Introduction to U.S. Law and Legal Practice

Section 1: Professor Irene Ayers

Just or Unjust? Punitive Damages and the American Judicial System
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Oberg v. Honda Motor Co.
Supreme Court of Oregon
SC No. S38436


Prior History: On review from the Court of Appeals. * CC No. A8709-05897; CA No. A61587.

Disposition: The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

Core Terms
documents, accidents, punitive damages, award of punitive damages, trial court, notice, admissible, hearsay, excerpts, provides, consumer product, vehicles, injuries, circumstances, defendants', Consumer, exhibits, factors, overturn, cases, manufactured, stability, all-terrain, misconduct, records, hazard, product safety, due process, incidents, characteristics

Case Summary

Procedural Posture
Defendants, manufacturers and sellers, appealed from a decision of the Court of Appeals (Oregon) that affirmed a judgment in favor of plaintiff consumer in his products liability action.

Overview
A consumer attempted to drive an all-terrain vehicle (ATV) up a steep embankment. It overturned backward and injured him. A jury returned a verdict in favor of the consumer in his subsequent product liability action against the manufacturers and sellers. The appellate court affirmed. On further appeal, the court affirmed. Consumer Products Safety Commission documents were relevant to

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN1 See U.S. Const. amend. XIV.

Evidence > Relevance > Relevant Evidence

HN2 Or. Evid. Code 401 provides that "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Evidence > Relevance > Relevant Evidence

HN3 Or. Evid. Code 402 provides that all relevant evidence is admissible, except as otherwise provided by the Oregon Evidence Code, by the Constitutions of the United States and Oregon, or by Oregon statutory and decisional law. Evidence which is not relevant is not admissible.

Evidence > ... > Hearsay > Rule Components > General Overview
Evidence > ... > Hearsay > Rule Components > Declarants
Evidence > ... > Hearsay > Rule Components > Truth of Matter Asserted

HN4 Or. Evid. Code 801(3) provides that "hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Civil Procedure > Judicial Officers > Judges > General Overview
Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN5 Under Or. Evid. Code 403, relevant evidence is admissible so long as its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. Or. Evid. Code 403 requires the trial judge to go through a conscious process of balancing the costs of the evidence against its benefits. Unless the judge concludes that the probative worth of the evidence is substantially outweighed by one or more of the countervailing factors, there is no discretion to exclude; the evidence must be admitted.

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials
Civil Procedure > Judgments > Relief From Judgments > Newly Discovered Evidence

HN6 Under Oregon law, newly discovered evidence which will justify a court in granting a new trial must meet the following requirements: (1) it must be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as, with due diligence, could not have been discovered before the trial; (4) it must be material to the issue; (5) it must not be merely cumulative; (6) it must not be merely impeaching or contradicting of former evidence.

Civil Procedure > Remedies > Damages > General Overview
Civil Procedure > Remedies > Damages > Punitive Damages
Torts > ... > Types of Damages > Punitive Damages > General Overview


Torts > ... > Types of Damages > Punitive Damages > General Overview

HN8 See Or. Rev. Stat. § 41.315.

In cases involving potential awards of punitive damages in Oregon, the finder of fact must determine what punitive damages, if any, to award based on the proper premise of deterring future similar misconduct by the defendant or others. To this end, a number of factors may be relevant, including the seriousness of the hazard to the public, the attitude and conduct of the wrongdoer upon learning of the hazard, the number and position of employees involved in causing or covering up the misconduct, the duration of the misconduct or its cover-up, the financial condition of the wrongdoer, and prior and potential punishment from similarly situated plaintiffs or other sources.

Counsel: Jeffrey R. Brooke, of Bowman and Brooke, Phoenix, Arizona, argued the cause and filed the petition for petitioners on review. With him on the petition were Paul G. Cereghini, Phoenix, Arizona, and Thomas W. Brown and James H. Gidley, of Cosgrave, Vergeer & Kester, Portland.

William A. Gaylord, of Gaylord & Eyerman, P.C., Portland, argued the cause for respondent on review and filed a response to the petition. With him on the response was Doris J. Brook, and Raymond F. Thomas of Royce, Swanson & Thomas, Portland.


Mildred J. Carmack and Ridgway K. Foley, Jr., P.C., of Schwab, Williamson & Wyatt, Portland; and James N. Westwood, of Miller, Nash, Wiener, Hager & Carlsen, Portland, filed a brief on behalf of amicus curiae Oregon Association of Defense Counsel.

