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NOTE

TXO PRODUCTION CORP. v. ALLIANCE RESOURCES CORP.: A FAILURE TO CREATE TRUE CONSTITUTIONAL PROTECTION AGAINST EXCESSIVE PUNITIVE DAMAGES

Punitive damages\(^1\) historically have been a part of every legal system, originating in ancient times.\(^2\) Traditionally, courts assess punitive damages against civil defendants whose conduct society seeks to punish and

1. Punitive damages are damages “over and above what will barely compensate [the plaintiff] for his property loss.” BLACK'S LAW DICTIONARY 390 (6th ed. 1990). Courts impose punitive damages to punish the defendant for outrageous tortious conduct. Id. In contrast, courts grant compensatory or actual damages to “put plaintiffs back in the position they would have been in had they not been injured.” Lynda A. Sloane, Note, The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages, 28 VA. U. L. REV. 473, 473 (1993). Nominal damages are trivial sums that courts award to acknowledge the plaintiff’s harm without compensation, such as a one-dollar award upon a finding of liability. Id. Other terms used for punitive damages include “exemplary damages,” “vindictive damages,” or “smart money.” Id. at 473 n.6.

Accordingly, the universal modern rule is that courts impose punitive damages only when a defendant acts beyond mere negligence.

When a court assesses punitive damages against a civil defendant, that defendant may claim that the amount of punitive damages awarded by the jury is excessive and request that the court reduce the amount of the award. Alternatively, a defendant may challenge the punitive damages award by asserting that the methods used to determine the necessity for and amount of punitive damages violate several constitutional provisions, including the Double Jeopardy Clause and the Excessive Fines Clause.

A less persuasive rationale for punitive damages is the "private attorney general" doctrine, which contends that punitive damages serve as an incentive for private citizens to bring suit against wrongdoers. Sloane, supra note 1, at 480. Sloane suggests that, historically, punitive damages were intended to fill voids for nonpecuniary losses.

Although the standard may vary among the states, it is universal that "some element of conscious wrongdoing is required." Ghiardi, Punitive Damages: State Extraction Practice Is Subject to Eighth Amendment Limitations, 26 Tort & Ins. L.J. 119, 120 (1990); see also Restatement (Second) of Torts § 908 (1979) (same).


The Supreme Court's first decision on punitive damages indicated that courts do not assess this type of penalty unless the defendant acts outrageously. The Amiable Nancy, 16 U.S. at 558-59. More recently, courts have required only that the defendant commit reckless or malicious acts. Rustad & Koenig, supra note 2, at 1305-07. Although the standard may vary among the states, it is universal that "some element of conscious wrongdoing is required." Ghiardi, Punitive Damages: State Extraction Practice Is Subject to Eighth Amendment Limitations, 26 Tort & Ins. L.J. 119, 120 (1990); see also Restatement (Second) of Torts § 908 (1979) (noting that courts award punitive damages for outrageous conduct). State law determines the standards for awarding punitive damages.

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Clause. These constitutional arguments against excessive awards of punitive damages have failed in nearly all cases. Despite this lack of success, increasingly large punitive damage verdicts have forced defendants to continue making constitutional attacks on large punitive damages awards. Recently, the United States Supreme Court has addressed yet
another constitutional attack on punitive damages: that the Due Process Clause of the Fourteenth Amendment to the United States Constitution limits the amount of punitive damages.11

These due process claims rest on the premise that civil defendants are entitled to procedural safeguards comparable to those provided to criminal defendants.12 This argument is based on a weak premise, however, because strict constitutional protections apply uniquely to criminal—not civil—defendants.13 Nevertheless, courts are more receptive to various due process concepts as a basis for challenging punitive damages than to other constitutional challenges to these awards.14

CAL. L. REV. 839, 841 (1993) (discussing and citing arguments for either abolishing or paying punitive damages to the state); Jonathan Kagan, Comment, Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damage Reform, 40 UCLA L. REV. 753, 755, 772-82 (1993) (indicating that there is a public perception of a punitive damage crisis and need for reform, and evaluating punitive damage reforms in four categories: abolishment, caps, procedural limits, and diverting a portion to the state); Kile, supra note 3, at 163 (commenting that “[l]egislative action is necessary to mend the constitutional infirmities of punitive damage law”); Sloane, supra note 1, at 477-78 n.24, 483-85 (discussing state reform movements that award the state a portion of all punitive damage awards and state reforms that raise the burden of proof and cap the amount of punitive damages); Stephanie B. Goldberg, Punitives in Peril, A.B.A. J., Oct. 1989, at 46 (indicating that punitive damages are a “hot-button tort reform issue”).


Due process is a basic concept of the English legal system, dating back to the Magna Carta. May, supra note 2, at 575 & n.5. The Fourteenth Amendment applies this concept to American law. Id. at 575.

12. See Riggs, supra note 6, at 871-72 (explaining that “[t]he primary purpose of punitive damages is retribution and deterrence—precisely the rationale underlying penal law. If functionally the two types of proceedings are similar, then . . . due process ought to require the greater safeguards applicable to criminal prosecutions”); Jeffries, supra note 2, at 139. Procedural protections to which a civil defendant is not entitled include: the right to confront hostile witnesses; the protection against self-incrimination; the right to trial by jury; and the right to a standard of proof “beyond a reasonable doubt.” Sloane, supra note 1, at 475 n.15.

13. See 1 GHIARDI & KIRCHNER, supra note 5, § 3.03 (stating that the Supreme Court has held that criminal law procedural safeguards do not apply to civil punitive damages defendants); Bruce J. Ennis, Punitive Damages and the U.S. Constitution, 25 TORT & INS. L.J. 587, 593 (1989) (finding that lower courts reject this requirement because “[w]holesale incorporation of the panoply of criminal procedural protections . . . [is] inconsistent with the basic rule that the necessity for according particular protections should be evaluated in the context of the particular setting in which those protections are claimed”).

14. See infra notes 110-92 and accompanying text (discussing modern jurisprudence applying due process to punitive damages).
Due process generally requires that legal procedures be fundamentally fair. Thus, defendants attack punitive damage awards in two ways. First, an excessive punitive damage award may represent an unreasonable and arbitrary taking of property that no rational state purpose can justify, thus potentially violating substantive due process. Second, the method by which courts assess and review punitive damages may fail procedural due process requirements.

The United States Supreme Court addressed these arguments in Pacific Mutual Life Insurance Co. v. Haslip. Although the Haslip Court agreed with the defendant that due process requirements apply to punitive damages, the Court upheld the punitive damage scheme in Alabama without...
defining any clear constitutional limits. In the wake of judicial uncertainty following Haslip, the Court addressed a similar challenge in TXO Production Corp. v. Alliance Resources Corp.

TXO involved a contract establishing mineral rights between Alliance and TXO. In 1984, TXO geologists discovered that a profitable oil and gas repository existed under an area of land controlled by Alliance. TXO and Alliance entered into an agreement in which TXO purchased oil and gas rights to the land; TXO paid Alliance a per-acre price for the rights, as well as a percentage of revenues that TXO earned from the land. After entering into the agreement, TXO discovered a 1958 deed that indicated that some of the rights to Alliance's land actually were vested in Virginia Crews Coal Company. Because this 1958 deed involved land rights similar to those purchased by TXO, the deed purportedly gave TXO grounds to believe that there was a cloud on the title. Subsequent research, however, indicated that the 1958 deed conveyed only coal rights, while Alliance explicitly had reserved the oil and gas rights.

Nevertheless, TXO attempted to use the purported title discrepancy to achieve a bargaining position that would force Alliance to renegotiate the royalty agreement. TXO first advised Alliance of the possibility that its title was not valid. Second, TXO attempted to convince Virginia Crews that Virginia Crews had a vested oil and gas interest in the land, and then paid Virginia Crews for a quitclaim deed conveying to TXO any interest Virginia Crews might have held. Finally, TXO attempted to induce the original holder of the 1958 deed to attest falsely that the deed may have included some oil and gas rights.

After failing in its attempt to renegotiate the royalty agreement with Alliance, TXO filed a declaratory judgment action to remove the alleged cloud from the title. TXO actually intended, however, to reduce its royalty payments and, at the same time, increase its interest in the oil and gas

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22. Id. at 2715.
23. Id.
24. Id.
25. Id. The 1958 deed involved respondent Tug Fork Land company, a predecessor in interest to Alliance. Id.
26. Id.
27. Id.
28. Id. at 2716.
29. Id.
30. Id.
31. Id. at 2715-16.
32. See id.
rights, thereby making the contract more profitable for TXO. In adjudicating the declaratory judgment action, the court found that the deed upon which TXO’s claim of title rested was a “nullity.”

In response to TXO’s action, Alliance demanded and received a jury trial on a counterclaim for slander of title. The jury awarded $19,000 in actual damages and ten million dollars in punitive damages. After the trial court denied TXO’s motions for judgment notwithstanding the verdict and remittitur, TXO appealed to the Supreme Court of Appeals of West Virginia.

On appeal, TXO claimed that the ten million-dollar punitive damage award violated the Due Process Clause as interpreted by the United States Supreme Court in Haslip and by the Supreme Court of Appeals of West Virginia in Games v. Fleming Landfill, Inc., a case decided after TXO’s trial. TXO requested a new trial, arguing that because its trial did not provide the procedural requirements of Games, TXO was entitled to a new trial on the issue of punitive damages. The state supreme court.

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33. Id. The West Virginia Supreme Court of Appeals found that TXO “knowingly and intentionally brought a frivolous declaratory judgment action against the appellees to clear a purported cloud on title.” TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 875 (W. Va. 1992), aff’d, 113 S. Ct. 2711 (1993). The court also found that TXO’s quitclaim deed from Virginia Crews was “an attempt to steal [Alliance’s] land.” Id. at 881.

34. TXO, 113 S. Ct. at 2716 n.8 (explaining that TXO did not obtain oil or gas rights from Virginia Crews because the Hawley Mining Company never conveyed title for those rights to Virginia Crews).

35. Id. at 2716, 2717 n.14 (describing slander of title as a long-recognized common law tort).

36. Id. at 2717. The actual damages represented Alliance’s costs for defending the declaratory judgment action. Id.

37. Id. at 2716-17. The jury heard evidence indicating that TXO, a wealthy subsidiary of a very large company, knew that Alliance had clean title; that TXO acted in bad faith; that the amount of royalties TXO sought to “renegotiate” was substantial; and that TXO had acted similarly in other business dealings throughout the country. Id.

38. A judgment notwithstanding the verdict is “a judgment rendered in favor of one party notwithstanding the finding of a verdict in favor of the other party.” BLACK’S LAW DICTIONARY 1055 (6th ed. 1990).

39. Remittitur is the process by which the judge reduces a jury’s excessive award instead of remanding the damages issue for a new trial. Id. at 1295.

40. TXO, 113 S. Ct. at 2717.

41. Id.


43. 413 S.E.2d 897 (W. Va. 1991).

44. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 886 (W. Va. 1992), aff’d, 113 S. Ct. 2711 (1993). In response to Haslip, the Supreme Court of Appeals of West Virginia in Games reversed and remanded the $105,000 punitive damages award for operating a solid waste disposal facility as a nuisance when the jury awarded no compensatory damages. Games, 413 S.E.2d at 900. The Games court found that Haslip required specific procedural rules that limit jury discretion and that provide for sufficient trial and appellate
determined a new trial was unnecessary because it would be "especially
diligent" in reviewing punitive damages awards when the lower court did
not utilize the Garnes protections at trial.\footnote{TXO, 419 S.E.2d at 886.}

To determine whether the award was reasonable, the court focused on
three factors: the maliciousness of TXO's actions, the potential harm re-
sulting from those actions, and the amount of damages needed to deter
TXO from future misconduct.\footnote{Id. at 889.} TXO's history of damaging behavior
and the particularly egregious behavior that it had exhibited with Alliance
were factors that strongly influenced the court's decision to affirm
the award.\footnote{Id. at 889.}

The United States Supreme Court granted certiorari and affirmed the
decision of the Supreme Court of Appeals of West Virginia.\footnote{See
TXO Prod. Corp. v. Alliance Resources Corp, 113 S. Ct. 2711, 2718 (1993).}
Six justices agreed that the award did not violate due process.\footnote{Id.
at 2714.} A plurality of the

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To satisfy these requirements, the court outlined specific factors
for the jury and reviewing courts to consider in making and evaluating punitive
damages awards. See id. at 908-10. Because TXO was decided prior to Garnes, the court did not
give TXO the benefit of the Garnes protections. TXO, 419 S.E.2d at 886. TXO argued
that it should be granted a new trial on punitive damages because it did not receive the
Garnes protections. Id. at 908. To analyze the TXO award, the court
discussed various categories of defendants who the courts have found liable for punitive damages after Haslip. See id. at 886-87
(noting the importance of first determining the severity of the defendant's conduct). The
court concluded that the limit on punitive damages would vary depending on the type
of category that the defendant fit. Id. Using very colorful language, the court placed punitive
damage defendants into three categories: "(1) really stupid defendants; (2) really mean
defendants; and, (3) really stupid defendants who could have caused a great deal of harm
by their actions but who actually caused minimal harm." Id. at 887-88 (footnote omitted).
"Really stupid defendants" were those who did not harm victims intentionally, but who
causen harm through extreme carelessness. Id. at 888. For "really stupid defendants," the
outer limit of punitive damages is five times greater than compensatory damages, except
when the actual damages are either nominal or very large. Id. at 889. Because "really
mean defendants" intentionally commit harmful acts, the court determined that the limits
must be greater to deter their conduct. Id. Therefore, an award 500 times actual damages
would be acceptable so long as it would "reasonably... attract the defendant's attention." Id.
(explaining that an award 500 times greater than actual damages is not per se
unconstitutional).

