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Big Business Beware: Punitive Damages Do Not Violate Fourteenth Amendment According to Pacific Mutual Life Insurance Co. v. Haslip

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Big Business Beware: Punitive Damages Do Not Violate the Fourteenth Amendment According to *Pacific Mutual Life Insurance Co. v. Haslip*

I. INTRODUCTION

Punitive damages have been called "a salutary method of discouraging evil motives,"[1] a "monstrous heresy,"[2] and everything in between. Juries award punitive damages in certain cases when the actions of a defendant have been particularly egregious.[3] They are not intended to compensate the victim, but rather to punish and deter the defendant.[4] America's system of awarding punitive damages is referred to as the common law system, so called because little has changed since the first settlers brought it with them from England.[5] The system remains quite simple. The jury is instructed to consider the seriousness of the defendant's wrongful actions and the need to deter similar conduct in the future.[6] If the jury chooses to award punitive damages, then the trial court reviews the award, and the appellate court does likewise.[7] Although a seemingly basic system, punitive damages have never been without controversy.

In the last twenty years, the debate concerning punitive damages has intensified. Punitive damages became a hot topic in both legal circles and the general population as enormous awards began to appear in the 1970s.[8] The burgeoning areas of mass tort litigation and bad faith insurance claims, combined with the expanding notion of vicarious liability, resulted in punitive awards that were often staggering in size.[9] A Texas jury awarded a three-*billion* dollar punitive award in the mid-1980s, but an appellate court reduced the amount—

1. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 2, at 12 (5th ed. 1984).

2. Fay v. Parker, 53 N.H. 342, 382 (1873).

3. *See* KEETON ET AL., *supra* note 1, § 2 at 9-11.

4. *See infra* notes 46-64 and accompanying text.

5. *See infra* notes 26-36 and accompanying text.

6. *See* Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1042 (1991).

7. *Id.*

8. *See* Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 1 n.1 (1980).

9. *See infra* note 87 and accompanying text.

to one billion.[10] Tort reform groups arose, and individuals ranging from legal scholars[11] to most recently the Vice President[12] have called for a change. Many felt that this change would come from the United States Supreme Court,[13] as three of the Court's decisions in the 1980s hinted that the Court might look favorably upon a due process challenge to the common law system.[14] The Court resolved the issue in *Pacific Mutual Life Insurance Co. v. Haslip*.[15]

Pacific Mutual has been called the most important case of the United States Supreme Court's 1990-91 term[16] and also the most important business case of the decade.[17] In *Pacific Mutual*, the Court examined a due process challenge to an award of punitive damages and held that the common law system did not violate due process.[18] The punitive award in the case was $840,000, more than two hundred times greater than the plaintiff's out-of-pocket expense.[19] This decision surprised many, especially the eighty business groups that filed twenty-four amicus briefs in hopes that the Court would decide to reform the system. However, their pleas did not persuade the Court.[20]

This Note discusses the *Pacific Mutual* decision and its impact on law and business. Section II briefly examines the history of punitive damages, paying special attention to the issues involved in *Pacific Mutual*.[21] Among those issues are vicarious liability and insurance bad faith actions.[22] Sections III and IV discuss the background of the decision and analyze the decision itself.[23] Section V examines *Pacific*

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10. *See* Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 866 (Tex. Ct. App. 1987). For further discussion of the case, see *infra* notes 153-58 and accompanying text.

11. *See, e.g.*, James B. Sales & Kenneth B. Coles, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984).

12. Vice President Dan Quayle, Address at the American Bar Association Conference (Aug. 13, 1991) (calling on the ABA to help reform the punitive damage system in America).

13. *See* Steven H. Sneiderman, *The Future of Punitive Damages After Browning-Ferris Industries v. Kelco Disposal*, 51 OHIO ST. L.J. 1031, 1046 (1990) (concluding that in light of recent decisions, "it is this Author's opinion that the Court will be receptive to a due process argument regarding excessive punitive damage awards").

14. *See infra* notes 162-92 and accompanying text.

15. 111 S. Ct. 1032 (1991).

16. Denise Kalette, *Consumers Hail High Court Ruling*, USA TODAY, Mar. 5, 1991, at 7B (quoting Stephen Bokat, General Counsel for the United States Chamber of Commerce).

17. Tony Mauro, *Damaging the Anti-Punitive Crusade*, LEGAL TIMES, Oct. 8, 1990, at 10. The case has also been referred to as "[t]he most important case in aviation law, in decades." Lee S. Kreindler, *Clearance for Punitive Damages*, N.Y.L.J., Mar. 29, 1991, at 3.

18. *Pacific Mutual*, 111 S. Ct. at 1043.

19. *Id.* at 1037, 1046.

20. *See* Andrea Sachs, *A Blow to Big Business: The Supreme Court Upholds a $1 Million Jury Verdict*, TIME, Mar. 18, 1991, at 71.

21. *See infra* notes 26-193 and accompanying text.

22. *See infra* notes 90-108 and accompanying text.

23. *See infra* notes 194-372 and accompanying text.

Mutual's impact on business, future due process challenges, and the states.[24] Section VI provides a brief conclusion.[25]

II. HISTORICAL BACKGROUND

A. History of Punitive Damages

1. English History

The roots of our punitive damages system extend through history, arguably reaching back to ancient times.[26] The genesis of the common law tradition of punitive damages dates back to the thirteenth century, when juries began to award damages in excess of the actual loss.[27] However, the awarding of actual punitive or exemplary damages dates back to 1763 and the cases of *Wilkes v. Wood*[28] and *Huckle v. Mahoney*.[29] In both of these cases, English appellate courts upheld trial court awards that punished the guilty party for outrageous conduct that had harmed the honor of the plaintiff.[30]

In the years following *Wilkes* and *Huckle*, punitive damages became an accepted part of the English legal system, though confusion as to their purpose and application arose.[31] Some courts felt that they were a separate and truly punitive award, while others believed that they were merely an extra allowance of compensatory damages permitted in cases of outrageous conduct.[32] In 1964, the court in *Rookes v. Barnard*[33] finally put the confusion to rest by severely limiting the instances where a party can seek punitive damages.[34] In the United Kingdom, punitive damages may only be awarded: (1) to punish a government official's egregious conduct; (2) when private entities engage in conduct designed to make an extreme profit for the

24. *See infra* notes 373-434 and accompanying text.
25. *See infra* note 435 and accompanying text.
26. *See* LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 1.2 (2d ed. 1989).
27. *See* Belli, *supra* note 8, at 3; Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518 n.13 (1957).
28. 98 Eng. Rep. 489 (1763) (involving trespass).
29. 95 Eng. Rep. 768 (1763) (involving imprisonment).
30. SCHLUETER & REDDEN, *supra* note 26, at 6-8; Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 6-7 (1990) [hereinafter Daniels & Martin study].
31. SCHLUETER & REDDEN, *supra* note 26, at 12-13.
32. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 78 (1935).
33. 1 All E.R. 367 (1964).
34. For a detailed explanation of the *Rookes* decision and the current English doctrine, see SCHLUETER & REDDEN, *supra* note 26, at 12-13.

actor; or (3) when a statute authorizes a punitive damages award.[35] As a result, punitive damages have virtually disappeared in England.[36]

2. American History

Punitive damages have always been part of the American justice system. The 1791 case of *Coryell v. Colbaugh*[37] awarded damages for the sake of example when a defendant breached a promise to marry.[38] In 1851, the United States Supreme Court first upheld the common law method for assessing punitive damages in *Day v. Woodworth*.[39] The Court subsequently recognized punitive damages in other decisions of the period.[40] However, the method has always been controversial.

From the mid-nineteenth century, commentators Simon Greenleaf and Theodore Sedgwick debated the nature of punitive damages.[41] Greenleaf argued that punitive damages were actually a form of compensation,[42] while Sedgwick maintained that in cases of "gross fraud, wantonness, malice, or oppression" courts could impose punitive damages to punish the defendant.[43] Some courts of the era refused to acknowledge the existence of punitive damages.[44]

a. Primary rationales for punitive damages

The argument regarding the value and propriety of punitive damages continued into the twentieth century, and scholars have debated

35. *Id.* at 14. *See also* KEETON ET AL., *supra* note 1, § 2, at 9 & n.20.

36. *See* Belli, *supra* note 8, at 4.

37. 1 N.J.L. 90 (1791).

38. *Id.* The court urged the jury not to look at the actual loss, but to award damages for "example's sake." *Id.* at 91.

39. 54 U.S. (13 How.) 363 (1851).

40. *See* Scott v. Donald, 165 U.S. 58 (1897) (holding that the practice of awarding punitive damages is well settled); Lake Shore Ry. v. Prentice, 147 U.S. 101 (1893) (holding that punitive damages are not awarded for compensation, but for punishment and as a warning); Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512, 524 (1885) (stating that "the wisdom of allowing such additional damages . . . is attested by the long continuance of the practice").

41. For an explanation of the debate, see Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1047 (1991) (Scalia, J. concurring).

42. SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253, at 235 (13th ed. 1899). This idea continues today, as three states (Connecticut, Michigan and Georgia) consider punitives as an element of compensation. *See* Sneiderman, *supra* note 13, at 1036.

43. THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 347, at 687 (9th ed. 1912).

44. In a famous and often quoted passage, former Justice Foster of the New Hampshire Supreme Court assessed punitive damages, stating, "The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law." Fay v. Parker, 53 N.H. 342, 382 (1873).

the various rationales for the practice.[45] Of the rationales, the two most often cited and discussed are punishment and deterrence.[46]

i. Punishment

Proponents of punitive damages argue that punishment is a valid purpose for a civil penalty because the criminal justice system does not handle all outrageous conduct.[47] As such, punitive damages serve as gap fillers to address conduct deserving of punishment that happens to fall beyond the realm of criminal law.[48] Proponents note that some courts are adopting the higher standard of clear and convincing evidence as opposed to the traditional civil standard of preponderance of the evidence; thus, as a quasi-criminal punishment is meted out, it is done according to a quasi-criminal standard.[49] Some legislatures have followed suit.[50]

Critics of the punishment rationale argue that punitive damages are a function of civil laws, and that the nature of civil law involves

45. *See* Dorsey D. Ellis Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982) [hereinafter Ellis, 1982]. Professor Ellis sets out seven objectives for punitive damages that have emerged through the years: (1) punishment; (2) specific deterrence (to prevent the offending party from repeating his actions); (3) general deterrence (to prevent others from acting similarly); (4) preservation of the peace; (5) as an inducement for private law enforcement; (6) compensation where compensation is not available through other means; and (7) payment of the plaintiff's attorney fees. *Id.* at 3-12.

46. *See* RESTATEMENT (SECOND) OF TORTS, § 908 (1979) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person for his outrageous conduct and to deter him and others like him from similar conduct in the future."); Belli, *supra* note 8, at 6-7. *See generally* Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982) (examining the punishment and deterrence rationales in light of existing law).

47. Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 644-47 (1980); Samuel Friefield, *The Rationale of Punitive Damages*, 1 OHIO ST. L.J. 5, 6-9 (1935). *See also* KEETON ET AL., *supra* note 1, § 2, at 12 (stating that punitive damages act "as an incentive to bring into court and redress a long array of petty cases of outrage and oppression which in practice escape the notice of prosecuting attorneys occupied with serious crime").

48. JAMES D. GHIARDI & JOHN L. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 2.02 (4th ed. 1990).

49. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Roginsky v. Richardson-Merell, Inc., 378 F.2d 832 (2d Cir. 1967); Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675 (Ariz. 1986). For a detailed analysis of the preponderance/clear and convincing debate concerning punitive damages, see Jewell Hargleroad, Comment, *Punitive Damages: The Burden of Proof Required by Procedural Due Process*, 22 U.S.F. L. REV. 99 (1987) (arguing that the clear and convincing standard is more appropriate).

50. *See, e.g.*, ALASKA STAT. § 09.17.020 (1989); GA. CODE ANN. § 51-12-5.1(b) (Michie 1988); IND. CODE § 34-4-34-2 (1985); OR. REV. STAT. § 30.925(1) (1988).

compensation, not punishment.[51] The punishment rationale is often criticized as handing out essentially a criminal punishment while not offer the protections of the criminal justice system.[52] It is further argued that if punishment is the goal, a criminal burden of proof should have to be met, not a civil one.[53]

ii. Deterrence

Proponents argue that the deterrent effect of punitive damages operates effectively on both an individual and a general level.[54] An individual forced by the court to pay a large punitive award will be hesitant to repeat his wrongful act for fear of a court levying another such award against him.[55] This generally deters others from engaging in similar acts for fear of similar reprisal.[56] Also, it has been stated that deterrence is achieved because an award of punitive damages "stigmatizes" the individual defendant in a far greater way than a compensatory award does, almost reaching the level of a criminal verdict.[57] Others will refrain from similar conduct for fear of having the stigma of a punitive award attached to them.[58]

Critics of the deterrence rationale charge that no proof exists that conduct is, in fact, deterred.[59] Others postulate that punitive damages are ineffective in deterring corporate misconduct in the modern world.[60] Additionally, some maintain that the deterrence rationale fails because it works too well; it deters entities from acting in posi-

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51. *See* GHIARDI & KIRCHER, *supra* note 48, at § 2.02.

52. Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 991-99 (1989) [hereinafter Ellis, 1989].

53. *See, e.g.*, Susan M. Peters, *Punitive Damages in Oregon*, 18 WILLAMETTE L. REV. 369, 407 (1982). *See also* Andrew M. Kenefick, Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987) (arguing that punitive damages are as punitive as criminal penalties, and thus, Eighth Amendment protections should apply).

54. *See* GHIARDI & KIRCHER, *supra* note 48, at § 2.06.

55. *Id.* at § 2.07.

56. *Id.* at § 2.09.

57. *See* John Dwight Ingram, *Punitive Damages Should Be Abolished*, 17 CAP. U. L. REV. 205, 218 (1987). There does, however, seem to be some inconsistency in Ingram's article. Ingram states that when a jury finds malicious action on the part of the defendant, a punitive damage "judgment based on such a finding carries with it a stigma nearly as damaging as a criminal conviction." *Id.* However, Ingram also writes that "[c]riminal punishment carries with it much stronger social disapprobation, and much more lasting consequences." *Id.* at 213.

58. *Id.* at 218.

59. *See* Peters, *supra* note 53, at 420-23.

