson* dissenters, Judges Houston and Maddox. *Id.* at 997-98. Judge Houston had argued that punitive damages do not represent a right of the plaintiff; Judge Maddox had argued that if the legislature could abolish punitive damages, then it could limit them. *Id.* (citing *Henderson*, 627 So. 2d at 899 n.11 (Maddox, J., concurring in part & dissenting in part), 909 (Houston, J., dissenting)). The *Printup* court acknowledged that the plaintiffs had not attacked the right of the legislature to cap punitive damages, but instead alleged that vesting the right to award punitive damages in a judge rather than a jury violated their right to a trial by jury. *Id.* at 998. Nevertheless, the court followed the reasoning of the *Henderson* dissenters, holding that nothing in the Kansas common law or constitution prevented the legislature from vesting the power in the judge rather than the jury. *Id.*

204. *Id.* at 998.

205. *Id.*

206. *Hurtado v. California*, 110 U.S. 516, 529 (1884) (cited in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2340 (1994)).

by jury when it held a state constitutional amendment unconstitutional because the amendment eliminated post-verdict review of punitive damages awards.²⁰⁷ Accordingly, both the Supreme Court, as well as state courts, would likely find that plaintiffs have neither a right to receive punitive damages nor a right to a jury trial on punitive damages.²⁰⁸

C. Decisions from the Frontlines: Some Statutes Subordinate the Traditional Purpose of Punitive Damages to Other Social Interests

Underlying each victorious skirmish concerning statutory restrictions on punitive damages lies an implicit judicial acknowledgment of the legislative ability to subordinate the traditional purposes of punitive damages to other, more-compelling social goals. Commentators have argued that statutory restrictions on a punitive damages award limit the deterrent effect of punitive damages.²⁰⁹ But regardless of whether the statutory restrictions fail to deter defendants, legislatures traditionally have had the power to limit punitive damages or, in some jurisdictions, to eliminate them altogether.²¹⁰ Quite rightly, few courts have entered the legislative bailiwick to assess the legitimacy of its cost-benefit balancing of societal interests.²¹¹

One common challenge to statutory restrictions contends that defendants simply calculate the flat caps into the costs of their actions, undermining the award's deterrent effect as well as decreasing safety standards.²¹² Most statutes, however, permit the judge to override their statutory caps when a defendant's actions are malicious or

207. See *Honda*, 114 S. Ct. at 2341-42.

208. See *supra* notes 149-181 and accompanying text.

209. 2 DOBBS, *supra* note 5, § 8.1(6).

210. See *supra* note 41, *infra* note 226, and accompanying text.

211. But see *infra* notes 221-24 and accompanying text for a discussion of the courts that erroneously overstepped their authority.

212. See 2 DOBBS, *supra* note 5, § 8.1(6) (explaining that a statutory cap may permit an actor engaging in wrongful conduct enough profit to continue the wrongful activity); Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1406 (1987) (stating that punitive damages caps take away safety incentives); Rustad & Koenig, *supra* note 1, at 1277 (contending that capping punitive damages favors big business because they undermine deterrent effect); David I. Rosenbaum, Comment, *Punitive Damages in Professional Malpractice Cases*, 61 TEMP. L. REV. 1431, 1476 (1988) (arguing that punitive damages caps address liability but limit deterrence); Toy, *supra* note 6, at 326 (asserting that defendants simply calculate tort liability into the cost of business). But see Maskin & Antonucci, *supra* note 29, at 580-81 (maintaining that the ratio between compensatory and punitive damages over-deters, destroys corporate existence, and violates the due process rights of defendants involved in mass toxic tort claims).

intentional.²¹³ These exceptions permit the courts to tailor awards to ensure deterrence for particularly wrongful acts.²¹⁴ As a result, despite these statutory caps, punitive damages remain a deterrent in most jurisdictions, since defendants are unsure when their actions will fall into an exception where the cap does not apply.²¹⁵

