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Law, Economics, and Politics: The Untold History of the Due Process Limitation on Punitive Damages

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I. INTRODUCTION

In the 1991 case of *Pacific Mutual Life Insurance Co. v. Haslip*, the Supreme Court held that punitive damage awards may be constrained by the Due Process clause.[1] This decision spawned several sequels, all of which have been characterized as bad constitutional interpretation.[2] Commentators have critiqued these opinions' tenuous connection to the text of the Constitution and their disregard for federalism.[3] Furthermore, prior to *Haslip*,

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1. 499 U.S. 1, 18 (1991).

2. *See, e.g.*, Jim Davis, BMW v. Gore*: Why the States (Not the U.S. Supreme Court) Should Review Substantive Due Process Challenges to Large Punitive Damage Awards*, 46 U. KAN. L. REV. 395 (1998); Michelle J. Carey, Note, BMW of America v. Gore*, A Misplaced Guide for Punitive Damage Awards*, 18 N. ILL. U. L. REV. 219 (1997); Glen R. Whitehead, Note, BMW of North America v. Gore*: Is the Supreme Court Initiating Judicial Tort Reform?*, 16 Quinnipiac L. REV. 533 (1997). Some scholarship has endorsed the Supreme Court's punitive damages jurisprudence, usually applauding the decision as good policy. *See, e.g.*, Thomas H. Dupree Jr., *Punitive Damages and the Constitution*, 70 LA. L. REV. 421 (2010).

3. *See* Davis, *supra* note 2, at 396; Carey, *supra* note 2, at 236-38. *But see* Christine D'Ambrosia, Comment, *Punitive Damages in Light of* BMW of

the argument had been roundly rejected by all courts to consider the issue. So why did the decision come out the way it did? I contend that the argument won acceptance due to a cultural shift, observed by scholar Mark A. Smith, which began in the 1970s: a move towards evaluating social policies based solely on their adherence to free-market ideology.[4] In the face of economic disruptions during the 1970s, conservative and Republican policymakers relied heavily on free-market economic arguments.[5] According to these arguments, any policies that reduce corporate profits—including punitive damages—are impediments to the nation's economic well-being. A majority of the Supreme Court, persuaded by the reasoning long urged by Justice Sandra Day O'Connor, agreed in the *Haslip* case.

In this article, I argue that the Supreme Court's series of punitive damage cases was wholly motivated by these contemporary political considerations. The restrictions imposed by the Court were justified through reference to the Due Process Clause; specifically, that juror discretion was so broad that judicial enforcement of punitive damage awards was unconstitutionally arbitrary.[6] This, however, was a subterfuge. Nothing had changed in punitive damages practice or procedure in centuries. The only thing that had changed was the fact that awards had grown in size and amount and were increasingly assessed against corporate wrongdoers. There is no theoretical reason that this should affect the constitutionality of punitive damages. But, in the midst of a conservative assault on punitive damages, shielding corporate wrongdoers was a defensible position for jurists of the 1970s and 80s.

I provide a brief history and overview of the doctrine of

North America, Inc. v. Gore*: A Cry for State Sovereignty*, 5 J.L. & POL'Y 577, 578-79 (1997).

4. MARK A. SMITH, THE RIGHT TALK: HOW CONSERVATIVES TRANSFORMED THE GREAT SOCIETY INTO THE ECONOMIC SOCIETY 11-15 (2007).

5. *Id.* at 110-30. For discussion of economic arguments by conservative intellectuals, see *id.* at 110-22; for those made by Republican politicians, see *id.* at 123-30.

6. Due to these vague standards, the Constitutional defect can be framed as a problem of notice. If the standards employed by courts are vague and arbitrary, civil defendants cannot receive meaningful notice as to what the consequences of their acts will be. *See infra* note 45 and accompanying text.

punitive damages in Part II. In Part III, I examine attacks on punitive damages from the nineteenth century to the present, paying particular attention to the shift that took place in the 1970s. Part IV is devoted to an analysis of the Supreme Court's jurisprudence regarding the Due Process limitation on punitive damages. I offer a brief conclusion in Part V.

II. A BRIEF OVERVIEW OF PUNITIVE DAMAGES

A. The Doctrine

All damages, including punitive damages, are monetary sums awarded to litigants as the result of a decision by a judge or jury. However, the unique feature of punitive damages is that they are not intended to compensate the party who has suffered an injury—instead, they are intended to punish and to deter wrongdoers from similar conduct in the future.[7] Typically, this portion of the award will be directed to the plaintiff, although some states have passed legislation mandating that a portion of the award go to a state fund.[8]

Punitive damages originally served three significant purposes. First, they allowed juries to award remedies for harms not compensable at common law, such as mental anguish and wounded dignity.[9] Second, they allowed jurors to punish wrongdoers by assessing financial penalties for harmful conduct that caused little or no physical damage.[10] Finally, they served to deter particular parties and, hopefully, other potential wrongdoers.[11] Over time, as courts allowed plaintiffs to recover damages for mental anguish and other intangible harms, the

7. *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008) ("[T]he consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.").

8. *See, e.g.*, ALASKA STAT. § 09.17.020(j) (2008) ("If a person receives an award of punitive damages, the court shall require that 50 percent of the award be deposited into the general fund of the state."); IOWA CODE ANN. § 668A.1 (1998) ("[A]n amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator.").

9. LINDA L. SCHLUETER, PUNITIVE DAMAGES §§ 1.3(C), 1.3(D) (6th ed. 2010).

10. *Id.* § 1.3(B).

11. *Id.* § 1.3(E).

importance of the first goal decreased.[12] But the latter two goals—punishment and deterrence—remain relevant today.

Only the worst of the worst conduct will subject a defendant to a claim for punitive damages. Generally, a defendant's conduct must satisfy two requirements: it must have been intentional, and it must have been reprehensible.[13] Courts often phrase this requirement using a string of colorful adverbs. For example, Hawaii's sample jury instructions inform jurors that: "[y]ou may award punitive damages . . . only if . . . the particular defendant acted intentionally, willfully, wantonly, oppressively or with gross negligence."[14] These instructions reinforce the message that punitive damages are not to be awarded lightly.

In awarding punitive damages, courts and juries are often invited to consider a number of factors. In *Haslip*, the Supreme Court cited with approval several factors considered by the Alabama Supreme Court in reviewing jury awards of punitive damages. While these particular factors were to be considered after trial, they are the same factors judges often instruct juries to consider before issuing an award of punitive damages. The factors included:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm [inflicted] . . . ; (b) the degree of reprehensibility of the defendant's conduct . . . ; (c) the profitability to the defendant of the wrongful conduct . . . ; (d) the "financial position" of the defendant; (e) all the costs of litigation . . . .[15]

Depending on the jurisdiction, jurors may be invited to consider some or all of these factors in determining whether to award punitive damages.

