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*Todd Shipyards Corp. v. Cunard Line, Ltd.: Procedural Due Process and an Arbitrator's Punitive Damage Award*

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TODD SHIPYARDS CORP. V. CUNARD LINE, LTD.: PROCEDURAL DUE PROCESS AND AN ARBITRATOR'S PUNITIVE DAMAGE AWARD

There is a perception among business interests and the civil defense bar that the frequency of punitive damage awards has increased in recent years, resulting in extremely high economic and social costs. Predictably, these parties have challenged the constitutionality of punitive damage awards. The bases for these actions have included the First Amendment, the Eighth Amendment Excessive Fines clause, and substantive due process. The Supreme Court has rejected each of these

1. Empirical data as to trends in the award of punitive damages is limited. See Robert E. Riggs, Constitutionalizing Punitive Damages: The Limits of Due Process, 52 OH. ST. L. J. 859, 913 (1991). Professor Riggs conducted a rough "empirical study" of his own, concluding that there was "[a] noticeable increase in the percentage of punitive damages claims from 1960 to 1985, with a leveling off since then." Id. at 913 n.194.


challenges, while alluding to the possibility that opponents of punitive damages might find more success in questioning the adequacy of procedural due process afforded defendants facing punitive damage awards.8

In Todd Shipyards Corp. v. Cunard Line, Ltd., the United States Court of Appeals for the Ninth Circuit upheld against a Fourteenth Amendment procedural due process challenge an arbitration panel award of $1 million in punitive damages.9 In reaching this conclusion, however, the court failed to take into account the relevant principles outlined in the Supreme Court’s latest ruling, Pacific Mutual Life Insurance Co. v. Haslip, on the adequacy of process afforded by a jury’s award of punitive damages.10 Instead, the Ninth Circuit employed a hybrid test for determining whether punitive damages violate the due process clause, a test which had been expressly rejected by the Court in Pacific Mutual.11 This comment will apply the Pacific Mutual rationale to the Todd Shipyards facts, concluding that the arbitrator’s punitive damages award in Todd Shipyards does violate the Fourteenth Amendment.

Part II of this comment examines the Pacific Mutual decision, exploring the majority’s use of a “reasonableness” approach and contrasting it with the historical approach employed by Justice Scalia in his concurring opinion as well as the Mathews v. Eldridge paradigm used by Justice O’Connor in her dissent. In Part III, the Todd Shipyards opinion will be described with a particular

7. The Fourteenth Amendment provides that “[n]o State shall make or enforce any law which shall . . . deprive any person of . . . property, without due process of law.” U.S. Const. amend. XIV, cl. 1.
8. See, e.g., Browning-Ferris, 492 U.S. at 280 (Brennan, J., concurring) (stating that the Browning-Ferris decision “leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties”); see also Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828-29 (1986) (noting the necessity for resolution of important due process questions in the context of punitive damage awards).

Justice Brennan foretold accurately the eventual demise of certain punitive damage awards at the hands of the Due Process Clause. See, e.g., Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) (rejecting a punitive damage award previously approved by the South Carolina Supreme Court on due process grounds).
9. 943 F.2d 1056, 1063-64 (9th Cir. 1991).
10. 111 S. Ct. 1032 (1991). Todd Shipyards was argued and submitted to the Ninth Circuit on December 11, 1990; Pacific Mutual was argued more than two months earlier, on October 3, 1990. In light of the potential impact of Pacific Mutual on its case, the Todd Shipyards court should have delayed its decision and required the parties to submit supplemental briefs addressing the applicability of the Pacific Mutual decision.
11. See infra notes 65-67 and accompanying text.
emphasis on the court's due process inquiry in the context of the punitive damages award. Finally, in Part IV, this comment substantiates the Pacific Mutual majority's rejection of the Mathews approach when determining the adequacy of the procedural due process afforded to the defendant. Also in part IV, this comment extrapolates principles from the brief and conclusory opinion of the Pacific Mutual majority and applies them to the issue of whether an arbitrator's award of punitive damages such as that administered in Todd Shipyards violates the procedural due process rights of the parties involved.

II. BACKGROUND

Arbitration has been employed as an alternative dispute resolution mechanism for many decades. It is favored for its provident and expeditious method of settling controversies in several fields including, inter alia, commercial, labor and medical malpractice. Since the decision to submit disputes to arbitration has been perceived to be a voluntary contractual agreement, courts have generally favored its use and afforded arbitrators substantial latitude in fashioning remedies.