Even if the restrictions permit defendants to calculate the award into their own assessment of the cost of their actions, the role of the court is to ensure only that the award is not arbitrary or irrational.²¹⁶ For example, in Virginia, where the legislature has taken all discretion from the hands of the judiciary, courts have rightly upheld the legislation as constitutional.²¹⁷ Such a limitation could realistically fail to achieve the goal of deterrence for large corporations, to whom a one-time \$350,000 punitive damages award could be almost immaterial.²¹⁸ Nevertheless, courts have deferred to the Virginia legislature's cost-benefit determination, because the statute involves economic regulation.²¹⁹ Since the purpose of the statutes is specifically to restrict the punitive award, and not to punish the defendant per se, the cap itself is neither arbitrary nor irrational in light of these goals.²²⁰

213. See *supra* notes 41-44 for a discussion of statutes that provide exceptions to the flat statutory caps; Virginia remains the only state with a statutory cap without exceptions. See also Rustad & Koenig, *supra* note 1, at 1281 n.67 (providing examples of statutes permitting courts to override caps).

214. See *supra* notes 41-44 for a discussion of statutes that provide exceptions to the flat statutory caps.

215. At least one commentator has suggested that regulatory agencies should step in and perform the deterrence function by enforcing safety statutes. Owen, *supra* note 31, at 672. The relevant agency would either fine violators or banish use of the results of the violating act. *Id.*

216. Statutes requiring that the punitive award stand in some fixed ratio to the actual damages may permit the defendant to more easily calculate the award, since the ratio creates a more rigid rule. See Rustad and Koenig, *supra* note 1, at 1282 n.67; see also *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) (examining damages awards under the rational relation test).

217. See *Wackenhut Applied Technologies Ctr., Inc. v. Sygnatron Protection Sys., Inc.*, 979 F.2d 980 (4th Cir. 1992) (upholding the Virginia statute even though it applied to all awards); see also VA. CODE ANN. § 8.01-38.1 (providing no exceptions to the statutory cap).

218. See *supra* notes 27-31 and accompanying text for a discussion of the purposes of punitive damages. As the parties stipulated in the Fourth Circuit's decision in *Wackenhut*, because the statute was an economic regulation, it consequently needed to bear only a reasonable relation to its purpose. See *Wackenhut*, 979 F.2d at 985 (finding that statute bears relationship to the statutory intent to protect society from runaway punitive damages awards while continuing its deterrence and punishment functions).

219. See *Wackenhut*, 979 F.2d at 985 (deferring to the legislative purpose to strike a balance between deterring defendants and burdening society).

220. See *supra* notes 27-31 and accompanying text for a discussion of the purposes behind punitive damages. If the purpose of the Virginia legislation was to punish the

Few have crystallized this concern about the subordinate purpose of punitive damages into the true issue: separation of powers between the court and the legislature. But challengers are essentially asking the courts to reject the legislative cost-benefit assessment. *McBride*, *Kirk*, and *Henderson* represent examples of courts engaging in legal gymnastics in order to bypass legislative cost-benefit determinations. Each overstepped its authority by failing to defer to the legislative determination that other social needs outweighed the purposes of punitive damages.²²¹ For example, the *McBride* court held the Georgia legislation to a higher standard than required under *Duke* by examining the purpose of the legislation and determining whether or not it agreed with that purpose.²²² Since, in the *McBride* court's opinion, the goal of protecting corporate viability was not legitimate, the court found the legislation unconstitutional.²²³ Similarly, both *Kirk* and *Henderson* failed to defer to the legislature, instead finding property or common-law rights to a certain punitive damages award, which were previously unavailable under their respective state laws.²²⁴

Kirk, *McBride*, and *Henderson* stand alone against the tide of decisional law upholding the constitutionality of state statutory restrictions on punitive damages. Instead, the weight of authority clearly indicates that courts defer to democratically elected legislatures, examining only whether the statute bears a rational relation to its legitimate purpose.²²⁵ Future courts will most likely agree that legislatures

defendant, it would be both arbitrary and irrational because it would effectively deter only those defendants to whom \$350,000 appeared significant.

