# Constitutionalizing Punitive Damages: The Limits of Due Process

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## I. INTRODUCTION

A legal problem that persists over time and touches important societal interests in the United States tends to generate pressure for a constitutional solution. This is currently manifest in the law of punitive damages,[1] in which the growing exposure of deep-pocket defendants to large punitive damage awards[2] has spawned a vigorous constitutional assault on the punitive damages system.[3] It was probably inevitable that this conflict would

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[1] Punitive damages are also under political attack on a wide scale. *See* Daniels & Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990) [hereinafter *Myth and Reality*].

[2] Probably the most widely cited empirical evidence on the size and frequency of punitive damage awards is M. PETERSON, S. SARMA & M. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS iii, v-ix (1987), based on a study of jury verdicts in Cook County, Illinois, and San Francisco County, California, conducted by the Rand Corporation Institute for Civil Justice. Research at the American Bar Foundation has also produced evidence of increased size and frequency of punitive damage awards in selected jurisdictions. *See* S. DANIELS & J. MARTIN, EMPIRICAL PATTERNS IN PUNITIVE DAMAGE CASES: A DESCRIPTION OF INCIDENCE RATES AND AWARDS (American Bar Foundation Working Paper Series No. 8705, 1988); Daniels & Martin, *Jury Verdicts and the 'Crisis' in Civil Justice*, 11 JUST. SYS. J. 321 (1986); Daniels, *Punitive Damages: The Real Story*, A.B.A. J. Aug. 1986, at 60; *Myth and Reality*, *supra* note 1. Authors of the ABF studies emphasize, however, that the increased frequency of punitive damage awards (in relation to the total number of jury trials) is modest, and that increased size of awards (in constant dollars) is minimal when analysis utilizes medians rather than means or extreme cases. Their time series data is limited to Dallas County, Texas, and Jackson County, Missouri, 1970–88. For data on punitive damage awards in product liability cases, *see* PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES 23–29 (GAO/HRD-89-99 1989).

[3] *See, e.g.*, Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667 (1988); Ellis, *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975 (1989); Geller & Levy, *The Constitutionality of Punitive Damages*, 73 A.B.A. J. Dec. 1, 1987, at 88; Hughes, *The Excessive Fines Clause—Its Role in the Constitutional Attack on "Bad Faith" Punitive*

find its way to the spongy battleground of due process, if not inevitable that the issue should still be unresolved. In *Pacific Mutual Life Insurance Co. v. Haslip*[4] the Supreme Court had ample opportunity to clarify due process limits on punitive damages but apparently was not sure what the limits were. Although seven justices agreed that an Alabama punitive damages award did not violate due process, the majority opinion failed to address the major doctrinal questions in a way that would provide helpful guidelines for the future. As a result, the issue is certain to be revisited. The decision in *Haslip* was not wrong, but it lacks a viable rationale. Anticipating the day of revisitation, this paper offers doctrinal and policy reasons why due process should not become the means of constitutionalizing the law of punitive damages.

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*Awards*, 54 DEF. COUNS. J. 252 (1987); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); Leitner, *Punitive Damages: A Constitutional Assessment*, 38 FICC Q. 119 (1988); Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987); Olson & Boutros, *Constitutional Restraints on the Doctrine of Punitive Damages*, 17 PEPPERDINE L. REV. 907 (1990); Schwartz, Browning-Ferris*: The Supreme Court's Emerging Majorities*, 40 ALA. L. REV. 1237 (1989); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983); Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CALIF. L. REV. 1433 (1987); Comment, *The Constitution and Punitive Damages: Does Due Process Require the Definition of Degrees of Culpability?*, 18 CAP. U. L. REV. 545 (1989); 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); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987); Note, *Can Punitive Damages Standards Be Void for Vagueness?*, 63 ST. JOHN'S L. REV. 52 (1988); Note, *Constitutional Defenses Against Punitive Damages: Down but Not Out*, 65 IND. L.J. 141 (1989). *But see* Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385 (1987); Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 DRAKE L. REV. 195 (1977–78); Comment, *Can Punitive Damages withstand a Due Process Challenge after* Bankers Life & Casualty Co. v. Crenshaw *and* Browning-Ferris Indus. of Vermont v. Kelco Disposal*?*, 18 FORDHAM URBAN L.J. 121 (1990); Note, *In Defense of Punitive Damages*, 55 N.Y.U. L. REV. 303 (1980).

The latest constitutional challenges to punitive damages in the United States Supreme Court include Pacific Mutual Life Insurance Co. v. Haslip, 111 S. Ct. 1032 (1991); Browning-Ferris Indus. v. Kelco Disposal, Inc., 992 U.S. 257 (1989); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988). Doubts about punitive damages, constitutional and otherwise, have been raised in the past, *see, e.g.*, Fay v. Parker, 53 N.H. 342, 382 (1873); Riewe v. McCormick, 11 Neb. 261, 264–65, 9 N.W. 88, 89–91 (1881); C. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES 276 (1935), but they have now become more serious.

[4] 111 S. Ct. 1032 (1991).

## II. COURT RESPONSE TO PREVIOUS CONSTITUTIONAL CHALLENGES

Most state and lower federal courts, when presented with the question, have refused to find punitive damage awards in violation of due process or any other provision of the federal constitution.[5] The United States Supreme Court, however, has been modestly receptive to pleas for constitutional limitations in special contexts. As early as 1913, the Supreme Court invoked due process to invalidate a statute-based penalty payable to private litigants, on the ground that the award in question was arbitrary and excessive.[6] More recently, after some vacillation, the Court imposed first amendment limitations upon punitive damages in defamation cases. The process of constitutionalizing the law of defamation began in 1964 with *New York Times Co. v. Sullivan*,[7] which held that a plaintiff who is a "public official" must prove the defendant acted with "actual malice" in order to recover for defamation relating to his official conduct.[8] In *Curtis Publishing Co. v. Butts*[9] the Court extended the rule to include "public figures" as well as officials but rejected a plea to find a first amendment prohibition of punitive damages in a defamation action. Citing the 1851 decision of *Day v.*

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[5] *See generally* J. GHIARDI AND J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE, §§ 3.01-09 (1985) (Supp. 1989). With respect to due process in particular, the *Haslip* opinion observed: "So far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process." *Haslip* at 1043. Nevertheless, the current constitutional assault on punitive damages has found a sympathetic echo in a few judicial opinions. *See, e.g.*, Womack v. Gettelfinger, 808 F.2d 446, 451 (6th Cir. 1986), *cert. denied*, 484 U.S. 820 (1987); *In re* School Asbestos Litig., 789 F.2d 996, 1003-08 (3d Cir. 1986); *In re* Federal Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 840 (2d Cir. 1967); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1064 (D.N.J. 1989).

[6] Chicago Milwaukee & St. Paul Ry. v. Polt, 232 U.S. 165 (1914). *See also* Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482 (1915); Missouri P. Ry. v. Tucker, 230 U.S. 340 (1913). These precedents still stand, but they did not involve common-law punitive damages and have had little impact on the practice of awarding punitive damages at the discretion of the jury. Other cases of the same period reaffirmed the existence of a due process limit but found the awards in question not to be so "grossly excessive" or arbitrary as to fall within the constitutional prohibition. *See infra* notes 49-50 and accompanying text.

[7] 376 U.S. 254 (1964).

[8] *Id.* at 279-81.

[9] 388 U.S. 130 (1967).

*Woodworth*,[10] the Court observed that "the Constitution presents no general bar to the assessment of punitive damages in a civil case."[11] Seven years later, however, in *Gertz v. Robert Welch, Inc.*,[12] the Court discovered that the first amendment required a showing of "actual malice" as a predicate for recovery of either presumed or punitive damages in any defamation action.[13] The holding did not affect suits brought by public officials or public figures because *New York Times v. Sullivan* had already established "actual malice" as a requisite to imposing liability in such cases even for proven damages. It did, however, place additional constitutional limitations upon actions by private persons.[14]

The limits placed on punitive damages in defamation actions reflect first amendment values and have not led to Supreme Court curtailment of punitive damages in other contexts.[15] On the contrary, the Court has since rejected claims that suits for punitive damages, though civil in form, are sufficiently penal in nature to require the same constitutional safeguards as criminal prosecutions. In *Browning-Ferris Industries v. Kelco Disposal, Inc.*,[16] the Court ruled expressly that the excessive fines clause of the eighth

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[10] 54 U.S. (13 How.) 363 (1851).

[11] *Curtis Publishing*, 388 U.S. at 159.

[12] 418 U.S. 323 (1974).

[13] Justice Powell's opinion for the Court was heavy with implied criticism of juries: "The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Id.* at 349. Further, "[J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.* at 350.

[14] *Id.* at 349. Since most states already required some form of "malice" to award punitive damages, *Gertz* has had little impact on the law of punitive damages. It has, however, eliminated the award of compensatory damages in cases where damage is presumed, rather than proved, unless the plaintiff can prove malice.

[15] In cases not involving constitutional rules, the Court has construed federal statutes having implications for punitive damages and has sent out mixed signals there as well. In International Brotherhood of Electric Workers v. Foust, 442 U.S. 42 (1979), the Court refused to award punitive damages against a union for breach of its duty of fair representation, citing statutory policy as the basis for its decision. Two years later, in City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), the Court declared municipalities exempt from punitive damages in actions brought under 42 U.S.C. § 1983. In Smith v. Wade, 461 U.S. 30 (1983), however, a majority of the Court held that § 1983, in a proper case, would sustain a claim for punitive damages (although not against a municipality). The award affirmed in that case had been assessed according to common-law rules.

[16] 492 U.S. 257 (1989).

amendment does not limit the award of punitive damages, at least when the government is not a party to the action and does not share in the recovery.[17] In *United States v. Halper*,[18] decided the same term, the Court took a similar position with respect to the double jeopardy clause, asserting flatly that "[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties."[19] Absent another change of mind, these two cases suggest that punitive damage defendants will not find much help in constitutional safeguards addressed specifically to criminal prosecutions.[20]

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[17] *Id.* at 260.

[18] 490 U.S. 435 (1989).

[19] *Id.* at 450. The statement was dictum but emphatic. The case held that the double jeopardy clause of the fifth amendment limited recovery by the federal government in a civil action based on conduct for which the defendant had previously been punished through the criminal process. The Court qualified its position by stating that nothing in the opinion would preclude a *private* party from filing a civil action seeking damages for conduct that previously had been the subject of criminal prosecution and punishment. The Court left open the question whether a *qui tam* action, in which a private party sues in the name of the United States and shares with the government any award recovered, could implicate double jeopardy. *Id.* at 450 n.11.

The Fifth Circuit had previously held that punitive damages awarded in a private lawsuit to an individual plaintiff were not part of an "essentially criminal" proceeding and thus were not within the purview of the double jeopardy clause. Hansen v. Johns-Manville Prod. Corp., 734 F.2d 1036 (5th Cir. 1984). *See also* Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053 (D.N.J. 1989) (private action against asbestos manufacturers held not sufficiently "criminal" in nature to invoke double jeopardy clause); Brotherton v. Celotex Corp., 202 N.J. Super. 148, 157, 493 A.2d 1337, 1345 (1985) (citing *Hansen*).

[20] These safeguards include the sixth amendment rights to a speedy trial, confrontation of witnesses, and assistance of counsel; the eighth amendment guarantee against cruel and unusual punishment, and the fifth amendment protection against self-incrimination. In dictum the *Browning-Ferris* decision indicated that no part of the eighth amendment was applicable "to cases of punitive damages awards in private civil cases . . . . We think it clear . . . that the Eighth Amendment places limits on the steps a *government* may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments." 492 U.S. at 275 (emphasis supplied). The Court specifically left open the question of applying criminal guarantees in situations where the government is a party or shares in the proceeds of the award. *Id.* at 2920 n.21. Conceivably the Court might find the excessive fines clause applicable to punitive damages in the courts of Florida, Illinois, Iowa, or Utah, where a portion of the award may accrue to the state.

## III. DUE PROCESS LIMITS: *HASLIP* PERPETUATES UNCERTAINTY

*Browning-Ferris* left intact the prospect of constructing a constitutional bulwark against punitive damages on the foundation of the due process clause. In *Browning-Ferris* the Supreme Court refused to consider a due process challenge to the award of punitive damages because that issue was not raised in the courts below,[21] but it indicated willingness to address the issue in a proper case.[22] The opportunity was presented in *Pacific Mutual Life Insurance Co. v. Haslip*,[23] in which the defendant insurance company offered a due process defense at every stage of the litigation. The claim arose from the fraudulent acts of a local insurance agent who misappropriated health insurance premiums, leaving employees of Roosevelt City, Alabama, without coverage. Pacific Mutual was not the health insurer, but it did employ the agent for the sale of life insurance. In this case, the agent had sold a Pacific Mutual life insurance policy to the city in a package with the health insurance, the latter issued by a company not party to the suit. Although Pacific Mutual was not directly implicated in the fraud, the jury found the company liable for compensatory and punitive damages on a theory of *respondeat superior*.[24] Of the 1,040,000 dollars awarded to

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[21] *Id.* at 277. The Court similarly avoided the issue in a case decided during the 1987 term, Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988).

[22] *Browning-Ferris* at 277; *id.* at 281–82 (Brennan, J., concurring); *id.* at 283 (O'Connor, J., concurring and dissenting).

[23] 111 S. Ct. 1032 (1990). Petitioner Pacific Mutual also invoked the equal protection clause and the criminal guarantees of the fifth and sixth amendments as further bases for review. *See* subject matter summary, 58 U.S.L.W. 3602 (1990). Neither point was argued by petitioner nor addressed by the Court, probably because neither had much potential as a viable argument. Having decided that the excessive fines clause of the eighth amendment is inapplicable to punitive damages claims between private parties, and in recent dictum ruled out the double jeopardy clause, the Supreme Court was unlikely to find that other Bill of Rights protections for the criminally accused are nevertheless available. As for the equal protection claim, there is no obvious fundamental interest to raise the level of scrutiny above minimum rationality. Thus, for Pacific Mutual to succeed, the Court would have to conclude that Alabama could not rationally fix statutory civil penalties for some types of proscribed conduct without simultaneously fixing limits in all situations where punitive damages or other civil penalties are allowed. The Court obviously was not prepared to reach such a conclusion.

[24] The Court concluded that subjecting the principal to punitive damages liability for the acts of its agent did not violate substantive due process, even though the acts were unauthorized, performed on behalf of another company and done without the principal's knowledge. Said the Court: "We cannot say that this does not rationally advance the

respondent Cleopatra Haslip, the punitive damage component was assumed by the Court to be at least 840,000 dollars.[25] The Court held that neither the size of the award nor the court procedures violated any mandate of due process.[26]

Although the outcome commanded a large majority, Justice Blackmun's opinion for the Court is notably lacking in helpful guidelines for the resolution of future cases. It does little more than straddle the larger due process issue. On the one hand, the Court rejected the position "that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional."[27] On the other hand, the Court found it "just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional."[28] If punitive damages are not necessarily, but nevertheless may be, unconstitutional, what is the guiding principle? The rule, if there is one, is captured in the following lines:

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, 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. With these concerns in mind, we review the constitutionality of the punitive damages awarded in this case.[29]

This in essence is a prescription for ad hoc, case by case review of court procedures and the size of awards to determine the reasonableness of punitive damages. As a common-law principle it undoubtedly makes sense; it is not far from describing what reviewing courts presently do. But it is not very

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State's interest in minimizing fraud." *Haslip* at 1041.

[25] Counsel for Haslip had asked for $200,000 compensatory damages, and total damages exceeded that amount by $840,000. *See id.* at 1037 n.2.

[26] Except for the *respondeat superior* issue, Pacific Mutual's due process objections related to the size of the award as distinguished from the finding of liability for punitive damages. Pacific Mutual did not contend that the agent's fraud was insufficient to justify a punitive award. Rather it contended that the company should not be held liable for the agent's conduct and that the award failed due process because of its size and the procedures by which the amount was determined.

[27] *Id.* at 1043.

[28] *Id.*

[29] *Id.*

useful as a rule of constitutional law, and certainly not one that the Supreme Court with its finite review capacity has the resources to police.

