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Mean, Stupid Defendants Jarring Our Constitutional Sensibilities: Due Process Limits on Punitive Damages After TXO Production v. Alliance Resources

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NOTE

MEAN, STUPID DEFENDANTS JARRING OUR CONSTITUTIONAL SENSIBILITIES: DUE PROCESS LIMITS ON PUNITIVE DAMAGES AFTER *TXO PRODUCTION V. ALLIANCE RESOURCES*

> The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourage private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by the criminal law.[1]
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> The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.[2]

INTRODUCTION

On June 25, 1993, the U.S. Supreme Court upheld a "monstrous"[3] $10 million punitive damages claim against a defendant who had caused only $19,000 in actual damages.[4] In a patchwork plurality opinion, the Court held that even though punitive damages were 526 times actual damages, no violation of TXO's constitutional due process rights had occurred.[5] The defendant, the Court reasoned, had received the process it was due in the form of a jury trial and appellate review in the plaintiff's home state of West Virginia.[6] The punitive award, though "certainly large,"[7] was neither a result of bias nor passion on the part of the jury, but was a proper reflection of the "magnitude of the potential harm that the defendant's conduct would have caused."[8] The Court held that the tremendous damages the defendant could have caused, had its scheme of fraud and trickery succeeded, justified the $10 million verdict.[9]

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1. Luther v. Shaw, 147 N.W. 18, 19-20 (Wis. 1914).
2. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 8 n.4 (1991) (quoting Fay v. Parker, 53 N.H. 342, 382 (1873).
3. *Id.* at 52 (O'Connor, J., dissenting).
4. TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2724 (1993).
5. *Id.* at 2718.
6. *Id.* at 2727 (Justices Scalia and Thomas, concurring in the judgment).
7. *Id.* at 2722.
8. *Id.*
9. *Id.*

The *TXO* decision flies directly in the face of a 1992 Supreme Court decision, *Pacific Mutual Insurance Co. v. Haslip*[10], which appeared to hold that punitive damages awards of more than roughly four or five times actual damages would deserve thorough due process scrutiny. The *Haslip* ruling was the first decision to articulate a due process limit on punitive damages that are grossly disproportionate to actual damages.[11] While declining to provide a "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable,"[12] the Court expressed deep concern over punitive damages that "run wild."[13] However, because the Alabama trial court provided thorough jury instructions on the issue of punitive damages,[14] and because the Alabama Supreme Court's appellate review established firm standards by which to test punitive damages awards for fairness,[15] the U.S. Supreme Court declined to upset the state court's decision.[16]

Unfortunately, the Supreme Court's opinion in *TXO* has left the morass that was the controversial punitive damages issue even more obscure. By leaning toward a more strict judicial review in *Haslip*, the Court finally seemed to begin articulating the long-awaited due process limitations on punitive damages. Yet, in *TXO*, the very next case involving due process review of punitive damages, the Court not only failed to continue to develop the standards of due process review of punitive damages awards, but surprised many by retreating to a vague "reasonableness" standard reminiscent of its pre-*Haslip laissez faire* standard of review.

Part I of this Note is a brief review of the voluminous commentary on the social, moral, and economic justifications for imposing constitutional limits on punitive damages. Part II reviews the history of punitive damages, highlighting the recent impulse to define constitutional limits on excessive and egregious awards. Additionally, this section analyzes *Pacific Mutual Life Ins. Co. v. Haslip*,[17] in which the Court first articulated the standard of review for violations of due process claims regarding punitive damages. Part III examines *TXO Production v. Alliance Resources*,[18] in which the Court in that case altered the *Haslip* standards. Part IV is a discussion of *TXO's* effect on the *Haslip* substantive due process standard. Part V examines the clarifications *TXO* has made to the procedural due process requirements laid out in *Haslip*. Part VI discusses the problems of interpreting the scattered plurality opinion in *TXO*. Part VII explains the difficulty lower courts will

10. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. at 1 (1991).
11. *Id.* at 28.
12. *Id.* at 18.
13. *Id.*
14. *Id.* at 19-20.
15. *Id.* at 21.
16. 113 S. Ct. at 2724.
17. 499 U.S. 1 (1991).
18. 113 S. Ct. at 2711.

have in applying the reasonableness test. Part VIII proposes some improvements to the *TXO* decision. This Note concludes that *TXO* has eroded the fragile beginnings of a healthy reform of the much maligned area of punitive damages.

I. SOCIAL AND MORAL JUSTIFICATION FOR PUNITIVE DAMAGES

Punitive damages are "extracompensatory [awards] . . . intended to punish or deter extreme departures from acceptable conduct."[19] Jurors commonly award punitive damages to extract a toll from defendants who purposely or negligently misbehave.[20] These awards are often legally and morally justified by two distinct rationales; retributivist "just deserts," and consequentialist deterrence.[21]

The retributivist rationale for punitive damages appeals to our desire for retaliation.[22] The purpose of this retributivist rationale is to punish wrongdoers in order to re-establish the "moral order" disturbed by their misdeeds.[23] While society requires merely negligent tortfeasors only to repair the injured party, malicious or intentional tortfeasors excite our collective ire.[24] These defendants deserve something more harsh than mandatory reparations, because what these defendants do is morally repugnant.[25] Hence, separate punitive awards are necessary to re-establish the "moral equilibrium."[26]

Another sense in which punitive damages are appealing is more systematic. Punitive damages, if imposed at sufficient levels, will tend to deter future misbehavior by providing an economic disincentive for any such conduct.[27] This justification addresses the "bean counter"[28] problem, in which a company will build a product it knows will cause a certain rate of injury if making safer products is more expensive than simply paying for the damages the product causes.[29] These companies, in calculating the

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19. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 452 (2d ed. 1993).

20. *E.g.*, David G. Owen, *Civil Punishment and the Public Good*, 56 SO. CAL. L. REV. 103, 109-12 (1987); *See also*, David G. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CAL. L. REV. 665, 667-70 [hereinafter *Deterrence*].

21. For an excellent general discussion of the moral justifications of punitive damages, see David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 705 (1989) [hereinafter *Foundations*].

22. *Id.* at 109-12.

23. *Id.*

24. *Id.* at 110-111.

25. *Id.*

26. *Id.*

27. *Deterrence*, *supra* note 20, at 670.

28. *E.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (1981) (assessing a corporation punitive damages for deaths caused by its failure to use safer equipment in attempt to lower the price of an automobile).

29. *See generally* David G. Owen, *Crashworthiness Litigation and Punitive Damages*, 4 J. PROD. LIAB. 221 (1981).

profitability of adding various features affecting safety, weigh the cost of installing safer features against the overall cost of dealing with the subsequent injury and wrongful death lawsuits.[30] In a legal system without punitive damages, a corporation may have little economic incentive to make the product as safe as is economically feasible because damages in actual lawsuits will be small in comparison to profits.[31] Yet, when a jurisdiction imposes punitive damages, the company is forced to give greater weight to the potential costs of injury. If the product is dangerous, and could potentially cause significant injury, then the company will either take extra precautionary measures, or will not make the product at all.[32]

Insofar as punitive damages serve to force defendants to give greater weight to the extrinsic costs of human suffering and death, punitive damages make products safer. However, imposing excessive punitive damages can have serious repercussions.[33] If the courts impose punitive damages in excess of what is necessary to protect the social interest at stake, defendants are punished for engaging in risky, but potentially beneficial production.[34] When punitive damages increase beyond what is necessary, defendants will either pass these costs along to consumers, or simply stop doing business in the industry.[35] In either case, society as a whole will suffer.[36] The "retributivist" justification for punitive damages, too, must not be unlimited. Meting out arbitrary or egregiously excessive punishment is itself morally repugnant,[37] and is proscribed by the Eighth and Fourteenth Amendments.[38] Confines on punishment appeal to our intuitive sense of fairness, which tells us that punishment should be proportionate to the nature of the wrong. Thus, civil punishment has sound moral and historical foundations, but only when administered fairly.[39]

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30. *Id.*

31. *Id.*

32. *See Deterrence*, *supra* note 20, at 670.

33. *Id.* at 671.

34. *See* David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1262 (1976).

35. *Id.*

36. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J. concurring in part and dissenting in part). *See also* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 152-71 (1988).

37. *Foundations*, *supra* note 21, at 723.

38. U.S. CONST. amend. VIII, XIV.

39. *Foundations*, *supra* note 21, at 739.

II. PUNITIVE DAMAGES PRIOR TO *TXO*: *HASLIP* AND ITS PREDECESSORS

A. The Punitive Damages Debate

As early as the 18th Century, American courts recognized the usefulness of punitive damages to punish or deter malicious conduct.[40] The legal debate over the proper limitations on punitive damages has perplexed American courts for over a century.[41] The quandary of Constitutional limits on excessive punitive damages awards, too, has been long-lingering on the Supreme Court's conscience.[42] The Court first established a standard for due process review of punitive damages in 1908, holding that excessive fines "amount to a deprivation of property without due process of law."[43] As early as 1915, the Court struck down a punitive damages award that it regarded as violative of the Due Process Clause.[44] More recently, commentators have decried the growing number and size of punitive damages awards, and have appealed for stronger judicial constraints.[45] In the late seventies, punitive damages claims of $250,000 were considered exceptionally large.[46] By the mid-eighties, punitive damages claims as large as $7 million were common.[47] The upward trend continues, with a recent claim topping $1 billion in punitive damages *alone*.[48] State legislatures have responded to the perceived crisis by enacting statutes limiting the amount juries may award in

40. Coryell v. Colbaugh, 1 N.J.L. 77 (1791).

41. Fay v. Parker, 53 N.H. 342 (1872) (characterizing punitive damages as a "monstrous heresy"); Luther v. Shaw, 147 N.W. 18 (Wis. 1914) (characterizing punitive damages as an "outgrowth of the English love of liberty").

42. Seaboard Air Line Ry. Co. v. Seegers, 207 U.S. 73, 76-77 (1907); St. Louis I.M.& S.R. Co. v. Williams, 251 U.S. 63, 66 (1919); Standard Oil Co. of Ind. v. Missouri, 224 U.S. 270, 281 (1912).