\footnote{Id. at 889. In applying these factors, the court stated that "[t]he type of fraudulent
action intentionally undertaken by TXO in this case could potentially cause millions of
dollars in damages to other victims." Id. Additionally, the court found that the reprehensibility
of TXO's actions clearly justified the award. Id. Finally, the court noted that a
large penalty was necessary to "discourage TXO from continuing its pattern and practice
of fraud, trickery and deceit." Id. at 889-90.}

\footnote{Id. at 2714. Chief Justice Rehnquist, Justice Stevens, Justice Blackmun, Justice
Kennedy, Justice Scalia, and Justice Thomas agreed that the award did not violate due
process. Id. at 2714, 2724, 2726.}
Supreme Court found that the amount of the punitive damages award was reasonable and that the procedures the courts employed satisfied due process.50

This Note discusses different methods that courts use to determine whether punitive damage awards are constitutional. This Note first compares the standards that courts used prior to the Supreme Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip* with the standards developed in the wake of that decision's constitutional mandates. This Note then examines *TXO Production Corp. v. Alliance Resources Corp.* and assesses its effects on the constitutional requirements in a punitive damages context.51 This Note suggests that while there is a framework of due process protection against excessive punitive damages, there are no clear standards for applying that framework. This Note concludes that the uncertain rationale underlying the Court's decision in *TXO* impinges on both procedural and substantive due process protections from excessive punitive damage awards.

I. Standards for Determining Excessiveness

Courts historically have limited the jury's discretion to award punitive damages.52 The protection that the courts provided, however, did not develop out of due process considerations; rather, the courts examined the reasonableness of the award to determine if it was excessive.53 In so doing, the standards that the courts used did not have a unifying framework and, as such, the approaches ranged from extremely subjective tests to detailed objective examinations of several factors.

50. See id. at 2722, 2724 (affirming the judgment of the Supreme Court of Appeals of West Virginia).

51. The scope of this Note is limited to the due process issues of punitive damages. This Note does not discuss policy issues, namely whether there is a crisis resulting from large punitive damage awards, and if so, what methods should be used to restructure the system. See Riggs, supra note 6, at 874-75 & n.67 (distinguishing between constitutional and policy questions and detailing law review articles on policy aspects); see also supra note 10 (citing literature regarding reform movements in the punitive damage crisis).

52. 2 Ghiardi & Kirchner, supra note 5, § 18.01 (stating that "most states hold that a trial or appellate court may exercise limited control over the amount awarded by reducing excessive verdicts").

53. Id. § 18.05 (stating that courts must judge excessiveness on a case-by-case basis, utilizing flexible standards for guidance). Various states have developed factors to assist them in determining the reasonableness of punitive damage awards. Id. § 18.05 (Supp. 1994).
A. General Excessiveness Standards

Courts that used subjective standards retained a limited supervisory function over punitive damages, allowing the jury great discretion when determining the proper amount to award. In reviewing awards, these courts often couched their standards of review in vague terms, such as "clearly excessive;" "when the verdict is so grossly excessive as to shock the court's conscience;" when "the verdict represents a monstrous or shocking injustice;" if the jury's verdict indicated some type of passion or prejudice; and if "it clearly appears that the amount awarded resulted from caprice, prejudice, partiality, corruption or some other improper influence." Under these general excessiveness standards, the appellate court gave almost complete discretion to the trial court to review the award, an approach that apparently resulted from the hesi-

54. See id. § 18.04 (noting the great deference paid to the jury's decision to award punitive damages such that "[o]nly in extreme cases can a trial or appellate court interfere with the jury's determination" (footnotes omitted)). But cf. id. (Supp. 1994) (noting that Montana and Kansas enacted statutes reducing jury discretion). In Montana, the trial judge must review the award and may increase or decrease it as necessary. Id. In Kansas, the statute ensures that juries decide only if the punitive damages are appropriate, and the court determines the amount. Id.

55. Embassy/Main Auto Leasing Co. v. C.A.R. Leasing, Inc., 508 N.E.2d 331, 335-36 (Ill. App. Ct.) (upholding $50,000 in punitive damages against a landlord for misappropriation and tortious interference with business), appeal denied, 515 N.E.2d 106 (Ill. 1987); see also Statler v. Catalano, 521 N.E.2d 565, 572 (Ill. App. Ct.) (noting that "a reviewing court will not reduce the amount of punitive damages awarded unless the award is clearly excessive" (citing Smith v. Seiber, 469 N.E.2d 231 (1984)), appeal denied, 530 N.E.2d 265 (Ill. 1988).

56. American Business Interiors, Inc. v. Haworth, Inc., 798 F.2d. 1135, 1146-47 (8th Cir. 1986) (stating that the district court did not abuse its discretion by sustaining a $250,000 award of punitive damages for tortious interference against a manufacturer in favor of a former franchisee) (citing Ouachita Nat'l Bank v. Tosco Corp., 716 F.2d 485, 488 (8th Cir. 1983) (en banc)).

57. Id. (citing Vanskike v. Union Pac. R.R. Co., 725 F.2d 1146, 1149-50 (8th Cir. 1984)).


60. See American Business Interiors, 798 F.2d at 1146 (citing Murray v. Fairbanks Morse, 610 F.2d 149, 152-53 (3d Cir. 1979)). Appellate courts find that this discretion is justified because it is the trial court that evaluates the evidence and is familiar with the community's standards. Murray, 610 F.2d at 153 ("The trial judge is in the best position to evaluate the evidence and assess whether the jury's verdict is rationally based."); see also Davis v. Gage, 712 F.2d 730, 731 (Idaho Ct. App. 1985) (stating that the amount of punitive damages is within the discretion of the trial court) (citing Cheney v. Palos Verdes Inv. Corp., 665 F.2d 661 (Idaho 1983)). See generally 2 GHIARDI & KIRCHNER, supra note 5, § 18.01, at 18-67 (Supp. 1994) (concluding that whether and in what amount to award punitive damages has traditionally been considered a jury issue). But cf. Shamblin's Ready Mix, Inc. v. Eaton Corp., 873 F.2d 736, 742 (4th Cir. 1989) (holding that the Seventh Amendment does not require that the jury determine punitive damages).
tancy of appellate courts to substitute their own judgment for that of the jury.61

These types of standards provided little guidance for courts to determine whether an award was proper.62 The ambiguous terminology that courts used to define excessive punitive damages resulted in courts haphazardly applying various principles to determine if an award was excessive.63 For example, a court that applied a deferential abuse of discretion standard could affirm almost any award.64 Another court could uphold an award by considering just one of a variety of factors.65 Alternatively, a court could base its decision that an award was excessive66 on any one of the same factors.67 Thus, the use of a general excessiveness standard re-

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63. See 2 GHIARDI & KIRCHNER, supra note 5, § 18.05, at 18-16. The authors universally find that "no one fixed formula exists nor can one be devised by which to measure the award's excessiveness with mathematical precision." Id. (footnote omitted). Rather, courts utilize a fact-based approach guided by "a combination of rough judicial standards." Id.

64. See, e.g., American Business Interiors, 798 F.2d at 1147 (upholding the jury's award of punitive damages because of a lack of clear evidence of excessiveness); Oppenhuizen v. Wennersten, 139 N.W.2d 765, 770 (Mich. Ct. App. 1966) (stating that there is no set rule to determine the excessiveness of a punitive damage award).

65. See, e.g., Villella, 543 N.E.2d at 469 (finding that the defendant's "total disregard for the law and the rights of appellee" justified an award of $150,000 in punitive damages even though the jury awarded only $250 in actual damages); Statler v. Catalano, 521 N.E.2d 565, 572-73 (Ill. App. Ct.) (finding punitive damages not excessive in light of defendant's "extremely outrageous and malicious" actions), appeal denied, 530 N.E.2d 265 (Ill. 1988); Embassy, 508 N.E.2d at 336 (focusing on the failure of the moving party to meet its burden of proving excessiveness); Davis v. Gage, 712 P.2d 730, 731 (Idaho Ct. App. 1985) (determining that a $10,000 punitive damage award was not excessive where defendant breached a covenant not to compete and inflicted emotional distress); Tower Oil and Technology Co., Inc. v. Buckley, 425 N.E.2d 1060, 1069 (Ill. App. Ct. 1981) (justifying award to punish the defendant).


67. See Cunningham v. Simpson, 461 P.2d 39, 44-45 (Cal. 1969) (en banc) (comparing libel cases to find the award excessive). Similarly, if the record indicates jury antipathy towards the defendant, then "passion or prejudice" may cause a disproportionate award, thereby requiring reversal. Id. at 45 (alterations in original) (quoting Morris v. Standard Oil Co., 205 P. 1073 (Cal. 1922); Washer v. Bank of Am. Nat'l Trust & Sav. Ass'n, 197 P.2d 202 (Cal. Ct. App. 1948)). When the amount of the award "shock[s] the judicial conscience," the court will examine the rationale supporting the award. Elyria-Lorain, 300 So.
sulted in a variety of approaches that utilized ambiguous standards and provided little guidance. 68

B. Single Factor Tests for Finding Excessiveness

Some courts avoided the problems associated with the use of a general excessiveness test by considering specific factors when determining the reasonableness of an award, thereby reducing the subjective nature of the evaluation. 69 These courts focused specifically on a single factor to evaluate the validity of a punitive damage award. 70 One factor commonly considered by these courts was the wealth of the defendant. 71 Other decisions emphasized similarly objective, numerical factors, such as the

2d at 719 (quoting Hutchinson v. Lott, 110 So. 2d 442 (Fla. Dist. Ct. App. 1959)). After the Elyria-Lorain court thoroughly examined the facts, it concluded that the jury misunderstood the law, or that the jury's decision was a result of "passion or prejudice." Id. at 719.

68. GHIARDI & KIRCHNER, supra note 5, § 18.07 (noting the subjective nature of this test); cf. Cunningham, 461 P.2d at 45. (Mosk, J., dissenting). Judge Mosk dissented in the decision to reverse the punitive damage award, noting that the award of $25,000 did not "shock[ ] the [judicial] conscience," so much that the reviewing court should replace its judgement for that of the trial court. Id. The differences between the majority and minority view of the facts in Cunningham illustrates the ambiguous nature of this approach. Id.

See infra notes 71-83 (discussing single factor tests of excessiveness).

70. See infra notes 71-83 and accompanying text (indicating single factor approaches).

71. See Vogel v. Bushnell, 221 S.W. 819, 824 (Mo. Ct. App. 1920) (holding that a punitive damage award that appropriated all of the defendant's wealth was clearly excessive); see also 2 GHIARDI & KIRCHNER, supra note 5, § 18.08, at 18-33 (Supp. 1985) (stating that "consideration of the defendant's wealth to gauge an award's size is probably the most logical and empirically workable guide that juries and courts have, since it is based on a tangible and quantifiable entity within the record" (footnote omitted)).

A punitive damages award is clearly excessive if the jury renders an amount that could potentially cause the defendant financial ruin. Arab Termite & Pest Control v. Jenkins, 409 So. 2d 1039, 1043 (Fla. 1982); Jos. Schlitz Brewing Co. v. Central Beverage Co., Inc., 359 N.E.2d 566, 581 (Ind. Ct. App. 1977) (finding an award of $50,000 in punitive damages, when compared to the defendant's annual profits of millions annually, was not clearly excessive); see also 2 GHIARDI & KIRCHNER, supra note 5, § 18.05, at 18-30. Conversely, if punitive damages do not cause financial ruin, courts hold that they are not excessive. Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1025 (9th Cir. 1985), cert. denied, 474 U.S. 1059 (1986). Although the Transgo court considered other factors in upholding a punitive damage award, the court predominantly focused its reasoning on the defendant's financial position. Id. The award represented 5% of one defendant's net worth and 2.5% of the other's, and the court concluded that these awards were not excessive because they did not impose great financial hardship on either defendant. Id. Yet, when the defendant's financial condition interacted with other factors, courts often considered the financial position to be dispositive of the issue of excessiveness. See, e.g., Gregg v. U.S. Indus., Inc., 887 F.2d 1462, 1477 (11th Cir. 1989) (considering a punitive damages award that was based on the degree of defendant's misconduct and ability to pay not excessive); T.D.S., Inc. v. Shelby Mut. Ins. Co., 760 F.2d 1520, 1530-31 (11th Cir. 1985) (same). Although these cases considered two factors, the courts made it clear that the financial position of the defendant, an objective factor, was determinative of the issue of excessiveness. See Gregg, 887 F.2d at 1477; T.D.S., 760 F.2d at 1530-31.
mathematical relationship between punitive and compensatory damages. Rather than requiring a fixed numerical ratio, these courts determined that the punitive damages had to be proportional in amount to the compensatory damages.

Similarly, other courts compared the harm resulting from the defendant's actions with the punitive damage award, and evaluated whether the record supported the award. Thus, these courts examined the ratio between actual and punitive damages, or the relationship between the injury inflicted and the punitive damages imposed.

Courts also evaluated awards in light of the two purposes of punitive damages: punishment and deterrence. Evaluations of the amount of the award in relation to these goals defined the boundaries of excessive-ness. An award was not excessive unless it exceeded an amount necessary to punish or deter. This "purpose" approach required courts to

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72. See 2 Ghiardi & Kirchner, supra note 5, § 18.06, at 18-19 (Supp. 1985) (stating that courts often consider "the relative ratio between the amount of actual damages awarded by the jury and the amount of punitive damages"); see also Contractor Utility Sales Co. v. Certain-Teed Corp., 748 F.2d 1151, 1156 (7th Cir. 1984), cert. denied, 470 U.S. 1029 (1985). In Contractor Utility, the court required the punitive damages to be proportional to the compensatory damages. Id. However, because the record did not establish a clear ratio, the court examined other relevant facts. Id. Courts that take this approach often compared the punitive damage award before them to awards that other courts made in similar cases. Id. The ratio was most crucial when a trial or appellate court reduced compensatory damages, in which case the court was compelled to reduce the punitive damages as well, to maintain the same ratio between the compensatory and punitive damages. See, e.g., Ogilvie v. Fotomat Corp., 641 F.2d 581 (8th Cir. 1981) (stating that when a court reduces compensatory damages, it also must reduce punitive damages by the same margin to avoid an excessive award); Natco Inc. v. Williams Bros. Eng'g Co., 489 F.2d 639, 640 (5th Cir. 1974) (holding it proper for a trial court to reduce punitive damages when it reduced actual damages).

