SUPREME COURT OF THE UNITED STATES

No. 92–479

TXO PRODUCTION CORP., PETITIONER *v.* ALLIANCE RESOURCES CORP., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

[June 25, 1993]

JUSTICE O'CONNOR, with whom JUSTICE WHITE joins, and with whom JUSTICE SOUTER joins as to Parts II–B–2, II–C, III, and IV, dissenting.

In *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U. S. 1 (1991), this Court held out the promise that punitive damages awards would receive sufficient constitutional scrutiny to restore fairness in what is rapidly becoming an arbitrary and oppressive system. Today the Court's judgment renders *Haslip*'s promise a false one. The procedures that converted this commercial dispute into a $10 million punitive verdict were wholly inadequate. Rather than producing a judgment founded on verifiable criteria, they produced a monstrous award—526 times actual damages and over 20 times greater than any punitive award in West Virginia history. Worse, the State Supreme Court of Appeals rejected petitioner's challenge with only cursory analysis, observing that petitioner, rather than being "really stupid," had been "really mean." 187 W. Va. 457, 474–475, 419 S. E. 2d 870, 887–889 (1992). The court similarly refused to consider the possibility of remittitur because petitioner "and its agents and servants failed to conduct themselves as gentlemen." *Id.*, at 462, 419 S. E. 2d, at 875. In my view, due process does not tolerate such cavalier standards when so much is at stake. Because I believe that neither this award's size nor the procedures that produced it are consistent with the principles this Court articulated in *Haslip*, I respectfully dissent.

Our system of justice entrusts jurors—ordinary citizens who need not have any training in the law—with profoundly important determinations. Jurors decide not only civil matters, where the financial consequences may be great, but also criminal cases, where the liberty or perhaps life of the defendant hangs in the balance. Our abiding faith in the jury system is founded on longstanding tradition reflected in constitutional text, see U. S. Const. Art. III, §2, Amdts. 6, 7, and is supported by sound considerations of justice and democratic theory. The jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values. See 3 W. Blackstone, Commentaries *379–*381; *Haslip*, *supra*, at 40 (KENNEDY, J., concurring in judgment); W. Olson, The Litigation Explosion 175 (1991); Hyman & Tarrant, Aspects of American Trial Jury History, in The Jury System in America 23, 27–28 (R. Simon ed. 1975).

But jurors are not infallible guardians of the public good. They are ordinary citizens whose decisions can be shaped by influences impermissible in our system of justice. In fact, they are more susceptible to such influences than judges. See H. Kalven & H. Zeisel, The American Jury 497–498 (1966) ("The judge very often perceives the stimulus that moves the jury, but does not yield to it. . . . The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude"). Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking. Modern judicial systems therefore incorporate safeguards against such influences. Rules of evidence limit what the parties may present to the jury. Careful instructions direct the jury's deliberations. Trial judges diligently supervise proceedings, watchful for potential sources of error.

And courts of appeals stand ready to overturn judgments when efforts to ensure fairness have failed.

In the usual case, this elaborate but necessary judicial machinery functions well, ensuring that our jury system is an engine of liberty and justice rather than a source of oppression and arbitrary imposition. As JUSTICE KENNEDY has explained, "[e]lements of whim and caprice do not predominate when the jury reaches a consensus based upon arguments of counsel, the presentation of evidence, and instructions from the trial judge, subject to review by the trial and appellate courts." *Haslip*, 499 U. S., at 40 (opinion concurring in judgment). But the risk of prejudice, bias, and caprice remains a real one in every case nonetheless.

This is especially true in the area of punitive damages, where juries sometimes receive only vague and amorphous guidance. Jurors may be told that punitive damages are imposed to punish and deter, but rarely are they instructed on how to effectuate those goals or whether any limiting principles exist. See, *e.g.*, *id.*, at 39. Although this Court has not held such instructions constitutionally inadequate, it cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict. See *id.*, at 43, 63 (O'CONNOR, J., dissenting); *id.*, at 41 (KENNEDY, J., concurring in judgment) ("[T]he generality of the instructions may contribute to a certain lack of predictability"); *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 281 (1989) (Brennan, J., concurring) (Such "skeletal" guidance is "scarcely better than no guidance at all," creating a need for more careful review); *Smith* v. *Wade*, 461 U. S. 30, 88 (1983) (REHNQUIST, J., dissenting) (elastic standards applicable to punitive awards "giv[e] free reign to the biases and prejudices of juries"). As one

commentator has explained:

> "Like everyone else in the court system, juries need and deserve objective rules for decision. Deprived of any fixed landmarks and guideposts, any of us can be distracted, played on, and befuddled to the point where our best guess is far from reliable." Olson, *supra,* at 175.

It is therefore no surprise that, time and again, this Court and its members have expressed concern about punitive damages awards "`run wild,'" inexplicable on any basis but caprice or passion. *Haslip*, *supra*, at 9–12, 18 (discussing cases); see also *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974) ("[J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused").

Influences such as caprice, passion, bias, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand. See *Haslip*, *supra*, at 41 (KENNEDY, J., concurring in judgment) ("A verdict returned by a biased or prejudiced jury no doubt violates due process"). Of course, determining whether a verdict resulted from improper influences is no easy matter. By tradition and necessity, the circumstances in which jurors may impeach their own verdict are quite limited. See *Tanner* v. *United States*, 483 U. S. 107, 117–121, 127 (1987); 11 C. Wright & A. Miller, Federal Practice and Procedure §2810, pp. 71–72 (1973); 2 W. Tidd, Practice of Courts of King's Bench and Common Pleas *908–*909. But fundamental fairness requires that impermissible influences such as bias and prejudice be discovered nonetheless, by inference if not by direct proof. As a result, courts at common law in England traditionally would strike any award that appeared so grossly disproportionate as to evidence caprice, passion, or

bias.[1] This practice long has been followed in this Nation as well.[2] Indeed, the New Hampshire Supreme Court emphasized its importance over a century ago, observing that a court's duty to interfere with a disproportionate jury verdict "is absolutely necessary to the safe administration of justice, and ought, in all proper cases, to be asserted and exercised." *Belknap* v. *Boston & Maine R. Co.*, 49 N. H. 358, 372 (1870).

