CORPORATE CAPITAL PUNISHMENT? AN ANALYSIS OF THE SUPREME COURTS ADMONITION AGAINST UNBRIDLED JURY DISCRETION IN THE AWARDING OF PUNITIVE DAMAGES AFTER *PACIFIC MUTUAL LIFE INSURANCE CO. V. HA SLIP*

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"The law of torts is concerned primarily with the adjustment of the conflicting interests of individuals to achieve a desirable social result."[2]

-William L. Prosser

I. INTRODUCTION

The debate over the propriety of punitive damage awards that greatly exceed the actual damages necessary to compensate a party has been a subject of controversy for over a century.[3] The topic has surfaced recently at the state level, both through legislative reform[4] and judicial opinion.[5] On the federal

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'111 S. Ct. 1032 (1991).

[2]PROSSER ON TORTS 13 (2d ed. 1955).

[3]*See e.g.* Fay v. Parker, 53 N.H. 342,382 (1873). ("The idea is wrong. It is monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of a body of the law.")

[4]See e.g., Ga CODE ANN. § 51-12-5.1 (1987) (Requiring that punitive damages may be awarded only when proven by clear and convincing evidence standard: allowing only one award of punitive damages to be recovered from a defendant in a products liability case arising from the s?me act or omission; requiring that 75% of an amount awarded as punitive damages in a products liability case be paid into the state treasury.) *But see* McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990). (Holding unconstitutional both the provision that required the payment of the funds into the state treasury and the single award limitation.)

[5]*See* Owens-Illinois Inc. v. Zenobia, 66 Sept. Term 91 (Md. Ct. of App.) (Abolishing the requirement that a contractual relationship must exist between parties to justify the imposition of punitive damages. And raised the standard of proof from preponderance of the evidence of gross negligence, to clear and convincing evidence that the defendants conduct amounted to actual

level, two recent Supreme Court cases have examined the constitutionality of punitive damages under the Excessive Fines Clause of the Eighth Amendment,[6] and under the Due Process Clause of the Fourteenth Amendment.[7]

In *Browning-Fems Industries of Vermont Inc. v. Kelco Disposal Inc.,*[1] the Court determined that the Excessive Fines Clause of the Eighth Amendment does not apply to a punitive damages award in a civil case between private parties.[9] In *Browning-Fems,* the Court specifically left for another day whether the Due Process Clause of the Fourteenth Amendment might act as a check on undue jury discretion to award punitive damages when there is no express statutory limit. That day came when the Court decided *Pacific Mutual Life Insurance Co.* v. *Haslip,*[10] however, the opinion came as somewhat of a disappointment to business interests who had been hoping for a bright line constitutional limit on punitive damages. Instead, they received a 7-1 majority opinion that did little more than analyze the Alabama scheme at issue, and determined that it does not violate due process. The Court admonished unbridled jury discretion in punitive damage awards, strongly suggesting that even though the Alabama statute passed muster, other state schemes may not. Unfortunately, the ad hoc analysis of the Alabama scheme gives little guidance for legislatures and courts to recognize the core elements of an acceptable scheme, therefore making it a virtual certainty that other state statutes will be attacked on due process grounds.

This paper reviews the judicial and intellectual history of punitive damages particularly as they relate to the Fifth and Eighth amendments, including a thorough analysis of the *Haslip* opinion. The article argues that the Supreme Court has clearly admonished against unbridled jury discretion in the context of punitive damage awards and therefore future attacks upon state punitive damage schemes on the basis of procedural due process will follow. Capital sentencing guidelines are then compared to punitive damage procedures in an attempt to structure a future paradigm which could be usefully employed to resolve the current controversy regarding "excessive[H] punitive damage awards.

malice.)

[6]492 U.S. 257 (1989).

[7]111 S. Q. 1032 (1991).

[8] *Supra* note 6.

ibid.

[10]Haslip. Ill S.Q. 1032.

II. THE ORIGIN OF PUNITIVE DAMAGES

The common law origins of punitive damages are generally traced to two English cases that date back to 1763, *Wilkes* v. *Wood*[11] and *Huckle* v. *Money*.[12] In each of these two cases, the reviewing courts upheld jury awards of damages that exceeded the actual damages of the injured party. These cases established monetary awards that were not proportional to the actual injury. Rather than merely to serve the purpose of compensating the injured party, these damages were intended to be a civil punishment against the offending party.

The earliest American case that refers to punitive damages appears to be *Coryell* v. *Colbaugh*[13] in 1791. The cause of action in this case arose from a breach of a promise to marry, in calculating damages, the court instructed the jury to not only look to the actual loss of the plaintiff, "but to give damages for *example's* sake, to prevent such offences in [the] future."[14] By awarding a sum in excess of the actual loss, the court stated that this "would mark [the jury's] disapprobation, and be an example to others."[15]

In modem courts, an award of punitive damages is generally available only in tort, and not in contract or commercial contexts. The idea is that a simple contract breach is not morally repugnant, and will not warrant punitive awards to a plaintiff. An award of punitive damages typically must be based on behavior by the defendant that demonstrates conduct that is malicious, willful, and outrageous. The state schemes generally have penalty, punishment, and/or deterrence as their underlying rationales.