221. The judiciary should defer to the legislature, unless it is clear beyond a reasonable doubt that the statute violates a fundamental principle. *See, e.g., Henderson*, 627 So. 2d at 895-97 (Maddox, J., concurring in part & dissenting in part). Judge Maddox points out that the Supreme Court's analysis of the statute violates the separation of powers between the two branches of government. *Id.* (Maddox, J., concurring in part & dissenting in part). In his opinion, Judge Maddox states that courts should not strike down legislation unless it appears beyond a reasonable doubt that the legislation violates fundamental rights. *Id.* at 897 (Maddox, J., concurring in part & dissenting in part); *see also* Schwartz & Behrens, *supra* note 31, at 1372-74 (arguing that legislatures, not courts, should reform because they can best see the big picture).

222. *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1576-77 (M.D. Ga. 1990) (stating that the deterrence purpose of the statute was not advanced and that the real purpose is to preserve the viability of Georgia business). The *McBride* court stands alone as the only court to hold this legislative goal invalid. *Cf. Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992) (*per curiam*) (upholding a similar legislative intent as valid), *cert. denied*, 113 S. Ct. 1647 (1993).

223. *McBride*, 737 F. Supp. at 1577.

224. *See supra* notes 73-82, 121-31, and accompanying text for a discussion of these cases.

225. *See supra* notes 83-120 and accompanying text.

may limit punitive damages, or subject them to certain conditions.²²⁶ This growing alliance between state legislatures and the judiciary foretells a future legislative victory over plaintiffs' constitutional assaults.

VII. CONCLUSION: ALTHOUGH LEGISLATURES MAY HAVE LOST SOME BATTLES, THEY WILL MOST LIKELY WIN THE CONSTITUTIONAL WAR

While the apparent alignment of state and federal courts with legislatures may indicate a continued acceptance of state statutory restrictions on punitive damages, it is equally apparent that plaintiffs will not acquiesce without a prolonged fight.²²⁷ Nevertheless, plaintiffs are fighting a losing battle, for their intermittent triumphs indicate nothing more than a minor setback in an otherwise certain legislative victory.²²⁸

Future courts examining plaintiffs' due process and equal protection challenges, including the United States Supreme Court, should continue to recognize that plaintiffs have no constitutional or common-law right to punitive damages.²²⁹ Moreover, these courts will most likely continue to find that legislation restricting punitive damages awards reflects a legitimate governmental purpose.²³⁰ Since *Henderson* stands alone amid a growing number of courts which refuse to find a right to a jury trial on punitive damages, it is likely that future courts will continue the trend.²³¹

Future issues may arise, however, where the purposes of the legislation focus on the due process rights of defendants.²³² Statutory restrictions may bear no reasonable relation to the severity of the harm, and consequently fail to protect defendants' due process rights.²³³

226. See, e.g., *Bagley v. Shortt*, 410 S.E.2d 738, 739 (Ga. 1991) (stating that if the legislature can eliminate them, it can regulate them); see also *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 273, 274-75 (Colo. 1991) (Rovira, C.J., dissenting) (arguing that a claim for exemplary damages is a statutory right which may be conditioned by the legislature and consequently the entire award never vests in the plaintiff). Although the *Kirk* court recognized that a legislative body might choose to eliminate exemplary damages in civil cases without offending due process of law, it refused to acknowledge that other legislative restrictions should pass constitutional muster, although it did not give its reasons. *Id.* at 272-73 (Rovira, C.J., dissenting).

227. See *supra* parts IV-V for a discussion of the constitutional challenges that plaintiffs have brought; see also *infra* apps. A and B for a discussion of the cases and statutes.

