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The Due Process Implications of Ohio's Punitive Damages Law — A Change Must Be Made

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COMMENTS

THE DUE PROCESS IMPLICATIONS OF OHIO'S PUNITIVE DAMAGES LAW — A CHANGE MUST BE MADE

The touchstone of due process is protection of the individual against arbitrary action of government.[1]

I. INTRODUCTION

For more than two centuries, United States and Ohio common law have recognized the significance of punitive damages awards[2] in punishing and deterring dangerous behavior.[3] For most of its history, the constitutionality and propriety of punitive damages went largely unquestioned.[4] In the past, courts "rarely assessed" punitive damages, and when they did, the awards were ordinarily "small in amount."[5] During the past two decades, however, the "frequency and size of such awards have been skyrocketing."[6] The increasing size and frequency of punitive damages awards have been the subject of extensive debate

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1. Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

2. Punitive damages, also known as exemplary damages, are "awarded to punish the guilty party and deter tortious conduct by others." Digital & Analog Design Corp. v. North Supply Co., 590 N.E.2d 737, 740-41 (Ohio 1992). For an extended discussion of the purpose of punitive damages awards in Ohio, see *infra* notes 38-43 and accompanying text.

3. *See infra* notes 24-43 and accompanying text. For a detailed history of punitive damages, see David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1262-64 (1976).

4. *See infra* notes 29-37 and accompanying text.

5. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982).

6. TXO Prod. Corp. v. Alliance Resources, 113 S. Ct. 2711, 2742 (interim ed. 1993) (O'Connor, J., dissenting). Empirical data suggests that the amount of punitive damages awards has indeed risen in the past two decades. *See, e.g.*, 2 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 21.01 (1985); MARK PETERSON ET AL., RAND CORPORATION, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 3, 65 (1987). *But see* Stephen Daniels, *Punitive Damages: The Real Story*, 72 A.B.A. J., Aug. 1, 1986, at 60 (questioning the alleged severity of the recent increase in punitive damages awards).

among judges, legislators, and commentators.[7] This dialogue has resulted in numerous legislative responses across the United States.[8] Despite this debate, Ohio retained a common law system of punitive damages that remained virtually unchanged until 1987. In that year, the Ohio General Assembly enacted the Ohio Civil Justice Reform Act,[9] forever altering the State's punitive damages system. The stated purpose of the Act is to reduce "the causes of the current insurance crisis."[10] The Act combines both traditional common-law standards with major departures from accepted practices.[11]

This Comment examines the effectiveness and constitutionality of Ohio's punitive damages law in terms of the stated goals of punishment and deterrence. This Comment explores the law within the context of two recent Supreme Court decisions that redefined the role of the Due

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7. *See, e.g.*, Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 836-39 (1989) (explaining primary criticisms of punitive damages awards); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986). According to Jeffries, "punitive damages are out of control. Certainly recent awards are unprecedented in both incidence and amount. . . . Not surprisingly, this situation has become a focus of constitutional debate." *Id.*; *see also* Theodore B. Olson & Theodore J. Boutros, Jr., *Constitutional Restraints on the Doctrine of Punitive Damages*, 17 PEPPERDINE L. REV. 907, 908 (1990) (members of the judiciary have "criticized punitive damage awards as a disruptive and distorting component of the justice system").

8. *See, e.g.*, ALA. CODE § 6-11-21 (Supp. 1992) (monetary cap of $250,000 in some situations); ALASKA STAT. § 09.17.020 (Supp. 1992) (requires clear and convincing evidence); CAL. CIV. CODE § 3294(a) (West Supp. 1993) (clear and convincing evidence standard); COLO. REV. STAT. ANN. § 13-21-102 (West 1989) (limits exemplary award to maximum three times actual award under certain circumstances); CONN. GEN. STAT. ANN. § 52-240b (West 1991) (judicial assessment of punitive damages in products liability actions not to exceed twice actual damages); FLA. STAT. ANN. § 768.73(1)(a) (West Supp. 1993) (limits punitive award to three times actual damage award); GA. CODE ANN. § 51-12-5.1(g) (Supp. 1992) (monetary cap of $250,000 in some cases); ILL. ANN. STAT. ch. 110, para. 2-604.1 (Smith-Hurd 1992) (pretrial motion to establish reasonable likelihood of supporting punitive award prerequisite to request); IOWA CODE ANN. § 668A.1(1)(a) (West 1987) (requires "preponderance of clear, convincing, and satisfactory evidence"); KAN. STAT. ANN. § 60-3702 (Supp. 1992) (judicial assessment of punitive damages in all civil actions in separate proceeding); MINN. STAT. ANN. § 549.20(4) (West Supp. 1993) (bifurcated assessment proceeding); NEV. REV. STAT. ANN. § 42.005 (Michie Supp. 1991) (bifurcated assessment proceeding; limits amount of award in some cases); N.J. STAT. ANN. § 2A:58C-5(b) (West 1987) (bifurcated assessment proceeding); OKLA. STAT. ANN. tit. 23, § 9 (West 1987) (limits amount of punitive damages award to size of compensatory damages awarded in some cases); S.D. CODIFIED LAWS ANN. § 21-1-4.1 (1987) (pretrial hearing required); TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (West Supp. 1993) (limits to greater of four times actual damage or $200,000); VA. CODE ANN. § 8.01-38.1 (Michie 1992) (monetary cap of $350,000). Unless otherwise permitted by statute, punitive damages are not permitted in Louisiana (McCoy v. Arkansas Natural Gas Co., 143 So. 383, 385-86 (La. 1932), *cert. denied*, 287 U.S. 661 (1932)), Massachusetts (Burt v. Advertiser Newspaper Co., 28 N.E. 1, 5 (Mass. 1891)), Nebraska (Boyer v. Barr, 8 Neb. 68 (1878)), New Hampshire (N.H. REV. STAT. ANN. § 507:16 (Supp. 1992)), or Washington (Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1075 (Wash. 1891)).

9. 1987 Ohio Legis. Serv. 5-801 to 5-839 (Baldwin).

10. *Id.* at 5-801.

11. STANTON G. DARLING, OHIO CIVIL JUSTICE REFORM ACT 118 (1987).

Process Clause of the Fourteenth Amendment in punitive damages awards: *Pacific Mutual Life Insurance Co. v. Haslip*[12] and *TXO Production Corp. v. Alliance Resources*.[13] Part II of this Comment provides background by examining the history and purpose of punitive damages awards and the reluctance of the United States Supreme Court to utilize the Due Process Clause to interfere with such awards.[14] Part III dissects the elements of Ohio's current system and independently analyzes Ohio's required standard for punitive liability,[15] the required burden of proof,[16] the changing roles of the judge and jury,[17] the broad discretion in damages assessment,[18] and appellate review.[19] This Comment concludes that while the required standard, burden of proof, and role of the judge in Ohio's system are constitutional and advantageous, the broad discretion that the law affords judges in assessing punitive damages and the law's inadequate appellate review process are unconstitutional and detrimental. Additionally, this Comment suggests solutions to Ohio's problem of unfair and arbitrary punitive damages, thus ensuring adequate due process protection in Ohio.[20]

II. BACKGROUND

Before undertaking a comprehensive analysis of Ohio's punitive damages law, it is important to understand the framework within which such an analysis should take place. This section begins by examining the long history and development of punitive damages laws in England and the United States.[21] Next, this section describes the purpose of Ohio's punitive damages law.[22] Finally, this section discusses the due process implications of punitive damages and the reluctance of the United States Supreme Court to interfere with increasing punitive damages awards.[23]

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12. 499 U.S. 1 (1991).
13. 113 S. Ct. 2711 (interim ed. 1993).
14. *See infra* notes 21-138 and accompanying text.
15. *See infra* notes 147-71 and accompanying text.
16. *See infra* notes 172-85 and accompanying text.
17. *See infra* notes 186-276 and accompanying text.
18. *See infra* notes 277-362 and accompanying text.
19. *See infra* notes 363-83 and accompanying text.
20. *See infra* notes 341-54 and accompanying text.
21. *See infra* notes 24-37 and accompanying text.
22. *See infra* notes 38-43 and accompanying text.
23. *See infra* notes 44-138 and accompanying text. Background material relevant only to a specific area of Ohio's punitive damages law is not included in this section. To avoid confusion, information regarding each specific area of Ohio's punitive damages law is included in the background section of each separate discussion.

A. The History of Punitive Damages

Punitive damages awards are deeply rooted in the history of both English and American law. An English court first permitted exemplary damages[24] in *Huckle v. Money*.[25] Huckle, a printer, was arrested and detained for six hours on authority of the Secretary of State for allegedly printing an objectionable publication.[26] Huckle suffered only minor injuries, but he was awarded 300 pounds for imprisonment and assault.[27] The court refused to set aside the award based on excessiveness, finding that the egregious conduct of the defendant violated the Magna Carta and justified "exemplary damages."[28]

One of the first reported American punitive damages cases was *Coryell v. Colbaugh*, a 1791 case.[29] In *Coryell*, the New Jersey Supreme Court upheld an award, "not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for example's sake, to prevent such offenses in [the] future."[30] The United States Supreme Court recently recognized the practice of awarding punitive damages as having "long been a part of traditional state tort law."[31] Furthermore, the Court historically accepted the validity of punitive damages awards against due process challenges: "The imposition of punitive or exemplary damages in such cases cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law. . . . [I]ts propriety and legality have been recognized . . . by repeated judicial decisions for more than a century."[32]

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24. The terms "exemplary damages" ("to make an example of") and "punitive damages" ("to punish") are synonomous and may be used interchangeably. BLACK'S LAW DICTIONARY 390 (6th ed. 1990). The Ohio Supreme Court used the terms interchangeably as early as 1869. *See* Atlantic & Great W. Ry. Co. v. Dunn, 19 Ohio St. 162, 167 (1869).

25. 95 Eng. Rep. 768 (K.B. 1763). Wilkes v. Wood, 95 Eng. Rep. 766 (K.B. 1763), the companion case to *Huckle*, involved the publisher of the allegedly libelous pamphlet. For the historical development of punitive damages, see 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 1.1 (2d ed. 1989); Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207, 208-16 (1977).

26. *Huckle*, 95 Eng. Rep. at 768.

27. *Id.*

28. *Id.* at 769.

29. 1 N.J.L. 77 (N.J. Super. Ct. 1791). For an educational historical comment on the development of punitive damages laws, see Owen, *supra* note 3, at 1262-64; James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic that has Outlived its Origins*, 37 VAND. L. REV. 1117, 1119-24 (1984).

30. *Coryell*, 1 N.J.L. at 77.

31. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984).

32. Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26, 36 (1889). The practice of punitive damages awards finds added support in Luther v. Shaw, 147 N.W. 18 (Wis. 1914). In *Luther*, the court noted that the practice of awarding punitive damages elevates "the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to, and confidence in, the courts of law." *Id.* at 20.

Despite isolated opposition, some courts have recognized the awards of punitive damages as an historically valid practice.[33]

The historical validity of awarding punitive damages is also well settled in Ohio. *Simpson v. McCaffrey*[34] was one of the first Ohio cases to recognize the practice of awarding punitive damages. Within two decades of the *Simpson* decision, in the landmark case of *Roberts v. Mason*,[35] the Ohio Supreme Court fully embraced "damages not only to recompense the sufferer but to punish the offender."[36] The Court recognized that "if any thing can be settled by judicial decision and long and general practice, this doctrine must be regarded as thus settled . . . . [T]he rule has been considered, so far as we know, established and elementary."[37] As evidenced by this brief survey of case law, both United States and Ohio courts have repeatedly recognized the practice of awarding punitive damages in appropriate circumstances.

B. The Purpose of Punitive Damages

Ohio courts have traditionally awarded punitive damages for two reasons: to punish and to deter.[38] Punitive damages are not compensatory.[39] Instead, they are "awarded to punish the guilty party and deter tortious conduct by others."[40] In *Simpson v. McCaffrey*,[41] the Supreme

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33. *But see* Fay v. Parker, 53 N.H. 342, 382 (1873). According to the *Fay* court, the concept of punitive damages is "wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law." *Id.*

34. 13 Ohio 508, 522 (1844) (allowing award of "smart money, or damages, beyond compensation, to punish the party guilty of the wrongful act").

35. 10 Ohio St. 277 (1859).

36. *Id.* at 280.

37. *Id.*; *see also* Atlantic & Great W. Ry. Co. v. Dunn, 19 Ohio St. 162, 167 (1869) (observing that the law permitting the recovery of punitive damages "against an individual party acting for himself, is settled in [Ohio] by the case of *Roberts v. Mason*."

38. Digital & Analog Design Corp. v. North Supply Co., 590 N.E.2d 737, 740-41 (Ohio 1992); *see also* Detling v. Chockley, 436 N.E.2d 208, 209 (Ohio 1982). This dual purpose has its foundings in the early days of punitive damages in England: "Damages 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." Wilkes v. Wood, 98 Eng. Rep. 489, 498-99 (K.B. 1763). While the purpose of punitive damages is to punish and deter, there is no empirical evidence as to whether punitive damages are effective in fulfilling those goals. 1 GHIARDI & KIRCHER, *supra* note 6, § 2.06.

39. Compensatory damages are awarded to compensate the plaintiff for actual damages sustained as a direct result of the behavior in an effort to make the victim whole. *Digital*, 590 N.E.2d at 741; *see also* Western Union Tel. Co. v. Smith, 59 N.E. 890, 892 (Ohio 1901) (holding that in "[s]uch damages, being punitive in their nature, are an exception to the general rules that in private actions the injured party is to be made whole, and that acts deemed worthy of punishment are prosecuted by the state"); *cf.* 13 OHIO JUR. *Damages* § 138 (1930) (noting that "[i]n some jurisdictions the theory is that exemplary damages are awarded by way of compensation, . . . but in Ohio . . . punitive damages are allowed as a punishment . . . and as an example").

40. *Digital*, 590 N.E.2d at 740-41; *see also* Montgomery v. Anderson, No. 92 CA 12, 1993 Ohio App. LEXIS 1368, at *9 (Mar. 2, 1993). This dual purpose of punitive damages is accepted

Court of Ohio rationalized that the "principle of permitting damages, in certain cases, to go beyond naked compensation, is for example, and the punishment of the guilty party for the wicked, corrupt, and malignant motive and design, which prompted him to the wrongful act."[42] The validity of punitive damages

> rests not on the ground of abstract or theoretical justice, but on the ground of public policy—a policy which seeks to promote the public safety; to punish, through the medium of a civil proceeding, a fraudulent, malicious, insulting, or willful wrongdoer, and to hold him up as a warning example to others, to deter them from offending in like manner.[43]

Having considered the history and purposes of punitive damages awards, Ohio's punitive damages law must be examined as an historically valid method of punishment and deterrence. The effectiveness of Ohio's law should be tested against its stated goals.

C. Due Process and the United States Supreme Court's Reluctance to Confront Increasing Punitive Damages Awards

A discussion of due process protection demands an answer to the question: "[W]hat process is due[?]"[44] In *Snyder v. Massachusetts*,[45] the United States Supreme Court commented that the ultimate measuring rod of due process is fairness.[46] Due process has taken two forms. *Procedural* due process imposes "constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[47] *Substantive* due process restrains the govern-

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in most states. *See* RESTATEMENT (SECOND) OF TORTS § 908(1) (1965) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."); *see generally* Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1 (1985); David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705 (1989); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982).

41. 13 Ohio 508 (1844).

42. *Id.* at 522; *see also* Railroad Co. v. Hutchins, 37 Ohio St. 282, 294 (1881); Smith v. Pittsburg, Fort Wayne & Chicago Ry. Co., 23 Ohio St. 10, 18 (1872).

43. Atlantic & Great W. Ry. Co. v. Dunn, 19 Ohio St. 162, 170 (1869); *see also* Saberton v. Greenwald, 66 N.E.2d 224, 229-30 (Ohio 1946).

44. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

45. 291 U.S. 97 (1934) (upholding the constitutionality of state policy permitting jury to view murder scene in absence of defendant).

46. *Id.* at 116-17.

47. Mathews v. Eldridge, 424 U.S. 319, 332 (1976). For an informative discussion concerning the history of due process, see Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 25-34 (1991) (Scalia, J., concurring in the judgment).

ment from participating in conduct that "shocks the conscience"[48] or impedes rights "implicit in the concept of ordered liberty."[49] Unlike some technical legal rules, the requirements of due process are not fixed or immune to changing times and circumstances.[50] Instead, the guarantee of due process is "flexible and calls for such procedural protections as the particular situation demands."[51] The changing requirements of the Due Process Clause have proved troublesome for the United States Supreme Court in the area of punitive damages.

Three times before 1990, the United States Supreme Court addressed the relationship between the Due Process Clause of the Fourteenth Amendment[52] and punitive damages awards.[53] Each time, the Court was able to resolve the punitive damages issue on grounds unrelated to due process.[54] Several Justices, however, expressed concern about the implications of the Due Process Clause in "an appropriate case."[55] In his concurring opinion in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,[56] Justice Brennan stated that he concurred only "on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties."[57] The Court directly ad-

48. Rochin v. California, 342 U.S. 165, 172 (1952).

49. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

50. Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

51. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *see also Mathews*, 424 U.S. at 334.

52. U.S. CONST. amend. XIV. The Due Process Clause provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *Id.*

53. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986). At the beginning of the 20th century, the Supreme Court invalidated statutory penalties similar to punitive damages. *See, e.g.*, Chicago, Milwaukee & St. Paul Ry. Co. v. Polt, 232 U.S. 165 (1914) (penalty was arbitrary and excessive). The Court also discussed due process problems with awards that were "grossly excessive" (Waters-Pierce Oil Co. v. Texas (No. 1), 212 U.S. 86, 111 (1909)) or "severe and oppressive" (St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919)).

54. *Browning-Ferris*, 492 U.S. at 264 (Excessive Fines Clause of the Eighth Amendment; failure to preserve question of Due Process); *Bankers Life*, 486 U.S. at 76 (failure to preserve Due Process question); *Aetna Life*, 475 U.S. at 825 (failure of biased judge to recuse himself).

55. *Bankers Life*, 486 U.S. at 87 (O'Connor, J., joined by Scalia, J., concurring in part and concurring in the judgment). Members of the Supreme Court often expressed concern about the due process implications of punitive damages awards. *See, e.g.*, *Browning-Ferris*, 492 U.S. at 283 (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part); *see* Victor E. Schwartz & Liberty Magarian, *Challenging the Constitutionality of Punitive Damages: Putting Rules of Reason on an Unbounded Legal Remedy*, 28 AM. BUS. L.J. 485, 494 (1990). "Taking all the opinions in both *Browning-Ferris* and *Bankers Life* into account, at least five Justices—Brennan, Marshall, O'Connor, Stevens and Scalia—have indicated that punitive damage awards should be subject to due process standards." Schwartz & Magarian, *supra*.

56. 492 U.S. 257 (1989).