David A. Engels, of Banks, Newcomb & Engels, Portland, filed a brief on behalf of amici curiae Consumer Federation of America; United States Public Interest Research Group; Oregon State Public Interest Research Group; Portland Family Head Injury Support Group; Oregon Trial Lawyers Association; and The Southern Poverty Law Center.
This case involves a product liability claim against defendants, who manufactured and sold a 1985 Honda Model ATC350X three-wheeled all-terrain vehicle (ATV) used by plaintiff. Plaintiff attempted to drive the ATV up a steep embankment; it overturned backward, injuring him. Plaintiff then brought this action against defendants, alleging that they were negligent in manufacturing, distributing, and selling the ATV, because they knew or should have known that it had an inherently dangerous design that rendered it unreasonably dangerous to users, and alleging strict liability.

A jury returned a verdict in favor of plaintiff, awarding both general and punitive damages. Defendants appealed. They argued, among other things, that the trial court erred in admitting in evidence excerpts of various documents generated by the Consumer Product Safety Commission (CPSC), because that evidence was used for the limited and relevant purpose of showing defendants' knowledge of the allegedly dangerous characteristics of ATVs. Oberg v. Honda Motor Co., 108 Or App 43, 47-48, 814 P2d 517 (1991). The Court of Appeals also held that the trial court did not err in denying defendants' motion for a new trial on the basis of the discovery of new eyewitnesses to plaintiff's accident, because the trial court was entitled to find that the newly discovered evidence probably would not have changed the verdict. Id. at 55-56. With respect to punitive damages, the court held that the award did not violate defendants' rights under Article I, section 16, of the Oregon Constitution, because that provision "does not apply in civil actions between private parties." Id. at 49-50. Finally, the court held that the award of punitive damages did not violate defendants' rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Id. at 50-55. We affirm the decision of the Court of Appeals.

**ADMISSIBILITY OF CPSC DOCUMENTS**

Defendants first argue that the trial court erred in allowing plaintiff to read to the jury excerpts from nine CPSC documents. The documents included seven CPSC internal staff memoranda on the safety of ATVs; a CPSC notice of proposed rulemaking and request for comments and data relating to the safety of ATVs; and a CPSC press release concerning ATV-related accidents and injuries.

**A. Relevance**
During the hearing on defendants' motion in limine to exclude documents generated by the CPSC, plaintiff argued that the disputed material was relevant to show that defendants had "notice" of the alleged dangerousness of ATVs and that [**1087] the material was, therefore, relevant to two issues: the foreseeability of plaintiff's injury and defendants' reaction to the notice as bearing on punitive damages.

**H2 OEC 401 provides:**

"Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[*268] **H3 OEC 402 provides:**

"All relevant evidence is admissible, except as otherwise provided by the Oregon Evidence Code, by the Constitutions of the United States [***7] and Oregon, or by Oregon statutory and decisional law. Evidence which is not relevant is not admissible."

Defendants do not challenge the authenticity of the CPSC documents, and they stipulated that they had received each of the documents from which plaintiff read excerpts, at approximately the time of its publication. Defendants do not argue that their knowledge of ATVs' potential instability was irrelevant to the issues at trial. Rather, they argue that the other ATVs and the other accidents described in the disputed documents were so unlike this ATV and this accident that knowledge of the documents did not give defendants notice of anything relevant.

First, defendants contend that the ATVs that were the subject of the CPSC documents were not "substantially similar" to the Honda ATV that allegedly caused the injury in this case. We are unpersuaded. The CPSC documents dealt with ATVs as a class of vehicles. As one of the documents stated, vehicles of that class are of similar design. The trial court was entitled to find that the ATVs that were the subject of the CPSC documents were sufficiently similar to the ATV that caused the injury in this case to provide notice to defendants [***8] of danger to persons in plaintiff's position.

Second, defendants contend that the accidents that were referred to or described in the CPSC documents were not "substantially similar" to the accident that caused plaintiff's injury here. Again, we disagree with defendants' contention. One of the excerpts at issue concerned reports of the instability of ATVs as a class.

Another concerned reports showing a "pattern of loss of control" specifically associated with ATVs manufactured by Honda. Three excerpts concerned reported incidents in which ATVs overturned backward, and three others more specifically concerned incidents in which ATVs overturned backward while climbing hills. As noted, the ninth excerpt concerned the similarity in configuration among all brands of ATVs. The trial court was entitled to find that the prior occurrences that were described in those [*269] excerpts were sufficiently similar to the accident at issue in this case to make those occurrences relevant.