Despite the significant discretion given arbitrators in fashioning remedies, the relationship between arbitration and the specific remedy of punitive damages has been a strained one over the years. Judicial posturing spans the spectrum of acceptance, ranging from complete approval to total rejection of arbitrator's punitive damage awards. In addressing the propriety of arbitrators' awards of pu-

13. See, e.g., Leo Kanowitz, Alternative Dispute Resolution and the Public Interest: The Arbitrator's Experience, 38 Hast. L.J. 239, 284-85 (1987) (stating that "arbitration typically resolves disputes much more quickly than the cumbersome procedures of the NLRA").
14. See, e.g., Lauren K. Saunders, The Quest for Balance: Public Policy and Due Process in Medical Malpractice Arbitration Agreements, 23 Harv. J. on Legisl. 267, 268-69 (1986) (stating that binding arbitration is a common method for screening out frivolous malpractice suits which raise the costs of settling valid claims).
15. See, e.g., School City v. East Chicago Fed'n of Teachers, Local 511, 422 N.E.2d 656, 622 (Ind. App. 1981) (concluding that arbitrators are not bound by principle of substantive law when granting relief); see also American Arbitration Association Commercial Arbitration Rules, rule 43 (1990) (empowering arbitrators to "grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties").
16. Several states have given blanket approval to the awarding of punitive damages by arbitrators. See Bishop v. Holy Cross Hosp. of Silver Spring, 410 A.2d 630 (Md. App.
nitive damages, courts must endeavor to strike the appropriate balance between two conflicting principles — the parties’ right to contract with respect to the resolution of their disputes and the state’s interest in retaining the power to punish its residents as defined by sociologically-derived philosophies about correction and reform. The relative weights given to these principles determine where on the spectrum of acquiescence courts will reside.\textsuperscript{17}

This policy-oriented approach to the validity of punitive damage awards from arbitrators has dominated the reasoning of courts. Inquiries as to the constitutionality of such awards, on the other hand, have been rare. This is unfortunate since the Court has intimated that the due process clause is a fertile ground for attacks on the validity of punitive damages.

1980); Rodgers Builders, Inc. v. McQueen, 331 S.E.2d 726 (N.C. App. 1985); Grissom v. Greener & Sunner Constr., Co., 676 S.W.2d 709 (Tex. App. 1984). On the other hand, many state courts have totally rejected arbitrator awards of punitive damages, regardless of whether or not the arbitrator had been empowered to award such damages by the parties. See McRae v. Waller 731 S.W.2d 789 (Ark. App. 1987); United States Fidelity & Guaranty Company v. DeFlitler, 456 N.E.2d 429 (Ind. App. 1983); Shaw v. Kuhn & Assoc., Inc., 698 P.2d 880 (N.M. 1985); Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 836 N.Y.S.2d 831 (1976). Some states refuse to adhere to either of these polar positions, electing instead to allow punitive damages awards only when the arbitration agreement expressly empowers the arbitrator to make such awards. See Belko v. AVX Corporation, 204 Cal App. 3d 894, 251 Cal Rptr. 557 (1988); Complete Interiors, Inc. v. Behan, 558 S.2d 48 (Fla. Ct. App. 1990).

The United States Supreme Court has not spoken definitively on this issue. However, in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), the Court’s rejection of the Second Circuit’s refusal to allow a civil RICO claim to be submitted to arbitration could be interpreted as an indication that the summary rejection of punitive damage awards from arbitrators is disfavored by the Court’s members. In McMahon, the defendant, a brokerage firm, was charged by the plaintiff, a customer of the firm, with churning the accounts of the plaintiff and misrepresentation in violation the Racketeer Influenced and Corrupt Organizations Act (RICO). \textit{Id.} at 223. The defendant demanded that the claim be arbitrated pursuant to an arbitration clause contained in the customer agreement signed by the plaintiff. \textit{Id.} The plaintiff, on the other hand, claimed that the RICO claim was nonarbitrable because the offense, racketeering, was criminal in nature and thus had to be heard by the courts to satisfy the “public interest in [its] enforcement.” \textit{Id.} at 239. The Court rejected the defendant’s argument, however, ruling that the the civil nature of RICO claims made such claims subject to arbitration. \textit{Id.} at 242. As a result, the vitality of the decision declaring awards of punitive damages per se invalid is questionable if statutory treble damages are simply a subset of punitive damages. But see Karen Ruga, \textit{Argument Against the Availability of Punitive Damages in Commercial Arbitration}, 62 St. John’s L. Rev. 270, 281-83 (1988) (arguing that punitive damages are unaffected by \textit{Shearson/American Express} since punitive and treble damages are governed by different standards).