43. Waters-Pierce Oil Co. v. Texas (No. 1), 212 U.S. 86, 111 (1908) (citing Coffey v. Harlan County, 204 U.S. 659 (1907)).

44. Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 491 (1915) (holding punitive damages award was "arbitrary and oppressive").

45. *See generally* Daniel B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies,* 40 ALA. L. REV. 831 (1989); Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?,* 40 ALA. L. REV. 1143 (1989); Stephen D. Daniels & Joanne M. Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990); Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839 (1969); PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988).

46. *See* David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1329-1332 (1976).

47. *See* Ford Motor Co. v. Durrill, 714 S.W.2d 329, 347 (Tex. Ct. App. 1986) ($10 million); Ford Motor Co. v. Stubblefield, 319 S.E. 2d 470, 481 (Ca. Ct. App. 1984) ($8 million); Palmer v. A.H. Robins Co., 684 P.2d 187, 221 (Colo. 1984) ($6.2 million).

48. Thomas W. Ladd, Haslip *and Beyond: The Future of Punitive Damages*, FOR THE DEF., May 1991, at 3.

punitive damages.[49] By far, the most common way of calculating a restraint on punitive damages is limiting them to some proportion of actual damages.[50] The U.S. Supreme Court has recently reflected a concern over "skyrocketing" punitive damages awards,[51] and has recently given serious consideration to enunciating Constitutional limits.[52]

The most successful challenges to punitive damages have arisen under the Due Process Clause of the Fourteenth Amendment.[53] Challenges have focused both on substantive[54] as well as procedural[55] due process. In the 1988 case, *Bankers Life & Casualty Co. v. Crenshaw*,[56] the petitioner presented the Court with a due process argument for limiting punitive damages in the case, but the majority declined to address the issue because the petitioner did not raise the issue below.[57] However, in her dissent, Justice O'Connor hinted that, given the proper procedural posture, a due

49. At least 18 states impose some statutory limitation on punitive damages awards, including Alabama, Arizona, California, Colorado, Illinois, Kansas, Florida, Massachusetts, Minnesota, New Jersey, New York, Ohio, Oregon, Rhode Island, South Dakota, Utah, Virginia, and West Virginia. Brief for Petitioner, app. C, TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993).

50. Proportional limitations generally affix punitive damages as a multiple of compensatory damages; normally two or three times compensatory damages. Of the 18 states that have enacted statutes limiting punitive damages, all use some form of proportional limitation such as double or treble actual damages. Fewer states utilize absolute monetary caps, while others create combinations of absolute and proportional limitations. *Id.*

51. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 10 (1991) (quoting Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part)).

52. The Court has examined several theories purporting to find Constitutional limits on punitive damages, Browning-Ferris Indust. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (Excessive Fines Clause of the Eighth Amendment); United States v. Halper, 490 U.S. 435 (1989) (Double Jeopardy Clause of the Fifth Amendment); Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71 (1988) (Equal Protection and Contract Clauses).

53. Due Process challenges to penalties date back to the early 20th Century. Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909); Seaboard Air Line Ry Co. v. Seegers, 207 U.S. 73 (1907); St. Louis I M & S R Co. v. Williams, 251 U.S. 63 (1912). Recent challenges include Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71 (1988); United States v. Halper, 490 U.S. 435 (1989); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993).

54. The concept of substantive due process, in its classical form, has been defined thusly: In "every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty?" Lochner v. New York, 198 U.S. 45, 56 (1905).

55. The concept of procedural due process has been defined thusly: "The element of due process analysis characterized as "procedural due process" delineates the constitutional limits on judicial, executive, and administrative enforcement of legislative or other governmental dictates or decisions." LAURENCE H. TRIBE & RALPH S. TYLER, JR., AMERICAN CONSTITUTIONAL LAW § 10-7, at 664 (2d ed. 1988).

56. 486 U.S. 71 (1988).

57. *Id.* at 78-79.

process claim may arise from an excessive punitive damages claim.[58] The very next year the Court heard *Browning-Ferris Industries v. Kelco Disposal*,[59] another case invoking due process limitations on punitive damages.[60] Again, the Court declined to address the issue for lack of consideration below. However, all nine justices did express a willingness to consider a Due Process challenge:

> Petitioners also ask us to review the punitive damages award to determine whether it is excessive under the Due Process Clause of the Fourteenth Amendment. The parties agree that due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness . . . . There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award . . . but we have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. . . .[61]

Given the right case, the Court seemed ready to articulate a due process limitation.

B. Toward Articulation

The Supreme Court's chance to apply due process limits to punitive damages came during the winter term of 1990, when Pacific Mutual Life Insurance Company appealed an unfavorable punitive damages award from an Alabama state court.[62] The plaintiffs in that case, Cleopatra Haslip and her fellow employees of Roosevelt City, Alabama, sued Pacific Mutual when they discovered the health insurance policy they thought they had purchased from Pacific Mutual did not exist.[63] Pacific Mutual's agent fraudulently misappropriated premiums paid by Roosevelt City, and Pacific Mutual, thinking the premiums delinquent, canceled the city's policy.[64] Soon thereafter, Haslip was hospitalized and incurred significant medical bills.[65] Pacific Mutual refused to remit payment, and the Hospital sought payment

58. *Id.* at 87 ("Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. . . . In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause."). *Id.*

59. 492 U.S. 257 (1989).

60. *Id.* at 276-77.

61. *Id.* (citations omitted).

62. *Haslip*, 499 U.S. at 1.

63. *Id.* at 4-5.

64. *Id.* at 5.

65. *Id.*

from Haslip, eventually turning the account over to a collection agency.[66]

Haslip and several other employees brought suit against Pacific Mutual, seeking compensatory damages of $200,000, and punitive damages of $3 million.[67] The judge gave the jury detailed instructions describing the purpose of punitive damages,[68] and the jury was not allowed to hear evidence of Pacific Mutual's wealth.[69] The jury awarded Haslip $1,040,000, at least $840,000 of which was a punitive damages award.[70] In accordance with Alabama law,[71] the trial court conducted a post-trial hearing of the damage award to Haslip, finding sufficient grounds for a jury finding of "malicious, gross, or oppressive fraud."[72]

On appeal, the Supreme Court of Alabama reviewed the punitive award. The Alabama Supreme Court undertook a two-step, post-verdict review analyzing the award first from a comparative standard.[73] The state supreme court applied its own substantive "*Hornsby*" standards to determine whether the award exceeded the minimum amount necessary to accomplish the state's goals of deterring and punishing fraud.[74] After this thorough scrutiny, the Alabama Supreme Court found that the trial court properly conducted it's post-trial review, and found the amount of the award was reasonable given the express punitive and deterrence objectives stated in *Hornsby*.[75]

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66. *Id.*

67. *Id.* at 6 n.2.

68. Jury members were told that punitive damages were "not to compensate the plaintiff for any injury," but "to punish the defendant" and "for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future." *Id.* at 6 n.1.

69. *Id.* at 6.

70. *Id.* at 6 n.2.

71. *See* Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986). Alabama requires the trial court to conduct a "*Hammond*" hearing to determine independently whether damages are excessive. *Hammond* requires the trial court to consider the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties," and "other factors, such as the impact on innocent third parties." *Haslip*, 499 U.S. at 20 (explaining *Hammond*).

72. 499 U.S. at 23.

73. *Id.* at 21. Alabama's first step of review is defined in Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1053 (Ala. 1987).

74. Alabama's second step of review is defined in Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989); Wilson v. Dukona Corp., 547 So. 2d 70, 73 (Ala. 1989); Central Ala. Elec. Coop. v. Tapley, 546 So. 2d 371, 377-378 (Ala. 1989). The *Hornsby* test considers whether a punitive award promotes the state's goals of deterrence and retribution of offenders. The Court cited with approval several factors in these cases that may be taken into account in determining whether an award is excessive: "(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 actually 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 recency 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." *Haslip*, 499 U.S. at 21-22.

75. 499 U.S. at 23.

When the case reached the Supreme Court, Justice Blackmun, writing for the majority, was well-pleased by the thorough review given by the Alabama judicial system. The Court focused its due process analysis both on procedural and substantive aspects of the Alabama court system's procedure, and found it adequate.[76] The Court focused on three aspects of Alabama's process. First, the jury instructions given by the trial court were adequate because they constrained the jury's discretion to deterrence and retribution.[77] Second, the appellate court's review, which proscribed imposition of damages that "exceed an amount that will accomplish society's goals of punishment and deterrence,"[78] and provided a "sufficiently definite and meaningful constraint" on the jury in awarding punitive damages.[79] Third, the Court also reviewed the substantive due process issue of whether the amount of damages itself was a violation of the petitioner's substantive due process.[80] Justice Blackmun opined that even though punitive damages of over four times the amount of compensatory damages, and over 200 times Haslip's out-of-pocket expenses, were "close to the line,"[81] the post-verdict review provided sufficient review of "objective criteria"[82] so that the Alabama's judicial process was, overall, not a violation of Pacific Mutual's right to due process.[83]

In *Haslip*, the Court reviewed both the state court's reviewing procedure, including jury instructions and trial court review, as well as the substantive issue of whether the actual amount of the award was so large as to be a violation of substantive due process.[84] The procedural due process test for review was whether the state court, through jury instructions and post-verdict review, imposes "sufficiently definite and meaningful constraint on the discretion of . . . fact finders in awarding punitive damages."[85] In addition, on review, the Court required the state's appellate court to ensure "that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory

76. *Id.* at 21-24.

77. *Id.* at 19-20. In Alabama, pre-verdict constraint consists of jury instructions that describe the purpose of punitive damages as to protect the public and to punish and deter the defendant. The court admonished the jury to consider the character and degree of wrong shown and necessity of preventing similar wrong in setting the amount of punitive damages. The court reminded the jury that punitive damages are not mandatory, and the jury did not hear evidence of defendant's wealth. *Id.*

78. *Id.* at 21.

79. *Id.* at 22.

80. *Id.* at 23.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 20-22.