Applying this rule, the Court examined the jury instructions[30] and the post-trial review procedures in *Haslip*, concluding that they were adequate.[31] In justifying the outcome, Justice Blackmun placed great weight on Alabama's appellate review procedures as a check on the discretion of the jury and of the trial court.[32] His emphasis on the role of review procedures is probably well taken, but this does not clearly distinguish Alabama from most other jurisdictions. Setting aside or modifying excessive punitive damage verdicts is the prerogative and the common practice of judges

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[30] If these jury instructions were adequate it is hard to imagine any extant jury instructions that would fail. For discussion of jury instructions in other jurisdictions *see infra*, notes 133–45 and accompanying text. In this case the jury was told that the purpose of punitive damages was "'not to compensate the plaintiff for any injury' but 'to punish the defendant' and 'for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future;'" and that "the jury 'must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.'" *Haslip* at 1044.

[31] *Id.* at 1043–46. Under Alabama law the trial court is required to place in the record its reasons for reducing, or not reducing, a jury verdict, taking account of such factors as defendant's culpability and the need to discourage others from engaging in similar conduct. *Id.* at 1045. The Alabama Supreme Court has also laid down criteria for appellate courts to consider in reviewing punitive damage awards. *See* Aetna Life Insurance Co. v. Lavoie, 505 So. 2d 1050, 1061 (Ala. 1987). These were summarized by the *Haslip* court as follows:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) 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 similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Haslip at 1045.

[32] *Id.* at 1044–46.

throughout the United States.[33] In the end this decision tells us that Alabama procedures pass the "reasonableness" test, but provides little basis for predicting how other procedures will fare.[34]

Justice Scalia's concurring opinion offers a rationale capable of resolving the question definitively, but his position did not, and probably will not in the future, command much support on the Court. He insisted that punitive damages are valid simply because they "are a part of our living tradition that dates back prior to 1868."[35] This conclusion, in turn, rested on the somewhat broader proposition that "no procedure firmly rooted in the practices of our people can be so 'fundamentally unfair' as to deny due process of law."[36] Tradition, apparently, should govern no matter how unfair the practice might appear in the abstract.[37] Justice Blackmun's opinion for the Court patently did not espouse this viewpoint, and the other two opinions in the case, Justice Kennedy's concurrence and Justice O'Connor's dissent, expressly rejected it.[38]

In future litigation the Court's opinion will not be very helpful in resolving the constitutional issues, and the Scalia concurrence is almost certain to be unacceptable. The remaining two opinions in the case, however, provide the framework for a sensible resolution of the question. Justice

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[33] Justice O'Connor in dissent commented, "Alabama's punitive damages scheme is indistinguishable from the common-law schemes employed by many States." *Id.* at 1056 (O'Connor, J., dissenting).

[34] Concurring, Justice Scalia commented: "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.* at 1046–47. The Court suggested that the punitive damage systems of Vermont and Mississippi, at issue in Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989), and Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988), respectively, might not have passed muster had the due process issue been considered. Vermont used the standard of "'manifestly and grossly excessive,'" and Mississippi required the award to be a product of "'passion, bias and prejudice on the part of the jury so as to shock the conscience.'" *See Haslip* at 1045 n.10.

[35] *Haslip*, at 1054 (Scalia, J., concurring).

[36] *Id.* at 1053. This follows his opinion for the Court in Burnham v. Superior Court of California, 110 S. Ct. 2105, 2109 (1990), in which he had previously argued that traditional practice is conclusive of fundamental fairness, unless the practice violates a provision of the Bill of Rights other than the due process clause.

[37] Justice Scalia did not think the Alabama procedure was very fair, in any ordinary sense of the word: "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." *Haslip* at 1053 (Scalia, J., concurring).

[38] *Id.* at 1054 (Kennedy, J., concurring); *id.* at 1056 (O'Connor, J., dissenting).

O'Connor, in dissent, identifies the particular issues that need to be addressed if the Court is to provide a compelling rationale for its action. Her opinion has a modest defect—she comes down on the wrong side—but her elaboration of the issues should nevertheless be extremely useful to a future court. Justice Kennedy's brief concurrence, by contrast, ignores all but the central issue of fundamental fairness, but he provides the correct bottom line: the common-law system for awarding punitive damages is sufficiently fair and rational to satisfy due process. This paper will examine the issues raised by Justice O'Connor (and others sharing her views) and, in doing so, will provide a rationale for Justice Kennedy's conclusion.

## IV. THE CONTENT OF DUE PROCESS

The argument for due process limits on punitive damages has a certain plausibility because of the breadth and flexibility of the due process concept. In this regard due process has some obvious advantages over constitutional provisions that have been invoked. It has the flexibility that comes with unusual vagueness, and historically it has served as a limit upon the substance of governmental conduct as well as upon governmental procedures. As a substantive limitation upon government, due process at the turn of the century became a refuge for business interests seeking constitutional shelter from economic regulation by Congress and state legislatures. The due process clause was interpreted to deny legislatures the power to abridge "liberty of contract" and "vested property rights" through "unreasonable" regulation.[39] Although resort to due process as a limit on economic regulation ceased with the triumph of the New Deal revolution, and subsequently fell into disrepute,[40] the due process clause continues to

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[39] *See* discussion in Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 198 (1936). The leading case was Lochner v. New York, 198 U.S. 45 (1905), which struck down a New York statute limiting employment of bakery workers to ten hours a day and sixty hours a week. The statute was said to infringe on liberty of contract as protected by the fourteenth amendment due process clause. For further elaboration of substantive due process as applied early in this century, *see* Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926); Haines, *Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations on Legislatures*, 3 TEX. L. REV. 1 (1924); Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265.

[40] The last Supreme Court case to find an economic regulation in violation of substantive due process was Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, 617–18 (1936), invalidating a state minimum wage law for women. The Court refused to apply the doctrine in West Coast Hotel v. Parrish, 300 U.S. 379, 397–400 (1937) (another minimum wage case) and has since expressly repudiated it. *See, e.g.*, Ferguson

have at least theoretical relevance as a prohibition of governmental conduct that is arbitrary and unreasonable[41] or that "shocks the conscience."[42] Since 1965, moreover, substantive due process has enjoyed a renaissance through a new doctrine of "privacy" that invokes due process protection for individual interests in abortion, contraception, and other "fundamental rights" affecting family relations and personal autonomy.[43] Substantive due process thus continues alive and well, although its application to punitive damages appears to have much more in common with the old *economic* substantive due process, now largely disavowed, than with the new substantive due process of privacy and fundamental rights.

As a procedural concept, due process is a guarantee of fair procedures when life, liberty, or property are threatened by governmental action. Ordinarily, procedural due process is not relevant to the process by which laws or other governmental rules are *made*, but rather limits the *application* of governmental rules to individual cases. A legislative enactment may, nevertheless, run afoul of procedural due process if it prescribes judicial or administrative procedures that are constitutionally inadequate[44] or if it imposes penalties upon individuals without providing for an appropriate prior hearing to determine if the penalty is applicable. In the latter event the statute may violate procedural due process—not because of a defect in the legislative process (to which the due process clause does not apply) but because the statute makes no provision for proper procedures in application to the individual case.[45] The more typical application of

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v. Skrupa, 372 U.S. 726, 730-31 (1963); Williamson v. Lee Optical, 348 U.S. 483, 488 (1955); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949).

[41] *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986); Wolff v. McDonnell, 418 U.S. 539, 558 (1974); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

[42] *E.g.*, United States v. Salerno, 481 U.S. 739, 746 (1987); Rochin v. California, 342 U.S. 165, 172 (1952).

[43] *E.g.*, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

[44] *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[45] For example, in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the relevant congressional statute stripped citizenship from any American who left or remained outside the country for the purpose of military draft evasion. The Court concluded that the statute deprived the affected persons of liberty without due process of law and, because the statute was penal rather than regulatory, deprived them of fifth and

procedural due process comes in scrutinizing judicial procedures to determine if the proceedings have been fundamentally fair. What constitutes the required "fundamental fairness," of course, varies from one context to another.[46] Administrative proceedings also are subject to due process requirements whenever individual interests in liberty or property are at stake, as in the administrative revocation of a driver's license or the denial of welfare benefits.[47]

## V. DUE PROCESS LIMITS ON PUNITIVE DAMAGES: THE CLAIMS

Punitive damage awards, potentially at least, are amenable to challenge on both substantive and procedural due process grounds. The argument for a substantive due process check on punitive damages is quite straightforward and speaks primarily to the size of the award. That is, an award may be so excessive in relation to a defendant's conduct and so disproportionate to the damages actually incurred that imposing such a penalty is wholly arbitrary and unreasonable. As noted above, Supreme Court decisions from the early years of this century invalidated statutory penalties akin to punitive damages because the authorizing statute, on its face or as applied, was arbitrary and unreasonable.[48] Dicta in cases interpreting other statutes of the same period assert that due process may be offended by damage awards that are "grossly excessive"[49] or "so severe and oppressive as to be wholly disproportioned to the offense, and obviously unreasonable."[50]

The principle of a substantive due process limit upon grossly excessive civil damages, although not applied by the Supreme Court for

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sixth amendment rights available to the criminally accused. *Id.* at 164–66.

[46] *See, e.g.*, Ford v. Wainwright, 477 U.S. 399 (1986); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985); Duncan v. Louisiana, 391 U.S. 145 (1968); Hurtado v. California, 110 U.S. 516 (1884); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

[47] Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits).

[48] *See supra* note 6 and accompanying text.

[49] Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909). *Waters-Pierce* was a civil anti-trust action initiated by the state, not a dispute between private parties.

[50] St. Louis, I. M. & S. Ry. v. Williams, 251 U.S. 63, 66 (1919) (citations omitted). In each of these cases the civil litigant was seeking damages within a range of possibilities specified by the legislature, and the Court found the damage awards not to be excessive. *See also* Missouri P. Ry. v. Humes, 115 U.S. 512, 522–23 (1885).

decades, remains a viable precedent and has recently been endorsed by some of its members. Justice Brennan's concurring opinion in *Browning-Ferris*, in which Justice Marshall joined, indicated that the earlier cases were still relevant.[51] Justice O'Connor's partial dissent in the same case (joined by Justice Stevens), also presumed that due process might impose a substantive limit on punitive damage awards.[52] The Court itself, in a portion of the *Browning-Ferris* opinion to which all justices subscribed, acknowledged the existence of "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."[53] In *Haslip* the Court indicated that the size of the award, in relation to the plaintiff's compensatory damages and out-of-pocket expenses, might implicate due process but did not indicate whether the concern was substantive or procedural.[54] Lower courts also have surmised that substantive due process may place limits on punitive damages, without, as yet, holding any jury award invalid on that ground.[55]

The procedural, as contrasted with the substantive, due process argument is somewhat more complex. One line of reasoning speaks to the punitive nature of the proceeding. The primary purpose of punitive damages is retribution and deterrence—precisely the rationale underlying penal law.

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> Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are "grossly excessive" . . . or "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable" . . . I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits.

*Browning-Ferris*, 492 U.S. at 280 (Brennan, J., concurring).

[52] *Id.* at 283 (O'Connor, J., concurring and dissenting).

[53] *Id.* at 276 (citing St. Louis, I. M. & S. Ry. Co. v. Williams, 251 U.S. 63 (1919)).

[54] "While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety." *Haslip* at 1046. This brief comment appeared in the context of a procedural due process analysis. The Court made explicit reference to substantive due process in deciding the respondeat superior issue (discussed *supra* note 24).

[55] *See, e.g.*, Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989); *In re* School Asbestos Litig., 789 F.2d 996, 1004–05 (3d Cir. 1986); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053 (D.N.J. 1989).

If functionally the two types of proceedings are similar, then, as the argument runs, due process ought to require the greater safeguards applicable to criminal prosecutions.[56] The prospect of prevailing on such a claim is weakened by the Court's refusal in *Browning-Ferris* to treat punitive damages as a criminal issue for purposes of the eighth amendment. But even if criminal safeguards are not required, there is still an argument that such a proceeding ought to require more stringent procedural standards to satisfy due process than does the ordinary civil case. Typically, procedures recommended by those who take this position include a higher burden of proof ("clear and convincing" evidence rather than mere "preponderance") and bifurcation of trials so that the jury first renders a verdict on the underlying claim for compensatory damages before hearing evidence on the issue of punitive damages.[57]

A second strand of the procedural due process argument focuses on the absence of meaningful standards to guide the jury in determining liability for punitive damages and fixing the amount of the award.[58] This, more than any other due process argument, has captured the attention of the Supreme Court. Prior to the *Haslip* decision, several members of the Court had noted a possible constitutional flaw in the lack of jury guidelines for deciding how much the hapless defendant must pay. Justice Brennan (with Justice Marshall), commenting on the punitive damages instruction given by the trial court in the *Browning-Ferris* case, characterized the issue as potentially very serious:

> Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision.

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[56] *See, e.g.*, Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, at 245 (1985); Jeffries, *supra* note 3, at 139; Note, *The Constitutionality of Punitive Damages*, *supra* note 3; Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967).

[57] *See, e.g.*, Ellis, *supra* note 3, at 991–1003; Wheeler, *supra* note 3, at 272. For a carefully considered set of proposals for reform of punitive damages law, *see* AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE (1989). *See also Punitive Damages*, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 231 (A.L.I. Reporters' Study 1991).

[58] A variant of this argument emphasizes the lack of notice to potential defendants, stemming from the vagueness of the standards. This issue is discussed *infra*, notes 169–90 and accompanying text.

> Indeed, the jury in this case was sent to the jury room with nothing more than the following terse instruction: "In determining the amount of punitive damages, you may take account of the character of the defendants, their financial standing, and the nature of their acts."...Because "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Daniels v. Williams*, 474 U.S. 327, 331 (1986), quoting *Dent v. West Virginia*, 129 U.S. 114, 123 (1889), I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.[59]

Justice O'Connor, in an opinion joined by Justice Scalia, had earlier expressed a similar belief that the due process clause is violated by a law giving "juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state."[60] In her *Browning-Ferris* partial dissent, Justice O'Connor reaffirmed her concern about "the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages."[61] Justice Stevens joined in that opinion.

The same focus on jury discretion is found in *Haslip*, in which six of the eight participating justices treated jury discretion as the central issue. Justice O'Connor, in dissent, thought the Alabama punitive damages award unconstitutional because the jury instructions "offered less guidance than is required" by due process.[62] The five justices in the majority (Blackmun, joined by Rehnquist, White, Marshall and Stevens) also focused on jury discretion as the crucial variable[63] but concluded that due process was satisfied because Alabama procedures kept the exercise of jury discretion within reasonable limits.[64] Implicit in their analysis is the unavoidable conclusion that other procedures might leave jury discretion so uncabined as to violate due process. Indeed, by explicitly distinguishing the post-trial

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[59] Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring).

[60] Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring). Judging from his concurring opinion in *Haslip*, Justice Scalia must have changed his mind on this point, or perhaps never agreed with Justice O'Connor on that detail of her opinion.

[61] 492 U.S. at 283 (O'Connor, J., concurring and dissenting).

[62] Haslip at 1056 (O'Connor, J., dissenting).

[63] *Id.* at 1036.

[64] *Id.* at 1044–46.

procedures for limiting jury discretion in *Browning-Ferris* and *Bankers Life & Casualty Co.*, the Court implied that Justice Brennan and Justice O'Connor may have been correct in raising a due process question in those cases.[65]

Each of these claims will be examined in turn but, as a preface to that analysis, the issue of constitutionality must be distinguished from issues regarding the wisdom or desirability of altering the law governing the award of punitive damages. The point is basic and is frequently made in a general way by the Court when distinguishing the proper bounds of its own role vis-a-vis legislatures. Separating the two in practice, however, is not a simple thing. Litigants, attorneys, judges, and commentators are all influenced in their attitudes toward the constitutional issue by their evaluations of the effects of punitive damages in particular cases and upon the legal system generally. Even analytically the two are not wholly distinct because consideration of practical impacts has a role in constitutional analysis, especially with a concept like due process which asks if conduct is "arbitrary," "unreasonable," or "fundamentally unfair." Nevertheless, the two are not the same. All that is desirable is not constitutionally required unless one views the Constitution as somehow guaranteeing a remedy for all perceived wrongs.[66]

From a policy standpoint, a reasonable argument can be made in favor of limiting and bringing more predictability to the process. The literature on the policy question is extensive,[67] and most of it proposes

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[65] *Id.* at 1045 n.10.