17. \textit{See}, e.g, Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793, 797, 386 N.Y.S.2d 831, 834 (1976) (stating that “[t]he freedom to contract does not embrace the freedom to punish, even by contract” in rejecting an arbitrator’s punitive damages award).
As of 1992, the Court has not addressed the issue of whether punitive damage awards from arbitrators violate the due process requirements of the Fourteenth Amendment. However, in *Pacific Mutual Life Insurance Co. v. Haslip*, the Court declared that a jury award of punitive damages did not violate the same clause.  

Through *Pacific Mutual*, the Court defined the paradigm to be used in scrutinizing the constitutionality of procedures for awarding punitive damages. In May 1982, plaintiff-appellee, Cleopatra Haslip, filed suit in a state trial court. Haslip alleged that Pacific Mutual and one of its licensed agents, Lemmie L. Ruffin, Jr., had committed fraud; Ruffin's misappropriation of Haslip's premium payments caused her health coverage to lapse, unbeknownst to her, leaving her unable to pay for a hospital stay.

The trial court instructed the jury that if it found the defendant liable for fraud, it could award punitive damages in addition to compensatory damages. In defining the jury's task, the court explained that the purpose of punitive damages was to punish the defendant as well as to deter the defendant and others from engaging similar conduct. The court also instructed that the decision of whether to award punitive damages was "entirely discretionary with the jury." The jury found for the plaintiff and awarded a general verdict of more than $1 million. The trial judge reviewed and upheld the award.

After the Supreme Court of Alabama affirmed the decision, Pacific Mutual sought review by the United States Supreme Court, alleging *inter alia* that punitive damages are barred by procedural due process when the jury is given unlimited discretion to award them.

The Court affirmed the Alabama decision. The majority began

19. Id. at 1036-37.
20. Id. at 1036.
21. Id. at 1037.
22. The trial judge instructed the jury: "Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." Id.
23. Id. at 1037 n.1.
24. Id. at 1037, 1037 n.2. The Supreme Court assumed that more than $800,000 was punitive damages.
25. Id. at 1044.
27. Pacific Mutual, 111 S. Ct. at 1037.
by reasoning that the long common law tradition of allowing juries significant discretion in awarding punitive damages precluded the Court from declaring procedures for awarding such damages per se unconstitutional.\textsuperscript{28} Rather, the Court's narrow objective was to determine whether the particular procedures Alabama had chosen met "general concerns of reasonableness" and were thus constitutional.\textsuperscript{29}

The foundation for the Court's conclusion that the jury instructions "reasonably accommodated Pacific Mutual's interest in rational decision-making and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution"\textsuperscript{30} rested on a trio of assertions. First, the majority noted that the "significant" jury discretion was circumscribed by the instructions which expressly tied the award to deterrence and retributive objectives.\textsuperscript{31} Second, the Court added that the trial court's instructions directing the jury to "take into consideration the character and the degree of wrong as shown by the evidence and necessity of preventing similar wrong" further limited the jury's discretion.\textsuperscript{32} Finally, the Court pointed to Alabama's post-verdict review procedures at both the trial and appellate levels as additional checks on the reasonableness of a punitive damage award.\textsuperscript{33} The combination of these three fact-specific factors enabled the Court to conclude that the punitive damage awards in \textit{Pacific Mutual} did not violate procedural due process principles grounded on a reasonableness objective.