B. The Origin of Punitive Damages

There is a tradition of forcing wrongdoers to pay money as a form of punishment in Anglo-American jurisprudence dating back

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12. *Id.* § 1.4(B).
13. *Id.* § 4.2(A)(2).
14. *Hawai'i Standard Civil Jury Instructions, Instruction No. 8.12*, SUP. CT. HAW. (Oct. 11, 1999), http://www.courts.state.hi.us/docs/legal_references/jury_instructions_civil.pdf.
15. Pac. Mutual Life. Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991).

to the thirteenth century.[16] The modern doctrine of punitive damages, however, dates back to a pair of English cases from 1763 that involved John Wilkes, a colorful seventeenth-century Member of Parliament and a stalwart advocate of a free press.[17] Wilkes disliked King George III and had particular animosity towards John Stuart Bute, the King's trusted minister. He fiercely attacked both officials in print. George III retaliated by waging a battle against Wilkes and his printing press. The ensuing events made Wilkes a hero to many eighteenth-century Britons and Americans.[18]

An essay Wilkes authored in *The North Briton* number forty-five infuriated King George so much that that he promptly issued a warrant for Wilkes's arrest.[19] This retaliatory decision, however, was made against the King's better instincts. Because Wilkes was a Member of Parliament, it was fairly clear that his editorial was privileged under English law.[20] The Crown officials proceeded anyway. Not knowing the identity of the publishers, the Crown engaged in an overbroad search and arrested forty-nine individuals in its search for three publishers.[21] Wilkes was eventually discovered and arrested.[22] Soon after, the officials pillaged Wilkes's house, gathering as many of his papers and writings as they could in the hopes of finding something incriminating.[23]

Wilkes and others decided to challenge the assaults on their homes and property. At least forty cases were filed relating to the

16. SCHLUETER, *supra* note 9, § 1.3(A).

17. For more on Wilkes, see ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY (2006).

18. *Id.* at 1-2. Wilkes was so famous on this side of the Atlantic that two towns—Wilkesboro, North Carolina and Wilkes-Barre, Pennsylvania—were named after him. *Id.* at 2.

19. *Id.* Specifically, Wilkes blasted the government for various abuses it had allegedly committed. *Id.* at 100. He predicted public resistance to the government's oppressive acts: "[A] spirit of liberty ought . . . to arise, and I am sure ever will, in proportion to the weight of the grievance [we] feel." *Id.*

20. *Id.* at 101. Also, his arrest was effectuated by use of a general warrant, the offensive device that would later inspire the Fourth Amendment protection against unreasonable searches and seizures. *See id.*

21. *Id.* at 105.

22. *Id.* at 107.

23. *Id.* at 109.

North Briton search.[24] The English judiciary responded by holding the government accountable for its unnecessarily expansive search. Large jury awards were upheld in two cases, *Huckle v. Money* and *Wilkes v. Wood*. These cases marked the birth of the modern doctrine of punitive damages. In *Huckle v. Money*, a wrongfully arrested printer (Huckle) sued the Crown official for trespass and false imprisonment.[25] This was in spite of the fact that, after his arrest, Huckle was confined for only six hours and was treated quite well.[26] At most, Huckle suffered £20 in damages, but an outraged jury awarded him £300.[27] Denying a motion for a new trial, Lord Camden of the Court of Common Pleas upheld the jury's verdict, commenting that: "[I] think [the jury] ha[s] done right in giving exemplary damages. To enter a man's home by virtue of a name-less warrant in order to procure evidence is worse than the Spanish Inquisition, a law under which no English-man would wish to live an hour."[28]

Wilkes's own challenge to the wrongful search and seizure of his effects was also successful. He sued Undersecretary Robert Wood for his role in the affair and was awarded the whopping sum of £1000.[29] Lord Chief Justice Pratt affirmed the jury's award, refusing to limit Wilkes' recovery to the nominal damage incurred by the trespass.[30] Lord Chief Justice Pratt opined that "[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."[31] By allowing Wilkes to recover well in

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24. *Id.* at 133.

25. SCHLUETER, *supra* note 9, § 1.3(A); *see also* CASH, *supra* note 17, at 132-33.

26. SCHLUETER, *supra* note 9, § 1.3(A).

27. *Id.*

28. *Id.* (citation omitted) (internal quotation marks omitted).

29. CASH, *supra* note 17, at 160; *see also* Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Master: The American Civil Justice System as a Background of Social Theory*, 68 BROOK. L. REV. 1, 56 (2002). Based on an online calculator developed by Professor Eric Nye at the University of Wyoming, £1000 in 1773 is equal to $136,357.89 in 2009 U.S. dollars. *See* Eric Nye, *Pounds Sterling to Dollars: Historical Conversion of Currency*, U. WYO., http://uwacadweb.uwyo.edu/numimage/currency.htm (last visited Mar. 23, 2012).

30. Jeffrey R. White, *State Farm and Punitive Damages: Call the Jury Back*, 5 J. HIGH TECH. L. 79, 81 (2005).

31. Leah R. Mervine, Comment, *Bridging the "Philosophical Void" in*

excess of his actual damage, Wilkes's jury and Chief Justice Pratt sent a message to the Crown: outrageous behavior will be punished even if the physical damage caused is negligible.

C. The Growing Acceptance of Punitive Damages

Punitive damages were imported into the American colonies and quickly became a fixture of American jurisprudence. Indeed, Wilkes was lauded as a heroic defender of liberty in revolutionary America.[32] The practice was not uncontroversial, and some states refused to award punitive damages under any circumstances. But these states were a minority, and punitive damages were a widely accepted remedy by the mid-nineteenth century. In an 1852 opinion, the United States Supreme Court declared that "if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question [of the validity of punitive damages] will not admit of argument."[33] More than 150 years later, punitive damages are still available to litigants. However, they have increasingly admitted of argument and have become subject to Constitutional restraints.[34]

III. THE ORIGINS OF THE DUE PROCESS LIMITATION ARGUMENT

A. The Historical Debate Over Punitive Damages

Though punitive damages achieved acceptance in American jurisprudence, they have always faced criticism from a small but determined minority. Early critics offered a formalistic critique.[35] They argued that damages in civil actions must compensate for the harm inflicted, no more and no less. Damages awarded as punishment or for additional compensation violated the order and symmetry of the law.[36]

Punitive Damages: Empowering Plaintiffs and Society Through Punitive Damages, 54 BUFF. L. REV. 1587, 1599 (2007) (citation omitted) (internal quotation marks omitted).

32. CASH, *supra* note 17, at 265 (noting that "Wilkes and Liberty" had become a "battle cry in America").

33. Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).

34. *See infra* Part IV.

35. *See, e.g.*, Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931).

36. *See* Rustad & Koenig, *supra* note 29, at 79-80 (2002). Professor Simon Greenleaf, author of an influential treatise on evidence, was perhaps

These critiques could be quite forceful. Perhaps the most vociferous example came from Judge Foster of the New Hampshire Supreme Court in 1872.[37] Reviewing an award of actual and punitive damages in a case of assault and battery, Foster delivered a "very lengthy"[38] discussion of the doctrine of punitive damages. He expressed outrage at the fact that courts awarded damages in excess of actual damages, and argued that the imposition of punitive damages would constitute double jeopardy if a defendant was subject to criminal liability for the act in question. In an oft-quoted passage, Foster expressed his disgust at the doctrine of punitive damages: "What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law."[39] Given this searing indictment, it is not surprising that the court set aside the jury's punitive damages award without even discussing the facts of the case.[40]

The formalistic, policy-based argument continued well into the twentieth century.[41] But while the decline of legal formalism in the twentieth century quieted many critics,[42] the critics did not disappear. They renewed their attacks in the late nineteenth century under a new theory: the notion that punitive damages violate the Due Process clause.

B. The Due Process Argument

1. Early Twentieth Century Challenges

Litigants have alleged for over a century that particular punitive damages awards violate the Due Process Clause of the Constitution. Reported examples of Due Process challenges to punitive damages awards first appeared around the turn of the twentieth century. These arguments, however, were case specific

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the most well-known advocate of this position. *See id.*

37. Fay v. Parker, 53 N.H. 342, 342-43 (N.H. 1872).

38. This (accurate) description is borrowed from the Oregon Supreme Court. *See* Van Lom v. Schneiderman, 210 P.2d 461, 469 (Or. 1949).

39. *Fay*, 53 N.H. at 382.

40. *Id.* at 342-43.

41. *See, e.g.*, Morris, *supra* note 35.

42. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 546 (3d ed. 2005) (explaining the decline of formalism).

and not the result of any general argumentative strategy. Instead, litigants challenged punitive damages awarded under particular statutes and causes of action.[43] These arguments proved wholly unsuccessful.[44]

The precise nature of the Due Process argument is difficult to nail down. However, the version adopted by the Supreme Court appears to be that the Due Process Clause's notice requirement renders punitive damage verdicts void.[45] According to this argument, defendants who may be found liable for punitive damages cannot predict whether their intentional or grossly negligent behavior would result in a punitive damages award and, if so, how much would be assessed.