[66] *See* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981), for a refutation of this idea in the context of a critique of noninterpretivist approaches to constitutional analysis.

[67] *See, e.g.*, American College of Trial Lawyers, *supra* note 57; Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1 (1985-86); Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 F. 57 (1975); Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053 (1989); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982); Grass, *supra* note 56; Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385 (1987); Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F. L. REV. 613 (1979); Mahoney & Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 SCIENCE 1395 (1989); Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639 (1980); Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976); Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103 (1982); Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705 (1989); Peters, *Punitive Damages in Oregon*,

changes in the existing system. A number of state legislatures have responded to these concerns by enacting procedural modifications and statutory caps upon the size of punitive damage awards.[68] Courts in some jurisdictions also have imposed more stringent procedural requirements through their power to adjust and declare the common law.[69] At the national level, the United States Congress for several years has been considering proposals to establish a uniform national standard for product liability litigation. If adopted, such legislation could provide a solution to one of the more vexing problems of punitive damages—that of repetitive awards for the same course of conduct.[70] All this legislative and judicial activity indicates that arguments

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18 WILLAMETTE L. REV. 369 (1982); Sales & Cole, *Punitive Damages: A Relic That has Outlived Its Origin*, 37 VAND. L. REV. 1117 (1984); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967); Note, *In Defense of Punitive Damages*, 55 N.Y.U. L. REV. 303 (1980).

[68] According to the Research and Policy Committee of the Committee for Economic Development, WHO SHOULD BE LIABLE? A GUIDE TO POLICY FOR DEALING WITH RISK, 103-05 & n.69 (May 1989), at least 28 states had statutorily modified their punitive damages laws since 1985. As illustrative of these, Alabama adopted a clear and convincing evidence standard for punitive damages liability and placed a $250,000 cap on most punitive damages awards, ALA. CODE §§ 6-11-20, 6-11-21 (Supp. 1990); Colorado adopted a reasonable doubt evidentiary standard and limited punitive damages to the amount of compensatory damages, COLO. REV. STAT. §§ 13-25-127(2), 13-21-102 (1987); Connecticut required the court rather than the jury to fix the amount of punitive damages and limited the award to twice compensatory damages in products liability actions, CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1990); Florida adopted a clear and convincing evidence standard for punitive damages greater than three times compensatory damages, FLA. STAT. § 768.73(1)(a) (1)(b) (Supp. 1991); Georgia required clear and convincing evidence and set a $250,000 cap on punitive damages, GA. CODE ANN. § 51-12-5.1(b), (g) (Supp. 1990); New Jersey bifurcated trials in products liability cases, N.J. STAT. ANN. § 2A:58 C-5b (West 1987); Oklahoma adopted a clear and convincing evidence standard for punitive damages exceeding compensatory damages, OKLA. STAT. tit. 23, § 9 (West 1987); Texas limited punitive damages awards to $200,000 or four times actual damages, TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon 1987).

[69] *See, e.g.*, Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326, 723 P.2d 675 (1986); Orkin Exterminating Co. v. Traina, 486 N.E.2d 1019 (Ind. 1986); Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980).

[70] *See, e.g.*, H.R. 2700, 101st Cong., lst Sess. (1990); S. 1400, 101st Cong., 1st Sess. (1990). For further discusson of the problem of punitive damages in the product liability context, *see* GAO, PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES (Sept. 1989); GAO, PRODUCT LIABILITY: EXTENT OF "LITIGATION EXPLOSION" IN FEDERAL COURTS QUESTIONED (Jan. 1988); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI.

against the present system of punitive damages have been persuasive, at least in some quarters. However, it does not make a case that change is constitutionally required and may indeed be better evidence that the issue of punitive damages is a policy matter appropriately left to legislatures and, perhaps, to courts exercising their common law powers. In any event, to the extent possible, the issue of constitutionality must be addressed on its own terms and not confused with the policy question. The following discussion of due process as a limit on punitive damages will maintain that distinction.

## VI. PUNITIVE DAMAGE AWARDS AND SUBSTANTIVE DUE PROCESS

If the Supreme Court were determined to find substantive constitutional limits on the size of individual awards, the excessive fines clause would have been a better vehicle than due process because it relates directly to the central issue—the excessiveness of the penalty. With the excessive fines clause ruled out for any proceeding to which the government is not a party, however, due process is undoubtedly the best remaining possibility. The concept is elastic enough to permit stretching to fit, and, as a limitation upon the substance of governmental actions, it requires suprisingly little stretching. The older cases dealing with statutory penalties[71] are relatively close on point, and the prohibition of excessive and unreasonable damages is quite consistent with the residual concept of substantive due process that survived the Roosevelt era—the idea of a check on governmental conduct that is arbitrary, capricious, and unreasonable.

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L. REV. 1 (1982); Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency, and Control*, 52 FORDHAM L. REV. 37 (1983); Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919 (1989); Williams, *Mass Tort Class Actions: Going, Going, Gone?* 98 F.R.D. 323 (1983). For judicial views *see, e.g.*, Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984); *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053 (D.N.J. 1989); *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887 (N.D. Cal. 1981); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980).

[71] *See supra* note 3.

Arguably, as the present Court has acknowledged, such a limitation already exists.[72]

In practice, however, substantive due process has not provided any significant check upon the the size of punitive damage awards. It is seldom invoked for such a purpose and, when invoked, is almost uniformly rejected.[73] This undoubtedly reflects the general disfavor in which economic substantive due process has been held over the past half century. State law governing punitive damages, whether common law or statute, may be seen as a form of economic regulation. Thus, any attempt to create substantive due process limits on the size of awards would look like a revival of the discredited economic substantive due process doctrine. The case for revival is not helped by the fact that the principal beneficiaries of such a revival would be the same kinds of business and corporate interests that benefitted from the old substantive due process. The current constitutional challenge to punitive damage awards is not, generally speaking, being mounted on behalf of drunken drivers or persons who viciously defame or batter their victims out of personal spite, malice, or anger. The Supreme Court, heretofore, has

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[72] *See supra*, notes 51-54 and accompanying text. The existence of due process limits on the size of an award was assumed by the U.S. District Court for the district of New Jersey in an opinion rejecting a defendant's motion for summary judgment on a punitive damages claim. Speaking of views expressed by members of the Court in *Browning-Ferris* and *Bankers Life*, the court commented: "[W]e think that they can only be taken as evidence that an unreasonably generous award of punitive damages may be attacked under the Due Process Clause, which is hardly news." Germanio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297, 1300 (D.N.J. 1990). The Court in *Haslip*, at 1046, also saw due process implicated by the size of a punitive damages award but did not specifically invoke substantive due process.

[73] *See, e.g.*, Kumar v. Lewis, 561 So. 2d 1082 (Ala. 1990). Product liability actions have in recent years provided a modest exception to this generalization. Substantive due process has been frequently invoked as a limitation on multiple punitive damages awards for a single course of conduct, and several courts have expressed sympathy for the argument without, however, having occasion to apply it. *See* cases cited *supra* note 5. One case, Juzwin v. Amtorg Trading Corp., 705 F. Supp.1053 (D.N.J. 1989), *vacated on other grounds*, 718 F. Supp. 1233 (D.N.J. 1989), in fact held that such multiple exposure violated substantive due process. On reconsideration, however, the court vacated its order dismissing the punitive damages claims because "equitable and practical concerns" prevented it from "fashioning a fair and effective remedy." 718 F. Supp. at 1236. Other courts have rejected the substantive due process objection to such multiple exposure. *See, e.g.*, McCleary v. Armstrong World Indus., 913 F.2d 257 (5th Cir. 1990); Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2d Cir. 1990); Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. 1985); Guarino v. Armstrong World Indus., No. 88-1087-CIV (S.D. Fla. 1989) (LEXIS, Genfed library, Dist file); Leonen v. Johns-Manville Co., 717 F. Supp. 272 (D.N.J. 1989).

shown no disposition to resuscitate the doctrine of economic substantive due process generally, and this undoubtedly is a deterrent to its revival in the lower courts. If the Court should find substantive due process relevant to punitive damages, of course, it will become a standard mode of attack upon jury awards.

Another reason for disregarding substantive due process is more fundamental. In its current formulation as a barrier to excessive and unreasonable governmental action, it adds essentially nothing to existing state law on the subject. Courts in all states that permit punitive damages already have the power, under common-law rules, to reduce or set aside awards that are grossly excessive, arbitrary and unreasonable.[74] Evidence relevant to show that a particular award is grossly excessive under the due process clause can be used to attack the jury verdict under state law. If the very deferential review now associated with economic substantive due process were applied in the punitive damages area, it is hard to see how defendants would gain much.[75]

The Court faces a dilemma in any attempt to define due process rules for determining excessiveness. On the one hand, to make any difference in existing practices, guidelines must be quite specific in their demands.

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[74] According to J. GHIARDI & J. KIRCHER, *supra* note 5, at § 18.01 (Supp. 1989), all but four states (Iowa, Kentucky, Missouri and Oregon) allow reduction of a punitive damages award by remittitur. All states permit the court, on motion for a new trial or judgment n.o.v., to set aside or change a jury verdict. However:

> The jury verdict will not be changed or set aside unless the court finds that: (1) it exceeds the punitive damages claimed in the complaint; (2) it was based on prejudice, passion or bias; (3) it was based upon a mistake of law or fact; (4) it lacks evidentiary support; (5) it shocks the judicial conscience.

*Id.* at § 18.02 (Supp. 1989). Appellate courts may also overturn a grossly excessive verdict, although the trial court's decision will be reversed only if abuse of discretion is shown. *Id.* at § 18.03.

[75] *See, e.g.*, Puppe v. A.C.S., Inc., 733 F. Supp. 1355 (D.N.D. 1990), in which the court observed:

> If there are no grounds for a punitive damages award, a court need not reach for a constitutional ground to reverse it. Such an unjustified award can and should be reversed by either the trial or appellate courts on the merits . . . . If this Court is in this case presented by a punitive damage award which appears excessive, it will be reduced; the constitutional argument that excessive punitive damages awards violate due process need never be reached.

*Id.* at 1362–63.

Otherwise lower courts will not find due process limits visibly different from the limits presently imposed under common-law rules. On the other hand, the more specific and demanding the guidelines, the less convincing they appear as mandates of the due process clause, as heretofore interpreted. The substantive due process standard that questions only arbitrary and unreasonable conduct has not been a demanding one; as guidelines become more specific and demanding, they look less and less like the due process we have known. The Court can of course revise the Constitution to fit its current predilections—the power comes with the office—but this seems a peculiar cause in which to make a major shift in due process doctrine with implications extending well beyond the area of punitive damages.

Stricter scrutiny of punitive damages might be warranted under current substantive due process doctrine if the affected interests could be characterized as "fundamental," but they are not very analogous to the rights of privacy currently given such protection.[76] Advocates of a stiffer constitutional standard for punitive damages often claim that heightened protection is justified because the proceeding is in some respects "penal."[77] Certainly one objective of punitive damages is to punish the offender, but the similarity to a criminal prosecution stops there. The litigation is between private individuals, the state is neither prosecutor nor complainant, and the losing defendant ends up paying money to the private plaintiff,[78] as in any other civil case. No possibility of a prison term arises without a separate criminal prosecution. No criminal record is created. Some commentators and courts have claimed the supposed "stigma" associated with liability for punitive damages is comparable in important respects to the stigma flowing from a criminal conviction,[79] thus providing another parallel. Claims of any significant stigma are not very convincing, however, and even if they were, the stigma would logically follow from the finding of culpability, not from

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[76] *See supra* note 43 and accompanying text.

[77] *See, e.g.*, Ellis, *supra* note 3; Grass *supra* note 56; Jeffries, *supra* note 3. *See also* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1062 (1991) (O'Connor, J., dissenting) ("The punitive character of punitive damages means that there is more than just money at stake. This factor militates in favor of strong procedural safeguards.")

[78] In jurisdictions where some portion of a punitive damages award is paid to the state, a different constitutional rationale might apply. As suggested in Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 268 (1989), such an award might also be limited by the excessive fines clause of the eighth amendment.

[79] *E.g.*, Grass, *supra* note 56, at 251–52; Massey, *supra* note 3, at 1238; Wheeler, *supra* note 3, at 282–84. Justice O'Connor also accepts this argument as valid. *See Haslip* at 1062 (O'Connor, J., dissenting).

the amount of the damages.[80] There simply is no fundamental interest here, stemming from the rights of the accused or any other source, that could justify heightened due process scrutiny.

In its essentials, the issue raised by "excessive" punitive damages awards is simply one of money. Money is not inconsequential; behavior of individuals and business firms is heavily influenced by it. But governmental conduct affecting economic interests is not entitled to exacting scrutiny under current constitutional norms. If the conduct is not arbitrary and unreasonable, it should stand. If a punitive damages award is so excessive as to be arbitrary and unreasonable, it can be voided or remitted under existing state law. Substantive due process, properly applied, may confirm this result, but it adds nothing to it.[81]

## VII. PUNITIVE DAMAGES AND PROCEDURAL DUE PROCESS

Procedural due process objections to the current law of punitive damages require a more extended analysis. The case law dealing with procedural due process raises two broad questions: Does the due process clause apply to the situation at hand, and, if it does, what procedural safeguards does it require? With punitive damages the first question—applicability of due process—demands an affirmative answer. Due process provides protection against deprivation of life, liberty, or property[82]

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[80] For further discussion of the "stigma" issue, see *infra*, notes 105–16 and accompanying text.

[81] A substantive due process objection can be made to aspects of punitive damages law other than the excessiveness of the award. In *Haslip*, for example, the defendant insurance company contended that due process is violated by permitting punitive damages to be granted under a respondeat superior theory. Assessing punitive damages against a company for fraudulent acts of an agent committed without the company's knowledge or authority and contrary to the company's interest seems harsh, but it is not irrational or arbitrary to assume that a company may thereby be induced to exercise better control over its agents. As a policy matter, perhaps the law should be otherwise, but it surely survives minimum rationality scrutiny under the due process clause, and the *Haslip* Court so held. *Haslip* at 1041. For a good exposition of the logic of finding "complicity" on the part of the principal, *see* Briner v. Hyslop, 337 N.W.2d 858, 866–67 (Iowa 1983).

[82] Much recent litigation has asked whether the injured person has a sufficient "liberty" or "property" interest at stake to invoke the protection of the clause. *See, e.g.*, Kentucky Dep't. of Corrections v. Thompson, 491 U.S. 454, (1989); Vitek v. Jones, 445 U.S. 480 (1980); Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976).

at the hands of a governmental actor.[83] An action for punitive damages necessarily involves prospective deprivation of property and this by decision of a court, which is an arm of the government.[84]

## A. *The* Mathews v. Eldridge *Test*

Since the due process clause clearly applies, the critical question is what due process requires. The answer could be quite straightforward if the Constitution prescribed the same procedures for all situations, but it does not. Notice to the accused (or the party concerned) and an opportunity for a hearing (or some expression of views) are basic elements of due process in any situation, but what constitutes adequate notice and hearing varies with the circumstances. Criminal proceedings demand the most stringent safeguards. Due process is less demanding in a civil action and still more flexible when applied to administrative deprivations of liberty or property. Flexibility is the central theme of the Court's oft-quoted formula, from *Mathews v. Eldridge*,[85] which makes the "specific dictates of due process" dependent upon "consideration of three distinct factors:"

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[86]

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[83] Due process is a restriction upon state and federal governments and their instrumentalities, not private persons. The Court is frequently asked to decide whether an entity is sufficiently governmental in nature, or so closely involved with the government, that due process should apply. *See, e.g.*, NCAA v. Tarkanian, 488 U.S. 179 (1988); Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

[84] Despite Shelley v. Kramer, 334 U.S. 1 (1948), which found state action in judicial enforcement of a private restrictive covenant, mere resort to the courts has not been treated, by itself, as sufficient to turn the subject matter of every lawsuit into state action. *See, e.g.*, Evans v. Abney, 396 U.S. 435 (1970); Bell v. Maryland, 378 U.S. 226 (1964). However, no one doubts that the procedures of *courts* must satisfy due process, whatever the subject of the action.

[85] 424 U.S. 319 (1976).