73. See supra note 72 (citing cases requiring proportionality).

74. See Morrissey v. Welsh Co., 821 F.2d 1294, 1299 (8th Cir. 1987); see also 2 Ghiardi & Kirchner, supra note 5, § 18.08, at 33 (stating that courts often look to the defendant's conduct to evaluate the award).

75. See Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914, 925 (Tex. Ct. App. 1991) (finding a one million dollar punitive damage award for slander reasonable in relation to the $296,000 compensatory damage award).

76. See, e.g., Ogilvie, 641 F.2d at 586 (requiring the trial court to reduce both punitive and compensatory damages proportionally to ensure that the punitive damages bear a reasonable relationship to the injury sustained).

77. See Nichols v. Shelter Life Ins. Co., 923 F.2d 1158, 1166 (5th Cir. 1991). Generally, most courts concur that the function of punitive damages is to punish and deter defendants. See 2 Ghiardi & Kirchner, supra note 5, § 18.08.

78. See generally 2 Ghiardi & Kirchner, supra note 5, § 18.08 (indicating that the purposes of punitive damages are often a fundamental basis in courts' evaluations of the amount of an award).

79. See Tolliver v. Amici, 800 F.2d 149, 151 (7th Cir. 1986) (holding that courts consider punitive damages excessive only if the amount exceeds what is needed to punish and deter); see also DeRance, Inc. v. Painewanber, Inc., 872 F.2d 1312, 1328 (7th Cir. 1989)
consider other factors, such as the seriousness of the wrongdoing,\textsuperscript{80} the wealth of the defendant,\textsuperscript{81} and the amount of punitive damages awarded in similar cases\textsuperscript{82} to determine whether an award served society’s goals. Accordingly, even when courts focused on one factor they necessarily analyzed several additional factors, an approach that created a more detailed framework for evaluating an award.\textsuperscript{83}

\section*{C. Intensive Multi-factor Scrutiny}

Evaluating a punitive damage award under the single factor test was misleading because it necessarily required an analysis of several other relevant factors.\textsuperscript{84} Some courts avoided this problem by mandating consideration of many relevant factors,\textsuperscript{85} including the nature of the defendant’s actions, the degree of wrongdoing, the reprehensibility of the actions, the economic status of the defendant, and the punishment and deterrence purposes of the award.\textsuperscript{86}

(reducing a twenty million dollar punitive damages award to seven million dollars because it exceeded what was required to punish and deter the defendant).

\textsuperscript{80} DeRance, 872 F.2d at 1330 (holding that if the seriousness of a wrongdoing is not commensurate with the injury, the court may reduce the punitive damages).

\textsuperscript{81} Tolliver, 800 F.2d at 151 (considering the defendant’s gross income).

\textsuperscript{82} Nichols v. Shelter Life Ins. Co., 923 F.2d 1158, 1167 (5th Cir. 1991); DeRance, 872 F.2d at 1329-30.

\textsuperscript{83} Nichols, 923 F.2d at 1167.

\textsuperscript{84} See DeRance, 872 F.2d at 1329-30.

\textsuperscript{85} See Estate of Korf v. A.O. Smith Harvestore Prods. Inc., 917 F.2d 480, 485 (10th Cir. 1990) (finding that an examination of the relevant factors defined whether the verdict was “shocking to the conscience or leads to the inescapable inference of improper jury passion or prejudice”); Keehr v. Consolidated Freightways, 825 F.2d 133, 142 (7th Cir. 1987) (applying several factors to determine whether “the jury was guided by passion and by prejudice” (quoting Murphy Auto Sales v. Coomer, 112 N.E.2d 589, 593-94 (Ind. Ct. App. 1953))); Sulecki v. Southeast Nat'l Bank, 516 A.2d 1217, 1220 (Pa. Super. Ct. 1986) (applying several factors to determine whether a punitive damage award “shocks one’s sense of justice”); Coale v. Dow Chem. Co., 701 P.2d 885, 889 (Colo. Ct. App. 1985) (holding that determinations of excessiveness are based on several relevant factors, and not solely on ratios).

\textsuperscript{86} See Estate of Korf, 917 F.2d at 485 (finding that relevant factors include the nature of the act, the defendant's economic status, the deterrence effect, and the relation to compensatory damages); Keehr, 825 F.2d at 142 (stating that relevant factors include the nature of the tort, the actual damages suffered by the plaintiff, and the defendant's economic position); Roberts v. Ford Aerospace & Communications Corp., 274 Cal. Rptr. 139, 146 (Cal. Ct. App. 1990) (examining the degree of reprehensibility of the defendant's conduct, the defendant's wealth, the amount of compensatory damages, and the deterrent effect); Sulecki, 516 A.2d at 1220 (finding the nature of the conduct, the purpose of the award, an appropriate punishment of the defendant, and the relationship to the compensatory damage award to be relevant factors); Coale, 701 P.2d at 889 (finding relevant factors to be the nature of the act, the defendant's economic status, and the deterrent effect).

Despite the uniformity in the various relevant factors, the courts seemed unable to decide whether ratio was a relevant factor. Compare Keehr, 825 F.2d at 142 (stating that
While courts considered various factors to determine if an award was excessive, the use of these factors varied considerably. Some courts simply stated the relevant factors and concluded whether these factors justified the award. In another case, a reviewing court examined the trial court's application of the standards. Using this approach, the reviewing court must engage in a detailed application of the elements of the test to the facts of each case as they appear in the trial record. Accordingly, this method involved thorough scrutiny of all elements of a punitive damage award, both legal and factual, to determine if it was excessive.

II. THE CONSTITUTIONALIZATION OF EXCESSIVENESS STANDARDS

A. Supreme Court Recognition of Constitutional Protections

The Supreme Court has addressed the constitutionality of punitive damages on many occasions. Challenges to punitive damage awards have focused on such constitutional concepts as double jeopardy, freedom of speech and press, equal protection, and the excessive fines punitive damages need not be "within a certain ratio to compensatory damages") and Coale, 701 P.2d at 889 (finding that ratio is not "a factor to be considered in determining the excessiveness of a punitive damages award") with Roberts, 274 Cal. Rptr. at 146 (determining that the amount of compensatory damages is one factor for courts to consider) and Sulecki, 516 A.2d at 1220 (holding that courts should consider ratio as a factor). 87. See infra notes 88-91 and accompanying text (discussing various applications of these tests).

88. See Estate of Korf, 917 F.2d at 485 (finding the award reasonable); Coale, 701 P.2d at 889 (finding that sufficient evidence supported the need for substantial punitive damages).

89. See Sulecki, 516 A.2d at 1220-21 (finding that the trial court properly applied the relevant factors in determining that remittitur was required).


91. See Texaco, Inc., 729 S.W.2d at 865-66. Texas law requires courts to consider six factors in determining whether a punitive damage award is reasonable: a reasonable proportion to compensatory damages, the nature of the wrong, the character of the defendant's conduct, the mental state of the wrongdoer, the respective positions of the parties involved, and public policy issues based on offensiveness to public consciousness. Id. at 865. The Pennzoil court focused on "the type of action, the conduct involved, and the need for deterrence" to determine that it should reduce the punitive damage award for tortious interference with contract from three billion dollars to one billion dollars. Id. at 866. Courts can use similar intense scrutiny to uphold an award. See Keehr, 825 F.2d at 142 (finding that the nature of the defendants' actions and their wealth justified the award).

92. See generally Blatt, supra note 2, § 2 (discussing the history of constitutional attacks on punitive damages); 1 Ghiardi & Kirchner, supra note 5, § 3 (same).

93. See 1 Ghiardi & Kirchner, supra note 5, § 3.02.

94. See id. § 3.04.

95. See id. § 3.05.
The Court, however, has given the most attention to due process challenges to punitive damages.

1. **Historical Background**

Due process challenges must overcome the fact that punitive damages have long been a part of the American legal system. In *The Amiable Nancy,* the Supreme Court, indicating the importance of punitive damages to the legal system, held that punitive damages were appropriate when the defendant's conduct rose to a level of egregiousness beyond negligence. Four decades later, in *Day v. Woodworth,* the Court specifically addressed the constitutionality of punitive damages, finding that the long tradition of punitive damages evidenced the "propriety" of the "doctrine." Furthermore, the Court stressed that the decision to award punitive damages was within the discretion of the jury.

When Congress enacted the Fourteenth Amendment in 1868, it provided a new angle by which to attack punitive damages—due process of law. In *Missouri Pacific Railway Co. v. Humes,* the Court addressed this aspect of punitive damages. The Court noted that although there are no rules to control jury discretion, the punitive damage remedy is important and useful to the legal system. Thus, the Court concluded

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96. See *id.* § 3.06.
97. BLATT, supra note 2, § 2.3, at 19 (stating that "punitive damages are an entrenched part of the American legal tradition, and this fact has been a decided obstacle to persuading the Supreme Court of the United States that constitutional limits on punitive damages are required").
98. 16 U.S. 546 (1818).
99. *id.* at 558. A private, armed vessel detained the papers of the schooner *Amiable Nancy.* *id.* at 546-49. As a result, Great Britain retained the ship. *id.* The owners of the *Amiable Nancy* were awarded $15,000 in punitive damages against the owner of the private vessel. *id.* The Court affirmed the award, indicating that punitive damages are appropriate to punish wrongdoers for gross misconduct. *id.* at 558-59.
100. *id.*
101. 54 U.S. 363 (1852).
102. See BLATT, supra note 2, § 2.3, at 21 (stating that *Day v. Woodworth* is "often referred to as the Court's first decision on the constitutionality of punitive damages").
103. *Day,* 54 U.S. at 371. *Day* involved damages assessed against neighbors who trespassed on Mr. Day's land to lower his dam. *id.* at 363. The Court indicated that although many scholars had questioned the concept of punitive damages, punitive damages have been a part of the law for over a century. *id.* at 371. That fact indicated that punitive damages were appropriate and constitutional in certain cases. *id.* at 371.
104. *id.* (noting that the award depends on the unique facts of each case).
105. See Missouri Pac. Ry. v. Humes, 115 U.S. 512, 519 (1885) (framing the issue as whether the statute in question violated the Fourteenth Amendment).
106. 115 U.S. at 512.
108. *id.* at 521. The Court noted that the awarding of punitive damages "blends together the interests of society and of the aggrieved individual, and gives damages, not only
that the punitive damage award did not exceed the limits imposed by the Due Process Clause. 109

2. Modern Constitutional Approaches

Although the lack of successful due process attacks on punitive damages may have indicated that the Supreme Court had foreclosed such challenges, 110 three decisions in the 1980s revealed that the Court was willing to consider due process challenges to punitive damages. 111 In Aetna Life Insurance Co. v. Lavoie, 112 the Court noted that the due process issue required resolution, 113 but decided the case on other grounds. 114 Similarly, in Banker's Life & Casualty Co. v. Crenshaw, 115 the Court did not decide the due process issue, 116 but did indicate the concern of several justices about the validity of such large punitive damage awards. 117

109. Id. at 522.

110. See Blatt, supra note 2, § 2.5, a: 26 (stating that “[g]iven the historical failure of Nineteenth Century challenges to the constitutionality of punitive damages, few believed prior to 1986 that punitive damages would be held to be unconstitutional”).


112. 475 U.S. 813 (1986).

113. Id. at 828-29 (stating that although the appellant's Eighth Amendment and due process arguments raised issues that must be resolved, the Court's decision on other issues made it unnecessary to reach those issues).

114. Id. at 829. This case involved an action for bad faith against an insurance carrier against whom the jury assessed $1,378 in compensatory damages and $3.5 million in punitive damages. Id. at 816. The Court reversed the award because of the failure of the trial judge to recuse himself, making it unnecessary for the Court to address the constitutional issues. Id. at 828.

115. 486 U.S. 71 (1988). The jury awarded $20,000 in compensatory damages and $1.6 million in punitive damages against the defendant-insurer for wrongful failure to pay medical benefits. Id. at 75.

116. Id. at 79-80 (refusing to review the constitutional argument because of the possibility that the lower courts would resolve the issue).

117. See id. Most notably, Justice O'Connor indicated great concern about the constitutionality of such a large punitive damage award. Id. at 87-88 (O'Connor, J., concurring). Justice O'Connor reasoned that the punitive character implicated the Due Process Clause because the law grants a "wholly standardless discretion" to juries to award punitive damages in any tort case. Id. at 88.
The Court, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, finally addressed one constitutional issue regarding punitive damages—the application of the Excessive Fines Clause of the Eighth Amendment. The Court held that the Excessive Fines Clause did not apply to civil litigation between private parties in which punitive damages were assessed. Although the Court once again declined to decide the due process issue, the members of the Court explicitly noted that they would be willing to consider the application of the Due Process Clause to punitive damages in an appropriate case. *Aetna Life, Banker's Life, and Browning-Ferris* indicated that the due process element of punitive damages was an open issue, thus setting the stage for a decision resolving the issue.