Corporations were the first and most frequent challengers of punitive damage verdicts. For example, railroad companies challenged the excessiveness of punitive awards assessed under the doctrine of vicarious liability.[46] Also, insurance companies sought to invalidate statutes that permitted awards of punitive damages against insurers who in bad faith refused to settle claims.[47] Courts were unsympathetic to these arguments.[48] They summarily dismissed these claims, deferring to judicial precedent

43. *See, e.g.*, Niebyski v. Welcome, 108 A. 341, 343 (Vt. 1919) (challenging a plaintiff's ability to recover punitive damages for rape).

44. *See, e.g.*, U.S. Cast Iron Pipe & Foundry Co. v. Sullivan, 3 F.2d 794, 795-96 (5th Cir. 1925); Riser v. S. Ry. Co., 46 S.E. 47, 51 (S.C. 1903). I have deliberately excluded those jurisdictions that never recognized punitive damages in the first instance. *See, e.g.*, Sunderland Bros. Co. v. Chicago, B. & Q. R. Co., 177 N.W. 156, 157 (Neb. 1920) ("A statute which takes property from one individual and gives it to another, not in compensation for any injury sustained, is contrary to the provisions of the [Nebraska] Constitution securing property rights of private individuals.").

45. *See* BMW of North America, Inc. v. Gore, 517 U.S. 559, 586-88 (1996) (Breyer, J., concurring).

46. *See* Hull v. Seaboard Air Line Ry., 57 S.E. 28, 29 (S.C. 1907); Reeves v. Southern Ry., 46 S.E. 543, 545 (S.C. 1904) ("Is a master liable in punitive damages for the willful tort of a servant? This principle has been settled so long and recognized so often in this state . . . that we do not deem it necessary to add any authorities to those cited . . . .").

47. *See, e.g.*; Mo. State Life Ins. Co. v. Lovelace, 58 S.E. 93 (Ga. App. 1907) (rejecting a challenge to the constitutionality of a state statute as it was previously upheld by the U.S. Supreme Court); Barber v. Hartford Life Ins. Co., 187 S.W. 867, 870 (Mo. 1916) (refusing to entertain a due process argument due to repeated rejection of the argument by the U.S. Supreme Court and the Missouri Supreme Court).

48. *See supra* notes 46-47 and accompanying text.

or legislative authority.[49]

2. The 1960s: Opening Shots

Arguments against punitive damages emerged again with newfound vigor in the 1960s. Critics, including judges and commentators, assailed the theoretical basis of the doctrine and issued a renewed attack on punitive damages under the Due Process Clause. Significantly, these attacks expressed no opinion on the effect of punitive damage awards on the American economy. They also proved unpersuasive to courts, who continued to award punitive damages.

Two publications from 1965 are representative of this era of punitive damage criticism: one a judicial dissent, the other a scholarly article. The judicial dissent came from Judge Richard Rives of the Fifth Circuit Court of Appeals in the case of *Curtis Publishing Co. v. Butts.*[50] Rives was a member of the so-called "Fifth Circuit Four," a group of Southern judges who bravely and consistently waged a judicial battle against Southern segregation following *Brown v. Board of Education.*[51] Judge Rives was appalled by Southern States' treatment of and lack of concern for African-Americans.[52] Perhaps it was this distaste for state-imposed or state-condoned punishment that informed Judge Rives' beliefs about punitive damages.

In *Butts*, a majority of the Fifth Circuit upheld a punitive damages award of $400,000 for the publication of a defamatory article. The Court reasoned that although the award was quite large, the jury had acted properly and the award was otherwise in accordance with Georgia law.[53] Judge Rives vehemently disagreed. He voiced several objections to the award, including several constitutional ones. Looking back, his dissent reads like a preview of the U.S. Supreme Court's opinion in *Pacific Mutual Life Insurance v. Haslip*.

First, Judge Rives assessed the validity of the award by

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49. *Id.*

50. 351 F.2d 702, 726-33 (5th Cir. 1965) (Rives, J., dissenting).

51. *See* Anne S. Emanuel, *Forming the Historic Fifth Circuit: The Eisenhower Years*, 6 TEX. F. ON C.L. & C.R. 233, 245-46, 258-59 (2002).

52. *Id.* at 236-242.

53. *Butts*, 351 F.2d at 717-18.

comparing it to legislative sanctions for similar conduct.[54] The maximum fine for criminal libel in Georgia's was $1000. Rives then compared this amount with the punitive award using a mathematical ratio.[55] This produced a large disparity: the ratio between the fine and the reduced amount on appeal was 400-to-1 and the ratio between the fine and the jury's original award was 3000-to-1.[56] He also argued that because the punitive damages resembled a criminal fine, defendant Curtis Publishing should have received criminal constitutional protections.[57]

Second, he made the argument that the punitive award was void because there was no "definite standard or controlling guide to govern the award."[58] The standards given to the jury were "vague" and "arbitrary" and, thus, the jury could not possibly produce a verdict that was the result of a rational process.[59] Implicit in this argument is the idea that due process prohibits the government from acting irrationally. Though Judge Rives claimed that his discussion was limited to the case at hand, it could be easily applied to future cases since the procedures employed by the trial court in that case were typical of those used in Georgia and throughout the country.[60]

Professor James D. Ghiardi, then Research Director for the Defense Research Institute (DRI), echoed Judge Rives' sentiments in an article written for the American Bar Association's Section of Insurance, Negligence, and Compensation Law.[61] The Defense Research Institute was founded in 1960 to protect the interests of the defense bar, a group consisting largely of corporations and

54. *Id.* at 726 (Rives, J., dissenting).
55. *Id.* (Rives, J., dissenting).
56. *Id.* (Rives, J., dissenting).
57. *Id.* at 727-28 (Rives, J., dissenting). These safeguards include proof of guilt beyond a reasonable doubt, the rights of a criminal indictment and confrontation, and the rights against self-incrimination and double jeopardy.
58. *Id.* at 728-29 (Rives, J., dissenting).
59. *Id.* at 729 (Rives, J., dissenting).
60. *See id.* at 727 (Rives, J., dissenting).
61. For more information regarding Professor Ghiardi, see *Faculty and Staff Directory: James D. Ghiardi*, MARQ. U. L. SCH., http://law.marquette.edu/faculty-and-staff-directory/detail/2010874 (last visited Nov. 13, 2011); *see also* DAVIDSON REAM, A HISTORY OF DRI: SERVING THE DEFENSE BAR (2005), *available at* http://www.dri.org/ContentDirectory/Public/About/DRI-History 2005.pdf.

insurance companies.[62] The article was titled *Should Punitive Damages Be Abolished?—A Statement for the Affirmative.*[63] The article lambasted punitive damages, echoing the criticisms voiced by Judge Foster almost a century ago.[64] In particular, Ghiardi railed against plaintiffs and their lawyers, the latter of whom were perpetually unable to "satisfy the[ir] insatiable appetite for . . . larger and larger . . . verdict[s] . . . ."[65] Like Judge Foster of the New Hampshire Supreme Court, Ghiardi's constitutional objection to the doctrine was that punitive damages awarded in a civil suit could constitute double jeopardy if the defendant was also subject to criminal liability.[66]

Despite the arguments of Judge Rives, Ghiardi, and others, there was no widespread change in punitive damages practice. This occurred a decade later when several cultural factors converged to convince many Americans that punitive damages were a threat to economic stability.