In summary, the excerpts from the CPSC documents, admitted by the trial court, were relevant to issues at trial. The trial court did not err in so holding.

**B. Hearsay**

We next consider defendants' argument [***9] that, even if the excerpts from the CPSC documents were relevant to the issue whether defendants had notice of the dangerousness of the product, those excerpts were inadmissible because they were hearsay. **H4 OEC 801(3) provides:**

"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Defendants' hearsay objections were not well taken, because the excerpts from the CPSC documents were not offered to prove the truth of the matters asserted therein. Rather, those excerpts were offered for the limited and proper purpose of showing that defendants had knowledge of the potential dangerousness of ATVs. See Kirkpatrick, Oregon Evidence 484-85 (2d ed 1989) ("[m]any out-of-court statements may be received in evidence because they are not being offered for the truth of the matter asserted," but for some other purpose, including the purpose of showing that the recipient of the statement had knowledge of the matter asserted therein).

[**1088] It is clear that the trial court admitted the documents for the limited purpose for which plaintiff offered them. The court gave the [***10] following instruction just before the excerpts of CPSC documents were read to the jury:

"Jurors, I am now going to permit plaintiff's counsel to read to you excerpts from some documents of the federal agency. The documents that I will allow plaintiff's counsel to read to you are not admitted for the purpose of establishing the truth of the statements
contained in those documents. That means that you should not assume that the statements in those documents are true.

'These documents are admitted for the limited purpose of notice. Plaintiff has alleged that these documents gave [*270] defendants notice before the date of [plaintiff's] accident that the [ATVs] could overturn.

'I will not suggest to you that these documents constitute adequate notice. The adequacy of the notice is an issue for you to decide. The statements contained in these documents, the ones that will be read to you, may or may not be true. But we are not going to resolve their truth in this courtroom. In other words, they are coming in for a limited purpose on the basis that the plaintiff has alleged that [Defendants] had notice, and this is the evidence that's submitted to you and you will make that ultimate [***11] determination.' After plaintiff's counsel read the excerpts, the trial court told the jury:

'Jurors, again, I want to review with you the limitation that the Court has placed on this information. First, I want to remind you that you should not assume that these statements are true. The plaintiff claims that the excerpts that the lawyer just read to you gave [defendants] notice before plaintiff's accident that [ATVs] could overturn, and I'm not suggesting to you that the excerpts just read to you constitute adequate notice. That will be an issue that you will have to decide.'

The CPSC documents were not excludable as hearsay.

C. Prejudice

Defendants argued that the probative value of each of the CPSC documents was substantially outweighed by its prejudicial effect. In *State v. Pinnell*, 311 Or 98, 112, 806 P2d 110 (1991), this court explained:

\[HN5\] "Under OEC 403, relevant evidence is admissible so long as its probative value is not 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence.' [***12]

"OEC 403, like its federal counterpart, FRE 403, "requires the trial judge to go through a conscious process of balancing the costs of the evidence against its benefits. Unless the judge concludes that the probative worth of the evidence is "substantially outweighed" by one or more of the countervailing factors, there is no discretion to exclude; the evidence must be admitted.'"

[*271] (Quoting Wright & Graham, 22 Federal Practice and Procedure 263-64.)

The record in this case demonstrates that the trial court went through the conscious process that is required. The court carefully considered the evidentiary costs and benefits of the CPSC documents and concluded that the probative value of those documents was not substantially outweighed by the danger of unfair prejudice. The record permitted a reasonable trial court to draw that conclusion. Having permissibly drawn that conclusion, the trial court was required then to admit the disputed evidence. There was no error.

D. Conclusion

The excerpts from the CPSC documents were authentic, were relevant, and were not hearsay. The trial court did not err in admitting them.

[**1089] NEWLY DISCOVERED EVIDENCE

We [***13] next consider defendants' argument that the trial court erred in denying their motion, made pursuant to *ORCP 64B(4)* [***14] and *ORCP 71B(1)(b)*, for a new trial based on the discovery, after trial, of two eyewitnesses to part of the incident giving rise to plaintiff's injury. The witnesses were a man and his...
daughter, who was seven years old at the time of plaintiff's accident. Defendants assert that the testimony of those witnesses would have disputed the testimony of the only other eyewitnesses to the accident -- plaintiff's two [*272] brothers -- in regard to plaintiff's location at the time he began the maneuver that culminated in his accident and in regard to his speed and his position on the ATV during the maneuver. Defendants argue that, because the witnesses would have provided the jury with "important new evidence" on many basic facts of the accident and because they were the only unbiased witnesses to the incident, it was probable that their testimony would have changed the outcome of the trial.