57. *Id.* at 280 (Brennan, J., joined by Marshall, J., concurring).

dressed the strength of those due process constraints on punitive damages awards in *Pacific Mutual Life Insurance Co. v. Haslip*.[58]

1. General Concerns of Reasonableness—Pacific Mutual Life Insurance Co. v. Haslip

In 1981, the health insurance of Cleopatra Haslip and other employees of Roosevelt City, Alabama, lapsed when Lemmie Ruffin, an agent for Pacific Mutual, misappropriated premiums issued by the City.[59] Haslip was hospitalized in January 1982, incurring hospital and physician's charges.[60] When the hospital could not confirm health coverage due to Ruffin's misappropriation, Haslip's account was placed with a collection agency, which adversely affected her credit.[61] The employees filed an action against Pacific Mutual for damages as a result of fraud.[62]

The case was tried before a jury.[63] Although Haslip incurred less than $4,000 in out-of-pocket expenses, the jury found Pacific Mutual liable for $200,000 in compensatory damages and $840,000 in punitive damages.[64] The trial court reviewed the jury's decision based on standards set forth in *Hammond v. City of Gadsen*[65] and upheld the award.[66] The Supreme Court of Alabama affirmed the decision utilizing the "Green Oil factors,"[67] Alabama's appellate standard of review

58. 499 U.S. 1 (1991).

59. *Id.* at 4-5.

60. *Id.* at 5.

61. *Id.*

62. *Id.* at 5-6. The action against Pacific Mutual was based on the theory of respondeat superior. *Id.* at 6. Respondeat superior is the doctrine that the master is liable for the wrongful acts of his servant in some cases. Posin v. A.B.C. Motor Ct. Hotel, 344 N.E.2d 334, 340 (Ohio 1976).

63. *Pacific Mutual*, 499 U.S. at 6.

64. *Id.* at 7 n.2. The jury instructions afforded the jury considerable discretion, explaining the purpose of punitive damages and commanding that "in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." *Id.* at 6 n.1.

65. 493 So. 2d 1374 (Ala. 1986). Trial courts are "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." *Id.* at 1379. The trial court should consider the "culpability of the defendant's conduct, [the] desirability of discouraging others from similar conduct, [the] impact upon the parties, [and] other factors, such as the impact on innocent third parties." *Id.* (citations omitted).

66. *Pacific Mutual*, 499 U.S. at 20, 23.

67. These factors are based upon Green Oil Co. v. Hornsby. 539 So. 2d 218 (Ala. 1989). The Alabama Supreme Court announced that appellate courts should consider the following in determining whether an award was appropriate:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

for punitive damages awards, thereby providing an additional check on the jury's and trial court's discretion.[68]

The United States Supreme Court affirmed *Pacific Mutual* by a margin of seven to one.[69] Initially, the Court noted that in view of the long and accepted common-law tradition of allowing juries discretion in awarding punitive damages awards, the Court was unwilling to hold that the practice was "so inherently unfair as to deny due process and be *per se* unconstitutional."[70] A majority of the Court accepted the premise of Justice O'Connor's dissent that the Due Process Clause *could* operate to impose limitations on the discretion of juries or the size of awards in punitive damages decisions.[71] The majority did not, however, believe that this case crossed "the line into the area of constitutional impropriety."[72] In reaching this conclusion, Justice Blackmun recog-

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(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or 'cover-up' of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

(4) The financial position of the defendant would be relevant.

(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

Id. at 223-24 (quoting Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially).

68. Pacific Mut. Life Ins. Co. v. Haslip, 553 So. 2d 537 (Ala. 1989), *aff'd*, 499 U.S. 1 (1991).

69. *Pacific Mutual*, 499 U.S. at 2. Justice O'Connor was the lone dissenter. *Id.* at 42. The focus of her dissent was the void-for-vagueness doctrine and the *Mathews v. Eldridge* test. *Id.* at 43. See *infra* notes 305-62 and accompanying text for an evaluation of these considerations. Justice Souter did not participate in the decision. *Pacific Mutual*, 499 U.S. at 24.

70. *Pacific Mutual*, 499 U.S. at 17.

71. Justice O'Connor argued that the Due Process Clause *did* impose limitations on jury discretion in assessing the punitive damages award in this case. *Id.* at 42 (O'Connor, J., dissenting). Justice Blackmun's majority opinion, joined by Chief Justice Rehnquist and Justices White, Marshall, and Stevens, claimed to decide "whether the Due Process Clause renders the punitive damages award in this case constitutionally unacceptable." *Id.* at 18. Justice Scalia argued that the Due Process Clause had no effect on the imposition of punitive damages. *Id.* at 24-25 (Scalia, J., concurring). He concluded that, because history and tradition dictate that punitive damages are a jury question and the tradition does not violate the Bill of Rights, the policy necessarily constitutes due process. *Id.* at 25. Justice Kennedy agreed that "the judgment of history should govern the outcome in the case" and concurred in the judgment. *Id.* at 40 (Kennedy, J., concurring).

72. *Id.* at 24.

nized that the Court need not and cannot "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. [The Court] 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."[73] Because the Court found that Alabama's method of assessing and reviewing punitive damages awards satisfied its concerns for reasonableness and adequate guidance, it upheld the award of punitive damages.[74] In so doing, the Court rejected Pacific Mutual's contention that unbridled jury discretion resulted in an unfairly excessive verdict in conflict with its due process rights.[75] In evaluating Pacific Mutual's challenge, the Court examined the jury instructions,[76] the trial court's scrutiny of the award,[77] and the review of the Alabama Supreme Court.[78] The Court found that each phase gave Pacific Mutual "the benefit of the full panoply of Alabama's procedural protections."[79]

While the Supreme Court's analysis contained separate and detailed evaluations of jury instructions, trial court scrutiny, and appellate review, the Court did not intend to provide a simple three-factor test to determine constitutionality.[80] Instead, the Court designed its

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73. *Id.* at 18.

74. *Id.* at 19-24.

75. *Id.* at 7.

76. See *supra* note 64 for jury instructions. The United States Supreme Court concluded that the instructions "reasonably accommodated Pacific Mutual's interest in rational decisionmaking. . . . [D]ue process is satisfied." *Pacific Mutual*, 499 U.S. at 20. For analysis of jury discretion, see *infra* notes 276-362 and accompanying text.

77. See *supra* note 65 for trial court scrutiny. The Supreme Court concluded that the "*Hammond* test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." *Pacific Mutual*, 499 U.S. at 20.

78. See *supra* note 67 for the "Green Oil factors" used in Alabama Supreme Court review. The Supreme Court concluded that "[t]he application of these standards . . . imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." *Pacific Mutual*, 499 U.S. at 22.

79. *Pacific Mutual*, 499 U.S. at 23.

80. Since *Pacific Mutual*, some courts have mistakenly resolved due process challenges to punitive damages based solely on how the state's standards compare with Alabama's. *See, e.g.*, Union Nat'l Bank of Little Rock v. Mosbacher, 933 F.2d 1440 (8th Cir. 1991); Phillips v. Dallas Carrier Corp., 766 F. Supp. 416 (M.D.N.C. 1991); Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991). More disturbing is the interpretation of *Pacific Mutual* by an Ohio Appeals Court. In *Estate of Baxter v. Grange Mut. Casualty Co.*, that court upheld a punitive award simply because the ratio of punitive damages to compensatory damages was less in its case than in *Pacific Mutual*. 597 N.E.2d 1157, 1163 (Ohio Ct. App. 1992). The court did not examine the process of assessing the award, nor did it test the award for excessiveness. *Id.* The court simply decided to overrule the appellant's assignment of error on the grounds that in *Pacific Mutual*, "the Supreme Court concluded that a punitive damages award of more than four times the amount of compensatory damages . . . was constitutional." *Id.* This opinion represents a complete misunderstanding of the *Pacific Mutual* decision, which focused not on ratios, but on procedure and fairness. The *TXO*

search for reasonableness in response to the structure of the system it was reviewing, that of Alabama, without rejecting the law of other states.[81] The Court tested Alabama's three-tiered system against its true test for reasonable awards and adequate procedural safeguards:

> In essence, the Court in [*Pacific Mutual*] reasoned that the constitutionality of an award of punitive damages is a function of two practical considerations: (1) whether the circumstances of the case indicate that the award is reasonable, and (2) whether the procedure used in assessing and reviewing the award imposes a sufficiently definite and meaningful constraint on the discretion of the fact finder.[82]

So long as the award is reasonable for the particular case and the procedures used in assessing the award provide adequate constraints on the factfinder, the Supreme Court will not interfere with a punitive damages award.

The South Carolina Supreme Court noted the essence of the holding in *Pacific Mutual*: "[I]t is sufficient that the protections meet 'general concerns of reasonableness' and are followed by 'adequate guidance' from the trial court."[83] Alabama Supreme Court Justice Maddox concluded that after *Pacific Mutual*, punitive damages awards "must be approached on a case-by-case basis, and it is clear . . . that if the trial courts and appellate courts do not, in fact, conduct an adequate and meaningful review of awards of punitive damages . . . then a defendant's due process rights can be seriously jeopardized."[84] Justice Maddox's interpretation of the holding in *Pacific Mutual* indicates that the United States Supreme Court was interested in protecting defendants from arbitrary decisions by implementing the procedural protections of adequate guidance and meaningful review.

Until the last paragraph of the *Pacific Mutual* majority opinion, the Supreme Court appeared to consider the punitive award/due process question only in terms of the procedural questions of the "reasona-

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Court rejected outright the exclusive use of ratios in evaluating constitutionality. TXO Prod. Corp. v. Alliance Resources, 113 S. Ct. 2711, 2721 (interim ed. 1993). By utilizing the ratio of *Pacific Mutual* as a constitutional guideline, the Ohio appellate court erroneously ignored the procedural and substantive due process issues which were of paramount importance.

81. *See* William H. Volz & Michael C. Fayz, *Punitive Damages and the Due Process Clause: The Search for Constitutional Standards*, 69 UNIV. DET. MERCY L. REV. 459, 486-87 (1992).

82. Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1381 (5th Cir. 1991) (citing *Pacific Mutual*, 499 U.S. 1 (1991)) (on remand from the Supreme Court for reconsideration in light of *Pacific Mutual*); *see* Eichenseer v. Reserve Life Ins. Co., 881 F.2d 1355 (5th Cir. 1989), *vacated and remanded*, 499 U.S. 914 (1991).

83. Gamble v. Stevenson, 406 S.E.2d 350, 354 (S.C. 1991).

84. Fraser v. Reynolds, 588 So. 2d 448, 454 (Ala. 1991) (Maddox, J., concurring in part and dissenting in part).

bleness" and "adequate guidance" of the jury instructions, trial-court review, and appellate review. Surprisingly, the Court ended its opinion by inviting future challenges based not only on improper instructions or appellate review, but on the size of the award alone. The Court concluded that "[w]hile the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety."[85] The Supreme Court's search for such a "line of constitutional impropriety" began in 1993 in the case of *TXO Production Corp. v. Alliance Resources*.[86]

2. Jarring One's Constitutional Sensibilities—TXO Production Corp. v. Alliance Resources

TXO Production Corporation ("TXO"), a subsidiary of USX, attempted to lease the "Blevins Tract," an extremely valuable tract of land in West Virginia, to develop the oil and gas resources of the region.[87] Alliance Resources ("Alliance") controlled the rights to the development of the Blevins Tract, and in April 1985, agreed to assign its interest in the tract to TXO on the condition that Alliance would return any consideration if TXO determined that title to that interest had failed.[88] Soon after the agreement, TXO discovered a 1958 deed that conveyed mineral rights in the property to a third party, but which reserved all oil and gas rights in the grantor, who was Alliance's predecessor in interest.[89] Despite the fact that Alliance had clear title to the oil and gas rights, TXO filed a declaratory judgment action against Alliance to clear this alleged cloud on the title.[90] Alliance counterclaimed, asserting slander of title.[91]

The jury found for Alliance, assessing $19,000 in compensatory damages[92] and $10 million in punitive damages.[93] The Supreme Court of West Virginia affirmed the award, finding that TXO "knowingly and intentionally brought a frivolous declaratory judgment action"[94] in an

85. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991).
86. 113 S. Ct. 2711 (interim ed. 1993), *aff'g* 419 S.E.2d 870 (W. Va. 1992).
87. *Id.* at 2715.
88. *Id.*
89. *Id.*
90. *Id.* at 2716.
91. *Id.*
92. The compensatory damages consisted of attorney's fees in defending the quiet-title declaratory action. *Id.* at 2717.
93. *Id.*
94. TXO Prod. Corp. v. Alliance Resources, 419 S.E.2d 870, 875 (W. Va. 1992), *aff'd*, 113 S. Ct. 2711 (interim ed. 1993).

attempt "to use the purported cloud as leverage for increasing its interest in the oil and gas rights."[95] In upholding the award, the West Virginia Supreme Court indicated that it considered "(1) the potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future."[96] The court found that the award satisfied all three criteria.[97] The West Virginia Supreme Court also categorized punitive damages cases as involving "really stupid defendants, really mean defendants, and really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm."[98] According to the majority, because TXO was "really mean," the punitive damages award did not violate due process.[99]

The United States Supreme Court upheld the award of punitive damages against TXO.[100] In doing so, the Court rejected the claim that "a $10 million punitive damages award—an award 526 times greater than the actual damages awarded by the jury—is so excessive that it must be deemed an arbitrary deprivation of property without due process of law."[101] Justice Stevens, writing for the plurality and reiterating the Court's decision in *Pacific Mutual*, repeated that the Court will not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[102] Instead, Justice Stevens continued to apply the "reasonableness" standard for determining whether a punitive damages award is so "grossly excessive" as to violate due process guarantees.[103] The plurality ignored the difference between the punitive and compensatory damages amount, a factor of 526 times, asserting only that "the dramatic dis-

95. *Id.* at 877.

96. *Id.* at 889.

97. *Id.* The court found that TXO could potentially cause millions of dollars in damages to other victims, that TXO's conduct was reprehensible, and that a large award was necessary to discourage TXO in the future. *Id.*

98. *Id.* at 888. According to the West Virginia Supreme Court, "really stupid" defendants can be assessed punitive damages in a ratio of "five to one" to compensatory damages, whereas for "really mean" defendants, "even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional." *Id.* at 889. The ratio in TXO was 526:1. *See infra* text accompanying note 103. The court did not articulate its legal reasoning behind "really stupid" and "really mean" classifications. *TXO*, 419 S.E.2d at 889. Two Justices who concurred in the opinion rejected the "really mean" classification as a "cavalier attempt to be clever and amusing" and opted for a more traditional characterization of defendants in cases involving punitive damage awards. *Id.* at 895.

99. *TXO*, 419 S.E.2d at 889.

100. TXO Prod. Corp. v. Alliance Resources, 113 S. Ct. 2711 (interim ed. 1993).

101. *Id.* at 2718.

102. *Id.* at 2720 (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)).

103. *Id.*

parity between the actual damages and the punitive award [is not] controlling in a case of this character."[104] Instead, the plurality concentrated on the relation between the punitive damages award and TXO's $8.3 million potential gain had their fraudulent declaratory judgment action been successful and declared that the disparity between this potential gain and the punitive damages award did not "jar one's constitutional sensibilities."[105]

The Court's analysis, however, is not persuasive since the plaintiff never made the argument concerning potential profits before either the jury or the West Virginia Supreme Court.[106] The jury instructions did not contain information about either the potential harm to Alliance or the potential gain to TXO.[107] The plaintiff did not present the $8.3 million figure until the case reached the United States Supreme Court.[108] As a result, the jury, the trial court, and the West Virginia Supreme Court all based their decisions on theories other than potential loss or potential gain—the one theory relied upon by the United States Supreme Court plurality.[109] The plurality ignored the procedural aspects of the punitive award, an award that was not premised on the potential harms or gains of either party. Instead, the plurality judged the amount of the award based upon its own impression of what seemed to be a "reasonable" amount after considering evidence which was not presented until the case reached the United States Supreme Court. The plurality opinion represented a shift away from the procedural scrutiny offered by *Pacific Mutual* and toward a substantive review of the amount of the award, regardless of whether proper procedural review occurred at the state level. By upholding a punitive award 526 times the compensatory award, the TXO plurality also abandoned *Pacific Mutual's* "line of constitutional impropriety."[110] While the *Pa-*

104. *Id.* at 2722.

105. *Id.* (quoting *Pacific Mutual*, 499 U.S. at 18).

106. *Id.* at 2734 (O'Connor, J., dissenting).

107. *Id.*

108. *Id.*

109. While the plurality also considered its own estimates in upholding the award, it acted as the fact-finder in this case, considering evidence that was not admitted before the jury. By doing so, the Court abandoned the principles of proper appellate review, substituting its findings of fact for those of the jury and trial court. It is surprising that the Supreme Court based its conclusion on evidence that was never considered at trial or initial appeal because "when reviewing evidence presented at trial, an appellate court must not re-weigh the evidence." Montgomery v. Anderson, No. 92 CA 12, 1993 Ohio App. LEXIS 1368, at *6 (Ohio Ct. App. Mar. 2, 1993). Furthermore, due process requires more than a substantively acceptable punitive amount; it demands procedural safeguards to ensure that the award was reached on the basis of "permissible considerations." *TXO*, 113 S. Ct. at 2735 (O'Connor, J., dissenting). By focusing on speculative estimates, the plurality abandoned the requirements of procedural due process and proper appellate review.

110. *See supra* note 72 and accompanying text.

cific Mutual Court found a punitive award *four* times the compensatory award "close to" this imaginary line of unconstitutionality, the *TXO* Court upheld an award *526* times the compensatory award.[111] As Justice O'Connor observed in her dissent, a punitive award that is more than 500 times the compensatory award "surely must cross" that line of unconstitutionality.[112] The *TXO* plurality also seemed to ignore the *Pacific Mutual* requirement that there be adequate and informed trial court review consisting of trial court articulation of reasons for upholding an award and adequate appellate standards.[113] Only Chief Justice Rehnquist and Justice Blackmun joined Justice Stevens' plurality opinion.[114]

Justice Kennedy disagreed with the "reasonableness" standard, asserting instead that the Constitution could only be violated if the award reflected passion or bias instead of rational policy concerns.[115] He concurred in the verdict only because "it was rational for the jury to place great weight on the evidence of TXO's deliberate, wrongful conduct in determining that a substantial award was required in order to serve the goals of punishment and deterrence."[116] Justice Scalia, joined by Justice Thomas, also rejected the plurality's substantive "reasonableness" standard, arguing that the Fourteenth Amendment is not "the secret repository of all sorts of other, unenumerated, substantive rights" such as a constitutional right to a substantively "reasonable" punitive award determination.[117] Instead, Justice Scalia argued that the Due Process Clause requires only that the appellate courts review the punitive damages awards—not that they reach a precise, substantively correct determination.[118] Justice Scalia, despite his disagreement with the plurality concerning substantive "reasonableness" rights, was pleased that the ruling in this case was "far less detailed and restrictive than [that] upheld in [*Pacific Mutual*]."[119] While Justices Kennedy, Scalia, and Thomas disagreed with the plurality's "reasonableness" standard, they

111. *TXO*, 113 S. Ct. at 2718.

112. *Id.* at 2733 (O'Connor, J., dissenting).