3. The 1970s: The Economic Revolution

Scholar Mark A. Smith has persuasively argued that various economic disruptions of the 1970s, including the oil embargo and stagflation,[67] produced widespread economic insecurity.[68] This insecurity persists to the present day.[69] Surveys of Americans from 1973 to the present reveal that Americans generally have pessimistic predictions for the American economy[70] and their

62. REAM, *supra* note 61, at 1-3.

63. James D. Ghiardi, *Should Punitive Damages Be Abolished?—A Statement for the Affirmative*, A.B.A. SEC. INS. NEGL. & COMPENSATION L. 282 (1965).

64. Ghiardi explicitly cited Judge Foster's infamous comment with approval. *See id.* at 282.

65. *Id.* at 290.

66. *Id.* at 287-88. The Defense Research Institute officially weighed in on the issue of punitive damages in a 1969 monograph titled *The Case Against Punitive Damages. See* DEFENSE RESEARCH INSTITUTE, THE CASE AGAINST PUNITIVE DAMAGES (1969).

67. For an interesting and concise description of the oil embargo and the resulting economic disruption, see KENNETH C. DAVIS, DON'T KNOW MUCH ABOUT HISTORY 506-9 (2003).

68. SMITH, *supra* note 4, at 17.

69. *See id.*

70. *Id.* at 51-60. Specifically, Americans were decidedly negative about the national economy from 1973 until 1983. There was an increase in optimism in the 1990s, but this proved fleeting as predictions became gloomy

personal futures.[71]

Conservatives and Republicans picked up on these trends and began to advocate for policies that spoke to this insecurity.[72] Increasingly, the justifications offered for conservative policies became economic ones.[73] There are numerous theories about how to best promote economic growth, but conservatives and Republicans grew to rely mostly on laissez faire economic arguments.[74] There are two reasons for this. First, conservatives and Republicans endeavored to distinguish their beliefs from the dominant Keynesian form of economics. Second, many of the important figures in the conservative movement—most notably William F. Buckley, Jr.—were libertarians who opposed any and all government regulation of private industry.[75] Libertarian theory is not necessarily consistent with pro-business ideology; however, the two beliefs coalesced comfortably in the minds of many conservatives.

Additionally, private industry looked appealing in the wake of government failure and scandal during the 1960s and 70s.[76] After all, executive branch officials had been responsible for Watergate, and the executive and legislative branches teamed up to wage the disastrous war in Vietnam. Additionally, the failure of President Lyndon Johnson's well-intentioned but flawed Great Society

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again around the year 2000. *See id.* at 51-52.

71. *Id.* at 53.

72. *See id.* at 15; *see also id.* chapters five (conservatives) and six (Republicans).

73. *Id.* at 14-15.

74. *Id.* at 110-12. Smith notes that conservatives made free-market arguments decades earlier; however, these were cast in terms of promoting freedom. In the 1970s, the rationale for these arguments shifted to economic productivity. *Id.* at 110-19.

75. Ellen Byers, *Corporations, Contracts, and the Misguiding Contradictions of Conservatism*, 34 SETON HALL L. REV. 921, 936-7 (2004) ("The first identifiable group of conservatives to emerge post-war consisted of a new breed of classical liberals who endeavored to steer America's political development away from government intervention and back toward[s] . . . individualism . . . [These included] the young William F. Buckley, Jr."). Buckley himself did not eschew the label. One of his many books is titled *Happy Days Were Here Again: Reflections of a Libertarian Journalist* (1993).

76. *See* PATRICK ALLITT, THE CONSERVATIVES: IDEAS & PERSONALITIES THROUGHOUT AMERICAN HISTORY 211 (2009); Mich. Sup. Ct. Hist. Soc'y, Placek v. Sterling Heights, *Civil Wrongs and the Rights Revolution*, 88 MICH. B. J. Mar. 2009, at 6, 10.

programs suggested that the government was incapable of solving social problems. All of this contributed to the perception that, in Jimmy Carter's famous phrase, the country was suffering from a "crisis of confidence."[77] A renewed commitment to domestic industry appeared to be a cure.

In arguing that they were for economic security, conservatives and Republicans implied that liberals and Democrats were not. It was a successful strategy. Conservative anti-governmental attitudes thought discredited by the "scale and scope" of the Great Depression suddenly enjoyed renewed legitimacy.[78] These arguments were disseminated through a network of journals and think tanks created in the 1970s and 80s. Corporations and industry lobbying groups such as the Defense Research Institute, beneficiaries of these policies, also joined the fray.[79]

The number of conservative journals doubled from 1950 to 1980.[80] This success may fairly be attributed to the popularity of William F. Buckley Jr.'s *National Review*.[81] Founded in 1954, *National Review* revolutionized the field with its talented staff including Buckley, Russell Kirk, and Frank Meyer. *National Review* was a perennial foe of governmental regulation of the economy, but it increasingly resorted to free market arguments to make its case starting in the 1970s.[82]

Another product of the 1970s was the partisan think tank, a conservative invention.[83] Before the 1970s, think tanks did not expressly commit themselves to any particular ideological or political goal.[84] This changed with a self-conscious effort by conservatives to produce research that affirmed the wisdom of free

77. The phrase was used by Jimmy Carter in a Presidential address delivered on July 15, 1979. *"Crisis of Confidence" Speech* (July 15, 1979), MILLER CTR. PUB. AFF. U. VA., http://millercenter.org/scripps/archive/speeches/detail/3402 (last visited Feb. 22, 2012) (providing a video and transcript of the speech).

78. SMITH, *supra* note 4, at 81 ("The scale and scope of the Depression had undermined the belief that government should stay out of the economy.").

79. *Id.* at 73-94.

80. *Id.* at 85, Figure 4.1.

81. *Id.* at 83.

82. *See id.* at 107-10.

83. *Id.* at 87.

84. *Id.* at 86-87.

market economics.[85] Thus were born the Heritage Foundation in 1973, the Cato Institute in 1977, and the Manhattan Institute (originally the International Center for Economic Policy Studies) in 1978.[86] A central goal of each of these think tanks was, and is, the promotion of free market economic policies.[87] These organizations have exerted significant influence on policy makers.[88]

Many businesses and industry groups threw their support behind conservative think tanks.[89] They also pressed their usual arguments against governmental regulation and the imposition of legal liability, which were favorably received in the free market climate of the 1970s and 80s. One such group was the United States Chamber of Commerce.[90] In a report composed for the organization's thirtieth anniversary in 2007, the litigation arm of the Chamber of Commerce boasted of filing amicus curiae briefs in every Supreme Court case involving constitutional challenges to punitive damages.[91]

The growing free market movement reached its apex with the election of Ronald Reagan in 1980. Reagan welcomed many pro-business figures into his inner circle such as William J. Casey, founder of the Washington Legal Foundation—yet another conservative think tank.[92] Reagan was a reader of *National*

85. *See id.* at 86-87.

86. *Id.* at 89.

87. *See About*, HERITAGE FOUND., http://www.heritage.org/About/ (last visited Feb. 22, 2012) ("[Our] mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense."); *Cato's Mission*, CATO INST., http://www.cato.org/about-mission.php (last visited Feb. 22, 2012) ("The mission of the Cato Institute is to increase the understanding of public policies based on the principles of limited government, free markets, individual liberty, and peace."); MANHATTAN INST. FOR POL'Y RESEARCH, http://www.manhattan-institute.org/ (last visited Feb. 22, 2012) (a banner on the home page reads: "The mission of the Manhattan Institute is to develop and disseminate new ideas that foster greater economic choice and individual responsibility").

88. SMITH, *supra* note 4, at 91-92.

89. *Id.* at 90.

90. *See generally About the U.S. Chamber of Com.*,U.S. CHAMBER COM., http://www.uschamber.com/about/ (last visited Feb. 24, 2012).

91. NATIONAL CHAMBER LITIGATION CENTER, 30TH ANNIVERSARY REPORT 11 (2007).

92. JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 180 (2004). Casey was appointed director of the

Review and a stalwart opponent of government regulation.