85. *Id.* at 22.

damages."[86] so that the punitive damages claim does not "upset one's Constitutional sensibilities."[87]

Haslip, the long-awaited opinion on the limits of punitive damages, appeared to establish a rather strict test for lower courts as to whether the state procedures established "definite and meaningful constraints on the jury." As an example of such a review, *Haslip* endorsed the Alabama judicial review system, which required state courts to afford defendants procedural due process by providing (1) reasonable constraints on the fact finder's discretion (2) a meaningful and adequate post-verdict review of the punitive award by the trial court, and (3) a meaningful and adequate review by a state appellate court.[88]

III. *TXO V. ALLIANCE*

In *Haslip*, the Court seemed to have found the theoretical basis for the beginnings of constitutional limits on punitive damages. However, in the very next case concerning due process limits on punitive damages, the Court reversed its apparent direction *in TXO Production v. Alliance Resources*.

A. The Case In West Virginia

In 1984, geologists employed by TXO Production, a subsidiary of US Steel's Oil and Gas division, were searching for large oil and gas deposits in the West Virginian Appalachian Mountains.[89] TXO's geologists called the corporation's attention to an unutilized, thousand-acre tract of land known as the "Blevins Tract" owned by Tug Fork Land Company, and leased to respondent Alliance Resources. After some initial bargaining, TXO approached Alliance with what Alliance considered a "phenomenal offer."[90] TXO agreed to give Alliance $20 per acre in cash, 22 percent of the oil and gas revenues, and pay all development costs in exchange for Alliance's oil and gas rights on the Blevins Tract.[91] TXO required, however, that Alliance agree to return all consideration paid by TXO if TXO's attorney determined that "title had failed."[92]

Upon examining the title to Alliance's leasehold to the Blevins tract, TXO's attorney discovered what they believed to be a problem with a 1958 conveyance from the then-owner of Blevins Tract, Tug Fork, to a successor-

86. *Id.*
87. *Id.* at 18.
88. Garnes v. Fleming Landfill, 413 S.E.2d 897, 907-08 (W. Va. 1991).
89. Brief for Respondent, at 2, TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) (No. 92-479).
90. 113 S. Ct. at 2715.
91. *Id.*
92. *TXO*, 419 S.E.2d at 875.

in-interest, Leo J. Signaigo, Jr.[93] However, rather than notify Alliance of the potential problem to allow them to clear any clouds on title, TXO contacted Mr. Signaigo directly.[94] Mr. Signaigo told TXO's agent that the 1958 conveyance gave him coal rights only, and did not convey oil and gas rights.[95]

Yet, rather than take Mr. Signaigo's statement as clearing possible clouds to title, TXO sought to establish that Mr. Signaigo could not say whether the oil and gas rights were included in the 1958 deed.[96] TXO's attorneys drew up an affidavit that did not accurately represent Mr. Signaigo's belief about what the deed conveyed, stating that "there was no specific agreement [between Signaigo and] Tug Fork Land Company as to whether or not the oil and gas would be reserved by Tug Fork Land Company."[97] Mr. Signaigo flatly refused to sign the affidavit.[98]

Since Signaigo would not agree to sign the affidavit, TXO purchased a quitclaim deed from a successor in interest to Mr. Signaigo, Virginia Crews, for $6,000, apparently hoping either to acquire thereby some interest in the oil and gas rights to the Blevins Tract, or simply to ensure Signaigo would not reassert a claim at a later date.[99] However, TXO did not immediately notify Alliance of its acquisition of the quitclaim deed. Only after recording its quitclaim deed did TXO inform Alliance of the putative cloud on Alliance's title.[100] According to Alliance, TXO's attorneys aggressively attempted to gain concessions in Alliance's "phenomenal" royalty by threatening to sue over the "cloud" on Alliance's title.[101]

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93. 113 S. Ct. at 2715. The deed conveyed "all the coal and other minerals and mineral substances in, on, and underlying" the Blevins tract. In West Virginia in 1958, "mineral substances" commonly referred to oil and gas. A later section excepted "from the operation of this deed: (a) All the oil and gas and all the coal in the Pocahontas No. 3 and No. 4 seams in said three tracts of land above described." TXO felt that the exception left ambiguous whether the grantor reserved *all* oil and gas underlying the Blevins Tract, or just the oil and gas underneath "the Pocahontas No. 3 and No. 4 seams" If "all the oil and gas and all the coal" was one phrase, modified by "in the Pocahontas No. 3 and No. 4 seams" then the grantor only reserved the oil and gas underneath the Pocahontas seams. However, if the phrase is treated as two separate objects, consisting of (1) "all the oil and gas" and (2) "all the coal," then only the second phrase, "all the coal" is modified by "in the Pocahontas" seams. In this case, the grantor reserved all the oil and gas underneath the entire Blevins Tract. Brief for Petitioner, at 4, TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) (No. 92-479).

94. 113 S. Ct. at 2716.

95. 419 S.E.2d at 876.

96. *Id.*

97. *Id.*

98. 419 S.E.2d at 876. Clearly, Mr. Signaigo did not appreciate the intricate litanies required by property law. He stated that he did not intend to purchase anything more than the coal rights, and refused to agree that he may have unwittingly done so.

99. *Id.* at 877.

100. *Id.*

101. *Id.*

Alliance refused any concessions, and shortly thereafter TXO filed an action for a declaratory judgment to quiet title.[102] Alliance counterclaimed, alleging slander of title, an ancient cause of action rarely used in modern West Virginia courtrooms.[103] The circuit court bifurcated each party's claims, and quickly dismissed TXO's declaratory judgment action, finding the 1958 deed to be "clear and unambiguous."[104] Alliance claimed $19,000 in actual damages, the amount which Alliance spent in attorney's fees defending TXO's claim.[105] In addition to the actual damages, the jury awarded Alliance $10 million in punitive damages.[106]

Ultimately the Supreme Court of Appeals of West Virginia found sufficient basis for the punitive damages award.[107] The court reasoned that while TXO's concern over any possible clouds on Alliance's title was well-warranted given the huge investment TXO was about to undertake, TXO's handling of the problem demonstrated nefarious motives.[108] The court noted that if TXO's motive was purely to clear up any clouds on the title, it could have easily done so by naming Tug Fork as assignee of the quitclaim deed TXO purchased, or by simply requesting that Alliance clear up any problems itself.[109] Moreover, haling Alliance into court on the quiet title action, the court reasoned, revealed TXO's true intent to use the nuisance value of the lawsuit as a bargaining chip in an effort to reduce the "phenomenal" royalties it was obligated to pay Alliance.[110]

TXO claimed that the punitive damages award should be set aside as a violation of West Virginia's due process requirements as set forth in *Garnes v. Fleming Landfill*.[111] In examining *Garnes*, the Supreme Court of Appeals laid out West Virginia's procedural due process requirements in imposing punitive damages.[112] The West Virginia Supreme Court of Appeals found the 1958 deed to convey unambiguously the coal rights only to Signaigo.[113] However, rather than simply apply the facts in TXO's case to the *Garnes*

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102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *TXO*, 113 S. Ct. at 2714.
107. 419 S.E.2d at 877.
108. *Id.*
109. *Id.*
110. *Id.* at 880.
111. 413 S.E.2d 897 (W. Va. 1991).
112. *Id.* at 887. The court lays out nine factors the court should instruct the jury to consider: (1) Punitive damages should bear a reasonable relationship to the harm likely to occur from the defendant's conduct as well as to the actual harm, (2) the reprehensibility of the conduct, (3) any profit the defendant gained should be removed, (4) punitive damages should bear a reasonable relationship to compensatory damages, (5) the "financial position" of the defendant (6) the costs of litigation, (7) any criminal sanctions imposed on the defendant, (8) any other civil actions against the same defendant, based on the same conduct, and (9) the appropriateness of punitive damages to encourage settlements when the defendant is obviously wrong. *Id.*
113. *Id.*

requirements, the West Virginia court embarked on an unusual characterization of the *Garnes* criteria:

> Generally, the cases fall into three categories: (1) really stupid defendants; (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm. By really stupid defendants, we signify those defendants who have not harmed victims intentionally, but have harmed them as a result of extreme carelessness. . . . By really mean defendants, we signify those defendants who intentionally commit acts they know to be harmful. . . .[114]

The court described how lower courts should assess punitive damages within each respective category.

> In cases in which the defendant falls into the really stupid category, and compensatory damages are neither negligible nor very large . . . we hold that the outer limit of punitive damages is roughly five to one. . . . When the defendant is not just stupid, but really mean, punitive damages limits must be greater in order to deter future evil acts by the defendant.[115]

The court held:

> [I]n cases where the defendant has intentionally committed mean-spirited and harmful acts . . . even punitive damages of 500 times greater than compensatory damages are not per se unconstitutional under *Haslip* and *Garnes*.[116]

Garnes required the court to examine whether the punitive damages bear a "reasonable relationship" to the harm caused.[117] Ultimately, the state court held in *TXO* that the high punitive damages award did bear a "reasonable relationship" to the harm caused, but that "harm caused" included not only the *actual* damages, but must also include the *potential* harm that TXO's actions could have caused.[118] The court reasoned that since TXO could have cost Alliance millions of dollars in damages, and their conduct was "highly reprehensible," the high punitive damages award was necessary to both

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114. *Id.* at 888.

115. *Id.* at 889.

116. *Id.* The court placed TXO into the later category; that of "really mean" defendants who ought to be punished very severely to deter future evil acts. However, it is difficult to see how the court's distinction between "really stupid" and "really mean" defendants clarifies the analysis. Determining whether or not TXO was mean or just stupid adds nothing to the analysis of whether this particular award violated TXO's due process rights. It would be difficult to deny that TXO was both mean and stupid, given its aggressive pursuit of a hopeless claim. The court made no attempt to relate its mean/stupid distinction to the elemental analysis required by *Garnes*.

117. 413 S.E.2d at 910.