113. The trial judge did not articulate any reasons for upholding the award. *TXO*, 113 S. Ct. at 2724. The West Virginia Supreme Court's classification of "really stupid" and "really mean" defendants offers far less guidance than the objective "Green Oil factors" examined in *Pacific Mutual*. *See id.* at 2740-41 (O'Connor, J., dissenting).

114. *Id.* at 2714.

115. *Id.* at 2724-25 (Kennedy, J., concurring). Justice Kennedy was more concerned with the reasons for the large award rather than the size of the award itself. *Id.* at 2725.

116. *Id.* at 2726.

117. *Id.* at 2727 (Scalia, J., concurring in judgment).

118. *Id.*

119. *Id.*

concurred in the judgment, thus creating the six to three majority upholding the punitive award against TXO.[120]

Justice O'Connor again dissented, joined by Justice White and in part by Justice Souter.[121] Justice O'Connor protested that in *Pacific Mutual*, the Supreme Court "held out the promise that punitive damages awards would receive sufficient constitutional scrutiny to restore fairness in what is rapidly becoming an arbitrary and oppressive system. Today the Court's judgment renders [*Pacific Mutual's*] promise a false one."[122] She called the award "monstrous," and argued that despite the sanctity of the jury, judicial intervention in cases of excessive awards is a vital element in just award assessment.[123] She criticized the plurality for failing "to provide guidance to courts that . . . must address jury verdicts such as this on a regular basis."[124] She rejected the plurality's use of TXO's potential profit for the reasons noted above, and theorized that the true explanation for the verdict was not rational policy concerns, but juror bias against a large, wealthy, out-of-state corporation.[125] Finally, Justice O'Connor criticized the plurality's acceptance of the cavalier standards of "really stupid" and "really mean" defendants which were applied by the West Virginia Supreme Court.[126] She argued that such characterizations were a "caricature of the difficult task of determining whether an award may be upheld consistent with due process," and were insufficient in comparison to the more rigorous standard of review required in *Pacific Mutual*.[127]

The Court's retreat from the promises of *Pacific Mutual* indicates that the Supreme Court is unlikely to find that any punitive damages award violates the Due Process Clause except in the most egregious cases. Justice O'Connor concluded that "[the TXO] decision renders the meaningful appellate review contemplated in [*Pacific Mutual*] illusory; courts now may disregard the post-trial review required by due process at whim or will, so long as they do not deny its necessity openly or altogether."[128] This result was also contemplated by Justice Scalia: "[T]he great majority of due process challenges to punitive damages awards can henceforth be disposed of simply with the observation that 'this is no worse than TXO.' "[129]

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120. *Id.* at 2714.
121. *Id.* at 2728 (O'Connor, J., dissenting).
122. *Id.*
123. *Id.* at 2728-31.
124. *Id.* at 2732.
125. *Id.* at 2736.
126. *Id.* at 2741.
127. *Id.*
128. *Id.* at 2742.
129. *Id.* at 2727 (Scalia, J., concurring in judgment).

3. Concerns of Federalism and State Action

One reason that the United States Supreme Court is reluctant to interfere with punitive damages awards is that "[p]unitive damages have long been a part of traditional state tort law."[130] The Supreme Court will only interfere with state law if the law is proven unconstitutional beyond a reasonable doubt.[131] In *Pacific Mutual*, Justice Scalia commented:

> A harsh or unwise procedure is not necessarily unconstitutional . . . . State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so. (citation omitted) It is through these means—State by State, and, at the federal level, by Congress—that the legal procedures affecting our citizens are improved.[132]

Justice Kennedy agreed that "the usual protections given by the laws of the particular State must suffice until judges or legislators authorized to do so initiate system-wide change."[133] In suggesting alternatives to the common-law system of punitive damages assessment, Justice O'Connor hesitated to specify any "best" plan, stating that "[g]iven the existence of several equally acceptable methods, concerns of federalism and judicial restraint counsel that this Court should not legislate to the States which particular method to adopt. I would thus leave it to individual States to decide what method is most consistent with their objectives."[134] She concluded that the United States Supreme Court should "not dictate to the States the precise manner in which they must address the problem. [The Court] should permit the States to experiment with different methods and to adjust these methods over time."[135] Ohio accepted the opportunity to legislatively alter its common-law punitive damages system even before *Pacific Mutual* invited this experimentation.

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130. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984).

131. Zoppo v. Homestead Ins. Co., No. 62926, 1993 Ohio App. LEXIS 3459, at *18 (Ohio Ct. App. July 8, 1993) (review pending).

132. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 39 (1991) (Scalia, J., concurring in judgment) (citing Corn Exchange Bank v. Coler, 280 U.S. 218, 223 (1930)).

133. *Id.* at 42 (Kennedy, J., concurring in judgment). The Ohio Supreme Court went one step further, placing the burden of reform entirely on the state legislature: "If an alteration of the [punitive damages] rule were deemed desirable, therefore, it would come more properly from the legislature than from us." Roberts v. Mason, 10 Ohio St. 277, 280 (1859); *see also* 13 OHIO JUR. *Damages* § 137 (1930) (arguing that "[t]he rule is deemed so firmly settled as to require alteration to come from the legislature rather than from the judiciary").

134. *Pacific Mutual*, 499 U.S. at 58 (O'Connor, J., dissenting).

135. *Id.* at 63-64.

In 1987, the Ohio General Assembly enacted the Ohio Civil Justice Reform Act.[136] The Assembly enacted this comprehensive legislation in response to observations that the "national crisis in liability and insurance availability and affordability [had become] more pronounced in Ohio [than in other states]."[137] The stated purpose of the legislation was "to make changes in civil justice and insurance law, thereby reducing the causes of the current insurance crisis and preventing future crises."[138] To achieve this goal, the Ohio legislature made several substantive changes in the common-law system of punitive damages awards. This Comment examines the entire system of punitive damages awards in Ohio tort actions, both common-law and statutory, since the enactment of the Ohio Civil Justice Reform Act. This Comment recognizes that due to the United States Supreme Court's *TXO* decision, it is extremely unlikely that an Ohio punitive damages award will be deemed unconstitutional by the Supreme Court. Despite the *TXO* decision, this Comment maintains that the current law in Ohio, while an improvement over traditional common-law mechanisms, violates the Due Process Clause in several important respects.

III. ANALYSIS

Historically, Ohio has recognized punitive damages awards as a means of promoting the legitimate state interests of punishment and deterrence. It would be "inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never

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136. 1987 Ohio Legis. Serv. 5-801 to 5-839 (Baldwin).

137. Verne Riffe, *Foreword* STANTON G. DARLING, OHIO CIVIL JUSTICE REFORM ACT at v (1987). Debate on the existence of a "tort crisis" or "insurance crisis" is not lacking. *See generally* Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1987); George L. Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497 (1987).

138. 1987 Ohio Legis. Serv. 5-801 (Baldwin). The threat of high punitive damages awards is also disruptive to industry:

> Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. . . . Since then, awards more than 30 times as high have been sustained on appeal. . . . The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. . . . Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.

Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (citations omitted). This Comment suggests that meaningful tort reform is the only means of reducing punitive awards and preventing such harm to Ohio industries.

unconstitutional."[139] This Comment analyzes the effectiveness and constitutionality of Ohio's punitive damages law. In so doing, it considers the following aspects of that law: the conduct prerequisite to punitive awards;[140] the standard of proof required to find liability for punitive damages;[141] the role of the judge and jury in assessing punitive damages;[142] the judge's discretion in calculating an appropriate award;[143] and the process of appellate review[144] in light of two recent Supreme Court decisions, *Pacific Mutual Life Insurance Co. v. Haslip*[145] and *TXO Production Corp. v. Alliance Resources*.[146] This Comment demonstrates that, while some aspects of Ohio's punitive scheme adequately serve the State's interest in punishment and deterrence within the bounds of due process, unlimited discretion in assessment and improper appellate review procedures violate due process protection and reduce the effectiveness of punitive awards. This Comment also suggests solutions to the problem of unfair and arbitrary punitive damages—solutions that ensure adequate due process protection in Ohio.

A. Prerequisites to Punitive Damages Awards—Malice and Actual Harm

One aspect of traditional tort law that the Ohio Civil Justice Reform Act did not significantly affect is the nature of the conduct necessary to support an award of punitive damages.[147] Instead of altering the common-law system for finding liability for punitive damages, the Act merely codifies the existing tort common law:[148]

> [P]unitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:
> (1) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or that defendant as principal or master authorized,[149] participated in, or ratified actions or omissions of an agent or servant that so demonstrate;

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139. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) (citing Williams v. Illinois, 399 U.S. 235, 239 (1970) (" '[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack.' ")).

140. *See infra* notes 147-71 and accompanying text.

141. *See infra* notes 172-85 and accompanying text.

142. *See infra* notes 186-275 and accompanying text.

143. *See infra* notes 276-362 and accompanying text.

144. *See infra* notes 363-83 and accompanying text.

145. 499 U.S. 1 (1991).

146. 113 S. Ct. 2711 (interim ed. 1993).

147. DARLING, *supra* note 11, at 119.

148. DARLING, *supra* note 11, at 119.

149. For more discussion on principal and master liability, see 25 C.J.S. *Damages* § 125(4)(1966). "It may be stated as a general rule that the principal or master may be held liable for exemplary damages where the act complained of was authorized or subsequently

(2) The plaintiff in question has adduced proof of actual damages that resulted from acts or omissions as described in division (B)(1) of this section.[150]

While the Ohio courts have long been concerned with delineating the precise conduct necessary to support punitive damages awards,[151] it is clear that the courts have always required conduct more severe than simple negligence.[152] Because courts award punitive damages to punish the offender and not merely to compensate the victim, a positive element of conscious wrongdoing is always necessary.[153] Punitive damages awards exist to punish and deter conduct "so callous in its disregard for the rights and safety of others that society deems it intolerable."[154] As early as 1859, Ohio courts defined this conscious level of intolerable wrongdoing as fraud, malice, or insult.[155] Early cases defined malice using different terms, such as "wrongful intention,"[156] "willful

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adopted by him, or where he participated in and ratified the wrongful act of the agent or servant." *Id.* (footnote omitted); *see also* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 14 (1991). The Court in *Pacific Mutual* observed that "[i]mposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in position 'to guard substantially against the evil to be prevented.' " *Pacific Mutual*, 499 U.S. at 14 (quoting Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 116 (1927)).

150. OHIO REV. CODE ANN. § 2315.21(B) (Baldwin 1990).

151. Villella v. Waikem Motors, Inc., 543 N.E.2d 464, 466 (Ohio 1989) (recognizing that "[t]he conduct necessary to support punitive damages awards has been a major concern of trial courts"); Preston v. Murty, 512 N.E.2d 1174, 1175 (Ohio 1987) (complaining that "[t]he standards for imposing and assessing punitive damages, however, have remained frustratingly vague"); *see generally* Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 642 (1980).

152. *Preston*, 512 N.E.2d at 1176; *see also* Jones v. Wittenberg Univ., 534 F.2d 1203, 1213 (6th Cir. 1976); Calmes v. Goodyear Tire & Rubber Co., 575 N.E.2d 416, 419 (Ohio 1991); Detling v. Chockley, 436 N.E.2d 208, 211 (Ohio 1982); Leichtamer v. American Motors Corp., 424 N.E.2d 568, 580 (Ohio 1981); Ferritto v. Olde & Co., Inc., 577 N.E.2d 101, 106 (Ohio Ct. App. 1989); Petrey v. Liuzzi, 61 N.E.2d 158, 162 (Ohio Ct. App. 1945); *see generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, 9-10 (5th ed. 1984) ("Something more than the mere commission of a tort is always required for punitive damages . . . . [M]ere negligence is not enough.").

153. *Preston*, 512 N.E.2d at 1176. "This element has been termed conscious, deliberate or intentional. It requires the party to possess knowledge of the harm that might be caused by his behavior." *Id.*

154. *Calmes*, 575 N.E.2d at 419; *see also* Normandy Pointe Assoc. v. Paul J. Streibel & Assoc., Nos. CA92-06-055, CA92-07-058, 1993 Ohio App. LEXIS 3280, at *10 (Ohio Ct. App. June 28, 1993).

155. Roberts v. Mason, 10 Ohio St. 277 (1859) (first paragraph of syllabus); *see also* Motorists Mut. Ins. Co. v. Said, 590 N.E.2d 1228, 1233 (Ohio 1992); *Preston*, 512 N.E.2d at 1175; *Detling*, 436 N.E.2d at 209; Johnson v. Stackhouse Oldsmobile, Inc., 271 N.E.2d 782, 783 (Ohio 1971); Saberton v. Greenwald, 66 N.E.2d 224, 227 (Ohio 1946); Montgomery v. Anderson, No. 92 CA 12, 1993 Ohio App. LEXIS 1368, at *10 (Ohio Ct. App. Mar. 2, 1993) (malice, fraud, oppression, or insult); *see generally* 13 OHIO JUR. *Damages* § 139 (1930).

156. Rayner v. Kinney, 14 Ohio St. 283, 287 (1863).

wrong,"[157] and "wrongful act [that] was wanton or otherwise aggravated,"[158] thus creating debate of the proper standard. In *Preston v. Murty*,[159] the Ohio Supreme Court recognized this confusion and conclusively held that "actual malice" was required for a finding of punitive damages.[160] That court defined "actual malice"[161] as "first, behavior characterized by hatred, ill will, or a spirit of revenge and, second, extremely reckless behavior revealing a conscious disregard for a great and obvious harm."[162] Ohio courts have adopted the *Preston* definition as the standard of conduct necessary to award punitive damages[163] and when applying the Ohio Civil Justice Reform Act, trial courts will likely continue to use this common-law definition for analyzing the actions of a defendant.[164] This requirement of actual malice promotes Ohio's twofold purpose of punishment and deterrence by requiring that punitive damages be assessed only against conduct resulting from a

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157. Smith v. Pittsburg, Ft. W. & C. Ry. Co., 23 Ohio St. 10, 18 (1872).

158. Railroad Co. v. Hutchins, 37 Ohio St. 282, 294 (1881). Ohio courts have used numerous other standards as well, including "negligence . . . so gross as to show a reckless indifference to the rights and safety of other persons," Gearhart v. Angeloff, 244 N.E.2d 802, 803 (Ohio Ct. App. 1969), "intentional or deliberate behavior," Locafrance United States Corp. v. Interstate Dist. Serv., 451 N.E.2d 1222, 1226 (Ohio 1983), "reckless, wanton, wilful and gross acts which cause injury," Columbus Finance, Inc. v. Howard, 327 N.E.2d 654, 658 (Ohio 1975), and "wrongful, unlawful and intentional," Smithhisler v. Dutter, 105 N.E.2d 868, 869 (Ohio 1952) (paragraph two of syllabus).

159. 512 N.E.2d 1174 (Ohio 1987).

160. *Id.* at 1175.

161. "Actual malice" is different than the "legal malice," traditionally applied in tort law. Detling v. Chockley, 436 N.E.2d 208, 210 (Ohio 1982). *Legal* malice is implied in any wrongful, unlawful, and intentional act where the probable result is the injury complained of. *Id. Actual* malice requires hatred or conscious disregard for a great probability of harm, whereas legal malice does not. *Id.*; *see also* Calmes v. Goodyear Tire & Rubber Co., 575 N.E.2d 416, 419 (Ohio 1991); Pickle v. Swinehart, 166 N.E.2d 227, 228-29 (Ohio 1960); *Smithhisler*, 105 N.E.2d at 871.

162. *Preston*, 512 N.E.2d at 1175; *see also Calmes*, 575 N.E.2d at 419; *Detling*, 436 N.E.2d at 210 (quoting Columbus Fin., Inc. v. Howard 327 N.E.2d 654, 658 (Ohio 1975)). Actual malice is "that state of mind under which a person's conduct is characterized by hatred or ill will, a spirit of revenge, retaliation, or a determination to vent his feelings upon other persons." *Columbus Finance*, 327 N.E.2d at 658.

163. *See, e.g.*, Motorists Mut. Ins. Co. v. Said, 590 N.E.2d 1228, 1234-35 (Ohio 1992); *Calmes*, 575 N.E.2d at 419; Digital & Analog Design Corp. v. North Supply Co., 540 N.E.2d 1358, 1365 (Ohio 1989); Montgomery v. Anderson, No. 92 CA 12, 1993 Ohio App. LEXIS 1368, at *10-11 (Ohio Ct. App. Mar. 2, 1993).

164. Stanley B. Kent, *The New Punitive Damage Laws*, 61 CLEV. B.J. 104 (1990). Malice can be inferred from the actions of a defendant. Davis v. Tunison, 155 N.E.2d 904, 907 (Ohio 1959). "[I]t is rarely possible to prove actual malice otherwise than by conduct and surrounding circumstances. One who has committed an act would scarcely admit that he was malicious about it, and so, necessarily, malice can be inferred from conduct." *Id.*; *see also Montgomery*, 1993 Ohio App. LEXIS at *11 ("Malice can be inferred from conduct.").

mental state so callous in its disregard for the safety of others that society finds it intolerable.[165]

The requirement of "actual malice" is the first part of Ohio's statutory punitive damages law that derives from common law. The second requirement of the Act derived from common law is that the defendant's actual malice must result in conduct that causes actual harm to the plaintiff.[166] This section is derived from the Ohio common-law requirement that punitive damages only be awarded upon a finding of actual harm. In *Richard v. Hunter*,[167] the Supreme Court of Ohio adopted the holding of the West Virginia Supreme Court of Appeals in *Toler v. Cassinelli*: "A plaintiff cannot maintain an action merely to recover punitive or exemplary damages. He cannot maintain an action merely for the infliction of punishment. A finding of compensatory damages is a necessary predicate for an award of punitive damages."[168] An Ohio Court of Appeals followed the *Richard* opinion in *Uebelacker v. Cincom Systems, Inc.*[169] The *Uebelacker* court accepted a jury instruction that prohibited punitive damages if the "plaintiff has failed to meet his burden of proof with respect to actual compensatory damages on his causes of action."[170] The commonly accepted requirement[171] of actual harm as a prerequisite to a punitive damages award is a logical outgrowth of the purpose of punitive damages. Society does not need to punish or deter behavior that results in no compensable harm.

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165. If another section of the Revised Code expressly contradicts the malice requirement of OHIO REV. CODE ANN. § 2315.21(B)(1) in a particular case, the malice requirement does not apply. OHIO REV. CODE ANN. § 2315.21(D) (Baldwin 1990). As a result, several actions do not require a showing of malice, including child stealing crimes, *id.* § 2307.50(B)(2), vandalism, desecration, ethnic intimidation, *id.* § 2919.12(E), and unlawful body cavity or strip searches, *id.* § 2933.32(D)(3).

166. *Id.* § 2315.21(B); *see* text accompanying note 150.

167. 85 N.E.2d 109 (Ohio 1949).