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[1]See *Hewlett* v. *Cruchley*, 5 Taunt. 277, 281, 128 Eng. Rep. 696, 698 (C. P. 1813) (Mansfield, C. J.) ("[I]t is now well acknowledged in all the Courts of *Westminsterhall* [that] if the damages are clearly too large, the Courts will send the inquiry to another jury"); *Duberly* v. *Gunning*, 4 Durn. & E. 651, 657 (K. B. 1792) (Buller, J.) ("New trials have been granted from the year 1655" on "the grounds . . . of excessive damages"); *Chambers* v. *Caulfield*, 6 East. 244, 256, 102 Eng. Rep. 1280, 1285 (K. B. 1895) (Lord Ellenborough, C. J.) ("[I]f it appeared to us from the amount of the damages given as compared with the facts of the case laid before the jury, that the jury must have acted under the influence either of undue motives, or some gross error or misconception on the subject, we should have thought it our duty to submit the question to the consideration of a second jury"); *Leith* v. *Pope*, 2 Bl. W. 1327, 1328, 96 Eng. Rep. 777, 778 (K. B. 1782) (award will be reversed only where "so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury"); *Fabrigas* v. *Mostyn*, 2 Bl. W. 928, 96 Eng. Rep. 549 (K. B. 1774) ("Some [awards] may be so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury"); *Gilbert* v. *Burtenshaw*, 1 Cowp. 230, 231, 98 Eng. Rep. 1059, 1060 (K. B. 1774) (Court may grant new trial only where damages are so "flagrantly outrageous and extravagant" as to constitute "internal evidence of intemperance in the minds of the jury"); 2 Tidd, at

Accord, *Gough* v. *Farr*, 1 Y. & J. 477, 479–480, 148 Eng. Rep. 759, 760 (Ex. 1827) (Vaughan, B.) ("It is essential to the due administration of justice, that the Courts should exercise a salutary control over Juries" by requiring retrial where the amount of the verdict indicates that the jury "acted improperly, or upon a gross misconception of the facts"); *id.*, at 478–479, 148 Eng. Rep., at 759–760 (Alexander, L. C. B.)

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*909 (A new trial may be had "for excessive damages" but "the damages ought not to be weighed in a nice balance, but must be such as appear at first blush to be outrageous, and indicate passion or partiality in the jury").

[2]G. Field, Law of Damages 685–686 (1876) ("[W]hen the verdict of the jury is so flagrantly excessive that the mind at once perceives that the verdict is unjust, it should be set aside"); *id.*, at 684 (Court may set award aside "where it is apparent, from the amount of the verdict or otherwise, that the jury were influenced by passion, prejudice, corruption, or an evident mistake of the law or the facts"); 1 J. Sutherland, Law of Damages 810 (1882) (Where "the amount is so great or so small as to indicate" that "it is the result of a perverted judgment, and not that of [the jury's] cool and impartial deliberation," the court, "in its discretion, will interpose and set it aside"); *Travis* v. *Barger*, 24 Barb. 614, 629 (N.Y. 1857) (Damages award will be set aside where "so flagrantly outrageous and extravagant" as to evince "intemperance, passion, partiality or corruption"); *Pleasants* v. *Heard*, 15 Ark. 403, 406 (1855) (verdict to be set aside if the "amount of damages, upon all the facts of the case, . . . shocks our sense of justice"); *Worster* v. *Proprietors of Canal Bridge*, 33 Mass. 541, 547–548 (1835) (Court may interfere where damages are "manifestly exorbitant"); *Belknap* v. *Boston & Maine R. Co.*, 49 N. H. 358, 372 (1870) (Where damages are so excessive that one familiar

(Where damages are so excessive that "the Courts are of opinion . . . that the Jury have acted under the influence of undue motives, or of misconception, it is their duty to interfere"); *Travis* v. *Barger*, 24 Barb. 614, 629 (N.Y. 1857) (reciting Lord Ellenborough's view that, "if it appeared from the amount of damages given, as compared with the facts of the case laid before jury, that the jury must have acted under the influence either of undue motives, or some gross error or misconception of the subject, the court would have thought it their duty to submit the question to the consideration of a second jury"); *Flannery* v. *Baltimore & Ohio R. Co.*, 15 D. C. 111, 125 (1885) (When the punitive damages award is disproportionate, "we feel it our duty to interfere").

Judicial intervention in cases of excessive awards also has the critical function of ensuring that another ancient and fundamental principle of justice is observed—that the punishment be proportionate to the offense. As we have observed, the requirement of proportionality is "deeply rooted and frequently repeated in common-law jurisprudence." *Solem* v. *Helm*, 463 U. S. 277, 284–285 (1983). See, *e.g.*, *Le Gras* v. *Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (C. P. 1316) reprinted in 52 Selden Society 3, 5 (1934) (amercement vacated and bailiff ordered to "take a moderate amercement proper to the magnitude and manner of that offence"); First Statute of Westminster, 3 Edw. I, ch. 6 (1275).

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with case would conclude that the "jury . . . acted under the influence of a perverted judgment, it is the duty of the court in the exercise of a sound discretion to grant a new trial"). Accord, *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 41 (1991) (KENNEDY, J., concurring in judgment) ("[T]he extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case").