3. Haslip: Recognition of Due Process Protection

In *Pacific Mutual Life Insurance Co. v. Haslip*, the Supreme Court directly addressed the due process issue for the first time, establishing a framework for evaluating whether an award satisfied constitutional re-

119. *Id.* at 259; see supra note 8 (providing the text of the Excessive Fines Clause)
120. *Id.*
121. *Id.* at 276-77. The Court indicated that it had not yet addressed the "precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit." *Id.* (citations omitted). In his concurrence, Justice Brennan, joined by Justice Marshall, explicitly indicated his belief that the decision of the Court did not answer the due process question. *Id.* at 280 (Brennan, J., concurring). Furthermore, Justice Brennan concurred in the majority opinion with "the understanding that [the majority opinion] leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases." *Id.* Justice O'Connor also suggested that the door to address due process remained open. *Id.* at 283 (O'Connor, J., concurring in part and dissenting in part). She reiterated the same concern that she expressed in *Bankers Life & Casualty Co.* that punitive damages in fact may violate due process. *Id.; see also* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 86-89 (1988) (O'Connor, J., concurring in part and concurring in judgment); supra note 117 (discussing Justice O'Connor's concerns as expressed in *Bankers Life & Casualty Co.*).

In addition, Justices Brennan and O'Connor indicated the course that they believed the due process analysis would eventually take. Justice Brennan indicated his belief that the Court should closely scrutinize a jury award of punitive damages made without reference to any statutory guidelines. *Browning-Ferris Indus.*, 492 U.S. at 281. Similarly, Justice O'Connor indicated that there may be a due process challenge to both the amount of the award itself and the procedures used by courts to make the award, thereby laying the framework for analysis of both substantive and procedural due process claims. See *id.* at 283 (O'Connor, J., concurring in part and dissenting in part).

122. *See supra* notes 111-21 and accompanying text.
quirements. \textsuperscript{124} Haslip involved an insured's action against Pacific Mutual for fraudulently failing to cover her medical expenses.\textsuperscript{125} The jury awarded $840,000 in punitive damages,\textsuperscript{126} which the trial judge upheld\textsuperscript{127} and the Alabama Supreme Court affirmed.\textsuperscript{128} Thereafter, Pacific Mutual challenged the award on due process grounds because the trial court had given the jury unlimited discretion.\textsuperscript{129} Despite this challenge, the Supreme Court found that the punitive damage award did not violate due process.\textsuperscript{130}

In the majority opinion,\textsuperscript{131} Justice Blackmun first noted that while the common law system of assessing punitive damages was not "\textit{per se} unconstitutional,"\textsuperscript{132} a particular award could be unconstitutional.\textsuperscript{133} To make this constitutional determination, the Court established a method of analysis that focused on both the procedures used to impose the award and the reasonableness of the amount of the award.\textsuperscript{134}

\textsuperscript{124} See id. at 12 (indicating that parties previously had brought constitutional challenges to punitive damages before the Court, but that the Court did not resolve those issues).

\textsuperscript{125} Id. at 4-6. Pacific Mutual's agent accepted payments for canceled insurance policies. Id. at 5. The plaintiff thus did not have valid insurance coverage and was personally liable for medical bills that she was unable to pay. Id. A judgment against her for these bills adversely affected her credit. Id. In her action against Pacific Mutual, she claimed damages for fraud based on the agent's actions, and the trial court held Pacific Mutual liable under a theory of \textit{respondeat superior}. Id. at 6.

\textsuperscript{126} Id. at 7 n.2. The jury did not specify the amount of punitive damages, although the trial court found it likely that the amount was at least $840,000. Id.

\textsuperscript{127} See Pacific Mutual Life Ins. Co. v. Haslip, 533 So. 2d 537, 540 (Ala. 1989), aff'd, 499 U.S. 1 (1991). The appellate court noted that the trial judge refused to reduce the award because the defendant's conduct was egregious. Id.

\textsuperscript{128} Id. (affirming the award of punitive damages).

\textsuperscript{129} Haslip, 499 U.S. at 7. As a preliminary matter the Court held that imposing liability based on \textit{respondeat superior} did not violate due process. Id. at 15.

\textsuperscript{130} Id. at 23-24 ("We conclude . . . that in this case [the punitive damage award] does not cross the line into the area of constitutional impropriety." (footnote omitted)).

\textsuperscript{131} Id. at 2. Justice Blackmun wrote the majority opinion in which Chief Justice Rehnquist and Justices White, Marshall, and Stevens joined. Id.

\textsuperscript{132} Id. at 17-18. The majority reviewed cases that upheld the common law method of imposing punitive damages. Id. at 17. The Court noted that in each of these cases, the reviewing court concluded that the common law system did not violate due process. Id. The Court found that the historical acceptance of the common law system indicated that it is not so unfair as to be inherently unconstitutional. Id. at 17-18.

\textsuperscript{133} Id. at 18 (declaring that historical recognition of punitive damages does not preclude finding them unconstitutional).

\textsuperscript{134} Id. In the most frequently cited portion of the Haslip opinion, the Court stated that "unlimited jury discretion . . . may invite extreme results that jar one's constitutional sensibilities. We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable . . . however . . . general concerns of reasonableness and adequate guidance from the court . . . properly enter into the constitutional calculus." Id. at 18 (citation omitted).
In evaluating the procedural aspects of the award, the Court examined the jury instructions and concluded that the jury’s discretion, while significant, was limited enough to satisfy due process. Moreover, the Court found that Alabama’s post-trial procedures for reviewing punitive damage awards ensured meaningful review of the award at both the trial and appellate levels. Thus, the Court determined that the existing judicial procedures sufficiently limited jury discretion and that Pacific Mutual received sufficient procedural due process protections.

The Court also briefly analyzed the reasonableness of the award, noting that the punitive damages were more than four times greater than the compensatory damages. Nevertheless, the Court did not find that this ratio rendered the award unconstitutional.

The Court’s decision established a precedent for examining the substantive reasonableness by comparing punitive and actual damages.

Justice Scalia concurred with the majority opinion and agreed that jury assessment of punitive damages was an accepted part of the legal system that satisfied due process. Justice Kennedy also concurred, noting

135. See id. at 6 n.1. The judge instructed the jury that if it found that the defendant committed fraud, it should award punitive damages to punish and deter the defendant by imposing an amount that is based on “the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.” Id.

136. Id. at 19. The Court found that the charge limited the jury’s discretion because it directed the jury to focus on deterrence and retribution. Id. at 19-20. The instructions fully informed the jury as to whether it should impose punitive damages at all and also gave the jury guidance regarding the amount of punitive damages to impose. Id. Accordingly, the instructions both advanced the state’s interest in punishing and deterring the defendant, while giving Pacific Mutual the benefit of a rational decision. Id. These facts led to the conclusion that the jury exercised its discretion “within reasonable constraints,” thus meeting the due process requirements. Id. at 20.

137. Id. at 20-23. The trial court procedure required that the judge state on the record his or her reasons for upholding or reducing an award, such as the culpability of the defendant’s conduct, the deterrent effect, the impact on the parties, and other unspecified factors. Id. at 20.

138. Id. at 20-21. The Court indicated that Alabama first “undertakes a comparative analysis,” and then applies the “detailed substantive standards it has developed for evaluating punitive awards.” Id. at 21. The Court also noted seven factors that Alabama considers in evaluating an award to provide further assurance that the award is proportionate to the severity of the conduct and is reasonably related to actual damages. Id. at 22.

139. Id. at 18-23.

140. Id. at 23.

141. Id.

142. Id.

143. Id.

144. Id. at 24-25 (Scalia, J., concurring).

145. Id. at 38-40; see also id. at 24. It is traditional to leave the punitive damage decision to the jury’s discretion and doing so does not violate the Bill of Rights; thus, there cannot be a due process violation. Id. at 24-40. Justice Scalia would have approved the
ing that the concept of punitive damages was so integral a part of legal
tradition that it would be nearly impossible to find this remedy unfair. Justice O'Connor dissented, however, finding that unlimited jury discre-
tein the common-law system did not provide the meaningful standards
that the Due Process Clause demanded.

*Haslip* clearly established that there were due process limits to punitive
damages. It also established a framework for determining whether an
award satisfied the requirements of due process. When faced with con-
stitutional challenges to punitive damages awards, lower courts were left
with the task of amending their standards of excessiveness to fit the newly
announced constitutional framework.

**B. The Modification of State Excessiveness Standards to Comply with
Due Process**

The *Haslip* decision demonstrated that a jury’s imposition of a large
punitive damage award does not violate due process per se. However,
 challenged procedure without further inquiry into its "‘fairness’ " or “‘reasonableness.’ "

146. *Id.* at 40 (Kennedy, J., concurring). Justice Kennedy found that “[j]ury determina-
tion of punitive damages has such long and principled recognition as a central part of our
system that no further evidence of its essential fairness or rationality ought to be deemed
necessary.” *Id.* However, he questioned the soundness of the majority's approach, as it
did not specify how a common law award of punitive damages would violate due process.
*Id.* Instead, Justice Kennedy would apply further due process scrutiny only when a “biased
or prejudiced jury” returned a verdict, as evidenced by the “extreme amount of an award
compared to the actual damage inflicted.” *Id.* at 42. In a prophetic statement, Justice
Kennedy noted that the incomplete nature of the *Haslip* decision would require the Court
to examine these issues again. *Id.* at 42.

147. *Id.* at 42-44 (O'Connor, J., dissenting). Justice O'Connor continued to stress the
need for clear standards to limit jury discretion. *Id.* She reasoned that only through clear
standards can a court ensure that the jury acts reasonably, and therefore protect the de-
fendant's constitutional rights. *Id.* Justice O'Connor faulted the jury instruction because
of its ambiguity in explaining how to compute the amount of punitive damages. *Id.* 48-49.
“Due process may not require a detailed roadmap, but it certainly requires directions of
some sort.” *Id.* at 49. In reaching this conclusion, Justice O'Connor focused on the proce-
dural nature of due process, concluding that it would not burden the plaintiff or the state to
impose an additional procedural safeguard of increased constraint on jury discretion. *See id.*
at 53-60.

148. While *Haslip* does not specifically discuss procedural and substantive due process
separately, it is beneficial to separate the elements of the case that relate to each concept.
*See May, supra* note 2, at 587-88.


150. *See supra* notes 131-43 and accompanying text (discussing the majority opinion in
*Haslip*).

151. *Haslip*, 499 U.S. at 18; *see also Blatt, supra* note 2, at 35 (stating that *Haslip'*s
“seven to one majority decision appears at a minimum, to settle one issue, namely that
large punitive damages awards do not constitute a per se violation” of due process).
"Haslip" left many constitutional questions regarding punitive damages unanswered, and, as a result, encouraged defendants to challenge state punitive damage award procedures. As courts delineated the requirements of due process in a punitive damages context, they created a wide range of standards.

1. General Reasonableness Tests

Many courts cited "Haslip" only for the proposition that punitive damages are constitutional, and continued to employ the standard of reasonableness that they already had defined. After considering several factors, including deterrence, the potential damage of the defendant’s actions, and the defendant’s wealth, these courts found that their excessiveness tests satisfied due process as defined in "Haslip".

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152. See BLATT, supra note 2, at 35; May, supra note 2, at 586-87 (indicating that "Haslip" does not preclude due process attacks on punitive damages).

153. The "Haslip" decision caused courts to reconsider their procedures for assessing and reviewing punitive damages. See 1 GHIARDI & KIRCHNER, supra note 5, § 3.03 (Supp. 1993). Courts were very unclear as to the requirements of procedural due process. BLATT, supra note 2, at 45-46. The result is that "the outcome of the struggle over the constitutionality of punitive damages is likely to vary dramatically from state to state and from issue to issue for many years to come." Id. at 53.


155. See Browning-Ferris, 845 S.W.2d at 945-46 (finding that the jury instruction properly limited the jury’s discretion because it identified the purposes of punitive damages); Bard, 811 S.W.2d at 263 (affirming an award to deter the defendant from committing future wrongful acts, regardless of the defendant’s ability to pay or even the plaintiff’s ability to collect the judgment).

156. Hospital Auth. v. Jones, 409 S.E.2d 501, 502-03 (Ga. 1991) (finding that the use of deterrence as a basis for a punitive damage award requires an analysis of several factors and therefore is a constitutional approach), cert. denied, 112 S. Ct. 1175 (1992).

157. See, e.g., Adams v. Murakami, 813 P.2d 1348, 1351 (Cal. 1991) (finding that in determining whether an award is excessive, the court must consider what amount would deter and punish the defendant in light of the defendant’s net worth); American Medical Int’l, Inc. v. Scheller, 590 So. 2d 947, 952 (Fla. Dist. Ct. App. 1991) (stating that punitive damages should be based, in part, on the defendant’s wealth to deter him and others from similar future conduct) (citing Lassiter v. International Union of Op. Eng’rs., 349 So. 2d 622, 626 (Fla. 1976)).

158. See Bard, 811 S.W.2d at 263; Republic, 810 P.2d at 793 (finding that despite Republic’s oppressive behavior, an award of $22.5 million in punitive damages clearly exceeded what was required to deter the defendant).
By considering several factors in determining the size of punitive damages awards, courts satisfied the constitutional mandate that the award be reasonable. Consequently, a constitutional principle developed whereby courts did not have to consider any particular factors as long as they reviewed some factors in evaluating the reasonableness of the award.

2. **Procedural Focus**

Other courts interpreted Haslip simply to require that they use fair procedures to assess punitive damages, rather than an independent evaluation of reasonableness. These courts established procedures that they believed satisfied due process by mimicking Haslip's three procedural elements: constrained jury discretion, meaningful trial court review, and meaningful appellate review.

Courts could limit jury discretion sufficiently by instructing the jury to consider various factors when awarding punitive damages. These factors included the degree of recklessness of the defendant, the punishment and deterrence purposes of the award, the actual damages, and the defendant's ability to pay. Regardless of the particular factors selected, courts satisfied due process if they provided a meaningful constraint on jury discretion.