4. The Free Market Revolution in the Legal Community

Free market principles were also gaining strength in American law schools. The Federalist Society, a conservative legal organization, was founded just two years after Reagan's election in 1982.[93] Although the organization includes both "conservatives and libertarians,"[94] the tenor of the organization is decidedly libertarian.[95] But perhaps no development captures the growth of free market ideology like the law and economics movement of the 1970s.[96] The movement seeks to explain law in economic terms and advocates for legal policies that best promote economic efficiency. Economic efficiency, however, is code for unregulated free market economics.[97] These policies obviously benefit large businesses, which have and continue to offer financial support to law and economics programs across the nation.[98]

Against this conservative backdrop, the tone of legal scholarship discussing punitive damages changed.[99] The

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CIA by Reagan. He was also the head of Reagan's election campaign. *Id.*

93. *Our Background*, FEDERALIST SOC'Y http://www.fed-soc.org/aboutus/id.28/default.asp (last visited Feb 24, 2012).

94. *Id.*

95. The Federalist Society's "Conservative & Libertarian Pre-Law Reading List" is revealing in this regard. It organizes reading recommendations for pre-law students into seven categories. The first is "Law 101," followed by "Economics 101" and "Law and Economics." Section two begins with the bold statement that: "[t]o gain a fuller understanding of the law, a student should seek to understand basic microeconomics." Also recommended to pre-law students are the websites of the Cato Institute and Heritage Foundation. *See Conservative & Libertarian Pre-Law Reading List*, FEDERALIST SOC'Y http://www.fed-soc.org/resources/id.65/default.asp (last visited Feb. 22, 2012).

96. Eric M. Fink, *Post-Realism, or the Jurisprudential Logic of Late Capitalism: A Socio-Legal Analysis of the Rise and Diffusion of Law and Economics*, 55 HASTINGS L J. 931, 945 (2004).

97. *See id.* at 945-46 ("Law and Economics . . . serve[s] to 'legitimate and justify the newly emergent forms of domination' of late capitalism . . . . [I]t does so. . . by contributing to the hegemony of neo-Liberal ideology such that pro-corporate capitalist outcomes come to appear universal, rather than particular, and as common sense, rather than contested." (citation omitted) (footnote omitted)).

98. *See id.* at 948-49.

99. *See, e.g.*, John Calvin Jeffries, Jr., *A Comment on The Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 139 (1986); David

immediate impetus for this was the products liability revolution of the 1960s. Punitive awards in products liability cases produced large, visible sanctions against manufacturers.[100] These multi-million dollar awards undoubtedly dipped into corporate budgets, but they were not being assessed haphazardly. In order to recover punitive damages, plaintiffs had to prove that a manufacturer engaged in conscious wrongdoing in the design or manufacturing of a product.[101] Thus, punitive awards were imposed on those companies that made deliberate choices to sacrifice safety features in order to save money.

This fact went unrecognized in much of the scholarly literature. Commentators ignored that corporate defendants were being punished for intentional decisions that proved unpalatable to juries. David G. Owen, who endorsed the wisdom of awarding punitive damages in products liability litigation in 1976, had changed his mind just six years later.[102] Writing in the Chicago Law Review in 1982, he declared that: "[T]he increasing number and size of [punitive damages] awards may fairly raise concern for the future stability of American industry."[103] Other legal commentators were equally if not more dramatic. James B. Sales and Kenneth B. Cole Jr., writing in a 1984 article entitled *Punitive Damages: A Relic That Has Outlived Its Origins*, opined that "theoretical arguments mask the archaic and destructive nature of the punitive damages doctrine"[104] and that "[r]esponsible jurisprudence . . . argues forcefully in favor of relegating this legal dinosaur to an era that long since has

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G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 6 (1982); James B. Sales & Kenneth B. Cole Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1118 (1984). *See also* Jewell Hargleroad, *Punitive Damages: The Burden of Proof Required by Procedural Due Process*, 22 U.S.F. L. REV. 99, 99 n.1 (1987). For additional commentary sounding the punitive damages alarm, see Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 2 (1992).

100. *See* Owen, *supra* note 99, at 3-4.

101. This remains the case today. *See* Mark S. Dennison & Warren Freedman, *Punitive Damages in Products Liability Litigation*, 54 AM. JUR. TRIALS 443, § 1 (1995).

102. Owen, *supra* note 99, at 6.

103. *Id.*

104. Sales & Cole, *supra* note 99, at 1118.

passed."[105]

Even acclaimed scholar John Calvin Jeffries got swept up in the anti-punitive damages fervor. In an article devoted to a discussion of the constitutionality of punitive awards, he offered his analysis of the American tort system.[106] His position relied on dubious logical and causal assumptions. First, he argued, as evidenced by "the newspapers," the "American civil liability system [was] approaching a crisis."[107] Next, he declared that punitive damages were a "prominent aspect" of the crisis.[108] This led him to conclude that punitive damages were "out of control."[109]

Professor Jeffries assertions were not supported by citations, and nor could they have been. The basis of critics' complaints was that punitive damages were "out of control." But "out of control" is merely a subjective complaint that does not explain anything. What Professor Jeffries and other critics meant to say was that punitive verdicts were increasing in size and amount. And this was true: tort verdicts, which often included punitive damages, were on the rise.[110] In a startling and likely representative statistic, tort awards in Cook County, Illinois went from $52,000 in 1960 to $1.2 million in 1984.[111] Many saw this as a burden on manufacturers, who, in turn, burdened the public by raising prices on goods and services to compensate for litigation costs.[112] Whatever the validity of this argument, it is indefensible as applied to punitive damages awards. A punitive damages award means that a company committed an intentional or grossly negligent act. The American tort system allows people and corporations to engage in such activity but, if they choose to, they must pay for making such decisions.

However, free market arguments enjoyed such legitimacy that defendants who intentionally produced unsafe products were portrayed as victims. This argument would have been

105. *Id.* at 1119.
106. Jeffries, *supra* note 99, *passim*.
107. *Id.* at 139.
108. *Id.*
109. *Id.*
110. *See* Mich. Sup. Ct. Hist. Soc'y, *supra* note 76, at 10.
111. *See id.*
112. *See id.* ("One West Virginia Supreme Court justice opined, 'Much of my time is devoted to ways to make business pay for everyone else's bad luck.'" (citation omitted)).

unfathomable in the wake of World War II, but it gained traction in a climate hospitable to anti-regulatory, pro-corporation sentiments. The stage was thus set to renew constitutional attacks on punitive damages, and attorneys for the Aetna Life Insurance Company got the chance to do so before the Supreme Court in 1986.

IV. THE SUPREME COURT'S PUNITIVE DAMAGE JURISPRUDENCE

A. Introduction

The issue of the constitutionality of punitive damages first reached the U.S. Supreme Court in 1986 and was dismissed. But, as the years went on, the theory quickly gained adherents. The speed with which anti-punitive damages sentiment took hold on the Court was incredible. Within five years of rejecting a constitutional challenge, the Supreme Court had reversed course and held that punitive damages were constrained by the Due Process Clause.[113]

We may never know what conversations the Supreme Court Justices had on this issue, and we will certainly never know what went through their minds. However, an educated guess can be made based on the Justices' written opinions and personalities. Justice Sandra Day O'Connor, the Court's most vocal critic of punitive damages, appears to have been the driving force behind the punitive damage limitation.[114] Her opinions read much like the legal literature of the time, emphasizing that punitive damages were large, out of control, and to blame for the country's economic decline.[115]

While Justice O'Connor's distaste for large punitive damage awards was surely influenced by the negative press afforded punitive damages in the 1970s and 80s, the roots of her aversion are deeper.[116] O'Connor was influenced by the views of her father,

113. *Compare* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) *with* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

114. Patrick H. Foley, Note, *Oil and Water: How the Polluted Wake of the Exxon Valdez Has Endangered the Essence of Punitive Damages*, 43 SUFFOLK U. L. REV. 475, 493-95 (2010).