118. *Id.* at 889.

punish TXO's deceit and discourage TXO from continuing its nefarious business practices.[119]

B. The U.S. Supreme Court's Review

On review by the U.S. Supreme Court, TXO sought to overturn the state court's punitive damages award for violating procedural and substantive due process guarantees. The central issue the Court faced was whether the $10 million dollar award was so excessive as to violate TXO's due process rights. The plurality, composed of Justices Stevens, Blackmun, Rehnquist, Kennedy, Thomas and Scalia held that TXO's rights were not violated- but three separate opinions were filed.

The core of the plurality opinion, written by Justice Stevens, diminished the importance of the "dramatic disparity" between the actual and punitive damages awards.[120] Agreeing with the West Virginia Supreme Court's reasoning, the Court focused on the "magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded."[121] Since TXO's misbehavior could potentially have caused "millions of dollars in damages to other victims,"[122] the jury was justified in granting such a disproportionate award. The Court reasoned that if TXO had succeeded in coercing Mr. Signaigo into signing the affidavit, or if the state court had granted TXO's declaratory judgment action, Alliance would have suffered "potentially millions" in damages.[123]

The plurality also addressed TXO's claim that the trial or appellate court did not adequately review the punitive damages award. TXO criticized the West Virginia Supreme Court of Appeals' "cavalier"[124]decision.[125] The Court disagreed. Even though Justice Stevens found that the West Virginia Supreme Court of Appeals judge "did not articulate his reasons" for upholding the verdict, he did "[indicate] his agreement with the jury's appraisal of the egregious character of the conduct of TXO's executives."[126] The Court went on to state that the court's "colorful" characterizations of "really mean" and "really stupid" defendants was not essential to the holding in the case, and the state court did attempt to justify its holding in more traditional terms.[127]

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119. *Id.*
120. *TXO,* 113 S. Ct. at 2722.
121. *Id.*
122. *Id.*
123. *Id.*
124. Brief for Petitioner at 11, TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) (No. 92-479).
125. 419 S.E.2d at 895.
126. 113 S. Ct. at 2724.
127. *Id.*

According to Justice Kennedy, due process guarantees a citizen's security against irrational or arbitrary awards that reflect bias or passion on the part of the jury.[128] Hence, he would focus the due process inquiry on the jury's motives for imposing the award, which imposes on the courts a duty to investigate the size of the award, trial record, and the relative culpability of the defendant's actions.[129] Moreover, Justice Kennedy departed with the Stevens group's approval of the potential harm as an appropriate justification for disproportionate awards.[130] Although ultimately agreeing with the verdict because of TXO's malice, Justice Kennedy lent no support to the Stevens group's reasonableness test.

Justices Scalia and Thomas, while concurring in the judgment, also rejected the Stevens group's test. They wrote in a terse opinion that the Due Process Clause of the Fourteenth Amendment does not create a right to judicial review of the substance of the process by which punitive damages are awarded, so long as due process, defined by the two justices as "traditional procedure," is observed. [131] These justices reasoned that since the judge instructed the jury in West Virginia's law, and both the trial court and state Supreme Court of Appeals reviewed the award, TXO's due process claim fails.[132] They denied even the Stevens group's lax reasonableness standard, and find no "substantive due process right that punitive damages be reasonable."[133] So long as defendants receive their *procedural* due process rights under the Constitution, they have received all of the "process that is due."[134]

IV. SUBSTANTIVE DUE PROCESS AFTER TXO:

A. The Interpretation Problem in Haslip

The Court in *TXO* sheds new light on the substantive due process element of the test endorsed in *Haslip* regarding the stringency of the "bright line" proportionality test. In *Haslip*, the Court stated that there was no "mathematical bright line between constitutionally acceptable and constitutionally unacceptable punitive awards."[135] However, elsewhere the Court appears to contradict itself by implying that such a "mathematical bright

128. *Id.*
129. *Id.* at 2725.
130. *Id.* at 2730.
131. *Id.* at 2726.
132. *Id.* at 2721.
133. *Id.* at 2726 (Scalia and Thomas, JJ., concurring in the judgment). Justice Kennedy also rejects the substantive due process inquiry, stating that the Court should "not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions." *Id.* at 2725 (Kennedy, J., concurring in part and concurring in the judgment).
134. *Id.* at 2726.
135. 499 U.S. at 1043.

line" might well exist. The majority reasons that while the particular level of punitive damages in *Haslip* were constitutionally acceptable, punitive damages more than four times compensatory damages "may be close to *the line.*"[136] The Court seemed to imply that punitive damages in excess of some proportion, about five times, of actual damages could constitute a *per se* substantive due process violation

In the period between the Court's decision in *Haslip* and its decision in *TXO*, state courts struggled to make sense of this contradictory language. Courts have disagreed about whether the Court intended to impose some kind of absolute substantive due process limit on punitive damages of greater multiples than "the line"[137] of four or five times actual damages.[138] In most cases, the state courts have construed the proportionality requirement as only a "guideline," or simply ignored the proportionality language altogether.[139] However, in some cases lower courts have taken literally the proportionality language in *Haslip* as imposing an absolute bar to punitive damages awards greater than five times compensatory damages.[140]

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136. *Id.* at 1046 (emphasis added).

137. *Id.*

138. *See* Richard A. Dean, *Punitive Damages: The Immediate Aftermath of* Haslip, FOR THE DEF., May 1992, at 9; Thomas W. Ladd, Haslip *and Beyond: The Future of Punitive Damages*, FOR THE DEF., May 1991, at 2; Guy O. Kornblum & William A. Cerillo, *Punitive Damages Are Alive and Well After* Haslip, *But Is There No Hope?*, DEF. COUNS. J., Jan. 1993, at 29.

139. *See, e.g.*, Hilgedick v. Koehring Fin. Corp., 8 Cal. Rptr. 2d 76 (Ct. App. 1992) (upholding punitive damages almost 12 times compensatory damages); Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1277, 1384 (5th Cir. 1991) (upholding punitive damages 500 times compensatory damages); Viking Ins. Co. v. Jester, 836 S.W.2d 371 (Ark. 1992) (upholding punitive damages 250 times compensatory damages); Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502 (4th Cir. 1991) (holding trial court erred by reducing punitive damages award); Oberg v. Honda Motor Co., 814 P.2d 517 (Or. Ct. App. 1991) *cert. granted*, 114 S. Ct. 751 (1994); Republic Ins. Co. v. Hires, 810 P.2d 790 (Nev. 1991) (upholding punitive damages 12 times compensatory damages); Ira Gore v. BMW, No. 90-CV-9658 (Jefferson County Cir. Ct. Ala. June 8, 1992) (upholding punitive award 1,000 times compensatory award); Glassocock v. Armstrong Cork Co. 946 F.2d 1085 (5th Cir. 1991) (upholding punitive damages 19.2 times actual damages) *cert. denied*, 112 S. Ct. 1778 (1992); MGW, Inc. v. Fredricks Dev. Corp., 6 Cal. Rptr. 2d 888 (Ct. App. 1992) (upholding punitive damages 5.44 times compensatory damages); Southern Life & Health Ins. Co. v. Turner, 586 So. 2d 854, 858 (Ala. 1991); Hospital Auth. v. Jones, 409 S.E.2d 501 (Ga. 1991) (upholding punitive damages 260 times compensatory damages); Associates Fin. Serv. Co. v. Barbour, 592 So. 2d 191 (Ala. 1991) (explicitly rejecting literal proportional cap of 5 times compensatory damages); Wolf v. Goodyear Tire & Rubber Co., 808 S.W.2d 868 (Mo. Ct. App. 1991) (upholding punitive damages 5.05 times compensatory damages). *See* Dean, *supra* note 141; Ladd, *supra* note 141.

140. Alexander & Alexander, Inc. v. B. Dixon Evander & Assoc., 596 A.2d 687 (Md. Ct. Spec. App. 1991) (overturning $12.5 million punitive damages award, over 50 times compensatory damages, on basis that if four times compensatory damages was "close to the line" in *Haslip*, then 50 times was surely over the line), *cert. denied*, 605 A.2d 137; Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991) (stating punitive damages are not excessive only when no greater than three times actual damages); Dunn v. Owens-Corning Fiberglass, 774 F. Supp. 929 (D.V.I. 1991) (granting remititur, reducing punitive damages from $25 million to $2 million after reducing compensatory damages from $1.3 million to $500,000. The court interpreted *Haslip* as frowning on punitive damages greater than four times compensatory damages.); Garnes v. Fleming Landfill, 413 S.E.2d 897 (W. Va. 1991) (holding that where no compensatory damages are awarded, an award of punitive damages is a violation of due

B. Resolution of the Interpretation Problem in Haslip

TXO effectively clarified the requirements of the proportionality rule. The three-justice Stevens group[141] explicitly rejected an absolute proportionality test, holding that a substantive due process review requires only "a general concern of reasonableness" in the relationship of compensatory damages to punitive damages.[142] While the Stevens group refused to require bright-line numerology of lower courts in reviewing punitive damages, it did require lower courts to consider the proportion as relevant to the overall reasonableness standard.[143]

The concurring opinions also eschewed such a bright-line rule. Justice Kennedy, in a concurring opinion, rejected an absolute proportionality test in favor of an esoteric inquiry into the motives of the jury.[144] Justices Scalia and Thomas, in a separate concurring opinion, rejected any right whatsoever to substantive due process in assessment of punitive damages, and, hence, plainly disfavored a strict proportionality rule.[145] Dissenting Justices O'Connor, White, and Souter, while favoring a more detailed review that may include examination of the proportion of actual to punitive damages, also did not advance a "bright line" test.[146]

Hence, *TXO* effectively clarified *Haslip's* ambiguous language concerning the stringency of the proportionality rule. Three justices held that a substantive due process violation arises only when the amount of punitive damages are "unreasonable," and three others held that disproportionate punitive damages, alone, can never give rise to a due process violation. Hence, the Court in *TXO* rejected the many applications of *Haslip* by lower courts that felt required to overturn punitive damages greater than five times compensatory damages.[147] This conclusion is supported by the few lower courts that have interpreted *TXO,* which have rejected an absolute proportional cap, although no court has had an opportunity to adjudicate the specific issue.[148] After *TXO*, the concept of an absolute substantive due process limit on disproportionate punitive damages is dead.