Because punitive damages are designed as punishment rather than compensation, *Browning-Ferris*, 492 U. S., at 297 (O'CONNOR, J., concurring in part and dissenting in part) (citing cases), courts historically have required that punitive damages awards bear a reasonable relationship to the actual harm imposed.[3] This Court similarly has recognized that the requirement of proportionality is implicit in

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[3]*Ante*, at 13, and n. 24 ("[S]tate courts have long held that `exemplary damages allowed should bear some proportion to the real damage sustained,'" quoting *Grant* v. *McDonogh*, 7 La. Ann. 447, 448 (1852), and citing other cases). See, *e.g.*, *McCarthy* v. *Niskern*, 22 Minn. 90, 91–92 (1875) (punitive damages "enormously in excess of what may justly be regarded as compensation" for the harm incurred must be set aside "to prevent injustice"); *International & Great Northern R. Co.* v. *Telephone & Telegraph Co.*, 69 Tex. 277, 282, 5 S. W. 517, 518 (1887) (punitive damages "when allowed should be in proportion to the actual damages sustained" (internal quotation marks omitted)); *Burkett* v. *Lanata*, 15 La. 337, 339 (1860) (Punitive damages should "be commensurate to the nature of the offence"); *Saunders* v. *Mullen*, 66 Iowa 728, 729, 24 N. W. 529 (1885) ("When the actual damages are so small, the amount allowed as exemplary damages should not be so large"); *Flannery* v. *Baltimore & Ohio R. Co.*, 15 D. C. 111, 125 (1885) (When punitive damages award "is out of all proportion to the injuries received, we feel it our duty to interfere"). See also *Leith* v. *Pope, supra*, at 1328, 96 Eng. Rep., at 778 (Court will interfere where damages are "outrageously disproportionate, either to the wrong received, or to the situation and circumstances of either the plaintiff or defendant"); *Duberly* v. *Gunning*, 4 Durn. & E., at 657 (Buller, J.) (The Court has the power to order a new trial where "the damages given are enormously

the notion of due process. We therefore have held that an award that is "plainly arbitrary and oppressive," *Southwestern Telegraph & Telephone Co.* v. *Danaher*, 238 U. S. 482, 491 (1915), "grossly excessive," *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 111 (1909), or "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable," *St. Louis, I. M. & S. R. Co.* v. *Williams*, 251 U. S. 63, 66–67 (1919), offends the Due Process Clause and may not stand.

The plurality does not retreat today from our prior statements regarding excessive punitive damages awards. Nor does it deny that our prior decisions have a strong basis in historical practice and the common law. On the contrary, it reaffirms our precedents once again, properly rebuffing respondents' attempt to denigrate them as *Lochner*–era aberrations. *Ante*, at 9–10. It is thus common ground that an award may be so excessive as to violate due process. *Ante*, at 10. We part company, however, on how to determine if this is such an award.

In Solomonic fashion, the plurality rejects both petitioner's and respondents' proffered approaches, instead selecting a seemingly moderate course. See *ante*, at 11–13. But the course the plurality chooses is, in fact, no course at all. The plurality opinion erects not a single guidepost to help other courts find their way through this area. Rather, quoting *Haslip*'s observation that there is no ```mathematical bright

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disproportionate to the case proved in evidence"); *Townsend* v. *Hughes*, 2 Mod. *150, *151, 86 Eng. Rep. 994, 995 (C. P. 1677) (Atkins, J.) (court should "consider whether the [offense] and damages bear any proportion; if not, then the Court ought to lay their hands upon the verdict").

line between the constitutionally acceptable and the constitutionally unacceptable,'" *ante*, at 13 (quoting 499 U. S., at 18), the plurality abandons all pretense of providing instruction and moves directly into the specifics of this case.

I believe that the plurality errs not only in its result but also in its approach. Our inability to discern a mathematical formula does not liberate us altogether from our duty to provide guidance to courts that, unlike this one, must address jury verdicts such as this on a regular basis. On the contrary, the difficulty of the matter imposes upon us a correspondingly greater obligation to provide the most coherent explanation we can. I agree with the plurality that we ought not adopt TXO's or respondents' suggested approach as a rigid formula for determining the constitutionality of punitive damages verdicts. But it does not follow that, in the course of deciding this case, we should avoid offering even a clue as to our own.

TXO's suggestion that this Court should rely on objective criteria has much to commend it. As an initial matter, constitutional judgments "`should not be, or appear to be, merely the subjective views of individual Justices.'" *Rummel* v. *Estelle*, 445 U. S. 263, 274 (1980) (quoting *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (opinion of WHITE, J.)). Without objective criteria on which to rely, almost any decision regarding proportionality will be a matter of personal preference. One judge's excess very well may be another's moderation. To avoid that element of subjectivity, our "`judgment[s] should be informed by objective factors to the maximum possible extent.'" 455 U. S., at 274–275 (quoting same). As the plurality points out, *ante*, at 10–11, TXO directs our attention to various objective indicators, including the relationship between the punitive damages award and compensatory damages, awards of punitive damages upheld against other defendants in the

same jurisdiction, awards upheld for similar torts in other jurisdictions, and legislatively designated penalties for similar misconduct. While these factors by no means exhaust the due process inquiry, they are quite probative. It is to their proper application that I now turn.

In my view, due process at least requires judges to engage in searching review where the verdict discloses such great disproportions as to suggest the possibility of bias, caprice, or passion. As JUSTICE STEVENS observed in a different context, "[o]ne need not use Justice Stewart's classic definition of obscenity—`I know it when I see it'—as an ultimate standard for judging" the constitutionality of a punitive damages verdict "to recognize that the dramatically irregular" size and nature of an award "may have sufficient probative force to call for an explanation." Cf. *Karcher* v. *Daggett*, 462 U. S. 725, 755 (1983) (concurring opinion) (footnotes omitted).

This $10 million punitive award, returned in a case involving only $19,000 in compensatory damages, is a dramatically irregular, if not shocking, verdict by any measure. At the very least it should raise a suspicious judicial eyebrow. Not only does the punitive award represent over 500 times actual damages, but it also exceeds economic harm by over $9.98 million. Thus, it cannot be accepted as bearing the "understandable relationship to compensatory damages," 499 U. S., at 22, the Court found sufficient in *Haslip*. Indeed, in *Haslip* the Court observed that an $840,000 punitive award, representing four times compensatory damages, may have been "close to the line" of "constitutional impropriety." *Id.*, at 23–24. If the quadruple damages, $840,000 award in *Haslip* was "close to the line," absent a convincing explanation, this $10 million award—over 500 times actual damages—surely must cross it.