168. *Id.* at 112 (quoting Toler v. Cassinelli, 41 S.E.2d 672, 679 (W. Va. 1947)). For additional support for this proposition, see 1 SEDGWICK ON DAMAGES § 361, at 708 (9th ed. 1912). "[I]n most jurisdictions . . . if the plaintiff has suffered no actual loss, he cannot maintain an action merely to recover exemplary damages." *Id.* "Actual damage must be found as a predicate for the recovery of exemplary damages." 2 SUTHERLAND ON DAMAGES § 406, at 1322 (4th ed. 1916).

169. 608 N.E.2d 858 (Ohio Ct. App. 1992).

170. *Id.* at 861.

171. 15 AM. JUR. *Damages* § 270, at 706 (1938). "According to the rule laid down by a majority of the decisions, actual damage must be found as a predicate for . . . an award of exemplary damages." *Id.* At least one section of the Ohio Revised Code permits recovery of punitive damages without actual harm. OHIO REV. CODE ANN. § 955.40 (Baldwin 1990) (action against corporation for violation of rabies quarantine order).

B. *Standard of Proof—Clear and Convincing Evidence*

The importance of the standard of proof chosen in any particular situation has not gone unnoticed by the United States Supreme Court:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjucation." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.[172]

To recognize the potential severity of punitive damages, and to distinguish them from simple compensatory awards,[173] the Ohio General Assembly, by enacting the Civil Justice Reform Act, increased the plaintiff's burden of proof,[174] requiring the plaintiff to show by "clear and convincing evidence . . . that he is entitled to recover punitive or exemplary damages."[175] The Ohio Supreme Court defines "clear and convincing evidence" as that degree of proof which is more than "preponderance of the evidence," but less than "beyond a reasonable doubt,"[176] and which will produce in the mind of the trier of fact a firm conviction as to the facts sought to be established.[177] The change in standard means that the jury will use one quantum of proof, preponderance of

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172. Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

173. Villella v. Waikem Motors, Inc., 543 N.E.2d 464, 467 n.2 (Ohio 1989).

174. The old standard in Ohio was "preponderance of the evidence." *See, e.g.*, Johnson v. Stackhouse Oldsmobile, Inc., 271 N.E.2d 782, 784 (Ohio 1971). The "preponderance of evidence" standard requires the plaintiff to present evidence which is more convincing to a jury than the evidence offered in opposition. Braud v. Kinchen, 310 So. 2d 657, 659 (La. Ct. App. 1975).

175. OHIO REV. CODE ANN. § 2315.21(C)(3) (Baldwin 1990); *see also* Normandy Pointe Assoc. v. Paul J. Streibel & Assoc., Inc., Nos. CA92-06-055, CA92-07-058, 1993 Ohio App. LEXIS 3280, at *10 (Ohio Ct. App. June 28, 1993); Grodhaus v. Burson, 594 N.E.2d 717, 718 (Ohio Ct. App. 1991). Other state legislatures have raised the burden of proof from "preponderance of the evidence" to "clear and convincing evidence" in punitive damage actions. *See, e.g.*, ALA. CODE § 6-11-20 (Supp. 1993); ALASKA STAT. § 09.17.020 (Supp. 1993); CAL. CIV. CODE § 3294(a) (West Supp. 1994); GA. CODE ANN. § 51-12-5.1(b) (Supp. 1993); IOWA CODE ANN. § 668A.1.1(a) (West 1987); KAN. STAT. ANN. §§ 60-3701(c), 60-3702(c) (Supp. 1992); KY. REV. STAT. ANN. § 411.184(2) (Baldwin 1991); MINN. STAT. ANN. § 549.20.1(a) (West Supp. 1994); MONT. CODE ANN. § 27-1-221(5) (1993); NEV. REV. STAT. ANN. § 42.005 (Michie Supp. 1993); N.D. CENT. CODE § 32-03.2-11.1 (Supp. 1993); OR. REV. STAT. § 41.315(1) (1988); S.C. CODE ANN. § 15-33-135 (Law. Co-op. Supp. 1993); S.D. CODIFIED LAWS ANN. § 21-1-4.1 (1987); UTAH CODE ANN. § 78-18-1 (1992).

176. "Beyond a reasonable doubt" is the standard used in criminal cases, and the jury must be completely satisfied that the evidence fully supports a conviction before finding a defendant guilty. *See, e.g.*, Johnson v. Louisiana, 406 U.S. 356, 359-60 (1972).

177. Cross v. Ledford, 120 N.E.2d 118, 123 (Ohio 1954); *Normandy Pointe*, 1993 Ohio App. LEXIS 3280, at *10.

the evidence, in determining the defendant's liability for the claim itself, and a higher standard, clear and convincing evidence, for determining defendant's liability for punitive damages.[178]

Traditionally, the quantum of proof which was required for an award of punitive damages in Ohio was a "preponderance of the evidence."[179] In *Pacific Mutual,* the United States Supreme Court considered whether the "clear and convincing evidence" standard is constitutionally required.[180] The majority opinion spoke favorably of the higher standard, but concluded that the Due Process Clause does not require "clear and convincing evidence," especially when a "preponderance of the evidence" standard is supported by the procedural and substantive protections of adequate guidance and appellate review.[181] In her dissenting opinion, Justice O'Connor examined the importance of raising the burden of proof.[182] She argued that the higher standard would serve two goals. First, it would constrain the jury's discretion, limiting punitive damages awards to the more egregious cases and permitting closer scrutiny by trial and appellate courts.[183] Second, it would be a signal to the jury that it should have a high level of confidence in its factual findings before finding liability for potentially devastating punitive damages awards.[184]

While not constitutionally required, Ohio's new law creates a more rigorous standard for finding liability for punitive damages. This legislative change away from the common-law standard recognizes the significance of a punitive sanction, and it forces jurors to more carefully consider all the evidence before they find liability severe enough to require punishment. Considering the importance of accurate and fair punitive damages awards, the change is a significant improvement over common law.[185]

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178. Prior to the enactment of Ohio Revised Code § 2315.21, the court in *Johnson v. Stackhouse Oldsmobile, Inc.* opined that bifurcating the trial and using two standards of proof would lead to confusion in the jury. 271 N.E.2d 782, 784 (Ohio 1971). There is no evidence available to demonstrate that any confusion materialized as a result of the changes.

179. *Stackhouse Oldsmobile*, 271 N.E.2d at 784.

180. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 n.11 (1991).

181. *Id.*

182. *Id.* at 58 (O'Connor, J., dissenting).

183. *Id.*

184. *Id.*

185. *See* David G. Owen, *Crashworthiness Litigation and Punitive Damages,* 4 J. PROD. LIAB. 221, 226 (1981) (higher burden of proof is "both fair and logical"); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1166-67 (1984) (advocating higher standard than "preponderance of the evidence"); Schwartz & Magarian, *supra* note 55, at 496 ("basic due process should also require more" than preponderance of the evidence). In California, the "clear and convincing evidence" standard, coupled with specific objective criteria for assessing punitive damages, has been found to have adequate procedural safeguards to satisfy due process requirements. Liberty Transport, Inc. v. Harry

C. *The Changing Roles of Judge and Jury*

The most significant change in Ohio's punitive damages awards law is the redefinition of the roles of the court and the jury in assessing the amount of a punitive damages award.[186] Prior to 1988, Ohio common law allowed the trier of fact to determine both liability for punitive damages and the amount of such a remedy.[187] By its enactment of the Ohio Civil Justice Reform Act, however, the Ohio General Assembly resolved that "[i]n a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court."[188] At least two other states have enacted similar statutes requiring courts to assess punitive damages.[189] Several commentators have suggested that the Ohio statute is an unconstitutional abridgment of the right to trial by jury.[190] After a brief survey of the history of both federal and state guarantees of the right to trial by jury, this Comment asserts that the reallocation of judicial power regarding punitive damages assessment is both a positive and constitutionally permissible step in reforming Ohio's punitive damages award system.

1. The Right to Jury Assessment of Punitive Damages

Like the right to trial by jury,[191] the right to jury assessment of punitive damages has gone largely unquestioned. The "right of a jury

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W. Gorst Co., 280 Cal. Rptr. 159, 173 (Cal. Ct. App. 1991). "Moreover, because of California's higher standard of proof by 'clear and convincing evidence' and objective criteria for determining the propriety and amount of an award, awards of punitive damages in [California] have sufficient procedural safeguards to satisfy due process." *Id.* While Ohio currently uses the "clear and convincing evidence" standard, the California courts' findings may not be applied to Ohio because, unlike California, Ohio lacks objective guidelines in the assessment phase of the trial. *See infra* notes 278-363 and accompanying text.

186. DARLING, *supra* note 11, at 120-21 (the change resulted from the passage of the Ohio Civil Justice Reform Act).

187. Villella v. Waikem Motors, Inc., 543 N.E.2d 464, 469 (Ohio 1989).

188. OHIO REV. CODE ANN. § 2315.21(C)(2) (Baldwin 1990).

189. CONN. GEN. STAT. ANN. § 52-240b (West 1991) (product liability actions); KAN. STAT. ANN. § 60-3702(a) (Supp. 1992) (all civil actions).

190. *See, e.g.*, Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142 (1991); Margaret M. Koesel, *Invading the Province of the Jury: Section 2315.21(C) and Judicial Determination of the Amount of Punitive Damages*, 15 OHIO N.U. L. REV. 55 (1988).

191. The right to trial by jury in America dates back to the early 17th century when Virginia used juries to decide certain matters in that state. Miller v. Wikel Mfg. Co., 545 N.E.2d 76, 82 (Ohio 1989) (Douglas, J., concurring in part and dissenting in part). The Declaration of Independence denounced the deprivation of the "[b]enefits of Trial by Jury" by the British Crown. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776). Thomas Jefferson explained that the right to trial by jury is "the only anchor yet ever imagined by man, by which a government can be held to the principles of its constitution." Galloway v. United States, 319 U.S. 372, 397 n.1 (1943)

in certain cases to award exemplary damages has been said to be as old as the right of trial by jury itself, and, while objections have been advanced, the doctrine is now one of general accept[ance]."[192] In *Day v. Woodworth*,[193] the United States Supreme Court confirmed that it "is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant."[194] As a matter of tradition, the assessment of punitive damages awards "has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."[195] Prior to the Ohio Civil Justice Reform Act, Ohio courts "viewed the issue of a defendant's *liability* for punitive damages as a jury question, and . . . permitted juries to set the *amount* of those damages."[196] The question, then, is whether the traditional practice of jury assessment of punitive damages is not just a tradition, but a protected right under the guarantees of the Ohio and United States Constitutions.

(Black, J. dissenting) (quoting 3 WRITINGS OF THOMAS JEFFERSON 71 (Washington ed. 1861)). In her dissent in *TXO*, Justice O'Connor extolled the virtues of the jury system, claiming that it "long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values." TXO Prod. Corp. v. Alliance Resources, 113 S. Ct. 2711, 2728 (interim ed. 1993) (O'Connor, J., dissenting). This "bulwark against tyranny" is immortalized in the Seventh Amendment of the United States Constitution: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

The Seventh Amendment has not been made applicable to state courts via the Fourteenth Amendment. Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916). However, an examination of the Seventh Amendment here provides insight into the history and purpose of its counterpart in the Ohio Constitution, which guarantees that "[t]he right of trial by jury shall be inviolate." OHIO CONST. art. I, § 5. The right to trial by jury was one of the founding principles of both the United States and Ohio Constitutions, and neither will tolerate any statute that abridges this right. *See, e.g.*, *Miller*, 545 N.E.2d at 81 (Douglas, J., concurring in part and dissenting in part). "[T]he right to trial by jury is one of the touchstones of the founding of our country. The right precedes by many years even the rights of free speech, free exercise of religion, freedom of the press and freedom from self-incrimination." *Id.*

192. Saberton v. Greenwald, 66 N.E.2d 224, 229 (Ohio 1946) (quoting 25 C.J.S. *Damages* § 117).

193. 54 U.S. (13 How.) 363 (1852).

194. *Id.* at 371.

195. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 16 (1991) (quoting *Day*, 54 U.S. (13 How.) at 363, 371).

196. Digital & Analog Design Corp. v. North Supply Co., 590 N.E.2d 737, 742 (Ohio 1992); *see also* Miller v. Wilkel Mfg. Co., 545 N.E.2d 76, 81 (Ohio 1989) (Douglas, J., concurring in part and dissenting in part) ("When a case involving damages is tried to a jury, it has always been one of the functions of the jury to determine the right to and the amount of any damages to be awarded.").

2. Law and Equity Courts in the United States and Ohio—Determination of Liability

The Seventh Amendment of the United States Constitution guarantees the right to trial by jury in federal courts in most "suits at common law."[197] The United States Supreme Court interprets this clause to require a jury trial in all actions analogous to suits at common law.[198] Prior to the adoption of the Seventh Amendment, juries decided cases brought into courts of English law.[199] Those actions analogous to cases tried in courts of equity or admiralty, however, did not require a jury trial.[200] Consistent with this history, federal courts currently distinguish between legal actions and equitable actions before determining whether there is a constitutional right to a jury trial.[201] In *Tull v. United States*,[202] the Supreme Court devised a two-part test to determine whether a cause of action is analogous to suits tried in courts of law or equity.[203] First, the action is compared to eighteenth century actions brought in the courts of England before the law and equity courts combined.[204] Second, the remedy sought by the plaintiff is considered to determine whether it is equitable or legal in nature.[205] When this test is applied to causes of action justifying the award of punitive damages, it is evident that the determination of liability for punitive damages is a legal question requiring the right to trial by jury.

Historically, a civil penalty was a remedy that was enforceable only in courts of law.[206] Likewise, a cause of action allowing punitive or exemplary damages was always tried in a court of law.[207] Further, remedies intended to punish wrongdoers were considered legal, not equitable, relief and were handed down exclusively by courts of law.[208] After applying the test, the *Tull* Court determined that "the remedy of civil penalties is similar to the remedy of punitive damages, another legal remedy."[209] As Circuit Judge Butzner concluded in *Shamblin's Ready*

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197. U.S. CONST. amend. VII.
198. Tull v. United States, 481 U.S. 412, 417 (1987).
199. *Id.*
200. Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830).
201. Ross v. Bernhard, 396 U.S. 531, 533 (1970).
202. 481 U.S. 412 (1987).
203. *Id.* at 417-18.
204. *Id.* at 417; *see, e.g.*, Pernell v. Southall Realty, 416 U.S. 363, 374-75 (1974).
205. *Tull*, 481 U.S. at 417-18; *see, e.g.*, Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974); Shamblin's Ready Mix, Inc. v. Eaton Corp., 873 F.2d 736, 740 (4th Cir. 1989) ("To determine whether the Seventh Amendment is applicable, our task is to examine the nature of an action seeking punitive damages and the remedy sought.").
206. *Tull*, 481 U.S. at 422.
207. *Shamblin's Ready Mix*, 873 F.2d at 740.
208. *Curtis*, 415 U.S. at 197.
209. *Tull*, 481 U.S. at 422 n.7.

Mix, Inc. v. Eaton Corp.,[210] "there can be no doubt that the seventh amendment guarantees a jury trial on the issue of the defendant's liability for punitive damages."[211]

The right to trial by jury in civil actions is similarly "inviolate" under the Ohio Constitution.[212] A right to trial by jury on a specific cause of action, however, is recognized only if the action presented a jury question prior to the adoption of the Ohio Constitution in 1802.[213] In addition, a right to trial by jury does not exist in Ohio if the relief sought is equitable rather than legal.[214] The determination of liability for punitive damages in Ohio satisfies both requirements and is, therefore, a legal determination requiring trial by jury. First, actions allowing punitive damages such as negligence and personal injury actions are actions at common law.[215] Causes of action requiring monetary damage awards similarly are legal actions requiring the right to trial by jury.[216] As noted above, punitive damages awards are legal rather than equitable remedies, and common-law causes of action allowing punitive damages awards existed long before the adoption of the Ohio Constitution.[217] Accordingly, the determination of liability for punitive damages is a legal question that requires the right to trial by jury under the Ohio Constitution.[218] The Ohio Civil Justice Reform Act is consistent with this requirement, because it allows the trier of fact to determine the issue of liability.[219] The final unanswered question, then, is whether there exists a right to jury assessment of the size of the punitive award after liability has been determined.

3. The Fundamental Elements of the Right to Trial by Jury—Assessment of Punitive Damages Award

While limited information concerning the actual intent of the framers of the Seventh Amendment to the United States Constitution is available, it is apparent that Americans feared that the civil jury would be abolished by a new government.[220] In response to this con-

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210. 873 F.2d 736 (4th Cir. 1989).

211. *Id.* at 740.

212. OHIO CONST. art. I, § 5.

213. Pokorny v. Local No. 310, 311 N.E.2d 866, 869 (Ohio 1974); *see also* Digital & Analog Design Corp. v. North Supply Co., 590 N.E.2d 737, 741-42 (Ohio 1992).

214. Taylor v. Brown, 110 N.E. 739 (Ohio 1915); *see also Digital*, 590 N.E.2d at 742.

215. Cleveland Ry. Co. v. Halliday, 188 N.E. 1 (Ohio 1933); Keller v. Stark Elec. Ry. Co., 130 N.E. 508 (Ohio 1921).

216. Gunsaullus v. Pettit, 17 N.E. 231 (Ohio 1888).

217. *See supra* notes 24-37 and accompanying text.

218. Shamblin's Ready Mix, Inc. v. Eaton Corporation, 873 F.2d 736, 740 (4th Cir. 1989).

219. "In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages." OHIO REV. CODE ANN. § 2315.21(C)(1) (Baldwin 1990).

220. Colgrove v. Battin, 413 U.S. 149, 152 (1973).

cern, the framers wrote the Amendment "to preserve the basic institution of jury trial in only its most fundamental elements."[221] The test for punitive damages assessment, therefore, is whether jury assessment of punitive damages is necessary to preserve "the substance of the common-law right of trial by jury."[222] If jury assessment is not necessary to preserve that right, it is not within the scope of the Seventh Amendment and the legislature may restrict or eliminate it. *Tull v. United States* reaffirmed the United States Supreme Court's holding in *Colgrove v. Battin*[223] that "[o]nly those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature."[224] Recently, the Ohio Supreme Court adopted the *Tull* "fundamental elements" test to hold that assessment of attorney fees was not essential to the right to trial by jury.[225] Applying the *Tull* "fundamental elements" test to the jury assessment of punitive damages demonstrates that jury assessment is not required by either the United States Constitution or the Ohio Constitution.

The *Tull* Court addressed the question of whether a judge is permitted to assess the amount of a civil penalty under the Clean Water Act.[226] After holding that the Seventh Amendment required jury determination of liability based on the legal-equitable distinction,[227] the Court turned to the fundamental elements test. The Court concluded that the assessment of a civil penalty is not a fundamental element requiring the right to trial by jury.[228] The Court reasoned that because Congress was permitted to fix the amount of a civil penalty by statute, Congress had an equal right to delegate that responsibility to the trial court judge.[229] Further, civil damage assessment requires "highly discretionary calculations that take into account multiple factors,"[230]

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221. Galloway v. United States, 319 U.S. 372, 392 (1943).

222. *Colgrove*, 413 U.S. at 156 (quoting Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935)); *see also* Tull v. United States, 481 U.S. 412, 426 (1987).