In a concurring opinion, Justice Scalia focused on history and tradition as the basis for reaching the same conclusion as the majority. Admonishing the majority for its reliance on the fact-based reasonableness standard,\textsuperscript{34} Justice Scalia elected instead to apply a more defined due process test, stating that "no procedure firmly rooted in the practices of our people can be so 'fundamentally unfair' as to deny due process of the law."\textsuperscript{35} Justice Scalia went further to argue that the history of due process demonstrated clearly that "if the government chooses to follow a historically ap-

\textsuperscript{28} \textit{Id.} at 1041-43.
\textsuperscript{29} \textit{Id.} at 1043.
\textsuperscript{30} \textit{Id.} at 1044.
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.} at 1044-46.
\textsuperscript{34} \textit{Id.} at 1047 (Scalia, J. concurring).
\textsuperscript{35} \textit{Id.} at 1053.
proved procedure, it necessarily provides due process.” Thus, Justice Scalia opted to dispense with the majority’s “rootless” analysis which he viewed as dependent solely on the predilections of the nine members of the Court. Instead, he favored an approach which endeavors to find evidence of historical and traditional acquiescence in defining a particular procedure to determine whether it fulfills constitutional due process requirements.

Justice O’Connor’s application of the Mathews v. Eldridge paradigm led her to the inescapable conclusion that the Alabama procedures for awarding punitive damages were unconstitutional. Mathews requires courts to consider three factors in determining the process due in a particular context: (1) the private interest at stake, (2) the risk that existing procedures will wrongly impair the interest, and (3) the government’s interest in maintaining the existing procedure.

Justice O’Connor first determined that a strong private interest existed in Pacific Mutual as the parties attempted to avoid potentially magnanimous damage awards that were punitive in nature. In addition, there was a strong risk of error generated by the standardless nature of the system enabling jurors to use their own prejudices and biases in determining damage awards. Further, Justice O’Connor asserted that this infirmity could be easily cured by requiring jurors to apply more defined standards similar to those already employed by the trial and appellate courts in post-verdict review. The government interest in standardless instructions, according to Justice O’Connor, was weak or even non-existent. By balancing these three factors, Justice O’Connor was able to conclude that the Pacific Mutual instructions were unconstitutional.

Thus, the Pacific Mutual decision defined the approach employed by the Court in determining the propriety of punitive damage awards with respect to the Constitution’s procedural due process requirements as well as those analyses which will be rejected by the Court.

36. Id. at 1050 (emphasis omitted).
38. Id. at 335.
40. Id.
41. Id. at 1064.
42. Id. at 1064-65.
III. TODD SHIYARDS CORP. V. CUNARD LINE, LTD.\textsuperscript{43}

Disputes such as those giving rise to Todd Shipyards are common in the commercial setting. In September 1983, Todd Shipyards Corporation ("Todd") and Cunard Line, Limited ("Cunard") entered into a contract under which Todd would repair and refit Cunard's passenger cruise ship, the M.V. Sagafjord ("Sagafjord").\textsuperscript{44} Although the contract provided that "[d]rawings and [s]pecifications pertinent to this Contract are attached hereto as Exhibits A and B respectively, and made a part hereof," the provision unfortunately went unfulfilled.\textsuperscript{45} Cunard neglected to hire an outside engineering firm to inspect the ship and prepare detailed drawings for the project, failed to provide various materials or sufficient installation instructions and failed to adequately pre-custimize certain fixtures.\textsuperscript{46} As a result of this neglect, Todd was unable to complete the repair and conversion of the Sagafjord in the contractually prescribed time and, as a result of its efforts to meet the deadline without benefit of the missing plans and drawings, incurred significant overtime labor expenses.\textsuperscript{47} Cunard relied on this failure to meet the contractual deadline in "refus[ing] to pay even the fixed contract price."\textsuperscript{48}

Todd filed a suit against Cunard and against the Sagafjord \textit{in rem} seeking damages for breach of contract, quantum meruit, breach of good faith and fair dealing and fraud.\textsuperscript{49} Pursuing its rights under a comprehensive arbitration clause included in the contract, Todd filed a demand for arbitration.\textsuperscript{50}

The arbitration hearings began in March 1985 and concluded more than two years later with the panel awarding Todd in excess of $6 million in compensatory damages, $1 million in punitive damages and $4 million in attorneys' fees and costs.\textsuperscript{51}

In response to Cunard's motion in the District Court of New Jersey to vacate the award, Todd petitioned the District Court for

\begin{footnotesize}
\begin{enumerate}
\item 943 F.2d 1056 (9th Cir. 1991).
\item \textit{Id.} at 1058.
\item \textit{Id.}
\item \textit{Id.} at 1058-59.
\item \textit{Id.} at 1059.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
the Northern District of California to confirm the award. The latter court heard the case and confirmed the award in its entirety.\textsuperscript{52} The Ninth Circuit heard the case on appeal in the decision at issue.