III. THE DEBATE

The articulated objectives of punishment and deterrence of most state schemes are hotly debated.[16] Both the propriety and the effectiveness of punitive damages are severely criticized. For example, the punishment rationale arguably attempts to duplicate criminal type penalties without the concomitant procedural safeguards.[17] More rigorous standards of proof, right to counsel, and the size and role of juries are all fundamental precepts of criminal procedure. But conversely they are not necessarily integral

11. 98 Eng. Rep. 489 (K.B. 1763).

12. 95 Eng. Rep. 768 (K.B. 1763).

13. 1 NJ.L. 90 (Sup. Q. 1791).

14. Id. at 91 (emphasis in original).

15. *Id.*

16. See *generally,* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages.* 56 S. CAL. L. REV. 1 (1982).

17. See generally, Malcolm E Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 VA. L. REV. 269 (1982).

requirements of civil law. Likewise, the deterrence rationale is often criticized as inadequate to support the awarding of punitive damages. The arguments include the insufficiency of data to support a deterrent effect; ambiguity as to who is actually supposed to be deterred; the proper recipient of a windfall award; and some concern about "the race to the courthouse" before a defendant's resources are wiped out.[18]

Proponents of punitive damages argue that such awards are necessary because not all outrageous conduct is criminal in nature, and punitive damages fill this gap.[19] As far as the procedural concerns, the proponents argue that a growing number of jurisdictions are adopting a "clear and convincing" standard to replace a mere preponderance of the evidence.[20] Also, an argument can be made that a lower burden of proof is appropriate in cases like medical malpractice and products liability where the defendant has better access to information than the plaintiff.[21] Other defenses are the adequacy of appellate review, and the control of the trial court as safeguards against potential abuse by the jury.[22] The deterrence rationale has also been defended. Proponents argue that there does not seem to be any systematic evidence that there is overkill in the awards given by juries.[23] The argument against deterrence is primarily based on some notion that awards are so excessive that they go beyond the deterrence objective. Therefore without any empirical evidence, the argument is weak. Proponents further argue that without the threat of high damages, there can realistically be no effective deterrence.[24]

IV. THE TREATMENT OF PUNITIVE DAMAGES BY THE SUPREME COURT

There is some confusion as to exactly when the Supreme Court first considered the constitutionality of punitive damage awards to private plaintiffs. Some commentators[23] and several subsequent cases[26] suggest that the Court

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

[19]Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach,* 31 HASTINGS LJ. 639, 644-47 (1980).

20. See supra, Owens-Illinois Inc. v. Zenobia, 66 Sept. Term 91 (Md. Ct. of App.) at note 5.

[21] *See* Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Ton Law,* 87 COLUM. L REV. 1385, 1403-04 (1987).

[22] *Id.*

[23]*See* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages,* 75 MlNN. L Rev. 1,63 (1990).

24. Johnston, *supra* note 20, at 1406.

[25] *See* Justice Harlan's plurality opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130, 159 (1967); Note, *In Defense of Punitive Damages,* 55 N Y U. L REV. 303, at 331 & n. 151; Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages,* 41 N.Y.U. L REV. 1158,1177-78 (1966).

upheld the constitutionality of punitive damage awards in *Day* v. *Woodworth?* However, punitive damages were not at issue in the case. A judgment was challenged by a prevailing party because the jury had failed to award costs. The Court affirmed, holding that costs could be awarded only if authorized by the appropriate legislative authority, and that this had not been shown. In dictum the Court distinguished such an award of costs from an award of punitive damages.[28]

Other landmark cases which attempt to define the parameters of the issues include *Missouri Pacific Railway* v. *Humes,*[29] *Curtis Publishing Company* v. *Butts,*[30] *Gertz* v. *Robert Welch, Inc.,*[11] *Browning-Femss Industries* v. *Kelso Disposal, Inc.*[31] alluded to earlier, and *United States* v. *HalperP* The latter two cases seem to suggest that punitive damage defendants will have to look somewhere besides criminal type constitutional safeguards for relief. The hope was that *Haslip*[34] would provide this relief through the Due Process Clause. However, the opinion seems to merely have added to the uncertainty rather than provide any bright constitutional line of reasoning.

V. THE SUPREME COURT AND PROCEDURAL DUE PROCESS[35] PRINCIPLES

The Due Process Clauses of the Fifth Amendment, as applied to the federal government, and the Fourteenth Amendment, as applied to the states,

26. See Scott v. Donald, 165 U.S. 58, 87-89 (1897), Milwaukee & St. P. Ry. v. Arms, 91 U.S. 489, 492-93 (1875); Philadelphia. W. & B.R.R. v. Quigley, 62 U.S. (21 How.) 202, 213-14 (1858).

27. 54 U.S. (13 How.) 363 (1851).

28. *Id.* at 371.

29. 115 U.S. 512(1885).

30. 388 U.S. 130 (1967).

31. 418 U.S. 323 (1974).

32. 292 U.S. 257 (1989).

33. 490 U.S. 435 (1989).