223. 413 U.S. 149 (1973).

224. *Tull*, 481 U.S. at 426 (quoting *Colgrove*, 413 U.S. at 157 (quoting Austin W. Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 671 (1918))).

225. Digital & Analog Design Corp. v. North Supply Co., 590 N.E.2d 737, 742 (Ohio 1992).

226. *Tull*, 481 U.S. at 414.

227. *See supra* notes 197-219 and accompanying text.

228. *Tull*, 481 U.S. at 426.

229. *Id.* An action to recover civil penalties traditionally seeks the amount Congress prescribes. *See, e.g.*, United States v. Regan, 232 U.S. 37, 40 (1914); Hepner v. United States, 213 U.S. 103, 109 (1909); *see also Digital*, 590 N.E.2d at 742 ("[T]here is no federal constitutional guarantee for a jury trial in the remedy stage of a civil proceeding in the federal courts.").

230. *Tull*, 481 U.S. at 427.

which are "calculations traditionally performed by judges."[231] Because assessing the amount of civil penalties is not a fundamental element of the right to trial by jury and because judges are better able to perform the highly discretionary calculations of punitive damages assessments, the statutory mandate of judicial assessment of punitive damages awards is constitutional.

The Fourth Circuit Court of Appeals, in *Shamblin's Ready Mix, Inc. v. Eaton Corp.*,[232] expanded the application of the *Tull* "fundamental elements" test from the assessment of civil penalties to include determination of punitive damages.[233] The Fourth Circuit concluded that a judge may remit a portion of a jury-assessed punitive damages award without allowing either party to request a new trial.[234] Traditionally, courts could order a remittitur only with the consent of the plaintiff.[235] The United States Supreme Court ruled that a court may not set aside a jury verdict for compensatory damages and substitute its own estimate, citing the Seventh Amendment right to trial by jury.[236] After acknowledging that the amount of compensatory damages was a fundamental element requiring the right to trial by jury, the *Shamblin's Ready Mix* court distinguished punitive damages as "a remedy in the nature of a penalty designed to punish and deter reprehensible conduct,"[237] unlike the purpose of compensatory damages, which is to make the plaintiff whole.[238]

The court instead likened punitive damages to the civil penalty in *Tull*.[239] Because "[t]here is no principled distinction between civil penalties and the modern concept of punitive damages,"[240] it is "clear that

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231. *Id.*; *see* Albemarle Paper Co. v. Moody, 422 U.S. 405, 442-43 (1975) (Rehnquist, J., concurring).

232. 873 F.2d 736 (4th Cir. 1989).

233. *Id.* at 741. "We believe the Court's reasoning [in *Tull*] may be applied to punitive damages." *Id.*

234. *Id.* The First, Seventh, and Eighth Circuit Courts of Appeals have also reduced the amount of jury-assessed punitive damages, though none made direct reference to Seventh Amendment concerns. *See* Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 207 (1st Cir. 1987); Bell v. City of Milwaukee, 746 F.2d 1205, 1267-79 (7th Cir. 1984); Guzman v. Western State Bank, 540 F.2d 948, 954 (8th Cir. 1976). *But see* McKinnon v. City of Berwyn, 750 F.2d 1383, 1391-92 (7th Cir. 1984) (holding Seventh Amendment did not permit a district court to reduce jury verdict for punitive damages).

235. Fromson & Davis Co. v. Reider, 189 N.E. 851, 852 (Ohio 1934); *see also* Chester Park Co. v. Schulte, 166 N.E. 186, 188 (Ohio 1929); Schendel v. Bradford, 140 N.E. 155, 156 (Ohio 1922).

236. Kennon v. Gilmer, 131 U.S. 22, 28-30 (1889); *see also Shamblin's Ready Mix*, 873 F.2d at 741 ("Assessing the extent of harm is appropriately within the province of the jury in its capacity as fact finder.").

237. *Shamblin's Ready Mix*, 873 F.2d at 742.

238. *See supra* note 39 and accompanying text.

239. *Shamblin's Ready Mix*, 873 F.2d at 741-42.

240. *Id.*

the amount of exemplary damages is not a fundamental element of the trial,"[241] and judicial determination of a punitive damages award, like that of a civil penalty, does not violate the right to trial by jury.[242] An Ohio court adopted this reasoning in *Zoppo v. Homestead Insurance Co.*:[243] "The amount of civil penalties imposed, after a finding of liability by the trier of fact, may be reserved for the court's determination."[244] The Ohio Supreme Court went further in *Digital & Analog Design Corp. v. North Supply Co.*,[245] determining that "the requirement that a party pay attorney fees under these circumstances is a punitive (and thus equitable) remedy" and does not require jury assessment of damages.[246]

Judicial assessment of punitive damages is a relatively recent phenomenon and few Ohio or federal courts have ruled on the constitutionality of this practice. In the cases that have arisen challenging the propriety of judicial assessment of punitive damages, the courts have supported the change being "persuaded that the approach taken by the legislature is the proper course for the development of the common law of [Ohio]."[247] The Court of Appeals for the Eighth Appellate District upheld judicial assessment against direct constitutional challenge in *Zoppo*.[248] Recognizing that "all legislative enactments enjoy a presumption of constitutionality,"[249] the *Zoppo* court concluded that the plaintiff did not prove the unconstitutionality of the statute beyond a reasonable doubt.[250] In *Bazali v. Wincle, Chevrolet, Olds, Pontiac, Inc.*,[251] the Ohio Court of Appeals for the Third Appellate District approved of judicial assessment of punitive damages without questioning the right to trial by jury.[252] The *Bazali* court remanded a punitive

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241. *Id.* The Court continued: "The measure of damages in a cause of action for a tort is not a fundamental element of a trial. The proper measure is a function of law not of facts found by a jury." *Id.*

242. *Id.*

243. No. 62926, 1993 Ohio App. LEXIS 3459 (Ohio Ct. App. July 8, 1993).

244. *Id.* at *19.

245. 590 N.E.2d 737 (Ohio 1992).

246. *Id.* at 742.

247. *Id.* at 743. The court recognized that after the enactment of the Ohio Civil Justice Reform Act, "it is a proper function for the trial court, in a jury trial in a tort action, to determine the amount of punitive damages, but . . . the issue of liability is expressly reserved to the jury." *Id.* at 742.

248. No. 62926, 1993 Ohio App. LEXIS 3459 (Ohio Ct. App. July 8, 1993).

249. *Id.* at *18 (quoting Sedar v. Knowlton Constr. Co., 551 N.E.2d 938 (Ohio 1990) (citing Hardy v. VerMeulen, 512 N.E.2d 626 (Ohio 1987), *cert. denied*, 484 U.S. 1066 (1988))).

250. *Zoppo*, 1993 Ohio App. LEXIS 3459, at *18. The court observed that "[a] statute can be declared invalid only when its unconstitutionality is shown beyond a reasonable doubt." *Id.*; *see also* Board of Educ. v. Walter, 390 N.E.2d 813, 819 (Ohio 1979).

251. No. 11-91-7, 1992 Ohio App. LEXIS 4124 (Ohio Ct. App. July 23, 1992).

252. *Id.* at *14.

damages award because the jury assessed the award in contravention of the statutory requirement of judicial assessment.[253] Likewise, the Ohio Court of Appeals for the First Appellate District has recognized the statutory grant of judicial power to assess punitive damages without question.[254] Finally, the United States Court of Appeals for the Sixth Circuit approved of judicial assessment without comment while applying Ohio law in *Compton v. Kolvoord*.[255] The Ohio Civil Justice Reform Act, requiring judicial assessment of punitive damages awards, is only a few years old. It appears, however, that neither Ohio nor federal courts question the right of a judge to assess punitive damages once the jury finds punitive liability.[256]

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253. *Id.* The court noted that "[t]he trial court erred as a matter of law by failing to apply R.C. 2315.21 to the action and instructing the jury to determine the amount of punitive damages." *Id.* at 15. "[T]he amount of punitive damages should have been determined by the court, following the jury's determination that such damages were warranted." *Id.*

254. Uebelacker v. Cincom Systems, Inc., 608 N.E.2d 858 (Ohio Ct. App. 1992).

255. 605 N.E.2d 950 (1993), *dismissing appeal from* No. 92-3214, 1993 U.S. App. LEXIS 10542 (6th Cir. Apr. 30, 1993) (citing and using Ohio Revised Code § 2315.21 without questioning the constitutional right to trial by jury).

256. *But see* Miller v. Wilkel Mfg. Co., 545 N.E.2d 76, 81 (Ohio 1989) (Douglas, J., concurring in part and dissenting in part). "The more we countenance, in any way, the abrogation of the right of trial by jury, the more we can expect to see both legislative and judicial attempts at erosion of the sacred right. . . . R.C. 2315.21(C)(2) is yet another example. . . . Again, the right to trial by jury has been abridged." *Id.* Courts in some states have included the right to jury assessment of punitive damages in their states' constitutional right to jury trial. *See, e.g.*, Samsel v. Wheeler Transp. Serv., 789 P.2d 541, 551 (Kan. 1990); Perilli v. Bd. of Educ. Monongalia County, 387 S.E.2d 315, 317 (W. Va. 1989).

Judicial assessment of punitive damages, while not in violation of the right to trial by jury, has been criticized on civil procedure grounds. *See* DARLING, *supra* note 11, at 121. This challenge argues that mandatory judicial assessment is invalid under Article IV, § 5(B) of the Ohio Constitution, which, as part of the Modern Courts Amendment of 1968, provides that the Ohio Supreme Court "shall prescribe rules governing practice and procedure in all courts of the state." OHIO CONST. art IV., § 5(B). Furthermore, all "laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." *Id.* The argument is that the judicial assessment requirement "apparently imposes a mandatory bifurcation of trial . . . in conflict with [Ohio Rule of Civil Procedure 42(B)], which contemplates that bifurcation is not mandatory but is to be decided by trial courts on a case-by-case basis." DARLING, *supra* note 11, at 121. As a result, mandatory judicial assessment results in mandatory bifurcation in contravention of the optional bifurcation contemplated by the Ohio Rules of Civil Procedure. *Id.*

The argument is flawed for several reasons. First, Revised Code § 2315.21 does not explicitly require a separate bifurcated trial as contemplated in Civil Rule 42(B). The statute requires only that the court determine the proper amount of punitive damages, not that it separate the phases of the trial. The Rules of Civil Procedure do not prohibit judicial action, they simply require that the legislature not explicitly require bifurcation. Admittedly, trial separation would be likely in most cases, but the decision to separate remains within the discretion of the trial judge. Second, mandatory judicial assessment is in harmony with the goals of the Civil Rules. One purpose of the Civil Rules is to "avoid prejudice." OHIO CIV. R. 42(B). As shown below, there is a high risk of bias or prejudice in punitive damages juries. *See infra* notes 265-73 and accompanying text. Because bias is prevalent in punitive damages awards assessed by juries, judicial assessment of the amount of the punitive awards avoids inherent jury bias and is consistent with one goal of Civil Rule 42(B).

4. The Benefits of Judicial Assessment of Punitive Damages

Requiring the court to assess punitive damages after the jury finds liability appears to be constitutional. It is also a beneficial step for creating stability in Ohio's increasingly chaotic punitive damages system. The problems of jury assessment of punitive damages have been widely noted for years. The United States Supreme Court discussed the problem of jury discretion in *Gertz v. Robert Welch, Inc.*[257] The *Gertz* Court noted that "[i]n most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."[258] In *Rosenbloom v. Metromedia, Inc.*,[259] Justice Marshall concluded that the "discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others."[260] In his concurring opinion in *Villella v. Waikem Motors, Inc.*,[261] Justice Brown complained that unlimited jury discretion had become a problem in Ohio as well: "The problem is that juries are given little or no guidance with respect to the measure of punitive damages. The consequence is that the amount awarded by a jury for punitive damages is unpredict-

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Third, Civil Rule 42(B) contemplates allowance of separate trials in the interest of fairness. OHIO CIV. R. 42(B). It is an expansive device intended to be used by judges when a single proceeding would be unfair to a party. Mandatory judicial assessment further expands the right to separate trials and is therefore compatible, not in conflict, with the Civil Rules. A conflict would arise only if the right to a separate trial were statutorily reduced, truly removing the option of the judge. Mandatory judicial assessment, however, while arguably removing some discretion from the trial judge, does not conflict with the purpose of the Civil Rule—to allow a separate trial when necessary.

Finally and most significantly, the Modern Courts Amendment only affects those statutes in existence prior to its enactment in 1970. In *Gates v. Brewer*, an Ohio Court of Appeals adopted the opinion of Judge Holmes, observing that the language of the Ohio Constitution "refers and applies only to those statutes in force at the time the Civil Rules became effective on July 1, 1970. The intent as clearly expressed by such language was to provide for the repeal of those statutes in conflict with the rules on July 1, 1970." 442 N.E.2d 72, 76 (Ohio Ct. App. 1981) (quoting Hearing v. Delnay, No. 76AP-493 (Ohio Ct. App. Dec. 21, 1976)). The court continued:

> If the intent of the framers of the language of the constitutional amendment would have been otherwise, it would have been a simple procedure to have provided for the predominance of any rule as found to be in conflict with any law enacted after the effectiveness of the rule. Such not having been done, [subsequent legislation] prevails, and does no violence to Article IV, Section 5 of the Ohio Constitution.

Id. at 76-77. Therefore, since the Ohio Civil Justice Reform Act containing mandatory judicial assessment was passed following the Modern Courts Amendment, it is valid.

257. 418 U.S. 323 (1974).

258. *Gertz*, 418 U.S. at 350. Ironically, the Supreme Court adopted the "excessive" standard in *TXO*. *See supra* notes 100-05 and accompanying text.

259. 403 U.S. 29 (1971).

260. *Id.* at 84 (Marshall, J., dissenting).

261. 543 N.E.2d 464 (Ohio 1989).

able."[262] Ohio punitive damages awards were being assessed by juries that received virtually no guidance, ultimately resulting in unpredictable and arbitrary awards.

While jury discretion may result in arbitrary or unpredictable results, such discretion by itself is not a valid reason for reducing the role of the jury.[263] Providing additional guidance would reduce discretion without abridging traditional jury domain.[264] Even with proper guidance, however, there is a risk that jury-assessed punitive damages awards might remain arbitrary and unpredictable because juries hold inherent biases that, despite procedural safeguards, can adversely affect fair assessment of punitive damages awards. As Justice O'Connor recognized in *TXO*:

> Our system of justice entrusts jurors—ordinary citizens who need not have any training in the law—with profoundly important determinations. . . . But jurors are not infallible guardians of the public good. They are ordinary citizens whose decisions can be shaped by influences impermissible in our system of justice. . . . Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decision making. . . . This is especially true in the area of punitive damages.[265]

Appellate review may exist to curtail overt juror passion and prejudice, but it does not adequately protect defendants from unseen bias.[266]

While juries often act with passion and bias, judges are largely immune from such emotion.[267] Juries are more susceptible to passion and bias than judges.[268] According to one commentator, "[t]he judge very often perceives the stimulus that moves the jury, but does not yield to it. . . . The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude."[269] The coupling of these stimuli and the fact that juries hear only one case create an environment of uncer-

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262. *Id.* at 471 (Brown, J., concurring).

263. Discretion in assessment is discussed more fully *infra* notes 276-362 and accompanying text.

264. *See infra* notes 341-54 and accompanying text.

265. TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2728-29 (interim ed. 1993) (O'Connor, J., dissenting).

266. See *infra* notes 363-83 and accompanying text for discussion of the passion and prejudice review standard.

267. *See infra* notes 377-78 and accompanying text.

268. *TXO*, 113 S. Ct. at 2728 (O'Connor, J., dissenting). "In fact, [jurors] are more susceptible to such influences [as passion and bias] than judges." *Id.*

269. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY, 497-98 (1966).

tainty and unpredictability that the trial judge can avoid.[270] Given the importance of punitive damages and the uncertainty surrounding a potentially devastating award, it is advantageous to have the determination of an appropriate award in the hands of a trial judge, who is less susceptible to both bias and passion and can assess punitive damages with consistency, based solely upon the law, evidence, and reason.

Another problem with jury assessment of punitive damages is that jurors may be less likely than a trial judge to fully comprehend the true purpose of punitive damages awards. If the jury does not assess a punitive award with a complete understanding of the reasons for doing so, the amount of the award will be either too large or too small to achieve the purpose of the award. This arbitrary result is unacceptable and potentially devastating to the defendant. In *Bazali v. Wincle, Chevrolet, Olds, Pontiac, Inc.*,[271] an Ohio appellate court vacated a jury-assessed punitive damages award due to the requirement of judicial assessment.[272] The court also noted that: "It is obvious from the record that the jury failed to understand the rationale behind an award of punitive damages. . . . [T]he award of the jury was insufficient to fulfill the objectives of punitive awards."[273] Requiring courts to assess damages eliminates the risk that the assessor will misunderstand the importance or purpose of his task.

The right to trial by jury in the United States and Ohio continues to be a "bulwark against tyranny."[274] The right, which predates both Constitutions, is as valuable a tool for preserving individual rights today as it was at the birth of this nation. The statutory grant requiring punitive damages assessment by the court following a determination of liability by the jury does indeed reduce the traditional role of the jury. It does not, however, abridge the constitutional guarantees of either the United States or Ohio. Instead, the redistribution of power recognizes an inherent weakness in the jury system today. Despite strict discretionary controls, the system is open to unseen biases that lead to unpredictable and unfair results. Reducing verdicts upon a finding of overt passion and prejudice does not restore fairness to an extremely complicated damage award, an award that cannot be defined with the ease of

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270. Juries are asked to accurately assess the minimum amount that will both adequately punish and deter. This burden requires a greater understanding of punitive damages than a one-time jury member can be expected to have. Unlike jurors, judges who hear numerous punitive damages cases are well suited for the difficult task of balancing all interests in evaluating a proper award. *See* Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 997-1008 (endorsing judge assessed punitive damages awards).

271. No. 11-91-7, 1992 Ohio App. LEXIS 4124 (Ohio Ct. App. July 23, 1992).

272. *Id.* at *15.

273. *Id.* at *16.

274. *See supra* note 191.

compensatory damages.[275] Rather, judicial assessment of punitive damages allows judges, who presumably understand the complexities of such an award better than jurors, to assess awards that are both fair and consistent. Instead of mourning the loss of one aspect of trial by jury, critics should recognize that the statutory strategy embraced by the Ohio General Assembly in the Ohio Civil Justice Reform Act enables its citizens to experience a fair and just method of damage assessment.

D. Discretion in Judicial Assessment of Punitive Damages Awards

Notably absent from both Ohio common law and the Ohio Civil Justice Reform Act is any discussion regarding the standard for determining the actual amount of a punitive damages award.[276] Recognizing the dual purpose of punitive damages,[277] Ohio courts have insisted that the amount of the award should be neither more nor less than is sufficient to achieve that purpose.[278] Legislatures and courts, however, have

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275. While compensatory damages are not easy to define *per se*, the assessment of compensatory damages is guided by the simple directive to make the plaintiff whole, and the jury can assess compensatory damages within its role as fact-finder. *See supra* note 39 and accompanying text. Punitive damages, in contrast, are used to express society's outrage at malicious behavior and are not founded on simple calculations of the plaintiff's loss. *See supra* notes 38-43 and accompanying text.