115. *See, e.g.*, Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (O'Connor, J., concurring in part and dissenting in part).

116. *See* JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 13-14 (2006).

a firm believer in individualism. He rejected any and all reliance on others, including the government. He especially despised President Roosevelt's New Deal, even though New Deal policies had helped keep his ranch in business.[117] Punitive damages do not fare well according to this view. Depending on the judiciary to award and enforce punitive damages violates principles of self-reliance, while having to pay for more damage than one caused runs counter to strong feelings of self-responsibility. Judging from her opinions in punitive damage cases, it appears that Justice O'Connor may have internalized her father's sentiments.

Justice O'Connor was also well known for ensuring that her opinions became the opinions of the Court[118] and, when this could not be accomplished, that a middle-of-the-road compromise was reached.[119] Justice O'Connor eventually got four members of the Court to endorse her views on the relationship between punitive damages and the Constitution. In a testament to how widespread fears over punitive damages were, O'Connor did not even have to compromise her thoughts on the issue one bit.

Of course, there are other arguments supporting a Due Process limitation besides adherence to free market principles. Justices William Brennan and Thurgood Marshall, like Judge Rives, argued that punitive damages instructions were too irrational, and produced results that were impermissibly unpredictable.[120] This concern undoubtedly motivated their decisions. However, if this was their only concern, the proper

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117. *Id.* at 13-14, 24.

118. *See* Emily Bazelon, *The Swing Vote*, N.Y. TIMES, Feb. 5, 2006, Section 7 at 21 ("She . . . remade the court in her own image."); Jeffrey Rosen, *A Majority of One*, N.Y. TIMES, June 3, 2001, Section 6 at 32 ("We are all living now in Sandra Day O'Connor's America. Take almost any of the most divisive questions of American life, and Justice O'Connor either has decided it or is about to decide it on our behalf.").

119. Bazelon, *supra* note 118 ("She was always splitting the baby – by allowing for abortion regulation while salvaging Roe; by hacking away at defendants' rights and then voting to end execution of the mentally retarded; by limiting the scope of affirmative action without striking down all racial preferences; and by allowing local governments to display crèches at Christmas – if they threw in Santa Claus and a menorah."); *see also* Dahlia Lithwick, *Robed in Mystery*, N.Y. TIMES, July 2, 2005, at A15 ("Justice O'Connor's jurisprudence is narrow and fact-centered. Sometimes the lines she draws are visible only to her . . . .").

120. *See, e.g., Browning-Ferris*, 492 U.S. at 280-81 (Brennan, J., concurring).

remedy would have been a requirement for more detailed jury instructions, not a monetary ceiling on punitive awards. As we will see, the Constitutional limitation adopted by the Court went much further, severely limiting the amount of punitive damages recoverable by litigants. The Justices who voted for this doctrine must also have believed that punitive damages were out of control.

B. *Aetna Life Insurance v. Lavoie*

The Due Process argument was first presented to the Supreme Court in a 1986 case, *Aetna Life Insurance v. Lavoie*.[121] The underlying dispute in the case involved an insurer's bad faith refusal to settle a claim.[122] On appeal to the Supreme Court, the main issue was not the merits of the case or amount of the award, but whether the judge who authored the Alabama Supreme Court's opinion and cast the deciding vote should have been disqualified.[123]

Aetna Life Insurance, however, also sought to attack the amount of punitive damages assessed against the company. It argued that the punitive damages awarded violated both the Excessive Fines Clause and the Due Process Clause of the Constitution. In its appellate brief, Aetna argued that punitive damages are "arbitrary, capricious, severe and whimsical."[124] The brief included various semi-critical quotations about the nature of punitive damages plucked from a handful of Supreme Court opinions.[125] The Supreme Court did not entertain these arguments, but it did not firmly reject them either. The majority suggestively noted that Aetna's arguments "raise important issues which, in an appropriate setting, must be resolved."[126]

121. 475 U.S. 813 (1986).
122. *Id.* at 815-16.
123. *Id.* at 815.
124. Brief of Appellant at 46, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) (No. 84-1601).
125. *See id.* at 46-49. Aetna also filed a reply brief that offered similar arguments. Reply Brief of Appellant at 14-20, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) (No. 84-1601).
126. *Aetna*, 475 U.S. at 828-29.

C. *Bankers Life & Casualty Co. v. Crenshaw*

The dispute in *Bankers Life & Casualty Co. v. Crenshaw*, like *Aetna*, was over an alleged bad faith refusal to settle.[127] Bankers Life and Casualty argued on appeal to the Supreme Court that a Mississippi statute mandating a fifteen percent penalty for parties who unsuccessfully appealed a monetary award violated the Equal Protection Clause.[128] On this point, six of the seven justices who heard the case agreed that there was no Equal Protection violation.[129] Bankers Life also tried to stage a Due Process attack on the punitive award on appeal.[130] The Court refused to entertain the claim, however, finding that it was not properly raised below.[131] Justice O'Connor, writing separately, agreed that the claim should not be entertained. However, she went out of her way to interject her own view on the issue.[132] Justice O'Connor criticized the unpredictability of punitive damage awards, inviting future litigants to raise the issue "in an appropriate case."[133] Though the nature of the attack differed slightly, Browning-Ferris Industries accepted the invitation one year later.

D. *Browning-Ferris Industries of Vermont v. Kelco Disposal*

Browning-Ferris, supported by industry and tort reformers, challenged a six million dollar punitive damages award based on the Excessive Fines and Due Process Clauses of the Constitution.[134] The excessive fines argument proved unsuccessful, as seven of the nine Justices held that the clause did not apply to a civil action where the government did not prosecute the suit or receive the alleged fines.[135] The Due Process claim was also unsuccessful, but for a procedural reason: since the issue was not raised in the court below, the majority refused to consider

127. *See* 486 U.S. 71, 73 (1988); *Aetna*, 475 U.S. at 815-16.
128. *Bankers Life*, 486 U.S..at 73.
129. *Id.* at 72, 85-86. Justice Blackmun argued that the Mississippi Statute violated the Equal Protection Clause. *See id.* at 89-93 (Blackmun, J., concurring in part and dissenting in part).
130. *Id.* at 76.
131. *Id.* at 78.
132. *Id.* at 86-89 (O'Connor, J., concurring in part).
133. *Id.* at 87-88 (O'Connor, J., concurring in part).
134. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 259-60 (1989).
135. *Id.* at 263-64.

it.[136]

Although all Justices agreed that the issue of a Due Process limitation on punitive damages had not been properly raised, many of them had something to say about it. Justice Brennan, joined by Justice Marshall, concurred with the Court on the understanding that the Due Process issue would be reserved for another day.[137] Justice Brennan expressed alarm at the fact that juries impose monetary fines based on vague, amorphous judicial instructions regarding punitive damages.[138]

Justice O'Connor, concurring in part and dissenting in part, did Justice Brennan one better.[139] Joined by Justice Stevens, Justice O'Connor sharply criticized the large awards assessed against corporate wrongdoers, arguing that "skyrocketing" verdicts were stifling the creation of new products.[140] For an issue the Justices agreed not to decide, the Due Process argument had nevertheless garnered considerable attention.

E. *Pacific Mutual Life Insurance v. Haslip*

Doctrinally, *Haslip* was a milestone in the Supreme Court's Due Process jurisprudence. For the first time, the Court explicitly acknowledged that the Due Process clause limits the amount of punitive damages that may be awarded.[141] However, the Court merely gave the new doctrine lip service in applying it to the facts at hand.