34. Ill S.Ct. 1032 (1991).

35. Punitive damage awards are capable of being challenged under either substantive or procedural due process grounds. However, a challenge on substantive due process grounds must necessarily speak primarily to the size of the award. That is, the argument would be that the size of the award is so grossly excessive that the imposition of such a penalty is wholly arbitrary and unreasonable. Although this remains a viable basis for attacking an award, and the present Court has acknowledged that such a limitation exists, *see* Browning-Ferris. 292 U.S. 257 (1989) and Bankers Life & Casualty, Co. v. Crenshaw, 486 U.S. 71 (1988), the argument is seldom invoked in this type of situation and when it is, it is almost uniformly rejected. This is probably because any attempt to use substantive due process limits on the size of the award would look like a revival of the economic substantive due process doctrine that is now held in disrepute. *See* Robert E. Riggs, *ConstitutionaJizing Punitive Damages: The Limits of Due Process,* 52 OHIO ST. LJ. 859, 876- 77 (1991).

Had the Court wished to limit punitive damages based on the size of the award, the eighth amendment's excessive fine clause would have been a more direct and effective mechanism than substantive due process. Of course in *Browning-Ferris* it declined to do so.

provide that the government shall not take a person's life, liberty, or property without due process of the law.[36] Due process contemplates process/procedure, that requires at least an opportunity to present objections to the proposed action to a fair, neutral decision-maker, though not necessarily a judge.[37] The due process provisions do not create property or liberty interests, rather their purpose is to provide procedural protections against arbitrary deprivation.[38]

In *Mathews v. Eldridge*[39] the Court sets out three factors that should be weighed in determining the type of process and thus the level of procedural protection that is required in a particular type of case.[40] It was against this backdrop that the Court decided *Pacific Mutual Life Insurance Co.* v. *Haslip.*[lx]

VI. *PACIFIC MUTUAL LIFE INSURANCE CO. V. HAS LIP*[*2]

A. *Blackmun's Majority Opinion*

Clara Haslip worked for a municipality that attempted to purchase life and health insurance coverage for its employees through an agent that sold insurance for a number of companies, including Pacific Mutual Life Insurance Co. The agent represented that he was affiliated with Pacific Mutual even though Pacific Mutual did not even sell health insurance. The agent falsely claimed that a company called Union Fidelity was a Pacific Mutual subsidiary, and that Union Fidelity would provide the health coverage while Pacific Mutual would provide the life insurance. The agent never submitted the policies to either company and kept the premiums for himself.

When Haslip and other city employees attempted to file claims under the health plan, they were informed that they were not covered. The employees were forced to pay the expenses out of their own pockets, In Haslip s case this amounted to about one half of her annual salary. Haslip and

36. U.S. CONST, amends. V & XIV.

37. 'See Logan v. Zimmerman Brush Co.. 102 S. Cl. 1148, 1156 (1982); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 (1981).

38. For example, the Fourteenth Amendment's due process clause does not give out-of-state attorneys the right to appear in state courts without meeting a states bar admission requirements. Leis v. Flynt, 439 U.S. 438 (1979).

39. 424 U.S. 319 (1976).

40. Id. at 335.

(i) The importance of the individual interest involved;

(ii) The value of specific procedural safeguards to that interest;

(iii) The governmental interest in fiscal and administrative efficiency.

In all situations the Court will require fair procedures and an unbiased decisionmaker. It is not enough that the state provide the punitive damages defendant with a full blown trial. The trial procedures must also be adequate to ensure that awards will not be arbitrary.

41. I11 S. Ct. 1032 (1991).

42. *Id*

several of her fellow co-workers sued the agent for fraud and Pacific Mutual under a theory of respondeat superior. Haslip was awarded $1,040,000 in compensatory and punitive damages. The figure represented about four times the compensatory damages she sought and 200 times her out of pocket expenses.

Pacific Mutual argued that the instruction given to the jury by the trial judge amounted to unbridled jury discretion and was thus violative of due process. The instruction was based on Alabama law and read in pertinent part:

> [I]f you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion ... award an amount of money known as punitive damages . . . . This amount of money is awarded ... to punish the defendant ..
> .. Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence and the necessity of preventing similar wrong.[43]

Justice Blackmun, writing for the majority, noted that punitive damages have been a part of traditional state tort law for a very long time.[44] And the traditional common law approach allows the jury to at least initially determine the amount, if any, of the punitive damage award, based upon the gravity of the wrong and the need to deter similar conduct. The determination of the jury is then reviewed by both trial and appellate courts to ensure that it is reasonable.[45] Blackmun then noted that the Supreme Court has on several occasions approved of the common law method for assessing punitive awards, which was well established before the enactment of the Fourteenth Amendment.[46] Blackmun conceded that a historical tradition is not enough to show that their importance is never unconstitutional, even though the traditional basis for punitive damage awards has strongly suggested that there is nothing inherently unfair about the common law method for assessing punitive damages or that it would deny due process and thus was *per se unconstitutional*,[47] Blackmun further expressed the Court's concern that punitive damages might "run wild."[48]

[43]Haslip, 111 S. Q. at 7 n.1.

44. See supra note 10-14 and accompanying text.

[45.] Haslip, 111 S. Q. at 22.

46. M Blackmun specifically discussed Day v. Woodworth. 13 How. 363 (1852), *see supra* note 26 and Missouri Pacific R. Co. v. Humes. 115 U.S. 512 (1885), *see supra* note 28, to support this proposition.