276. *See* OHIO REV. CODE ANN. § 2315.21 (Baldwin 1992) (containing no reference to any guidelines for assessing punitive damages). Surprisingly, the Ohio General Assembly did enact statutory standards for assessing punitive damages for drug product liability claims. *Id.* § 2307.80. The product liability statute requires:

> In determining the amount of punitive or exemplary damages, the court shall consider factors including, but not limited to, the following:
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> (1) The likelihood that serious harm would arise from the misconduct of the manufacturer or supplier in question;
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> (2) The degree of the awareness of the manufacturer or supplier in question of that likelihood;
>
> (3) The profitability of the misconduct to the manufacturer or supplier in question;
>
> (4) The duration of the misconduct and any concealment of it by the manufacturer or supplier in question;
>
> (5) The attitude and conduct of the manufacturer or supplier in question upon the discovery of the misconduct and whether the misconduct has terminated;
>
> (6) The financial condition of the manufacturer or supplier in question;
>
> (7) The total effect of other punishment imposed or likely to be imposed upon the manufacturer or supplier in question as a result of the misconduct, including awards of punitive or exemplary damages to persons similarly situated to the claimant and the severity of criminal penalties to which the manufacturer or supplier in question has been or is likely to be subjected.

Id. It is surprising that the General Assembly so thoroughly defined the standard for punitive damage assessment in drug claims while not including a similar standard for tort actions.

277. The dual purpose is to punish and deter. *See supra* notes 38-43 and accompanying text.

278. *See, e.g.*, Villella v. Waikem Motors, Inc., 543 N.E.2d 464, 477 (Ohio 1989) (Wright, J., concurring in part and dissenting in part); *see also* Compton v. Kolvoord, No. 92-3214, 1993

been reluctant to articulate a specific method for determining what amount would be sufficient to punish and deter malicious conduct.[279] As a result, judges often tell juries that the purpose of punitive damages is to punish and deter, but judges offer no guidance as to a proper means of effecting either punishment or deterrence.[280] In *Villella v. Waikem Motors, Inc.*,[281] a controversial Ohio case upholding a punitive award of $150,000 on $250 in actual damages,[282] the Supreme Court of Ohio failed to discuss any of the factors upon which a punitive damages award amount should be based.[283] This lack of guidance enables Ohio judges to award punitive damages in an arbitrary and oppressive manner, thus violating the constitutional guarantees of due process of law.

1. The Historical Criticism of Jury Discretion

Criticism of unlimited jury discretion in assessing punitive damages has existed virtually since the beginning of punitive damages awards.[284] In the absence of adequate standards for determining "how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. . . . [P]unitive damages are imposed by juries guided by little more than an admonition to do what they think is

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U.S. App. LEXIS 10542, at *7 (Ohio Ct. App. Apr. 30, 1993) ("The amount awarded should be no more or no less than that sufficient to punish and deter conduct.").

279. TXO Prod. Corp. v. Alliance Resources, 113 S. Ct. 2711, 2741-42 (interim ed. 1993) (O'Connor, J., dissenting); *see also* Shamblin's Ready Mix, Inc. v. Eaton Corp., 873 F.2d 736, 743 (1989) ("Assessing punitive damages cannot be done with scientific exactitude.").

280. *TXO*, 113 S. Ct. at 2742 (O'Connor, J., dissenting).

281. 543 N.E.2d 464 (Ohio 1989).

282. *Id.* at 471. In this case, Waikem Motors held Villella's car for two hours because Villella refused to pay an auto repair bill for his daughter. *Id* at 465. A jury awarded Villella $250 in actual damages, $15,000 in attorney fees, and $150,000 in punitive damages for conversion of property. *Id* at 471.

283. *Id.* at 476 (Wright, J., concurring in part and dissenting in part). Judge Wright noted:

> Of greater concern is the majority's willingness to confer upon a jury unbridled discretion in setting the amount of a punitive damages award. . . . No mention is made of the factors on which a punitive damages amount should be determined or whether these factors would justify the exorbitant award granted in this case.

Id.

284. The majority of criticism regarding assessment discretion is targeted at juries for two reasons. First, judicial assessment of punitive damages is a recent phenomenon, and commentators have not had the opportunity to evaluate its effects. Second, judges are less likely to be swayed by passion or bias, and lack of standards will probably not result in the extreme judgments found in standardless jury assessments. *See supra* notes 257-75 and accompanying text. The constitutional infirmities discussed in this section, however, deal not with the results of standardless discretion, but rather the discretion itself. Therefore, analysis mentioning and criticizing jury discretion is equally applicable to judges in Ohio, who have the same standardless discretion as their jury predecessors.

best."[285] In her dissenting opinion in *Pacific Mutual Life Insurance Co. v. Haslip*, Justice O'Connor harshly criticized common-law procedures for awarding punitive damages:

> States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. . . . [S]uch instructions are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections.[286]

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[287] Justice Brennan complained that such skeletal guidance is "scarcely better than no guidance at all."[288] The potential ramifications of giving juries or judges this broad discretion are numerous. The majority in *Pacific Mutual*, while upholding the award of punitive damages, conceded 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."[289] Unlimited discretion in the assessment of punitive damages is a dangerous and potentially devastating practice.

2. Supreme Court Majority Acceptance of Vague Guidelines

Despite frequent criticism of vague assessment guidelines, the United States Supreme Court continues to uphold the constitutionality of such guidelines. In *Pacific Mutual*, the trial court simply instructed the jury that the purpose of punitive damages was to punish and deter[290] and that punitive damages were not compulsory.[291] The Supreme Court acknowledged that these "instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. . . . These instructions . . . reasonably accommodated Pacific Mutual's interest in rational decisionmaking and Alabama's interest in meaningful individualized assessment of appropriate

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285. Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring).

286. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42-43 (1991) (O'Connor, J., dissenting).

287. 492 U.S. 257 (1989).

288. *Id.* at 281 (Brennan, J., concurring).

289. *Pacific Mutual*, 499 U.S. at 18. Interestingly, this admission includes a concern for "unlimited judicial discretion." This reference indicates a concern that, while a judge may understand the purpose of punitive damages better than a lay jury, he or she might still award punitive damages beyond the scope of punishment or deterrence if not given proper guidance.

290. *Id.* at 6 n.1.

291. *Id.*

deterrence and retribution."[292] The Court reasoned that "[a]s long as the discretion is exercised within reasonable constraints, due process is satisfied."[293]

The Supreme Court's analysis in *Pacific Mutual* contains serious flaws. First, while the trial court instructed the jury that punitive damages should punish and deter, the jury did not receive any guidance in assessing proper levels of punishment or deterrence.[294] The jury received no standard for calculating those factors that could influence the effectiveness of such an award. Unpredictable and arbitrary awards cannot further the goals of punishment and deterrence because some awards will be too harsh or too lenient, and because third persons cannot plan their behavior based upon arbitrary considerations. Second, while the jury's discretion was not "unlimited," it was certainly broad enough to allow jurors to "make determinations of the crucial issue upon their notions of what the law should be instead of what it is."[295] This allowance arguably creates an arbitrary and unfair system of awards that is based not upon reason or law, but rather upon the particular biases and feelings of individual jurors. The system is unfair to defendants who suffer the risk of an excessive penalty at the hands of a vindictive jury, instead of a reasoned and guided punitive award assessed rationally by an informed court.

Finally, while the real problem is the standardless discretion of the jury, the "reasonable constraints" used by the Supreme Court to justify vague instructions are merely *post hoc* evaluations of the size of the award.[296] This *post hoc* evaluation is constitutionally insufficient because it does not address the true problem with the current law. The standards used by judges and juries to assess punitive damages awards grant too much discretion and allow awards not based upon objective criteria. Simply because an appellate court does not consider an individual award "grossly excessive" does not rectify the infirmities of unlimited discretion: "Well intentioned prosecutors and judicial safe-

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292. *Id.* at 19-20. This holding is somewhat surprising given that, in the cases prior to *Pacific Mutual*, "a majority of the Court could fairly be regarded as having recognized that the Due Process Clause could be violated by the broad discretion accorded to juries in determining whether to impose punitive damages and what amount to award." Volz & Fayz, *supra* note 81, at 474.

293. *Pacific Mutual*, 499 U.S. at 20. The "reasonable constraints" in Alabama include appellate review of awards based upon the "Green Oil" test, discussed *supra* note 67.

294. See *supra* note 64 for jury instructions.

295. *Pacific Mutual*, 499 U.S. at 46 (O'Connor, J., dissenting) (quoting Giaccio v. Pennsylvania, 382 U.S. 399, 403 (1966)).

296. *Id.* at 52.

guards do not neutralize the vice of a vague law."[297] A damage award based on vague standards that coincidentally satisfies appellate court review for excessiveness still violates the defendant's right to procedural due process.[298]

As Justice O'Connor noted, "[e]ven a wholly irrational process may, on occasion, stumble upon a fair result. What is critical is that the existing system is not rational."[299] Alabama Supreme Court Justice Houston, in addressing the process of appellate review, realized that the courts "attempted to deal with the issue of the reliability of punitive damages assessments by post-trial review only. . . . That attempt does not really address the issue."[300] The United States Supreme Court has often recognized the potential ramifications of highly discretionary standards for assessing punitive damages. In *Pacific Mutual*, however, the majority failed to acknowledge that this unlimited discretion creates an arbitrary and oppressive system in contrast to the requirements of the Due Process Clause of the United States Constitution. Unfortunately, as a result of the Supreme Court's acceptance of extremely broad discretion in the assessment of punitive damages in *Pacific Mutual*, several courts copied the jury instructions given in that case believing them to be constitutionally adequate.[301]

3. Broad Jury Discretion and Due Process

In a her dissenting opinion in *Pacific Mutual*, Justice O'Connor articulated two compelling reasons why broad jury discretion violates the guarantees of due process.[302] First, she argued that the guidelines

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297. Baggett v. Bullitt, 377 U.S. 360, 373 (1964); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984).

298. Due process has both substantive and procedural aspects. *See supra* notes 44-58 and accompanying text. A result that appears to satisfy substantive tests may still fail procedural due process if the amount is assessed in an unfair manner.

299. *Pacific Mutual*, 499 U.S. at 52 (O'Connor, J., dissenting).

300. Charter Hosp. of Mobile, Inc. v. Weinberg, 558 So. 2d 909, 915 (Ala. 1990) (Houston, J., concurring specially).

301. *See, e.g.*, Braswell v. ConAgra, Inc., 936 F.2d 1169, 1176 (11th Cir. 1991). "The district court's jury instructions are similar to those approved by the Supreme Court in [*Pacific Mutual*]. The jury was not given unlimited discretion, but was instructed to consider the character and degree of the wrong and the necessity of preventing similar wrongs." *Id.*; *see also* American Employers Ins. Co. v. Southern Seeding Serv., Inc., 931 F.2d 1453, 1458 (11th Cir. 1991) (jury instruction "substantially similar to the one in [*Pacific Mutual*]"); Robertson Oil Co., Inc., v. Phillips Petroleum Co., 930 F.2d 1342 (8th Cir. 1991) (approving jury instruction as "comparable to that approved in [*Pacific Mutual*]").

302. *Pacific Mutual*, 499 U.S. at 43 (O'Connor, J., dissenting). In an earlier case, Justice O'Connor commented that "[t]his grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring). Because the issue had not been "raised and passed upon in state court," however, the Supreme Court did not fully consider the discretion question. *Id.* at 76.

in *Pacific Mutual* were void for vagueness.[303] Second, the guidelines failed the due process test set forth in *Mathews v. Eldridge*.[304] Though not commanding a majority of the Supreme Court, Justice O'Connor's opinion is persuasive. The void for vagueness doctrine and the three-tier *Mathews* test can be applied to the vague assessment guidelines of Ohio to reach the same conclusion that Justice O'Connor reached in *Pacific Mutual*: Vague guidelines granting broad discretion are unconstitutional in violation of the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution.

a. Void for Vagueness

States are required to provide meaningful standards to guide the application of their laws.[305] Laws that lack adequate standards are void for vagueness.[306] The void for vagueness doctrine applies both to laws that proscribe conduct and supply penalties and to laws that grant standardless discretion to the jury.[307] In *Giaccio v. Pennsylvania*,[308] the United States Supreme Court struck down a statute that granted unlimited jury discretion in determining whether to assess costs against an acquitted criminal defendant.[309] Justice Black reasoned that the lack of standards for determining whether to assess costs was arbitrary and discriminatory:

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303. *Pacific Mutual*, 499 U.S. at 44-53 (O'Connor, J., dissenting).

304. *Id.* at 53-63 (O'Connor, J., dissenting). For discussion of the *Mathews v. Eldridge* test, see *infra* notes 323-62 and accompanying text.

305. *Pacific Mutual*, 499 U.S. at 44 (O'Connor, J., dissenting); *see also* Kolender v. Lawson, 461 U.S. 352, 358 (1983).

306. The void-for-vagueness doctrine may have had its origins in the nonconstitutional common-law practice of the judiciary in refusing to enforce acts considered too uncertain to apply. Ralph W. Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923). Despite its history in common law, the Court has recognized the due process ramifications of the vagueness doctrine. In *Champlin Ref. Co. v. Corporation Comm'n of Oklahoma*, for example, the Court determined whether the statute's "words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law." 286 U.S. 210, 243 (1932). For an informative discussion of the vagueness doctrine, see Nicholas K. Kile, Note, *Constitutional Defenses Against Punitive Damages: Down But Not Out*, 65 IND. L.J. 141, 150-55 (1989); Forrest Campbell, Comment, *Bankers Life: Justice O'Connor's Solution to the Jury's Standardless Discretion to Award Punitive Damages*, 24 WAKE FOREST L. REV. 719, 728-42 (1989).

307. *Pacific Mutual*, 499 U.S. at 44 (O'Connor, J., dissenting); *see also* United States v. Batchelder, 442 U.S. 114, 123 (1979).

308. 382 U.S. 399 (1966).

309. *Id.* at 402-03. In *Pacific Mutual*, the majority distinguished *Giaccio* because while *Giaccio* considered *whether* to assess a penalty, *Pacific Mutual* considered the *amount* of penalty to assess. *Pacific Mutual*, 499 U.S. at 24 n.12. This is a distinction without a difference. The *Giaccio* analysis did not hinge on the specific facts of one case—it examined vagueness in general and held that arbitrary and discriminatory punishments violate due process. *Giaccio*, 382 U.S. at 402-03.

> Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce.[310]

The assessment guidelines for punitive damages awards should undergo even harsher scrutiny than the standards considered in *Giaccio* because "scrutiny under the vagueness doctrine intensifies . . . in proportion to the severity of the penalty imposed."[311] While the maximum penalty possible under *Giaccio* was a mere $230.95,[312] the potential amount of punitive damages is virtually unlimited. An examination of Ohio's punitive damages assessment guidelines under the harsh scrutiny required by *Giaccio* demonstrates that virtually unlimited discretion violates the void for vagueness doctrine and, as a result, contravenes the constitutional guarantee of due process of law.

Without imposing any real standards for juries or judges to consider in assessing punitive damages, the assessment is left to individuals "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application,"[313] the very dangers the Due Process Clause is designed to prevent. The majority in *Pacific Mutual* asserted that instructing juries about the purpose of punitive damages without issuing further guidelines satisfies vagueness requirements. Justice O'Connor observed, however, that such instructions "do not assist a jury in making a reasoned decision. . . . [T]he trial court's instruction identified the ultimate destination, but it did not tell the jury how to get there."[314] Such broad discretion has "an open-ended, anything goes quality that can too easily stoke . . . the vindictive or sympathetic passions of juries."[315] Without more guidance, juries and judges may act indiscriminately and assessment of punitive damages becomes an arbitrary process, susceptible to individual impressions and feelings.

Broad discretion in the assessment of punitive damages awards has resulted in inexplicably disparate results. A primary example of this problem was illustrated in the Alabama case of *Charter Hospital of*

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310. *Giaccio*, 382 U.S. at 403.

311. *Pacific Mutual*, 499 U.S. at 46 (O'Connor, J., dissenting); *see* Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982).

312. *Giaccio*, 382 U.S. at 400.

313. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

314. *Pacific Mutual*, 499 U.S. at 48-49 (O'Connor, J., dissenting).

315. PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 118 (1988).

Mobile, Inc. v. Weinberg.[316] In that case, Justice Houston discussed two Alabama cases that were decided within five years of each other.[317] Each case involved the same misconduct, insurance misrepresentation, and the same jury instructions.[318] In the first case, the plaintiff received punitive damages of approximately $21,000, approximately 15 ½ times the compensatory damages.[319] In the second case, the jury awarded punitive damages of $2,490,000, about 249 times the compensatory award.[320] As this example demonstrates, broad guidelines such as those permitted by the majority in *Pacific Mutual* fail to adequately restrain juries in any meaningful way, allowing arbitrary and discriminatory application of the law. This is the evil that the Due Process Clause was designed to prevent. As Justice O'Connor concluded, "[d]ue process may not require a detailed roadmap, but it certainly requires directions of some sort."[321] Because neither the common law nor statutory law in Ohio provide any meaningful guidelines in determining a proper amount of punitive damages, the process violates due process and is void for vagueness.[322]

The void-for-vagueness doctrine does not require precise laws that are inflexible. It recognizes that laws, while not arbitrary, must be flexible in order to accommodate changing times and standards, as well as different, unanticipated situations and problems. This Comment does not recommend precise, fixed amounts or inflexible standards for punitive damages assessment. Rather, it acknowledges that flexibility and discretion within a reasoned framework reduce arbitrary decision-making. This flexibility and discretion need not be so broad, however, so as to violate the due process guarantee of meaningful laws.

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316. 558 So. 2d 909 (Ala. 1990).

317. *Id.* at 916. The cases were Land & Assocs., Inc. v. Simmons, 562 So. 2d 140 (Ala. 1989), *cert. denied*, 499 U.S. 918 (1991), and Washington Nat'l Ins. Co. v. Strickland, 491 So. 2d 872 (Ala. 1985).

318. *Weinberg*, 558 So. 2d at 916. In both cases, the jury instructions offered little more guidance than the command to find an amount that will punish and deter. *Id.*

319. *Washington*, 491 So. 2d at 874.

320. *Weinberg*, 558 So. 2d at 916.

321. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 49 (O'Connor, J., dissenting).