Pacific Mutual raised yet another Due Process challenge to a punitive damages award. The Supreme Court reached a compromise on the issue. In defense of punitive damage awards, the Court held that the prevailing method for determining punitive damages was constitutional.[142] The Court noted that the procedure had been in existence for centuries, all courts to address the issue agreed as to its constitutionality, and that there was no evidence that the drafters of the Fourteenth Amendment had any

136. *Id.* at 276-77.
137. *Id.* at 280 (Brennan, J., concurring).
138. *Id.* at 281 (Brennan, J., concurring).
139. *Id.* at 282 (O'Connor, J., concurring in part and dissenting in part).
140. *Id.* (O'Connor, J., concurring in part and dissenting in part).
141. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).
142. *Id.* at 17.

concerns with punitive damages.[143] Nevertheless, the Court stated that "unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[144] Its support for this statement consisted of an inapposite Supreme Court case from almost a century earlier, and an article published by David Owen in the Alabama Law Review.[145]

What appeared to be a radical shift in punitive damages jurisprudence, however, was mitigated by the Court's subsequent language and holding. The Court acknowledged that a strict Due Process limitation on punitive damages could never be established. Instead, the Court stated that "reasonableness and adequate guidance from the court" should suffice to keep jury verdicts within an acceptable range.[146] This reduced the Court's restrictive holding to a mere judicial slap on the wrist. The Court seemed to be merely telling states to simply keep an eye on punitive damages verdicts. Indeed, the Supreme Court found the $840,000 award here eminently reasonable.[147] The Court noted that both the jury instructions and the Alabama Supreme Court's factors for analyzing punitive damage awards were acceptable.[148]

Justice Scalia, concurring in the judgment, criticized the majority's holding on the Due Process issue.[149] He stressed the historical pedigree of punitive damages, and criticized the majority for allowing their personal views on punitive damages to warp their interpretation of the Due Process Clause.

Justice O'Connor authored a forceful dissent, elaborating upon her statements in *Crenshaw* and *Browning-Ferris*. She blasted the unpredictable nature of punitive damages, arguing

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143. *Id.* at 15-18.

144. *Id.* at 18.

145. *Id.* at 18 & n.8. The cited case, *Waters-Pierce Oil Co. v Texas*, involved criminal penalties assessed under anti-trust legislation. 212 U.S. 86, 96 (1909). This distinguishes it from a civil action where punitive damages are assessed according to common law doctrine. The defendant oil company did, however, argue that the penalties assessed against it were excessive and violated the Due Process clause. *Waters-Pierce,* 212 U.S. at 111. The Supreme Court disagreed, upholding the penalties. *Waters-Pierce*, 212 U.S. at 112.

146. *Haslip*, 499 U.S. at 18.

147. *See id.* at 7 n.2, 24.

148. *Id.* at 19-24.

149. *Id.* at 24-42 (Scalia, J., concurring).

that they had "explode[ed] in . . . frequency and size" in recent years.[150] She argued that the jury instructions here were woefully inadequate and void for vagueness.[151] Also, she argued, the award violated Pacific Mutual's right to procedural due process due to the vague instructions.[152] While Justice O'Connor may have lost the battle, she had won the war. Punitive damages were now subject to constitutional constraints.

F. *TXO Production Corporation v. Alliance Resources Corporation*

The TXO Production Corporation had embarked upon a mission to prove that Alliance Resources, a company with which it was negotiating to purchase gas rights, did not have good title to the land involved in the transaction.[153] The problem with this plan, however, was that it was fraudulent and pursued in bad faith. When TXO sued Alliance over an alleged encumbrance on its title, Alliance counterclaimed for slander of title.[154] At trial, jurors heard evidence regarding TXO's conduct, and learned that TXO had engaged in similar schemes throughout the country.[155] The jury responded in kind and awarded Alliance $19,000 in actual damages (the cost of defending the suit) and ten million dollars in punitive damages.[156] Reduced to a ratio, Alliance received over 500 times its actual damages in punitives.[157]

One might expect that the parties would once again duel over whether the Constitution precludes excessive punitive damages verdicts. But this issue, surprisingly, was conceded by Alliance's counsel.[158] Instead the parties battled over what kind of scrutiny a jury-imposed punitive verdict should receive. Alliance advocated for a mere rational basis review, while TXO argued that such awards should be subject to heightened scrutiny.[159] Specifically, TXO requested that the Court consider four factors in determining whether a punitive damages verdict was

150. *Id.* at 61 (O'Connor, J., dissenting).
151. *Id.* at 43 (O'Connor, J., dissenting).
152. *Id.* (O'Connor, J., dissenting).
153. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 448-9 (1993).
154. *Id.* at 447, 450.
155. *Id.* at 450-51.
156. *Id.* at 451.
157. *Id.* at 453.
158. *Id.* at 455.
159. *Id.*

constitutional: (1) similar awards in the same jurisdiction; (2) similar awards in other jurisdictions; (3) laws imposing penalties for similar conduct; and (4) the "relationship" of compensatory damages to punitives in all similar cases.[160]

A plurality of the Court rejected both parties' proposed standards of review.[161] Instead, the plurality, per Justice Stevens, suggested that any such test would be inappropriate.[162] The plurality affirmed the jury's verdict, noting that although the award was shocking, so too was TXO's conduct.[163] The plurality effectively confirmed the minimal effect of *Haslip*'s Due Process pronouncements. It did not even consider TXO's challenge to the jury instructions.[164]

The plurality, composed of four justices (three who joined in whole, and one in part),[165] was supported by a concurring faction of Justices Scalia and Thomas. Justice Scalia echoed his argument in *Haslip*: the constitution does not guarantee a right against excessive jury verdicts.[166] However, he was placated by the plurality's loose application of *Haslip*. He predicted that large punitive verdicts would now be routinely affirmed by the Supreme Court, which would simply note that the award in question was "no worse than *TXO*."[167]

Justice O'Connor authored a fierce dissent. She declared that punitive damage awards were "monstrous" thanks to the continued operation of an "arbitrary and oppressive system."[168] She acknowledged the importance of the jury in American jurisprudence; however, she criticized these "ordinary citizens" as

160. *Id.* at 455-56. These factors were derived from Justice Powell's majority opinion in *Solem v. Helm*, which involved the distinguishable context of a criminal defendant's challenge to a sentence of life without parole as disproportionate under the Eighth Amendment. *See* 463 U.S. 277, 284-92 (1983).

161. *TXO*, 509 U.S. at 456.

162. *See id.* at 456-57.

163. *Id.* at 462.

164. *See id.* at 463-65.

165. The three members who joined the plurality opinion in whole are Justices Stevens, Rehnquist and Blackmun. *Id.* at 446. Justice Kennedy joined the plurality's opinion as to parts I and IV. *Id.* Writing separately, Justice Kennedy emphasized that, although this was a close case, the jury's verdict was justified by TXO's malicious conduct. *Id.* at 466-69.

166. *Id.* at 470 (Scalia, J., concurring).

167. *Id.* at 472 (Scalia, J., concurring).