60. *See* E. Donald Elliot, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053 (1989) (stating that punitive damages are ineffective and ought to be abolished in corporate litigation because their imposition is too slow and uncertain, and their magnitude is minimal). *But see* Michael Wells, *Comments On Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1073 (1989) (arguing for modification, not abandonment, of the punitive damage system).

tive ways because they cannot accommodate the financial risk.[61] Further, some have argued that if deterrence is the goal, there is no justification for plaintiffs reaping a punitive damage jackpot.[62] In fact, some have proposed that the government should benefit from punitive awards,[63] and some states have enacted legislation to bring this about.[64]

b. Punitive damages and mass tort litigation

The debate continued along these academic lines for years, and though always a point of contention, punitive damages were a relatively benign issue until the concept of mass tort litigation arose in the late 1960s.[65] Prior to that time, a typical case involving punitive damages had only two parties and involved some isolated incident between them.[66] The singular nature of the cases and the relation of the parties aided juries in assessing unspectacular awards.[67]

In 1967, the Second Circuit decided *Roginsky v. Richardson-Merrell*.[68] In *Roginsky*, the plaintiff brought a products liability action against a drug manufacturer, claiming that the company knew about possible harmful effects of one of their drugs.[69] The plaintiff as-

61. *See* Ingram, *supra* note 57, at 214 (stating that "[d]esired products may never come to market, new ideas may be stifled, and needed advocacy may be suppressed").

62. Commentators have made this argument for many years, and still make it today. *See, e.g.*, Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries—but no more."); Bass v. Chicago & Northwestern Ry. Co., 42 Wis. 654, 672 (1877) (arguing that "it is . . . difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer.") *See also* Sales & Coles, *supra* note 11, at 1165 (stating that "punitive damages simply provide a windfall to the plaintiff"); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1206 (1931) (stating that the flaw of the punitive damage system is that it encourages plaintiffs to bring frivolous suits purely out of self-interest, hoping to win a large punitive judgment).

63. Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 523 (1957).

64. *See, e.g.*, FLA. STAT. ch. 768.73(2) (1988); IOWA CODE § 668A.1 (1987); MO. ANN. STAT. § 537.675 (Vernon 1988).

65. *See* John Calvin Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 141 (1986).

66. *Id.*

67. *Id.* "[M]ost punitive damage judgments were, by today's standards, almost trivial in amount." *Id.*

68. 378 F.2d 832 (2nd Cir. 1967).

69. For more information concerning the *Roginsky* litigation and other suits brought concerning the drug involved in *Roginsky*, MER/29, see Paul D. Rheingold, *The MER/29 Story: An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116 (1968).

serted that he suffered personal injury, primarily cataracts, after taking the defendant's drug that was intended to lower blood cholesterol levels.[70] The company altered test results that it submitted to the Food and Drug Administration and marketed the product anyway, despite knowledge of the hazards.[71] Although the court held that there was insufficient evidence to allow punitive damages in *Roginsky*, the case exposed the problems that can arise when a large number of plaintiffs seek punitive damages against a single defendant.[72] Each plaintiff could obtain an enormous punitive judgment against the company.[73] The company would then be vulnerable to a staggering amount of liability, risking bankruptcy and the investments of stockholders.[74] The dangers *Roginsky* exposed, however, did not immediately come to pass. In 1976, a leading commentator wrote that the anticipated flood of large punitive damage awards had not occurred, and that only three appellate courts had upheld punitive damage awards in product liability cases.[75] This calm did not last.

Plaintiffs filed an abundance of product liability actions that included claims for punitive damages from the late 1970s through the 1980s.[76] These cases involved manufacturers of products that were widely used by the public.[77] The defendants in these lawsuits in-

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70. *Roginsky*, 378 F.2d at 834.

71. *Id.*

72. Judge Friendly warned:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive damages in the amount here awarded these would run into the tens of millions, as contrasted with the maximum criminal penalty . . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.

Id. at 839.

73. *Id.*

74. *Id.* at 841.

75. David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1261 & n.12 (1976).

76. Jeffries, *supra* note 65, at 142.

77. *Id.* For more information concerning these types of lawsuits and the problems encountered with them, see generally Edward F. Sherman, *Class Actions and Duplicative Legislation*, 62 IND. L.J. 507 (1986) (postulating that federal class actions may avoid the problem of duplicative litigation); Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1 (1985) (providing an overview of products liability cases involving punitive damages and suggesting reforms to bring punitives closer to their purposes); Timothy J. Phillips, Note, *The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishment*, 1984 U. ILL. L. REV. 153 (arguing that punitive damage class actions can avoid many problems associated with mass punitive litigation); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness*, 52 FORDHAM L. REV. 37 (1983) (discussing the inherent problems of mass tort litigation and suggesting possible solutions).

cluded, for example, manufacturers of asbestos,[78] automobiles,[79] tampons,[80] DES (a form of synthetic estrogen used to prevent miscarriages),[81] Agent Orange,[82] formaldehyde,[83] and the Dalkon Shield.[84] Additionally, the size of punitive damage awards dramatically increased to the point that it was not surprising to read of a Florida jury awarding $3 million in an action concerning a defective automobile,[85] or of a Colorado jury handing $6.2 million in punitive damages to a plaintiff in an IUD case.[86] Examples of enormous awards became common.[87] This sudden change in the awarding of punitive damages resulted in extensive scholarship devoted to products liability litigation during the late 1970s and early 1980s.[88] Currently, most

78. *See, e.g.*, Moran v. Johns-Manville Sales Corp., 691 F.2d 811 (6th Cir. 1982) (upholding $500,000 punitive award).

79. *See, e.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal. Ct. App. 1984) (upholding $3.5 million punitive award in Pinto case).

80. *See, e.g.*, O'Gilvie v. International Playtex, Inc., 821 F.2d 1438 (10th Cir. 1987) (reinstating $10 million punitive verdict that trial court remitted to $1,350,000).

81. *See, e.g.*, Bichler v. Eli Lilly & Co., 436 N.E.2d 182 (N.Y. 1982) (upholding verdict in favor of plaintiff that pre-natal exposure to defendant's product caused cancer). For more information on mass DES litigation, see Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981).

82. *See, e.g.*, In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980) (granting government's motion to dismiss in class action brought by Vietnam veterans and members of their families).

83. *See, e.g.*, Hughes v. Segal Enter., 627 F. Supp. 1231 (W.D. Ark. 1986) (allowing punitive damages in personal injury action involving formaldehyde gas).

84. *See, e.g.*, In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) (granting certification of a class on motion by manufacturer of intrauterine device for all plaintiffs with pending punitive damage actions).

85. *See* Toyota Motor Co. v. Moll, 438 So. 2d 192 (Fla. Dist. Ct. App. 1983) (affirming $3 million punitive award in an auto fuel design defect case).

86. *See* Palmer v. A. H. Robins Co., 684 P.2d 187 (Colo. 1984) (affirming $6.2 million punitive award in an IUD case).

87. *See, e.g.*, Texaco v. Pennzoil Co., 729 S.W. 2d. 768 (Tex. Ct. App. 1987), *cert. dismissed*, 485 U.S. 994 (1988) ($3 billion punitive damage award remitted to $1 billion); Central Telecommunications, Inc., v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) ($25 million punitive damage verdict); Tetuan v. A. H. Robins Co., 738 P.2d 1210 (Kan. 1987) ($7.5 million punitive damage award); Downey Sav. & Loan Ass'n v. Ohio Casualty Ins. Co., 234 Cal. Rptr. 835 (Cal. Ct. App. 1987), *cert. denied*, 486 U.S. 1036 (1988) ($5 million punitive damage award). For further lists of large punitive damage awards, see Brief of Petitioner at app. A, Pacific Mutual v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279) (listing 89 jury verdicts in Alabama between 1985 and mid-1990 that returned punitive damage awards over $500,000, including six over $10 million); Jeffries, *supra* note 65, at 145 n.23 (providing an extensive list of large punitive awards). *See also* Sales & Coles, *supra* note 11, at 1154 ("[T]he amount of punitive damage awards awarded in recent years, as if feeding upon itself, has escalated to astronomical figures that boggle the mind.").

88. *See generally* James D. Ghiardi & John J. Kircher, *Punitive Damage Recovery in Products Liability Cases*, 65 MARQ. L. REV. 1 (1981) (stating that knowledge and

courts allow punitive damages to be awarded in products liability litigation.[89]

c. *Punitive damages and vicarious liability*

The number of punitive damage awards grew as courts held more employers liable through the doctrine of vicarious liability. However, obtaining punitive damages from an employer for the wrongful acts of employees was not always easily accomplished. Near the turn of the century, the United States Supreme Court held that a corporation would be liable for punitive damages only if it expressly authorized or ratified the acts of its employees.[90] Commentators of the day agreed with this view.[91] They argued that it is wrong to punish the innocent employer for acts that he did not authorize.[92] Moreover, they purported that such punishment would not result in more careful hiring practices.[93]

Nevertheless, some jurisdictions expanded the doctrine of *respondeat superior* to hold employers responsible for punitive damages, even if the employer does not expressly authorize the employee's wrongful acts.[94] In these jurisdictions, the employer is responsible

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fault on the part of the manufacturer are consistently present in products liability actions involving punitive damages); Mark P. Robinson, Jr. & Gerald H. B. Kane, Jr., *Punitive Damages in Product Liability Cases*, 6 PEPP. L. REV. 139 (1979) (arguing that punitive damages are appropriate and constitutional in products liability cases); Timothy J. Phillips, Note, *The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishment*, 1984 U. ILL. L. REV. 153 (argues that a class action is an effective means of avoiding multiple punishment); Mark Donald Peters, Comment, *Punitive Damages, The Common Question Class Action, and the Concept of Overkill*, 13 PAC. L.J. 1273 (1982) (arguing that courts should consider various factors concerning the purposes of punitive damages prior to certifying a class action that seeks punitives); Nadine E. Roddy, Note, *Punitive Damages in Strict Products Liability Litigation*, 23 WM. & MARY L. REV. 333 (1981) (stating that most courts find punitive damages appropriate in products liability suits); Harvey R. Weingarden, Comment, *Exemplary Damages in Products Liability Cases*, 1980 DET. C.L. REV. 647 (stating that courts should impose punitive damages in products liability cases only when the manufacturer knows of the defect or consciously ignores the possibility); Alan Schulkin, Comment, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797 (1979) (discussing the dangers of mass liability and proposing a new system based on considering awards already given when determining new awards).

89. *See* MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY, ¶ 29.01(2) (2d ed. 1990).

90. *See* Lake Shore & Michigan So. Ry. Co. v. Prentice, 147 U.S. 101, 115 (1893) (holding that a railroad was not liable for punitive damages since it did not authorize or ratify the actions of employee).

91. *See* THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES, § 380 at 740-41 (9th ed. 1912) (preferring the view that punitive damages be awarded only if the corporation authorized or ratified the conduct, or if the corporation was negligent in hiring the employee).

92. *See* Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296 (1961).

93. *Id.* at 1305-06.

94. *See* SCHULETTER & REDDEN, *supra* note 26, at § 4.4(B)(2)(a).

for punitive damages if the company could be held liable for other damages, and if the employee committed the wrong within the scope of employment.[95] This expansion came about as courts saw a need to encourage companies to monitor their employees, and to discourage companies from ignoring certain wrongful acts of their employees that would benefit the company.[96] Most jurisdictions apply this broad rule, though it is often criticized.[97]

Some jurisdictions rejected the broad scope of employment rule and adopted a narrower rule advocated by the Second Restatement of Torts and the Second Restatement of Agency.[98] This view, like the old rule, holds that the employer will be liable for punitive damages if the employer authorized the employee's act or was negligent in employing the person.[99] However, the Restatements specify that the corporation may be liable for unauthorized acts of managers, or for employee actions approved or ratified by the principal or a manager.[100] Therefore, depending on the jurisdiction, employers are vicariously liable to different degrees for punitive damages awarded against their employees.[101]

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95. 22 AM. JUR. 2D *Damages* § 788 (1988).

96. *See* Clarence Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 220 (1960) (stating that holding employers generally liable is proper where the company benefits from and ignores the employee's wrong).

97. *See, e.g.*, Randy S. Parlee, *Vicarious Liability for Punitive Damages: Suggested Changes in the Law Through Policy Analysis*, 68 MARQ. L. REV. 27 (1984) (suggesting changes from the current system that would greatly limit the liability of employers); Timothy R. Zinnecker, Comment, *Corporate Vicarious Liability for Punitive Damages*, 1985 B.Y.U. L. REV. 317 (arguing that punitive damages be imposed only if the employee's act occurred within the scope of his employment and if damages would deter future tortious conduct).

98. *See* RESTATEMENT (SECOND) OF TORTS § 909 (1979); RESTATEMENT (SECOND) OF AGENCY § 217c (1958).

99. The *Second Restatement of Torts* states that punitive damages may be awarded "if the principal or a managerial agent authorized the doing and the manner of the act, or the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him." RESTATEMENT (SECOND) OF TORTS § 909 (1979). The *Second Restatement of Agency* states that punitive damages may be awarded "if the principal authorized the doing and the manner of the act, or the agent was unfit and the principal was reckless in employing him." RESTATEMENT (SECOND) OF AGENCY § 217c (1958).

100. The Restatements hold the corporation liable if "the agent was employed in a managerial capacity and was acting in the scope of employment, or the principal or managerial agent of the principal ratified or approved the act." RESTATEMENT (SECOND) OF TORTS § 909 (1979); RESTATEMENT (SECOND) OF AGENCY § 217c (1958).

101. Some argue that punitive damages through vicarious liability should not be an established part of the American legal system. *See* Ellis, 1989, *supra* note 52, at 980 (stating that "no cogent justification has emerged" for imposing punitive damages through vicarious liability); Ingram, *supra* note 57, at 221 (arguing that if punitive

d. Punitive damages and insurance bad faith actions

Insurance bad faith actions are a fairly recent development, and these actions have added to the number of punitive damage awards. Two factors created the bad faith cause of action. First, in the 1950s, courts began to recognize a separate tort for breach of contract in addition to the underlying contractual claim.[102] Second, courts began to read an implied covenant of good faith and fair dealing into contracts.[103] These factors combined to create the tort of bad faith.[104]

The bad faith cause of action arose primarily as a means to bring sanctions against insurance companies who engage in improper practices, usually consisting of the refusal to pay the claims of their insureds.[105] The rationales behind the bad faith action are: First, to balance the disparity in power between the parties; second, to protect the policyholder's reasonable expectations; and finally, to counter the benefits that an insurer can gain by not paying claims.[106] Increasingly over the last two decades, courts have been willing to impose punitive damages against insurers in these types of cases.[107] These cases also resulted in very large punitive damage awards, as juries tended to look unfavorably on large, institutional, profit-making defendants.[108]

These developments brought the punitive damage issue to the forefront of not just the legal community, but of the general public as

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damages can be justified at all, they certainly cannot be justified through vicarious liability).

102. *See* Laurence P. Simpson, *Punitive Damages for Breach of Contract*, 20 OHIO ST. L.J. 284, 287 (1959) ("[A]n increasing number of cases have been decided approving assessment of exemplary damages in contract actions.").

103. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("[E]very contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement."); *see also* STEPHEN S. ASHLEY, BAD FAITH ACTIONS: LIABILITY AND DAMAGES § 1:01 (1991) (explaining the covenant of good faith and fair dealing as "a fictional promise that neither party to a contract would do anything to deprive the other party of the benefits of the contract").

104. *See* Gruenberg v. Aetna Ins. Co., 510 P.2d 1032 (Cal. 1973). In *Gruenberg*, the court examined the implied covenant of good faith and fair dealing and the duty of an insurer to make payments that are due, and concluded that "[t]hese are merely two different aspects of the same duty." *Id.* at 1037. *See generally* Richard B. Graves III, *Bad-Faith Denial of Insurance Claims: Whose Faith, Whose Punishment? An Examination of Punitive Damages and Vicarious Liability*, 65 TUL. L. REV. 395, 399 (1990) (stating that *Gruenberg* "laid the theoretical and legal foundation for the explosion of . . . bad-faith insurance litigation that followed").

105. *See* Ashley, *supra* note 103, at § 1:09. Ashley states that bad faith actions "evolved as a means of imposing sanctions on insurers who frustrate the smooth functioning of the insurance mechanism." *Id.*

106. *See* Graves, *supra* note 104, at 399.

107. *Id.* at 395.

108. *See* Ellis, 1989, *supra* note 52, at 999. Professor Ellis states that because jurors do not effectively represent a cross-section of the community, they are even more likely to bear antagonism toward institutional defendants than the public at large. *Id.* at 997.

well. Tort reform groups arose, calling for the abolition or modification of the punitive damage system.[109] These groups engaged in public relations and lobbying for their cause, extending the debate beyond academics and into the political arena.[110] Legal commentators showed more interest in the debate and took sides as the issue became more heated.[111] The general sentiment of the scholars seemed adverse to awarding punitive damages.[112] While some commentators remained unconvinced,[113] as the years went on, the case against punitive damages grew stronger.[114]

e. Empirical studies of punitive damages

As the debate surrounding the value of punitive damages grew, supporters and detractors alike looked for hard data to support their claims. The punitive damages debate has generally limited empirical data to two studies,[115] though recently the results of a third study have been published.[116] The Rand study, published in 1987, studied

109. For a lengthy list of reform groups that arose in the 1980s, see Daniels & Martin study, *supra* note 30, at 11 n.43.

110. *Id.* at 10-11. Daniels and Martin see the tort reform movement not as natural reaction by the general public to the situation, but as "an intense, well-organized, and well-financed political campaign by interest groups seeking fundamental reforms in the civil justice system benefiting themselves." *Id.* at 10. They go on to state that reformers characterize the system as being out of control to serve their own ends, with the result being that "the punitive damages debate has become a matter of public relations, propaganda, and the mobilization of prejudice and fear, rather than a matter of rational discourse." *Id.* at 13.

111. *See Symposium: Punitive Damages*, 40 ALA. L. REV. 687 (1989); *Symposium: Punitive Damages*, 56 S. CAL. L. REV. 1 (1982).

112. *See* Ellis, 1989, *supra* note 52, at 975-76.

113. *See, e.g.*, Harvey R. Levine, *Demonstrating and Preserving The Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F. L. REV. 613 (1979) (arguing that punitive damages have a desirable effect in that they deter unfair insurance claims practices); Steven H. Reisberg, Note, *In Defense of Punitive Damages*, 55 N.Y.U. L. REV. 303 (1980) (arguing that punitive damages play an important role in the law of torts).

114. *Compare* David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258 (1976) (arguing that punitive damages are an appropriate and effective means of punishment and deterrence in products liability litigation) *with* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982) (questioning the appropriateness of punitive damages in products liability cases due to abuses of the system).

115. M. Peterson, et al., *Punitive Damages: Empirical Findings* (RAND, The Institute for Civil Justice, 1987) [hereinafter Rand study]; STEVEN DANIELS & JOANNE MARTIN, EMPIRICAL PATTERNS IN PUNITIVE DAMAGE CASES: A DESCRIPTION OF INCIDENCE RATES AND AWARDS (American Bar Foundation Working Paper Series No. 8705, 1988) [hereinafter ABF study].

116. Daniels & Martin study, *supra* note 30.

punitive damage awards in Cook County, Illinois and San Francisco County, California between 1960 and 1984.[117] The 1988 American Bar Foundation (ABF) study analyzed punitive damage awards in thirty-four counties in ten states during the early 1980s.[118] The Daniels & Martin study in 1990 first looked at the punitive awards of forty-seven counties in eleven states from 1981-85, and then the awards in two counties from 1970-88.[119]

Groups on both sides of the punitive damage debate have used the data and results of the Rand study.[120] The findings seem to show that although punitive damage awards generally increased in size and frequency, most punitive awards, unlike the awards that grabbed the headlines, were small.[121] The ABF study concluded that courts did not routinely award punitive damages, and that large awards were rare.[122] The Daniels & Martin study was in agreement with these findings.[123] However, opponents of punitive damages have argued that although large awards are rare, punitive damages are still problematic because the system allows for arbitrary awards.[124]

B. Due Process and Punitive Damages

1. Procedural v. Substantive Due Process

Due process issues have always arisen in the context of punitive damages. The Fourteenth Amendment to the United States Constitution prohibits state governments from depriving a person of "life, liberty, or property without due process of law."[125] The Fifth Amendment proscribes essentially the same thing with respect to the federal government.[126] The concept of due process encompassed in both amendments has traditionally been difficult to define.[127] The

117. Ellis, 1989, *supra* note 52, at 985.

118. *Id.*

119. Daniels & Martin study, *supra* note 30, at 6.

120. For examples and an explanation of this contradiction, see *id.* at 24 n.101, 26 n.122. Daniels and Martin are critical of either side basing findings on the Rand study, claiming that a case study such as Rand "does not represent a legitimate sample and cannot serve as the basis for statistical generalization." *Id.* at 27.

121. *See* Ellis, 1989, *supra* note 52, at 985-86.

122. ABF study, *supra* note 115, at 19.

123. Daniels & Martin study, *supra* note 30, at 43.

124. *See* Ellis, 1989, *supra* note 52, at 987-88. Professor Ellis writes, "[I]t is not the increase in median or even average awards that has stimulated the concern of business executives, public officials, and journalists, and the interest of scholars. Rather, it is the volatility and variance of the awards." *Id.* at 987.

125. U.S. CONST. amend. XIV, § 1.

126. *See* U.S. CONST. amend IV.

127. *See* Lassiter v. Department of Social Servs., 452 U.S. 18, 24 (1981). The Court stated that "[f]or all its consequence, 'due process' has never been, and perhaps can never be, precisely defined. '[Unlike] some legal rules . . . [it] is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Id.* (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

Supreme Court has stated that for procedures to comport with due process, they must be consistent with "ordinary notions of fair play and the settled rules of law,"[128] they must comply with "traditional notions of fair play and substantial justice,"[129] and they must not offend "the community's sense of fair play and decency."[130] The Court has further stated that the concept of fundamental fairness must always be present, "a requirement whose meaning can be as opaque as its importance is lofty."[131]

Due Process issues are raised in the context of two distinct categories.[132] Procedural due process guarantees that the state will not take one's life, liberty or property interests without a fair procedure.[133] Substantive due process is concerned with the constitutionality of a law or government action.[134] Specifically, it concerns the way that legislative action may impair individual freedoms.[135] Thus, in a substantive due process analysis, the Court determines whether the substance of a rule falls within constitutional boundaries.[136] In a procedural due process analysis, the Court examines if the process used in applying a certain rule is fair.[137]

An award of punitive damages raises both procedural and substantive due process concerns.[138] The state may violate procedural due process if the state procedure for awarding punitive damages is unfair in that it gives juries unlimited discretion to award the damages.[139] A substantive due process violation may occur when the court finds the amount of a punitive damage award to be arbitrary and capricious.[140] A procedural due process claim and a substantive due process claim may arise together, or they may arise independently of each other. For example, an arbitrary jury award may violate substantive due process, though the jury followed an appropriate procedure.

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128. Connally v. General Const. Co., 269 U.S. 385, 391 (1926).
129. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).
130. Rochin v. California, 342 U.S. 165, 173 (1952).
131. *Lassiter*, 452 U.S. at 24.
132. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 13.1 at 487 (4th ed. 1991).
133. *Id.* at § 10.6 at 338.
134. *Id.* at § 10.6 at 339.
135. *Id.* at § 13.1 at 487.
136. *Id.* at § 10.6 at 339.
137. *Id.*
138. *Id.* at § 10.6 at 338 n.1.
139. *Id.*
140. *Id.*

Although the Supreme Court has acknowledged the common law system of awarding punitive damages throughout its history, it has never ruled directly on the issue of the system being violative of procedural due process.[141] Likewise, no other court has held that the common law system violates procedural due process, though courts have ruled on various substantive due process issues.[142]

2. Substantive Due Process Issues

In *Wangen v. Ford Motor Co.*,[143] Ford was the defendant in two lawsuits alleging strict liability in tort and negligence after a Pinto, manufactured by Ford, exploded in an accident.[144] Ford argued that the court should view the mass production of a defective product as one wrongful act.[145] Under this view, Ford maintained that allowing many plaintiffs to recover would constitute multiple punishment and therefore, violate due process.[146] The Wisconsin Supreme Court rejected the argument, finding that the wrong Ford committed was not in the manufacture, but in the injuries that Ford caused; hence, the court could punish Ford for each injury.[147]

In *Cathey v. Johns-Manville Sales Corp.*,[148] the defendant made a similar argument. In *Cathey*, two separate plaintiffs brought products liability actions against a manufacturer of asbestos.[149] The defendant, Johns-Manville, claimed that imposing multiple punitive damage awards in a mass tort action would constitute multiple punishment for only one wrong.[150] Such punishment, it argued, would violate due process.[151] The Sixth Circuit did not agree and held that the opportunity to litigate the propriety of the punitive damage awards gave Johns-Manville all the process it was due.[152]

Other defendants have argued that a single punitive damages

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141. *See* Smith v. Wade, 461 U.S. 30 (1983); Standard Oil Co. v. Missouri, 224 U.S. 270 (1912); Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26 (1889); Barry v. Edmunds, 116 U.S. 550 (1886); Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512 (1885); Day v. Woodworth, 54 U.S. (13 How.) 363 (1851).

142. *See, e.g.*, McCutchen v. Liberty Mutual Ins. Co., 699 F. Supp. 701, 709 (N.D. Ind. 1988) (stating that the court could find no cases where the punitive damage system was held to violate due process); FDIC v. W.R. Grace & Co., 691 F. Supp. 87, 100 (1988), *cert. denied*, 110 S. Ct. 1524 (1990) ("[T]he court finds no constitutional infirmity as to the procedure for assessment of punitive damages.").

143. 294 N.W.2d 437 (Wis. 1980).

144. *Id.* at 440.

145. *Id.* at 454.

146. *Id.* at 466.

147. *Id.* ("The gravamen of Ford's alleged offense is not only the manufacture and distribution of the car but the injury caused thereby.").

148. 776 F.2d 1565 (6th Cir. 1985).

149. *Id.* at 1567-69.

150. *Id.*

151. *Id.*

152. *Id.* at 1571.

award may be so large as to deny due process. Texaco appealed a Texas state court's approval of a $3-billion punitive damages award in *Texaco, Inc., v. Pennzoil Co.*[153] In *Texaco*, Pennzoil alleged that Texaco knowingly and intentionally interfered in a pending contract between Pennzoil and Getty Oil in which Pennzoil was to buy almost half of Getty's stock.[154] The jury awarded a total of $11.12 billion in damages, $7.53 billion being compensatory.[155] Texaco sought and obtained a preliminary injunction that prohibited Pennzoil from enforcing the judgment. The Second Circuit determined that because of the enormous size of the award, state statutory lien and bond provisions limited Texaco's right to appeal, thereby denying due process.[156] The case then went to the Texas court of appeal, which allowed a punitive award, but found that $3 billion was excessive.[157] The court ordered the award remitted to $1 billion.[158]

In *Dahlbeck v. DICO Co., Inc.*,[159] an employee brought a product liability action against a truck manufacturer, seeking punitive damages and claiming that a malfunction caused a crane on top of a truck to strike power lines and injure the employee.[160] The defendant argued that the simultaneous submission of the requests for a finding of liability and an award of punitive damages violated due process. While recognizing this possibility, the appellate court refused to rule on the issue as it was not raised at trial.[161]

The above decisions reflect the variety of substantive due process challenges to punitive damage awards. As more of these cases were brought, it became inevitable that some would reach the Supreme Court, and also that a procedural due process challenge to the common law system would emerge.

3. Supreme Court Decisions in the 1980s

On three occasions in the late 1980s, the Supreme Court decided

153. 784 F.2d 1133 (2d Cir. 1986).
154. *Id.* at 1136.
155. *Id.*
156. *Id.* at 1154. However, the Supreme Court soon removed the injunction and ruled that the Court of Appeals should not have heard the case, because adequate state remedies may have been available. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).
157. Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 866 (Tex. Ct. App. 1987).
158. *Id.* The court stated that "[i]n this case, punitive damages of one billion dollars are sufficient to satisfy any reason for their being awarded, whether it be punishment, deterrence, or encouragement of the victim to bring legal action." *Id.*
159. 355 N.W.2d 157 (Minn. Ct. App. 1984).
160. *Id.* at 161.
161. *Id.*

cases involving punitive damages that raised due process issues.[162] In each case, for various reasons, the Court refused to rule directly on the due process claims, and decided the cases on other grounds. However, the Court expressed interest in each case as to the due process challenge, but postponed the opportunity to rule on the issue. A brief look at these cases and the Court's comments is important to establish a context for examining *Pacific Mutual*.

a. Aetna Life Insurance Co. v. Lavoie (1986)

The first case the Supreme Court decided was *Aetna Life Ins. Co. v. Lavoie*.[163] In *Aetna*, a policy holder filed suit against an insurance company in state court after the company refused to pay the full amount of a hospital bill.[164] The plaintiff claimed bad faith on the part of the company, and the jury returned an award of roughly $1.6 million in compensatory damages and $3.5 million in punitive damages.[165] The Alabama Supreme Court affirmed the award in an opinion joined by Judge Embry.[166] Aetna appealed on various grounds. It argued that the Alabama procedure for awarding punitive damages lacked sufficient standards and therefore violated procedural due process.[167] Additionally, while the appeal was pending, the appellant learned that Judge Embry had filed two suits, pending at the time *Aetna* was decided, against insurance companies that alleged bad faith refusal to pay claims and sought punitive damages.[168] The appellant then filed motions that challenged Judge Embry's participation in the case on the grounds that substantive due process mandates that only disinterested judges participate.[169]

The Supreme Court held that Judge Embry's participation in the case did, in fact, violate the appellant's due process rights.[170] Because the Court decided the case on these grounds, the Court did not rule on the procedural due process issue concerning the method of assessing punitive damages. However, the opinion stated that the argument "raise[d] important issues which, in an appropriate setting,

162. Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986).