Plaintiff responds that, because the eyewitnesses did not see the ATV turn over, but only saw plaintiff as he started up the hill and again after he had been injured, the testimony of the eyewitnesses "provided no new insight into the nature of plaintiff's accident."

This court has not previously considered what factors a trial court should weigh in ruling on a motion for a new trial, under ORCP 64B(4), based on the discovery of new evidence. ORCP 64B(4) is, however, materially identical to former OCLA 5-802(4) and former ORS 17.610(4). In reviewing the denial of motions made under those statutes, this court consistently stated that applications for a new trial based on newly discovered evidence are not favored and that the grant or denial of such motions is within the sound discretion of the trial court.

"'(1) It must be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as, with due diligence, could not have been discovered before the trial; (4) it must be material to the issue; (5) it must not be merely cumulative; (6) it must not be merely impeaching or contradicting of former evidence. § 5-802, O.C.L.A." (Citation omitted.)"

The trial court in this case found that there was no lack of diligence by defendants in their efforts to locate the [*273] witnesses before trial. See ORCP 64B(4) (stating that prerequisite for granting a new trial for reason of newly discovered evidence); State v. Davis, supra (same under former law). After reviewing affidavits from the newly discovered witnesses and other information pertaining to their expected testimony, however, the trial court found that "the newly discovered evidence probably would not have changed the result" of the trial.

[**1090] We conclude that, first, the trial court did not err in applying that standard to the newly discovered evidence. See ORCP 64B (new trial may be granted for specified "causes materially affecting the substantial rights" of aggrieved party); State v. Davis, supra (under former law, stating test of probable change of result). Second, having reviewed the evidence, we conclude that the trial court did not abuse its discretion in denying the motion. We note, as did the Court of Appeals, the length of time between the accident and the witnesses' statements (four years), the daughter's young age at the time of the accident, the distance from which the witnesses observed plaintiff, the fact that neither witness actually saw the accident, and the fact that the father said that he did not disagree with plaintiff's testimony. Those factors suggest that the newly discovered evidence probably would not have changed the result of the trial.

HN6 "Newly discovered evidence which will justify a court in granting a new trial must meet the following requirements:

'(4) Newy discovered evidence. material for the party making the application, which such party could not with reasonable diligence have discovered and produced at trial."

6 ORCP 71B(1)(b) provides:

"On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: * * * (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64F, requiring that a motion for a new trial be filed within 10 days after the entry of the judgment sought to be set aside]."
The trial court did not err in denying defendants' motion for a new trial on the basis of the discovery of the new witnesses.

CONSTITUTIONALITY OF THE AWARD OF PUNITIVE DAMAGES

We next turn to defendants' constitutional arguments. We first consider defendants' state constitutional claim. See State v. Kennedy, 295 Or 260, 262, 666 P2d 1316 (1983) (court considers state constitutional claims before federal ones).

A. Article I, section 16

Defendants argue that the award of punitive damages in this case violated their rights under Article I, section 16, of the Oregon Constitution, set out in note 3, supra, to be free from "excessive fines" and from penalties not "proportioned to the offense." This court has not previously considered the application of that constitutional provision to a civil award of punitive damages.

We begin by examining the text and context of the provision. See Priest v. Pearce, 314 Or 411, 415-19, 840 P2d 65 (1992) (setting out method of construing another provision of Oregon Constitution). The first sentence of Article I, section 16, refers to what may be done before and after conviction of a crime. Article I, section 16, limits the amount of bail that may be required; bail relates to criminal proceedings. See Article I, section 14 (providing that offenses other than murder and treason shall be bailable). The first sentence of Article I, section 16, further specifies that "excessive fines" may not be imposed. That limitation follows the reference to bail and precedes two sentences relating only to criminal cases. Moreover, at the time that the Oregon Constitution was drafted (as now), a "fine" commonly referred to a criminal penalty. See Burrill's Law Dictionary, Part 1, at 491 (1850) ("Fine" means "[a] payment of money imposed upon a party as a punishment for an offense." "To fine" means "[t]o impose a pecuniary punishment; to order, adjudge or sentence that an offender pay a certain sum of money as a punishment for his offence.").

The second sentence of Article I, section 16, uses two terms that refer to crimes: "punishments" and "offense." Those terms appear in the two preceding constitutional provisions, where they clearly refer only to crimes. Article I, section 14, relates to bail for criminal "offences" [sic], and Article I, section 15, uses the word "punishment" to refer to punishment for crime. See State v. Wagner, 305 Or 115, 212, 752 P2d 1136 (1988) (Linde, J., dissenting) ("principles of humane penal laws" are "enshrined" in Article I, section 15, and Article I, section 16 (emphasis added)).