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159. See supra notes 154-58 (discussing means used to constrain jury discretion and, thus, satisfy due process).

160. See Jones, 409 S.E.2d at 503 (stating that "Haslip analyzed the punitive damages award by comparing it to the actual award, [but] nothing in the opinion mandates such a comparison").


162. Id.

163. See id. at 908 (finding that to comport with Haslip, courts must provide "(1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review").

164. See id. at 909 (establishing five factors about which the court should instruct the jury); Gamble v. Stevenson, 406 S.E.2d 350, 355 (S.C. 1991) (listing eight factors the jury should consider). Courts require that the jury consider specific factors in an effort to better define the general concepts that are the basis for punitive damage awards. See Transportation Ins. Co. v. Moriel, 814 S.W.2d 144, 149-50 (Tex. Ct. App. 1991) (stating that factors guide the jury in determining what is a reasonable proportion between punitive and actual damages), rev'd on other grounds, 879 S.W.2d 10 (Tex. 1994).

165. Gamble, 406 S.E.2d at 354. The factors the jury considers will vary with the particular jurisdiction. See supra note 164 (discussing how courts apply the various factors).

166. Courts have found that the jury instructions do not need to follow the Haslip instruction exactly, as long as the instruction significantly controls jury discretion. See Wolf v. Goodyear Tire & Rubber Co., 808 S.W.2d 868, 874 (Mo. Ct. App. 1991) (finding that the instruction was adequate because it was similar to Haslip, at least in effect if not in content); Heideman v. American Family Ins. Group, 473 N.W.2d 14 (Wis. Ct. App. 1991).
Trial courts used standards of review that varied significantly.\textsuperscript{167} Under an abuse of discretion standard,\textsuperscript{168} a court would overturn only those awards that were clearly excessive.\textsuperscript{169} Other courts required independent trial court review\textsuperscript{170} or contemplated factors in addition to those that the jury considered.\textsuperscript{171} When the trial court did not adhere to the established procedures, the award presumptively violated due process.\textsuperscript{172}

Finally, \textit{Haslip} required appellate court review of the award.\textsuperscript{173} The standards of appellate review, like trial court review, ranged from the traditional abuse of discretion standard\textsuperscript{174} to a more detailed review of all of the relevant factors that the lower courts had analyzed.\textsuperscript{175} The appel-
late courts followed the general principle that the judicial review satisfied due process if it was "objective and meaningful."\textsuperscript{176}

In evaluating whether any single procedural aspect was sufficient, courts analyzed the totality of the procedural aspects.\textsuperscript{177} Even when one aspect appeared suspect, courts found that the analysis satisfied due process if other procedural protections remedied the deficiency.\textsuperscript{178} If the procedures as a whole met the requirements of "'reasonableness' and 'adequate guidance to the jury,'" they satisfied the constitutional procedural requirements.\textsuperscript{179}

Under an approach that focused on \textit{Haslip}'s procedural requirements, an award was constitutional when a trial court followed established procedures.\textsuperscript{180} Conversely, an appellate court could find that an award was unreasonable and reverse it when the trial court did not follow the established procedures.\textsuperscript{181} Although this type of approach emphasized procedural aspects, it also forced the trial judge to consider various factors, resulting in a substantitive determination of the constitutionality of a par-


\textsuperscript{177} See Wolf v. Goodyear Tire & Rubber Co., 808 S.W.2d 868, 874 (Mo. Ct. App. 1991) (determining that there was no violation of due process after reviewing both the trial court's instruction and the sufficiency of the trial court's post-verdict review); Heideman v. American Family Ins. Group, 473 N.W.2d 14, 23 (Wis. Ct. App. 1991) (finding that the trial judge's instruction concerning the purposes of punitive damages properly limited the jury's discretion, thereby satisfying due process).

\textsuperscript{178} Heideman, 473 N.W.2d at 23. For example, jury instructions that did not adequately limit discretion violated due process when the review procedure was not sufficient to protect against unbridled jury discretion. Cf. Johnson v. Hugo's Skateway, 974 F.2d 1408, 1415 (4th Cir. 1992) (finding that the minimal trial and appellate review did not remedy the standardless discretion that the court allowed the jury); Mattison v. Dallas Carrier Corp., 947 F.2d 95, 105-06 (4th Cir. 1991) (finding the procedures unsatisfactory because neither the instruction to "the jury to enter punitive damages in such 'sum as you believe' will punish and deter" nor the trial court review under an excessiveness standard provided adequate standards to guide the award of punitive damages).

\textsuperscript{179} Wollersheim v. Church of Scientology, 6 Cal. Rptr. 2d 532, 537 (Cal. Ct. App. 1992), cert. denied, 114 S. Ct. 1216 (1994); see also Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1099 (5th Cir. 1991) (finding that although the procedures differed from those that the Court analyzed in \textit{Haslip}, they still could be acceptable so long as they met the general requirement of limited jury discretion and adequate post-trial review), cert. denied, 112 S. Ct. 1778 (1992).

\textsuperscript{180} See, e.g., Brown v. Petrolite Corp., 965 F.2d 38, 49 (5th Cir. 1992) (finding that the court already concluded that the Texas procedures regarding punitive damages satisfied due process, so the only inquiry was whether the court followed these procedures in the instant case).

\textsuperscript{181} See supra note 172 and accompanying text (indicating that in \textit{American Employers}, the court reversed a punitive damage award because the trial court failed to follow established procedures).
ticular award. Furthermore, in reviewing the award, the appellate court analyzed and dissected the elements of each factor, providing an additional substantive test of reasonableness. Thus, while these courts appear to have focused on procedural elements, they actually afforded some substantive protection to punitive damage defendants.

3. Procedural and Reasonableness Test

A third line of cases established a two-prong test in which courts analyzed the procedures used to impose punitive damages and conducted a separate substantive evaluation of the reasonableness of the award. These courts interpreted Haslip to require this type of analysis.

Courts met the procedural requirements if there were meaningful protections against an award that resulted from improper responses by the jury. Courts satisfied the substantive test if any factor supported the size of the award. This fact-intensive inquiry was based on various factors that the court determined essential to the constitutional test, rather than on the abstract amount of an award.

182. See supra note 171 (indicating the substantive nature of trial court review in Games).

183. Bradley v. Hubbard Broadcasting, 471 N.W.2d 670, 679 (Minn. Ct. App. 1991) (considering the factors required by statute in the appellate court's analysis of the award to determine that the award was excessive and that the trial court did not properly apply the factors). California courts have determined that their procedures are constitutional, but when the trial court does not consider the defendant's net worth in determining the reasonableness of the award, the court has applied the procedures incorrectly. See Wollersheim, 6 Cal. Rptr. 2d at 545 (finding that a punitive damages award that represents 150% of the defendant's net worth is clearly excessive and must be reduced).

184. See Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., 596 A.2d 687, 710 (Md. Ct. Spec. App. 1991) (stating that when "faced with a punitive award that was entered upon proper procedure but which nonetheless contravenes due process because it is out of all proportion to both the harm caused and the perniciousness of the conduct," the court must find the award unconstitutional), cert. granted, 627 A.2d 1063 (Md. 1993).

185. See Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1381-82 (5th Cir. 1991) (stating that "after Haslip, an award of punitive damages is constitutional if the circumstances of the case indicate that the award is reasonable and the procedure used in assessing and reviewing the award imposes a sufficiently definite . . . constraint on the discretion of the factfinder" (emphasis added)).

186. Id. at 1385. The court determined that the instructions to the jury regarding the policies of deterrence and retribution sufficiently limited the jury's discretion, and, coupled with meaningful appellate review, met the requirements of procedural due process. Id. at 1385-86.

187. Id. The court determined that the egregious conduct and corporate wealth of the defendant supported the reasonableness of the punitive damage award. Id. at 1382.

188. Id. at 1382; see also Capstick v. Allstate Ins. Co., 998 F.2d 810, 818 (10th Cir. 1993) (applying both a procedural and reasonableness analysis to determine that the award was proper); Broadcort Capital Corp. v. Summa Medical Corp., 972 F.2d 1183, 1193-94 (10th Cir. 1992) (same); Market Tavern, Inc. v. Bowen, 610 A.2d 295, 304 (Md. Ct. Spec. App. 1992) (same).
The result of this two-prong approach was that a court could find an award unconstitutional simply because the award appeared excessive, even if the procedures were satisfactory. This approach clearly exemplified the potential ramifications of the Haslip decision. Rather than adapting Haslip to existing tests of reasonableness, or evaluating procedures used in awarding punitive damages, this two-prong approach attempted to achieve both goals. Thus, when courts assessed punitive damages against defendants in these jurisdictions, the defendants had two independent methods for challenging the award. These defendants received the full panoply of constitutional protection that the Supreme Court announced in Haslip.

Although Haslip established a framework for analyzing punitive damages on a constitutional basis, courts interpreted it differently and, as a result, the application of due process concepts to this context varied greatly. This lack of uniformity led to the Supreme Court's decision in TXO Production Corp. v. Alliance Resources Corp., a decision that many anticipated would address the questions that Haslip left unanswered.

III. TXO PRODUCTION CORP. V. ALLIANCE RESOURCES CORP.: LACKING A MEANINGFUL DEFINITION OF DUE PROCESS

A. The Plurality: Reasonableness Based on Potential Harm

The plurality in TXO began by affirming several key principles from Haslip, including the concepts that a punitive damage award may violate due process if it is grossly excessive, and that the Court cannot create

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190. See Fraidin, 611 A.2d at 1067-70; Zubiate, 808 S.W.2d at 604-05; Alexander & Alexander, 596 A.2d at 710-11.

191. See Fraidin, 611 A.2d at 1067-70; Zubiate, 808 S.W.2d at 604-05; Alexander & Alexander, 596 A.2d at 710-11; see also supra notes 184-88 and accompanying text (discussing two avenues that the defendant may pursue in challenging award).

192. See supra notes 154-91 and accompanying text (discussing three categories of responses to Haslip).

193. TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2718 (1993). The plurality acknowledged that "TXO correctly point[ed] out that several of our opinions have stated that the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" Id. (quoting Seaboard Air Line R. Co. v. Seegers, 207 U.S. 73, 78 (1907)). Alliance also agreed that due process imposed a substantive limit on the punitive damage award. Id. at 2719.
an objective test to determine excessiveness.\textsuperscript{194} Accordingly, the plurality held that courts should only contemplate general concerns for reasonableness to determine if an award violated due process.\textsuperscript{195}

In \textit{TXO}, the Court reiterated its requirement that punitive damages bear some "'reasonable relationship to compensatory damages.'"\textsuperscript{196} This relationship, however, remains only one relevant factor.\textsuperscript{197} The Supreme Court indicated that courts also may consider the potential harm resulting from the defendant's actions.\textsuperscript{198} The Supreme Court considered the potential monetary harm of TXO's conduct—the amount that TXO potentially could have gained from its fraudulent scheme—rather than the actual damages awarded.\textsuperscript{199} When viewed in this light, the disparity between the actual and punitive damages did not appear to be as

\textsuperscript{194} \textit{Id.} at 2720. The Court affirmed its position in \textit{Haslip} that it cannot create a bright line test for evaluating a punitive damage award. \textit{Id.} Accordingly, the plurality rejected TXO's "objective" test for examining the fairness of an award. \textit{Id.} at 2719. TXO suggested that the court examine several objective criteria to determine whether the award was excessive, such as comparing the award to other punitive damage awards for similar actions. \textit{Id.} TXO submitted that if this comparison revealed that the award was excessive, the Court should deem the award to be unconstitutional, unless there was a compelling interest supporting such an award. \textit{Id.} TXO concluded that its punishment was clearly irrational when compared to other awards. \textit{Id.} at 2719 n.22. The Court also rejected TXO's contention that strict scrutiny applied because the award was made without statutory guidance. \textit{Id.} at 2719-20.

The Court noted that objective criteria may be useful in certain cases, but should not be the sole basis for assessing the constitutionality of an award. \textit{Id.} at 2720. The Court indicated that a comparison to other awards may be a relevant factor. \textit{Id.} However, the Court was hesitant to hold that courts should consider comparisons as an objective measurement in every case. \textit{Id.} Thus, the Court felt that it could not create a single "test" to evaluate whether an award was constitutional. \textit{Id.}

\textsuperscript{195} \textit{Id.} at 2720. The Court adopted a test that reflected a "general concer[n] of reasonableness" to evaluate if a large punitive damage award violates substantive due process. \textit{Id.} (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) (alterations in original)). Moreover, the Court noted that an award may be unreasonable, but may not necessarily violate due process. \textit{See id.} at 2720 n.24. To violate due process the award must be both unreasonable and "'grossly excessive.'" \textit{Id.}

\textsuperscript{196} \textit{Id.} at 2721 (quoting Garnes v. Fleming Landfill, Inc., 413 S.E.2d., 897, 909 (W. Va. 1991)).

\textsuperscript{197} \textit{Id.} at 2721 (stating that the courts have declined to adopt approaches which focus entirely on the relationship between actual and punitive damages).

\textsuperscript{198} \textit{Id.} The Court stated that consideration of the potential harm is consistent with \textit{Haslip}. \textit{Id.} at 2721. Potential harm is harm that the plaintiff would have suffered if the defendant had succeeded, as well as the possible harm that other victims could have suffered if the defendant had acted in a similar manner against others. \textit{Id.} at 2722.

\textsuperscript{199} \textit{Id.} The Court cited the determination of the Supreme Court of Appeals of West Virginia that TXO's behavior could have caused millions of dollars in damages, and could have deprived Alliance of revenues ranging from $5 to $8.3 million. \textit{Id.}
severe. This fact led the Court to conclude that the award was not unconstitutionally excessive.