[47]Haslip, 111 S. Q. at 25.

48. Id.

> One must concede that unlimited jury discretion - or unlimited judicial discretion for that matter - in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. 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.[49]

The core of what is important and frustrating with the *Haslip* opinion is in this statement from Blackmun. What it explicitly iterates is important, because there clearly is a discernible constitutional limit to the discretion that can be given to a jury in awarding punitive damages against a defendant. But it is equally frustrating in what it does not say. That is, it does not explain what the core values are that must exist in a state scheme to satisfy Blackmun's "constitutional calculus." The statement by Blackmun suggests little more than an *ad hoc* analysis on a case by case basis.

In examining the constitutionality of the Alabama scheme in question, Blackmun noted that although the instructions gave the jury significant discretion, that discretion was not unlimited.[50] Holding that the instructions did not violate the dictates of due process, he discussed the following specifics of the Alabama scheme that he felt were important in arriving at this conclusion:

1. The trial court expressly described for the jury that the purpose of a punitive damages award was not to compensate the plaintiff for any injury but to punish the defendant as well as deter the defendant and others from doing such wrong in the future.[31]

Blackmun seemed to look favorably upon the express policy of Alabama that when awarding punitive damages 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.[52] Blackmun considered the instructions sufficient to "enlighten the jury as to the punitive damages' purpose, identify the damages as punishment for civil wrongdoing of the kind

49. Id. at 27.

50. Id. at 28.

51. Id.

52. Also note that any evidence of Pacific Mutual's wealth was excluded from the trial under Alabama law. See Southern life & Health Ins. Co. v. Whitman, 358 So.2d 1025, 1026-27 (Ala. 1978).

involved, and explain that their imposition was not compulsory."[53] Therefore Blackmun held that "Pacific Mutual's interest in rational decisionmaking and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution" were reasonably accommodated through the instructions.[54]

2. The Supreme Court of Alabama had established post trial procedures for scrutinizing punitive damage awards. Trial courts must consider the culpability of the defendant's conduct, the desirability of discouraging others from similar misconduct, the impact on the parties and other factors, such as the impact on innocent third parties.[55] The reasons for either choosing to interfere or not to interfere with an award must be specifically reflected in the record.[56]

3. The Alabama Supreme Court also provided for appellate review of punitive damage awards as an additional check on the jury's or trial court's discretion. First the reviewing court should undertake a comparative analysis;[57] then it should apply the detailed substantive standards it has developed for evaluating punitive damage awards, to ensure that the award does "not exceed an amount that will accomplish society's goals of punishment and deterrence."[58]

53. Id. at 30.

54. Id.

55 Id at 31(citing Hammond v. City of Gadsdea 493 So.2d 1374 (1986)). These criteria were further refined in Green Oil Co. v. Hornsby, 539 So.2d 218. 223-24 (Ala. 1989) and Central Alabama Electric Cooperative v. Tapley, 546 So.2d 371. 376-77 (Ala. 1989). These cases held that the following could be taken into consideration in determining whether the award was excessive or inadequate: 1. 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; 2. the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; 3. 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; 4. the "financial position" of the defendant; 5. all the costs of litigation; 6. the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and 7. the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

56. Id.

57. Id. (citing Aetna Life Ins. Co. v. Lavoie, 505 So.2d 1050, 1053 (1987)).

58. Id. (citing Central Alabama Electric Cooperative v. Tapley, 546 So.2d 371, 377-78 (Ala. 1989); Green Oil Co. v. Hornsby, 539 So.2d 218, 222 (1989); Wilson v. Dukona Corp., 547 So.2d 70, 73 (1989)).

The Court seemed to feel that in particular this structured evaluation of a punitive award and its standard of review distinguished the Alabama system from the Vermont and Mississippi schemes about which Justices expressed concern in Browning-Ferris, 292 U.S. 257 (1989) and in Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71 (1988). In each of those two schemes an amount awarded would only be set aside or modified if it was "manifestly and grossly excessive or would be considered excessive when "it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience. " *See* Pezzano v. Bonneau, 329 A2d 659, 661 (Vt. 1974), Bankers Life and Casualty Co. v. Crenshaw, 483 So.2d 254. 278 (Miss. 1985).

The majority, through Blackmun, concluded that these standards impose a "sufficiently meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages."[59] And that the post-verdict review of the Alabama Supreme Court "ensures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages."[60]

Since Pacific Mutual had the "full panoply of Alabama's procedural protections,"[61] even though the size of the award was close to the constitutional line in terms of proportionality, it did not lack "objective criteria."[62] Accordingly, the Court held that the award was constitutionally sufficient, rejecting Pacific Mutual's due process challenge.