The final sentence of Article I, section 16, specifies that it applies "[i]n all criminal cases whatever." That sentence mentions civil cases only as a benchmark, further suggesting that the section does not itself apply to civil cases.

Reading Article I, section 16, as a whole, and in context, we conclude that it applies only to criminal cases.

B. Due Process

Finally, defendants argued on appeal that, because the award of punitive damages in this case was the product of an exercise of standardless discretion by the jury and was "excessive" and "disproportionate," it violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, set out at note 4, supra. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S Ct 1032, 113 L Ed 2d 1 (1991), which defendants cite in support of this argument, was decided after the trial in this case. In this court, defendants rely on Haslip for the proposition that, to afford due process, an award of punitive damages must be subject to comprehensive post-verdict trial and appellate court review and that, because Article VII (Amended), section 3, of the Oregon Constitution does not apply to civil awards of punitive damages. The award of punitive damages in this case, therefore, does not violate Article I, section 16.

[*275] History does not disprove what the text demonstrates. Article I, section 16 was modeled after the equivalent provision of the Indiana Constitution. Carey, The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857, at 468 (1926). We have found no Indiana court decision or other source antedating Oregon's adoption of the Indiana provision, which might inform us as to what the framers of our constitution understood. See Priest v. Pearce, supra, 314 Or at 418-19 (so stating).

We hold that Article I, section 16, of the Oregon Constitution, does not apply to civil awards of punitive damages. The award of punitive damages in this case, therefore, does not violate Article I, section 16.

[*276] 316 Ore. 263, *273; 851 P.2d 1084, **1090; 1993 Ore. LEXIS 62, ***17
Constitution 7 restricts the power of Oregon trial and [*276] appellate courts to conduct such a review, the required safeguards were absent here.

[***22] In response, plaintiff contends that, in approving Alabama’s procedure for awarding punitive damages in Pacific Mut. Life Ins. Co. v. Haslip, supra, the United States Supreme Court did not establish standards for such awards beyond the general requirements of “reasonableness” and of “adequate guidance” to the jury by the trial court. Plaintiff also contends that the award of punitive damages in this case met those standards.

Because of its significance to our decision here, we begin by examining in detail the decision of the United States Supreme Court in Pacific Mut. Life Ins. Co. v. Haslip, supra.8 In that case, the health insurance policies of four insureds lapsed after an agent of the insurer misappropriated their premium payments. The insureds brought an action for fraud against the insurer. The trial court instructed the jury that, if it found liability for fraud, it could award punitive damages to the plaintiffs.

[***23] The jury awarded punitive damages; the trial court approved the award, and the Alabama Supreme Court affirmed it on appeal. The insurer sought certiorari in the United States Supreme Court, on the ground that the award of punitive damages was the product of unbridled jury discretion and that it therefore violated the insurer’s rights under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

In considering that assertion, the United States Supreme Court noted that “[p]unitive [*1092] damages have long been a part of traditional state tort law,” Pacific Mut. Life Ins. Co. v. Haslip, supra, 111 S Ct at 1041, and that the common-law method of assessing those damages was not per se unconstitutional, id. at 1042-43. The Court described the common-law method as follows:

"Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury [*277] instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury’s determination is then reviewed by trial and appellate courts to ensure that it is [***24] reasonable." Id. at 1042. The Court noted that, on previous occasions, it had approved awards of punitive damages even where the "discretion of the jury * * * [was] not controlled by any very definite rules" and where "there was no statute fixing a maximum penalty, no rule for measuring damages, and no hearing." Ibid.

The Court cautioned, however, that the mere fact that punitive damages “have been recognized for so long” did not mean that “their imposition is never unconstitutional.” Expressing concern about “punitive damages ‘run wild,’” the Court concluded that it must "determine whether the Due Process Clause renders the punitive damages award in this case constitutionally unacceptable.” Id. at 1043.