[86] *Id.* at 335. The *Mathews* criteria received some academic criticism at the time but nevertheless have survived as accepted law. *See, e.g.*, Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three*

The facts of the *Mathews* case, which gave rise to this formulation, involved administrative termination of disability benefits without granting the claimant a pretermination evidentiary hearing. Applying these three factors the Court held that due process did not require such a hearing. The *Mathews* formula has since been applied by the Court to test the validity of a wide variety of administrative proceedings.[87] It is used less often to challenge the procedures of courts, and has yet to be applied by the Supreme Court in a judicial proceeding involving only private parties.[88]

Whether or not the specific formula in *Mathews* is appropriate to a particular case, some of its underlying principles have relevance for due process in any situation. In particular, the first *Mathews* factor—the nature of the private interest affected—is of central importance in determining what process is due. The principal justification for constitutional rules giving greater procedural protection to criminal defendants than parties to a civil suit lies in the differing private interests involved. In the ordinary civil action the thing at issue is "mere loss of money."[89] In a criminal case, by contrast, the defendant may be threatened with loss of personal liberty, which the Court has characterized as "an interest of transcending value."[90] The nature of the private interest affected may also dictate heightened protection even though the proceeding is nominally civil. A civil action for involuntary

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*Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

[87] *E.g.*, Washington v. Harper, 494 U.S. 210 (1990) (involuntary administration of drugs to prisoner); Schweiker v. Chilicky, 487 U.S. 412 (1988) (termination of disability benefits); Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230 (1988) (F.D.I.C. hearing); Atkins v. Parker, 472 U.S. 115 (1985) (reduction of food stamp benefits); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (dismissal of school employee); Hewitt v. Helms, 459 U.S. 460 (1983) (transfer of prisoner to administrative segregation).

[88] In Little v. Streater, 452 U.S. 1 (1981), the Court invoked *Mathews v. Eldridge* in a paternity suit brought by the mother with the aid of a state-paid attorney. In holding that due process required the state to pay for the indigent defendant's blood grouping test, Chief Justice Burger emphasized "the State's prominent role in the litigation." *Id.* at 6. Occasionally lower courts have invoked the *Mathews* criteria in private suits. *See, e.g.*, Premier Communications Network, Inc. v. Fuentes, 880 F.2d 1096 (9th Cir. 1989), in which the court used the *Mathews* criteria to fend off a due process challenge to a district court order in a suit between private parties. Justice O'Connor, in her *Haslip* dissent, found the *Mathews v. Eldridge* factors explicitly and directly relevant, *Haslip* at 1061–62 (O'Connor, J., dissenting), although none of the other opinions mentioned them.

[89] This expression was used by the Court in Addington v. Texas, 441 U.S. 418, 424 (1979), in giving reasons for variations in the required standard of proof.

[90] Speiser v. Randall, 357 U.S. 513, 525 (1958). *See also In re* Winship, 397 U.S. 358, 363–64 (1970), which emphasized the important interests at stake in the possible loss of liberty and the stigma imposed by conviction.

commitment to a mental hospital, for example, has been held to require a "clear and convincing" standard of proof, rather than the usual "preponderance" of the evidence, because the private interest at stake is "a significant deprivation of liberty."[91] Every due process case does not require a court to engage in fine tuning of procedural requirements to fit "the private interest that will be affected by the official action," but the nature of the interest is always an important consideration.

The second and third *Mathews* factors also reflect important general concerns but often are not immediately relevant to due process challenges that arise in a judicial proceeding. They suggest a cost-benefit or balancing analysis more specifically focused on administrative decision-making, the setting in which the test was enunciated. Consequently, these criteria have been used primarily in cases where the claimant's interest, and the value of additional or substitute procedures, must be weighed against the government's interest in getting on with the business of governing. When judicial proceedings are challenged on due process grounds, the *Mathews* criteria do not fit as well because the government seldom has an interest that ought to be weighed against any party's interest in procedural safeguards. If the government is a party, it clearly would be unfair (the antithesis of due process) to make the other party's procedural rights inversely proportional to the strength of the government's interest.[92] Hence, the three-factor formula is appplied only occasionally in a civil suit and almost never in a criminal prosecution.

As a practical matter, the fiscal and administrative burden imposed on courts is seldom a significant factor in determining what due process requires in a judicial forum.[93] The court's function is not to distribute public funds, hire and fire, dispense occupational licenses, or administer government programs. The government's interest in the outcome of a criminal proceeding, or any suit between private parties, is to do justice. This contrasts with administrative decision-making when individual interests in notice and hearing must be balanced against the requirements of

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[91] *Addington*, 441 U.S. at 425.

[92] When the government is a party, and the threatened deprivation to the private party could affect an important liberty interest, special circumstances may dictate consideration of the second *Mathews* factor—the risk of erroneous deprivation and the value of additional or substitute procedures. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982), discussed *infra* text accompanying notes 117–19.

[93] *But see* Little v. Streater, 452 U.S. 1 (1981). There the Court treated the cost of a blood grouping test in a paternity action as a fiscal/administrative burden on government that was outweighed by its value in reducing the risk of error and by the indigent putative father's interest in a correct determination of paternity.

administrative efficiency. If fiscal and administrative burdens are not taken into account in assessing what process can be demanded by individuals adversely affected by administrative decisions, government programs could conceivably be brought to a standstill by thousands of demands to be heard. The *Mathews* criteria were propounded with that setting in mind, not a court proceeding. With courts, a mandate to consider the fiscal and administrative costs of "additional or substitute" procedures in each case would make little sense unless a party is demanding some unusual service at government expense, such as a blood grouping test.

### B. Mathews v. Eldridge *and Punitive Damages*

The *Haslip* majority did not invoke the *Mathews* criteria in deciding whether Alabama law satisfied the requirements of procedural due process in the award of punitive damages. This is not surprising, since the Court has consistently ignored the *Mathews* test when confronted with a due process challenge to the sufficiency of judicial proceedings between private parties. Justice O'Connor's dissent, by contrast, relied heavily upon the *Mathews* factors to buttress her conclusion that Alabama procedures violated due process. In so doing, however, she appeared to be relying less on relevant precedent than upon Professor Malcolm Wheeler's widely cited discussion of constitutional limitations upon the award of discretionary punitive damages.[94] Although I disagree with the conclusions reached in Professor Wheeler's article and Justice O'Connor's opinion, their thoughtful analyses raise issues that deserve to be examined. In particular, their insistence upon the relevance of *Mathews v. Eldridge* for punitive damage proceedings merits thorough consideration.

One aspect of the problem can be explored by reference to their proposals for bringing state law into compliance with the *Mathews* due process standards. According to Professor Wheeler, due process cannot be satisfied unless the following reforms are implemented:

> (1) establishment of a statutorily-mandated maximum amount of punitive damages; (2) where the statute does not fix the amount of punitive damages, the bifurcation of trials in which punitive damages are sought, with the first phase of the trial determining liability and compensatory damages, and the second determining only punitive damages; and (3) proof of each element of a punitive

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[94] Wheeler, *supra* note 3; Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1061-65 (1991) (O'Connor, J., dissenting).

> damages claim by clear and convincing evidence, rather than by a mere preponderance of the evidence.[95]

Justice O'Connor explicitly endorses each of these proposed reforms,[96] although she is more inclined to treat them as recommendations than as absolute requirements of due process.[97] In addition Justice O'Connor places special emphasis on the need for instructions that provide better guidance to juries in determining liability for punitive damages and fixing the size of the award.[98] The following discussion will not evaluate the desirability of any of these measures on grounds of public policy. It will, however, challenge the proposition that any of them is required by *Mathews v. Eldridge*, or any other valid due process standard, in a punitive damages proceeding between private parties.

The proposal for a statutory cap on punitive damages is perhaps the easiest to dismiss as a dictate of the *Mathews* factors. It is primarily an appeal to the substantive rather than the procedural aspects of due process, and thus is not appropriately examined by reference to *Mathews*. A statutory cap undoubtedly has procedural implications because it limits the jury's discretion to set the size of an award. But thus limiting jury discretion serves no useful purpose without an underlying assumption that punitive damages beyond some fixed amount (or perhaps some multiple of compensatory damages) are excessive, arbitrary and unreasonable in a constitutional sense. Once this assumption is made, the real constitutional issue becomes the excessiveness of the award, which is a matter of substantive, not procedural, due process. Under substantive due process reasoning, a statutory maximum, whether expressed as a fixed ceiling or a predetermined ratio to compensatory damages, is hard to justify as a mandate of due process. Substantive due process is a guarantee against government action that is arbitrary and unreasonable, and an award of punitive damages can be deemed unreasonable or excessively large only in relation to the circumstances of a particular case. A given statutory cap or multiple (ratio) might, when applied to a wealthy and determined defendant, fall far short of the amount reasonably necessary either to punish or deter. A legislature, for policy reasons, might reasonably decide to establish a fixed limit of 250,000 dollars, 500,000 dollars, or some other figure, or a flexible set of limits for different

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[95] Wheeler, *supra* note 3, at 272.

[96] *Haslip* at 1063–65 (O'Connor, J., dissenting).

[97] She would allow states "to experiment with different methods and to adjust these methods over time." *Haslip* at 1067 (O'Connor, J., dissenting).

[98] *Id.* at 1055–61 (O'Connor, J., dissenting).

types of actions, but it is difficult to comprehend how due process could require it.

One could attempt to conceptualize the statutory maximum as an exclusively procedural requirement, having no reference to the excessiveness of any award. Viewed in this light due process is satisfied so long as the jury's discretion is constrained within limits set by the legislature, regardless of the limits the legislature chooses to set. Credulity is strained by postulating that any court would interpret due process in such a fashion.[99] The effect would be to outlaw common law punitive damages but leave legislators free to set limits of their own choosing. Hypothetically, a legislature might satisfy due process by fixing the cap at 10,000,000,000 dollars, since this would be "a statutorily-mandated maximum amount of punitive damages." If such a limit would satisfy due process, the requirement is patently meaningless. If it would not, the issue once more becomes excessiveness, a question of substantive, not procedural, due process.

Thus, a statutory cap on punitive damages cannot be conceived, sensibly, in purely procedural terms. Without some attention to the excessiveness of awards, due process would condone limits so broad that they are no limits at all, as well as limits so low that they serve only to limit the discretion of juries to make awards which themselves are not excessive. The dilemma posed by the attempt to mandate statutory caps on punitive damages by means of the due process clause is inescapable. As a procedural restraint requiring juries to make awards within statutory maxima, it is essentially meaningless unless the legislature is also restrained in setting the ceiling. But to limit the legislature, the Court must appeal to substantive due process which, with respect to punitive damages, must ask if the limit is arbitrary, unreasonable, and grossly excessive. Since what is arbitrary, unreasonable, and grossly excessive can only be determined in relation to the facts of a particular case, almost any statutory maximum should be able to survive—at least facially—a substantive due process attack. That leaves due process to be applied case by case to determine the excessiveness of individual awards, which, as argued above,[100] adds very little to the existing rules by which punitive damages awards are evaluated.

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[99] This may, however, be what Justice Brennan had in mind when he suggested that due process might be satisfied by providing the jury with "a range of penalties as to which responsible officials had deliberated and then agreed." Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 280 (1989) (Brennan, J., concurring). Query: If the legislature deliberated and decided to set no limits, would that satisfy due process? If the key factor is legislative deliberation, doesn't that make it a policy question rather than a constitutional question?

[100] *Supra* text accompanying notes 74–75.

The proposals for bifurcation of trials, proof of claims by clear and convincing evidence, and more detailed jury instructions are purely procedural in nature and do not raise the complications of substantive due process analysis. The question remains whether they are merely reforms that a legislature might choose to adopt in the exercise of its policy discretion or whether they are mandated by due process. Professor Wheeler and Justice O'Connor invoke the *Mathews* factors in support of their conclusion that due process is being violated; I believe, to the contrary, that *Mathews v. Eldridge*, to the extent that it is applicable, supports the opposite conclusion.

In assessing what due process requires, as viewed through the lens of *Mathews v. Eldridge*, my analysis will consider only the first two factors: 1) The nature of the private interest affected and 2) the risk of an erroneous deprivation through the procedures used. The third factor, the government's interest, including the fiscal and administrative burdens entailed by additional procedural requirements, will not be elaborated because it has little relevance to a punitive damages claim. Professor Wheeler devotes a substantial portion of his analysis to this factor,[101] but it amounts mainly to an argument that the present system of awarding punitive damages constitutes bad public policy and could be improved by the procedural changes he suggests. Whether or not his policy argument is valid, it is beside the point. The third *Mathews* factor does not call for an assessment of the public policy underlying the substantive rules courts are asked to apply but, rather, for an identification of specific government interests that might be burdened by requiring decisionmakers to adopt additional procedural safeguards. The government, as representative of the public, undoubtedly has a policy interest in every substantive rule of law that is the basis of any lawsuit, but a court's evaluation of the importance of that interest in each case surely cannot be a determinant of what process is due in a judicial proceeding. Otherwise, for example, the very substantial public interest in bringing lawbreakers to justice would militate against the extensive procedural protection that due process requires in criminal prosecutions. This is not what due process (or the third *Mathews* factor) is about.

Justice O'Connor gives much briefer treatment to the third factor but in doing so wholly misconceives its substance and intent. The third factor, as worded in *Mathews*, is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[102] As stated in the O'Connor dissent, however, "The final *Mathews* factor asks whether the

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[101] Wheeler, *supra* note 3, at 303–22.

[102] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

State has a legitimate interest in preserving standardless jury discretion that is so compelling as to render even modest procedural reforms unduly burdensome."[103] Quite apart from the liberties taken in transforming the general rule into the statement of a particular application, Justice O'Connor's restatement misses the point of the rule. The government interest to which *Mathews* refers is not an interest in preserving a particular procedure. If so, the third factor becomes redundant of the second, which already takes into account the procedures used. Rather, the third factor refers to the government's interest in the substantive function that might be impeded by requiring the agency to alter its procedures, which in that case meant taking into account the burden of holding an evidentiary hearing before deciding to terminate anyone's disability benefits. In a judicial proceeding, the third factor ordinarily is not relevant.[104]

Turning, then, to the first *Mathews* factor, the private interest affected in a punitive damages action is primarily, and perhaps exclusively, monetary. In the typical civil case, this kind of interest calls for no heightened procedural safeguards. It is sometimes said, and Professor Wheeler strongly contends, that punitive damage awards should be subject to greater safeguards because they also affect the defendant's reputational interest, with a resulting social stigma that is in some ways analogous to the stigma of a criminal conviction.[105] This is not a persuasive argument.

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[103] Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1064 (1991) (O'Connor, J., dissenting).

[104] *See supra* notes 92–93 and accompanying text.

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> To award punitive damages . . . the jury must find that the defendant acted maliciously, in "wanton and reckless disregard for the rights of others," with "flagrant indifference" to the rights of others, or in an "outrageous" manner. The word "punitive," denoting punishment for wrongdoing, is used to describe the award. Courts have stated that punitive damages awards represent the community's condemnation of "reprehensible conduct" and express "social condemnation and disapproval." Thus, a punitive damages award, unlike a compensatory award, seems always . . . to jeopardize the defendant's good name, reputation, honor, and integrity (citations omitted).

Wheeler, *supra* note 3, at 282. Justice O'Connor also makes the "stigma" argument. *Haslip*, at 1062 (O'Connor, J., dissenting). In Connecticut v. Doehr, 111 S. Ct. 2105 (1991), the Court explicitly recognized that the third *Mathews* factor does not apply unmodified to a due process analysis of procedures for prejudgment attachment. In place of the third factor, the Court (in a portion of the opinion joined by eight of nine justices) substituted, "in contrast to *Mathews*, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest

Punitive damages claims are not about stigma; they are about money. The alleged stigma in such cases is mostly inferential, indeed semantic, rather than empirical. Its existence is largely presumptive and is implied from the standard the jury applies in awarding punitive damages, not from any objectively ascertained reputational injury. A product manufacturer's reputation no doubt suffers from public knowledge that its defective product has created a hazard to health and safety, but this results from the initial finding of liability for the injury.[106] Any additional reputational injury flowing from an award of punitive damages would be hard to demonstrate. Certainly, the added increment of stigma, if any, is not comparable to "the stigma normally accompanying criminal proceedings."[107] It has none of the collateral consequences which serve to perpetuate the stigma of a criminal conviction. It cannot be used to impeach a person's testimony in a subsequent trial. It carries no forfeiture of civil rights or other legal disabilities. Prospective employers do not ask about it. Nor does it result in imprisonment.[108] In comparison with the monetary interests involved in the very large awards that have occasioned the current attack on punitive

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the government may have in providing the procedure or foregoing the added burden or providing greater protections." *Id.* at 2112.