A comparison of this award and prior ones in West Virginia confirms its unusual nature: It is 20 times larger than the highest punitive damages award *ever* upheld in West Virginia history for any misconduct. See App. to Brief for Petitioner 1a–3a (listing punitive damages awards affirmed on appeal in West Virginia). That figure is particularly surprising if one considers the nature of the offense at issue. This is not a case involving grave physical injury imposed on a helpless citizen by a callous malefactor. Rather, it is a business dispute between two companies in the oil and gas industry. TXO was accused of slandering respondents' title to a tract of land—that is, impugning their claim of ownership—in an attempt to win concessions on a pre-existing contract. Although TXO's conduct was clearly wrongful, calculated, and improper, the award in this case cannot be upheld as a reasoned retributive response. Not only is it greatly in excess of the actual harm caused, but it is 10 times greater than the largest punitive damages award for the same tort in any jurisdiction, *id.,* at 5a–8a (listing all recorded punitive damages awards for slander of title affirmed on appeal), and orders of magnitude larger than authorized civil and criminal penalties for similar offenses, see Brief for Petitioner 19, nn. 17–18, and App. to Brief for Petitioner 9a–21a (collecting statutes). By any "objective criteria," *Haslip*, 499 U. S., at 23, the award is "grossly out of proportion to the severity of the offense" and bears no "understandable relationship to compensatory damages," *id*., at 22. It is, at first blush, an "extreme resul[t] that jar[s] one's constitutional sensibilities." *Id.*, at 18.

That these disproportions might implicate due process concerns the plurality does not deny. Nonetheless, it refuses to "enshrine petitioner's comparative approach in a `test' for assessing the constitutionality of punitive damages awards." *Ante*, at 13. I agree with the plurality that, although it

might be convenient to establish a multipart test and impose it upon the States, the principles of federalism counsel against such a course. The States should be permitted to "experiment with different methods" of ferreting out impermissible awards "and to adjust these methods over time." *Haslip*, *supra*, at 64 (O'CONNOR, J., dissenting). Nonetheless, I see no reason why this Court or any other would wish to disregard such probative evidence. For example, although retribution is a permissible consideration in assessing punitive damages awards, it is quite difficult to determine whether a particular award can be attributed to that goal; retribution resists quantification. Nonetheless, jury awards in similar cases and the civil and criminal penalties created by the legislature for like conduct can give us some idea of the limits on retribution. Thus, a $5,000 punitive damages award on actual damages of $1 may not seem well proportioned at first blush; but if the legislature has seen fit to impose a $50,000 penalty for that very same conduct, the award might be deemed a reasoned retributive response.

This approach, of course, has its limits. Because no two cases are alike, not all comparisons will be enlightening. See *ante*, at 12–13 (plurality opinion). But recognizing the limits of an approach does not compel us to discard it entirely. I do not see what can be gained by blinding ourselves to the few clear guideposts in an area so painfully bereft of objective criteria. Indeed, JUSTICE STEVENS joined in proposing precisely such an approach to punitive damages under the Eighth Amendment in *Browning-Ferris*, see 492 U. S., at 301 (O'CONNOR, J., joined by STEVENS, J., concurring in part and dissenting in part). Moreover, courts at common law engaged in similar comparisons. See, *e.g.*, *Travis* v. *Barger*, 24 Barb. 614, 629 (N.Y. 1857) (comparing verdicts for similar torts); *International & Great Northern R. Co.* v. *Telephone & Telegraph Co.*, 69 Tex. 277, 282, 5

S. W. 517, 518 (1887) (comparing ratios). In any event, what the comparisons demonstrate in this case is what one might have suspected from the beginning. This award cannot be justified as a reasoned retributive response, for it is notably out of line with the punishment previously imposed by juries or established by statute for similar conduct.

That, however, does not end our inquiry. In some cases, the unusual nature of the award will be explained by the peculiar considerations placed before the jury. Indeed, the plurality asserts that such an explanation exists in this case. The award, the plurality explains, may have been based on the profit TXO anticipated or the harm TXO would have imposed on respondents had its scheme been successful. *Ante*, at 13–18.

I have no quarrel with the plurality that, in the abstract, punitive damages may be predicated on the potential but unrealized harm to the victim, or even on the defendant's anticipated gain. Linking the punitive award to those factors not only substantially furthers the State's weighty interests in deterrence and retribution,

but also can be traced well back in the common law. See, *e.g.*, *Benson* v. *Frederick*, 3 Burr. 1846, 97 Eng. Rep. 1130 (K. B. 1766) (Wilmot, J.) (damages for ordering the plaintiff flogged by two drummers not excessive even though disproportionate to plaintiff's actual suffering, as "it was rather owing to the lenity of the drummers than of the [defendant] that the [plaintiff] did not suffer *more*"). The plurality's theory, however, bears little relationship to what actually happened in this case.

The record demonstrates that the potential harm theory is little more than an after-the-fact rationalization invented by counsel to defend this

startling award on appeal. The $5.0 to $8.3 million estimate of potential loss that respondents proffer today appears nowhere in the record. No expert or lay witness testified to the jury about any such figure. No one directed the jury's attention to the technical documents or scattered testimony on which respondents now rely. See *ante*, at 5, n. 10 (plurality opinion). No one told the jury how to pull all those numbers together to calculate such a figure. In fact, the jury never was told that it was permitted to do so.

Respondents did not even present their $5.0 to $8.3 million estimate to defend the verdict before the West Virginia Supreme Court of Appeals. Nor did that court rely on such an estimate. Its opinion, which the plurality applauds as "thorough," *ante*, at 20, nowhere suggests that the jury might have based the award on the potential harm to respondents or on TXO's anticipated profit. Rather, its sole reference to potential harm is the "millions of dollars of damages" that might result if TXO *repeated* its misdeeds against "*other victims*." 187 W. Va., at 476, 419 S. E. 2d, at 889 (emphasis added). Virtually any tort, however, can cause millions of dollars of harm if imposed against a sufficient number of victims.