322. Critics of the void-for-vagueness doctrine observe that the doctrine has been exclusively applied to statutes, while punitive damages are a common-law remedy. *See, e.g.*, Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 909 (1991). This argument is no longer valid. While punitive damages are traditionally a common-law remedy, the last decade has seen statutory reform of punitive damages laws in nearly every state. *See supra* note 8. As a result of this reform, the void-for-vagueness doctrine applies to the statutory language affecting punitive damages. Ohio's punitive damages law is void for vagueness precisely because the comprehensive statutory language excludes any meaningful standard for assessment.

b. The Mathews v. Eldridge Test—Private and Public Interests

While the Ohio standard for assessing punitive damages in tort actions is arguably void for vagueness, it also fails the due process requirements articulated in *Mathews v. Eldridge*.[323] The *Mathews* Court examined whether due process requires an evidentiary hearing prior to the termination of Social Security disability payments.[324] The United States Supreme Court noted that unlike other rules, due process is not a fixed technical concept unrelated to time or surroundings.[325] Instead, "due process is flexible and calls for such procedural protections as the particular situation demands."[326] The *Mathews* Court recognized that the determination of whether a policy satisfies due process "requires analysis of the governmental and private interests that are affected."[327] The Supreme Court resolved the complexities of due process by designing a three-pronged test to evaluate any law under the Due Process Clause.[328] Courts should consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would entail.[329]

While *Mathews* addresses a specific administrative procedure, the United States Supreme Court has not confined this three-pronged ex-

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323. 424 U.S. 319 (1976). While the *Mathews* test is conspicuously absent from the majority opinion in *Pacific Mutual*, the Supreme Court has repeatedly relied on this useful analysis. *See, e.g.*, Brock v. Roadway Express, Inc., 481 U.S. 252, 261-62 (1987); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 320-21 (1985); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-43 (1985); Ake v. Oklahoma, 470 U.S. 68, 77 (1985); Schall v. Martin, 467 U.S. 253, 274 (1984).

324. *Mathews*, 424 U.S. at 323.

325. *Id.* at 334; *see also* Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

326. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

327. *Mathews*, 424 U.S. at 334; *see also* Arnett v. Kennedy, 416 U.S. 134, 167-68 (1974) (Powell, J., concurring in part); Goldberg v. Kelly, 397 U.S. 254, 263-66 (1970).

328. *Mathews*, 424 U.S. at 334-35.

329. *Id.* at 335. The *Mathews* test has been criticized for being overly utilitarian, ignoring other values and always assuming that there is a "correct" answer. *See, e.g.*, Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjucation in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46-57 (1976); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457-64 (1986). Despite this criticism, the Supreme Court continues to use the *Mathews* test in a variety of situations. *See supra* note 323 and accompanying text. The Court uses this test because the balancing of competing interests permits continued flexibility and is an effective analytical tool for the Supreme Court to adapt to changing times—one of the keys to the "flexible" Due Process Clause. *See supra* notes 50-51 and accompanying text.

amination to only analogous situations.[330] In fact, the Court's analysis in *Mathews* is "used as a general approach for determining the procedures required by due process whenever erroneous governmental action would infringe an individual's protected interest . . . ."[331] Applying this test to Ohio's punitive damages laws reveals that the unlimited discretion afforded judges in assessing awards violates the constitutional requirements of due process of law.

i. The Private Interest Affected By the Policy

The first prong of the *Mathews* test considers the private interest that is affected by the policy. The private property interest in punitive damages assessments is tremendous.[332] In the absence of legislative or common-law restraints on assessment standards, Ohio law permits judges to award punitive damages in the millions of dollars. This law is presumably based on the premise that an individual judge is capable of creating a formula to determine the amount that will best punish and deter. The judge has no guidance except that the final amount shall not be "grossly excessive." As a result, punitive damages awards are entirely subjective, and "the impact of . . . windfall recoveries is unpre-

330. Burns v. United States, 111 S. Ct. 2182, 2192 (1991) (Souter, J., dissenting); *see, e.g.*, Parham v. J. R., 442 U.S. 584 (1979) (relying on *Mathews* to examine Georgia procedure for involuntarily admitting child to mental hospital); Ingraham v. Wright, 430 U.S. 651 (1977) (applied *Mathews* in corporal punishment case).

331. *Burns*, 111 S. Ct. at 2193.

332. Critics of the *Mathews* test disagree that the private interest is high, claiming that the only interest is the "mere loss of money." *See* Riggs, *supra* note 322, at 882 (quoting Addington v. Texas, 441 U.S. 418, 424 (1979)). An award of punitive damages, however, is clearly distinguishable from other civil claims involving "mere loss of money." Unlike punitive damages, which are awarded to punish and deter, an award of compensatory damages focuses on the actual injuries suffered by the plaintiff, and an award of money acts to place the plaintiff in the same position she was in prior to the event. *See supra* notes 38-39 and accompanying text. In that case, the "mere loss of money" is not considered significant because the defendant's loss is necessary to make the plaintiff whole. Punitive damages, however, go beyond "mere loss of money" to intended punishment. *See supra* notes 38-43 and accompanying text. This punishment is quasi-criminal in nature and is certainly more substantial than the payment of compensatory damages. *See supra* notes 38-43 and accompanying text. The Ohio Legislature recognized this fact by raising the standard of proof for punitive damages to "clear and convincing evidence." *See supra* notes 172-76 and accompanying text. In *Cruzan v. Director, Missouri Dept. of Health*, the United States Supreme Court reiterated its position that the "clear and convincing evidence" rule is appropriate when the interests are "particularly important" and "more substantial than mere loss of money." 497 U.S. 261, 282 (1990). Indeed, the amount of money at stake does affect the constitutional analysis in due process challenges. 1 SCHLUETER & REDDEN, *supra* note 25, at 42. "[T]he likelihood of invoking additional procedural protections for the punitive damages process may be directly proportional to the size of the award and financial effect on the defendant." *Id.* Application of the *Mathews* test to Ohio's punitive damages law is consistent with the concern that punitive damages awards can substantially impair a defendant's private property interest.

dictable and potentially substantial."[333] Furthermore, "increases in the size and frequency of punitive damages awards in recent years have brought a concomitant increase in the amount of harm caused by any constitutional defect that infects punitive damages procedures."[334] Due to the extreme private interest in the state's punitive damages assessment system, the decision in *Mathews* requires strong procedural safeguards to satisfy constitutional due process requirements.

ii. The Risk to the Private Interest and the Possibility of Protecting the Interest

The Supreme Court considers two factors in the second prong of the *Mathews* due process analysis. First, the Court examines the risk that existing procedures will wrongfully impair the private interest established in the first prong.[335] Second, the Court evaluates the possibility that additional procedural safeguards could protect that private interest.[336] The enormity of the risks facing Ohio defendants is readily apparent.[337] By refusing to define assessment standards, Ohio law permits awards that are arbitrary, unpredictable, and potentially devastating. By their very nature, arbitrary awards cannot protect private interests. Rather, such awards are destructive to both the individuals they are imposed upon and the society that tolerates their imposition. Unlike civil compensatory damages, which are limited to the plaintiff's actual loss, and criminal penalties, which operate under rigid standards constrained by maximum sentencing, punitive damages enable judges to punish civil defendants without any real constraints. Punitive damages afford a plaintiff a potential windfall for a minor injury while destroying an unlucky defendant for an act that might have caused little harm. As a result, the private interest in protecting private property against arbitrary and oppressive government actions is at great risk. Justice O'Connor noted that this "grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process" because of the enormous risk facing defendants.[338]

Appellate review fails to substantially reduce the risk associated with broad discretion. As previously noted, "[r]etrospective case-by-case review cannot preserve fundamental fairness when a class of pro-

333. Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring) (quoting Electrical Workers v. Foust, 442 U.S. 42, 50 (1979)).

334. Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures*, 69 VA. L. REV. 269, 271 (1983) (footnote omitted).

335. *See supra* text accompanying note 329.

336. *See supra* text accompanying note 329.

337. *See supra* note 6 and accompanying text.

338. Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring).

ceedings is governed by a constitutionally defective evidentiary standard."[339] Appellate review is merely a safeguard, and while it may successfully reduce some awards, appellate review does not eliminate the tremendous risk to private interests. As long as overbroad discretion permits judges to award excessive punitive damages, the risk to individuals' private property interests are enormous.

To satisfy the second prong of the *Mathews* test, additional procedural safeguards that reduce the risk to private interests must exist. Despite the massive risks that are associated with standardless discretion in assessing punitive damages, Ohio legislators and judges have ignored the innumerable suggestions offered to eliminate them.[340] The solution to the problem lies in giving judges more guidance. Such guidance should emphasize the dual purpose of punitive damages and should give judges adequate flexibility to fairly assess those damages on a case-by-case basis. The author suggests the following guidelines and instructions for assessing punitive damages awards:

Model Guidelines for Assessing Punitive Damages Awards

If the trier of fact determines that punitive damages shall be allowed, the court shall assess the amount of the award. In determining the amount of punitive damages to be assessed, the court shall consider the following factors:

- Prior or similar acts by the defendant, the duration of the misconduct, and any concealment of it by the defendant[341]
- The attitude and conduct of the defendant upon discovery of the misconduct and whether the defendant attempted to mitigate the harm incurred by the plaintiff[342]
- The degree of reprehensibility of the defendant's conduct[343]
- The harm that actually occurred from defendant's conduct[344]

339. Santosky v. Kramer, 455 U.S. 745, 757 (1982).

340. See *infra* notes 341-54 and accompanying text for a partial list of the suggestions that have been offered to reduce the risks of standardless assessment discretion.

341. Villella v. Waikem Motors, Inc., 543 N.E.2d 464, 475 (Ohio 1989) (Holmes, J., dissenting in part and concurring in part); OHIO REV. CODE ANN. § 2307.80(B)(1)-(2) (Baldwin 1990); MINN. STAT. ANN. § 549.20(3) (1990).

342. *Villella*, 543 N.E.2d at 475 (Holmes, J., dissenting in part and concurring in part); *see* Leimgruber v. Claridge Assoc., Ltd., 375 A.2d 652, 655-58 (N.J. 1977); *see also* OHIO REV. CODE ANN. § 2307.80(B)(5) (Baldwin 1990); MINN. STAT. ANN. § 549.20(3) (1990).

343. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 51 (1991) (O'Connor, J., dissenting); Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989) (quoting Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially)).

344. State courts have held that "exemplary damages allowed should bear some proportion to the real damage sustained." Grant v. McDonogh, 7 La. Ann. 447, 448 (1852). This "reasonable relation concept may not be applicable in certain situations," however. *Villella*, 543 N.E.2d at 475 n.14 (Holmes, J., dissenting in part and concurring in part); *see, e.g.*, TXO Prod. Corp. v. Alli-

° The potential, unrealized, harm of the defendant's conduct[345]

° The potential or actual financial gain by the defendant as a result of the wrongdoing[346]

° The financial position of the defendant, including net worth and income[347]

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ance Resources, 113 S. Ct. 2711, 2721 (interim ed. 1993). For example, if a defendant acts with extreme malice, but luckily causes only minor injury, he should still be subject to high punitive damages. The factors considered should not force the judge to apply punitive damages in such a way as to ignore the punitive and deterrent functions such damages serve. *See also* Comment, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose* 9 PAC. L.J. 823, 839-840 (1978).

345. The plurality in *TXO* applied the "potential harm test" to uphold the damage award in that case. *TXO*, 113 S. Ct. at 2722. Justice O'Connor agreed that "punitive damages may be predicated on the potential but unrealized harm to the victim . . . . Linking the punitive award to those factors not only substantially furthers the State's weighty interests in deterrence and retribution, but also can be traced well back in the common law." *Id.* at 2734; *see, e.g.*, Benson v. Frederick, 97 Eng. Rep. 1130 (K.B. 1766).

346. *See, e.g.*, *TXO*, 113 S. Ct. at 2722 (anticipated, unrealized profit of $8.3 million was punished by punitive damages of $10 million, while compensatory damages were merely $19,000). *See generally* Mallor & Roberts, *supra* note 151, at 642.

347. "It should be beyond debate that the financial condition of the defendant must be considered in determining the amount of a punitive damage award and in reviewing whether that award is excessive." Volz & Fayz, *supra* note 81, at 507-08; *see, e.g., Pacific Mutual*, 499 U.S. at 51 (O'Connor, J., dissenting) (quoting Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (1989)); *Villella*, 543 N.E.2d at 472 (Brown, J., concurring) (quoting AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE 28 (March 3, 1989)). The Second Restatement of Torts notes:

> The wealth of the defendant is also relevant, since the purposes of exemplary damages are to punish for a past event and to prevent future offenses, and the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person.

RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (1979); *see also* Lunsford v. Morris, 746 S.W.2d 471, 472 nn.2-3 (Tex. 1988) (citing cases from 43 states and six federal courts of appeals which allow evidence of defendant's net worth in punitive damage assessment); *see, e.g.*, Wynn Oil Co. v. Purolator Chem. Corp., 403 F. Supp. 226 (M.D. Fla. 1974); Adams v. Murakami, 813 P.2d 1348, 1351 (Cal. 1991) (noting that "the award can be so disproportionate to the defendant's ability to pay that the award is excessive *for that reason alone*"); Neal v. Farmers Ins. Exch., 582 P.2d 980 (Cal. 1978); Citizens Bank of Univ. City v. Gehl, 567 S.W.2d 423 (Mo. Ct. App. 1978). *But see* Folks v. Kansas Power and Light Co., 755 P.2d 1319, 1334 (Kan. 1988); Anderson v. Latham Trucking Co., 728 S.W.2d 752, 754 (Tenn. 1987). Many statutes permit consideration of financial position. *See, e.g.*, OHIO REV. CODE ANN. § 2307.80(B)(6) (Baldwin 1990); MINN. STAT. ANN. § 549.20(3) (West Supp. 1993). *See generally* Annotation, *Excessiveness or Inadequacy of Punitive Damages in Cases not Involving Personal Injury or Death*, 35 A.L.R. 4th 538, 554-56 (1985).

Ohio currently permits consideration of net worth. Wagner v. McDaniels, 459 N.E.2d 561, 564 (Ohio 1984). Ohio courts have not, however, applied a consistent standard with regard to the net worth factor. In *Wagner*, evidence of financial condition was not a prerequisite to punitive damages. *Id.* In *Montgomery v. Anderson*, however, the court refused to allow punitive damages above attorney fees because evidence of financial condition was not presented. No. 92 CA 12, 1993 Ohio App. LEXIS 1368, at *5-6 (Ohio Ct. App. Mar. 2, 1993). Ohio is in need of a uniform standard. Some commentators are concerned that evidence of net worth will bias a jury against wealthy defendants. *See, e.g.*, *TXO*, 113 S. Ct. at 2723 ("emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice"). The safeguards

° If additional criminal or civil penalties or awards have been imposed on the defendant, their effectiveness should be considered in mitigation of the award[348]

° The amount of an award necessary to deter the defendant from similar conduct in the future[349]

° The amount of an award necessary to deter others from similar conduct in the future[350]

The purpose of punitive damages awards in Ohio is not to destroy or annihilate the defendant.[351] The purpose of punitive damages is to punish the defendant and to deter similar conduct in the future.[352] The award should be no greater than that necessary to fulfill this dual function.[353] Although there is no precise mathematical formula to calculate the proper amount of a punitive award, the court should strive to set the amount at a level it decides imposes a fair and reasonable punishment for the type of injury that the defendant caused the plaintiff.[354]

The preceding guidelines would greatly reduce the risk of arbitrary and discriminatory application of Ohio's punitive damages awards law because they channel the judge's discretion. While the guidelines do not constrain the court to a precise mathematical formula, they effectively promote a deliberate and thorough consideration of the purpose of punitive damages.[355] As a result, the possibility of fair, rea-

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of judicial assessment of damages in a bifurcated proceeding should, however, alleviate this concern, as no evidence of defendant's wealth needs to be presented at the trial. *See, e.g.*, NEV. REV. STAT. § 42.005(4) (Supp. 1992). "Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the subsequent proceeding to determine the amount of punitive or exemplary damages to be assessed." *Id.*; UTAH CODE ANN. § 78-18-1(2) (1992). "Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made." *Id.* Again, net worth is but one consideration, and the judge should apply the criteria only as each is relevant.

348. *Pacific Mutual*, 499 U.S. at 51 (O'Connor, J., dissenting); *Green Oil*, 539 So. 2d at 222. The defendant should only be punished as much as necessary for the particular wrongdoing. Any excessive punishment violates the purpose of punitive damages and hence the defendant's constitutional right to due process. If the defendant has been punished criminally for the wrong, this should be given special consideration in mitigating the punitive award. *See, e.g.*, Tuttle v. Raymond, 494 A.2d 1353, 1356 (Me. 1985) (defendant entitled to present factfinder with evidence of any criminal punishment imposed as mitigating factor).

349. *Villella*, 543 N.E.2d at 472 (Brown, J., concurring); AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 347, at 28.

350. *Villella*, 543 N.E.2d at 475 (Holmes, J., dissenting in part and concurring in part); OHIO REV. CODE ANN. § 2307.80(B)(7) (Baldwin 1990).

351. AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 347, at 28.

352. AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 347, at 28.

353. AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 347, at 28.

354. AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 347, at 28.

355. The Model Guidelines reject legislative caps on the size of punitive awards and mathematical formulae that limit punitive damages to a function of compensatory damages. These two

soned, and consistent awards is increased. The guidelines satisfy the due process concerns of the first two prongs of the *Mathews* test by recognizing the enormity of the private interest at stake and reducing the risk that this interest will be subject to the arbitrary will and unlimited discretion of one judge.[356]

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statutory limitations on the size of punitive awards serve only to undermine the effectiveness of the punitive system. Legislative caps are improper because they ignore the fundamental purpose of punitive awards: to punish and deter. A legislative cap allows a wealthy defendant or potential wrongdoer to avoid these goals by assessing the risks of the maximum award compared to the potential gains of the wrongdoing. If a defendant is wealthy enough, an award cap allows him to avoid the intended effect of the punishment. Conversely, an assessment of an award against a poor defendant might be influenced by a high punitive cap, resulting in an award far greater than that necessary to punish or deter. Punitive awards that are a function of compensatory damages are also inadequate because a compensatory award is neither related to the defendant's actual malice nor to an amount sufficient to deter, and the legislature should not invent such a correlation. Punitive damages must be assessed in a way that adequately punishes and deters, and establishing a statutory correlation between punitive damages and compensatory damages ignores the fundamental purpose of such awards. The solution lies not with predetermined award caps, but with consideration of a wide variety of factors such as the actual and potential harm to the plaintiff and the defendant's wealth, gain from the wrongdoing, and degree of malice. Recognizing that punitive awards are intended to punish and deter, the factors must be applied on a case-by-case basis, and punitive caps prevent such flexible assessment.