The Court’s analysis proceeded as follows:

"One must concede that unlimited jury discretion -- or unlimited judicial discretion for that matter -- in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns [***25] of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus. * * *

7 Article VII (Amended), section 3, of the Oregon Constitution, provides in part:

"In actions at law, where the value in controversy shall exceed $ 200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." In Van Lom v. Schneiderman, 187 Or 89, 110-13, 210 P2d 461 (1949), this court held that the assessment of punitive damages, because it is a matter "committed to the decision of a jury," is a question of fact to which the prohibition in Article VII, section 3 (now Article VII (amended), section 3), applies. See Friendship Auto v. Bank of Willamette Valley, 300 Or 522, 537, 716 P2d 715 (1986) (where there was evidence from which the jury could have found that the defendant acted with malice, so as to be liable for punitive damages, the trial court erred under Article VII (Amended), section 3, in entering a judgment for the defendant notwithstanding the jury verdict).

8 On March 31, 1993, the United States Supreme Court heard oral argument in TXO Production Corp. v. Alliance Resources, cert granted. U.S. 113 S Ct 594, 121 L Ed 2d 532 (1992) (case below, 187 W Va 457, 419 SE2d 870), a West Virginia case involving a due process challenge to an award of punitive damages.
"1. We have carefully reviewed the instructions [given] to the jury [by the Alabama court in this case]. 9 By these [*278] instructions, the trial court expressly described for the jury the purpose of punitive damages. * * *

'To be sure, the instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It was confined to deterrence and retribution, the state policy concerns sought to be advanced. And if punitive damages were to be awarded, the jury 'must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.' * * *

'These instructions, we believe, reasonably accommodated [the defendant's] interest in rational decisionmaking and Alabama's interest in meaningful individualized assessment of appropriate deterrence [**1093] and retribution. * * * As long as the discretion is exercised within reasonable constraints, due process is satisfied.

"2. Before the trial in this case took [***26] place, the Supreme Court of Alabama had established post-trial procedures for scrutinizing punitive awards. In Hammond v. City of Gadsden, 493 So 2d 1374 (1986), it stated that trial courts are 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages.' Among the factors deemed 'appropriate for the trial court's consideration' are 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.' The Hammond test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages.

"3. By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion. It first undertakes a comparative analysis. It then applies the detailed substantive standards it [*279] has developed for evaluating punitive damages. In particular, it makes its review to ensure that the award does 'not exceed an amount that will accomplish society's goals [***27] of punishment and deterrence.' Green Oil Co. v. Hornsby, 539 So 2d 218 (1989). This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.

"Also before its ruling in the present case, the Alabama Supreme Court had elaborated and refined the Hammond criteria for determining whether a punitive award is reasonably related to the goals of deterrence and retribution. Hornsby, [supra]. It was announced that the following could be taken into consideration in determining whether the award was excessive or inadequate: (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

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9 The trial court's instructions in that respect stated:

"Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.

"This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. * * *

"Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, * * * by way of punishment of the defendant and for the added purpose of protecting the public by deterring [sic] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury. * * *

"Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." As required by Alabama law, evidence of the defendant's financial worth was not submitted to the jury. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S Ct 1032, 1037 n 1, 1044, 113 L Ed 2d 1 (1991).
of reprehensibility of the defendant’s conduct, the duration of that conduct, the defendant’s awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that [***28] profit and 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.

'The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. * * *

"* * * The standards provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter. They surely are as specific as those adopted legislatively in [Ohio] and [Montana].

"[The insurer] had the benefit of the full panoply of Alabama's procedural protections. The jury was adequately instructed. The trial court conducted a post-verdict hearing that conformed with Hammond. * * * [The Supreme Court of Alabama] applied the Hammond standards and approved the verdict thereunder. It brought to bear all the relevant factors recited in Hornsby.

[***28] "We are [***29] aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses of [the plaintiff], and, of course, is much in excess of the fine that could be imposed for insurance fraud [under Alabama law]. * * * While the monetary comparisons are wide and, indeed, may be close to the line, the [***1094] award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety. Accordingly, [the defendant’s] due process challenge must be, and is, rejected." 111 S Ct at 1043-46 (footnotes omitted; some citations omitted).

[***30] In summary, the Supreme Court first identified the constitutional interests required to be safeguarded in the determination of an award of punitive damages: the constitutional interest in ensuring that the finder of fact has "adequate guidance" in making such an award and the constitutional interest in ensuring that the amount of the resulting award is "reasonable." Pacific Mut. Life Ins. Co. v. Haslip, supra, 111 S Ct at 1043. 10 The Court then identified the criteria that are applied in Alabama when a jury makes, or a court approves, an award of punitive damages. Finally, the Court determined that the application of those criteria adequately safeguarded the constitutional interests identified, because the criteria "impose[d] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages," id. at 1045, and because the criteria "provide[d] for a rational relationship" between the amount of an award and a defendant's conduct, the need for punishment, and the need for deterrence, id. at 1045-46.