B. *Scalia's and Kennedy's Concurrences*

Justices Scalia and Kennedy concurred in the judgment in separate opinions. Scalia criticized the majority for deciding the procedural issue only to the extent of the jury discretion provided in the *Haslip* case itself: "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 was intended to resolve."[63] Scalia argued that since it was "the traditional practice of American courts to leave punitive damages ... to the discretion of the jury"[64] then the Court should not look further into the "fairness" or "reasonableness" in a procedural context for purpose of satisfying due process. Scalia's view is that because the common law basis for both the existence of punitive awards, and jury discretion in the procedural context, have such a strong historical tradition, "it does not violate the Bill of Rights and necessarily constitutes due process."[65]

Kennedy, although not adopting in its entirety Scalia's historical approach, still recognized that ”[j]ury determination of punitive damages has such long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to be deemed

59. Haslip, 111 S. Ct. at 32.

60. Id. The Court also noted that these standards had some real effect as applied by the Alabama Supreme Court to punitive jury awards. *See* Hornsby, 539 So.2d at 219 & Williams v. Ralph Collins Ford Chrysler, Inc., 551 So.2d 964, 966 (1989) (trial practice); Wilson v. Dukona Corp., 547 So.2d 70, 74 (1989) & United Services Automobile Assn. v. Wade, 544 So.2d 906, 917 (1989) (reduction of punitive awards).

61. Haslip, 111 S. Ct. at 35.

62. *Id*

63. *Id* at 37 (Scalia, J. concurring).

64. Id.

65. Id

necessary."[66] As such he agreed that the "judgment of history should govern the outcome" in the *Haslip* case.[57]

C. *O'Connor's Dissent*

In dissent, Justice O'Connor, although not questioning the general legitimacy of punitive damages, cogently argued that there is a "strong need to provide juries with standards to constrain their discretion."[68] Her concern appears to have been that it is routine for states to authorize civil juries to award punitive damages without providing to them any meaningful instructions.[69] She further reasoned that the Constitution requires more than simply telling the jury to "do what you think best."[10]

In analyzing the Alabama instructions at issue in *Haslip,* she concluded that they did not typically provide any "meaningful standards to guide the juries decision to impose punitive damages or to fix the amount."[71] She characterized the instruction "as vague as any as I can imagine."[75] She criticized the majority's reliance on the State's mechanism for post verdict judicial review. She argued that such procedures are not capable of curing a grant of standardless discretion to the jury, post verdict review can only test the amount of the award, not the procedures by which the appropriateness of the award and its amount have been determined.[73] Accordingly, O'Connor concludes that Pacific Mutual was denied procedural due process because the jury instructions in *Haslip* offered less guidance than is required under the three tier test set out in *Mathews* v. *Eldridge*.[14]

O'Connor's primary emphasis, as noted above, is with the second *Mathews* v. *Eldridge* factor, that is the fairness and reliability of existing procedures. She contends that wholly standardless discretion to the jury is inconsistent with due process. Also noted above, she is not satisfied, as is the

66. *Id.* at 65 (Kennedy, J. concurring).

67. *Id.*

68. *Id.* at 68 (O'Connor, J. concurring).

69. Id.

70. *Id.*

71. Id. Justice O'Connor would prefer to analyze the case, and hold the instructions unconstitutional on the basis of the void for vagueness doctrine. *Set* Giaccio v. Pennsylvania, 382 U.S. 399 (1966). The argument was made by Pacific Mutual however, the majority rejected this approach. Haslip, 111 S. Ct. at 35. In *Giaccio* the Court struck down a Pennsylvania statute allowing costs to be awarded against a defendant acquitted of a misdemeanor. The statute did not concern jury discretion in fixing the amount of costs, and the *Haslip* majority determined that decisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred.

72. Haslip, 111 S. CX at 73 (O'Connor, J. dissenting).

73. *Id.*

74. 424 U.S. 319, 335 (1976). *See supra* note 39.

majority, with *post hoc* judicial review. Since the *post hoc* review at best deals with the excessiveness of the award, although it may be relevant to the substantive due process issue, it does not answer for insufficiencies with respect to the requirements of procedural due process.[75]

Justice O'Connor suggests that even the most modest of procedural safeguards would have made the process substantially more rational without impairing any legitimate governmental interest.[76] For example, the Alabama Supreme Court has already given its support to the *Green Oil* factors[77] in its post verdict review procedure.[78] O'Connor argues that by giving these factors to the juries, the State would be providing them with some specific standards to guide their discretion.[79] This would substantially enhance the fairness and rationality of the State's punitive damages system.[80] Some other procedural safeguards that O'Connor suggests would be equally effective are the fixing of monetary limits for the awards of punitive damages for particular kinds of conduct[81] and the bifurcation of trials into liability and damages stages, including a "clear and convincing" evidence standard at the punitive damages stage that the defendant acted with the requisite culpability.*[2]

Justice O'Connor would have Alabama adopt some method, either through its legislature or its courts, to constrain the discretion of its juries both in deciding whether to award punitive damages, and in deciding the amount of such an award. Since there is a variety of effective measures available that would satisfy her procedural due process concerns, she would leave it up to the State to "experiment with different methods and to adjust these methods over time."*[3]

VII. CORPORATE CAPITAL PUNISHMENT? AN ANALOGY

In his dissenting opinion in *Haslip*, Justice Scalia declared that "[The Court has] expended much ink upon the due process implications of punitive damages, and the fact-specific nature of the Court's opinion guarantees that we and other courts wfll expend much more in the years to come." This

[75] Id. at 92.

[76] Id.