163. 475 U.S. 813 (1986).

164. *Id.* at 815-16.

165. *Id.* at 816.

166. *Id.* at 816-17.

167. *Id.* at 828.

168. *Id.* at 817.

169. *Id.*

170. *Id.* at 825. Chief Justice Burger delivered the opinion of the Court and was joined by Justices Brennan, White, Powell, Rehnquist and O'Connor. Justice Blackmun concurred in the judgment, and was joined by Justice Marshall. Justice Stevens did not take part in the decision of the case.

must be resolved."[171] Thus, the Court demonstrated an initial interest in a procedural due process challenge.

b. Bankers Life and Casualty Co. v. Crenshaw (1988)

The Supreme Court next decided *Bankers Life and Casualty Co. v. Crenshaw*.[172] *Bankers Life* also involved a bad faith action against an insurance company that refused to pay a claim. The petitioner generally argued that a $20,000 actual damage and $1.6-million punitive damage award violated due process.[173] The Court did not decide the due process issues, however, because the petitioner failed to raise them.[174]

In her concurring opinion, Justice O'Connor, joined by Justice Scalia, voiced concern about the procedural due process issue.[175] She wrote that the "[a]ppellant has touched upon a due process issue that I think is worthy of the Court's attention in an appropriate case."[176] The opinion also expressed Justice O'Connor's belief that a party might successfully challenge that punitive damages violate due process. She stated that "because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause,"[177] and that the system which gives "wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."[178] The stronger language of *Bankers Life* lent momentum to the idea that the Court might decide against the common law punitive damage system.

c. Browning-Ferris v. Kelco Disposal (1989)

In the year following *Bankers Life*, the Supreme Court decided *Browning-Ferris Industries Inc. v. Kelco Disposal Inc.*[179] In *Browning-Ferris*, the defendants brought an action charging the plaintiffs with antitrust violations and interference with contractual rela-

171. *Id.* at 828-29.
172. 486 U.S. 71 (1988).
173. *Id.* at 76. For further discussion of the case, see Forrest Campbell, Comment, *Bankers Life: Justice O'Connor's Solution to the Jury's Standardless Discretion to Award Punitive Damages*, 24 WAKE FOREST L. REV. 719 (1989).
174. *Bankers Life*, 486 U.S. at 76-77.
175. *Id.* at 86-89 (O'Connor, J., concurring).
176. *Id.* at 87 (O'Connor, J., concurring).
177. *Id.* (O'Connor, J., concurring).
178. *Id.* at 88 (O'Connor, J., concurring).
179. 492 U.S. 257 (1989).

tions.[180] The appellants claimed that a $6 million punitive damage award violated the excessive fines clause of the Eighth Amendment.[181] The action also raised a due process challenge under the Fourteenth Amendment, questioning whether due process served to check jury discretion when there is an absence of statutory limits on punitive damage awards.[182] This claim, based on the size of the award, raised both substantive and procedural due process issues. The Court acknowledged that there might be some precedent for holding that a certain, exceedingly large punitive award might violate substantive due process.[183] Further, the Court stated that it had never addressed the issue of the lack of a statutory limit violating procedural due process.[184]

The Court noted that it had rarely invoked the Eighth Amendment in civil actions, but that the lack of past action did not preclude their doing so in this case.[185] Nevertheless, the Court refused to hold that the award violated the Eighth Amendment. It reasoned that the Eighth Amendment applies only when the government takes action against an individual, not in actions between private parties.[186] The Court did not address the due process issues, as the petitioners failed to raise them at either the trial or appellate level.[187]

Despite the Court's refusal to rule directly on either the substantive or procedural due process issues in *Browning-Ferris*, all of the opinions touched on due process, thus keeping due process concerns very much alive. Justice Blackmun's majority opinion stated that "[t]here is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme."[188] Justice Brennan, joined by Justice Marshall, wrote in a concurring opinion that he "join[ed] the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private par-

180. For more information and analysis concerning the decision, see Steven H. Sneiderman, *The Future of Punitive Damages After Browning-Ferris Industries v. Kelco Disposal*, 51 OHIO ST. L.J. 1031 (1990); Gary T. Schwartz, *Browning-Ferris: The Supreme Court's Emerging Majorities*, 40 ALA. L. REV. 1237 (1989).

181. *Browning-Ferris*, 492 U.S. at 261.

182. *Id.* at 277.

183. *Id.* at 276.

184. *Id.* at 276-77.

185. *Id.* at 263-64. This application of a traditionally criminal protection to a civil circumstance raised hope in some areas that the Court would likewise apply Fourteenth Amendment criminal protections to civil proceedings. *See* Nicholas K. Kile, Note, *Constitutional Defenses Against Punitive Damages: Down But Not Out*, 65 IND. L.J. 141, 149-50 (1989).

186. *Browning-Ferris*, 492 U.S. at 275.

187. *Id.* at 277. The Court stated that the "inquiry [into the due process challenge] must await another day." *Id.*

188. *Id.* at 276.

ties."[189] Justice O'Connor, joined by Justice Stevens, concurred in part and dissented in part. She stated that "nothing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed."[190]

The wording in the above cases clearly demonstrated the Court's interest in hearing a procedural due process challenge to punitive damages. Some commentators believed all along that a procedural due process attack could be successful,[191] and others came to see this as true in light of the Court's triumvirate of recent decisions.[192] Thus, the dicta in the previous cases paved the way for the resolution of the punitive damages due process issue in *Pacific Mutual v. Haslip*.[193]

III. STATEMENT OF THE CASE

A. Facts of the Case

In 1981, Lemmie Ruffin solicited life and health insurance coverage for the employees of Roosevelt City, Alabama.[194] Ruffin sold life insurance for Pacific Mutual Life Insurance Company and health insurance for Union Fidelity Life Insurance Company.[195] Although Ruffin always represented himself as a Pacific Mutual agent, and not as an agent for both companies, he made a single proposal to the city for both coverages.[196] Under this proposal, the city clerk made monthly payments directly to Ruffin on behalf of the city employees. Ruffin subsequently misappropriated most of the funds he re-

189. *Id.* at 280 (Brennan, J., concurring).

190. *Id.* at 283 (O'Connor, J., concurring in part and dissenting in part). Thus, Justice O'Connor welcomed both the substantive (relating to the "awards of punitive damages") and procedural (relating to "the method by which they are imposed") due process challenges. *Id.*

191. *See* Ellis, 1989, *supra* note 52, at 1007 ("The process of adjudicating punitive damages claims falls far short of due process.").

192. *See* Sneiderman, *supra* note 13, at 1046 (concluding that in light of the recent decisions, "the Court will be receptive to a due process argument regarding excessive punitive damage awards"); Kile, *supra* note 185, at 165 (1989). Kile states that *Browning-Ferris* did not set back constitutional challenges to punitive damages. *Id.* "Instead, the proper arrow [for a due process challenge] may be drawn from the constitutional quiver for an attack that appears stronger than ever."). *Id.*

193. 111 S. Ct. 1032 (1991).

194. *Id.* at 1036.

195. *Id.*

196. *See* Pacific Mutual Life Ins. Co. v. Haslip, 553 So. 2d 537, 542 (Ala. 1989). The Alabama Supreme Court decision lists examples where Ruffin acted solely as Pacific Mutual's agent. *Id.*

ceived.[197] Union Fidelity notified Ruffin that the city employees' health insurance had lapsed, but Ruffin failed to inform the city.[198]

Cleopatra Haslip, a city employee, was hospitalized in early 1982 with a kidney infection.[199] During her stay, she incurred physician and hospital charges of approximately $4,000.[200] Upon discharge, Haslip discovered that she had no health insurance coverage, and the hospital required her to pay her bill.[201] Haslip did not have the money, and the hospital turned over the collection of her accounts to a collection agency, which damaged her credit.[202] Haslip, along with three other city employees, brought suit against Pacific Mutual under the doctrine of *respondeat superior*, and against Ruffin, claiming damages for fraud.[203]

B. Procedural Facts

1. Trial Court

The court instructed the jury that they could award punitive damages if they found liability for fraud.[204] Pacific Mutual did not object

197. *Pacific Mutual*, 111 S. Ct. at 1036.

198. *Id.*

199. *Id.*

200. *Id.* at 1037 n.2. In their brief, Haslip's attorneys stated that "the hospital bills [were] equivalent to almost half her *annual* take home pay." Brief for Respondents at 1-2, Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279) (emphasis in original).

201. *Pacific Mutual*, 111 S. Ct. at 1036.

202. *Id.*

203. *Id.* at 1036-37.

204. *Id.* at 1037. The jury charge relating to punitive damages was as follows:

> Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.
>
> This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.
>
> Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by deterring [sic] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so.
>
> Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.

Id. at 1037 n.1.

to the jury charge.[205] The jury found that Ruffin acted as Pacific Mutual's agent when he committed his acts, and found that his acts were indeed fraudulent.[206] The jury returned a verdict of $1,040,000 in damages for Haslip, of which about $840,000 was punitive.[207] The jury also awarded the other three plaintiffs between $10,000 and $16,000.[208] Pacific Mutual moved for a new trial. The trial court reviewed and approved the punitive damages award before denying the motion.[209] Pacific Mutual appealed the decision to the Supreme Court of Alabama.

2. Supreme Court of Alabama

The Alabama Supreme Court, in a divided opinion, affirmed the trial court's decision.[210] Two Justices dissented in part, believing that the award violated Pacific Mutual's procedural due process rights because the Alabama system did not offer the defendant enough protections.[211] However, the majority did not agree. The majority found that the evidence supported the findings that Ruffin's fraud occurred within the scope of his agency.[212] The majority also agreed with the trial court's decision not to remit the punitive award.[213] Pacific Mutual, minus Ruffin, appealed the case again, and the United States Supreme Court granted certiorari to determine if the process and award violated the Due Process Clause of the Fourteenth Amendment.[214]

IV. ANALYSIS OF THE OPINION

A. Majority Opinion

In looking at the due process issues involved in the awarding of pu-

205. *Id.* at 1037.
206. Pacific Mutual Life Ins. Co. v. Haslip, 553 So.2d 537, 541-42 (Ala. 1989). Whether or not one is an agent of another is a question for the jury, and the jury reasonably believed that Ruffin was Pacific Mutual's agent. *Id.*
207. *Pacific Mutual*, 111 S. Ct. at 1037.
208. *Id.* at 1037 n.2.
209. *Pacific Mutual*, 553 So. 2d at 543.
210. *Id.*
211. *Id.* at 544-45 (Maddox, J., concurring in part and dissenting in part). Justice Maddox wrote that he could not believe that the Alabama common law system "is sufficient to accord to litigants all the due process protection the Constitution envisions." *Id.* at 545 (Maddox, J., concurring in part and dissenting in part).
212. *Id.* at 541-43.
213. *Id.* at 543.
214. Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. at 1032, 1037-38 (1991).

nitive damages to Cleopatra Haslip, a majority of the Court[215] held that: (1) finding the insurance company responsible for the acts of its agent does not violate substantive due process;[216] (2) the common law method of assessing punitive damages is not per se unconstitutional;[217] (3) the awarding of punitive damages might violate procedural due process in some instances;[218] and (4) the award of punitive damages in this case did not violate procedural due process because it was based upon objective criteria and was subject to procedural protections.[219] The opinion began with the facts of the case[220] and then discussed the Court's recent decisions concerning punitive damages.[221]

1. Substantive Due Process

The Court first dealt with Pacific Mutual's substantive due process claim.[222] Pacific Mutual asserted that holding the company liable for Ruffin's fraud on the basis of *respondeat superior* was fundamentally unfair.[223] To decide the issue, the Court examined whether Ruffin was acting within the scope of his employment when he defrauded his clients.[224] Pacific Mutual tried to establish that Ruffin was not acting as its agent.[225] To demonstrate the separation between themselves and Ruffin, Pacific Mutual listed various examples,[226] including a claim that Ruffin was in fact working for another company. Pacific Mutual also argued that the award was unfairly large because the focus of the punitive damage award was on the company, and not

215. Justice Blackmun wrote the majority opinion joined by Chief Justice Rehnquist, Justice White, Justice Marshall and Justice Stevens. Justice Scalia filed a concurring opinion, as did Justice Kennedy. Justice O'Connor filed a dissenting opinion. Justice Souter did not participate in the decision of the case. *Id.* at 1036.

216. *Id.* at 1041.

217. *Id.* at 1043.

218. *Id.*

219. *Id.* at 1046.

220. *Id.* at 1036-37. *See supra* notes 194-214 and accompanying text.

221. *Id.* at 1038-40. *See supra* notes 162-93 and accompanying text.

222. *Id.* at 1040-41.

223. *Id.* at 1040. Pacific Mutual argued in its brief, "Due process requires that corporations not be punished on a respondeat superior basis where, as here, the acts of the agent were not performed in the business of the corporation, with intent to benefit the corporation." Brief of Petitioner at 10, Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1989) (No. 89-1279).

224. *Pacific Mutual*, 111 S. Ct. at 1040-41.

225. *Id.*

226. Pacific Mutual argued that neither it nor its "manager was aware that Ruffin was collecting premiums contrary to his contract; that Pacific Mutual had no notice of the actions complained of prior to . . . this litigation; that it did not authorize or ratify Ruffin's conduct; that his contract . . . forbade his collecting any premium other than the initial one . . . ; and that Pacific Mutual was held liable and punished for . . . acts performed on behalf of another company."

Id. at 1040.

Ruffin, who was acting solely to benefit himself.[227] Pacific Mutual argued that to hold it liable in light of these facts was fundamentally unfair.[228]

The Court refuted Pacific Mutual's argument by first stating that the lower courts had found that Ruffin was acting within the scope of his employment, and that they had no reason to dispute this finding.[229] The Court also stated that Ruffin's claim of working for another insurance company had no merit since Pacific Mutual benefited from the policies that Ruffin sold.[230] The Court further explained that Pacific Mutual knew about Ruffin's shady business practices before this case arose.[231] Pacific Mutual had received notice that Ruffin had committed fraud of this type before, that his customers had complained about lacking coverage, and that he received premium payments directly, a practice against company policy.[232] The Court concluded that Ruffin indeed acted as an agent of Pacific Mutual when he committed the fraud.[233]

Having established that Ruffin was Pacific Mutual's agent, the Court next examined if holding Pacific Mutual liable for Ruffin's acts on the theory of *respondeat superior* violated substantive due process.[234] The Court noted that the traditional rule in Alabama holds a corporation responsible for compensatory and punitive judgments against its agents in actions for fraud.[235] The Court used the "rational basis" test[236] and determined that the rule "rationally advance[s] the State's interest in minimizing fraud."[237] This being the case, the Court held that finding Pacific Mutual liable for Ruffin's fraud did not violate Pacific Mutual's substantive due process

227. *Id.*

228. *Id.*

229. *Id.* The Court found that the record sufficiently supports the finding. *Id.*

230. *Id.* at 1041. The Court found that Ruffin was working for Pacific Mutual because "[t]he details of Ruffin's representation admit of no other conclusion." *Id.* *See supra* note 196 and accompanying text.