228. See *supra* notes 60-82, 110-44, and accompanying text.

229. See *supra* notes 145-68 and accompanying text.

230. See *supra* part VI.A.2.

231. See *supra* part VI.B-C.

232. See *supra* part VI.A.3.

233. See *supra* part VI.A.3.

Statutory restrictions generally advance more than this single purpose, however, and careful legislative drafting to clarify other purposes will easily circumvent challenges.²³⁴ Nevertheless, until the time when all courts agree, statutes that regulate punitive damages awards will continue to be the battleground for the ongoing struggle between the legislature restricting the awards, and the plaintiffs who accordingly receive less.

234. See *supra* note 226 and accompanying text.

APPENDIX A

CONSTITUTIONAL CHALLENGES TO STATUTORY RESTRICTIONS
ON PUNITIVE DAMAGES AWARDS

Date	State	Case	Holding
4/10/90	Georgia	McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990).	Statute diverting a portion of punitive damages award to state fund violates federal and state due process, equal protection, and excessive fines rights.
9/23/91	Colorado	Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991) (en banc).	Statute diverting a portion of punitive damages awards into a state fund is an unconstitutional taking under federal and state constitutions.
7/17/91	Iowa	Shepherd Components v. Brice Petrides-Donohue & Assocs., Inc., 473 N.W.2d 612 (Iowa 1991).	Statute diverting a portion of punitive damages awards into a state fund does not violate equal protection or due process.
12/2/91	Georgia	Bagley v. Shortt, 410 S.E.2d 738 (Ga. 1991).	\$250,000 statutory cap does not violate due process, equal protection or right of access to the courts.

11/10/92	Virginia	Wackenhut Applied Technologies Ctr., Inc. v. Sygnatron Protection Sys., Inc., 979 F.2d 980 (4th Cir. 1992).	\$350,000 state statutory cap without exceptions does not violate state or federal due process rights.
11/12/92	Florida	Gordon v. State, 608 So. 2d 800 (Fla. 1992) (per curiam), <i>cert. denied</i> , 113 S. Ct. 1647 (1993).	Statute diverting a portion of punitive damages awards into a state fund does not violate due process, right to trial by jury, or equal protection.
6/25/93	Alabama	Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993).	\$250,000 state statutory cap violates a plaintiff's right to trial by jury.
11/22/93	Georgia	Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635 (Ga. 1993).	Statute diverting a portion of punitive damages awards into a state fund does not violate state or federal due process or equal protection rights.
11/22/93	Georgia	State v. Moseley, 436 S.E.2d 632 (Ga. 1993) (all concurring), <i>cert. denied</i> , 114 S. Ct. 2101 (1994).	Statute diverting a portion of punitive damages awards into a state fund does not violate the right to a jury trial.
12/30/93	Kansas	Smith v. Printup, 866 P.2d 985 (Kan. 1993).	Statute requiring a judge to award punitive damages does not violate state or federal due process or equal protection rights; nor does it violate the state right to a trial by jury.

1/19/94	Iowa	Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994).	Statute diverting a portion of punitive damages awards into a state fund does not violate the defendant's due process rights, nor his or her right against double jeopardy.
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APPENDIX B

STATUTORY RESTRICTIONS ON PUNITIVE DAMAGES
AWARDS

State	Statute Section	Statute Content
Alabama	ALA. CODE § 6-11-21 (1993).	\$250,000 cap on punitive damages, with certain enumerated exceptions.
Alaska	ALASKA STAT. § 09.17.020 (1994).	No punitive damages unless supported by clear and convincing evidence.
Arizona	No limitations.	
Arkansas	ARK. CODE ANN. § 16-64-123 (Michie 1987).	Punitive damages awarded by jury unless erroneous instruction, jury passion or prejudice.
California	No limitations.	
Colorado	COLO. REV. STAT. ANN. § 13-21-102 (West 1989).	Where plaintiff can prove the defendant acted with fraud, malice, or willful and wanton conduct punitive damages awards limited to the amount of actual damages; placing one-third of the award into a state general fund.
Connecticut	CONN. GEN. STAT. ANN. § 52-240b (West 1991).	Limited to twice actual damages in product liability litigation.
Delaware	No limitations.	
Florida	FLA. STAT. ANN. § 768.73 (West Supp. 1995).	Three times compensatory damages, except where can be shown by clear and convincing evidence that facts and circumstances warrant exceeding limit; 35% to state general funds.