Respondents' $5.0 to $8.3 million estimate appeared for the first time after this Court granted certiorari, having been produced exclusively for our consumption. As the plurality notes, there is every reason to believe that the figure, derived as it is from a series of extrapolations and economic assumptions never presented to the jury and yet untested by adversary presentation, is unrealistic. See *ante*, at 16. Consequently, the plurality refuses to rely on the figure, instead offering a series of its own estimates. See *ante*, at 17. These estimates also are speculative, however, as the plurality does not indicate how they were derived or where they are supported in the record. The little evidence regarding potential harm the record does yield, it turns out, is

so uncertain and ambiguous that the plurality cannot rely on it, either; to the extent it demonstrates anything at all, it shows respondents' estimate to be exaggerated. See Tr. 100, 103–104.

But even if we assume that the plurality's estimates of potential harm are plausible or supported by the evidence, they are, on this record, entirely irrelevant. The question is not simply whether *this Court* might think the award appropriate in light of its estimate of potential harm. The question is also whether *the jury* might have relied on such an estimate rather than some impermissible factor, such as a personal preference for the primarily local plaintiffs as compared to the unsympathetic and wealthy out-of-state defendant, as TXO contends. After all, due process does not simply require that a particular result be substantively acceptable; it also requires that it be reached on the basis of permissible considerations. See *Haslip*, 499 U. S., at 41 (KENNEDY, J., concurring in judgment). In this case, the jury instructions precluded the jury from relying on the potential harm theory the plurality endorses. As a result, that theory can neither explain nor justify the otherwise astonishing verdict the jury returned.

At trial, the jury was instructed to consider numerous factors when setting the punitive damages award, including "`the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances.'" *Ante*, at 18–19, n. 29 (plurality opinion) (citing App. 34–35). Nowhere do the instructions mention the alternative measure of potential harm to respondents upon which the plurality relies today.

Of course, the instructions do mention that the goal of punitive damages is deterrence. One therefore might hypothesize that a particularly sophisticated

jury would realize that imposing damages in an amount linked to potential harm or the defendant's expected gain might provide appropriate deterrence. One might even go so far as to suppose that the jury would be daring enough to apply that measure, even though the trial court listed numerous factors, including *actual* harm, but made no mention of *potential* harm. But such speculation has no application in this case, for the jury instructions made it quite clear that deterrence was linked not to an unmentioned factor like potential gain but to a factor the trial court *did* mention—TXO's wealth:

> ```The object of [punitive damages] is to deter TXO Production Corp. and others from committing like offenses in the future. *Therefore* the law recognizes to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.'" *Ante,* at 19, n. 29 (plurality opinion) (quoting App. 35) (emphases added).

A reasonable juror hearing these instructions would not have felt free to consider the potential harm or expected gain measures the plurality proposes today.

The two passages the plurality excerpts from closing arguments, see *ante*, at 16–17, do not support the plurality's theory. Respondent Tug Fork Land Company's closing argument does mention that TXO thought the wells would produce "`lot[s] of money.'" *Ante,* at 17 (quoting Tr. 748–749). But that remark had nothing to do with punitive damages. Instead, counsel was addressing the issue of liability: According to him, TXO's desire to obtain all the royalties was the motive for its bad faith conduct. See Tr. 746–749 (TXO slandered respondents' title to lower the value of the property so it could exact concessions or win 100% of royalties by means of a lawsuit). When counsel *did* discuss the appropriate measure of punitive damages, not once did he

mention the potential harm to respondents. Instead, he relied exclusively on TXO's vast wealth:

> "His Honor has instructed you that you may award punitive damages and I've indicated to you what punitive damages [are]. *Now, just consider the wealth of this corporation*. [T]he reason for putting in [expert evidence on TXO's resources] is *that's how a jury considers the amount of punitive damages*. This is a multi-million dollar corporation—even a billion dollars in assets. . . . [Think about imposing a punitive award in the range of a] million, twelve million dollars. Those kinds of numbers are not out of line when you talk about a corporation that has assets of something like a billion dollars." *Id.,* at 757–758 (emphases added).

Counsel for respondent Alliance Resources Corp. similarly did not argue that punitive damages should be linked to potential harm. He did mention that TXO anticipated a large profit from its nefarious scheme. See *id.,* at 779–780; *ante*, at 16 (plurality opinion). But counsel once again made no attempt to quantify TXO's potential gain. Nor did he encourage the jury to base the punitive damages award on TXO's expected profit. Instead, counsel argued only *one* measure for punitive damages—TXO's wealth:

> "A two billion dollar company. Ha[s] earnings of $225,000,000, average. Last year made $125,000,000.00 alone. Last year. Now, what's a good fine for a company like that? A hundred thousand? A million? You can do that if you think it's fair . . . ." Tr. 781.

The portion of counsel's argument the plurality relies upon, *ante*, at 16, turns out to be a transition between a discussion of TXO's conduct and a plea for the jury to award punitive damages based exclusively on TXO's wealth. Immediately after delivering the portion of the argument the plurality reproduces—in which counsel told the jury that the punishment

should "`fit'" the scheme and "`fit the wealth,'" *ibid.* —he asked rhetorically, "Now, how much is the wealth?" Tr. 780. It was then that he told the jury, in great detail, about TXO's vast resources. At no point, however, did counsel ask rhetorically, "Now, how much was the potential profit?" At no point did he answer that question. Nor did he ever suggest that the jury calculate potential harm or base its punitive damages award thereon. Instead, like cocounsel before him, he relied exclusively on TXO's wealth. See *id.,* at 781–782.

I am therefore unpersuaded by the plurality's assertion that this award may be upheld based on the potential harm to respondents or TXO's potential gain. That theory was not available to the jury under the court's instructions. It was not one supported by evidence on which the jury might have relied. And it is not one that trial counsel chose to promote. It was instead an after-the-fact rationalization invented by appellate counsel who could not otherwise explain this disproportionate award.

There is another explanation for the verdict, but it is not one that permits affirmance. As I read the record in this case, it seems quite likely that the jury in fact was unduly influenced by the fact that TXO is a very large, out-of-state corporation.