[106] *Cf.* 1 L. SCHLUETER & K. REDDEN, PUNITIVE DAMAGES 44 (2d ed. 1989), who conclude that

> little or no stigmatization attaches to a defendant merely because punitive damages are assessed. . . . If there is any stigma, it is almost always left by the very fact that the defendant was found to have acted in a manner which calls into question the defendant's ability to deal fairly and forthrightly with the public. But that is true for any other civil cause of action which is resolved against a defendant. . . .

[107] Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036, 1042 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985). For similar views, *see* United States v. Hooker Chem. & Plastics Corp., 748 F. Supp. 67, 71–72 (W.D.N.Y. 1990) (*quoting* Wittman v. Gilson, 70 N.Y.2d 970, 520 N.E.2d 514, 525 N.Y.S.2d 795 (1988)) ("a civil verdict directing payment of punitive damages does not carry the same heavy societal stigma stamped by a criminal conviction"); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1058 (D.N.J. 1989) ("little if any stigma would be attached to an award of punitive damages"); Ah You Man v. Raymark Indus., 728 F. Supp. 1461, 1465 (D. Haw. 1989) (a punitive damages claim does not carry "the stigma inherent in a determination of a criminal violation" and is not "'criminal' or 'penal' in nature").

[108] In fairness, Wheeler recognizes these and other differences between criminal conviction and a punitive damages award, but he minimizes their implications for the resulting stigma. Wheeler, *supra* note 3, at 282–84.

damages, the stigma arising from punitive damages awards is inconsequential.

In the past the Supreme Court has refused to hold plaintiffs in civil actions based on claims of fraud, clearly stigmatic in nature, to a higher standard of proof than the usual "preponderance." Chief Justice Burger, in *Addington v. Texas*, [109] noted that some jurisdictions use the intermediate standard "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant,"[110] but his analysis made clear that this standard was not constitutionally required. A unanimous Court subsequently held that a "clear and convincing" standard of proof was not mandated by the Constitution in a civil suit for money damages alleging securities fraud.[111] Similarly, in *Ramsey v. United Mine Workers*[112] the Court rejected the defendant's plea for a "clear and convincing" standard of proof in a civil antitrust suit for treble damages, based on violation of a federal statute. At bottom, the attempt to invoke heightened due process protection for punitive damages defendants, based on the stigma flowing from a finding of liability, is supported neither by relevant precedent nor an appreciation of the real stakes involved. Money is the issue, and the private interest thus affected cannot be constitutionally distinguished from other civil claims involving "mere money."

A defendant's interest in protection against a punitive damages judgment is obviously different in kind from the private interests the Court has previously shielded by a higher standard of proof. In *Santosky v. Kramer*[113] the Court required "clear and convincing" evidence of parental unfitness because a fundamental interest in preserving parental rights was at stake.[114] In *Addington v. Texas*[115] it was loss of personal liberty in a civil proceeding for commitment to a mental hospital. No interest of comparable kind or magnitude is present in a punitive damages proceeding, in which the

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[109] 441 U.S. 418 (1979).

[110] *Id.* at 424.

[111] Herman & MacLean v. Huddleston, 459 U.S. 375, 387–88 (1983). *See also* Liquid Air Corp. v. Rogers, 834 F.2d 1297 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989), in which the court held the "preponderance" rule sufficient for a civil RICO action alleging fraud and claiming treble damages.

[112] 401 U.S. 302 (1971).

[113] 455 U.S. 745 (1982).

[114] *Id.* at 769. In Rivera v. Minnich, 483 U.S. 574 (1987), the Court held that due process did *not* require a clear and convincing evidence standard in an action to determine paternity.

[115] 441 U.S. 418 (1979).

core issue, pure and simple, is money—important to almost everyone, but not deemed so "fundamental" in a constitutional sense as to demand special safeguards.[116]

## C. *The Risk of Erroneous Deprivation*

The second *Mathews* factor—the risk of an erroneous deprivation and the probable value of alternative procedures—does not suggest any different outcome. The defendant is already entitled to all the safeguards of an adversary proceeding governed by the rules of civil procedure and aided by the best defense counsel he can hire. The typical defendant in a high stakes punitive damages case is not handicapped by inability to retain excellent counsel. *Santosky v. Kramer*,[117] which considered this factor at some length in deciding to impose a higher standard of proof than the usual preponderance, can again be readily distinguished. There, in addition to the "fundamental liberty interest of natural parents in the care, custody, and management of their child,"[118] the Court found several circumstances in the case that might, under the second *Mathews* factor, increase the risk of erroneous deprivation of the private interest. These included participation by the state in a semiprosecutorial capacity, disparity in the litigation resources of the state and the parents, and the possibility of "judgments based on cultural or class bias" when the parents subject to termination proceedings are "poor, uneducated, or members of minority groups."[119] Clearly, these special circumstances are not present in a punitive damages action between

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[116] In Cruzan v. Director, Missouri Dept. of Health, 110 S. Ct. 2841, 2853 (1990), the Court reiterated its position that the clear and convincing evidence rule is the appropriate standard when the interests at stake are "particularly important" and "more substantial than mere loss of money." 1 L. SCHLUETER & K. REDDEN, *supra* note 106, at 42, appear to believe that the amount of money in question can make a constitutional difference for procedural due process. Citing the *Santosky* Court's comment that the first *Mathews* factor considers the extent as well as the nature of the deprivation, *Santosky* at 758, they conclude: "Thus, the likelihood of invoking additional procedural protections for the punitive damages process may be directly proportional to the size of the award and financial effect on the defendant." It is unexplained, and perhaps inexplicable, how additional procedural protections can be invoked *after* the award has been made. If the award, once made, appears excessive, the issue then is substantive, not procedural, due process.

[117] 455 U.S. 745 (1982).

[118] *Id.* at 753.

[119] *Id.* at 763. *See also* Michael H. v. Gerald D., 491 U.S. 110 (1989), a family law case in which the dissent (Brennan, J.) cited the *Mathews* factors in support of his argument that a California law governing paternity actions violated procedural due process.

private parties. The state does not participate in a semiprosecutorial capacity, indeed is not a party at all; disparity in litigation resources, if any, commonly favors the defendant; and the prospect of judgment against the defendant on the basis of "cultural or class bias" would not seem to be the norm. Jury verdicts are sometimes characterized as arising from bias or prejudice against corporate defendants, but if the judge can detect any such bias his duty is to set aside the verdict. If an erroneous deprivation occurs, it is because the defendant has not been able to adduce facts convincing to judge or jury, not from lack of opportunity to fairly present his case.

Undoubtedly the risk of erroneously depriving the defendant of property can be limited by altering the procedures in his favor, but this increases the risk that the plaintiff will be erroneously deprived of damages she might otherwise recover. When each side has an adequate opportunity to present its case, as is true in the usual civil adversary proceeding, tilting the playing field toward one side or the other is more likely to increase rather than decrease the risk of an erroneous outcome.[120] A procedural tilt toward either side, thus, can scarcely be justified on the ground that it will promote a more correct outcome. If there is any justification, it must rest on the conclusion that the interests on one side deserve greater protection; and this conclusion returns the discussion to the first *Mathews* factor—the nature of

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[120] Here I use "erroneous outcome" rather than the "erroneous deprivation" language found in the second *Mathews* factor. This is because the *Mathews* factors, taken in context, contemplate a government party acting to deprive a private party of some protectible interest in liberty or property. In a private civil suit the government is not a party but a referee. The court's decision may ultimately deprive the defendant of property, but the court is no more interested in shielding the defendant from erroneous deprivation than in avoiding erroneous failure to give the plaintiff her due. When the government in its power and majesty acts to the detriment of an individual, due process appropriately asks that the risks of erroneous deprivation be weighed against the probable value of alternative procedural safeguards. When private parties contend, due process demands only fairness to both sides, not special concern for the defendant. Use of the expression "erroneous outcome" rather than "erroneous deprivation" avoids the the pro-defendant bias that might otherwise flow from the *Mathews* formulation. It further illustrates the problems inherent in using the *Mathews* factors to determine what due process requires in a judicial proceeding between private parties.

In Connecticut v. Doehr, 111 S. Ct. 2105 (1991), the Court expressly acknowledged that the *Mathews* factors require modification when applied to a dispute between private parties rather than to a government-initiated deprivation. Although Connecticut was a nominal party, the essential controversy was between private parties over a prejudgment attachment. Recognizing the difference, the Court modified the third factor to give "principal attention to the interest of the party seeking the prejudgment remedy" (rather than "the Government's interest"). *Id.* at 2112. This formulation, appropriately, puts the private parties on an equal plane.

the interests affected. The defendant's interest (I have previously argued) is not of the kind to which special procedural protection has been, or ought to be, granted. The tilt, conceivably, might be supported by the claim that the plaintiff's interest is even less compelling than the defendant's since the award of punitive damages is theoretically a windfall over and above any amounts found necessary for compensation. It is generally awarded not as a matter of individual right but to vindicate the public interest.[121] On this view of the matter, the weakness of the plaintiff's interest, rather than the strength of the defendant's interest, might be a reason for tilting the procedural balance. As Professor Wheeler summarizes the point, "If punitive damages are imposed improperly, or in an excessive amount, the defendant suffers far more than a plaintiff does if the jury incorrectly fails to impose them."[122]

This argument too is less than persuasive. Whether or not the point is correct that the defendant suffers more from loss than the plaintiff from absence of gain (or should we balance the pain of the defendant's loss against the pleasure of the plaintiff's gain?), such weighing of monetary interests is scarcely the stuff of constitutional distinctions. Moreover, it overlooks the public interests the plaintiff represents which are the reason for allowing punitive damages in the first place. Greater procedural protection for the defendant can only mean that the plaintiff's personal interest in being rewarded for his efforts as well as the public interest in punishment and deterrence will be less well served. In a contest between private parties, in which the state serves primarily as a referee, due process ought to aim at avoiding an erroneous outcome, rather than having a one-sided focus on erroneous deprivation of the defendant's property. Otherwise, due process becomes an aid to the defendant rather than an aid to justice, increasing rather than decreasing the probability of an erroneous decision.[123]

## VIII. JURY DISCRETION: THE CORE ISSUE

Under *Mathews v. Eldridge*, or any other due process standard, the issue of procedural fairness in the award of punitive damages is not fully

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[121] "Absent a statute allowing the recovery of punitive damages, a plaintiff has no *right* to recover such damages." 1 L. SCHLUETER & K. REDDEN, *supra* note 106, at 249, and cases cited therein. *See also* Smith v. Wade, 461 U.S. 30, 52 (1983) (punitive damages "are never awarded as of right").

[122] Wheeler, *supra* note 3, at 292.

[123] "The command of due process in the context of punitive damages requires . . . a balance between the due process rights of both the plaintiff and the defendant." Industrial Chem. & Fiberglass Corp. v. Chandler, 547 So. 2d 812, 835 (Ala. 1988).

resolved by noting that the defendant has full opportunity to present his case and that his interest is not of a kind meriting heightened procedural protection. Even though due process requires no greater solicitude for defendants than for plaintiffs, there remains a question whether the discretion of the jury in finding liability and determining the amount of the award is so unbounded as to be standardless, and hence fundamentally unfair. Criticism of the trial jury's broad discretion has been widespread and vehement. It has found expression among members of the Supreme Court (most recently from Justice O'Connor),[124] in some lower courts[125] and in academic commentary.[126] Most courts, however, have denied the allegation that juries within their jurisdictions exercise standardless discretion,[127] which suggests that the case against juries is far from airtight. However, the argument persists. Although it did not prevail in *Haslip*, the Court did not rule out a due process attack on jury discretion in future cases. The argument needs to be examined.

Underlying much of the concern with fairness in the award of punitive damages is doubt about the competence and the impartiality of juries, however they may be instructed. Much of the doubt about jury competence, especially juror capacity to deal with the facts and law of complex cases, is empirically based.[128] "As cases become more complex,"

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[124] *See supra* text accompanying notes 58–65.

[125] *E.g.*, Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1285 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

[126] *E.g.*, Ellis, *supra* note 3, at 988–91; Leitner, *supra* note 3, at 128; Mallor & Roberts, *supra* note 67, at 646–47; Wheeler, *supra* note 3, at 285–88.

[127] *See, e.g.*, Germanio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297 (D.N.J. 1990); Industrial Chem. & Fiberglass Corp. v. Chandler, 547 So. 2d 812 (Ala. 1988); Roberts v. Ford Aerospace & Communications Corp., 274 Cal. Rptr. 139 (Cal. Ct. App. Oct. 16, 1990); Hospital Auth. of Gwinnett County v. Jones, 386 S.E.2d 120 (Ga. 1989).

[128] A. ELWORK, B. SALES & J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); Davis, Bray & Holt, *The Empirical Study of Decision Processes in Juries: A Critical Review*, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 326 (J. Tapp & F. Levine eds. 1977); Campbell, *The Current Understanding of the Seventh Amendment: Jury Trials in Modern Complex Litigation*, 66 WASH. U.L.Q. 63 (1988); Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601; Goodman, Greene & Loftus, *What Confuses Jurors in Complex Cases*, 21 TRIAL, Nov. 1985, at 65; Steele & Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C.L. REV. 77 (1988). *But see* Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269 (1989), which sees the current criticism of juries as part of a broader attack on the whole civil

Ellis tells us, "the ability of juries to decide correctly— that is, on the basis of relevant evidence and the law as propounded by the court— becomes more problematic."[129] The cited studies show there is some truth in this observation, but as a constitutional argument it proves too much. If jury competence is a due process issue, using a jury in any complex case threatens due process. This, of course, is constitutional nonsense in view of the seventh amendment guarantee of a jury trial in civil disputes before federal courts in which the value in controversy exceeds twenty dollars.[130]

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justice system.

[129] Ellis, *supra* note 3, at 999.

[130] A few courts have tried to fashion a "complexity" exception to the Seventh Amendment, in the name of due process, but mercifully the idea did not catch on. *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980); ILC Peripherals v. International Business Mach., 458 F. Supp. 423, 444–49 (N.D. Cal. 1978), *aff'd on other grounds sub nom.* Memorex Corp. v. International Business Mach., 636 F.2d 1188 (9th Cir. 1980); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 71 (E.D.N.Y. 1978); *In re* Boise Cascade Sec. Litig., 420 F. Supp. 99, 104 (E.D. Wash. 1976). *But see In re* Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979); Kian v. Mirro Aluminum Co., 88 F.R.D. 351, 355 (E.D. Mich. 1980); and Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224, 227–29 (N.D. Ill. 1977), all of which rejected the concept of a "complexity" exception. Even in the courts that found a complexity exception, a decision about punitive damages would never satisfy their criteria for determining when a case is too complex for a jury to decide.

A concise statement of the arguments against a due process complexity exception is found in SRI Int'l v. Matsushita Elec. Corp. of Am., 775 F.2d 1107, 1126–31 (Fed. Cir. 1985). The complexity exception is discussed, but not endorsed, in Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U.L. REV. 190, 200–04 (1990). For arguments favoring the exception, see Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980); Oakes, *The Right to Strike the Jury Trial Demand in Complex Litigation*, 34 U. MIAMI L. REV. 243 (1980). For a historical argument opposing the exception see Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980).