On appeal, Cunard asserted \textit{inter alia} that the punitive damage award from the arbitration panel violated due process because the award was “not subject to the procedural strictures of the courtroom.”\textsuperscript{53} Cunard based its assertion on an application of the \textit{Todd Shipyards} facts to the \textit{Mathews} paradigm. Cunard claims that it had a “substantial” personal interest in not being deprived of the $1 million award.\textsuperscript{54} Further, Cunard argued that a substantial likelihood of erroneous deprivation existed because the arbitration panel was not bound by any rules of evidence, procedure or substantive law in its decisionmaking.\textsuperscript{55} Buttressing this claim of erroneous deprivation, according to Cunard, was the exiguity of the appellate standard of review.\textsuperscript{56} Finally, Cunard added that the governmental interest in the instant case was “minor.”\textsuperscript{57} The combination of these three factors, a substantial personal interest, a high probability of erroneous deprivation and low governmental interest, prompted Cunard to assert that it had been deprived of its constitutional right to procedural due process.

The court rejected Cunard’s argument as well as its use of a pure \textit{Mathews} approach. In its place, the court employed a hybrid of \textit{Mathews}, adding an estoppel element to the three \textit{Mathews} factors. Apparently acknowledging that Cunard’s interest was indeed substantial and the government’s interest was small, the court chose to focus on the issue of whether the arbitration proceeding would result in an erroneous deprivation. The court directly addressed this inquiry by summarily concluding that “Cunard had every opportunity to present evidence, [and] to argue the merits of its position” in front of the arbitration panel.\textsuperscript{58} Further, the court asserted that Cunard had ample occasion “to challenge the arbitrator’s award in court.”\textsuperscript{59} Thus, presumably, the likelihood of erroneous deprivation was small and, as a result, the process would be sufficient to fulfill the due process requirements under the

\begin{itemize}
\item \textsuperscript{52} \textit{Id.} at 1059.
\item \textsuperscript{53} \textit{Id.} at 1063.
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.}
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.} at 1064.
\item \textsuperscript{59} \textit{Id.}
\end{itemize}
Mathews paradigm.

However, the court went further by adding an estoppel hue to its discussion. Relying on the fact that Cunard had voluntarily agreed to arbitrate the dispute through a contractual provision, the court held that Cunard was, in effect, estopped from “assert[ing] that an award made pursuant to that agreement . . . denies due process because it is not sufficiently reliable.”60 “Having taken advantage of [the systemic protections], into which it entered voluntarily, Cunard cannot now argue that its due process was denied.”61

IV. ANALYSIS

Significantly, the Pacific Mutual majority discarded unequivocally both Justice Scalia’s historical ramification approach and Justice O’Connor’s reliance on the Mathews v. Eldridge balancing paradigm. In failing to endorse the proposal advanced by Justice Scalia, the majority implicitly recognized the dynamic nature of the concept of due process.62 Like other constitutional principles,63 due process is shaped and defined by societal values which are constantly evolving and which reflect the vitality of ever-changing circumstances.64 To shackle due process with a construction mired in historical confirmation is to ignore fundamental precepts of constitutional interpretation.

The majority’s rejection of the Mathews scheme endorsed by Justice O’Connor is more immediately pertinent, however, since this is the approach used by the court in the case at issue, Todd Shipyards. The Mathews balancing test has been criticized as excessively utilitarian.65 The test assumes that there is a “correct

60. Id. at 1063-64.
61. Id. at 1064.
62. The Court has rejected reliance on historical fiat in several cases. See, e.g., Connecticut v. Doehr, 111 S. Ct. 2105, 2112 (1991) (tracking the evanescent quality of due process through a series of cases).
63. See, e.g., Weems v. United States, 217 U.S. 349, 367, 373 (1910) (declaring that as a consequence of the ephemeral nature of the Constitution, any analysis of the prescription of punishments and its relation to the eighth amendment “is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by human justice”).
64. See 111 S. Ct. at 1065-66 (O’Connor, J., dissenting) (citing the increase in size and frequency of punitive damage awards as well as the recent proliferation of product liability and mass tort litigation as factors favoring reevaluation of the constitutionality of punitive damage awards).
65. See, e.g., Jerry L. Mashaw, The Supreme Court’s Due Process Calculus for Admin-
answer" that may be ascertained eventually through application of increasing quantities of process; the more process used in determining the answer, the less likelihood there is of an erroneous conclusion.66