[77] Green Oil Co. v. Hornsby, 539 So.2d 218, 223-24 (1989). *See supra* note 67

[78] *Id.*

79. Haslip, 111 S. CL at 95.

80. *Id.*

81. The argument is that as long as the legislatively determined ranges are sufficiently narrow, they could function as meaningful constraints on jury discretion while at the same time permitting juries to render individualized verdicts. *Id.* at 95.

82. The clear and convincing evidence requirement would constrain the jury's discretion by limiting punitive damages to the more egregious cases, and permit closer scrutiny of the evidence by trial judges and reviewing courts.

83. Id.

statement neatly sums up the frustrating aspect of the opinion in that the *ad hoc* analysis of the Court provides little guidance in the application of the case to the constitutionality of other State schemes. The statement by Scalia also describes the importance of the *Haslip* opinion in that the Court has clearly admonished unbridled jury discretion in the context of punitive damage awards, and so inevitability there will be future attacks upon State punitive damage schemes on the basis of procedural due process. It is therefore vital to determine the core values of a State scheme that will pass constitutional muster in the context of procedural due process.

A. Capital Sentencing as Analogy

In an attempt to determine the core values that must make up a state punitive damage scheme it will be useful to examine the Court's jurisprudence in the context of capital sentencing. No circumstance is more central to the underlying purposes for the procedural protections demanded by the Due Process Clause than the deprivation of life itself as punishment and/or a deterrent. By examining the requisite procedural safeguards of this most central issue, we can gain insight about the proper focus of procedural protections in the area of punitive damages, which in some sense threatens the life" of individuals and corporations in a financial sense through economic deprivation.[84]

Although English law has recognized that the sovereign could not put an individual to death without providing the individual with due process of the law since about 1354,[85] the Court has attempted to provide procedural safeguards to these defendants through the Eighth Amendment's ban on cruel and unusual punishment. Still, even though the Court has invoked the specific guarantees of due process in only a few cases, the requirements that can be gleaned from the Court's death penalty cases are largely procedural. The Due Process Clause, rather than the Cruel and Unusual Punishment Clause, would

84. Of course we do not mean to suggest that living or dying in the biological sense is the equivalent of economic viability of an individual or a corporation; quite to the contrary we wish to emphasize that there is a big difference between the two. What could be more important than assuring the fundamental fairness of a proceeding where the outcome may be the deprivation of a person's life? The high co«t of a mistake in this area suggests that there must be great concern for the adequacy of procedural safeguards to minimize the risk of error. An caploratkm of these more well procedural safeguards required by the Court in the "central case" of capital sentencing, and the policies underlying these restrictions, will through analogy tell us something about economic deprivation, and help determine the proper level of procedural protection in the awarding of punitive damages. Even though the "stakes" are higher with the deprivation of life as compared to economic deprivation, the underlying concerns about jury discretion resulting in arbitrariness and capriciousness are remarkably similar.

85. *Set* Faith Thompson. Magna Carta: Its Role in the Making of the English Constitution 1300-1629, at 92 & n.72 (1948).

have been an equally logical choice for constitutional procedural guarantees in the capital sentencing context.[86] The Court's reliance on the Eighth Amendment in developing procedural restrictions in capital sentencing cases does not preclude due process constraints on the penalty process of such cases,[87] nor make these restrictions any less instructive toward developing the core values of jury discretion in the punitive damage context.[88]

Before the Court's decision in *Furman* v. *Georgia,** juries in death penalty cases were typically given unbridled discretion to impose or withhold the penalty of death.[50] Decisions were often made solely on the basis of evidence presented in the guilt phase of the criminal trial. The results of this standardless sentencing system are notorious.[51] The Justices themselves viewed the imposition of the death penalty as being imposed in a arbitrary or "freakish"[52] manner, if not actually imposed discriminatorily and capriciously.[93] However, it is important to note that *Furman* provided no guidelines as to what type of procedures would be constitutionally permissible.

The states responded by passing two types of revised death penalty statutes in an attempt to comply with the *Furman* decision. One type was a mandatory death penalty statute that eliminated jury discretion entirely,[94] and the second was a death penalty statute that maintained sentencing discretion in the jury, but provided legislative standards to guide the sentencing process.[55]

[86] *See* Furman v. Georgia, 408 U.S. 238.248 n.ll (1972) (Douglas, J., concurring) (if the eighth amendment renders arbitrary the imposition of death penalty unconstitutional, then it must also be unconstitutional under the due process clause as well.) It may be that the Court placed restrictions on the death penalty through the eighth amendment because one year prior to its decision in Furman v. Georgia, 408 U.S. 238, 242 (1972), the Court had decided McGautha v. California. 402 U.S. 183 (1971) that held the failure to guide the juries' discretion on capital sentencing decisions did not violate due process. However, *McGautha* is relegated to a meaningless status in subsequent cases. *See* Linda E. Carter, *Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness.* 52 OHIO Sr. LJ. 195, 202 (1991).

See generally Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing,* 94 Yale LJ. 351 (1984).

87. See Linda E. Carter, *Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness, , id.* at 202.

[88] *See supra* notes 7-9 and accompanying text.

89. The opinion was per curiam, however, the five justices who supported the decision wrote separately. *Fumum,* 408 U.S. at 240. Chief Justice Burger and Justices Powell, Rehnquist, and Blackmun dissented

[90] *See* Welsh S. White, THE DEATH PENALTY in THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 5 (1987).