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process). *See* Dean, *supra* note 141; Ladd, *supra* note 141.

141. It comprised of Chief Justice Rehnquist, Justice Stevens and Justice Blackmun.

142. *TXO*, 113 S. Ct. at 2720 (quoting *Haslip*, 499 U.S. at 18).

143. *Id.* at 2720.

144. *Id.* at 2725. Commentators have suggested that Justice Kennedy's test supplies no less difficult a standard than the Stevens group's reasonableness inquiry he criticizes. *See* Lawrence H. Tribe, *Leading Cases*, 107 HARV. L. REV. 144 (1993).

145. *Id.* at 2727.

146. *Id.* at 2729.

147. 112 S. Ct. at 2729.

148. The Pacific Group v. First State Ins. Co., 841 F. Supp. 922, 940 n.9 (N.D. Cal. 1993) (stating after *TXO*, defendant's argument that punitive damages were violations of due process were "doomed"); Cantrell v. GAF Corp., 999 F.2d 1007, 1017 (6th Cir. 1993) (stating that a challenge to a punitive damages award of $450,000 on due process grounds would not be valid).

V. PROCEDURAL DUE PROCESS AFTER TXO

Even though TXO resolved the interpretation of the plurality problem in *Haslip*, the Court failed to provide much guidance as to procedural due process requirements. *Haslip* caused wide divergence among the states as to what procedural due process required when reviewing the punitive damages award.[149] *Haslip* explicitly endorsed Alabama's pre-verdict jury instructions and post-verdict trial court review procedures, holding that trial courts must impose "sufficiently definite and meaningful constraints on the discretion of" the jury. Lower courts have disagreed as to how closely their procedures must resemble the Alabama system.[150] Many lower courts overturned verdicts after *Haslip*, interpreting the Supreme Court's endorsement of Alabama's system as imposing those procedures onto other states as essential to due process.[151] Other courts have interpreted *Haslip's* endorsement of the factors stated in *Hornsby* as "mere platitudes,"[152] and have dispensed with one or more of the *Hornsby* factors approved in *Haslip*.[153] The plurality in *TXO* seemed to be more willing to accept significant divergence from the explicit procedural requirements of *Haslip*. The Court noted two salient differences between the West Virginia trial court's jury instructions and those

149. *See* Charles D. Stewart & Philip G. Piggott, *Punitive Damages Since Pacific Mut. Life Ins. Co. V. Haslip*, 16 AM. J. TRIAL ADVOC. 693.

150. Debra C. Moss, *The Punitive Thunderbolt: How Much Should Courts Curb Extraordinary Awards?*, ABA J., May 1993, at 88.

151. Johnson v. Hugo's Skateway, 949 F.2d 1338 (4th Cir. 1991), *remanded*, 974 F.2d 1408 (4th Cir. 1992) (reasoning that although jury instructions comported with *Haslip*, Virginia's post-verdict review did not examine the *Hornsby* factors, and hence was insufficient due process); Mattison v. Dallas Carrier Corp, 947 F.2d 95 (4th Cir. 1991) (holding that jury instructions and trial court post-verdict review were insufficient to guarantee due process); Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991) (holding that South Carolina trial courts are required to conduct a post-trial review to consider (1) defendant's degree of culpability, (2) duration of the conduct, (3) defendant's awareness or concealment, (4) the existence of similar past conduct, (5) likelihood the award will deter the defendant or others from like conduct, (6) whether the award is reasonably related to the harm likely to result from such conduct, (7) defendant's ability to pay, and (8) other factors noted in *Haslip*); Asams v. Murakami, 813 P.2d 1348 (1991) (state supreme court reversed punitive award, holding its review process was unconstitutional because it did not require evidence of defendant's financial position, as stated in *Haslip*); Medical Mut. Liab. Ins. Soc. v. Evander, 609 A.2d 353 (Md. Ct. Spec. App., 1992) (holding trial court's failure to state on the record its reasons for not interfering with a jury's verdict a denial of due process), *cert. denied*, 614 A.2d 973 (1992); Garnes v. Fleming Landfill, 413 S.E.2d 897 (Ala. 1991) (state supreme court holding trial court's post-verdict review not stringent enough to comport with due process as enunciated in *Haslip*, and adopting Alabama's *Hornsby* factors).

152. *TXO*, 413 S.E.2d at 906.

153. Hospital Auth. v. Jones, 409 S.E.2d 501 (Ga. 1991), *cert. denied*, 112 S. Ct. 1175 (1992) (citing *Haslip*, 111 S. Ct. at 1053, Scalia, J., concurring); General Motors Corp. v. Saenz, 829 S.W. 2d 230 (Tex. Ct. App. 1991) (eschewing a *Haslip* due process analysis by relying only on Texas' history of upholding punitive damages); Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991); Las Palmas Assoc. v. Las Palmas Ctr. Assoc., 1 Cal. Rptr. 2d 301 (Ct. App. 1991) (holding that the state's post-verdict review met due process even though trial court was not required to state its reasons for refusing to interfere with a punitive award).

in Alabama.[154] First, the trial court instructed the jury to consider the wealth of the "perpetrator" in setting the amount of damages, in order to assure that defendants of "large means" receive enough punishment to get their "attention."[155] The trial court also instructed the jury that in addition to the retributive and deterrence purposes, punitive damages serve "to provide additional compensation for the conduct to which the injured parties have been subjected."[156] What purpose, other than addition to retribution and deterrence, punitive damages were to serve, the state court did not indicate. Despite these significant departures from the instructions approved in *Haslip*, the Court in *TXO* declined to upset the award, noting that TXO failed to raise the issue below.[157]

On the issue of allowing the jury to consider the wealth of the defendant in assessing the amount of punitive damages, however, the Court did express reservations.[158] The Court agreed with the petitioner TXO that "the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations,"[159] but declined to find a violation of due process because in *Haslip*, the Court approved consideration of the wealth of the defendant in the post-verdict review process.[160] In her dissent, Justice O'Connor, with whom Justices White and Souter joined as to this issue, pointed out that the context in which Alliance disclosed TXO's wealth was drastically different from the context approved in *Haslip*. Defendant's wealth was a factor approved in *Haslip* only in the *post-verdict* stages of trial court and appellate review, with a judge as a finder of fact, and not a jury.[161] Indeed, the majority in *Haslip* took some solace in the idea that the jury was not allowed to consider the wealth of the defendant in determining either liability or damages. However, in *TXO*, the trial court permitted Alliance's counsel to speak to the jury at great length about TXO's "wealth,"[162] and the judge instructed the jury to consider this evidence in assessing damages.[163] Justice O'Connor notes in

154. *TXO*, 113 S. Ct. at 2723-24.

155. *Id.*

156. *Id.* at 2736. Justice O'Connor commented on the effect this instruction had on the jury, claiming that "[p]laintiffs 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." *Id.* at 2737.

157. *Id.* at 2723.

158. *Id.*

159. *Id.*

160. *Haslip*, 499 U.S. at 21-22.

161. *Id.* at 20-22.

162. 113 S. Ct. at 2736 (O'Connor, J., dissenting).

163. *TXO*, 419 S.E.2d at 887.

her dissent the impressionable nature of juries and the inflammatory effect of wealth evidence.

> [J]urors 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. . . . 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. . . . The jury repeatedly was told of TXO's extraordinary resources. . . . To make matters worse, unlike the jurors or the primary plaintiffs, TXO was not from West Virginia. . . . 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.[164]

Yet, even while acknowledging the bias that wealth may have on a jury, the Court declined to restrict this prejudicial influence and instead opened the door to another potentially inflammatory factor that jurors may consider in assessing punitive damages.[165] Instead of the long-awaited Supreme Court case clarifying the many due process issues left unanswered in *Haslip*, the Court in *TXO* retreated from the significant advancements made it's only attempt to restrain "skyrocketing"[166] punitive damages.

VI. THE WANING PRECEDENTAL VALUE OF THE REASONABLENESS TEST

A. Problems in Interpreting the Plurality

While it is clear after *TXO* that a punitive damages award in excess of five times compensatory damages will not constitute a *per se* due process violation, the fractured plurality leaves unanswered the question of whether the substantive due process "reasonableness" inquiry of the *Haslip* due process test will be *required* of lower courts at all.[167] In retreating from the

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164. 113 S. Ct. at 2728, 2736-38 (O'Connor, J., dissenting).

165. *Id.* at 2727 (Scalia, J. with whom Justice Thomas joins, concurring in the judgment). Justice Kennedy, concurring in part and concurring in the judgment, stated his position thusly: "Justice O'Connor makes a plausible argument, based on the record and the trial court's instructions, that the size of the punitive award is explained by the jury's raw, redistributionist impulses stemming from antipathy to a wealthy, out-of-state corporate defendant." *Id.* at 2725-26 (Kennedy, J., concurring in part and concurring in the judgment). Although Justice Kennedy ultimately sided with the plurality because he felt TXO demonstrated malice, he expressed doubt about whether evidence of wealth would be admissible in cases "involving vicarious liability, negligence, or strict liability." *Id.* at 2726.

166. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 10 (1990) (quoting Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part)).

167. Justices Stevens, Rehnquist, and Blackmun clearly held that a substantive due process inquiry is required, while Justices Scalia, Kennedy, and Thomas clearly believe it is not. Prior to Justice White's retirement, the swing votes would likely have come from the dissenters in *TXO*, Justices O'Connor, White, and Souter. Justices O'Connor and White agreed that some substantive due process inquiry is required, while Justice Souter, without explanation, failed to

beginnings established in *Haslip*, the Court has failed to amass a majority of Justices that support any one standard of due process review of punitive damages. Because only four justices in the plurality favor any substantive due process limits at all, a serious problem arises in attempting to determine which standard of review is required of lower courts.