[***31] [*281] We apply an equivalent analysis to the procedure for determining awards of punitive damages in Oregon product liability actions, to ascertain whether that procedure, although differing in some respects from the Alabama procedure, also adequately safeguards the due process rights of defendants in this state. We begin by setting out the statute establishing the substantive criteria to be considered by Oregon factfinders in deciding, in product liability actions, whether to make awards of punitive damages and in setting the amounts of those awards. HN7 ORS 30.925 provides:

"(1) In a product 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

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10 Although the Supreme Court does not use the terms, we interpret those two interests to coincide with the constitutional interests in procedural and substantive due process. A commentator explains that procedural due process in the context of an award of punitive damages relates to the requirement that the procedure employed in making that award be fundamentally fair: substantive due process in that context relates to the requirement that the amount of the award be proportional to the defendant's conduct and may also be implicated when multiple awards of punitive damages are made against the same defendant for the same course of conduct. May, Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After Pacific Mutual Life Ins. Co. v. Haslip, 22 Envtl L. 573, 587-88, 606-07 (1992). Multiplicity of awards is not an issue in this case.
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 [***32] 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 on the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties [**1095] to which the defendant has been or may be subjected." In addition, HN8 ORS 41.315 provides:

"(1) Except as otherwise specifically provided by law, a claim for punitive damages shall be established by clear and convincing evidence.

[*282] "(2) In a civil action in which a party seeks punitive damages from another party, evidence of the financial condition of a party shall not be admissible until the party seeking such damages has presented evidence sufficient to justify to the court a prima facie claim of punitive damages." 11

[***33] More generally:

"Punitive damages are allowed in Oregon to punish a willful, wanton or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in the future. Martin v. Cambas, 134 Or 257, 293 P 601 (1930); accord Noe v. Kaiser Foundation Hospitals, 248 Or 420, 435 P2d 459 (1968)."

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11 Defendants do not claim that the trial court failed to instruct the jury concerning the statutory criteria or that the jury did not properly apply those criteria. The trial court instructed the jury as follows:

"Punitive damages: If you have found that plaintiff is entitled to general damages, you must then consider whether to award punitive damages. Punitive damages may be awarded to the plaintiff in addition to general damages to punish wrongdoers and to discourage wanton misconduct.

"In order for plaintiff to recover punitive damages against the defendant[s], the plaintiff must prove by clear and convincing evidence that defendant[s have] shown wanton disregard for the health, safety, and welfare of others.

"* * *

"If you decide this issue against the defendant[s], you may award punitive damages, although you are not required to do so, because punitive damages are discretionary.

"In the exercise of that discretion, you shall consider evidence, if any, of the following:

"First, the likelihood at the time of the sale [of the ATV] that serious harm would arise from defendants' misconduct.

"Number two, the degree of the defendants' awareness of that likelihood.

"Number three, the duration of the misconduct.

"Number four, the attitude and conduct of the defendant[s] upon notice of the alleged condition of the vehicle.

"Number five, the financial condition of the defendant[s].

"And the amount of punitive damages may not exceed the sum of $ 5 million."
Punitive damages "are not a substitute for compensatory awards nor an offset against litigation expense." Id.; see also Andor v. United Air Lines, 303 Or 505, 511-13, 516-17, 739 P2d 18 (1987). * * *

"* * [T]he appropriate line of analysis that this Court has said a jury should follow \textit{HN9} in cases involving potential awards of punitive damages is:\*

\begin{quote}
\textbf{[\*283]} "[t]he finder of fact must determine what punitive damages, if any, to award based on the proper premise of deterring future similar misconduct by the defendant or others. To this end, a number of factors may be relevant, including the seriousness of the \textbf{[***34]} hazard to the public, the attitude and conduct of the wrongdoer upon learning of the hazard, the number and position of employees involved in causing or covering up the misconduct, the duration of the misconduct and/or its cover-up, the financial condition of the wrongdoer, and prior and potential punishment from similarly situated plaintiffs or other sources."