231. *Id.* at 1041.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. The rational basis test appears in Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955). Under the rational basis test, the Court will assume that the legislature had a rational reason for enacting a certain law, and if it can find no explicitly stated reasons, it will hypothesize until it can come up with a conceivable one. *See* NOWAK & ROTUNDA, *supra* note 132, at § 11.4 at 375.

237. *Pacific Mutual*, 111 S. Ct. at 1041.

rights.[238]

Pacific Mutual also argued that the jury instructions violated substantive due process because they were vague.[239] The Court barely acknowledged this argument, dismissing it in a five-sentence footnote at the end of the opinion.[240] Pacific Mutual argued that similar to the Court finding a statute that allowed juries discretion to award costs against an aquitted defendant to be unconstitutionally vague, so should it find Alabama's jury instructions to be unconstitutionally vague.[241] The Court distinguished the situations by noting that "[d]ecisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred."[242]

2. Constitutionality of the Common Law Method

The Court began an examination of the procedural due process challenge to the common law method by citing instances throughout history where the Court had approved of the procedure.[243] It stated that in light of its continued recognition of the practice, and the fact that no other court, state or federal, had ever held that the practice violated procedural due process, the Court could not hold the practice to be *per se* unconstitutional.[244] The Court noted that the practice existed prior to the enactment of the Fourteenth Amendment, and no evidence exists that the drafters of the Amendment desired a change in the system.[245]

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238. *Id.*

239. *Id.* at 1046 n.12. The void for vagueness doctrine applies to criminal laws, and it states that laws must give sufficient notice to citizens as to what activities are criminal so that people will know if they are acting illegally. *See* NOWAK & ROTUNDA, *supra* note 132 at § 16.9 at 950. Regarding the issue that the vagueness doctrine applied only to criminal laws, Pacific Mutual argued that "[p]unitive damages are punishment, and therefore the standard of scrutiny for vagueness should be similar to that in criminal cases." Brief for Petitioner at 9, Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279). Courts may strike laws that violate due process as being void for vagueness when persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). This occurs when a law is "so indefinite that the line between innocent and condemned conduct becomes a matted of guesswork." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-31 at 1033 (2d ed. 1988).

240. *Pacific Mutual*, 111 S. Ct. at 1046 n.12. However, Justice O'Connor thought the argument worthy of consideration and devoted a substantial portion of her dissent to it. *See infra* notes 309-36 and accompanying text.

241. *Id. See* Giaccio v. Pennsylvania, 382 U.S. 399 (1966) (finding statute granting juries discretion to award costs to acquitted defendants to be vague).

242. *Pacific Mutual*, 111 S. Ct. at 1046 n.12.

243. *Id.* at 1041-43.

244. *Id.* at 1043. The Court quoted, " 'If a thing has been practised [sic] for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.' " *Id.* (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 730 (1988)).

245. *Id.* at 1043. *See* Snyder v. Massachusetts, 291 U.S. 97, 111 (1934) ("The Fourteenth Amendment has not displaced the procedure of the ages.").

3. Common Law Method May Violate Procedural Due Process in Extreme Cases

The Court stated that though the common law method did not violate procedural due process, it would be error to say that an award of punitive damages could never be unconstitutional.[246] This might occur, for example, in a system where a jury is left entirely to its own discretion and reaches an outrageous punitive verdict that "jar[s] one's constitutional sensibilities."[247] However, the Court refused to adopt a rigid standard for determining when an award may be unconstitutional.[248] Rather, the Court stated that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus."[249]

4. Procedural Due Process Not Violated in This Case

Having stated that common law method may violate procedural due process in some instances, the Court next examined if the Alabama system was within constitutional bounds.[250] To do this, the Court examined three specific factors: the jury charge, the trial court's review, and the Alabama Supreme Court's review.[251]

The jury charge described the purposes of punitive damages but made no mention of the wealth of the defendant.[252] While recognizing that the instructions provided the jury with broad discretion to award punitive damages, the Court found that the instructions sufficiently limited that discretion, as they related to the legitimate state interests of punishment and deterrence.[253] The Court believed that

246. *Pacific Mutual*, 111 S. Ct. at 1043. The Court quoted Williams v. Illinois, 399 U.S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack.").

247. *Pacific Mutual*, 111 S. Ct. at 1043.

248. *Id.* The majority stated that "[w]e need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* In fact, the reasonableness standard is far from a bright line standard.

249. *Id.*

250. *Id.*

251. *Id.* at 1044-45. For a discussion of the rationales of punishment and deterrence, *see supra* notes 46-64 and accompanying text.

252. *Id.* Several phrases in the jury instructions explained that the purpose of punitive damages are "not to compensate the plaintiff for any injury" but "to punish the defendant" and protect "the public by [deterring] the defendant and others from doing such wrong in the future." *Id.* at 1044. For the complete jury instructions, see *supra* note 204.

253. *Id.* at 1044.

the instructions "reasonably accommodated Pacific Mutual's interest in rational decision-making and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution."[254] Also, other accepted areas of the law allowed similar discretion.[255] Thus, the Court found the discretion reasonably limited, and not violative of due process.[256]

The Court then turned its attention to Alabama's post-trial review procedures for trial courts in cases where the jury awards punitive damages.[257] The procedures consisted of an examination of the award in light of factors enunciated in *Hammond v. City of Gadsden*.[258] The *Hammond* court examined factors such as the culpability of the defendant's conduct, the desirability of discouraging others from future conduct, the impact upon the parties, and other factors including the impact on innocent third parties.[259] The Court found that the *Hammond* procedure provided a "meaningful and adequate review."[260]

The Court then examined the Alabama Supreme Court's review of the decision.[261] The regular procedure of the Court, followed in this case, begins with a comparative analysis of other awards given in similar cases,[262] and then reviews the award based on seven criteria set out in *Green Oil Co. v. Hornsby*.[263] These criteria extend and elaborate on the *Hammond* factors. The *Green Oil* factors are: (1) whether there is a reasonable relationship between the punitive award and the harm likely to result from the defendant's conduct as well as the harm that has actually occurred; (2) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of past conduct; (3) the profitability to the defendant from the wrongful conduct and the desirability of removing that profit and

254. *Id.*

255. *Id.* Examples that the Court cited were "the best interests of the child," "reasonable care," "due diligence," and "appropriate compensation for pain and suffering or mental anguish." *Id.*

256. *Id.*

257. *Id.*

258. 493 So.2d 1374 (Ala. 1986). In *Hammond*, the widow of a city employee, covered by her husband's insurance policy, sued the city for misrepresentation after a change in the city's coverage left her without insurance. *Id.* at 1374-76.

259. *Id.* at 1379.

260. *Pacific Mutual*, 111 S. Ct. at 1044.

261. *Id.* The Court noted that "the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion." *Id.*

262. The Alabama Supreme Court engaged in this type of comparative analysis in Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1053 (1987), *rev'd*, 475 U.S. 813 (1986). *See supra* notes 163-71 and accompanying text (discussing both decisions).

263. 539 So.2d 218 (Ala. 1989). *Green Oil* involved a claim by gas station owners that alleged fraud on the part of Green Oil, the company from which they bought gasoline.

of having the defendant sustain a loss; (4) the "financial position" of the defendant; (5) all the costs of the litigation; (6) the mitigating factor of the court's imposition of criminal sanctions on the defendant; and (7) the mitigating factor of the existence of other civil awards against the defendant for the same conduct.[264]

The Court determined that these standards imposed "a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages."[265] To demonstrate this, the Court cited instances where juries applied the factors,[266] and where the Alabama Supreme Court's application in post-verdict review resulted in the lowering of punitive damage awards.[267] The Court also stated that the standards were as specific as some adopted in other jurisdictions.[268]

Thus, the Court concluded that Pacific Mutual had benefited from all of the procedural safeguards available.[269] While recognizing the great size of the award,[270] the Court found that the award did not reach a level of unconstitutionality, and therefore, rejected the due process challenge.[271]

B. Justice Scalia's Concurring Opinion

Justice Scalia concurred in the judgment, but vented some strong criticism of the majority opinion. His concurrence began by berating

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264. *Id.* at 223-24.

265. *Pacific Mutual*, 111 S. Ct. at 1045.

266. *Id.* The Court cited *Green Oil*, 539 So. 2d at 219 and Williams v. Ralph Collins Ford-Chrysler, Inc., 551 So. 2d 964, 966 (Ala. 1989) (applying *Hammond* factors in a case for fraud involving a buyer and a car dealership).

267. *Id.* at 1045. The Court cited Wilson v. Dukona Corp., 547 So. 2d 70, 74 (Ala. 1989) (allowing compensatory but not punitive damages in the case of an adjoining landowner wrongfully cutting timber), and United Servs. Auto. Ass'n. v. Wade, 544 So. 2d 906, 917 (Ala. 1989) (stating that a punitive award in an insurance bad-faith action of $3,500,000 was excessive).

268. *Pacific Mutual*, 111 S. Ct. at 1046. Specifically, the Court cited statutes in Ohio and Montana. *Id.* OHIO REV. CODE ANN. § 2307.80(B) (Anderson Supp. 1989) and MONT. CODE ANN. § 27-1-221 (1989). *Id.*

269. *Pacific Mutual*, 111 S. Ct. at 1046.

270. *Id.* The Court acknowledged that the punitive damage award was "more than four times the amount of compensatory damages, [was] more than 200 times the out-of-pocket expense of respondent Haslip . . . [and was] much in excess of the fine that could be imposed for insurance fraud." *Id.*

271. *Id.* The punitive damage award in this case did not "cross the line into the area of constitutional impropriety." *Id.* This would be an example not of applying a "mathematical bright line," but of fixing a line as determined by the factors in an individual case.

the majority for not actually resolving the due process issue.[272] He stated his belief that the traditional practice of awarding punitive damages in itself satisfies procedural due process, and as such, questions of "fairness" and "reasonableness" are irrelevant.[273]

Justice Scalia examined the history of punitive damages, and noted that, as did the rest of the Court, they "were firmly rooted in our history."[274] For Justice Scalia, this fact was enough for him to conclude that the imposition of punitive damages could never violate due process.[275] To him, our legal system determines a practice's conformity with procedural due process, not the Court, and no precedent compels the Court to undertake this task.[276]

Justice Scalia then undertook a lengthy examination of the history and nature of "due process."[277] He elaborated on the historical approach to due process that the Court had adopted in the early twentieth century,[278] and noted that the concept of fundamental fairness had effectively replaced the historical approach.[279] The Court used the fundamental fairness rationale to find unconstitutional two traditional practices in *Sniadach v. Family Finance Corp. of Bay View*[280] and *Shaffer v. Heitner*.[281] Justice Scalia believes the the Court im-

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272. *Id.* at 1046-47 (Scalia, J., concurring). Justice Scalia wrote, "This jury-like verdict provides no guidance as to whether any *other* procedures are sufficiently 'reasonable,' and thus perpetuates the uncertainty that our grant of certiorari in this case was intended to resolve." *Id.* (Scalia, J., concurring) (emphasis in original).

273. *Id.* at 1047 (Scalia, J., concurring).

274. *Id.* at 1048 (Scalia, J., concurring).

275. *Id.* (Scalia, J., concurring). Justice Scalia noted that both the majority and the dissent recognize the lengthy history of acceptance of punitive damages, but both decisions "reject the proposition that this is dispositive for due process purposes . . . I disagree." *Id.* (Scalia, J., concurring). Justice Scalia has used a similar historical analysis to justify that substantive due process (as opposed to procedural in this case) was not violated. *See* Michael H. v. Gerald D., 491 U.S. 110, 124-27 (1989) (holding that not recognizing a father's interest in raising his daughter does not violate a father's substantive due process rights because the daughter was born to a woman married to another man, and such relationships are not traditionally protected).

276. *Id.* (Scalia, J., concurring).

277. *Id.* at 1048-53 (Scalia, J., concurring). Although Justice Scalia never actually stated so, he is obviously speaking of procedural due process.

278. Tenets of the historical approach rested on principles espoused in such cases such as Hurtado v. California, 110 U.S. 516 (1884), and Snyder v. Massachusetts, 291 U.S. 97 (1934), overruled by Malloy v. Hogan, 378 U.S. 1 (1964). As Justice Scalia explained, "*Hurtado*, then, clarified the proper role of history in a due process analysis: if the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it does not necessarily *deny* due process." *Pacific Mutual*, 111 S. Ct. at 1050 (Scalia, J., concurring) (emphasis in original). Justice Cardozo wrote in *Snyder* that a state may "regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental." *Snyder*, 291 U.S. at 105.

279. *Pacific Mutual*, 111 S. Ct. at 1051-53 (Scalia, J., concurring).

280. 395 U.S. 337 (1969) (holding that garnishing wages by creditor without notice or hearing is unconstitutional).

281. 433 U.S. 186 (1977) (holding general quasi in rem jurisdiction unconstitutional).

properly decided these cases.[282] This placed Scalia in a predicament; if he followed precedent, he could not agree with the majority because he did not believe that the practices in *Pacific Mutual* were fundamentally fair.[283] However, if he did not follow the cases, he would be ignoring *stare decisis*.

Justice Scalia resolved the problem by claiming that he need not follow the precedents of the two cases, as the Court has not.[284] Moreover, Scalia determined that the cases were inconsistent with opinions that the Court never overruled.[285] Therefore, he could follow the historical approach, and "affirm that no procedure firmly rooted in the practices of our people can be so 'fundamentally unfair' as to deny due process of law."[286]

Justice Scalia then stated that although the common law method of assessing punitive damages is "harsh or unwise," this does not mean that it is unconstitutional.[287] If in fact the system is harsh and unwise, then it is the states' responsibility to remedy it.[288] Justice Scalia concluded that if the states someday abandon the common law method, then perhaps the Court may hold that the method is not consistent with procedural due process, but it would be improper to do so when the method is still quite alive.[289]

C. Justice Kennedy's Concurring Opinion

In his brief concurring opinion, Justice Kennedy, like Justice Scalia, put forth the principle that a legal tradition does not survive a

282. *Pacific Mutual*, 111 S. Ct at 1053 (Scalia, J., concurring).