The problem of interpreting a plurality opinion is currently a hot topic.[168] A plurality decision in which no justices agree as to the correct rule of law represents only a weak precedent at best.[169] One model of precedental interpretation requires a clear majority of the plurality to establish a binding legal precedent.[170] In *TXO*, while six justices supported the outcome of the case,[171] at most only four[172] supported the application of the plurality rule in substantive due process analysis. The three-justice Stevens group departed from its earlier endorsement in *Haslip* of the more detailed substantive due process inquiry,[173] and instead supported a reasonableness standard for due process review of punitive damages. None of the remaining concurring members of the Court supported anything like a reasonableness standard, and the dissenters' opinion, while supportive of more exigent review, is not binding law under a "majoritarian" model.[174] Only four justices in the plurality favored anything like the reasonableness standard, even counting a contumacious Justice Kennedy. Hence, under a majoritarian precedental analysis, the reasonableness test fails to establish a binding precedent *at all.*

Under a more inclusive "persuasive opinion" model, only the part of the plurality that is intuitively persuasive and consistent with earlier opinions is considered binding.[175] In *TXO*, the three dissenting Justices, and Justice Kennedy in concurrence, wrote in favor of a more exacting substantive due process inquiry like that implicated in *Haslip*. In contrast, the plurality wrote to significantly alter the test proposed in *Haslip*. It would seem, then, that because the dissenters are more consistent with the relevant precedent, *Haslip*, under the "persuasive opinion" model they may write with more

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join a part of the dissent that explicitly supported such a requirement. Prior to Justice Blackmun's retirement, only if either Justice Souter or Ginsberg are persuaded to support a substantive due process requirement would *Haslip*'s reasonableness inquiry become a Constitutional requirement. With the current churning of the membership of the Court, however, predicting the outcome of future decisions is highly speculative.

168. *See* Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593 (1992) [hereinafter *Legitimacy*]. *See also* Mark A. Thurmon, *When the Court Divides: Reconsidering the Precedental Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419 (1992).

169. *Legitimacy, supra* note 168, at 1594-1605.

170. *Id.* at 1595. Kimura calls this interpretive model the "exclusive majoritarian" model.

171. Justices Stevens, Rehnquist, Scalia, Thomas, Blackmun, and Kennedy.

172. Justices Scalia and Thomas did not support application of the reasonableness test, but nevertheless agreed that TXO's due process was not violated.

173. Justices Blackmun, Rehnquist, White, Marshall, and Stevens made up the simple majority in *Haslip*.

174. *Legitimacy, supra* note 168, at 1595.

175. *Id.* at 1597.

precedental authority than the incongruous opinion of the five justices in the plurality. Depending on how "intuitively persuasive" each argument is, the dissent may have usurped some precedental authority from the plurality. This seriously diminishes the value of the reasonableness standard as a precedent. Strangely, the Court, in wrangling over which standard to impose, may have effectively imposed no standard of review at all.

The future of the reasonableness standard is unclear. Justice White's retirement eliminates a dissenter in *TXO*. However, since Justice White supported the majority in *Haslip*, his retirement also means the loss of the support he provided the majority in *Haslip*. Justice White may have provided a crucial swing vote for the Stevens group in a future case involving a less-sympathetic defendant than *TXO*, and more thorough state court review.[176] In deciding future cases, the Stevens group should be able to agree on some minimal substantive due process standard favored by Kennedy, O'Connor, Souter, or Ginsberg. Until a clear majority arises on the issue, lower courts are left to their own machinations in interpreting the remains of *Haslip*.

B. An Elastic Standard

As many lower courts noted, while *Haslip* was unclear on the stringency of the proportionality rule, both the letter and the spirit of *Haslip* indicated a preference for detailed judicial review of large, disproportionate punitive

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176. One such case is currently pending before the Court. *See* Oberg v. Honda Motor Co. 851 P.2d 1084 (Or. 1992), *cert. granted*, 114 S. Ct. 751 (1994). Oregon statutes govern the imposition of punitive damages in a way that imposes no specific guidelines for fixing the amount of the award, and has no absolute caps on damages, but gives significantly more guidance than that imposed on judges in West Virginia.

OR. REV. STAT. § 30.925 provides:

(1) In a products liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare of others.

(2) During the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover under subsection (1) of this section.

(3) Punitive damages, if any, shall be determined and awarded based upon the following criteria:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
(b) The degree of the defendant's awareness of that likelihood;
(c) The profitability of the defendant's misconduct;
(d) The duration of the misconduct and any concealment of it;
(e) The attitude and conduct of the defendant upon discovery of the misconduct;
(f) The financial condition of the defendant; and
(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, damages awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

Orberg v. Honda Motor Co., 841 P.2d 517, 522 n.10 (Or. Ct. App. 1991) (citing OR. REV. STAT. § 30.925 (1991)).

damages. In an unexpected break with precedent, Stevens' characterization of *Haslip's* due process test as requiring only a "general concern" of reasonableness "renders *Haslip's* promise a false one."[177] Like many other of the menagerie of vague, intuitive constitutional tests imposed by the Supreme Court, *TXO's* reasonableness standard provides little guidance to lower courts, and is highly manipulable by clever advocates, providing ample opportunity for abuse. Such a test is "scarcely better than no guidance at all."[178] Justice O'Connor chides the plurality for "reject[ing] both petitioner's and respondents' proffered approaches, instead selecting a seemingly moderate course. . . . But the course the plurality chooses is, in fact, no course at all."[179] She concludes that "[t]he plurality opinion erects not a single guidepost to help other courts find their way through this area."[180]

Several justices criticize the reasonableness standard. While Justice Kennedy concurred in the judgment, he found the Stevens group's "reasonableness" requirement inadequate.[181] The reasonableness test proposed by the Stevens group, "far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend."[182] Justice Kennedy did not join with the plurality as to their analysis of the substantive due process test, stating that while the respondent's "rational bias" proposal was unsatisfactory, he did "not believe that the plurality's replacement, a general focus on the 'reasonableness' of the award is a significant improvement."[183]

Even though they disfavored any due process right to limits on punitive damages, Justices Scalia and Thomas found some consolation in the reasonableness standard. In their dissent, they seemed pleased that even if *TXO* will stand for some Constitutional limits on punitive damages, the standard is "far less detailed and restrictive than that upheld in *Haslip*." They appeared to recognize the tremendous value of *TXO* as a precedent adverse to due process limits. Scalia's wry delight with the reasonableness standard is clear:

> Today's reprise of *Haslip*, despite the widely divergent opinions it has produced, has not been a waste. The procedures approved here . . . [suggest] that if the Court ever does invent new procedural requirements, they will not deviate significantly from the traditional ones that ought to govern. . . . [T]he Court's 'constitutional sensibilities' are far more resistant to 'jar[ring],' than one might have imagined after *Haslip*. . . .

177. *TXO,* 113 S. Ct. at 2728 (O'Connor, J., dissenting).

178. Browning-Ferris Indus. v. Kelco Disposal, Inc. 429 U.S. 257, 281 (Brennan, J., concurring).

179. *TXO,* 113 S. Ct. at 2731 (O'Connor, J. dissenting).

180. *Id.* at 2731-32 (O'Connor, J., dissenting).

181. *Id.* at 2724 (Kennedy, J., concurring in part and concurring in the judgment).

182. *Id.* at 2725.

183. *Id.* at 2724-25 (citation omitted).

> [T]he Court's decision is valuable, then, in that the great majority of due process challenges to punitive damages awards can henceforth be disposed of simply with the observation that "this is no worse than TXO."[184]

No *worse* indeed. It appears to these justices that even though *TXO* preserves some due process rights to review of punitive damages, *TXO* may provide the opponents of substantive due process limits on punitive damages a powerful bulwark against any imposition of such limits.

VII. TROUBLED APPLICATION OF THE REASONABLENESS STANDARD

Lower courts will likely have difficulty in the application of the reasonableness standard as set out in *TXO*. Even if the lower Courts interpret *TXO's* fractured opinion as a weak precedent favoring the broad reasonableness standard set out in *Haslip*, a greater problem exists in the meaningful application of such a requirement. The Court has stated for years that the Fourteenth Amendment imposes substantive due process limits on punitive damages, yet it has overturned such an award only twice in its history, the last time being in 1915.[185] Consistent with this unimpeded incumbency over substantive due process given the states prior to *Haslip*, the states rarely have overturned jury awards of punitive damages; normally only when they evinced passion or bias[186]—vague standards in and of themselves. The Court's seminal decisions in *Banker's Life and Cas. Co. v. Crenshaw,*[187] and *Haslip* seemed to indicate an end to these minimalist standards of review.

Yet, the application of the due process test after *TXO* is no less manipulable than are the jury-based standards. The ease with which clever advocates can manipulate this standard is apparent even in the very case that sets the standard. Erecting a broad, comprehensive "reasonableness" inquiry creates, as with many other Supreme Court standards of late, a nightmare for lower courts attempting to apply the manipulable standards. Lower courts, looking at *TXO*, will likely be baffled by the rickety logic applied by the Court. As a result, courts will have no choice but to return to the comfortable, but undisciplined review processes so common before *Haslip*.

To understand why courts will have difficulty understanding the tests espoused in *TXO*, it is instructive to examine how the circuit court applied the rationality test. In *TXO*, the ten million dollar punitive award was reasonable, the Court said, given "(1) the potential harm TXO's actions

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184. *Id.* at 2727 (Scalia, J., concurring in the judgment) (citations omitted).

185. *Id.* at 2718. The latest case *overturning* a punitive damages award is Southwestern Telegraph & Telephone Company v. Danaher, 238 U.S. 482 (1915).

186. Garnes v. Fleming Landfill, 413 S.E.2d 897, 907 (W. Va. 1992) (citing Wells v. Smith, 297 S.E.2d 872 (W. Va. 1982)).

187. 486 U.S. 71 (1988).

could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future."[188] The following three sections will examine in turn how the Court applied each of these elements, and attempt to reveal the minimum requirements of *TXO's* reasonableness standard.