However, presuming the presence of a "correct answer" is not legitimate in the context of punitive damage awards. The objective of reflecting societal outrage embodied in the retributive nature of punitive damages is incongruous with the correct answer presumption so critical to the Mathews approach:

[D]etermining the size of the [punitive damage] award has traditionally been left to the sound discretion of juries because the decision, like the prior decision on culpability, is inherently subjective . . . . [I]t [is not] obvious that any feasible instruction, however detailed, would enable juries to get much closer to the mark (just the right amount of punishment and deterrence, not too much, not too little), because nobody really knows where the mark is. Economic models can postulate a situation of optimum deterrence, but they are singularly deficient in dealing with the punishment objective. Moreover, values assigned to the variables in the model are always hypothesized and, in a real life situation, the true values remain anybody's guess. Historically, the right to make that guess has been left to the jury, subject to the right (and obligation) of the court to make a second guess if the jury's verdict appears excessive, contrary to the evidence, or the result of bias and prejudice.67

Thus, no matter how much process is employed to determine the punitive damages which depict moral outrage, it is impossible to authenticate the accuracy of the subjective emotive response. Consequently, the Mathews paradigm is useless.

Instead, the Todd Shipyards court should have employed the Pacific Mutual majority's reasonableness approach, an analysis more amenable to the dynamic and subjective nature of the concept of due process. While the Court neglected to clarify expressly the components of punitive damage awards that made them constitu-

66. Counterbalancing the utility of employing unlimited process is the objective of judicial or administrative efficiency.
67. Riggs, supra note 1, at 900-01.
tionally reasonable in light of the twin goals of retribution and deterrence discussed in Pacific Mutual, this comment will endeavor to extrapolate bases for the court’s conclusion and apply them to arbitral decisions exemplified by Todd Shipyards.

The Pacific Mutual opinion is fraught with unclear leaps that obfuscate the nexus between the limited discretion of the jury and the reasonableness of the jury instructions. The Court noted that the “not unlimited” discretion of the jury resulted from the court’s instructions directing the jury to link any punitive damage award with the two goals of punitive damage awards, retribution and deterrence. The Court then declared the instructions to be “reasonable” without any explanation for the connection of reasonableness to those goals. Rather, the Court inexplicably supported this “reasonableness” conclusion with a trio of cases, two of which found procedures invoked by administrative officials to be reasonable.

In the first case, Schall v. Martin, the Court held procedures in ordering pretrial detention of accused juveniles reasonable and within the confines of the due process clause. The Court’s reasoning centered on the deference to be accorded the expertise of administrative judges, an expertise stemming from repeated exposure to the same issues. The Court concluded that as a result of this expertise, administrative judges were best-suited to make detention decisions and should be able to act unencumbered by constrictive regulations.

In another case cited by the Pacific Mutual Court, Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, the Court again deferred to the expertise of the administrators involved, the parole board, in holding that, subsequent to a denial of parole, the board was not required to present evidence from an inmate’s file to comport with due process.

Despite the peculiar facts of these cases, the Pacific Mutual Court applied their reasoning to awards made by juries. The Court was apparently analogizing the role of jurors in the common law system, purportedly expert representatives of the community at large capable of expressing the outrage experienced by society and

69. Id.
71. Id. at 278-79.
72. 442 U.S. 1, 13-16 (1979).
determining the quantity of punishment necessary for deterrence, to the role of administrators illustrated by the *Schall* and *Greenholtz* cases. The Court appeared to suggest that decisionmakers who possess this expertise are best able to determine the appropriate penalty for satisfying both the retributive and deterrent goals of punishment. As a result, the presence of this decisionmaker expertise weighs heavily in favor of a conclusion that the decisionmaker's discretion was "exercised within reasonable constraints."