283. *Id.* (Scalia, J., concurring). Justice Scalia stated that "I can conceive of no test relating to 'fairness' in the abstract that would approve this procedure, unless it is whether something even more unfair could be imagined." *Id.* (Scalia, J., concurring).

284. *Id.* (Scalia, J., concurring).

285. *Id.* (Scalia, J., concurring). Because of this, Justice Scalia stated, "I think it [the rationale of *Sniadach* and *Shaffer*] has no valid stare decisis claim upon me." *Id.* (Scalia, J., concurring).

286. *Id.* (Scalia, J., concurring). This quotation paraphrased the words of Justice Cardozo in Snyder v. Massachusetts, 291 U.S. 97 (1934). This idea is directly opposed to the principles Justice O'Connor set forth in her dissent. *See infra* note 365 and accompanying text. Justice Scalia clarified his principle by explaining that not "every practice sanctioned by history is constitutional." *Id.* at 1054 (Scalia, J., concurring). Justice Scalia's principle applies to the Due Process Clause, but would not affect other provisions of the Constitution such as the Equal Protection Clause. *Id.* (Scalia, J., concurring).

287. *Id.* (Scalia, J., concurring).

288. *Id.* (Scalia, J., concurring). Justice Scalia stated: "It is through those means—State by State, and, at the federal level, by Congress—that the legal procedures affecting our citizens are improved." *Id.* (Scalia, J., concurring).

289. *Id.* (Scalia, J., concurring).

long period of time if it rests on "either irrational or unfair" principles.[290] However, Justice Kennedy did not take the principle to the extreme that Justice Scalia did. Rather, Justice Kennedy stated that a long historical pedigree does not always preclude the possibility that the practice might violate due process.[291] In this particular case, however, Justice Kennedy concluded that the common law method did not violate due process becasue it "has such a long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to be deemed necessary."[292]

Justice Kennedy then briefly examined the tradition of jury trials, and their inherent inconsistencies.[293] He stated that jury trials by their nature produce varying results, but this certainly does not mean that the system is unconstitutional.[294] Nevertheless, Justice Kennedy agreed with the majority that a specific award may indeed violate the Constitution.[295] However, he disagreed with the majority in the manner a particular award may be unconstitutional.

A court may find a specific punitive award, according to Justice Kennedy, unconstitutional when bias or prejudice is shown on the part of the jury.[296] A huge punitive damage award, where little actual damage exists, "can be some evidence of bias or prejudice in an appropriate case."[297] Such an award violates substantive, not procedural, due process. Justice Kennedy appreciated the difficulty in proving a case on this basis, but felt it offered a more workable approach than that put forth by the majority.[298] As such, Justice Kennedy seemed to be arguing that substantive due process will protect those who fall victim to the faults of the punitive damage system. He criticized the majority for validating the common law method while

290. *Id.* (Kennedy, J., concurring).

291. *Id.* at 1054-55 (Kennedy, J., concurring). Justice Kennedy could not agree with Justice Scalia's idea "that widespread adherence to a historical practice always forecloses further inquiry when a party challenges an ancient institution or procedure as violative as due process." *Id.* (Kennedy, J., concurring). However, Justice Scalia also wrote that the principle "does not say that every practice sanctioned by history is constitutional." *Id.* at 1054 (Scalia, J., concurring).

292. *Id.* at 1055 (Kennedy, J., concurring).

293. *Id.* (Kennedy, J., concurring). According to Justice Kennedy, the inconsistencies are present in juries for two reasons. First, juries act in one isolated situation, not over time. Second, the non-specific nature of jury instructions leads to unpredictability. *Id.* (Kennedy, J., concurring).

294. *Id.* (Kennedy, J., concurring). Justice Kennedy stated that "nonuniformity cannot be equated with constitutional infirmity." *Id.* (Kennedy, J., concurring).

295. *Id.* (Kennedy, J., concurring).

296. *Id.* (Kennedy, J., concurring).

297. *Id.* (Kennedy, J., concurring).

298. *Id.* (Kennedy, J., concurring). Justice Kennedy stated that his approach "rests on sounder jurisprudential foundations than does the approach espoused by the majority." *Id.* (Kennedy, J., concurring). However, he cited no authority for this conclusion. *Id.* (Kennedy, J., concurring).

still examining the specifics of this case.[299] He further expressed displeasure at the majority's failure to provide for future cases.[300]

Justice Kennedy concluded by asserting that if the common law system is flawed, state judges and legislatures are the appropriate means for effecting change, not the Supreme Court.[301] He expressed that the state courts and legislatures have the authority to change common law procedures that have become unworkable, while it is the role of the Supreme Court to interpret the Constitution.[302] This being the case, Justice Kennedy did not believe that the imposition of punitive damages violated the Constitution in *Pacific Mutual*.[303]

D. Justice O'Connor's Dissent

Justice O'Connor's dissenting opinion focused immediately on the problems with the common law system for awarding damages. She stated that the awards are "inconsistent" and "unpredictable" and that they are imposed "indiscriminately," with "a devastating potential for harm."[304] She stated that the Constitution requires courts to provide juries with some standards to guide them, and since the Alabama court failed to do so, accepting such a system will have a negative effect on punitive damage reform.[305] Justice O'Connor enunciated two arguments explaining why the Court should have decided the case differently. Firstly, the jury instructions were void for vagueness;[306] and secondly, the Alabama procedure, like that of most states, violates procedural due process when analyzed using factors presented in *Mathews v. Eldridge*.[307]

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299. *Id.* (Kennedy, J., concurring).

300. *Id.* (Kennedy, J., concurring). The majority's approval of the method coupled with further examination results in a "tension in its analysis . . . [that] must be resolved in some later case." *Id.* (Kennedy, J., concurring).

301. *Id.* at 1055-56 (Kennedy, J., concurring). This is in accord with some of Justice Scalia's comments. *See supra* note 288 and accompanying text.

302. *Id.* at 1056 (Kennedy, J., concurring). Justice Scalia's assertion that if the states remove the process from our legal system, the Court then might declare that due process has been violated, seems to be an extension of Justice Kennedy's thought. *See supra* note 288-89 and accompanying text.

303. *Id.* (Kennedy, J., concurring).

304. *Id.* (O'Connor, J., dissenting).

305. *Id.* at 1056-57 (O'Connor, J., dissenting).

306. *Id.* at 1056 (O'Connor, J., dissenting). *See supra* notes 239-43 and accompanying text.

307. 424 U.S. 319 (1976). *Mathews* dealt with the issue of whether due process requires an evidentiary hearing before terminating social security benefit payments. *Id.* The Court held that it did not. *Id.*

1. The Void for Vagueness Question

Justice O'Connor set the groundwork for her vagueness argument by stating that due process requires that states provide "meaningful standards to guide in the application of [their] laws."[308] If a law does not provide such standards, then it is void for vagueness.[309] Justice O'Connor found that Alabama's punitive damages procedures fall into this "void for vagueness" category.[310] She examined in detail the two decisions that the Alabama system requires juries to make: whether or not to impose punitive damages, and if so, in what amount.[311]

a. The decision to impose punitive damages

The Alabama court instructed the jury that the imposition of punitive damages was within the jury's discretion and that they did not have to impose them if they felt it was improper.[312] Justice O'Connor argued that this is unacceptably vague, and offers no guidance whatsoever for the jury.[313] She drew an analogy to *Giaccio v. Pennsylvania*,[314] where a statute afforded juries their discretion to determine if an amount of money should be assessed against a defendant.[315] In *Giaccio*, the Court struck down the statute as being void for vagueness.[316] Justice O'Connor believed the Court should do likewise here.[317] She stated that this case presents an even stronger argument for unconstitutionality, as the statute fixed the amount that the jury could award in *Giaccio*, while here the jury had absolute discretion.[318]

Justice O'Connor strengthened her vagueness argument by stating

308. *Id.* at 1057 (O'Connor, J., dissenting). *See* Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974) (stating " 'the principle element of the [void for vagueness] doctrine [is] the requirement that a legislature establish minimal guidelines' ")).

309. *Pacific Mutual*, 111 S. Ct. at 1057 (O'Connor, J., dissenting). Justice O'Connor stated that this test applies not only to laws concerning conduct, but also to laws concerning jury instructions. For this principle, she relied on United States v. Batchelder, 442 U.S. 114, 123 (1979) (stating that criminal statutes may violate due process if they do not specifically set out penalties).

310. *Pacific Mutual*, 111 S. Ct. at 1057 (O'Connor, J., dissenting).

311. *Id.* (O'Connor, J., dissenting).

312. *See supra* note 204 for the entire jury charge.

313. *Pacific Mutual*, 111 S. Ct. at 1057 (O'Connor, J., dissenting). Justice O'Connor felt that the instruction "invites individual jurors to rely on emotion, bias, and personal predilections of every sort." *Id.* (O'Connor, J., dissenting).

314. 382 U.S. 399 (1966). *Giaccio* involved an 1860 Pennsylvania statute that authorized juries, at their discretion, to assess costs against defendants, even if they were aquitted.

315. *Pacific Mutual*, 111 S. Ct. at 1057 (O'Connor, J., dissenting).

316. *Id.* (O'Connor, J., dissenting).

317. *Id.* (O'Connor, J., dissenting).

318. *Id.* at 1058 (O'Connor, J., dissenting). Justice O'Connor stated, "If anything, this is an easier case than *Giaccio*." *Id.* (O'Connor, J., dissenting).

that it did not matter that a jury instruction was at issue, as opposed to *Giaccio*, where a statute was involved.[319] She also argued that the vagueness standard does not apply exclusively to criminal penalties, and thus the Court may invoke it in this case.[320] Thus, Justice O'Connor concluded that the practice of leaving the decision regarding the imposition of punitive damages to juries, without any distinguishable standards to guide them, is void for vagueness.[321]

b. Fixing the amount of damages

Justice O'Connor then turned to the jury instruction regarding the amount of punitive damages to be awarded, if any. The charge told the jury that they "must take into consideration the character and the degree of the wrong as shown by the evidence and [the] necessity of preventing similar wrong."[322] She argued that this instruction provides no guidance to the jury; it merely refers obliquely to the rationales of punishment and deterrence without providing a context for them.[323] Justice O'Connor stated that due process requires the courts to guide juries in some discernable way regarding the determination of the amount of punitive damages to be awarded.[324]

Justice O'Connor wrote that the specific jury instructions in *Giaccio* made the statute less vague, but did not raise it to a level consistent with due process.[325] Similarly, she argued that the jury instructions in the present case did not raise the process to a constitutional level.[326] Moreover, she stated that the opposite might have happened, as the phrasing of the instructions might have led the jury away from a rational decision.[327]

To illustrate the irrationality of juries in responding to similar jury

319. *Id.* (O'Connor, J., dissenting).
320. *Id.* (O'Connor, J., dissenting).
321. *Id.* at 1058-59 (O'Connor, J., dissenting).
322. *Id.* at 1037 n.1. *See supra* note 204 for the entire jury charge.
323. *Id.* at 1059 (O'Connor, J., dissenting). Justice O'Connor stated that the Court should have suggested some relation between the award to be given and the harm caused, or suggested some way of measuring what the deterrent effect the award would be. *Id.* (O'Connor, J., dissenting).
324. *Id.* (O'Connor, J., dissenting). She wrote, "Due process may not require a detailed roadmap [of how to determine a punitive award], but it certainly requires directions of some sort." *Id.* (O'Connor, J., dissenting).
325. *Id.* (O'Connor, J., dissenting).
326. *Id.* (O'Connor, J., dissenting).
327. *Id.* (O'Connor, J., dissenting). Justice O'Connor paraphrased the instructions as saying, "Think about how much you hate what the defendants did and teach them a lesson." *Id.* (O'Connor, J., dissenting). A jury charge of this sort has little chance of producing "a fair, dispassionate verdict." *Id.* (O'Connor, J., dissenting).

instructions, Justice O'Connor provided two examples. First, she cited *Burlington N. R. Co. v. Whitt*,[328] in which an administrator of a decedent's estate sought $3 million in punitive damages, and received a $15-million award from the jury.[329] Second, she cited an Alabama Supreme Court decision that documented vastly different punitive awards in two cases with similar facts and jury instructions.[330] Justice O'Connor stated that these results are avoidable.[331] She explained that the Alabama Supreme Court has set out seven factors for determining punitive damage awards in *Green Oil Co. v. Hornsby*.[332] These seven factors could be used to assist juries in making rational decisions; unfortunately, they are not given to juries. As the majority discussed,[333] reviewing courts, not juries, use the "Green Oil Factors" to determine the propriety of the awards.[334] Unfortunately, applying the factors after the fact does nothing to remedy Justice O'Connor's concern with vague jury instructions.[335]

Based on these arguments, Justice O'Connor concluded that the Alabama system for awarding punitive damages is void for vagueness.[336] It fails to provide necessary guidelines to juries in determining if punitive damages should be awarded, and if so, in what amounts.

2. The Procedural Due Process Question

Justice O'Connor argued that Alabama's method of awarding punitive damages also violates procedural due process.[337] She stated that, contrary to Justice Scalia's opinion, procedural due process changed

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328. 575 So.2d 1011 (Ala. 1990), *cert. denied*, 111 S. Ct. 1415 (1991).

329. *Pacific Mutual*, 111 S. Ct. at 1060 (O'Connor, J., dissenting). According to Justice O'Connor, the jury awarded $15 million despite the fact that the decedent "pulled onto the tracks right in front of the train, thereby ignoring a stop sign, three warning signs, and five speed bumps." *Id.* at 1060 (O'Connor, J., dissenting). However, the court remitted the verdict to $5 million. *Whitt*, 575 So. 2d at 1024.

330. *Pacific Mutual*, 111 S. Ct. at 1060 (O'Connor, J., dissenting). The second case Justice O'Connor referred to is Charter Hosp. of Mobile, Inc. v. Weinberg, 558 So.2d 909 (Ala. 1990). In *Charter Hospital*, a doctor brought a conversion action against a hospital for his interest in an abuse-treatment program. *See also* Washington Nat'l Ins. Co. v. Strickland, 491 So.2d 872 (Ala. 1985) (returning a punitive verdict of $21,000, over 15 times the compensatory damages, against an insurance company); Land & Assocs., Inc. v. Simmons, 562 So.2d 140 (Ala. 1989) (returning a punitive verdict of $2,490,000, 249 times the compensatory damages, against an insurance company, which was later remitted to $600,000).

331. *Pacific Mutual*, 111 S. Ct. at 1061 (O'Connor, J., dissenting).

332. *Id.* at 1061 (O'Connor, J., dissenting) (citing Green Oil v. Hornsby, 539 So. 2d 218 (Ala. 1989)). *See supra* note 263 and accompanying text.

333. *See supra* note 265 and accompanying text.

334. *Pacific Mutual*, 111 S. Ct. at 1061 (O'Connor, J., dissenting).