In *Haslip*, this Court considered jury instructions that differed from those used here in two material respects. First, unlike the instructions in *Haslip*, which did not permit the jury to consider the defendant's wealth, the instructions in this case specifically directed the jury to take TXO's wealth into account. The plurality concedes that introducing TXO's wealth into the calculus "increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is," as here, "a non-resident." *Ante*, at 19. Second, the instructions

directed the jury to impose punitive damages "to provide additional compensation for the conduct to which the injured parties have been subjected." *Ante*, at 18, n. 29 (plurality opinion) (quoting App. 34). The latter instruction, of course, is without legal meaning. *Ante*, at 19 (plurality opinion) (We do "not understand the reference . . . to `additional compensation'"). Plaintiffs are compensated for injuries they have suffered; one cannot speak of "additional compensation" unless it is linked to some additional harm.

To a juror, however, compensation is the money it awards the plaintiff; "additional compensation," if not linked to a particular measure of harm, is simply additional money the jury gives to the plaintiff. As a result, the "additional compensation" instruction, considered together with the instruction directing the jury's attention to TXO's massive wealth, encouraged the jury to transfer some of TXO's impressive wealth to the smaller and more sympathetic respondents as undifferentiated "additional compensation"—for any reason, or no reason at all. In fact, the instructions practically ensured that this would occur. They provided the jury with only two objective factors on which to rely. See *supra*, at 15 (citing jury instructions). The first was actual harm, a relatively small sum on which the jury obviously did not rely; the second was TXO's wealth, a factor that obviously impressed the jury a great deal. Thus, unlike the instructions in *Haslip*, these instructions did not prevent respondents from "enjoy[ing] a windfall because they have the good fortune to have a defendant with a deep pocket." 499 U. S., at 22. Instead, they ensured that a windfall verdict would result by inviting the jury to redistribute wealth to respondents as undifferentiated "additional compensation," based solely on TXO's financial position.

That a jury might have such inclinations should

come as no surprise. Courts long have recognized that jurors may view large corporations with great disfavor. See, *e.g.*, *Illinois Central R. Co.* v. *Welch*, 52 Ill. 183, 188 (1869) ("[J]uries may generally assess an amount of damages against railway corporations which, in similar cases between individuals, would be considered unjust in the extreme. It is lamentable that the popular prejudice against these corporations should be so powerful as to taint the administration of justice, but we cannot close our eyes to the fact"). Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources; jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs. Brickman, The Asbestos Litigation Crisis, 13 Cardozo. L. Rev. 1819, 1849, n. 128 (1992); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 Cal. L. Rev. 1, 61–62 (1982); Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 45–46 (1982) (jury assessing punitive damages against multi-million dollar corporation forced to think of an award measuring seven, eight or nine figures); see also *supra*, at 4 (jurors not accountable for their judgments); cf. *Smith* v. *Covell*, 100 Cal. App. 3d 947, 960, 161 Cal. Rptr. 377, 385 (1980) (juror impressed with idea that plaintiffs had money and ```didn't need anymore'").

This is not to say that consideration of a defendant's wealth is unconstitutional. To be sure, there are strong economic arguments that permitting juries to consider wealth is unwise if not irrational, see Abraham & Jeffries, Punitive Damages and the

Rule of Law: The Role of Defendant's Wealth, 18 J. Legal Studies 415 (1989), especially where the defendant is a corporation, *id.*, at 421–422; cf. *Zazú Designs* v. *L'Oréal, S. A.*, 979 F. 2d 499, 508–509 (CA7 1992) (Easterbrook, J.). But, "[j]ust as the Fourteenth Amendment does not enact Herbert Spencer's Social Statics, see *Lochner* v. *New York*, 198 U. S. 45, 75 (1905) (Holmes, J., dissenting)," it does not require us to adopt the views of the Law and Economics school either. As a historical matter, the wealth of the perpetrator long has been thought relevant. See *Browning-Ferris*, 492 U. S., at 300 (O'CONNOR, J., concurring in part and dissenting in part) (citing the Magna Carta and Blackstone's Commentaries). Moreover, *Haslip* itself suggests that the defendant's wealth is a permissible consideration, *ante*, at 17–18, n. 28, 19 (plurality opinion), although it does so only in the context of *appellate* review. See 499 U. S., at 22.

Nonetheless, courts must have authority to recognize the special danger of bias that such considerations create. The plurality does just that today, *ante*, at 19, as this Court, other tribunals, and numerous commentators have before. See, *e.g.*, Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1191 (1931) ("It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare. Such evidence may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function"); Abraham & Jeffries, *supra*, at 424; *Illinois Central R. Co.*, *supra*, at 188 (bias against railroads); *McConnell* v. *Hampton*, 12 Johns. 234, 236 (N.Y. 1815) (Thompson, C. J.) (jury unduly influenced by defendant's great wealth); cf. *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 270–271 (1981) ("[E]vidence of a [municipality's wealth, inasmuch as

it has unlimited taxing power], may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial"); see also *Haslip*, 499 U. S., at 43 (O'CONNOR, J., dissenting) (jurors, if not properly guided, may "target unpopular defendants . . . and redistribute wealth'').

The risk of prejudice was especially grave here. The jury repeatedly was told of TXO's extraordinary resources, which respondents estimated at $2 billion. To make matters worse, unlike the jurors or the primary plaintiffs, TXO was not from West Virginia. It was an interloper, from the large State of Texas. As the Supreme Court of Appeals of West Virginia has recognized, the temptation to transfer wealth from out-of-state corporate defendants to in-state plaintiffs can be quite strong. See *Garnes* v. *Fleming Landfill, Inc.*, 186 W. Va. 656, 665, 413 S. E. 2d 897, 906 (1991) (Excess jury discretion "[i]nevitably . . . leads to increasing efforts to redistribute wealth from without the state to within"; cases involving large awards typically pit local plaintiffs against "out-of-state (often faceless, publicly held) corporations"). That court speaks from experience. The three highest punitive damages awards ever affirmed in West Virginia, including this one, were assessed against relatively wealthy out-of-state defendants. *Jarvis* v. *Modern Woodmen of America*, 185 W. Va. 305, 406 S. E. 2d 736 (1991); *Berry* v. *Nationwide Mutual Fire Ins. Co.*, 181 W. Va. 168, 381 S. E. 2d 367 (1989).