The U.S. Supreme Court has never directly addressed this issue, although in Ross v. Bernhard, 396 U.S. 531, 538 (1970), it stated without explanation that complexity is one of several criteria for determining whether a case falls within the realm of equity, rather than the common law, and thus outside the protection of the seventh amendment. In 1987, the Court reaffirmed the seventh amendment right to have liability determined by jury trial but declared that the amendment did not include the right to jury determination of damages. Tull v. United States, 481 U.S. 412, 426 (1987). Some state courts have interpreted the right of jury trial in their state constitutions to include jury determination of damages. *See, e.g.*, Samsel v. Wheeler Transp. Serv., 789 P.2d 541, 551; Perili v. Board of Educ. Monongalia County, 387 S.E.2d 315, 317 (W. Va. 1979). For a thoughtful historical and doctrinal argument against allowing any exceptions to the

With respect to jury partiality, that contingency is already anticipated in the authority of trial courts to set aside verdicts resulting from bias and prejudice,[131] and of appellate courts to reverse or modify lower court judgments. Jury bias, the antithesis of procedural fairness, undoubtedly is a due process violation, although courts generally look to their own precedents and procedure, rather than the due process clause, for authority to set aside the verdict.[132] Overturning a biased verdict in a particular case, however, is quite different from declaring a whole class of decisions so inherently subject to bias that due process requires greater protection for the defendants' interests than in other civil cases, and, indeed, other jury decisions in the same case. This is a distinction heretofore unknown to due process. The criminal defendant is granted more procedural safeguards than a party to a civil suit, but this reflects the nature of the interests involved—not a conclusion that juries are less competent in dealing with criminal cases or more prone to bias and prejudice. Bias, surely, is to be deduced from the facts and circumstances of a particular case. An estimate of what juries are likely to do when faced with a punitive damages claim surely cannot be more reliable than the trial judge's appraisal of what the jury actually has done, after the judge has witnessed the whole proceeding. A mode of analysis that gives greater weight to the former truly represents a triumph of the a priori over the empirical, of speculation over fact.

### A. *The Finding of Liability*

Since no attorney can, with a straight face, urge a court to declare juries unconstitutional, the constitutional attack is directed at instructions which leave the jury with standardless or "unbridled" discretion. The jury function in awarding damages involves two separate findings—one with respect to liability and the other the amount of the award. On the question of liability, the jury is typically informed that punitive damages are discretionary, not mandatory, but may be awarded if the defendant acted "maliciously or in wanton, willful or reckless disregard of the plaintiff's

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seventh amendment right of jury trial in punitive damages decisions, see Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142 (1991).

[131] The court may also set aside a verdict if it is based on a mistake of law or fact, lacking in evidentiary support, or shocking to the judicial conscience. *See* cases cited in 2 J. GHIARDI & J. KIRCHER, *supra* note 6, § 18.02 n.6. All but four states (Iowa, Kentucky, Missouri, and Oregon) permit trial judge remittitur of excessive punitive damages as well. *Id.* at 46 n.4.

[132] *E.g.*, Puppe v. A.C. and S., Inc., 733 F. Supp. 1355, 1360 (D.N.D. 1990).

rights."[133] Some states allow juries to award punitive damages for "negligence" but require a degree of negligence entailing indifference to consequences and utter disregard of the rights of others.[134] A number of states specify that the conduct must be "outrageous."[135] Such expressions undoubtedly leave the jury wide discretion to award punitive damages, or not; but given the thing the jury is asked to assess—the culpability of the defendant's conduct, imprecision and subjectivity are scarcely avoidable. Identifying degrees of fault or wrongfulness is a qualitative, not a quantitative process, and qualitative judgments are necessarily subjective. This is true everywhere in the legal process. Furthermore, it is hard to see how the

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[133] 1 J. GHIARDI & J. KIRCHER, *supra* note 5, at § 11.10, quoting Wisconsin pattern jury instructions. In Wisconsin, the jury is also told that it "may withhold or allow punitive damages as it sees fit, even if the conduct is found to be malicious, wanton, willful or reckless." *Id.* Pattern instructions of other states, as well as ABA Model Instructions for punitive damages are found *id.* at §§ 11.02–.20. For additional examples of pattern jury instructions, *see* 1 L. SCHLUETER & K. REDDEN, *supra* note 106, at 204–39. For a state-by-state summary of conduct giving rise to punitive damages liability, see R. SCHLOERB, R. BLATT, R. HAMMESFAHR & L. NUGENT, PUNITIVE DAMAGES: A GUIDE TO THE INSURABILITY OF PUNITIVE DAMAGES IN THE UNITED STATES AND ITS TERRITORIES 18–26 (1988).

[134] For example, the Alabama court has endorsed the following guidelines for the award of punitive damages:

> To authorize "punitive," "exemplary," or "vindictive" damages, there must be ". . . negligence," meaning such an entire want of care as to raise the presumption that the person at fault is conscious of the probable consequences of his carelessness and indifferent to the danger of injury to the person or property of others. Punitive damages are allowable for a wrong maliciously perpetrated, or where the wrongful act is done knowingly, wantonly, and recklessly, under such circumstances as to indicate that the wrongdoer knew that the act would probably injure persons or property, or where the act was so grossly negligent, oppressive, or fraudulent as to amount to malice.

Industrial Chem. & Fiberglass Corp. v. Chandler, 547 So. 2d 812, 836 (Ala. 1988) (quoting C. GAMBLE, ALABAMA LAW OF DAMAGES § 4-1 (2d ed. 1988)). *See also, e.g.*, White Constr. Co., Inc. v. Dupont, 455 So. 2d 1026, 1028 (Fla. 1984); Art Hill Ford, Inc. v. Callender, 423 N.E.2d 601, 602 (Ind. 1981); Newton v. Standard Fire Ins. Co., 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976); Inland Container Corp. v. March, 529 S.W.2d 43, 45 (Tenn. 1975).

[135] *See, e.g.*, Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38, 46 (Alaska 1979); Gargano v. Heyman, 203 Conn. 616, 622, 525 A.2d 1343, 1347 (1987); Martin v. Johns-Manville Corp., 508 Pa. 154, 171–72, 494 A.2d 1088, 1097 (1985); RESTATEMENT (SECOND) OF TORTS, § 908(2) (1979). No state makes "outrageous" conduct its sole criterion for awarding punitive damages.

typical instructions in a punitive damages case can be held to violate due process (by leaving the jury with "unbridled discretion") without also putting in doubt the large bodies of tort law that equally rely upon such subjective concepts as negligence, gross negligence, malice, or conduct that is reckless, wanton, willful and malicious.[136] If due process is to remake the law of punitive damages by finding these widely used concepts constitutionally infirm, it logically cannot stop until it has changed the whole face of tort law, and perhaps the rest of the law as well. One would be hard pressed to demonstrate that a jury's discretion is less "unbridled" in its search for "reasonableness" or "good faith," which permeate the entire body of the law, than in its efforts to find conduct sufficiently malicious, reckless, or wanton to justify punitive damages. This is truly a thicket that even the most courageous court should hesitate to enter.

### B. *Determining the Amount of the Award*

Once liability is found, the jury must also determine the amount of the award. The lack of adequate guidelines to cabin jury discretion in fixing the size of punitive damages is perhaps the central due process issue.[137] Instructions to juries on this subject typically state that the purpose of punitive damages is to punish and deter,[138] with the amount of the award related to those purposes. For example, the Illinois Pattern Jury Instructions contain the following statement:

> If you find that defendant was guilty of wilful and wanton conduct which proximately caused injury to the plaintiff and if you believe that justice and the public good require it, you may, in addition to any damages to which you find plaintiff entitled, award plaintiff an amount which will serve to punish the defendant and to deter others from the commission of like offenses.[139]

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[136] *See* W. PROSSER & R. KEETON, HORNBOOK ON TORTS (5th ed. 1984), *passim.*

[137] It was clearly the issue to which the Court gave the most attention in *Haslip*. *See Haslip*, at 1056-64.

[138] Nearly all state pattern jury instructions sampled in 1 L. SCHLUETER & K. REDDEN, *supra* note 106, at 217-39, make juries aware of these purposes.

[139] *Id.* at 227. *See also, e.g.*, Colorado pattern instructions (awarded "as punishment to the defendant, and as an example to others"), *id.* at 225; Missouri pattern instructions (a sum that "will serve to punish defendant and to deter him and others from like conduct"), *id.* at 228; Virginia model instructions (awarded "to punish the defendant for his actions and to serve as an example to prevent others from acting in a similar way"), *id.* at 230.

Another common variation is found in pattern instructions for the District of Columbia which, in addition to identifying the functions of punitive damages, expressly leave both the liability and the amount to "the sound judgment of the jury" in light of "all the circumstances and evidence in the case, the motives of the defendant and the intent with which he committed the acts complained of."[140] Other courts give somewhat more specific criteria for fixing the amount of the award. In New Jersey, for example, the relevant factors as identified by statute include the profitability of the misconduct, how long it lasted, when it was terminated, conduct indicating reckless disregard of the likelihood of serious harm, conduct aimed at mitigating the harm, and the defendant's financial condition.[141] Most states make the defendant's wealth a relevant factor,[142] but, conversely, the law of Alabama expressly precludes consideration of the defendant's wealth in fixing the amount of the award.[143] Some states also instruct the jury that punitive damages should bear some reasonable relationship to compensatory damages,[144] while in others the jury is told that they need not be related.[145]

These instructions admittedly leave wide discretion to the jury in setting the amount of the award, but the conclusion does not necessarily follow that due process has been violated. At the time the fifth amendment was adopted, juries in America, "unlike juries today, usually possessed the power to determine both law and fact."[146] This very broad (might we say

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[140] *Standardized Jury Instructions for the District of Columbia*, 1 L. SCHLUETER & K. REDDEN, *supra* note 106, at 226.

[141] N.J. STAT. ANN. §§ 2A:58C-5(b),(d) (West 1989). These instructions were upheld against a due process attack in Germanio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297 (D.N.J. 1990). For somewhat similar statutory lists of factors, see KY. REV. STAT. ANN. § 411.186(2) (Baldwin Supp. 1990); MINN. STAT. § 5.549.20 (1990); MONT. CODE ANN. § 27-1-221(7)(b) (1989) (setting forth criteria for judges, rather than juries).

[142] *E.g.*, Hawkins v. Allstate Ins. Co., 152 Ariz. 490, 733 P.2d 1073 (1987); Leidholt v. District Court, 619 P.2d 768 (Colo. 1980); Strauss v. Biggs, 525 A.2d 992 (Del. 1987); Bould v. Touchette, 349 So. 2d 1181 (Fla. 1977); Embrey v. Holly, 293 Md. 128, 442 A.2d 966 (1982).

[143] Industrial Chem. & Fiberglass Corp. v. Chandler, 547 So. 2d 812 (Ala. 1988).

[144] *See* cases discussed in Annotation, *Sufficiency of Showing of Actual Damages to Support Award of Punitive Damages—Modern Cases*, 49 A.L.R.4th 11, §§ 13-14 (1986).

[145] *See id.* at § 15.

[146] Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904 (1978). As late as 1793, Chief Justice John Jay, trying a jury case to which a state was a party, instructed a jury that it had the authority "to determine the law as well as the fact in controversy." Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794).

"unbridled"?) discretion of juries was not considered to violate due process at the time. Although the practice of permitting juries to determine the law of the case has since been abandoned, the change occurred through common law development and legislative enactment—not because due process was thought to require it.[147]

Historical analogies aside, determining the size of the award has traditionally been left to the sound discretion of juries because the decision, like the prior decision on culpability, is inherently subjective. How much "punishment" is enough? What amount will provide just the right deterrent to the defendant and an example to other potential offenders? The instructions of a jurisdiction like New Jersey identify specific factors for the jury to consider,[148] along with any other matters the jury believes relevant, but it is not clear that such detailed instructions are any more limiting than the simple admonition for the jury to determine what amount is adequate to punish and deter.[149] Nor is it obvious that any feasible instruction, however

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[147] *See* L. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 150–53 (1973). The jury's right to decide the law was not conclusively denied in federal courts until 1895 in Sparf v. United States, 156 U.S. 51, 102 (1895). The Court noted that juries in some states, by statute or constitutional provision, were permitted to decide questions of law. While the Court strongly rejected the practice as ill-advised, it made no suggestion that such state practices violated the federal constitution. *Id.*

[148] *See supra* text accompanying note 141.

[149] The New Jersey statute is too recent to have many reported cases under it. In Minnesota, however, juries have made large punitive damage awards despite a state statute setting forth equally explicit criteria for their guidance. MINN. STAT. § 5.549.20 (1990), reads as follows:

> Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

In Kociemba v. G. D. Searle & Co., 707 F. Supp. 1517 (D. Minn. 1989), a Minnesota jury applying these instructions to a claim of infertility awarded the plaintiff $7 million in punitive damages, in addition to $750,000 for pain and disability and $1 million for

detailed, would enable juries to get much closer to the mark (just the right amount of punishment and deterrence, not too much, not too little), because nobody really knows where the mark is. Economic models can postulate a situation of optimum deterrence,[150] but they are singularly deficient in dealing with the punishment objective. Moreover, values assigned to the variables in the models are always hypothesized and, in a real life situation, the true values remain anybody's guess. Historically, the right to make that guess has been left to the jury, subject to the right (and obligation) of the court to make a second guess if the jury's verdict appears excessive, contrary to the evidence, or the result of bias and prejudice.[151]

Instructing the jury in the intricacies of the economic models is unlikely to result in more rational or less biased verdicts. In all probability the jury would not understand the model, and, even if it did, the jury would still have to guess at the values to assign to the crucial variables, i.e., how much deterrence/punishment is needed in *this* situation, and how many units of deterrence/punishment will a dollar of punitive damages buy? These crucial values the model cannot supply. Perhaps a team of economists and other social scientists could define the mark more accurately and arrive at a closer approximation of the penalty needed to reach it (or perhaps not, since the crucial decisions may require value judgments rather than expertise). But that is not the system we have. Due process should not require juries to become, or pretend they are, economists and psychologists.[152]

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emotional distress. *See also* Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988) ($12.5 million punitive damages); Kempa v. E. W. Coons Co., 370 N.W.2d 414 (Minn. 1985) ($7.9 million); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn. 1980) ($1 million).

[150] *See, e.g.*, Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79 (1982); Cooter, *Punitive Damages for Deterrence: When and How Much?* 40 ALA. L. REV. 1143 (1989).

[151] Standards for judging excessiveness are also generally lacking in specificity, again because of the nature of the decision. According to 2 J. GHIARDI & J. KIRCHER, *supra* note 5, at § 18.05:

> Virtually all courts recognize that due to the special nature of punitive damages no one fixed formula exists nor can one be devised by which to measure the award's excessiveness with mathematical precision. Each case must be judged by its own facts, and the courts use a combination of rough judicial standards to guide them in this determination.

[152] David Friedman offers this enlightening comment at the close of his own economic explanation of punitive damages:

> [C]ourts are a very poor way of finding the correct answer to a difficult question. If you wish to diagnose an illness, design a computer, or

To suggest that a team of economists might reach a fairer result than a jury may be deferring too much to special expertise. Economic models, now much in vogue for the analysis of punitive damages,[153] are often quite limited in perspective, creating the temptation to reduce everything to economic terms. This often results in a focus upon the deterrent purpose of punitive damages, which is readily amenable to economic analysis, to the neglect of the punishment objective which is not. It also may lead to peculiarly deficient value judgments, as illustrated by an assertion in a recent economic critique, that punitive damages cannot be justified as a deterrent unless one first determines "that the judicial imposition of a detriment promotes rather than discourages the efficient use of resources."[154] Such

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> discover a new scientific law, you do not do it by picking a dozen people at random, forming them into a committee, and demanding that they give you an answer. You do not even do it by picking out one general-purpose expert and asking him.
>
> Given the limitations of courts, it is sensible to to try to avoid, so far as possible, asking them to do difficult things. I do not think that including this Article in the instructions to a jury in a civil case would be likely to result in a better, or even a more efficient decision. The law should therefore, wherever practical, be stated in terms of simple rules, even if they only imperfectly reproduce the outcomes of the much more complicated correct rules.

Friedman, *An Economic Explanation of Punitive Damages*, 40 ALA. L. REV. 1125, 1138 (1989).

[153] *E.g.*, Calfee & Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984); Cooter, *Economic Analysis*, *supra* note 150; Cooter, *Punitive Damages*, *supra* note 150; Ellis, *Due Process*, *supra* note 3; Ellis, *Fairness and Efficiency*, *supra* note 67; Friedman, *An Economic Explanation of Punitive Damages*, 40 ALA. L. REV. 1125 (1989); Grady, *Punitive Damages and Subjective States of Mind: A Positive Economic Theory*, 40 ALA. L. REV. 1197 (1989); Johnston, *Bayesian Fact-Finding and Efficiency: Toward an Economic Theory of Liability Under Uncertainty*, 61 S. CAL. L. REV. 137 (1987); Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F. L. REV. 613 (1979); Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103 (1982); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982); Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976); Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123 (1982).