335. *Id.* (O'Connor, J., dissenting).

336. *Id.* (O'Connor, J., dissenting).

337. *Id.* (O'Connor, J., dissenting).

with the times.[338] In reaching this conclusion, she relied on the three-factor test annunciated in *Mathews v. Eldridge*.[339] The factors are: First, the private interest at stake; second, the risk that existing procedures will wrongly impair this private interest, and the likelihood that additional procedural safeguards can effect a cure; and finally, the governmental interest in avoiding these additional procedures.[340]

a. The private interest at stake

In examining the private interest at stake, Justice O'Connor stated that private entities are often subjected to punitive damage awards. Juries award amounts that have potentially devastating consequences for defendants, and the lack of real standards makes this potential all the more likely.[341] She stated further that the quasi-criminal nature of punitive damage awards stigmatizes the defendant in a far more serious way than does a compensatory award.[342] Accordingly, Justice O'Connor concluded that "[t]he private property interest at stake is enormous."[343]

b. The effect of the existing procedures on the private interest and the likelihood that additional procedures will effect a cure

The second factor in the *Mathews* test requires the Court to initially examine the existing procedures to determine if they are fair and reliable, and, if not, to look at the feasibility of implementing a procedure that will be fair.[344]

i. The fairness and reliability of existing procedures

Justice O'Connor stated the Court has frequently examined the fairness and reliability of the common law punitive damage system

338. *Id.* (O'Connor, J., dissenting).
339. 424 U.S. 319, 335 (1976). *See supra* note 307 and accompanying text. *See* Sneiderman, *supra* note 13, at 1042-45 (undertakes a *Mathews* analysis of traditional punitive damage systems and concludes that more due process protections are required). *But cf.* Brief for Respondents at 35, n.57, Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) (No. 89-1279) (arguing that a *Mathews* analysis might not be proper, and if it is, it requires a finding that due process was not violated).
340. *Mathews*, 424 U.S. at 335.
341. *Pacific Mutual*, 111 S. Ct. at 1062 (O'Connor, J., dissenting).
342. *Id.* (O'Connor, J., dissenting). *See supra* note 57 and accompanying text.
343. *Id.* (O'Connor, J., dissenting).
344. *Id.* at 1062, 1064 (O'Connor, J., dissenting).

and has criticized it as being unfair and unreliable.[345] Justice O'Connor agreed with the criticisms and argued that remedies to the situation, such as post-trial review, are inadequate.[346] Justice O'Connor criticized post-trial review for giving too much deference to those who award punitive damages.[347] She argued that the result is not a review at all, but a mere formality followed in all but the most egregious cases.[348]

ii. The effect of new procedures

Justice O'Connor then examined the effect of new procedures. She stated that the courts and legislatures could quite easily remedy the problems with the existing system.[349] In Alabama, courts could implement the "Green Oil Factors" to provide much more guidance for the juries.[350] She suggested other remedies including state legislatures implementing caps on punitive damages, according to specific types of conduct.[351] Also, Justice O'Connor mentioned the bifurcation of trials into separate proceedings dealing first with liability, and then with punitive damages.[352] Justice O'Connor finally suggested that juries apply a clear and convincing evidentiary standard, as this would limit imposition of punitive damage awards to the most severe cases and emphasize the seriousness of the award to the juror.[353] Justice O'Connor stated that courts or legislatures could easily implement any of these modifications, and thus would provide more meaningful standards for the jury.[354]

c. The governmental interest in avoiding the new procedures

Justice O'Connor then focused on the last *Mathews* factor, the gov-

345. *Id.* at 1062-63 (O'Connor, J., dissenting). Justice O'Connor provided examples of this, the most prominent being in Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257 (1989) and Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988). *See supra* notes 172-90 and accompanying text.

346. *Id.* at 1063 (O'Connor, J., dissenting).

347. *Id.* at 1063-64 (O'Connor, J., dissenting).

348. *Id.* (O'Connor, J., dissenting). Justice O'Connor stated that "[b]lind adherence to the product of recognized procedural infirmity is not judicial review as I understand it. It is an empty exercise in rationalization that creates only the appearance of even-handed justice." *Id.* (O'Connor, J., dissenting).

349. *Id.* at 1064 (O'Connor, J., dissenting).

350. *Id.* (O'Connor, J., dissenting). *See supra* note 263 and accompanying text.

351. *Id.* (O'Connor, J., dissenting). Justice O'Connor justified imposing caps by stating that as long as "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).

352. *Id.* (O'Connor, J., dissenting).

353. *Id.* (O'Connor, J., dissenting).

354. *Id.* (O'Connor, J., dissenting). Justice O'Connor would leave the decision to the states as to which method they would adopt. *Id.* (O'Connor, J., dissenting).

ernmental interest in avoiding the new procedures. She examined whether the states have an interest in preserving the existing method of punitive damage awards.[355] Justice O'Connor concluded that the states do not have such an interest.[356] Justice O'Connor found meritless the argument that the existing system works to deter wrongful conduct.[357] She argued that while juries must have some discretion in awarding damages, allowing for totally arbitrary awards violates due process.[358] Moreover, Justice O'Connor argued that the remedies she suggested would still adequately serve the state's interest in punishing wrongful conduct.[359] She stated further that these remedies would better serve due process since the punishment would more appropriately suit the conduct.[360] Therefore, she opined, the states should have no objection to a system that serves their legitimate ends while being more fair and rational.[361]

3. Justice O'Connor's Response To Justice Scalia's Concurrence

Justice O'Connor disagreed with Justice Scalia's historical due process analysis.[362] She argued that due process is not static but flexible, and though there is "a strong presumption of continued validity" in established practices, this is a presumption, not an edict.[363] For support, Justice O'Connor relied on *Williams v. Illinois*,[364] where the Court invalidated a traditional practice, reasoning that not even "ad-

355. *Id.* (O'Connor, J., dissenting).

356. *Id.* (O'Connor, J., dissenting). Justice O'Connor relied on Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) which stated that "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of actual injury." *Id.* at 349.

357. *Pacific Mutual*, 111 S. Ct. at 1064 (O'Connor, J., dissenting). Justice O'Connor argued in support of the deterrence rationale that a system of predictable punitive damage awards will not deter wrongdoing, as companies will factor that cost into their business. *Id.* (O'Connor, J., dissenting).

358. *Id.* (O'Connor, J., dissenting). As Justice O'Connor put it, "the Due Process Clause does not permit a state to classify arbitrariness as a virtue." *Id.* (O'Connor, J., dissenting).

359. *Id.* at 1065 (O'Connor, J., dissenting).

360. *Id.* (O'Connor, J., dissenting).

361. *Id.* (O'Connor, J., dissenting).

362. *Id.* (O'Connor, J., dissenting). Justice O'Connor wrote that Justice Scalia "argues that a practice with a long historical pedigree is immune to reexamination." *Id.* (O'Connor, J., dissenting). This is very similar to Justice Kennedy's statement. However, Justice Scalia seemed not to make that broad of an assertion. *See supra* note 286 and accompanying text.

363. *Id.* (O'Connor, J., dissenting). *Mathews* set forth the concept that due process is "flexible" and varies with "time, place and circumstances." Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

364. 399 U.S. 235 (1970). *Williams* dealt with an Illinois statute that allowed the

herence to [the practice] through the centuries insulates it from constitutional attack . . . ."[365] Justice O'Connor argued that many changes have occurred in the recent past that merit reevaluation of the punitive damage system, and that procedural due process requires as much.[366]

4. Justice O'Connor's Conclusion

After Justice O'Connor explained her reasoning and addressed Justice Scalia's opinion, she made her final points. Justice O'Connor quoted the Court's statement that " '[t]he touchstone of due process is protection of the individual against arbitrary action of government.' "[367] She argued that the common law system promotes arbitrary results, going as far as to call it "the antithesis of due process."[368] To Justice O'Connor, the common law system of awarding punitive damages violates procedural due process despite its history and the fact that glaring abuse might not have been present in this case.[369]

Justice O'Connor declared that if she were to decide the case, she would have required Alabama, and all states, to adopt some judicial or legislative method of limiting jury discretion.[370] She stated that the Court should not impose a particular method on all the states.[371] Rather, the Court should let the states decide themselves which recommendations to implement.[372]

V. IMPACT

Consumer groups immediately hailed the *Pacific Mutual* decision, while business and insurance interests denounced it.[373] However, the decision will have a long-term impact not only these groups, but on many others as well.

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state to keep indigent prisoners confined beyond the maximum sentence if the prisoner could not pay fines levied at sentencing. *Id.* at 236.

365. *Id.* at 239 (O'Connor, J., dissenting).

366. *Pacific Mutual*, 111 S. Ct. at 1066-67 (O'Connor, J., dissenting).

367. *Id.* at 1067 (O'Connor, J., dissenting) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

368. *Id.* at 1067 (O'Connor, J., dissenting).

369. *Id.* (O'Connor, J., dissenting).

370. *Id.* (O'Connor, J., dissenting).

371. *Id.* (O'Connor, J., dissenting).

372. *Id.* (O'Connor, J., dissenting). Justice O'Connor speculated that the Court did not side with her view out of fear of having to rule on the constitutionality of each state's system. However, she did not see this happening, but instead believed that the states would work it out on their own. *Id.* (O'Connor, J., dissenting).

373. *Compare* Denise Kalette, *Consumers Hail Court Ruling*, USA TODAY, Mar. 5, 1991, at B7 ("[C]onsumer groups hailed [the decision] as a victory.") *with* Andrea Sachs, *A Blow to Big Business; The Supreme Court Upholds a Punitive $1 Million Jury Verdict*, TIME, Mar. 18, 1991, at 71 ("[B]usiness groups found [the decision] crushing.").

A. Effect on Business

Big business in America, as represented by the eighty business and professional organizations that filed twenty-four amicus briefs on Pacific Mutual's behalf, were disappointed with the decision. The Court's holding sent a clear message that courts will find employers liable for the acts of their agents. The task now for business interests is to protect themselves from such judgments, and to apply pressure on lawmakers to pass legislation to protect them.

1. Increase of Internal Scrutiny

The best way for companies to protect themselves from a punitive judgment is by increasing internal scrutiny. Justice Blackmun wrote that "[i]mposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented.' "[374] Courts will hold corporations responsible for the actions of their employees, and thus, it is imperative for a company to ensure that their employees comply with the law. If the employees do so, this greatly reduces the risk of litigation and a large punitive damage award.[375] If the employees do not, then it is important that the employer have proof that they attempted to ensure compliance with the law.

Businesses most often use a corporate code of conduct as proof of attempted compliance. These are becoming increasingly popular, as studies have shown that most corporations have adopted one.[376] Courts may use the existence of a code in determining a corporation's liability.[377] A code of conduct that is individually suited to the company, and carefully implemented and enforced, should greatly protect against an award of punitive damages.[378] It might also prevent

374. *Pacific Mutual*, 111 S. Ct. at 1041 (quoting Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 116 (1927)).

375. *See generally* Ronald M. Green & Richard J. Reibstein, *Negligent Hiring, Fraud, Defamation and Other Emerging Areas of Employer Liability*, BNA REP. 99-107 (1988) (listing nine ways that employers may reduce their risk of being sued).

376. *See* ETHICS RESOURCE CENTER, ETHICS POLICIES AND PROGRAMS IN AMERICAN BUSINESS 6 (1990) (stating that 85% of 711 corporations surveyed have adopted some form of a code of conduct).

377. *See* RESTATEMENT (SECOND) OF AGENCY § 230 cmt. c (1957) (stating that a code of conduct "may be a factor in determining whether or not, in an otherwise doubtful case, the act of the employee is incidental to the employment").

378. *See* Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559 (1990). The authors outline a procedure for companies to use in promulgating a code

the types of wrongs on the part of employees that lead to litigation.[379] If the corporation has evidence that they have tried to guide their employees in acting properly, then the rationale of using punitive damages to deter corporate misconduct is unconvincing.[380] Damages exceeding compensatory damages would be inappropriate, because the company diligently attempted to ensure lawful action on the part of employees.[381] To punish a company when it acted properly would not encourage other companies to do likewise.

2. Increase of Pressure on Local Lawmakers

After *Pacific Mutual*, the efforts of business interests will shift to where Justice Scalia suggested they should be: with the states.[382] Some groups that advocated reform of the system relaxed their efforts because they believed the Court's decision in *Pacific Mutual* would go in their favor.[383] It is clear that these groups will increase the pressure on state legislatures to enact various remedies encompassing their perception of the punitive damages problem.[384]

3. Other Effects on Business

a. Aviation law

Recent authorities see *Pacific Mutual* as "[t]he most important case in aviation law, in decades."[385] Punitive damages are particularly important in aviation law.[386] Courts award punitive damages generally when a plaintiff shows that a defendant knew the impropriety of his actions, and proceeded regardless.[387] In all aviation mat-

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of conduct. This procedure consists of: (1) selecting a team to draft the code; (2) tailoring the code to the culture of the company; (3) taking inventory of the companies needs; (4) crafting the corporate code; (5) adopting the corporate code; and (6) administrating the code. *Id.* at 1637-45.

379. *Id.* at 1635.

380. *Id.* at 1650. A corporation should offer evidence including documents signed by the offending employee stating that he understands and agrees to comply with the code of conduct, and some sort of documentation that the corporation previously disciplined an offending employee for similar acts. *Id.* at 1649-51.

381. *Id.* at 1651. The authors state that adopting a code of conduct demonstrates a strong intent to operate within the law. *Id.* at 1634.

382. *See Pacific Mutual*, 111 S. Ct. at 1054 (Scalia, J., concurring).

383. *See* Diane Dimond, *Think it Over and Get Back to Us: Supreme Court Ruling on Punitive Damage Awards*, INS. INFORMATION INST., 52 INS. REV. 32 (1991) (quoting Martin Connor, president of the American Tort Reform Association, "The Haslip case moves punitive damages back to the top of the agenda. We didn't push it while everyone thought the Supreme Court might solve the problem. But now it's clear the Court won't legislate for us.").

384. *See* Stephen Wermiel, *Justices Don't Limit Punitive Damages*, WALL ST. J., Mar. 5, 1991, at A2.

385. *See* Lee S. Kreindler, *Clearance for Punitive Damages*, N.Y. L.J., Mar. 29, 1991, at 3.

386. *Id.*

387. *Id.*

ters, manufacturers know that problems can occur at great speeds and altitude, and thus plaintiffs commonly allege recklessness and seek punitive damages.[388] Airline manufacturers and aviation attorneys had hoped that the Court would somehow limit punitive awards, but this did not happen.