A. The Potential Harm of Potential Harm

In *Haslip*, the Court enunciated the new "potential harm" factor.[189] In considering the size of a punitive award, the Court required consideration not only of actual harm, but also the harm that is "likely" to occur from the defendant's conduct. This rationale is a "narrow exception" in cases where "the actual harm was minimal but the potential harm was tremendous."[190] In one such case, a hospital was sued for injuries caused by a crash of its Life Flight helicopter.[191] Even though the crash killed several persons, the crash did not cause further injury to the accident victim being transported.[192] Tragically, the victim died only a few days later; not as a result of any injuries suffered in the crash, but because of his original burn injuries.[193] The court held that even though the plaintiff died as a result of his original injuries (and hence, compensatory damages were very small), the fact that the helicopter crash could have caused serious injuries justified punitive damages based on the harm that was *likely* to occur in the crash.[194]

However, *TXO* and *Jones* are disanalogous for two reasons: the harm likely to occur from the helicopter crash in *Jones* was, first, much more serious in nature, and, second, much more likely to occur. The potential

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188. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 889 (W. Va. 1992).

189. *Haslip*, 499 U.S. at 21. "(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 actually has occurred." *Id.*

190. *Garnes*, 413 S.E.2d at 908. The common analogy is to a man who shoots a gun through a crowded room. Even though he may hit no one, and cause only minimal damage, his behavior is so reckless and reprehensible that, in deciding the proper amount of punitive damages, we can take into account the possibility that he might very well have seriously injured or killed someone by his behavior. Hence, very high punitive damages would be in order where only minimal actual damage exists.

191. Hospital Auth. v. Jones, 409 S.E.2d 501 (Ga. 1991), *cert. denied*, 112 S. Ct. 1175 (1992) (compensatory damages were only $5,001, while punitive damages were $1.3 million). In *Jones*, the Hospital Authority funded a helicopter transport/rescue program that responded to emergency calls. However, in order to make this expensive program worthwhile to the hospitals participating in the program, the Hospital Authority instituted a policy of bypassing emergency care facilities at non-participating hospitals nearby the accident in order to transport victims to its own hospitals. The helicopter was moving a seriously injured burn victim from a hospital without a burn unit to a member hospital with burn victim facilities. However, the member hospital was not the closest hospital with a burn unit that could accept the new patient. In part because of the longer flight, on the way the helicopter crashed, killing or severely injuring everyone aboard except the decedent. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 503.

harm in Jones was the serious injury or loss of life likely to result from a helicopter crash.[195] The Court properly seeks to severely punish those who take risks with life and limb. However, in *TXO* the harm was at worst a big economic loss for Alliance.[196] While it is entirely justifiable to take into account potential harm when that harm is physical, it hardly follows that we should accord the same level of protection to economic interests; especially when those interests can be accounted for with compensatory damages.

The second disanalogy between *TXO* and *Jones* is that in *Jones*, the harm likely to occur was serious personal injury resulting from a helicopter crash. The fact that the crash did not seriously injure the patient is by far the exception—even miraculous. Indeed, the crash either killed or severely injured everyone else in the helicopter. The Court was correct in likening *Jones* to the case where one shoots a gun through a crowded room but miraculously hits no one. Even though there is no actual harm, the gunman has done something very wrong. In *Jones*, since the helicopter crash and longer flight threatened the plaintiff's safety to a much greater extent than his injuries would indicate, clearly the defendant there should not be allowed to escape punishment simply because his victim beat the overwhelming odds by emerging virtually unscathed.

However, notwithstanding the opinions of the Supreme Court of Appeals of West Virginia and the United States Supreme Court, this is not the case in *TXO*. In *TXO*, the West Virginia court asserted that "[t]he type of fraudulent action intentionally undertaken by TXO in this case *could potentially* cause millions of dollars in damages to other victims."[197] This is implausible for two reasons. First, it is inconsistent to claim both that TXO could have caused tremendous damage and that TXO filed a "frivolous" lawsuit. Alliance sued TXO in state court for slander of title, a rare defamation cause of action that requires two elements: first; a showing of malice, and second; a resulting "diminished value" of the property in West Virginia.[198] In order to prove up its case against TXO, Alliance had to establish that TXO's claim regarding a cloud in Alliance's chain of title was "frivolous." This would establish the absence of good faith in their declaratory judgment action to clear up the title to the Blevins Tract.[159] If TXO could establish that it had legitimate concerns about the validity of Alliance's title, it would be very reasonable to have sought clarification in a declaratory proceeding. However, in ruling against TXO, the state court

195. *Id.*
196. *TXO*, 113 S. Ct. at 2727 (O'Connor, J., dissenting).
197. *TXO*, 419 S.E.2d at 889 (emphasis added).
198. *Id.* at 879.
199. *Id.*

reasoned that the jury could have found malice on the part of TXO because it recorded "a quitclaim deed which it knew to be frivolous."[200]

The problem arises then, that if TXO's malice consisted in making a "frivolous"[201] legal claim, then that claim must have had *no basis* in fact or law. But if the claim had no basis in fact or law, then there is no reason to suppose that Alliance suffered the necessary damages for slander of title; that the value of the Blevins Tract was damaged "in the eyes of third parties."[202] A "frivolous" quiet title action would be very unlikely to diminish the value of property rights to land containing millions of dollars worth natural gas. Even if TXO's "frivolous" claim were to diminish the value in the eyes of layperson third parties, it is very unlikely that a genuinely frivolous claim would sway a judge trained in the law of property. Hence, in a court of law, TXO's frivolous claim would certainly meet with failure.

The court is hoisted on its own petard; to prove actual damages, Alliance must show that TXO had no chance of winning its lawsuit. Yet, to establish punitive damages for potential harm, Alliance must show TXO had a good chance of winning their suit. But this is clearly impossible. Either TXO's claim was colorable and therefore conducted in good faith (in which case punitive damages are inappropriate), or it was spurious and therefore no damage resulted from "diminished value" in the eyes of third parties. If no damage resulted from diminished value in the eyes of third parties, then either punitive damages are inappropriate,[203] or damages should be abated by the slim chances it had of winning the case. But the Court, in its assessment of the reasonableness of the West Virginia court's review, makes no effort at reconciling this contradiction.

If TXO was truly pursuing a "frivolous" lawsuit, with no valid legal claim to support it, then their chances for winning that lawsuit were nil. Given their slim chances for winning the lawsuit, TXO's actual threat was not "likely," as in *Jones*, but much more remote. Indeed, this case is very unlike *Jones*, in which the odds for serious injury (the likelihood of sustaining injury from a devastating helicopter crash) were very high. Rather than a gunman shooting through a crowded room, this is much more like a gunman shooting a water pistol through a crowded room.

Nevertheless, the West Virginia Supreme Court of Appeals reasoned that TXO's claim "could potentially cause millions of dollars in damages."[204] This "potential" that the court speaks of apparently includes both the very real possibility that a serious helicopter crash will kill someone, as well as the very remote possibility that a party to a declaratory action may win, even

200. *Id.* It is important to point out that the filing of the quitclaim deed was the *sine qua non* of TXO's slander of title action. TXO's misconduct in this case and at other times was relevant, but not the gravamen of the tort.

201. *Id.*

202. *Id.* at 879.

203. *Garnes*, 413 S.E.2d 897.

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

with a "frivolous" claim. Under this interpretation, "potential harm" means *any* possibility of harm, no matter how "remote. Moreover, the injury in *Jones* was the loss of human life and limb; a consequence well worth taking precautions against. In *TXO*, however, the injury was purely monetary. It does not seem immediately obvious that these two interests ought to be afforded the same level of protection. The Court's review, however, failed to account for these essential differences.

B. Maliciousness

The second factor of West Virginia's *Garnes* "reasonable relationship" test requires the court to inquire into the maliciousness of the defendant's actions.[205] This section will examine how that inquiry was conducted, and attempt to determine how the reasonableness standard endorsed by the Court worked in the West Virginia court's review.

The West Virginia court's examination of the maliciousness of TXO's actions indicates a very *un*reasonable review. On the issue of malice, Judge Neely states that "we believe the jury's verdict says more than we could say in an opinion twice this length."[206] The court reasoned that while TXO was justified in purchasing the quitclaim deed, in *filing* it, TXO effectively said to potential buyers, "I don't think you should buy that land. You know there is a cloud on the title because of Mr. Signaigo's old deed." According to the West Virginia court, TXO's malice consisted of the *recording* of the quitclaim deed it had purchased from Virginia Crews that it "knew" to be without any basis in fact. It "knew" that the deed was without any basis in fact, according to the court, because Signaigo, a predecessor in interest to Virginia Crews who was interested in the land only for its coal, didn't *believe* he had purchased anything more than the coal rights.[207] TXO claimed that it was acting in good faith, only seeking to clear up the 1958 deed from Tug Fork to Signaigo that appeared ambiguous. They argued that they purchased and filed the quitclaim deed from Signaigo's descendant in interest, Virginia Crews, as "insurance" against anyone else attempting to steal the deal away from them. Alliance, and ultimately the courts, found the deed unambiguous, and TXO's claim spurious.

Despite the jury's finding, there is much evidence to support a good faith basis for TXO's claim. The history of property law is replete with instances of courts construing property transfers differently from what the parties intended.[208] Signaigo's belief, alone, is not determinative of how the

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205. *Id.* at 889 (referring to *Garnes,* 413 S.E.2d at 904-05).

206. *Id.* at 889.

207. *Id.* at 881.

208. Take, for example, the requirement that conveyances in fee simple include the words "heirs and assigns," for the deed to be valid. The Contracts doctrine of *contra proferentum* often finds contractual provisions where one of more of the parties did not so intend. The Contracts Parole Evidence Rule looks to the plain meaning of the document irrespective of the

courts will construe the deed, as any first year law student can attest. Given the peculiar nature of property and contract law, TXO's concern that the language of the deed was ambiguous was not so "frivolous," especially given their multi-million dollar investment in this land. The Supreme Court said as much.[209] If purchasing the deed was good insurance, it is difficult to see how filing that deed, as a further guarantee, was not just as wise. Moreover, since the gravamen of the slander action was the *publication* (by filing), and not the *purchase* of the quitclaim deed, Alliance incurred no greater damages from the filing than they would have incurred if TXO would not have filed, but simply purchased the deed and sued to quiet title. In a slander of title action in West Virginia, plaintiffs may recover attorney's fees resulting from defending spurious actions against them.[210] In this case, Alliance spent $19,000 in attorney's fees defending the declaratory judgment action, and the jury awarded them that amount only, implying no further damage existed.[211] However, even if TXO had not committed its "malicious act" of *filing* the deed, Alliance still would have had to defend the quiet title lawsuit. The Supreme Court acknowledged that TXO, with millions of dollars at stake, would almost certainly have "purchased 'insurance' on their investment" by acquiring the quitclaim deed and seeking declaratory judgment.[212] Since a declaratory judgment action is a reasonable way to establish title in either of the parties, by *filing* the deed TXO cost Alliance *nothing*.