The features of the arbitral method parallel closely those of the administrative experience and therefore support the reasonableness of arbitrators awarding punitive damages. As in the administrative context, a significant advantage of arbitration as a dispute resolution technique is its reliance on the expertise of the decisionmaker. Arbitrators are considered experts primarily because of their familiarity with the practices of the members of a particular trade. This familiarity is most likely gained through close association with and study of the members of the trade, and/or through a history of membership within the trade.

Arbitrators, by virtue of their status as experts in a particular field, are sensitive to the quantum of punishment required to deter the parties from engaging in malicious or fraudulent conduct. As a result of their familiarity with the members of a trade, arbitrators are acutely aware of the amount of coercion necessary to trigger behavioral responses from parties to a dispute (or at least, the category of individuals represented by the parties to the dispute). Thus, arbitrators are uniquely capable of determining the relative

73. Contrary to the *Pacific Mutual* holding, it might be argued that although juries are capable of discerning the appropriate penalty to express the outrage of the community thereby fulfilling the retributive objective of the punishment, they lack familiarity with the behavior peculiar to parties involved in the dispute that might properly influence the magnitude of the penalty necessary to deter future malfeasance by the parties in the pertinent dispute and those similarly situated.

74. See, e.g., Butterkrust Bakeries v. Bakery, Conf. & Tobacco Wkrs., 726 F.2d 698, 699-700 (11th Cir. 1984) ("[A]rbitrators are expected to apply both the 'common law of the shop' and their own personal judgment when resolving labor disputes.").

75. See, e.g., American Almond Products Co. v. Consolidated Pecan Sales Co., Inc., 144 F.2d 448, 450 (2d Cir. 1944) ("In trade disputes one of the chief advantages of arbitration is that the arbitrators can be chosen who are familiar with the practices and customs of the calling, and with just such matter as what are current prices, what is merchantable quality, what are the terms of sale, and the like.").

76. See generally Richard J. Medalie, COMMERCIAL ARBITRATION FOR THE 1990s 83 (1991) ("Federal courts have found punitive damages in commercial matters to be an effective deterrent to malicious or fraudulent conduct.").
deterrent values of several penalties.

Arbitrators are similar to administrators in the sense that they too are experts capable of fulfilling the retribution function of punishment by fashioning a penalty which expresses community abhorrence for the acts of the defendant. Arbitrators, as experts in the practices of a particular trade, can determine issues of liability which depend on whether or not the behavior of the parties “transgress[es] the limits of acceptable practice in the trade.”\textsuperscript{77} The retributive hue of this determination suggests that courts would readily acknowledge the ability of arbitrators to make judgments concerning the retributive capacity of a penalty.\textsuperscript{78}

Not only did the Pacific Mutual Court imply that the reasonableness of the decisionmaker’s discretion was a function of the ability of the decisionmaker to discern the penalty which would best fulfill the deterrent goal as well as the retributive objective of punishment, the Court also intimated that the decisionmaker would have to strike the correct balance between the two ends in fashioning the appropriate penalty.\textsuperscript{79} By recognizing this balance, the Court is probably eluding to a belief that decisionmakers guided solely by retributive desires have a proclivity toward fashioning penalties which, though commensurate with society’s abhorrence of the defendants’ acts, may unreasonably exceed the amount necessary to deter the individuals. The deterrence objective thus acts as a tempering mechanism, ensuring that excessive penalties are not imposed on defendants in violation of their due process rights.

Nobody has the omniscience to predict the penalty that will optimize both deterrent and retributive objectives. However, in contrast to juries who sit for a single case, decisionmakers such as arbitrators are exposed repeatedly to the administration of such penalties.


\textsuperscript{78} The court in South East Atlantic Shipping Ltd. v. Garnac Grain Co., 656 F.2d 189 (2d Cir. 1966), implicitly acknowledged the arbitrator’s ability to express this retributive capacity:

\begin{quote}
[A]lthough the [arbitration] panel majority’s opinion indicates that they were morally outraged by Garnac’s conduct . . . the award was not punitive. Moreover, we think it within the arbitrator’s power to consider such questions of business morality in determining whether to award Atlantic the full extent of its loss regardless of whether some of that loss, in retrospect, might have been avoided. Such an award, however liberal, does not amount to an “unlawful” assessment of punitive damages.
\end{quote}

\textit{Id.} at 192 (emphasis added).

\textsuperscript{79} See supra note 22 and accompanying text.
awards. In addition, they have a broad base of knowledge inherent in their status as experts in the field. Thus, arbitrators are cognizant of the effect of punitive damage awards on parties and on society.