Counsels' arguments, however, converted that grave risk of prejudice into a near certainty. Repeatedly they reminded the jury that TXO was from another State. Repeatedly they told the jury about TXO's massive wealth. And repeatedly they told the jury that it could do anything it thought "fair." The opening line from rebuttal set the tone. "Ladies and

gentleman of the jury," one attorney began, "this greedy bunch from down in Texas still doesn't understand this case." Tr. 773. Playing on images of Texans as overrich gamblers who profit by chance rather than work, he referred to TXO shortly thereafter as a bunch of "Texas high rollers, wildcatters." *Id.,* at 777. Finally, counsel drove the point home yet one more time, comparing TXO to an obviously wealthy out-of-town visitor who refuses to put money in the parking meter to help pay for community service:

> "Well, what is fair? . . . If someone *comes to town* and intentionally doesn't put a quarter in the meter, stays here all day, [in this] *town that needs it to pay for the police force and the fire department*, they give [him] a fine. And at the end of the day [he] may have to pay a dollar. That person reaches in his billfold at the end of the day and maybe *he's got a hundred bucks in there*. He doesn't want to have to pay that dollar, but he does, because he knows if he doesn't [he'll have legal problems]. . . . The town didn't take everything from the individual, didn't ruin [him], just took one percent of what that person had in cash. One percent. *You can fine TXO one percent if you want, you can fine them one dollar if you want*. But I submit to you a one percent fine, the same as John Doe on this street, would be fair. *That's twelve and a half million dollars, based on what they had left over. And their earnings w[ere] $225,000,000.00 [per year]*. I mean, yeah, their cash flow. Their surplus. So anything between twelve and a half million and twenty-two million is only one percent—the same as this poor guy who just tried to cheat a little bit. Now that's a lot of money. I hope, like I said, you *don't analyze this on a lot or a little, but fair*." *Id.*, at 781–782 (emphases added).

Over and over respondents' lawyers reminded the

jury that there were virtually no substantive limits on its discretion. Time and again they told the jury of TXO's great wealth and that it could take away any amount it wanted, as long as it seemed "fair." *Id.*, at 781 ("It isn't really whether the verdict is too large or too small, too big or too little. It's whether it's fair"); *ibid*. ("A two billion dollar company. Have earnings of $225,000,000.00, average. Last year made $125,000,000.00 alone. Last year. Now, what's a good fine for a company like that? A hundred thousand? A million? You can do that if you think it's fair . . ."). And each time the argument found solid support in the trial court's instructions, which not only licensed the jury to afford respondents any "additional compensation" they believed appropriate, but also encouraged them to do so based on TXO's wealth alone.

Given the absence of another plausible explanation for this monumentally large punitive damages award, I believe it likely, if not inescapable, that the jury was influenced unduly by TXO's out-of-state status and its large resources. The plurality acknowledges this possibility, see *ante*, at 19, but refuses to address it. TXO, the plurality contends, failed to press its objections to the jury instructions in the state court below. *Ante*, at 19–20. I disagree. TXO's brief specifically argued that the jury instructions did not meet the "*Haslip* standards and [were] not constitutionally permissible." Brief for Appellant in No. 20281 (W. Va.), p. 48; see *id.*, at 44–46 (jury instructions insufficient under *Garnes* v. *Fleming Landfill, Inc., supra,* a recent West Virginia Supreme Court of Appeals decision interpreting *Haslip*). The State Supreme Court of Appeals so understood TXO's challenge. See 187 W. Va., at 473–477, 419 S. E. 2d, at 886–890.

Of course, TXO did not make precisely the same arguments it makes here. But it was not required to. "Once a federal claim is properly presented, a party

can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *Escondido*, 503 U. S. ___, ___ (1992) (slip op., at 13). There can be little doubt that TXO argued below that the punitive damages award was excessive; there can be little doubt that TXO identified the jury instructions as being partially responsible. TXO ought not be precluded from fully presenting its arguments here. Because those arguments demonstrate that this award was based on considerations inconsistent with due process, I would reverse the judgment below so the matter could be submitted to the consideration of a second jury.

Confronted by a $10 million verdict on damages of $19,000, the State Supreme Court of Appeals in this case did not engage in searching review. Instead it added insult to injury, applying cavalier standards in the course of a cursory examination of the case. Because the review afforded TXO was insufficient to conform with the criteria this Court approved in *Haslip*, the case at least should be remanded for constitutionally adequate post-verdict review.

Two Terms ago, this Court in *Haslip* upheld Alabama's punitive damages regime against constitutional challenge. Although the Court recognized that juries in Alabama receive limited instructions regarding punitive damages, see 499 U. S., at 6, n. 1, 19–20, it was reassured by the fact that the Alabama courts subject punitive verdicts to exacting postverdict review at two different levels. First, Alabama trial courts must indicate on the record their "`reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness.'" *Id.*, at 20 (quoting *Hammond* v. *Gadsden*, 493 So. 2d 1374, 1379 (1986)). Second, the Alabama Supreme

Court itself provides an additional "check" by conducting comparative analysis and applying detailed substantive standards— seven in all— thereby "ensur[ing] that the award does not exceed an amount that will accomplish society's goals of punishment and deterrence." 499 U. S., at 21 (internal quotation marks omitted). Specifically, the Alabama Supreme Court examines:

> "(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the `financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation." *Id.,* at 21–22.

In *Haslip*, the Court concluded that application of those standards "imposes a sufficiently definite and meaningful constraint" on fact-finder discretion. *Id.,* at 22. Because the standards had a "real effect," *ibid.*, the Court upheld Alabama's regime against constitutional challenge despite the relatively sparse guidance it afforded juries.