[154] Ellis, *supra* note 3, at 978. The statement appeared in the following context: "Deterrence, being an instrumental objective, implies an effort to improve the state of the world, which requires weighing the costs of imposing the threatened detriment. To justify punitive damages as a deterrent requires the determination that the judicial imposition of a detriment promotes rather than discourages the efficient use of

a statement suggests that the analyst has become a prisoner of his framework. Courts, lacking a better means of recompense, award damages for loss of life and limb measured in monetary terms. But this cannot mean that the value of preventing the injury in the first place can be measured solely in terms of "the efficient use of resources." Life and health and avoidance of human suffering have independent value. The economic costs and benefits of deterrence may be important societal concerns, but they are not the sole concerns. Legislatures might properly decide that the award of punitive damages should be governed by an economic cost/benefit analysis. Courts, however, ought not to do so without a legislative mandate, and certainly not on the pretense that due process requires it.

Considerations of efficiency are not totally irrelevant to due process. The *Mathews* factors direct a court to take account of fiscal and administrative efficiency in calculating how much process a governmental decision maker must provide to one adversely affected by the decision. That is a far cry, however, from measuring due process by the demands of economic efficiency. Quite the contrary, it is recognition that economic efficiency in government may be at odds with the individual's interest in fair treatment by government, to the extent that procedural safeguards hamper governmental operations. Nor is the opposition between efficiency and procedural fairness limited to administrative decision making. It is true of judicial proceedings as well. Summary justice undoubtedly would be cheaper, in an economic sense, than justice meted out under the stringent safeguards of due process. Courts, however, by their nature give heavy emphasis to fairness at the expense of efficiency because their substantive task is to dispense justice. In a broader perspective, if economic efficiency were the rule of decision, the entire American legal system would stand condemned. No sane person claims the American system of justice is economically efficient, or that it promotes efficiency within the American economy. Justice it may provide, rights it may vindicate, but economic efficiency is not one of its virtues. If the present legal system can be said to provide due process of law, the promotion of "efficiency"—whether in the judicial process or in the larger economy—cannot be the test of due process.

Even with the jury system we now have, ways undoubtedly could be devised to give the jury more precise guidelines for fixing the size of the award. With any given proposal, however, the difficulty lies in demonstrating how due process requires it or even how it serves the accepted purposes of punitive damages better than the rules now generally in use. The most obvious approach, a legislative cap on punitive damages, may not be

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resources."

inconsistent with the due process clause but, as previously shown, can scarcely be required by it.[155] The same is true of other more complex proposals. A particularly thoughtful example is Professor Dobbs' suggestion that punitive damages be measured by the defendant's profits from the offending activity or, alternatively, by the plaintiff's costs of litigation.[156] His proposal takes account of the practical limitations of juries and the judicial system, and in many respects it is a rational, attractive alternative to current approaches to punitive damages. It also provides a means of limiting jury discretion in fixing the amount of punitive damage awards. It achieves these objectives, however, only by remaking the substantive law of punitive damages—which is clearly not a mandate of procedural due process.

As a predicate for liability he would eliminate the need to show malice, recklessness, or any other indicator of a bad mental state, and replace it with the court's estimate of whether additional damages are needed to deter the defendant from repeating his harmful conduct in the future.[157] In calculating the amount of the award, deterrence of the defendant is again the only relevant factor.[158] The goals of punishment (giving the defendant his just desert) and example (deterring others similarly situated) are abandoned as irrelevant, perhaps illegitimate, and not amenable to any objective measurement.[159] Focusing solely on the deterrence function permits resort to quantifiable, hence objective, measures of deterrence—the profits resulting from the harmful act[160] and the plaintiff's litigation costs.[161]

Unfortunately the objectivity provided by readily quantifiable indicators does not mean that the measures are either reliable or valid. Calculation of profits is always a slippery business, and in this context, as Professor Dobbs recognizes, there is the additional difficulty of determining what portion of defendant's profits (and costs) are attributable to defendant's legitimate activities and which to the illegitimate. He also admits that a profits measure would provide no practical limitation on the total liability for punitive damages in cases of multiple injury arising from a single course of

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[155] *See supra* notes 96–100 and accompanying text.

[156] Dobbs, *Ending Punishment in 'Punitive' Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831 (1989). Some states presently instruct juries to consider these factors, although not to rely on them exclusively. *See supra* note 141 and accompanying text.

[157] *Id.* at 860–64.

[158] *Id.* at 840 *passim.*

[159] *Id.* at 854–56.

[160] *Id.* at 868–88.

[161] *Id.* at 888–909.

conduct, such as product liabilty, if each plaintiff is allowed to recover all of the defendant's profits.[162] Beyond these difficulties of measurement, profits would obviously have no relevance at all to an activity not motivated by profit. Litigation costs, including attorney fees, are suggested as an alternative measure of deterrence in recognition of these difficulties. As Professor Dobbs points out, both measures are more objective than standards presently placed before juries and, from the defendant's viewpoint, they have the advantage of providing upper limits. Their validity remains a matter of faith, however, since nowhere is it demonstrated that use of these measures would achieve in each (or any) case the optimum level of deterrence.[163]

Professor Dobbs' proposal is thoughtful, reasonable, and lucidly presented. It may deserve serious consideration by legislatures in the exercise of their policy judgment. It cannot, however, be a mandate of procedural due process. It requires substantive changes in the law, which is not the province of procedure, and its procedures offer no basis for supposing that juries so instructed will get closer to the demands of justice. Awards would become more subject to predictable limits than at present, and defendants would for that reason be better off, but nothing in the formula gives confidence that the ends of punishment, deterrence and example will be better served. Indeed, the proposal specifically disclaims punishment and example as valid objects of the law. Whatever the merit of such proposed changes in the law, they have little foundation in the procedural component of the due process clause.

One additional ground for assuming that broad jury discretion to fix the size of punitive damage awards does not violate due process, by analogy, may be found in the law governing the award of noneconomic compensatory damages. The two types of awards have obvious differences. Punitive damages are granted not by right but at the discretion of the jury to a plaintiff already made whole by the award of compensatory damages. Damages for pain and suffering are granted as of right, presumably in compensation for injury actually suffered. With respect to setting the amount of the award, however, there is essentially no distinction between them.

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[162] *Id.* at 885–87.

[163] A logical argument could be made that neither measure could possibly achieve that result unless one also assumes that the offender would invariably be sued and would invariably lose and that the assessment based on profits or litigation would provide the right amount of deterrence. Otherwise the potential defendant might calculate he would escape court challenge, or win, often enough to justify the gamble. Presumably the defendant would engage in such calculation; otherwise the whole notion of deterrence is undermined.

Noneconomic damage awards are often quite large,[164] and juries are given no specific guidance in deciding how large because, once again, the judgment is highly subjective.[165] In the absence of statute, the jury is left to

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[164] *E.g.*, Winbourne v. Eastern Airlines, Inc., 758 F.2d 1016 (5th Cir. 1984), *cert. denied*, 474 U.S. 1036 (1984) ($500,000); Wheat v. United States, 630 F. Supp. 699 (W.D. Tex. 1986) ($1.8 million); Cardillo v. United States, 622 F. Supp. 1331 (D. Conn. 1984) ($3.5 million awarded by judge); Gonzales v. Union Carbide Corp., 580 F. Supp. 249 (N.D. Ind. 1983) ($1.5 million); DiRosario v. Havens, 242 Cal. Rptr. 423 (Cal. App. 1987) ($2.1 million); Dolosovic v. New York, 541 N.Y.S.2d 685 (S. Ct. 1989) ($9.5 million); Duren v. Suburban Community Hosp., 24 Ohio Misc. 2d 25, 495 N.E.2d 51 (1985) ($1 million).

[165] "Because of the nature of noneconomic damages, there is no clear method for measuring the loss and determining the amount of compensation due." Samsel v. Wheeler Transp. Servs., 789 P.2d 541, 552 (Kan. 1990). Damages for pain and suffering have been widely criticized, prompting more than half of state legislatures since 1975 to enact statutory caps. *See Pain and Suffering*, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, *supra* note 57, at 199. This study presents a balanced critique, with recommendations that such damages be retained in the law but limited in significant ways. *Id.* at 229–30. A recent statistical analysis of products liability actions has concluded that pain and suffering awards "vary in a systematic and predictable fashion so that the extreme critiques of pain and suffering awards are not supported by the evidence." Viscusi, *Pain and Suffering in Products Liability Cases: Systematic Compensation or Capricious Awards?*, 8 INT'L REV. L. & ECON. 203, 219 (1988).

determine how much is reasonable in the circumstances.[166] This represents very broad jury discretion indeed.

Far from finding this broad discretion in violation of due process, a number of state courts have held quite the opposite—that statutory caps on noneconomic damages are themselves in violation of various state constitutional provisions, including due process.[167] Can due process now require, in the interest of bridling jury discretion, what some states have previously held that it prohibits? That, of course, is not the issue in the current debate over punitive damages. But the extent and nature of jury discretion in setting noneconomic compensatory damages is so similar to the

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[166] "The standard of evaluation by which an award for noneconomic damages is measured is such amount as a reasonable person estimates to be fair compensation when that amount appears to be in harmony with the evidence as arrived at without passion or prejudice." *Id.* The Kansas court emphasized the subjective nature of the judgment:

> The difficulty in determining the amount a reasonable person would award an injured party for his or her noneconomic loss has been recognized by both this court and the legislature. When instructing juries on how to assess damages for pain and suffering, our trial courts acknowledge: "For such items as pain, suffering, disability and mental anguish there is no unit value and no mathematical formula the Court can give you. You should award such sum as will fairly and adequately compensate him. The amount to be awarded rests within your sound discretion."

*Id.* The court, in the same decision, upheld a statutory cap on noneconomic damages in Kansas without, however, intimating that the common law rule leaving the amount to the sound discretion of the jury denied due process or violated any other constitutional provision. The Kansas rule is typical of the common law in other states. For example, *Michigan Standard Jury Instructions—Civil*, § 30.01 (Supp. 1972) provides the following instruction: "The amount of money to be awarded for certain . . . elements of damage, such as pain and suffering, cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment." *See also* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 544 (1973):

> Because pain and suffering damages are not compensatory, at least in the ordinary sense, there is no clear method of measuring them; indeed, there is almost no method at all. Courts have usually been content to say that pain and suffering damages should amount to "fair compensation" or a "reasonable amount," without any more definite guide.

[167] *E.g.*, Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987) (jury trial right, "open courts" provision violated); Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (void as "special law"); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (equal protection, due process violated); Lucas v. United States, 757 S.W.2d 687 (Tex. 1988) (due process violated); Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P.2d 711 (1989) (jury trial right violated).

jury's discretion in fixing the amount of punitive damages that the two cannot be analytically distinguished. If leaving the amount of punitive damages to the sound discretion of the jury offends the procedural guarantees of the fifth amendment, logically the common law discretion of juries to fix the amount of noneconomic damages is similarly defective. And, if this is so, the alleged due process objection to punitive damages once again calls into serious question other established rules of tort law. Fortunately the procedural due process objection is not valid because the problem of jury discretion is not procedural at all, but substantive. As long as the substantive law fails to specify limits on the amounts recoverable for noneconomic loss or punitive damages,[168] relying on the jury's sound discretion is scarcely avoidable (unless the jury role is eliminated). What is unavoidable surely cannot be unconstitutional.

### C. *Notice, Vagueness and Due Process*

One other due process objection to punitive damages, sometimes raised in academic commentary (and vehemently endorsed by Justice O'Connor), but never to my knowledge accepted by any court, is the void-for-vagueness doctrine.[169] Under this doctrine it is claimed that standards for determining liability and assessing the amount of punitive damages are

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[168] Several state courts have found state constitutional barriers to the enactment of caps on compensatory damages, *see supra* note 68 and accompanying text. By contrast, legislative modification or even abolition of punitive damages has not been generally regarded as subject to constitutional restriction. Only one court thus far has declared a state legislative cap on punitive damages unconstitutional, and that decision, was premised on an obvious misapplication of precedent. *See* McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990).

[169] Justice O'Connor's analysis is found in *Haslip* at 1057–65 (O'Connor, J., dissenting). For academic commentary, see, *e.g.*, Leitner, *Punitive Damages: A Constitutional Assessment*, FICC Q. 119, 126–32 (Winter 1988); Olson & Boutros, *supra* note 3, at 926. Note, *Justice O'Connor's Solution to the Jury's Standardless Discretion to Award Punitive Damages*, 24 WAKE FOREST L. REV. 719 (1989). Punitive damages cases rejecting the vagueness challenge include, *e.g.*, Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1975); Gourley v. State Farm Mut. Auto. Ins. Co., 227 Cal. App. 3d 1111, 265 Cal. Rptr. 634 (1990); Egan v. Mutual of Omaha Ins. Co., 133 Cal. Rptr. 899 (Cal. App. 1976); Kirk v. Combs, 28 Wis. 2d 65, 135 N.W.2d 789 (1965); Palmer v. A. H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984); Elam v. Alcolac, Inc., 765 S.W.2d 42 (Mo. App. 1988). For a good statement of standards for evaluating vagueness in a criminal statute, see Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). *See also* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); United States v. Harriss, 347 U.S. 612, 617 (1954).

so vague as to deny defendants the proper notice that due process requires. At first blush this argument carries a hint of plausibility, but it has a fundamental weakness that its proponents have largely ignored: the void-for-vagueness doctrine has been applied exclusively to statutes, and punitive damages are traditionally a common law remedy.[170] Many states have codified the law of punitive damages in statutes,[171] but it would be anomalous to hold the codified rule more constitutionally vulnerable on grounds of vagueness than the uncodified one. The void-for-vagueness doctrine has also been applied primarily to criminal statutes, although occasionally it has been invoked in a civil cause.[172] The Supreme Court has never asserted the void-for-vagueness doctrine to invalidate a rule of common law, however, nor indeed used it as a rule of decision in any case not involving a governmental party.[173]

The argument, nevertheless, was given a degree of credibility by Justice O'Connor's allusion to it in her *Crenshaw* concurrence, where she stated:

> The Court has recognized that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123 (1979). Nothing in Mississippi law warned appellant that by committing a tort that

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[170] Indeed, how could it be otherwise when common law courts are authorized to modify the law as they go along? Lack of notice is the gravamen of the void-for-vagueness rule, but lack of advance notice cannot possibly be grounds for invalidating a rule of common law. Given the nature of the common law, no one can know in advance what common law rule a court will choose to apply in a given case. This is necessarily true when the case is one of first impression in a jurisdiction, but almost equally true in other cases where the court has discretion to apply one rule of law rather than another, or simply exercise its common law powers to modify the law. Because this lack of notice is inherent in the system, the common law cannot be held void for vagueness without denying its essential nature. Justice O'Connor's *Haslip* dissent brushed over this crucial distinction between statute law and common law with the observation, "I have no trouble concluding that Alabama's common-law scheme for imposing punitive damages is void for vagueness." *Haslip*, at 1057 (O'Connor, J., dissenting). When examined closely, her arguments under the vagueness heading are probably best treated as an extension of the "unbridled jury discretion" theme.

[171] *See, e.g.*, statutes cited *supra* note 68.

[172] *E.g.* Hoffman Estates, Inc. v. Flipside, 455 U.S. 489 (1982) (civil fine imposed for violation of drug-paraphernalia licensing ordinance); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) (denial of license for coin-operated amusement establishment); Jordan v. DeGeorge, 341 U.S. 223 (1951) (deportation of alien).

[173] At least I was unable to find such a case.

> caused $20,000 of actual damages, it could expect to incur a $1.6 million punitive damage award.[174]

In *Crenshaw* Justice O'Connor objected primarily to Mississippi standards for fixing the amount of the award and apparently did not find the jury instructions on liability too vague.[175] In her *Haslip* dissent, however, she declared Alabama jury instructions unconstitutionally vague as to both liability and the amount of the award.[176] On close examination neither conclusion appears supportable.