Pacific Mutual could also hamper international efforts to ban punitive damages in airline disasters.[389] Some suggest that since the Court affirmed the validity of punitive damages, the United States may not take part in Montréal Protocol 3, an international treaty that would ban recovery of punitive damages in aircraft disasters.[390]

b. Punitive damages in arbitration

Business arbitrators have increasingly awarded punitive damages in cases before them.[391] As arbitration increases as an alternative to litigation, courts tend to uphold decisions of arbiters, including those that award punitive damages.[392] However, authorities are split on the propriety of awarding punitive damages in arbitration.[393] It is unclear as to how *Pacific Mutual* will affect the debate. If the Court had ruled in favor of Pacific Mutual, though, it seems that the decision would have limited or eliminated the practice of awarding punitives in arbitration.

B. Effect on Future Due Process Challenges

Although the Court upheld the constitutionality of the common law system for awarding punitive damages, the language of the deci-

388. *Id.* As the author wrote, "[W]hat may be ordinary negligence in the manufacture of a product to be used on the ground, may be wanton recklessness in contemplation of a failure in the air." *Id.*

389. *See Ruling May Kill Punitives Awards Ban*, CRAIN BUS. INS., Apr. 8, 1991, at 27.

390. *Id.*

391. *See* Michael Siconolfi, *Blow to Brokers: Stock Investors Win More Punitive Awards in Arbitration Cases*, WALL ST. J., June 11, 1990, at A1 (reporting that arbitration panels have awarded 21 punitive damage awards totaling $4.5 million since May of 1989).

392. *See, e.g.*, Raytheon Co. v. Automated Business Sys., Inc., 882 F.2d 6, 8-9 (1st Cir. 1989) (stating that there is no reason to prohibit arbiters from awarding punitive damages if they could have been obtained in court); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1387 (11th Cir. 1988) (stating that issues arising as to the scope of arbitration, including punitive damages, are to be resolved on the side of arbitration).

393. *Compare* Barbier v. Shearson Lehman Hutton, Inc., 752 F. Supp. 151 (S.D.N.Y. 1990) (upholding arbiter's punitive damage award) *with* Fahnestock & Co. v. Waltman, 935 F.2d 512 (2nd Cir. 1990) (vacating arbiter's punitive damage award).

sion left the door open for future due process attacks along several lines.

1. Post Trial Review Procedures

The majority decision focused on the existence of the post trial review procedures in Alabama to conclude that punitive damage awards did not violate procedural due process.[394] This suggests that the lack of a post-trial review, or a review less comprehensive than Alabama's, may violate procedural due process. States apply various standards, and approximately half the states have criteria as strict as Alabama's.[395] Punitive damage awards in other states that do not have such standards may be vulnerable to attack.[396] Attorneys and legislators in each state should review the constitutionality of their state's standards in light of *Pacific Mutual.*

2. Focus on the Wrong, not the Wrongdoer

The Court considered the fact that Alabama's procedures focus on the wrong committed, and not on the wealth of the wrongdoer.[397] A party could mount a due process challenge in a particular case if the wealth of the defendant was disclosed and ultimately considered by a jury.[398]

3. Focus on the Size of the Award

The Court stated that since the punitive damages award was two hundred times respondent's out-of-pocket expense, it came close, but did not "cross the line into the area of constitutional impropriety."[399] The relation of the punitive damage award to the compensatory

394. *Pacific Mutual*, 111 S. Ct. at 1044-45.

395. *See* Dimond, *supra* note 383. Victor Schwartz, a product liability expert with the Washington, D.C. firm of Crowell & Moring made the estimate.

396. *Pacific Mutual*, 111 S. Ct. at 1045 n.10. The decision distinguished the punitive damage schemes in Vermont and Mississippi, in which awards are set aside when they are "manifestly and grossly excessive" or "shock the conscience." *Id.* (quoting Pezzano v. Bonneau, 329 A.2d 659, 661 (Vt. 1974) and Bankers Life & Casualty Co. v. Crenshaw, 483 So.2d 254, 278 (Miss. 1985)). The implication seems to be that these schemes would not be constitutional. California likewise adopts a standard that presumes a punitive damages award is correct. A court will not overturn this standard unless it is so excessive as to be attributed to prejudice.

397. *Id.* at 1045. "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.*

398. *But see* Adams v. Murakami, 813 P.2d 1348 (Cal. 1991). This recent California case seems to misinterpret *Pacific Mutual.* Although the *Adams* court acknowledged that an examination of the defendant's worth is proper at a post-trial review, the court went on to say that *Pacific Mutual* encouraged the trial court to consider the impact upon the parties. The California Supreme Court concluded, "Obviously, this factor would encompass consideration of the defendant's financial condition." *Id.* at 1355.

399. *Pacific Mutual*, 111 S. Ct. at 1046.

award was roughly four to one.[400] It seems clear that a defendant could raise a valid due process claim when the ratio of punitive damages to either compensatory damages or out-of-pocket expenses exceeds that of *Pacific Mutual.*

C. Remedies to be Proposed to the States

Justice O'Connor, in her dissent, stated that there were several solutions to the current problems with the punitive damage system.[401] Specifically, state legislatures might place caps on punitive damages, courts could bifurcate trials into proceedings that deal first with liability and then punitive damages, and courts could require juries to apply a higher evidentiary standard in determining punitive damages.[402] Because reform of the punitive damage system will now fall squarely on the states, states will seriously consider these suggestions. The following sections analyze the viability and effectiveness of the various methods.

1. Caps on Punitive Damages

One can usually justify statutory caps on punitive damage awards on the grounds that the tremendous uncertainty associated with punitive awards is unfair to defendants[403] and that a huge, unforeseen award can lead to the destruction of companies.[404] However, legislatures must examine any consideration of statutory caps in light of the potential to undermine the deterrent function of punitive damages.[405] If a company has a reasonable estimate of the damages they might incur, they will consider this when deciding whether or not to proceed with questionable actions that might result in liability.[406]

Currently, nine states have adopted some form of a statutory cap

400. The court awarded the plaintiff $200,000 in compensatory damages and $840,000 in punitive damages. *Id.* at 1037 n.2.

401. *See supra* notes 351-56 and accompanying text.

402. *Id.*

403. *See* Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1145 (1989) ("Unpredictable damages are neither fair nor efficient."); David G. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CAL. L. REV. 665, 672 (1984) (favoring caps because "the risk of excessive awards should be reduced by establishing certain limits").

404. *See* Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 323 (1991).

405. *See* Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1406 (1987) ("[O]ptimal deterrence is not inconsistent with unlimited and variable awards.").

406. *See* Ellis, 1989, *supra* note 52, at 981.

on punitive damage awards.[407] These caps fall into three basic categories: the absolute dollar cap, the fixed ratio cap, and the profit extraction cap.[408]

a. The absolute dollar cap

An absolute dollar cap creates a maximum limit that a punitive damage award may not exceed.[409] States have imposed this type of cap in two ways. The first way is to create a ceiling for all punitive damage awards. If the jury goes beyond this limit, the court will reduce the judgment to meet the set amount.[410] The second way imposes a general limit, but creates an exception for particularly egregious cases.[411] Caps of this type seem to undermine the deterrent purposes of punitive damages, as companies can factor potential losses into the cost of doing business. If the company considers the amount insignificant, then the punitive damage award is not a punishment.

b. The fixed ratio cap

The fixed ratio cap sets a limit on punitive damage awards according to some ratio to the compensatory damages.[412] The ratio ranges from an amount equal to compensatory damages, to four times the amount, though some exceptions also apply.[413] The fixed ratio cap is much more flexible than the absolute dollar cap, yet it still might not effectively deter wrongful conduct on the part of business. The con-

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407. The states are: Alabama, Colorado, Florida, Georgia, Kansas, Nevada, Oklahoma, Texas, and Virginia.

408. *See* Toy, *supra* note 404, at 331-35. Toy sets forth the names of these categories, and gives an extensive discussion of each. *Id.*

409. *Id.* at 331.

410. Virginia has adopted this form of cap, and has set the limit at $350,000. *Id.*

411. Alabama and Georgia have adopted this type of system, and both have set the amount at $250,000. *Id.* at 331-32. Alabama invokes the exception for cases involving a pattern of wrongful behavior, malice or fraud, libel, slander or defamation. *Id.* at 332. Georgia does not impose a limit for cases that involve some specific intent to harm. *Id.*

412. *Id.* at 332-34. Five states have adopted some form of the fixed ratio cap: Colorado, Florida, Nevada, Oklahoma, and Texas. *Id.*

413. Colorado allows an amount equal to the actual damages, though the court can increase this to three times the amount if it finds the defendant willingly repeated his conduct or aggravated the plaintiff's injuries. *Id.* at 332-33. Florida's ratio is three times the actual damages, though courts may award more if clear and convincing evidence of extreme circumstances warrants. *Id.* at 334. Nevada applies a hybrid of the absolute dollar cap and the fixed ratio cap. Nevada limits punitive damage awards to three times the actual damages if the actual damages are $100,000 or more; if actual damages are less, then punitive damages may not exceed $300,000. *Id.* at 333. Nevada makes exceptions to these limits for actions involving toxic torts, defamation, or products liability. *Id.* Oklahoma allows punitive damages equal to actual damages, but if the court finds certain outrageous conduct before submitting the case to the jury, no limits apply. *Id.* at 333-34. Texas caps punitive damages at $200,000 or four times the actual damages, whichever is greater. *Id.* at 333. However, the limit does not apply to intentional torts, or cases involving malice. *Id.*

duct of the company at fault does not determine the amount of an award; rather, the harm that a plaintiff suffered is determinative.[414] This encourages companies to guard against wrongs that may result in large injuries, while factoring in or ignoring wrongs that may result in small ones.[415]

c. The profit extraction cap

The profit extraction cap is a unique type of limit which is applied in Kansas.[416] The punitive award limit is placed at the lesser of $5 million or the defendant's highest gross annual income in the preceding five years.[417] However, if the court determines that the defendant expected to profit in excess of the maximum punitive damage award, the court may award punitive damages equal to one and one-half times the defendant's expected profit.[418] A court can use this system to effectively deter and punish a company for its wrongs because the system tailors the limit to the individual company in a meaningful way.[419]

Statutory caps are but one way that states may attempt to modify their punitive damage systems. As shown, caps can effectively remove the unpredictability from punitive awards, but states must be careful not to subvert the deterrent purpose of punitive damages.

2. Bifurcated Trials

Justice O'Connor suggested that courts bifurcate trials into a liability phase and a separate phase to determine the amount of punitive damages. She based this idea on arguments made by a well-known commentator in the punitive damages field.[420] The rationale behind this idea is that punitive damages are often sought in cases whose complexity makes it difficult for juries to correctly and fairly assess the awards.[421] Some states, recognizing this problem, have created

414. *Id.* at 336-37.
415. *Id.*
416. KAN. STAT. ANN. § 60-3701(c) (1989).
417. *Id.* at § 60-3701(e).
418. *Id.* at § 60-3701(f).
419. *See* Toy, *supra* note 404, at 335. Toy states that "[t]his outer limit on punitive damages, based on a multiple of expected profit, deters the potential defendant completely . . . ." *Id.*
420. *See* Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1064 (1991) (O'Connor, J., dissenting) (referring to Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 995-96 (1989).
421. For a discussion of this complexity and the problems for juries, see Ellis, 1989, *supra* note 52, at 999-1003. *But see* Alan Howard Scheiner, *Judicial Assessment of Pu-*

statutes that require judges to assess punitive damages in cases where the jury has already determined liability.[422]

In most jurisdictions, courts can bifurcate trials involving punitive damages by statute or at their discretion.[423] However, this pertains only to the amount of punitive damages.[424] The liability for punitive damages is assessed at the same time as the compensatory liability.[425] Unfortunately, this process does not alleviate the complex problems that juries encounter in distinguishing the different standards and purposes of compensatory and punitive damages.[426] Courts should first have a trial dealing strictly with liability for compensatory damages, and then hold another proceeding dealing with liability and the amount of punitive damages.[427] This will allow juries to concentrate on one complex set of issues, standards, and amounts instead of two, thereby obtaining fairer results.[428]

3. Higher Standard of Proof

Some have suggested applying the higher standard of clear and convincing evidence to the determination of punitive damages.[429] The rationale is that the purpose of punitive damages is to punish and deter, not merely to compensate.[430] This being the case, punitive damages are more like criminal than civil penalties, and a higher standard is justified.[431] Some states have already adopted this higher standard.[432]

The clear and convincing standard serves two goals. First, it limits jury discretion by allowing punitive damage awards in only the most serious cases.[433] Second, it emphasizes the importance and distinct nature of punitive damages to the jury, and ensures that juries deter-

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nitive Damages, The Seventh Amendment, and the Politics of Jury Power, 91 COLUM. L. REV. 142, 144 (1991) ("[C]laims of jury incompetence and bias fall flat in the realm of punitive damages.").

422. Connecticut, Kansas and Ohio have done this. *See* Scheiner, *supra* note 421, at 142. Scheiner states that judges and juries generally agree on whether or not to impose punitive damages, but they significantly disagree on the amount to be awarded. *Id.* at 166.

423. *See* Ellis, 1989, *supra* note 52, at 1002-03.

424. *Id.*

425. *Id.* at 1003.

426. *Id.* at 1002.

427. *Id.* at 1003.

428. *Id.*

429. *See* Ellis, 1989, *supra* note 52, at 991-99; Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 93-94 (1985); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 311-14 (1983).

430. *See supra* notes 46-64 and accompanying text.

431. *See* Ellis, 1989, *supra* note 52, at 993.

432. *See supra* note 50 and accompanying text.

433. *See* Ellis, 1989, *supra* note 52, at 995.

mine liability more carefully.[434] Imposing the higher standard of proof is a quick and easy way for states to move toward limiting jury discretion.

The impact of *Pacific Mutual* will be felt by all the following: Businesses, future due process challenges, and remedies considered by the states. The Court's seven-one decision combined with the Court's youth seems to indicate that the impact of the decision will be felt for many years to come.

VI. CONCLUSION

The Court decided *Pacific Mutual* in a way that surprised many in the legal as well as business fields. Some have attributed the decision to a poor showing by Pacific Mutual's counsel during the oral arguments.[435] Whatever the case, the Court did not accept the due process argument that it had hinted it might. However, the Court's decision did not explicitly reject all other due process arguments. By wording the decision as broadly as it did, the Court left open the possibility of future cases coming before it on similar issues. What these issues are and when this will come about is uncertain. *Pacific Mutual* made it clear that until that time, any attempts at punitive damage reform will have to come from the states.

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434. *See* Wheeler, *supra* note 429, at 297-98.

435. *See* Tony Mauro, *Damaging the Anti-Punitive Crusade*, LEGAL TIMES Oct. 8, 1990, at 10. Mauro characterized the performance by Bruce Beckman, counsel for Pacific Mutual, as a "debacle" and "painful," noting that "Beckman stumbled from the start [and used a] tentative style—strained and full of long pauses." *Id.*