As the plurality admits, *ante*, at 18–19, the jury instructions used here were not dissimilar to those employed in *Haslip*. Unlike *Haslip*, however, the verdict they produced was not subjected to post-trial review sufficient to impose a "meaningful constraint" on fact-finder discretion. Indeed, the post-trial review

offered here bears no resemblance to that approved in *Haslip*. In contrast to the trial judge in *Haslip*, the trial judge here made no written findings. Nor did he announce why he believed—or even if he believed—that the amount of damages bore a reasonable or recognizable relationship to actual damages or any other relevant measure. Instead, ruling from the bench, the trial judge summarily denied TXO's motions seeking reduction or elimination of the punitive damages award.

More important, the Supreme Court of Appeals of West Virginia did not do much better. At the outset, it refused to consider the possibility of remittitur because TXO "and its agents and servants failed to conduct themselves as gentlemen." 187 W. Va., at 462, 419 S. E. 2d, at 875. Proceeding to the question whether the award of punitive damages should be stricken as excessive, the court distinguished between two categories of defendants: those who are "really stupid" and those who are "really mean." *Id.*, at 474–476, 419 S. E. 2d, at 887–889. If the defendant is "really stupid," the court explained, "the outer limit of punitive damages is" generally about "five to one." *Id.*, at 476, 419 S. E. 2d, at 889. For the "really mean" defendant, however, "even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional." *Ibid.* TXO, it seems, was not really stupid but "really mean." The Supreme Court of Appeals affirmed the $10 million punitive award even though it was 526 times greater than compensatory damages.

Reference to categories like "really stupid" and "really mean" are a caricature of the difficult task of determining whether an award may be upheld consistent with due process. It is simply not enough to observe that the conduct was malicious and conclude that, as a result, the sky (or 500 times compensatory damages) is the limit. But cf. *ante*, at 3–4 (KENNEDY, J., concurring in part and concurring in

judgment) (so concluding solely because the conduct was malicious and the defendant rich). Instead, post-trial review must be sufficient to "ensur[e] that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to" some measure of harm. *Haslip*, *supra*, at 22. Aside from its two-page dissertation on the difference between "really stupid" and "really mean," however, the State Supreme Court of Appeals offered only three conclusory sentences in a single paragraph to bolster its conclusion that the damages here were not excessive. See *ante*, at 8 (plurality opinion) (citing 187 W. Va., at 476, 419 S. E. 2d, at 889). Because I believe that such cursory review is inconsistent with this Court's decision in *Haslip*, I cannot join my colleagues in affirming.

That the Supreme Court of Appeals would engage in such cursory review is something of a surprise. In *Garnes* v. *Fleming Landfill Inc.*, 186 W. Va. 656, 413 S. E. 2d 897 (1991), that court demonstrated concern for the due process implications of punitive awards. Holding that West Virginia's previous punitive damages regime was constitutionally suspect in light of *Haslip*, it required trial courts to instruct juries on numerous factors relevant to the measure of punitive damages, see 186 W. Va., at 667–668, 413 S. E. 2d, at 908–909; it mandated that trial courts conduct extensive review and articulate reasons for their decisions on the record, *id.*, at 668–669, 413 S. E. 2d, at 909–910; and it announced that it would apply the factors approved in *Haslip* in its own review, *id.*, at 669, 413 S. E. 2d, at 910.

Unfortunately for TXO, *Garnes* was decided after TXO's trial took place. Although the Supreme Court of Appeals recognized that TXO had not received the benefit of *Garnes*' and *Haslip*'s protections, it refused

to remand the case. Instead, the court indicated that it would be "especially diligent" in reviewing this award; it went on to recite language from both *Haslip* and *Garnes*. It is therefore clear that *Haslip* still governs punitive damages awards in West Virginia. As a result, the plurality perhaps declines to reverse because it believes that the Supreme Court of Appeals' failure to follow *Haslip* here is of little consequence to anyone but TXO. After all, a decision of this Court requiring more searching review would alter only the result in this particular case and perhaps a few like it, without changing the law, even in West Virginia.

If the plurality is in fact proceeding on such an assumption, I believe it is mistaken. While this Court has the ultimate power to interpret the Constitution, we grant review in only a small number of cases. We therefore rely primarily on state courts to fulfill the constitutional role as primary guarantors of federal rights. But the state courts must do more than recite the constitutional rule. They also must apply it, faithful to its letter and cognizant of the principles underlying it. Unfortunately, such review is not always forthcoming. Amici recite case after case in which review has been inadequate or absent altogether. See, *e.g.*, Brief for Phillips Petroleum Co. et al. as *Amici Curiae* 20–27. The Supreme Court of Appeals of West Virginia, at the same time it recognized *Haslip* as law, itself warned:

> "[W]e understand as well as the next court how to . . . articulate the correct legal principle, and then perversely fit into that principle a set of facts to which the principle obviously does not apply. [All judges] know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." *Garnes, supra*, at 666, 413 S. E. 2d, at 907.

I fear that the Supreme Court of Appeals followed such a course in this case. By affirming the judgment

nonetheless, today's decision renders the meaningful appellate review contemplated in *Haslip* illusory; courts now may disregard the post-trial review required by due process at whim or will, so long as they do not deny its necessity openly or altogether.

As little as 30 years ago, punitive damages awards were "rarely assessed" and usually "small in amount." Ellis, 56 S. Cal. L. Rev., at 2. Recently, however, the frequency and size of such awards have been skyrocketing. One commentator has observed that "hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation, 40 Ala. L. Rev. 919 (1989). And it appears that the upward trajectory continues unabated. See Volz & Fayz, Punitive Damages and the Due Process Clause: The Search for Constitutional Standards, 69 Univ. Det. Mercy L. Rev. 459, 462, n. 17 (1992). The increased frequency and size of punitive awards, however, has not been matched by a corresponding expansion of procedural protections or predictability. On the contrary, although some courts have made genuine efforts at reform, many courts continue to provide jurors with skeletal guidance that permits the traditional guarantor of fairness—the jury itself—to be converted into a source of caprice and bias. This Court's decision in *Haslip* promised that, even if juries occasionally failed to fulfill their function faithfully, trial and appellate courts would provide meaningful review sufficient to discern impermissible influences and guarantee constitutional results. In my view, today's decision fails to make good on that promise. I therefore respectfully dissent.