From a procedural perspective, the Court did not address the adequacy of the jury instruction. The Court did acknowledge that the instructions emphasized the defendant's wealth and noted that although wealth is a permissible factor to consider, its mention creates a risk of jury prejudice against large corporations. Nevertheless, the Court found that the trial and appellate court review was sufficient, and, accordingly, that the procedures satisfied due process.

B. The Concurring Opinions: Reasonableness Based on Malice and Traditional Procedures

Justice Kennedy agreed with the plurality's assessment that the procedural aspects of the award satisfied due process. However, he disagreed with the plurality's "reasonableness" evaluation. Justice Kennedy preferred only to analyze the jury's reasons for imposing the award. He concluded that potential harm could not support the punitive damage award against TXO because Alliance did not present evidence of potential harm to the jury.

Justice Kennedy advocated alternatively to affirm the verdict based on TXO's malice, a factor that Alliance presented to the jury. The jury

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200. Id. The Court stated that in a case of this character, the disparity between actual and compensatory damages is not controlling. Id. This resulted from the fact that in this case, the actual damages did not represent the full measure of the harm that TXO's conduct could have caused. Id.
201. Id.
202. The Court did not address this issue because the defendants did not properly present it to the state supreme court. Id.
203. Id.
204. Id. The Court found that TXO did have an adequate hearing on its post-verdict motions, and that the trial judge did state that he agreed with the jury's finding of excessive. Id. The fact that the trial judge did not state his reasons for denying TXO's motions on the record did not constitute a constitutional violation. Id.
205. Id.
206. Id. at 2724 (Kennedy, J., concurring).
207. Id. at 2724-25 (stating that "[t]o ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? . . . [w]e are still bereft of any standard").
208. Id. at 2725. Justice Kennedy believed that a more useful constitutional inquiry would focus on the jury's reasons for making an award, thereby allowing for less conjecture on the part of the reviewing court. Id. An award clearly based on improper motives violates due process regardless of its size or the nature of the defendant's conduct. Id.
209. Id. at 2725.
210. Id. at 2726. Justice Kennedy found that the record adequately supported a showing of TXO's malice, and that the courts below had relied upon TXO's malice to justify the award. Id.
properly could have decided that TXO’s "deliberate, wrongful conduct" required a large award to punish TXO and to deter TXO from similar future conduct.\textsuperscript{211} Thus, Justice Kennedy asserted that the award was neither irrational nor unfair and, therefore, it satisfied due process.\textsuperscript{212}

Justice Scalia also concurred, but did not inquire into the substantive "reasonableness" of the punitive damage award.\textsuperscript{213} Rather, Justice Scalia focused on the procedures that the lower courts utilized.\textsuperscript{214} In his view, the Court should only "assure that due process (i.e., traditional procedure) has been observed."\textsuperscript{215} Once the Court made that determination, the award was constitutional and the Court need not make any further inquiry.\textsuperscript{216}

C. The O'Connor Dissent: A Substantively and Procedurally Unreasonable Award

Justice O'Connor dissented from the plurality on both substantive and procedural grounds.\textsuperscript{217} In finding that the award was substantively defective, Justice O'Connor emphasized the need for courts to consider objective criteria in evaluating punitive damages, especially where, as in the instant case, the award was grossly disproportionate to the actual damages.\textsuperscript{218} She found that the proper objective factors for the Court to consider in this case included prior awards in West Virginia\textsuperscript{219} and the criminal and civil penalties for similar offenses.\textsuperscript{220} Justice O'Connor reviewed these objective criteria and determined that the award was unconstitutional because it was grossly disproportionate to the degree of TXO's

\begin{itemize}
\item\textsuperscript{211} Id. at 2726.
\item\textsuperscript{212} Id.
\item\textsuperscript{213} Id. at 2726-27 (Scalia, J., concurring). Justice Scalia simply believed that the procedures were an accepted part of the legal landscape, and if the court followed those procedures the award was constitutional. Id.
\item\textsuperscript{214} Id. at 2727.
\item\textsuperscript{215} Id. (citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 27-28 (1991) (Scalia, J., concurring)).
\item\textsuperscript{216} Id.
\item\textsuperscript{217} See id. at 2728, 2731-32 (O'Connor, J., dissenting) (dissenting because "neither this award's size nor the procedures that produced it are consistent with the principles this Court articulated in Haslip").
\item\textsuperscript{218} Id. at 2732. Justice O'Connor reflected on the traditional practice of judicial intervention when an award appears to be the result of the jury's consideration of improper factors. See id. at 2728-31. She determined that when the "verdict discloses such great disproportions as to suggest the possibility of bias, caprice, or passion," courts must consider more than subjective criteria to determine whether the award is excessive. Id. at 2732.
\item\textsuperscript{219} Id. at 2732-33. Justice O'Connor stressed that the award was 20 times larger than any punitive damage award ever upheld in West Virginia. Id. at 2733.
\item\textsuperscript{220} Id.
\end{itemize}
wrongful conduct and to the amount of actual damages that Alliance suffered.\textsuperscript{221}

Moreover, Justice O’Connor cited two reasons for disagreeing with the Court’s use of potential harm to support a finding of reasonableness.\textsuperscript{222} First, she did not find any evidence in the record to support any estimate of potential harm.\textsuperscript{223} Second, she concluded that even with evidence of potential harm, the jury in \textit{TXO} could not have relied upon potential harm to award punitive damages.\textsuperscript{224} Potential harm was neither in the court’s instructions to the jury, nor introduced into evidence, nor argued at trial.\textsuperscript{225} Thus, Justice O’Connor concluded that potential harm was an “after-the-fact” justification that the plaintiff’s counsel used to support the validity of the award.\textsuperscript{226} Moreover, she asserted, the critical question was whether the jury based its decision on an impermissible factor, a question left unanswered by the Court’s analysis of potential harm.\textsuperscript{227}

Justice O’Connor then considered procedural due process and contended that the state court’s review of the award in \textit{TXO} was not constitutionally sufficient.\textsuperscript{228} First, she found the trial court’s summary disposal of \textit{TXO}’s motions to be an inadequate form of review.\textsuperscript{229} Second, she noted that the appellate court had focused simply on \textit{TXO}’s malicious

\textsuperscript{221} Id. Justice O’Connor recognized that there are limits to her approach, but she insisted that the Court mandate objective criteria. \textit{Id.} Furthermore, she asserted that the Supreme Court had proposed this approach in \textit{Browning-Ferris Industries v. Kelco Disposal, Inc.}, 492 U.S. 257, 301 (1989), and that common law courts also have used it in various cases. \textit{TXO}, 113 S. Ct. at 2733-34. Despite its limitations, this analysis revealed that the award against \textit{TXO} was not a proper response to its actions. \textit{Id.} at 2734.

\textsuperscript{222} Id. Justice O’Connor accepted the concept of potential harm as a valid basis for punitive damages, but in this case, she did not find the concept applicable. \textit{Id.}

\textsuperscript{223} Id. at 2734-35 (finding that, based upon the trial court record, evidence of potential harm was uncertain and almost nonexistent, and that the limited evidence only showed the estimates to be exaggerated).

\textsuperscript{224} Id. at 2735.

\textsuperscript{225} Id. at 2734. Justice O’Connor asserted that “the potential harm theory is little more than an after-the-fact rationalization invented by counsel to defend this startling award on appeal.” \textit{Id.}

\textsuperscript{226} Id. Justice O’Connor cited the “fact that \textit{TXO} is a very large, out-of-state corporation” as the basis for the jury’s verdict. \textit{Id.} at 2736. This conclusion extends from the general nature of jury reaction to wealthy corporate defendants and from the evidence presented to the \textit{TXO} jury. \textit{Id.} at 2736-39. Justice O’Connor stated that as a result of the undue influence of \textit{TXO}’s wealth and foreign status, the jury based the award on its consideration of impermissible factors, and thus the award violated due process. \textit{Id.} at 2739.

\textsuperscript{227} See \textit{id.} at 2735-36 (discussing the course of the trial, which indicated that no aspect of potential harm was presented to the jury).

\textsuperscript{228} Id. at 2740. (“Because the review afforded \textit{TXO} was insufficient to conform with the criteria this Court approved in \textit{Haslip}, the case at least should be remanded for constitutionally adequate post-verdict review.”).

\textsuperscript{229} Id. at 2740-42 (noting the inadequacy of the trial court’s review of the jury’s award).
behavior in concluding that there should not be a limit on the ratio between the punitive damages and the actual damages for a defendant with TXO's character.\textsuperscript{230} This appellate review, like the trial court's review, failed to satisfy the mandates of Haslip.\textsuperscript{231}

IV. PUNITIVE DAMAGES AFTER TXO: AN EMPTY FRAMEWORK OF DUE PROCESS PROTECTION

A. Blurring Due Process Standards

The Supreme Court's punitive damages jurisprudence indicated that there are both procedural and substantive limits on punitive damages under the Due Process Clause.\textsuperscript{232} Despite this realization, many questions about the elements of the due process equation remained unresolved.\textsuperscript{233} As a result, litigation challenging punitive damage awards on due process grounds ensued, but failed to define any clear constitutional standard.\textsuperscript{234} When the Court granted certiorari to review TXO, many commentators believed that the Court sought to clarify the contours of the due process standard.\textsuperscript{235} Unfortunately, the Court failed in this task

\textsuperscript{230} Id. at 2741. The Supreme Court of Appeals of West Virginia categorized TXO's behavior as "'really mean.'" Id.

\textsuperscript{231} Id. ("Because I believe that such cursory review is inconsistent with this Court's decision in Haslip, I cannot join my colleagues in affirming.").

\textsuperscript{232} See Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2343 (1994) (Ginsburg, J., dissenting) (indicating that Haslip and TXO found that due process limits punitive damages). In Honda, decided after TXO, the Supreme Court focused exclusively on a procedural question: whether Oregon may constitutionally prohibit judicial review of a punitive damage award. Id. at 2334-35. The Court specifically refused to address "the character of the standard that will identify unconstitutionally excessive awards" and focused only on procedural elements. Id. at 2335. In determining the constitutionality of the award, the Court compared the Oregon system to the traditional common law system and concluded that Oregon's system violated due process. Id. at 2335-42.

TXO remains the Court's most recent complete statement on punitive damages because Honda failed to address substantive due process and also left many procedural questions unanswered. See generally id. at 2334-42 (majority opinion). This Note discusses Honda only when it is illustrative of certain arguments.

\textsuperscript{233} See Blatt, supra note 2, at 35; Riggs, supra note 6, at 860 (indicating that in Haslip, the Court had the opportunity to announce due process limits, but failed to provide any "helpful guidelines for the future"); Schwartz & Behrens, supra note 3, at 1367 (stating that Haslip established that due process places limitations on punitive damages but failed to "express those limitations with precision").

\textsuperscript{234} Riggs, supra note 6, at 865 (indicating that Haslip failed to set any helpful guidelines, and thus is "a prescription for ad hoc, case by case review of court procedures and the size of awards to determine the reasonableness of punitive damages").

\textsuperscript{235} Schwartz & Behrens, supra note 3, at 1367, 1385 (reasoning that the Court's decision to review TXO indicated that it was concerned about punitive damages and the lack of appropriate standards for their review and hoping that TXO would provide constitutional guidelines for courts in awarding punitive damages); see Michael Rustad, In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78

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because it did not define methods to determine how to satisfy each element of due process. TXO has created only more uncertainty as to the constitutional scope of protection against excessive punitive damages. In fact, under TXO, defendants have less constitutional protection against excessive punitive damages because the TXO Court failed to delineate any clear standards.

1. The End of Any Real Substantive Protection

In TXO, the Court explicitly recognized that there are substantive due process protections against excessive punitive damages. This language suggests that the TXO Court sought to expand the constitutional protections against punitive damages. In actuality, however, the analysis indicated the opposite: the Court applied a minimal level of scrutiny to determine whether the lower courts had provided this substantive safeguard, thereby conferring very little protection.

The TXO plurality was dissatisfied with both the heightened scrutiny that TXO requested and the rational basis standard that Alliance suggested. Instead, the Court employed a general test of reasonable-

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236. See Andrew L. Frey & Evan M. Tager, Punitive Damages, the Constitution, and Due Process, The Recorder, Sept. 9, 1993, at 8 (indicating that if any of the key elements in TXO are missing, there is no standard for determining whether the constitution has been satisfied); see also Honda Motor Co. v. Ober, 114 S. Ct. 2331, 2343 (1994) (Ginsburg, J., dissenting) (indicating that neither Haslip nor TXO “declared any specific procedures or substantive criteria essential to satisfy due process”).

237. TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2731 (1993) (O’Connor, J., dissenting) (criticizing the plurality for choosing “no course at all”). Professor Riggs succinctly summarized Haslip by stating that “[i]n future litigation the Court’s opinion will not be very helpful in resolving the constitutional issues.” Riggs, supra note 6, at 867. The TXO opinion features the same weakness. See Thomas R. Newman & Steven J. Ahmuty, Jr., Review of Punitive Damages—IV, N.Y.L.J., Sept. 1, 1993, at 3 (stating that for those who thought TXO would “establish uniform constitutional requirements for punitive damages awards, the resultant decision was surely a disappointment”).

238. See TXO, 113 S. Ct. at 2742 (O’Connor, J., dissenting).

239. See id. at 2718 (indicating that TXO was correct in stating that due process invokes substantive limits on punitive damages); see also Riggs, supra note 6, at 877 n.72 (stating that Haslip “saw due process implicated by the size of a punitive damages award but did not specifically invoke substantive due process”).