Georgia	GA. CODE ANN. § 51-12-5.1 (Supp. 1994).	Imposing \$250,000 cap for all suits other than those alleging product liability or intent to harm; for product liability actions, one award per defendant and 75% of the award paid into the state treasury.
Hawaii	No limitations.	
Idaho	IDAHO CODE § 6-1604 (1990).	No punitive damages unless maliciousness proven by preponderance of evidence.
Illinois	ILL. COMP. STAT. ANN. ch. 735, § 5/2-1207 (West 1992 & Supp. 1994).	Court has discretion to apportion punitive damages award to Department of Rehabilitation.
Indiana	No limitations.	
Iowa	IOWA CODE ANN. § 668A.1(2)(b) (West 1987).	75% of the award to civil reparation trust fund for indigent civil litigation when defendant's act not directed specifically at plaintiff.
Kansas	KAN. STAT. ANN. § 60-3702(a), (e) (1994).	Punitive damages amount determined by judge, not jury; statutory cap of the lesser of \$5 million or highest annual gross income earned by the defendant over the past five years unless clearly inadequate: then may award 50% net worth of the defendant, or 1-1/2 times net profit from wrongful act.
Kentucky	No limitations.	
Louisiana	No limitations.	
Maine	No limitations.	
Maryland	No limitations.	
Massachusetts	No limitations.	

Michigan	No limitations.	
Minnesota	No limitations.	
Mississippi	No limitations.	
Missouri	MO. ANN. STAT. § 537.675(2) (Vernon 1988).	50% of punitive damages award to Tort Victims' Compensation Fund.
Montana	No limitations.	
Nebraska	No limitations.	
Nevada	NEV. REV. STAT. ANN. § 42.005 (Michie Supp. 1993).	Three times compensatory when compensatory exceeds \$100,000; \$300,000 cap when actual damages are less than \$100,000.
New Hampshire	N.H. REV. STAT. ANN. § 507:16 (Supp. 1994).	Punitive damages outlawed by statute.
New Jersey	No limitations.	
New Mexico	No limitations.	
New York	N.Y. CIV. PRAC. L. & R. § 8701 (McKinney Supp. 1995).	20% of punitive damages awards payable to state. The statutory cap expired on April 1, 1994.
North Carolina	No limitations.	
North Dakota	N.D. CENT. CODE § 32-03.2-11(4) (Supp. 1993).	Punitive damages limited to \$250,000 or twice compensatory, whichever is greater.
Ohio	No limitations.	
Oklahoma	OKLA. STAT. ANN. tit. 23, § 9 (West 1987).	Plaintiff must prove oppres- sion, fraud, or malice to receive punitive damages and limiting any award to the amount of compensatory damages, with exceptions.
Oregon	OR. REV. STAT. § 18.540(1)(c) (Supp. 1994).	50% payable to Criminal Injuries Compensation Account after attorney fees.

Pennsylvania	No limitations.	
Puerto Rico	No limitations.	
Rhode Island	No limitations.	
South Carolina	No limitations.	
South Dakota	S.D. CODIFIED LAWS ANN. § 21-1-4 (1987).	Punitive damages only as provided by statute.
Tennessee	No limitations.	
Texas	TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.007, .008 (West Supp. 1995).	\$200,000 cap or four times actual damages, whichever is greater. Cap not applicable to intentional torts.
Utah	UTAH CODE ANN. § 78-18-1(3) (1992).	50% of punitive damages in excess of \$20,000, after attorneys fees and costs, remitted to Treasury for payment into General Fund.
Vermont	No limitations.	
Virginia	VA. CODE ANN. § 8.01-38.1 (Michie 1992).	\$350,000 cap on all punitive damages awards.
Virgin Islands	No limitations.	
Washington	No limitations.	
West Virginia	No limitations.	
Wisconsin	No limitations.	
Wyoming	No limitations.	