168. *Id.* at 473 (O'Connor, J., dissenting).

prone to impassioned and irrational decision making.[169] Specifically, she spotted numerous flaws in the case under review. First, the verdict was simply too high—twenty times higher than the highest punitive damages award in similar West Virginia cases.[170] Second, she argued the Court should be allowed to rely upon only the information presented to the jury, not after-the-fact arguments raised on appeal.[171] Finally, Justice O'Connor claimed that TXO was likely unfairly punished by the jury due to the fact that it was an out-of-state company.[172]

Despite Justice O'Connor's vehement opposition towards large punitive damages awards, she said that she did not seek to impose strict standards on the states because "the principles of federalism counsel against such a course."[173] But, just five years later, she would join an opinion that did just that.[174] Even stranger, that opinion would be written by Justice Stevens, author of the plurality opinion in *TXO*.[175]

G. *BMW of North America v. Gore*

Ira Gore's plight was devoid of the usual sympathies often associated with plaintiffs who recover punitive damages. Mr. Gore's injury—that his allegedly new BMW had been repainted by BMW of North America—fell far short of the wrongdoing vindicated in *Lavoie*, *Crenshaw* or *Haslip*.[176] This injury was compounded when, during discovery, Gore's counsel discovered that BMW had adopted a nationwide policy of passing off old, damaged cars as new. Starting in 1983, had BMW adopted a policy dictating that if a car suffered damage in transport amounting to less than three percent of its retail value, the car would be repainted and sold as new.[177] This evidence was

169. *Id.* at 473-74 (O'Connor, J., dissenting).
170. *Id.* at 482 (O'Connor, J., dissenting).
171. *Id.* at 484-85 (O'Connor, J., dissenting).
172. *Id.* at 489 (O'Connor, J., dissenting). Of additional concern to Justice O'Connor was the fact that the defendant was a corporation, an entity type that "jurors may view . . . with great disfavor." *Id.* at 490 (O'Connor, J., dissenting).
173. *Id.* at 483 (O'Connor, J., dissenting).
174. *See infra* Part IV.G.
175. *See id.*
176. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 563 (1996).
177. *Id.* at 563. Cars that suffered damage greater than three percent of

disclosed at trial to a jury.

Gore received $4000 in actual damages.[178] The jury also awarded punitive damages to Gore, as there was evidence that BMW had sold just under 1000 repainted cars under this plan.[179] By multiplying Gore's damages ($4000) by the amount of repainted cars sold (1000), Gore's counsel arrived at four million dollars as a suggestion for appropriate punishment.[180] The jury took Gore up on this, awarding Gore precisely four million dollars in punitive damages.[181] This amount was halved on appeal.[182] The Alabama Supreme Court reasoned that this was necessary because BMW could be punished only for conduct that occurred within the state of Alabama.[183] BMW appealed to the Supreme Court, and the Court granted certiorari.[184]

Justice O'Connor assembled a five-person majority ready to lead the attack on punitive damages.[185] Justice Stevens, who had approved the massive punitive damages award in TXO, now joined Justice O'Connor's team and wrote the majority opinion.[186] First, the majority agreed with the Alabama Supreme Court that BMW could not be punished for out of state conduct.[187] Next, the majority gave teeth to its pronouncement in *Haslip* and struck down the punitive damages award as a violation of the Due Process clause.[188] Given Justice O'Connor's growing discontent over punitive damage awards, the Court's holding was not entirely a surprise.

The majority also established three "guideposts" to be considered in determining the constitutionality of a punitive damages award: (1) the "degree of reprehensibility" of the conduct in question; (2) the ratio between compensatory and punitive damages; and (3) the difference between this punitive award and

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their retail value were stored by the dealer for a certain amount of time and then sold as used. *Id.* at 563-64.

178. *Id.* at 565.
179. *Id.* at 565-66.
180. *Id.*
181. *Id.* at 565.
182. *Id.* at 567.
183. *Id.*
184. *Id.* at 568.
185. *See id.* at 561.
186. *See id.*
187. *Id.* at 572-73.
188. *Id.* at 574.

similar penalties.[189] These were, essentially, the guidelines proposed by TXO's counsel just three years earlier.[190] The first guidepost is simply a formulation of the traditional "shocks the conscience" standard of review. The second and third guideposts, however, represented dramatic shifts in punitive damage jurisprudence. The second requirement additionally begs the question: if punitive damages are not meant to make plaintiffs whole, but rather to deter and punish, why should they have to bear any relationship to compensatory damages? Even scholar Clarence Morris, a critic of punitive damages, dismissed this argument as illogical.[191]

Predictably, the Court found that BMW of America's conduct was not that reprehensible, the ratio between punitive and compensatory damages (500-to-1) was excessive, and that Alabama statutory penalties for similar conduct (fraud) were much smaller than the punitive award.[192] The Court was justified in its conclusion on the first point: passing off a repainted BMW is dishonest, but is not as morally reprehensible as denying insurance coverage to an injured person. On the second point, a 500-to-1 ratio is indeed enormous, but the Supreme Court approved of an even greater ratio just three years earlier in TXO.[193] The Court reconciled this discrepancy by focusing on the potential harm of TXO's conduct rather than the actual harm. Using this formula, the Court reduced TXO's punitive to actual damage ratio from 500-to-1 to 10-to-1.[194]

Four Justices dissented. Justice Scalia, joined by Justice Thomas, wrote one of the dissenting opinions and reiterated his general critique. He criticized the majority's new guideposts, observing that the guideposts, in fact, offer no guidance at all for

189. *Id.* at 574-75.

190. *See supra* note 160 and accompanying text.

191. Morris, *supra* note 35, at 1181-82 ("[T]he ratio test seems to be an impediment in many cases, rather than a good legal tool. If it has any effect at all, it may limit punitive damage awards when they should be severe, and result in heavy punitive damages when they should be lenient.").

192. *BMW*, 517 U.S. at 575-85.

193. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453 (1993).

194. Justice Ginsburg, dissenting in *Campbell*, noted this sleight of hand in a footnote. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 430 n.1 (2003).

reviewing courts.[195] Optimistically hoping that the guideposts were but a "false alarm," he hoped the guideposts were mere dicta that would soon disappear from practice.[196]

Justice Scalia's wishes were not borne out in subsequent cases. In the 2003 case of *State Farm Mutual Automobile Insurance v. Campbell*, the Court further limited punitive damages awards by declaring that "few [punitive damages] awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."[197] This less-than-ten-to-one requirement was further narrowed in the 2008 case of *Exxon Shipping Co. v. Baker*, which imposed a one-to-one ratio for punitive damage awards in admiralty actions.[198]

Justice O'Connor is now retired from the Court, but the punitive damages limitation she helped establish lives on. It grows more restrictive with each case the Supreme Court decides. Punitive damages awards are now perhaps more arbitrary than before: if plaintiffs are severely injured, they can receive large punitive damages, but if they suffer minimal injury, punitive damages will also be minimal. One is at a loss to explain how this system effectively allows for the punishment and deterrence of wrongdoing. It does, however, make sense if one considers the cultural climate in which the limitation originated, specifically, the free market environment of the 1970s and 80s. A majority of the Supreme Court cast aside history, precedent, and the text of the Constitution in order to render a decision based on prevailing social concerns.

V. CONCLUSION

Punitive damages were created to hold society's powerful accountable if they abused their power. In John Wilkes's era, the Crown was the most powerful institution in England and, in two notable cases, was punished by angry jurors for a perceived abuse of power. This was a modest way by which citizens could let the

195. *BMW*, 517 U.S. at 606 (Scalia, J., dissenting).
196. *Id.* at 602, 605 (Scalia, J., dissenting).
197. *Campbell*, 538 U.S. at 425.
198. Exxon Shipping Co. v. Baker, 554 U.S. 471, 513 (2008). Although the Court's holding was technically limited to admiralty actions, it seems likely that the Court might carry this limitation over to non-admiralty cases as well.

Crown know that they disapproved of its actions.

So it is with corporations in twenty-first century America. Corporations wield immense power and routinely engage in intentional or grossly negligent acts. Civil actions—and punitive damages—are one of the few checks citizens have on corporate malfeasance and arrogance. A recent incident indicates why America needs punitive damages: the Upper Big Branch South Mine in West Virginia collapsed in April of 2010 after the federal government issued over 100 citations and orders related to the Mine in 2010 alone.[199] A third of these were deemed "significant and substantial."[200] Additionally, the owner of the mine, Massey Energy Company, had been fined $1.8 million in governmental penalties since 2006.[201] This is behavior that should enrage the public, and if the citizens serving as jurors want to say so, they should be allowed to do so with a fine that will sting.

199. NPR Staff, *W. Va. Mine was Recently Cited for Safety Issues*, NAT'L PUB. RADIO (Apr. 6, 2010), http://www.npr.org/templates/story/story.php?storyId=125647477.

200. *Id.*

201. *Id.*