241. See infra text accompanying notes 243-59 (discussing the reasonableness test).

ness.\textsuperscript{243} In \textit{TXO}, the Court found support for the reasonableness of the award by making a subjective determination of the potential harm of TXO's actions.\textsuperscript{244} The Court refused to accept TXO's argument that it should uphold the award based on objective criteria.\textsuperscript{245} By ignoring objective criteria in its substantive due process evaluation, the Court ultimately employed the lowest possible level of scrutiny.\textsuperscript{246}

Courts previously had rejected this approach to evaluating reasonableness because they had found that it did not satisfy due process.\textsuperscript{247} These courts determined that the use of subjective standards did not yield any meaningful substantive due process protection against unreasonable punitive damage awards.\textsuperscript{248} After \textit{TXO}, each court that uses the plurality's method merely will examine the award based on its own subjective point of view.\textsuperscript{249} Such an approach represents a retreat from the post-\textit{Haslip} development of the use of objective criteria in determining whether an award is reasonable.\textsuperscript{250}

Any one of a variety of rationales may support the plurality's decision to employ such minimal scrutiny.\textsuperscript{251} Arguably, there is no constitutional mandate for strict scrutiny in punitive damages cases.\textsuperscript{252} Further, the state standards of excessiveness ultimately may protect constitutional rights, which would make an inquiry into substantive due process unnec-

\textsuperscript{243} \textit{Id.} at 2720 (stating that the applicable test involves "'general concer[n] of reasonableness' . . . properly enter[ing] into the constitutional calculus' " (alterations in original) (quoting \textit{Haslip}, 499 U.S. at 18)).

\textsuperscript{244} \textit{Id.} at 2721-22.

\textsuperscript{245} \textit{See id.} at 2720 (indicating that TXO's objective criteria were not sufficient to assess the constitutionality of punitive damages). This approach is unlike the approach in \textit{Haslip} where the court, focusing on an objective relationship between actual and punitive damages, upheld the award. \textit{See Haslip}, 499 U.S. at 24.

\textsuperscript{246} Under a system of analysis that does not include the consideration of objective factors, practitioners only can speculate as to whether a court will find that an award violates substantive due process. \textit{May, supra} note 2, at 612; \textit{see also TXO}, 113 S. Ct. at 2732 (O'Connor, J., dissenting) ("One judge's excess very well may be another's moderation.").

\textsuperscript{247} \textit{See supra} notes 153-92 and accompanying text (discussing the states development of constitutional standards after \textit{Haslip}, and the trend to include stricter judicial review).

\textsuperscript{248} \textit{See TXO}, 113 S. Ct. at 2725 (Kennedy, J., concurring) (claiming that a standard of review for excessiveness based on the conduct of a defendant and his potential damage "comes close to relying upon nothing more than [the Court's] own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution").

\textsuperscript{249} \textit{See id.}

\textsuperscript{250} \textit{See supra} notes 153-92 and accompanying text. After \textit{Haslip}, courts commonly included some reasonableness evaluation, whether it be a specific prong of the analysis or simply an aspect of the procedural test. \textit{See supra} notes 153-92 and accompanying text.

\textsuperscript{251} \textit{See infra} notes 252-56 and accompanying text.

\textsuperscript{252} \textit{TXO}, 113 S. Ct. at 2719-20. These procedural safeguards include the imposition of the award by an impartial jury, and review of the award by the trial and appellate courts. \textit{Id.}
The Court applies a minimal standard of scrutiny where economic regulation is concerned because the Court generally disapproves of the use of due process as a method to limit economic regulation. As such, the Court may have viewed punitive damages as a form of economic regulation, and, accordingly, applied a low level of scrutiny. Finally, the Court may have been concerned that a higher level of review of substantive due process would create excess litigation.

Despite this low level of scrutiny, the plurality attempted to retain a substantive element in its review, but it actually crafted a method of review that failed to provide any substantive protection. The clear message in the plurality's approach is that if a court follows the proper procedures when determining the propriety of punitive damages, then the award will be deemed reasonable, regardless of the amount. The Court's decision thus nullifies several key reasons to recognize a substantive component: (1) to avoid arbitrary awards, and (2) to prevent additional litigation that is likely to occur because there are no clear standards by which to determine whether an award is reasonable.

2. Unclear Standards of Procedural Due Process

The Court's analysis in TXO is bifurcated, focusing on both substantive and procedural due process elements, yet emphasizing different factors in the analysis of each element. Ironically, the Court's analysis of the substantive element adds confusion to the standards that procedural due

253. See Riggs, supra note 6, at 878. Professor Riggs explained that substantive due process protection against punitive damages currently "adds essentially nothing to existing state law on the subject." Id. He noted that "[e]vidence relevant to show that a particular award is grossly excessive under the due process clause can be used to attack the jury verdict under state law." Id. Substantive due process merely serves to affirm the result of the application of state standards of excessiveness. Id. at 880.

254. Id. at 877 (stating that there is "general disfavor" for economic substantive due process).

255. Id. (noting that the application of substantive due process limits on punitive damage awards may indicate "a revival of the discredited economic substantive due process doctrine").

256. Id. at 878.

257. Id. (concluding that the deferential type of review associated with economic substantive due process would not afford defendants much protection).

258. The plurality also indicated that a judgment is entitled to a strong presumption, or even an irrebuttable presumption, of validity as long as the courts follow proper procedures. TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2719-20 (1993).

259. See May, supra note 2, at 612-13 (indicating that the substantive due process analysis in Haslip left many issues unresolved and invites future litigation).

process requires. More specifically, the Court has failed to determine what procedures a court must implement to satisfy due process when awarding punitive damages. This element of the procedural due process equation remains undefined, despite the Court’s numerous decisions concerning punitive damages.

One of the touchstones of procedural due process is to constrain the jury’s discretion to award punitive damages. Judicial review is a primary method for achieving this limitation. Despite the importance of this aspect of procedural due process, there is no clear standard defining its constitutional limits. More significantly, the TXO Court’s approach clearly does not meet the existing constitutional standards that courts had developed prior to TXO.

The plurality in TXO emphasized the potential harm of TXO’s conduct as a justification for the jury’s decision to give such a large award to Alliance. The lower courts probably will adopt the potential harm approach that the Court utilized in TXO, just as they adopted the Haslip approaches. Unfortunately, the TXO approach diminishes the consti-

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261. Similarly, in Haslip, the Court focused on the procedural components, yet its reasoning affected both the procedural and substantive component in cases that followed. See supra notes 153-92 (discussing the development of the law after Haslip). However, as Justice Scalia pointed out, a procedural approach necessarily involves some substantive review of the award. See TXO, 113 S. Ct. at 2726-27 (Scalia, J., concurring). Moreover, the distinction between substantive and procedural due process is artificial, because the requirement that the court must limit jury discretion operates on an assumption of substantive measures; namely, that an award can be unconstitutionally excessive simply because of its size. Riggs, supra note 6, at 885. The Court’s analysis of one due process factor has an equal effect on interpretations of the other. Id. at 886.

262. See Honda, 114 S. Ct. at 2341 n.10. In Honda, the Court addressed the question of which procedures are necessary to satisfy due process. Id. at 2334. The Court conducted its evaluation by focusing on the differences between the Oregon procedures at issue and the traditional common law approach. Id. at 2335. Honda did not, however, "pose the more difficult question of what standard of review is constitutionally required." Id. at 2341 n.10. Thus, while Honda may have explained what procedural elements are plainly required, it did not answer the question of the shape that those procedural elements should assume. Id.

263. Riggs, supra note 6, at 898 ("The lack of adequate guidelines to cabin jury discretion in fixing the size of punitive damages is perhaps the central due process issue.").

264. Honda, 114 S. Ct. at 2340-41 (indicating that judicial review is an important safeguard against uncontrolled jury discretion).

265. See supra notes 153-92 (discussing variant approaches after Haslip). Compare Honda, 114 S. Ct. at 2341 n.10 (indicating that some courts require deferential review) with id. at 2334 (citing cases indicating that Haslip included a "‘clear constitutional mandate for meaningful judicial scrutiny of punitive damage awards’") (citations omitted).

266. See TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2721-23 (1993); Newman & Ahmuty, supra note 237, at 3 (noting TXO’s focus on potential harm).

267. See BLATT, supra note 2, at 35 (indicating that the common response to Haslip is the comparison of the state scheme to the punitive damage scheme that Haslip approved); 1 GHIARDI & KIRCHNER, supra note 5, § 4.17, at 4-32 (Supp. 1993) (stating that as a result
institutional requirements for punitive damages because it affords unbridled discretion to the jury and in judicial review.\textsuperscript{268} Both before and after \textit{Haslip}, courts' consideration of objective factors limited discretion to award punitive damages.\textsuperscript{269} Yet the plurality in \textit{TXO} focused on potential harm, a highly subjective factor.\textsuperscript{270} The Court's reliance on this highly subjective factor represents a retreat from the use of objective factors to define due process requirements.\textsuperscript{271} Moreover, the use of such a subjective factor is contrary to the general trend of utilizing objective factors in evaluating punitive damage awards.\textsuperscript{272} The tendency of the lower courts to consider objective factors was most apparent following \textit{Haslip}, probably due to the Court's reliance on an objective factor to evaluate the award in that case.\textsuperscript{273} Thus, after \textit{Haslip},

\textbf{of \textit{Haslip}, courts have been evaluating their procedures to determine if they satisfy the standards announced in \textit{Haslip}); Rustad \& Koenig, supra note 2, at 1311 (indicating that \textit{Haslip} resulted in courts evaluating punitive damages based on the proportionality framework utilized by the \textit{Haslip} Court). Because courts followed the proportionality framework of \textit{Haslip}, it is likely that they also will follow the potential harm framework established in \textit{TXO}.\textsuperscript{268} Riggs, supra note 6, at 894 (stating that the key question is "whether the discretion of the jury in finding liability and determining the amount of the award is so unbounded as to be standardless, and hence fundamentally unfair"); see also Frey \& Tager, supra note 236, at 8 (noting that the \textit{TXO} Court focused on the concept of potential harm, and discussing computational difficulties in analyzing potential harm).\textsuperscript{269} See supra notes 84-91 and accompanying text (discussing intensive, objective scrutiny of excessiveness standards); supra notes 154-60 (discussing objective evaluations of reasonableness).\textsuperscript{270} See supra notes 266-68 (discussing the subjective nature of potential harm). \textit{TXO} illustrates the extreme difficulty that courts could face when computing the subjective value of potential harm. In \textit{TXO}, the parties offered different figures for potential harm, ranging from one million dollars to over eight million dollars. \textit{TXO}, 113 S. Ct. at 2722. As computed by Alliance, the potential harm of \textit{TXO}'s actions was between $5 and $8.3 million. \textit{Id}. The Court gave little credence to these estimates and refused to rely on them in its analysis. \textit{Id}; see \textit{id} at 2734-35 (O'Connor, J., dissenting) used to rely on them in its analysis. \textit{Id}; see \textit{id} at 2734-35 (O'Connor, J., dissenting) (describing the unrealistic nature of Alliance's estimates). Instead, the plurality seemed to rely on a figure of one million dollars in potential harm to support its conclusion that the award was reasonable. \textit{Id} at 2722. This figure was completely speculative as well. \textit{Id} at 2734-35 (O'Connor, J., dissenting).\textsuperscript{271} Several members of the Court have criticized the plurality's reliance on potential harm. See \textit{TXO}, 113 S. Ct. at 2725 (Kennedy, J., concurring) (stating that "I do not agree that this provides a constitutionally adequate foundation for concluding that the punitive damages verdict against \textit{TXO} was rational"); \textit{id} at 2736 (O'Connor, J., dissenting) ("I am therefore unpersuaded by the plurality's assertion that this award may be upheld based on the potential harm to respondents or \textit{TXO}'s potential gain.").\textsuperscript{272} See supra notes 153-92 and accompanying text (highlighting the development of objective measures of reasonableness).\textsuperscript{273} See Pacific Mut. Life Ins. Co. v. \textit{Haslip}, 499 U.S. 1, 23-24 (1991) (relying on the existence of a four to one ratio between actual and punitive damages to affirm the award).
lower courts searched for objective factors on which to base their review whenever possible.\textsuperscript{274}

\textit{TXO}'s reliance on an extremely subjective factor is likely to reverse this trend and lessen the importance of objective evaluations of due process in punitive damages cases. Before \textit{TXO}, if the jury focused on subjective factors that were not fully presented, the courts deemed the award to be the result of unbridled jury discretion and, thus, unconstitutional.\textsuperscript{275} The risk associated with \textit{TXO} is that the jury will not consider more appropriate, objective factors and will remain unconstrained.\textsuperscript{276} \textit{TXO}'s reliance on a subjective factor thwarts the due process requirements that the Court previously imposed, including the central requirement that courts limit jury discretion.\textsuperscript{277}

If jury discretion is unconstrained, then judicial review must be particularly intense to protect due process interests.\textsuperscript{278} Courts often required judicial review that incorporated an analysis of several factors because they found an analysis of only one factor to be insufficient.\textsuperscript{279} After Haslip, courts held that the Constitution required judicial review to include a multi-factor evaluation.\textsuperscript{280} As a result, courts currently consider numerous factors when conducting judicial review of punitive damages awards, including factors in addition to those that the jury considered.\textsuperscript{281}

The multi-factor evaluation was clearly an important procedural safeguard to constrain jury discretion.\textsuperscript{282} The \textit{TXO} decision fails, both explicitly and implicitly, either to advance this procedural safeguard or to

\begin{itemize}
\item \textsuperscript{274} See \textit{supra} notes 153-92 and accompanying text.
\item \textsuperscript{275} See \textit{supra} notes 153-92 and accompanying text (discussing the post-\textit{Haslip} requirement that the jury focus on objective factors to limit its discretion).
\item \textsuperscript{276} See \textit{supra} notes 153-92 and accompanying text.
\item \textsuperscript{277} See \textit{supra} notes 153-92 and accompanying text.
\item \textsuperscript{278} See \textit{Honda Motor Co. v. Oberg}, 114 S. Ct. 2331, 2348 (1994) (Ginsburg, J., dissenting) (stating that "[t]he Court should inspect . . . the procedures employed—at trial and on appeal—to fix the amount of punitive damages").
\item \textsuperscript{279} See \textit{supra} notes 84-91 and accompanying text (discussing the requirement of multi-factor analysis).
\item \textsuperscript{280} See \textit{Pacific Mut. Life Ins. Co. v. Haslip}, 499 U.S. 1, 20-22 (1991) (approving of the Alabama approach in which both the trial and appellate courts consider several standards, thus satisfying due process). Either in form or in substance, the courts followed \textit{Haslip}'s constitutional mandate by considering numerous factors. See Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1098-99 (5th Cir. 1991) (finding that Texas' use of a variety of factors satisfied due process).
\item \textsuperscript{281} See \textit{Garnes v. Fleming Landfill, Inc.}, 413 S.E.2d 897, 909 (W. Va. 1991) (discussing additional factors a reviewing court must consider); \textit{supra} notes 84-91, 167-71 and accompanying text.
\item \textsuperscript{282} \textit{Honda} indicated that judicial review is a crucial factor in limiting jury discretion. See \textit{Honda}, 114 S. Ct. at 2340-41 & n.11 (stating that "[e]mpirical evidence, in fact, supports the importance of judicial review of the size of punitive damage awards").
\end{itemize}
define what approach to judicial review is constitutionally mandated. Implicitly, the Justices who affirmed the award relied on a single factor to find the award reasonable. This approach indicates that the consideration of only one factor satisfies the requirement of meaningful judicial review, thereby reducing the scope of due process protections.