[91] *See generally,* Barry Nakell & Kenneth A Hardy, THE ARBITRARINESS OF THE DEATH PENALTY 82 (1987).

92. Furman, 408 U.S. at 310 (Stewart, J. concurring).

93. *Id* at 255-57 (Douglas, J. concurring).

94. See, e.g., Woodson. 428 U.S. at 299-300.

95. See, e.g., Gregg, 428 U.S. at 164-165.

The Court's most favorable disposition toward these first statutes that it reviewed after *Furman* was the death penalty statute in *Gregg v. Georgia*™ In that case, the Court held that the concerns about the arbitrary or capricious imposition of the death penalty it had previously expressed in *Furman* could be "met by a carefully drafted statute that ensure[ed] that the sentencing authority [was] given adequate information and guidance."[97] The new Georgia sentencing procedures focused the jury's attention on the particularized characteristics of the individual defendant and his crime.[5]® The jury was permitted to consider any aggravating or mitigating circumstances, but it had to find and identify at least one statutory aggravating factor before it could impose a penalty of death." The Court found this channeling of the jury's discretion vital to the constitutionality of the Georgia statute.[100]

But as anxious as the Supreme Court was to sing the praises of Georgia's limited and directed sentencing discretion,[101] the Court invalidated the mandatory death penalty statute in *Woodson* v. *North Carolina*,[1(E] The Court decided that mandating the death penalty for specified crimes was not a constitutionally permissible alternative to unfettered discretion in

96. 428 U.S. 153 (1976).

[97]*Id.* at 195.

98. Id at 207.

99. Id at 208. The statute provided in part "[A] sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed."

[100.] *Id* at 207. The Court stated that "No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines."

See Lowenfield v. Phelps, 108 S. Cl. 546 (1988), in which the Court explicated the purpose of aggravating circumstances in death penalty sentencing; "the use of aggravating circumstances is not an end in itself, but a means of genuinely narrowing the class of death eligible persons and thereby channeling the jury's discretion." *Id* at 554. The finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty.

101. In *Junk v. Texas*, 428 U.S. 262 (1976), the Supreme Court held up another type of capital sentencing statute that did not adopt the aggravating-mitigating circumstances approach of *Gregg*, but essentially served an identical purpose. The Teas statute narrowed the categories of crime for which the death penalty could be imposed, and required the jury to answer affirmatively to three questions before a death sentence wxild be imposed. *Id* at 269.

The second question, that asks whether the defendant would constitute a continuing threat to society, was construed by the Texas Court of Criminal Appeals to allow any relevant mitigating evidence to be considered *Id* at 273. And the other two questions, that referred to deliberateness of the action and reasonableness of the response if the action was provoked, «ere actually aggravating circumstances much like those in the Georgia statute.

In essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed, and similarly alio«« consideration of any mitigating circumstancea. Although mechanically different, the substance of the Georgia and Taos statutes were the same.

[102.] 428 U.S. 280 (1976).

sentencing.[103] Such statutes did not permit consideration of the character and record of the individual offender and the circumstances of the particular offense.[104] Without this kind of particularized consideration, there would be no assurance that death was an appropriate punishment in a specific case.[105]

The next step for the Supreme Court after establishing the constitutional requirement of an individual sentencing determination was to hammer out the limits, if any, on the sentencer's discretion to consider the circumstances of the crime, the record, and the character of the offender as mitigating factors. In *Lockett* v. *Ohio,*[106] the Court did just that by invalidating an Ohio statute that permitted the sentencer to consider only three mitigating circumstances.[107] The Court determined that the limited range of mitigating circumstances that the Ohio statute allowed the sentencer to consider was incompatible with the Eighth Amendment.[108] In order to meet the constitutional requirement, a death penalty statute must not preclude consideration of any relevant mitigating factors.[109] The Court reasoned that such a rule was necessary to promote the development of "a system of capital

[103]*Id.* at 302.

104Id. at 304.

[105]*Id.* The Court determined that individualized sentencing was a constitutional imperative underlying the eighth amendment: "We believe that in capital cases the fundamental respect for humanity underlying the eighth amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

106. 438 U.S. 586 (1978).

107. The Ohio death penalty statute provided that a sentence of death could not be imposed if any of the following three mitigating circumstances was proven by a preponderance of the evidence: 1. the victim of the offense induced or facilitated the offense; *2.* the offense probably would not have been committed, but for the fact that the offender was under duress, coercion, or strong provocauom or 3. the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity. *Id* at 612-613 (quoting OHIO REV. CODE ANN. § 2929.04(B) (Anderson 1975)).

[108]*Id.* at 608.

[109] The Court concluded that:[T]he eighth and fourteenth amendments require that the sentencer. in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Id.* at 604.

The "rarest kind of capital case" that the Court refened to is the situation in which a prisoner serving a life sentence is found guilty of first degree murder. The Court did not determine whether this would be a situation where a mandatory death sentence would be permissible until it heard Sumner v. Shuman, 107 S. CL 2716 (1987).