Further, unlike the rigid judicial system, the nature of the arbitration process ensures the decisionmakers have the flexibility\(^{80}\) necessary to fashion penalties which reflect the needs and relative faults of the parties and consequently to achieve the retributive/deterrent balance closest to optimal. For instance, unlike judges and juries, arbitrators are not required to render a decision for a plaintiff or a defendant, "us[ing] 'burden of proof' to satisfy their conscience, appellate tribunals and rules of law."\(^{81}\) Rather, when confronted with a situation in which there is no clear right or wrong, they can construct a compromised penalty which manifests the proper retributive/deterrent nexus for the quantum of divined fault.\(^{82}\) Also, where an arbitrator rejects certain claims made by a party, the arbitrator may fashion an award which, though less than that requested, is commensurate with the retributive and deterrent goals endemic to the diminished fault.\(^{83}\) Finally, if parties such as those in *Todd Shipyards* were engaged in a continuing contractual relationship, an arbitrator could best balance the retributive and deterrent objective by fashioning a penalty which would coerce the defendant into continuing to perform while also punishing him for his past nonperformance.\(^{84}\)

The majority in *Pacific Mutual* failed to state explicitly whether post-verdict review, though present, was necessary to its holding, and if so, the type of review constitutionally mandated.\(^{85}\) As a result, assuming the necessity of a review, the *Todd Shipyards* review must be evaluated on the basis of the principles implicitly required of the initial decisionmaker by the *Pacific Mutual* Court.

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80. See supra note 15 and accompanying text.
82. Id.
84. See Hackett, supra note 77, at 292-93.
85. After concluding that the procedures employed in adjudicating the case sufficiently constrained the discretion of the jury, the *Pacific Mutual* Court addressed the post-verdict review of the Alabama Supreme Court. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044-46 (1991). The sequence of this analysis suggests that this material on the adequacy of the post-verdict review is dicta. However, this conclusion is far from clear.
The review conducted by the *Todd Shipyards* court was deficient according to the principles extrapolated from *Pacific Mutual*. The *Todd Shipyards* court applied a standard requiring the arbitrator's decision to be upheld unless it was “‘completely irrational,’ or it constituted a ‘manifest disregard of law.’”

The pertinent law, as required by the arbitration agreement, was New York substantive law. Under New York law, “punitive damages for fraud are available ‘upon a showing of willful and wanton conduct.’”

This standard is deficient for a pair of reasons. First, the standard fails to mandate a check that deterrence is effected by the punitive damage award. By contrast, the retributive function of the penalty is accounted for in the standard because the court must determine whether the defendant committed *willful* and *wanton* conduct. “Willful” and “wanton” indicate the subjective determination of society’s abhorrence of the conduct. However, the *Pacific Mutual* Court stated that a system for awarding punitive damages must reasonably further both retributive and deterrent goals. Thus, any post-verdict review of the sufficiency of process employed in awarding punitive damages must consider the goal of deterrence as well as the objective of retribution.

A second deficiency in the standard is the lack of any review of the reasonableness of the amount of the award. The *Pacific Mutual* Court nebulously required reviewing courts to examine the amount of the punitive damages award, concluding in the case before it that a punitive damage award four times greater than the compensatory damages came “close to . . . [but did] not cross the line into the area of constitutional impropriety.” Thus, although the *Todd Shipyards* court failed to review the reasonableness of the amount of the punitive award, the Court would not likely consider the award excessive because the punitive damages were only one sixth of the compensatory damages awarded by the arbitrator.

As a result of these two deficiencies in the reviewing procedure, and assuming the necessity of a post-verdict review similar to that employed in *Pacific Mutual*, the *Todd Shipyards* court should have rejected the punitive damages award as violating the Four-

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86. *Todd Shipyards Corp. v. Cunard Line*, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991) (quoting French v. Merrill Lynch, 784 F.2d 902, 906 (9th Cir. 1986)).
87. *Id.* at 1063.
88. *Id.* (quoting *Faller Group, Inc. v. Jaffe*, 564 F. Supp. 1177, 1185 (S.D.N.Y. 1983)).
89. *Pacific Mutual*, 111 S. Ct. at 1046.
teenth Amendment mandate of procedural due process.

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