Further, *TXO* explicitly failed to define what type of review is "meaningful" enough to satisfy due process. While *Haslip* indicated that standardless judicial review is unconstitutional, the *TXO* Court did not explain what these standards required. Instead, the Court merely found that the procedures that the lower courts used in the instant case were sufficient. This approach invites litigation because the Court's decision is limited to the specific system existing in *TXO*. Any system that varies from that system is open to constitutional attack. These undefined standards make it impossible for the development of any consistent con-

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283. *TXO*, 113 S. Ct. at 2722 (relying on potential harm to affirm the award). Although the Court also considered *TXO*'s actions and the relationship between punitive and actual damages, the decision clearly is based on potential harm. *Id.* at 2721-22. It is solely the potential harm aspect that leads to the conclusion that the relationship between actual and punitive damages is not excessive. *Id.* at 2722. Without the potential harm factor, the Court would not have upheld the award. Similarly, Justice Kennedy's approach considered only one factor—the malice of the defendant. *See TXO*, 113 S. Ct. at 2726 (Kennedy, J., concurring).

In contrast, the state supreme court, in upholding the award, focused on potential harm as well as two other factors, the maliciousness of *TXO*'s actions and the amount required to deter *TXO* in the future. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 889 (W. Va. 1992), aff'd, 113 S. Ct. 2711 (1993).

284. In justifying such a low level of review, the Court simply indicated that the fact that the jury calculated the award without statutory guidance does not require a higher standard of review. *TXO*, 113 S. Ct. at 2719-20.

285. *Honda* did not answer this question either. *Honda*, 114 S. Ct. at 2341 n.10; *Id.* at 2343 (Ginsburg, J., dissenting).

286. *See Schwartz & Behrens, supra* note 3, at 1376 (stating the *Haslip* suggests that "states with open-ended appellate review schemes are vulnerable to constitutional attack on the ground that their review of punitive damages awards is vague and arbitrary, and therefore violates due process").

287. *TXO*, 113 S. Ct. at 2724. Thus, *TXO* has the same problem as *Haslip*; it does not address variations from the procedural scheme that the lower court employed, and it does not explain how to determine whether a particular scheme in another case violates due process. *Honda*, 114 S. Ct. at 2343 (Ginsburg, J., dissenting) (stating that neither *Haslip* nor *TXO* clearly defined the due process requirements in a punitive damages context); May, *supra* note 2, at 601.

288. Justice Scalia noted this concern in *Haslip*, when he indicated that "[w]e have expended much ink upon the due-process implications of punitive damages, and the fact-specific nature of the Court's opinion guarantees that we and other courts will expend much more in the years to come." Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 39 (1991) (Scalia, J., concurring).
stitutional procedure. Thus, the level of procedural due process protection in different jurisdictions will be subjective, and, consequently, defendants are likely to receive varying levels of constitutional protection.

B. Balancing the Role of Judge and Jury

In both awarding and reviewing punitive damages, courts apply specific factors as mandated by a particular jurisdiction. Courts apply the factors based on the evidence and the findings of the trier-of-fact. If the record supports the interpretation of the relevant factors, then the court will not find that the award violates due process. This approach balances the central role of the jury in awarding punitive damages with the realization that judicial review must include a check on the jury to prevent the risk of arbitrary deprivation of property.

The use of the potential harm analysis in TXO to uphold the award does not sufficiently preserve this balance. The jury did not formally consider potential harm, and the plurality can identify only two instances of potential harm on the record. Even these references, however, were extremely minimal, and neither trial counsel nor the court formally

289. TXO, 113 S. Ct. at 2725 (Kennedy, J., concurring) (stating that "[t]his type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend").

290. While the Honda Court indicated that it did not address this question, its opinion may indicate the method that the Court is likely to use in the future to determine what method of review is required to satisfy due process. Honda established that the due process test includes a comparison of the procedure at issue to "traditional procedures." Honda, 114 S. Ct. at 2335. Thus, the question of what standard of review is appropriate may be analyzed in this framework. However, given various methods of judicial review that courts have employed, it would seem almost impossible to establish a constitutional principle in this manner.

291. See MGW, Inc. v. Fredricks Dev. Corp., 6 Cal. Rptr. 2d 888, 896-97 (Cal. Ct. App. 1992) (indicating that appellate court review must include a consideration of whether the record supports the amount of the award); State Farm Mut. Auto. Ins. Co. v. Zubiate, 808 S.W.2d 590, 605 (Tex. App. Ct. 1991) (indicating that the court must evaluate reasonableness by examining whether the evidence is sufficient to support the amount of the award).

292. MGW, 6 Ca. Rptr. 2d at 896-97; Zubiate, 808 S.W.2d at 605.

293. MGW, 6 Ca. Rptr. 2d at 896-97; Zubiate, 808 S.W.2d at 605.

294. See Honda, 114 S. Ct. at 2341 (stating that the purpose of judicial review is to protect against the danger of arbitrary awards). This concept recognizes the somewhat conflicting principles that while the court must respect the role of the jury in awarding punitive damages, too much jury discretion may violate procedural due process. May, supra note 2, at 590.

295. TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2721-22 (1993). First, the court advised the jury to consider harm "likely to occur from the defendant's conduct" in computing its award. Id. at 2721 (citations omitted). Second, the Court found that the closing arguments of counsel indicated that the jury considered potential harm. Id. at 2722.
presented the question of potential harm to the jury. Similarly, the appellate court did not rely on the potential harm of TXO's conduct in affirming the verdict. Thus, none of the judicial entities that evaluated the punitive damage award prior to the United States Supreme Court relied heavily on potential harm.

By relying on a factor not presented to the jury, the Court ultimately interfered with an essential aspect of the common-law system of awarding punitive damages: the jury. Throughout its discussion of the common-law system in Haslip, the Court focused on the importance of the jury and the traditional role that the jury plays in the punitive damages system. Although judicial review serves to balance the jury's role, the jury is the central component in the system, and it must be respected to satisfy due process.

The TXO Court's approach clearly undermines the jury's role in awarding punitive damages. By focusing on factors other than those presented to the jury, the Court took the ultimate decision away from the jury. After TXO, appellate courts may substitute their judgment for that of the jury, an act inconsistent with traditional notions of due process. This approach should be compared with constitutionally acceptable cases in which reviewing courts considered those factors upon which

296. See id. at 2725 (Kennedy, J., concurring) (stating that "Justice O'Connor demonstrates that the record in this case does not contain evidence, argument, or instructions regarding the potential harm from TXO's conduct"). Justice Kennedy noted that even if the jury did consider the harm likely to result from TXO's action, it did so without any evidence or supporting argument. Id. at 2725. Moreover, Alliance created the formal consideration of the potential harm of TXO's actions solely for the United States Supreme Court. Id. at 2734 (O'Connor, J., dissenting) (stating that Alliance's potential harm "estimate appeared for the first time after this Court granted certiorari, having been produced exclusively for our consumption").

297. Even if the lower court did consider potential harm, this clearly was not the focus of either the trial or appellate court's analysis. Had the court given it more attention, the parties obviously would have briefed the issue prior to doing so for the United States Supreme Court. Id.

298. See TXO, 113 S. Ct. at 2734.

299. Riggs, supra note 6, at 900. Indeed, it is almost a universal understanding that the jury plays the most influential aspect in determine punitive damage awards. Id. While any procedural analysis strives to limit jury discretion, its ultimate goal is to protect the jury's traditional role in making an award. Despite the inherently subjective nature of fixing the amount of punitive damages, it is a function that must be left to the jury. Id.


301. In many instances, reviewing courts contemplate factors other than those considered by the jury. See supra notes 164-66 and accompanying text. However, rather than replacing the jury's analysis, these courts consider the additional factors in conjunction with those that the jury considers. See supra notes 164-66 and accompanying text.

302. See Riggs, supra note 6, at 900.
the jury relied. If the reviewing court can base its decision solely on a factor that the jury did not consider, then the jury has a minimal role in the assessment of punitive damages. Thus, the TXO approach interferes with the foundations of the due process equation by muddling the proper role of the jury.

C. The Need for Objective Standards

The TXO decision indicates that an adequate definition of due process clearly requires objective standards. As the lower courts’ approaches indicate, objective standards successfully can provide a more principled basis for constitutional evaluation. Such objective tests can limit jury discretion and ensure meaningful judicial review, satisfying the procedural aspect. They also can define reasonableness, satisfying substantive due process. Although such tests vary greatly, they fulfill due process requirements by ensuring a minimal level of constitutional protection.

The Court may have hesitated to establish more objective standards because of its desire not to effectuate a radical shift in the law of punitive damages. However, such an objective approach merely would establish the range of constitutionally sufficient measures to impose punitive...
damage awards; it would not necessarily mandate wholesale modifications to all state punitive damages systems. Thus, an objective standard would be the best method to define the constitutional limits of due process for punitive damage defendants.

The result of the Court's failure to adopt a more objective and principled test will be continuous, case-by-case attacks on punitive damages. Without a clearer definition of the contours of due process requirements, the law is highly uncertain.

V. CONCLUSION

The United States Supreme Court recognizes that civil defendants enjoy federal constitutional protection against excessive punitive damages awards. The Court recognizes this protection on two intertwined, but equally important, levels: procedural and substantive. Unfortunately, the Court has not developed clear standards to apply this protection. The

310. Id. at 595 (indicating that if due process "requires reasonably objective or predictable standards for setting the amount of punitive damage awards" it would only provide the outer limits to punitive damage systems).

311. Riggs, supra note 6, at 903. Professor Riggs indicated that "ways undoubtedly could be devised to give the jury more precise guidelines for fixing the size of the award." Id.

312. See supra notes 151-92 and accompanying text (discussing the adjudicatory, ad hoc result of Haslip); see also Sarah Stevens and Larry Lempert, One Year After Haslip, State Systems for Awards Mostly Withstand Challenge, 24 SEC. REG. & L. REP., (BNA) 347, 347 (1992) (indicating that at least 32 decisions have rejected constitutional challenges). It is expected that TXO will increase this amount substantially. The unclear nature of the decision means that TXO is likely to further efforts for legislative reform of punitive damages. See Frey & Tager, supra note 236, at 8 (noting that TXO is likely to shift the focus to legislation and state common law for changes in punitive damages context); Linda S. Mullenix, Questions Linger on Punitives and Evidence, 15 NAT'L L. J., Aug. 23, 1993, at S4 (noting that TXO is likely to fuel demands for caps on the amount of punitive damages).

313. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 49 (1991) (O'Connor, J., dissenting) (stating that due process requires confidence that procedures produce "fair and reasonable results. When we lose that confidence, a change must be made.") See John E. Calfee & Richard Craswell, Some Effects of Uncertainty on Compliance with Legal Standards, 70 VA. L. REV. 965, 986-94 (1984) (arguing that uncertainty leads to economic inefficiency); Kile, supra note 3, at 143 (indicating that punitive damages chill industrial research, and may affect insurance coverage) (citations omitted); Schwartz & Behrens, supra note 3, at 1371 (stating that "[v]ague and uncertain punitive damages law has a substantial and detrimental impact on American industry [and] undermines confidence in the civil justice system") (footnote omitted). Alternatively, some commentators argue that punitive damages are beneficial to provide a remedy that criminal law cannot address. Sloane, supra note 1, at 476. Nonetheless, the lack of predictability interferes with the administration of justice because it will force lower courts to clarify any meaningful constitutional standards. Newman & Ahmuty, supra note 237, at 3 (stating that courts continue to have difficulty defining the constitutional contours of punitive damages); Mullenix, supra note 312, at S4 (indicating that TXO failed to establish a meaningful standard).
Court's analysis in *TXO* promotes uncertainty in due process and undermines the due process standards developed in lower courts.

The recognition of a constitutional right demands that the Court explicitly prescribe the standards used to define that right. In affirming the right but repeatedly failing to define the standards, the Supreme Court invites various subjective and inconsistent applications of those protections. The Court has created a framework for evaluating punitive damages without giving the lower courts the tools to apply that framework consistently. Thus, the constitutional protection afforded punitive damages defendants is illusory, or minimal at best.

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