Despite the tenuous underpinnings of the jury's finding of extreme malice, the West Virginia Supreme Court of Appeals refused to examine further the motives of the jury. This is especially troubling given the fact that there was sufficient opportunity for the jury to be swayed by inflammatory evidence of TXO's wealth. It would appear that even highly suspicious jury awards with significant evidence of jury bias will not be overturned under the reasonableness test, even though preventing the possibility of such bias is relatively simple.

C. The Punitive Penalty

The third factor in West Virginia's reasonableness test is whether the amount of the punitive award will sufficiently deter the defendant from similar action. Punitive damages are commonly used as an economic disincentive to causing harm to others.[213] Where a company can ignore certain costs external to its business activities, it can set the price of its goods at a level that is cheaper than the actual costs to society—which includes

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parties' intent.

209. 113 S. Ct. at 2724.

210. *TXO,* 419 S.E.2d at 870-881 (W. Va. 1992).

211. *Id.*

212. *Id.*

213. *See supra* Part II.

these external costs. Under a deterrence rationale, the amount of punitive damages should be just high enough to deter wrongful activity. However, when courts mete out punitive damages at a level higher than that necessary to effectively deter harmful conduct, the punitive damages impose unnecessary costs on the company, thereby harming other, legitimate business activity.

TXO is an oil and gas exploration company that supplies natural gas to the market in order to satisfy an essential social need. Locating and extracting natural gas is a costly activity that requires a huge investment, but can provide significant profits. Given this tremendous investment, oil companies are understandably cautious about taking chances with the ownership of oil and gas rights. No court reviewing this case has doubted TXO's caution in assuring that title to their new investment was without clouds. Given this precarious enterprise, courts must be very careful not to overdeter companies such as TXO from performing their useful and risky function. Moreover, the court imposed this extremely high punitive damages award because TXO pursued the highly technical quiet title action in a court of law. Courts must also be sensitive to the message this sends to other large institutions that have difficult legal problems that they wish to have decided by a judicial authority. While courts certainly need to encourage settlement of disputes, they should not do so in a way that gives smaller parties an advantage over larger ones. Forcing TXO to run the gauntlet of a local jury trial, and upholding the jury's verdict in the face serious evidence of bias is an unfair advantage for smaller parties. There are better ways of leveling the legal playing field.

There may be an appropriate level of punitive damages to deter TXO from filing spurious claims—perhaps paying opposing counsel's attorney's fees, or some other measure designed to deter TXO. Yet, in considering an appropriate level of damages to impose, the West Virginia Court had no evidence to support, and did no actual computation of the economic penalty necessary to deter TXO. In fact, the main, almost exclusive, figure that Alliance's counsel plead to the jury was the wealth of TXO and its parent company, U.S. Steel. The appellate court considered no other evidence than this in determining the penalty necessary to properly deter future defendants from recording bogus deeds. Hence, it would seem that the post-*Haslip* substantive due process test of "reasonableness" only requires courts to take little more than a glance at the evidence below. In the characteristically colorful words of Judge Neely, most judges "understand as well as the next court how to imitate the intermediate appellate court of Texas in *Texaco, Inc. v. Pennzoil, Co.*, articulate the correct legal principle, and then perversely fit into that principle a set of facts to which the principle obviously does not apply. Even judges who are remarkably dim bulbs know how to mouth the

correct legal rules with ironic solemnity while avoiding those rules' logical consequences."[214]

VIII. PROPOSALS FOR DUE PROCESS

In order to better safeguard the fair determination of punitive damage awards, the United States Supreme Court should revise the due process guidelines it laid out in *TXO*. Specifically, the Court should modify its guidelines for consideration of wealth, jury instructions, and potential harm.

A. Wealth

The Court should require trial bifurcation in order to determine liability and damages separately. At the liability portion of the trial, only relevant and otherwise admissible evidence tending to prove or disprove liability should be allowed. Unless otherwise relevant, the Court should not allow a jury to hear evidence of the defendant's wealth at the liability stage of the trial. Allowing the jury to hear evidence of wealth at the liability stage could cause a jury to become prejudiced against a wealthy defendant.[215] Therefore, by disallowing wealth evidence at the liability stage of trial, a jury will not be tempted into predicating liability on the defendant's wealth. The proper time to hear evidence of a defendant's wealth is at the second damages stage of the trial.

Additionally, the Court should divide the cases into two categories: physical injury and economic injury. Where physical injury occurred to the defendant, the Court should give significant deference to the jury award. In physical injury cases, the Court should only increase or decrease a jury award in clear cases of jury bias. On the other hand, however, where the defendant suffered economic harm without any physical harm, the Court should undertake a more stringent review of the jury award. In economic harm cases, courts should give a jury less deference, with careful attention to the possibility of overdeterrence. In instances where valuable economic activity may be unduly discouraged, the Court should encourage decreasing the punitive damages award. Alternatively, if the Court finds that the punitive damages award is not sufficient to properly deter or punish a defendant, the Court should increase the award. Imposing a significant fact finding mission on a judicial entity will more efficiently and effectively redress economic harms.

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214. 413 S.E.2d at 907 (citations omitted).

215. *TXO*, 113 S. Ct. at 2729, 2736-37. The separation of the determinations of liability and damages is analogous to the current practice in criminal law. First, in criminal law, the defendant is found guilty or not guilty in a trial. Similarly, this parallels the liability stage in a civil trial. Second, if the defendant is found guilty, a sentence is imposed at a later time. This parallels the damages stage of a civil trial.

B. Jury Instructions

The Court should require careful and accurate reading of jury instructions on the purposes of punitive damages. If thorough and accurate jury instructions are not given, a jury may award punitive damages erroneously. For example, the trial judge in *TXO* gave inexact jury instructions by saying that in addition to punishing and deterring, punitive damages can also serve as "additional compensation.[216] In *TXO*, the jury may have been invited to provide additional compensation to the plaintiff, even though the stated purposes of punitive damages were extracompensatory.[217] By requiring full and accurate jury instructions regarding punitive damages, the Court could help reduce incorrect jury awards.

C. Potential Harm

As set forth previously, the *TXO* court applied the *Garnes* criteria in reviewing the award of punitive damages.[218] The *Garnes* criteria called for the appellate judges to review the damage with an eye not only to actual harm, but also to potential harm.[219] In this sense, *TXO* is consistent with *Haslip*, since evidence of potential harm is not given directly to the jury.[220] In both cases, the potential harm factor is reserved for the exclusive use of the reviewing courts. In reviewing the potential harm threatened by defendants, courts focus almost exclusively on the magnitude of the harm, with very little consideration to the probability of its occurrence.[221]

Courts need to consider both the magnitude and imminence of the potential harm involved. Punitive damages should only be considered where the magnitude of the potential harm is high, or the likelihood of the potential harm is imminent. In personal injury cases where a high magnitude of potential harm is threatened, courts should be allowed to punish harms which have relatively low probabilities. However, in economic injury cases where a high magnitude of potential harm exists, courts should only allow juries to punish harms which have somewhat higher probabilities. This way, courts can provide deference to juries in cases involving physical injuries, while exercising more discretion in cases regarding economic injuries.

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216. *TXO*, 113 S. Ct. at 2736.
217. *TXO*, 419 S.E.2d at 887. *See also* 113 S. Ct. at 2737.
218. *TXO*, 133 S. Ct. at 2721-72.
219. *Id.*
220. *Id.*
221. *See, e.g.*, *Haslip*, 499 U.S. at 21, 51; *TXO*, 113 S. Ct. at 2722.

CONCLUSION

Haslip set out the beginnings of a new era of jurisprudence in due process limitations on punitive damages. After *TXO*, that brief beginning is in jeopardy. *TXO* declined to define a bright-line absolute proportional cap beyond which punitive damages may not go. However, rather than establishing an alternative test for substantive due process, the Court has pronounced a vague "reasonableness" test that proves intractable in the very case that lays out the standard. The Court has also refused to provide sufficient guidance to lower courts as to what procedures will adequately ensure procedural due process is met. Apparently, the Court believes that by simply showing lower courts the whip of appellate reversal, they can ensure a full and fair due process review of high punitive damages awards. Yet, the fractured plurality, puzzling logic, and lowered scrutiny make for a Supreme Court precedent of questionable legal merit. In fact, the only two justices excited about the "reasonableness" standard were the two who unequivocally oppose any substantive due process review at all.[222] The words of Justice O'Connor eloquently summarize the effect of *TXO* on the punitive damages due process debate. "In *Pacific Mutual Life Ins. Co. v. Haslip*, 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."[223]

The Court has missed an opportunity to develop a line of legal precedent establishing firm guidelines for imposing rationality on a system of naked, arbitrary wealth-transfer more capricious than a lottery. Simply showing lower courts the "whip" of a "reasonableness" review may bring about more rhetoric in justification, but, as judge Neely noted,[224] this is no guarantee of a more probing review. The higher level of scrutiny, and procedural protections suggested by this note would require lower courts to engage in a more searching inquiry into the many areas of possible jury bias, and adjust the penalty imposed based on the most effective and efficient method of punishment. Since the judiciary is uniquely well-equipped to administer justice in individual cases, it should continue with the many proposed reforms.

Colbern C. Stuart III[*]

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222. Justices Scalia and Thomas.

223. *TXO*, 113 S. Ct. at 2727 (citations omitted).

224. *See supra* note 224.

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