Quite apart from the inappropriateness of applying the void-for-vagueness doctrine to common law rules, the contention that the *Haslip* jury instructions on liability failed the vagueness test seems to be based on a misconception of what the trial judge actually said. Pacific Mutual's liability for punitive damages did not hinge on the typical jury instruction relating to conduct that is "malicious" or in "wanton, willful disregard of the plaintiff's rights."[177] Rather, the jury was told by the trial judge that it might award punitive damages if it found fraud.[178] No one suggests that "fraud" is too vague a concept for juries to handle, and that was the basis for the jury finding of liability. Strangely, Justice O'Connor said nothing about the fraud instruction but directed her void-for-vagueness attack to a portion of the instructions obviously intended to favor the defendant by assuring the jury that punitive damages were not mandatory, even if fraud were found. In the passage she quoted the court said, "Imposition of punitive damages is *entirely discretionary* with the jury, that means you don't have to award it unless this

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[174] Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part). On the other hand, given the wide discretion accorded to juries under Mississippi law, perhaps every potential defendant is on notice that a very large punitive damage award is at least *possible*.

[175] She said:

> Under Mississippi law, the jury may award punitive damages for any common law tort committed with a certain mental state, that is, "for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong." Although this standard may describe the required mental state with sufficient precision, the amount of the penalty that may ensue is left completely indeterminate.

*Id.* (citation omitted).

[176] *Haslip*, at 1057–65 (O'Connor, J., concurring).

[177] *See supra* notes 133–36 for reasons why such instructions satisfy procedural due process.

[178] Pacific Mutual Life Ins. Co. v. Haslip, 553 So. 2d 537, 540 (Ala. 1989).

jury *feels* that you should do so."[179] Given this misperception of the jury instructions, the ensuing analysis was necessarily wide of the mark.

The void-for-vagueness argument is equally unsupportable as applied to fixing the amount of the punitive damages award. In *Crenshaw* Justice O'Connor's objection to the jury instructions rested heavily on the implicit analogy between punitive damages and criminal sentencing provisions. Although the force of this objection was undoubtedly weakened by the Court's subsequent holding in *Browning-Ferris* that the two cases were insufficiently analogous for the eighth amendment excessive fines clause to apply to punitive damages,[180] she nevertheless returned to the same theme in *Haslip*.[181] Much of her analysis there confuses the void-for-vagueness question with the related, but different, issue of jury discretion. Since jury discretion has been dealt with above,[182] the discussion here will be confined to vagueness as a matter of notice.

Even had the Court not rejected the criminal penalty analogy in *Browning-Ferris*, the notion that vagueness in sentencing provisions violates due process surely is subject to serious question. The quotation from Justice Marshall's *Batchelder* opinion is at most a speculative observation and, in any event, pure dictum because sentencing provisions were not at issue in that case.[183] Moreover, it is dictum without support of precedent: the Supreme Court has yet to find the criminal penalty provisions of any statute too vague to satisfy due process. Justice Marshall cited three cases to bolster his assertion, but the cases he cited did not support what he said. Two of the cases dealt with statutory interpretation, not constitutional violations. In the first case, *United States v. Evans*,[184] the defendant was exonerated because the relevant statute, the Immigration Act of 1917, was unclear as to what penalty, if any, was to be imposed for the offense of concealing or harboring illegal aliens. The Court refused to fill the lacuna in the statute, concluding it was better for Congress to revise the Act "than for us to guess at the revision it would make."[185] In the second case, *United States v. Brown*,[186] the Court upheld the addition of an escape penalty to defendant's

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[179] *Haslip*, at 1057 (O'Connor, J., dissenting) (emphasis added by O'Connor).

[180] Browning-Ferris Indus. v. Kelco Disposal, Inc., 490 U.S. 454 (1989).

[181] *Haslip*, at 1058–65 (O'Connor, J., dissenting).

[182] *See supra* notes 124–68 and accompanying text.

[183] Nor has any Supreme Court opinion cited *Batchelder* on that point, save Justice O'Connor's *Crenshaw* concurrence and her *Haslip* dissent.

[184] 333 U.S. 483 (1948).

[185] *Id.* at 495.

[186] 333 U.S. 18 (1948).

consecutive sentences as a matter of statutory interpretation and decided nothing about the Constitution. The third case, *Giaccio v. Pennsylvania*,[187] raised a constitutional issue but was no more on point than the other two cited decisions. Although a state statute was voided on due process vagueness grounds, the defect was lack of fixed standards for determining what *conduct* was prohibited, not the failure to specify a penalty.[188] If the Court should ever decide that due process requires precision in the specification of penalties, it ought to find a better rationale than the authority of *Batchelder*. Judicial prudence also would suggest that it ought to start with a criminal statute, not the common law rule of punitive damages as applied in a suit between private parties.

A convincing rationale for such a requirement may be hard to come by, even as applied to criminal statutes. Logically, the void-for-vagueness doctrine (in the sense of providing advance notice to the prospective wrongdoer) ought not to extend to the specification of penalties. A person needs to know what conduct will create criminal *liability* so as to avoid that conduct. He does not need to know what the precise *penalty* will be, for any reason related to due process notice, unless the law also assumes that a person willing to accept the penalty is entitled to commit the criminal act. In that event, advance notice of the penalty would permit people to make the appropriate cost-benefit calculation. But no one has a right to violate the law, even if it is in his interest to do so. Advance knowledge of the penalty may serve a deterrent purpose, and the state may wish to specify punishment with particularity for that reason, as well as to provide some consistency in sentencing. But fairness does not require advance notice of the severity of punishment to assist people in deciding whether or not to comply with the law.[189] A fortiori, if fairness does not require precise advance specification

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[187] 382 U.S. 399 (1966).

[188] *Id.* at 403.

[189] Existing statutes often provide enough leeway in sentencing to leave great uncertainty as to the actual punishment that may be imposed. In Utah, for example, the punishment for a first degree felony is "a term of not less than five years, unless otherwise specifically provided by law, and . . . may be for life . . . ." UTAH CODE ANN. § 76-3-203(1) (1990). Further, the judge is authorized under § 77-18-1(1)(a) to suspend the sentence and place the defendant on probation. Hence, the effective range of punishment, as specified in the statute, is zero to life. Would this fail the vagueness test because the accused cannot know in advance whether he will get probation, a life term, or something in between? If not, why should the absence of precise limits on punitive damages violate due process when only money, not personal liberty, is at stake? Or does due process have a bias against juries, not judges? But doesn't the judge have the last word on the size of punitive damages too?

of penalties in a criminal proceeding, it surely cannot be a mandate of due process in a civil action for punitive damages.[190]

## IX. CONCLUSION

The risk of liability for unpredictably large punitive damages undoubtedly is a problem for defendants in product liability cases, insurance companies faced with claims of bad faith, and numerous other actual and potential tort defendants. It may also be a problem of social significance, but evidence on that point is limited and ambiguous. Available empirical data, far from complete, indicate that punitive damages are awarded in only a small fraction of cases and that very large awards are frequently reduced by trial or appellate courts.[191] Authors of the empirical studies do not sound an alarmist note. On the other hand, those who are alarmed can point to recent punitive damages awards in seven and even eight figures that survived judicial scrutiny,[192] along with the notorious $1 billion punitive damages award in Pennzoil's antitrust action against Texaco.[193] The increased frequency and size of punitive damages awards in recent years suggests that the problem may be growing, although the change is small if considered in relation to the total number of lawsuits filed.[194]

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[190] The Ninth Circuit made this point forthrightly in Maheu v. Hughes Tool Co., 569 F.2d 459, 480 (9th Cir. 1977), applying relevant statute and case law of California:

> [A]ny uncertainty as to the amount of permissible punitive damages in any specific case does not invalidate the statute. Fair warning concerning the specific conduct which is prohibited has been provided by relevant case law. The fact that the amount of a proper damage award may not be precisely known before trial does not make that award unconstitutional.

[191] *See Myth and Reality*, *supra* note 1; M. PETERSON, S. SARMA, & M. SHANLEY, *supra* note 2; *Product Liability: Verdicts and Case Resolution in Five States*, *supra* note 2.

[192] *E.g.*, Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986) ($25 million), *cert. denied*, 480 U.S. 910 (1987); Downey Sav. & Loan Ass'n v. Ohio Casualty Ins. Co., 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987) ($5 million); Tetuan v. A.H. Robins Co., 241 Kan. 441, 738 P.2d 1210 (1987) ($7.5 million).

[193] Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. Ct. App. 1987) ($3 billion jury verdict reduced to $1 billion), *cert. dismissed*, 485 U.S. 994 (1988).

[194] No comprehensive study of punitive damage awards in the United States has ever been undertaken. Existing empirical studies are limited both as to time span and locality. *See* works cited *supra* note 2. Thus impressions of trends in the United States as a whole are heavily dependent on press and other anecdotal evidence. In this communications

Even assuming that the present system of punitive damages has serious negative consequences for society, a remedy is more appropriately sought by legislative rather than by judicial means. Legislatures can consider all facets of the problem; the judicial perspective looks primarily to what is lawful. Because the primary values at stake are economic and social, not constitutional, legislatures are better equipped than the courts to weigh these values and consider appropriate remedies. Many legislatures have already done so, as witnessed by the recent outpouring of state laws regulating the award of punitive damages.[195]

In principle, at least, courts recognize that their role is to declare the law, leaving matters of governmental policy to the legislative judgment. When the United States Supreme Court addresses state law its primary concern is the constitutionality, not the wisdom, of the law.[196] Unfortunately, the distinction is often difficult to draw in practice. With the

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network, a jury award of punitive damages obviously commands more attention than denial of a claim, and a few large awards are far more noteworthy than a multitude of small ones. On the theory that some empirical data for the United States as a whole is better than none, I produced a "quick and dirty" estimate of the increasing incidence of punitive damages *claims* in federal courts. This was done by searching the United States District Court file in *Lexis* using the terms "court" and "punitive damages," respectively, then figuring the number of "punitive damages" cases as a percentage of the "court" cases (I assumed the word "court" appeared in every case). For the five year period 1981–1985 the figure was 6.5%; for the period 1986–1990 it was 6.1%, representing a slight decline from the earlier five-year period. The absolute number of cases had increased by about 50%. A noticeable increase in the percentage of punitive damages claims occurred from 1960 to 1985, with a leveling off since then. Applying the same search words to one-year time periods, I obtained the following figures:

| | | | | | |
|---|---|---|---|---|---|
| 1950 | 1.0% | 1970 | 2.4% | 1990 | 6.2% |
| 1955 | 1.2% | 1975 | 3.8% | | |
| 1960 | 1.2% | 1980 | 5.3% | | |
| 1965 | 1.7% | 1985 | 7.2% | | |

For federal Court of Appeals cases the percentage increase was smaller:

| | | | |
|---|---|---|---|
| 1950 | .7% | 1975 | 2.4% |
| 1955 | .7% | 1980 | 2.2% |
| 1960 | .9% | 1985 | 3.1% |
| 1965 | .7% | 1990 | 1.9% |
| 1970 | 1.1% | | |

[195] *See supra* note 68 and accompanying text.

[196] "We would not, of course, invalidate state law simply because we doubt its wisdom . . . ." Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

due process clause, in particular, the line between the two is at some points obliterated because "reasonableness" and "fairness" are elements of both wisdom and due process. This creates a very real temptation for courts to read their own policy preferences into the due process requirement that a law be reasonable and fair. For this reason, if no other, a court should hesitate to overturn long-established law on due process grounds without overwhelming evidence that the law is indeed unreasonable and unfair.

This Article has argued that such overwhelming evidence is not to be found. On the contrary, the present system satisfies due process. Substantive due process, as applied to economic matters, requires only that the law in question not be arbitrary or irrational. A system that imposes liability upon a factual finding of outrageous conduct, and admonishes the jury to consider all the facts and circumstances in determining the amount necessary for punishment and deterrence, is not on its face arbitrary or irrational. Under such a standard substantive due process plausibly could be invoked to void excessive punitive damages awards in individual cases, but this adds little if anything to existing common law powers of courts to overturn jury awards that are excessive or a result of bias and prejudice. Much would be changed if substantive due process were held to require a fixed limitation or ceiling on punitive damages generally, but such an interpretation of the standard would be inherently contradictory. Due process condemns the arbitrary and unreasonable, and any generalized limit—whether a fixed dollar limitation or some ratio or multiple of compensatory damages—is bound to be arbitrary precisely because it ignores the facts of individual cases. A cap fixed at a level high enough to satisfy in every case the demands of punishment, deterrence, and example would be too high to provide a meaningful limitation in most cases (and might even encourage higher awards). A cap fixed at a low level, on the other hand, would arbitrarily preclude larger awards even when needed to meet the demands of punishment or deterrence. A legislature, faced with the difficult policy choice, might constitutionally set a limit at one level or another. But surely due process should not *require* the fixing of a limit that must necessarily be arbitrary in some of its applications, or else so broad as to be meaningless.

With respect to procedural guarantees, the Supreme Court has previously decided, for good reason, that a punitive damages action involving only private parties does not entitle the defendant to claim the benefit of the Constitution's criminal safeguards, even if one purpose of the award is punishment.[197] Nor does a punitive damages action embrace any other element (such as potential loss of liberty, or other fundamental rights) that

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[197] Kelco v. Browning-Ferris Indus., 490 U.S. 454 (1989).

has in the past led the Court to grant special procedural protection to one party or the other.[198] Application of the relevant portions of the due process test set forth in *Mathews v. Eldridge*[199] leads to no different conclusion. The defendant's interest is primarily monetary—not an interest that calls for heightened procedural safeguards. As for the risk of an erroneous deprivation of property, the safeguards of an adversary proceeding conducted in accordance with the rules of civil procedure do not seem prima facie inadequate. Alternative procedures undoubtedly could be used to reduce the risk of an erroneous deprivation of defendant's property; indeed, punitive damages could be abolished and the risk would be reduced to zero. But that is not the point of *Mathews* or of due process. In a civil contest between two private parties, the aim of due process is to reduce the probability of an erroneous *outcome*. Any procedural change in the defendant's favor would increase the probability of erroneously defeating the plaintiff's claim. A legislature, for policy reasons, might wish to do this, or even to abolish the remedy of punitive damages. But due process does not require it.

The allegation of "unbridled" jury discretion, at first glance, is the most plausible of the due process arguments. Juries are usually instructed in terms that provide little specific guidance regarding either liability or the amount of the award.[200] However, broad jury discretion is not without precedent in the law. Large bodies of tort law rely heavily on such subjective concepts as gross negligence, malice, or wanton and willful behavior—the same concepts used in jury instructions for determining punitive damages liability. Moreover, the jury is typically left to its "sound discretion" in deciding what amount is appropriate to punish and deter and this is no broader than the typical instruction to juries charged with awarding compensatory damages for pain and suffering. Thus, if jury instructions in a punitive damages case are too imprecise to satisfy due process, other significant bodies of tort law are also called into question. This should at least give pause to a court contemplating the constitutionalization of punitive damages.

If the court pauses long enough, it may recognize that leaving such decisions to the sound discretion of the jury, subject to judicial oversight, is neither arbitrary nor irrational. Given the subjective nature of the things the jury is asked to assess—culpability, desert, deterrence—detailed instructions are likely to provide, at best, a spurious precision. The New Jersey statute cited earlier in this Article identifies a number of relevant factors for the jury

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[198] *See supra* text accompanying notes 109–16.

[199] 424 U.S. 319 (1976). *See supra* text accompanying notes 85–123.

[200] *See supra* notes 133–35, 137–45 and accompanying text.

to consider, such as the profitability of the misconduct, its duration, the defendant's mental state, any mitigating conduct, and the defendant's wealth. These could give some guidance to a jury, but would not necessarily be more limiting because they still leave a dominant role for subjective judgment and, in any event, the jury is free to consider other factors as well. The one effective way to limit the amount of the award is to establish specific ceilings or ranges within which the verdict must fall. At that point, however, the limitation becomes one of substantive law rather than procedure, raising again the paradox of setting arbitrary limits in the name of a constitutional rule intended to prevent arbitrary conduct.

The law of punitive damages may (or may not) stand in need of substantial reform. If reform is needed, constitutionalizing the law is a clumsy, inappropriate way to achieve it. The due process clause undoubtedly could be used as an instrument of reform because its contours are so vague and its substance so amorphous. For that very reason, however, the Court should hesitate to read new meaning into it unless fundamental rights can be protected in no other way. Otherwise due process becomes a cover for judicial legislation, a function not wholly eschewed by the Court in the past but one not conferred by the Constitution. A punitive damages claim involves no right more fundamental than money, and it is peculiarly amenable to legislative reform. Many legislatures have already given consideration to the matter. Without a clear mandate from the Constitution, the Court should leave reform of punitive damages law to the political process.