In Sumner, a Nevada statute mandated the death penalty for a prison inmate who was convicted of murder while serving a life sentence. *S*t infra* p. 2719. The statute provided no guidance to the jury about bow to make the sentencing decision or what, if any, individual factors it was to consider. The Court followed Lockett, holding that since such a scheme failed to provide information to enable the jury to consider the character and individual circumstances of a defendant prior imposition of a death sentence, the scheme violated the eighth amendment *Id.*

punishment at once consistent and principled, but also humane and sensible to the uniqueness of the individual."[110] By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognized that any consistency produced by ignoring individual differences is a false consistency.[111]

But beyond merely permitting the defendant to offer any relevant mitigating evidence, the Court has interpreted *Lockett* to require the sentencer to listen.[112] In *Eddings* v. *Oklahoma*,[113] the trial judge, in imposing the death sentence, found that the State had proved each of the alleged aggravating circumstances, but he refused, as a matter of law, to consider in mitigation the circumstances of the petitioner's unhappy upbringing and emotional disturbance. The trial judge found that the only mitigating factor was petitioner's youth, which was held to be insufficient to outweigh the aggravating circumstances.

The Court held that such limitations placed upon the consideration of mitigating evidence violated *Lockett*.[114] Just as the state statute may not preclude the sentencer from considering any mitigating factor,[113] neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.[116] The sentencer, or the reviewing court, may determine the weight to be given relevant mitigating evidence, but they may not fail to consider it by excluding such evidence from their deliberation.[117]

The Supreme Court has attempted to provide guidelines for a permissible death penalty statute that serve both the goals of measured, consistent application, as well as fairness to the accused. The Court concluded that the danger of an arbitrary and capricious death penalty can be prevented through careful statutory drafting that ensured the sentencing authority is given adequate information and guidance. Statutes that require the jury to find at least one enumerated aggravating circumstance before imposing the death penalty, and additionally require that the jury consider any relevant mitigating circumstances, are held to reduce the risk that the death penalty would be imposed in spite of factors that might call for a less severe penalty.

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110. Lockett, 438 U.S. at 598.

111. Eddings v. Oklahoma, 455 U.S. 112 (1982).

112. Id. at 115.

113. 455 U.S. 112 (1982).

114. Id. at 114.

115. The Oklahoma statute did permit the defendant to present evidence "as to any mitigating circumstances." *Id* at 115 n.10 (quoting Okla. Seat, tit 21, § 701.10 (1980)).

116. Id

117. Id

I

B. Applicability to Jury Discretion in the Awarding of Punitive Damages

The procedural due process issue of fairness in the context of capital sentencing necessarily focuses on the discretionary component of the determination that death is the appropriate punishment in a given case. Two components of the concern that discretion in capital sentencing be fair are discrimination and arbitrariness.[118] For purposes of the analogy to the punitive damage context, our concern is with arbitrariness rather than with discrimination.[119] In the capital sentencing context, the arbitrariness question is "whether discretion permits the death penalty to be applied randomly, capriciously, irregularly or disproportionately among the qualified defendants without any evident regard for the legal criteria designed to determine the selection."[120]

In the punitive damages context, the procedural due process issue of fairness also has discretion as its focal point, and has been the central concern of the Supreme Court in determining the validity of state punitive damage schemes. After an initial determination of liability has been made, the jury must then determine the amount of the punitive award, if any. It is the lack of adequate guidelines to govern jury discretion in fixing the size of the punitive damage award and the concomitant risk of random and capricious imposition of huge punitive awards that is the central due process issue. As in the capital sentencing context, such an "arbitrary" and therefore unconstitutional system is characterized as one that lacks adequate controls to assure that any determination conforms to the legal standards, and/or does not have adequate safeguards to protect against random or capricious imposition of excessive punitive damage awards.

VIII. CONCLUSION

Although important, empirical data and research are only one aspect of the formula. The traditional judicial approach for developing these so called constitutional or legislative facts necessary for policy decisions has been

118. Barry Nakell & Kenneth A. Hardy. The ARBITRARINESS OF THE DEATH PENALTY 16 (1987).

119. The discrimination question is whether discretion permits the penalty to be deliberately directed disproportionately against certain qualified defendants, not because of the nature of their crimes, but because they belong to a particular class or group, determined by such considerations as race, sex, nationality, religion, or wealth." *Id.* Although it is an interesting hypothesis that corporate or deep pocket defendants might be more prone to have a punitive damage judgment awarded against them there is no empirical evidence that such defendants are "discriminated" against in this manner.

120. Nakell & Hardy, *supra note* 133, at 16.

mostly intuitive.[121] Back to our capital sentencing analogy, when the majority decided *Furman*,[m] determining that the death penalty was being administered too arbitrarily to be constitutional, there was not enough empirical data to support this premise. Nevertheless, they did not hesitate to rely on it. Such intuition is shaped by the accumulated experience of precedent, as well as by the experiences of the Justice's themselves, including their understandings of ethics, morality and fairness. In the absence of an empirical study to the contrary who can say with confidence that intuitive reasoning is less efficient- or just-than formalized and specifically structured guidelines.

121. Compare constitutional facts with adjudicative facts that are the historical facts which are relevant for the determination of a particular case.

122. Furman, 408 U.S. 238 (1972).