356. The above standards reject a common suggestion offered to aid in reforming punitive damages laws: appropriating a portion of the award to a state fund. Several states, wary of allowing plaintiffs to recover "windfall verdicts" against wealthy defendants, have prescribed that part of the punitive award be placed in a state general fund that "serves a public purpose or advances the cause of justice." Fuller v. Preferred Risk Ins. Co., 577 So. 2d 878, 887 (Ala. 1991) (Shores, J., concurring specially); *see, e.g.*, COLO. REV. STAT. ANN. § 13-21-102(4) (West 1987) (one-third to public fund); FLA. STAT. ANN. § 768.73(2) (West Supp. 1992) (sixty percent to public fund); GA. CODE ANN. § 51-12-5.1(e)(2) (Supp. 1992) (product liability actions); ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd Supp. 1992) (discretionary decision); IOWA CODE ANN. § 668A.1(2)(b) (West 1987) (seventy-five percent to public fund); KAN. STAT. ANN. § 60-3402(e) (Supp. 1991) (one-half credited to health care stabilization fund in medical malpractice claims). Ohio should not establish such a fund. Placing a portion of a punitive award in a state general fund exposes awards to possible violations of the Excessive Fines Clause of the Eighth Amendment, which mandates that "[e]xcessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

In *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, the United States Supreme Court concluded that the Excessive Fines Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." 492 U.S. 257, 264 (1989). *Browning-Ferris* effectively prevented Excessive Fines challenges of punitive damages in suits between private parties. The proposed state general fund, however, revives potential challenges by including the government as the beneficiary of the award. Recently, the Georgia punitive state general fund was declared unconstitutional as a violation of the Equal Protection and Due Process Clauses of the Georgia and United States constitutions and the Georgia Excessive Fines Clause. McBride v. General Motors Corp., 737 F. Supp. 1563, 1579 (M.D. Ga. 1990). Subsequently, a similar Colorado statute was also declared unconstitutional for violating the Takings Clauses of the Colorado and United States constitutions. Kirk v. Denver Publishing Co., 818 P.2d 262, 271 (Colo. 1991).

iii. The Governmental Interest in Avoiding Additional Procedures

The first two prongs of the *Mathews* test demonstrate that the current system of punitive damages assessment in Ohio places important private property interests in grave danger through arbitrary decisions, and that the risk could be greatly reduced by the establishment of simple guidelines.[357] The suggested guidelines offer an improvement over Ohio's dangerously vague and contradictory standards. The third and final *Mathews* factor considers the governmental interest in avoiding these additional procedures.[358] If procedural safeguards place an undue burden on government or are detrimental to society, they should not be implemented even if the first two prongs of the test are satisfied. In the case of punitive damages assessment, the government does not have a legitimate interest in maintaining its current policy and the suggested guidelines would not be detrimental in any way.

Justice O'Connor observed that "[a] State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim."[359] Ohio has a legitimate interest in effective punishment and deterrence, but that interest is not fulfilled when judges may award punitive damages without any meaningful constraints.[360] The State has no valid interest in preserving a system that imposes irrational and arbitrary punishments that bear no relation to the severity of the offense. Instead, both the private property interest and the government deterrent interest suffer without adequate guidelines. Furthermore, the suggested guidelines would not impair government objectives in any way. The reforms offered do not intrude on the judge's ability to exercise reasoned discretion. "Due process requires only that a jury be given a measurable degree of guidance, not that it be straight-jacketed into performing a particular calculus."[361] Ohio has no legitimate objection to simple procedural safeguards that ensure reasoned decision-making based upon legal predicates and not upon unbridled personal bias. Thus, the third prong of the *Mathews* test is satisfied.

The United States Supreme Court designed the *Mathews* test to prevent the arbitrary and discriminatory application of laws in violation of the Due Process Clause. It tests the procedure by examining the interests at stake, the risk of injury to those interests, and the impact of potential solutions. Application of the *Mathews* test to the current sys-

357. *See supra* notes 332-56 and accompanying text.
358. *See supra* note 329 and accompanying text.
359. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting).
360. *See supra* notes 302-39 and accompanying text.
361. *Pacific Mutual*, 499 U.S. at 59 (O'Connor, J., dissenting).

tem of punitive damages laws in Ohio demonstrates that more stringent guidelines are required to ensure fair and accurate assessment of this potentially devastating punishment. Ohio has no legitimate public interest in maintaining its antiquated and oppressive system of extracting irrational, unguided punishments from its citizens. The suggested reforms would provide much needed guidance while maintaining judicial flexibility and discretion. The current system of assessing punitive damages in Ohio violates the guarantees of due process and now that system must be improved.

Admittedly, judicial assessment of punitive damages will likely result in a more consistent and less biased system than jury assessment, thus reducing the practical significance of excessive discretion in assessing punitive damages.[362] The constitutional infirmities regarding due process concerns for adequate assessment lie not in the actual result, however, but in the process the assessor uses to determine an adequate punitive amount. As long as judges have unbridled discretion, the risk of abuse exists, and it is that very risk which violates due process. Judges, like the juries that preceded them, need statutory guidance to assess punitive damages awards so that this extremely important task is completed in a meaningful way. Only with this guidance can Ohio judges act in a manner consistent with the constitutional requirements of the Due Process Clause.

E. Appellate Review

While the possibility of erroneous punitive damages assessment exists, appellate review can serve to reduce that risk. The standard for appellate review of punitive damages in Ohio was summarized in *Villella v. Waikem Motors*:[363] "A jury verdict as to punitive damages which is not the result of (1) passion and prejudice or (2) prejudicial error will not be reduced on appeal."[364] This standard of appellate review of punitive damages awards remained consistent throughout Ohio's history prior to the Civil Justice Reform Act. As early as 1930, Ohio courts would not set aside jury damages or enter remittitur in the absence of passion and prejudice shown in the record.[365]

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362. *See supra* notes 267-70 and accompanying text.

363. 543 N.E.2d 464 (Ohio 1989).

364. *Id.* at 465 (syllabus).

365. Goodyear Tire & Rubber Co. v. Marhofer, 176 N.E. 120, 122 (Ohio 1930). In fact, remittitur should not be entered at all in passion and prejudice cases. "[I]f the trial or reviewing courts found that a verdict was so influenced [by passion or prejudice], their sole duty was, not to enter a remittitur, but to grant a new trial." Fromson & Davis Co. v. Reider, 189 N.E. 851, 852 (Ohio 1934); *see also* Chester Park Co. v. Schulte, 166 N.E. 186, 188 (Ohio 1929); Schendel v. Bradford, 140 N.E. 155, 156 (Ohio 1922). For a discussion of remittiturs, see 22 AM. JUR.2D *Damages* §§ 1021-22 (1988).

The "passion and prejudice" standard is difficult to enforce in the absence of outward and obvious passion in the jury. The Ohio Supreme Court acknowledges that it "is difficult to apply a hard and fast rule for ascertaining whether or not verdicts are influenced by passion or prejudice."[366] It does recognize that a "large disparity [between compensatory damages and punitive damages], standing alone, is insufficient to justify a court's interference with the province of the jury."[367] Likewise, "the amount of the verdict, while it may furnish a suspicion of passion or prejudice, is not of itself conclusive proof of that fact."[368] The Ohio Supreme Court used this reasoning in *Villella* to ignore the huge disparity between compensatory and punitive damages and to affirm an award of $150,000 in punitive damages on a finding of only $250 actual damages.[369] The court did not examine the amount of the award to test whether it satisfied the "reasonableness" requirements of *Pacific Mutual* or *TXO*, concluding only that "there was substantial evidence to support the punitive damages award in light of appellant's behavior."[370] In the absence of an outright exhibition of jury passion, the Ohio Supreme Court did not find passion or prejudice in the punitive award even though it was 600 times the actual damages suffered by the plaintiff.

At one time, the "passion and prejudice" standard was an important tool for ensuring fair punitive damages awards in Ohio. The United States Supreme Court recognizes the importance of the "passion and prejudice" standard as a necessary check on biased jurors. It is "not disputed that a jury award may not be upheld if it was the product of bias or passion."[371] In *TXO*, Justice Kennedy summarized that "[w]hen a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no mat-

366. *Fromson*, 189 N.E. at 853.

367. *Villella*, 543 N.E.2d at 469 (citations omitted). Instead of simply examining the disparity between compensatory and punitive awards, courts should also consider:

> whether the record discloses that the excessive damages were induced by (a) admission of incompetent evidence, or (b) by misconduct on the part of the court or counsel, or (c) whether the record discloses any other action occurring during the course of the trial which can reasonably be said to have swayed the jury in their determination of the amount of damages that should be awarded.

Fromson, 189 N.E. at 853.

368. *Fromson*, 189 N.E. at 853.

369. *Villella*, 543 N.E.2d at 469.

370. *Id.*

371. Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 (1989).

ter what the absolute or relative size of the award."[372] The Court may disallow an award "where it is apparent, from the amount of the verdict or otherwise, that the jury was influenced by passion, prejudice, corruption, or an evident mistake of the law or the facts."[373] Justice O'Connor concluded that "[i]nfluences such as caprice, passion, bias, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand."[374] The "passion and prejudice" standard is a necessary tool in any phase of a jury trial, but that single standard alone is insufficient to protect defendants in Ohio from excessive punitive damages awards.

The use of the "passion and prejudice" standard in Ohio as the exclusive check in the review of jury punitive damages assessments is now meaningless and obsolete, since under the Civil Justice Reform Act it is the court, not the jury, which assesses punitive damages awards.[375] Ohio juries can no longer act with "passion and prejudice" in assessing punitive awards, because the jury no longer has any opportunity to act.[376] While the "passion and prejudice" standard may still be applied to the jury's finding of liability for punitive damages, an appellate court is now obligated to find that the trial judge acted with passion and prejudice in assessing damages before reducing or setting aside an award. It is highly unlikely that a reviewing court will find that a trial judge acted with passion. The Ohio Supreme Court recognized that "the trial judge is in the best position to determine whether an award is so excessive as to be deemed a product of passion or prejudice."[377] The person "in the best position to determine" whether

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372. TXO Prod. Corp. v. Alliance Resources, 113 S. Ct. 2711, 2725 (interim ed. 1993) (Kennedy, J., concurring); *see also* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 41 (1991) (Kennedy, J., concurring in judgment) (stating that "[a] verdict returned by a biased or prejudiced jury no doubt violates due process").

373. G. FIELD, LAW OF DAMAGES 685-86 (1876); *see also* Travis v. Barger, 24 Barb. 614, 629 (N.Y. 1857) (damages award will be set aside where "so flagrantly outrageous and extravagant" as to evince "intemperance, passion, partiality or corruption"); Pleasants v. Heard, 15 Ark. 403, 406 (1855) (verdict to be set aside if the "amount of damages, upon all facts of the case, . . . shocks our sense of justice"); Belknap v. Boston & Maine R.R. Co., 49 N.H. 358, 372 (1870) (where damages are so excessive to evidence that the "jury . . . acted under the influence of a perverted judgment, it is the duty of the court in the exercise of a sound discretion to grant a new trial"); 1 J. SUTHERLAND, LAW OF DAMAGES 810 (1882) (where "the amount is so great or so small as to indicate . . . it is the result of a perverted judgment, and not that of [the jury's] cool and impartial deliberation," the court, "in its discretion, will interpose and set it aside").

374. *TXO*, 113 S. Ct. at 2729 (O'Connor, J., dissenting).

375. *See supra* text accompanying note 188.

376. *See supra* text accompanying note 188.

377. Villella v. Waikem Motors, Inc., 543 N.E.2d 464, 469 (Ohio 1989); *see* Fromson & Davis Co. v. Reider, 189 N.E. 851, 852 (Ohio 1934); Institute of Veterinary Pathology, Inc. v. California Health Lab., Inc., 116 Cal. App. 3d 111 (1981); 22 AM. JUR.2D *Damages* § 1032, at 1082 (1988).

passion or prejudice exists is extremely unlikely to assess punitive damages with passion or prejudice.[378] Appellate courts traditionally grant the trial judge great latitude and deference, reversing a discretionary decision only if it resulted from an "abuse of discretion."[379] Without such abuse of discretion, it is extremely unlikely that an Ohio appellate court will set aside an assessment of punitive damages made by a trial judge. With the passage of the Ohio Civil Justice Reform Act, the "passion and prejudice" standard of review for assessment of punitive damages has become a moot and ineffective check on judicial discretion. As a result, meaningful appellate review of punitive damages awards no longer exists in Ohio. Because the United States Supreme Court requires meaningful appellate review of punitive damages awards to satisfy due process[380] and Ohio fails to meaningfully review punitive awards, Ohio's current system violates the constitutional requirements of procedural due process.[381]

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378. The Supreme Court of Ohio grants the trial courts great discretion precisely because the trial judges are trusted to act with reason and not passion. *See, e.g.*, Seasons Coal Co. v. Cleveland, 461 N.E.2d 1273, 1276 (Ohio 1984). "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Id.*

379. *In re* Jane Doe I, 566 N.E.2d 1181 (Ohio 1991).

380. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20-23 (1991).

381. While the "passion and prejudice" standard of review has been rendered meaningless in Ohio, the standard itself may have violated the due process requirements articulated in *Pacific Mutual* even before the judge assessed punitive damages. In *Pacific Mutual*, the Supreme Court expressed concern about appellate systems that merely considered whether the punitive award was grossly excessive or was the result of bias, passion or prejudice. *Id.* at 21 n.10. A punitive damages award that is excessive under the accepted "Green Oil" test of Alabama or a similar standard of review would not necessarily be grossly excessive or indicate "passion and prejudice." Volz & Fayz, *supra* note 81, at 512. The issue, then, is whether the "grossly excessive" or "passion and prejudice" standard, while less demanding than the "Green Oil" factors, is so permissive as to violate the requirements of due process.

Since *Pacific Mutual*, at least one federal court has expressed concern that the "passion and prejudice" standard is inadequate. Union Nat'l Bank v. Mosbacher, 933 F.2d 1440 (8th Cir. 1991). That court noted that the Arkansas "passion and prejudice" standard might not provide "standards which impose 'a sufficiently definite and meaningful constraint on the discretion' of the jury." *Id.*; *see also* Robertson Oil Co. v. Phillips Petroleum Co., 930 F.2d 1342, 1346 (8th Cir. 1991). The Supreme Court has remanded several cases using the "passion and prejudice" standard in light of the *Pacific Mutual* requirement for adequate review. In *Adams v. Murakami*, the California Supreme Court observed five remanded cases in California alone, remanded "apparently to determine whether the California 'passion and prejudice' standard of review is constitutionally sufficient." 813 P.2d 1348, 1356-57 n.9 (Cal. 1991). The cases were: Transamerica Occidental Life Ins. Co. v. Koire, 111 S. Ct. 2253 (1991); AMCA Int'l Fin. Co. v. Hilgedick, 111 S. Ct. 1614 (1991); Church of Scientology v. Wollersheim, 111 S. Ct. 1298 (1991); International Soc'y for Krishna Consciousness v. George, 111 S. Ct. 1299 (1991); and Pacific Lighting Corp. v. MGW, Inc., 111 S. Ct. 1299 (1991). In *The Post Office v. Portec, Inc.*, the Supreme Court vacated an award reviewed under the Colorado standard of "passion, prejudice, corruption, or other improper cause" for reconsideration in light of *Pacific Mutual*. 111 S. Ct. 1299 (1991) (reviewing The Post Office v. Portec, Inc., 913 F.2d 802, 811 (10th Cir. 1990)). Of course, this

The solution to the inadequacies of Ohio's appellate review of punitive damages awards is found in meaningful reform of punitive damages assessment standards. Given substantive and meaningful standards for assessing punitive damages awards at the trial court level, an appellate court must objectively evaluate the judge's decision, not on a "passion or prejudice" standard, but on whether the court assessed the award based upon those stated criteria.[382] A decision by a trial judge based upon meaningful statutory standards is reviewed only on an "abuse of discretion" standard, not on obscure and inadequate criteria such as whether the award is "grossly excessive," "shocks the conscience," or is a result of "passion or prejudice."[383] As a result, an appellate court will uphold an award that is assessed according to the statutory criteria regardless of whether individual members of the court believe the amount to be too high. Conversely, the appellate court must vacate an award that it finds appropriate if the trial court failed to apply the required standards. Applying objective criteria would substantially improve the appellate process because it would ensure meaningful procedures for evaluating the discretion of the trial judge. Appellate courts would not simply defer to the trial court's overbroad discretion under the guise of a "passion and prejudice" standard. Instead, they would apply substantive error analysis, thus furthering the State's objectives of punishment and deterrence in an objective and meaningful way.

IV. CONCLUSION

In enacting the new punitive damages law of the Ohio Civil Justice Reform Act, the Ohio General Assembly has taken a positive first step in reforming the punitive damages system in Ohio. Codifying the common-law requirements that malice and actual harm be found as a predicate to awarding punitive damages and raising the standard of

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problem is currently irrelevant in Ohio, as the role of the judiciary in assessment of punitive damages awards renders the "passion and prejudice" standard meaningless.

382. For example, the appellate court would not review the award based on the "passion and prejudice" standard alone. Instead, the appellate court would examine the trial judge's decision in light of specific guidelines such as those advocated *supra* notes 341-54 and accompanying text. If the trial judge correctly applied the guidelines to the specific case, the appellate court would affirm the judgment. If the trial judge misapplied the standards, the appellate court would reverse.

383. Ohio courts have defined "abuse of discretion" as including "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *In re* Jane Doe I, 566 N.E.2d 1181, 1184 (Ohio 1991); *see also* Worthington v. Worthington, 488 N.E.2d 150 (Ohio 1986). "The reviewing court is not free to substitute its judgment for that of the trial court." Montgomery v. Anderson, No. 92 CA 12, 1993 Ohio App. LEXIS 1368, at *7 (Ohio Ct. App. Mar. 2, 1993). Instead, the appellate court reviews the decision of the trial judge for abuse of discretion and will only overrule if such abuse is discovered. *Id.*

proof to clear and convincing evidence promotes Ohio's two-fold purpose of punishment and deterrence. Requiring judicial assessment of punitive awards constitutionally brings fairness and consistency to a system that had become unpredictable and unfair. Unfortunately, the law does not go far enough.

The principal infirmity with Ohio's punitive damages law is that neither the new statute nor the common law provides any guidance in assessing a proper damages award. Courts are given unlimited discretion in devising what they believe to be an appropriate award based upon the dual purpose of punishment and deterrence. This violates the right to due process protection under the United States and Ohio constitutions. The suggested reforms would provide much needed guidance while maintaining judicial flexibility and discretion.

The second area of Ohio law that fails to meet constitutional requirements is appellate review of punitive damages law. The "passion and prejudice" standard, while necessary, does not go far enough and has become moot in the face of judicial assessment. Once again, the solution lies with adequate guidance at the assessment level. With such guidance, appellate courts would review decisions based upon abuse of discretion, not on amorphous standards of "excessiveness" and "reasonableness."

After *TXO*, it appears unlikely that the United States Supreme Court will ever overturn an Ohio punitive damages award. This is an unfortunate development. Ohio cannot and should not continue to tolerate a system of laws that unnecessarily subjects its citizens to arbitrary and discriminatory deprivation of property with unbridled discretion at the trial court level and nonexistent appellate review, especially when solutions to such infirmities are readily available. The Ohio General Assembly should continue the work it began in 1987 to ensure that punitive damages awards serve their dual punishment and deterrent objectives without abridging the constitutional rights of individuals and corporations by arbitrarily depriving them of property without due process of the law. As Justice O'Connor concluded in *Pacific Mutual*, "[t]he Due Process Clause demands that we possess some degree of confidence that the procedures employed to deprive persons of life, liberty, and property are capable of producing fair and reasonable results. When we lose that confidence, a change must be made."[384]

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384. Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 63 (1991) (O'Connor, J., dissenting).