\textit{State ex rel Young v. Crookham, supra, 290 Or at 72.} \textit{Honeywell v. Sterling Furniture Co., 310 Or 206, 210-11, 797 P2d 1019 (1990).}"
\end{quote}

In summary, in Oregon, as in Alabama, the factfinder must consider the "culpability" of a defendant. \textit{ORS 30.925(1); Haslip, supra, 111 S Ct at 1046}, "Objective" criteria, see \textit{Haslip, supra, 111 S Ct at 1046}, considered in Alabama, and required to be considered in Oregon product liability actions, include the likelihood of harm from a defendant's conduct, the duration and profitability of the conduct, the defendant's awareness or concealment of it, the defendant's financial position, \textbf{[***35]} and the imposition of other sanctions on the \textbf{[**1096]} defendant. 12 Oregon law also provides an extra precaution; a plaintiff must prove entitlement to punitive damages by clear and convincing evidence, rather than a mere preponderance. \textit{ORS 30.925(1); ORS 41.315(1)}. We conclude that, in product liability actions in Oregon, as in Alabama cases, application of objective criteria ensures that sufficiently definite and meaningful constraints are imposed on the finder of fact and ensures that the resulting award is not disproportionate to a defendant's conduct and to the need to punish and deter.

\begin{quote}
\textbf{[***36]} Neither is the Oregon procedure in product liability actions rendered unconstitutional by the fact that objective \textbf{[\*284]} criteria are applied during the factfinder's \textit{initial} determination of the amount of an award of punitive damages, rather than during post-verdict or appellate review of the award. We do not interpret \textit{Haslip} to hold that an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review that includes the possibility of remittitur. \textit{See May, Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After Pacific Mutual Life Ins. Co. v. Haslip, 22 Envtl L 597, 601 (stating that \textit{Haslip} leaves open that question); Union Nat. Bank of Little Rock v. Mosbacher, 933 F2d 1440, 1447-48 (8th Cir 1991) (reviewing the \textit{Haslip} decision and stating that the Supreme Court considered Alabama's jury instructions, post-trial scrutiny, and appellate review to be "significant factors" in determining the constitutionality of that state's procedure). 13 Rather, in \textit{Haslip}, the \textbf{[***37]} Court determined only that the Alabama procedure, as a whole and in its net effect, did not violate the Due Process Clause. See \textit{Pacific Mutual Life Ins. Co. v. Haslip, supra, 111 S Ct at 1043} (Court's task was to determine whether the Due Process Clause rendered constitutionally unacceptable the punitive damages award in that case).

\textbf{[***38]} Similarly, we believe that Oregon's procedure in product liability actions -- as a whole and in its net effect
\end{quote}

\textit{[13] The California Supreme Court, considering the decision of the United States Supreme Court in \textit{Haslip, supra, in the context of the limited question whether a defendant's financial condition is a proper criterion for consideration in the assessment of punitive damages, stated in \textit{dictum} that \textit{Haslip} "has made clear a constitutional mandate for meaningful judicial scrutiny of punitive damage awards." \textit{Adams v. Murukami}, 54 Cal 3d 105, 813 P2d 1348, 1356 (1991). \textit{See also Alexander v. Evander, 88 Md App 672, 596 A2d 678 (1991)} (\textit{Haslip} implicitly requires both standards to guide the jury's and trial court's discretion and judicial review of jury verdicts). To the extent that the statement of the California Supreme Court does not account for variations in pre-verdict procedures for determining punitive damage awards, we disagree with it.}

\textit{[12] The Oregon statutory criteria are almost identical to the criteria established in the Ohio statute that is noted approvingly by the Supreme Court in \textit{Haslip, 111 S Ct at 1046}. In Ohio, however, the criteria are abolished by the trial court after the factfinder -- whether a jury or the court -- determines that the defendant is liable for punitive damages. \textit{Ohio Rev Code Ann § 2307.80.}
-- is constitutional. If anything, initial application of the constitutionally sufficient objective criteria enumerated in ORS 30.925, rather than post-hoc application of those criteria, increases the protective effect of the criteria. See Haslip, supra, 111 S Ct at 1060-61 (O'Connor, J., dissenting) (Alabama system violates due process, because that system vests standardless discretion in the jury to fix a penalty and [*285] provides for application of standards only on review of jury award; jury should be instructed in, and apply, Alabama criteria).

We also note that the trial court, after the verdict, and the appellate courts are not entirely powerless. If there is no evidence to support the jury's decision -- in this context, no evidence that the statutory prerequisites for the award of punitive damages were met -- then the trial court or the appellate courts can intervene to vacate the award. See ORCP 64B(3) (trial court may grant a new trial if the evidence is insufficient to justify the [*39] verdict or is against law); Hill v. Garner, 277 Or 641, 643, 561 P2d 1016 (1977) (judgment notwithstanding [*107] the verdict is to be granted when there is no evidence to support the verdict); State v. Brown, 306 Or 599, 604, 761 P2d 1300 (1988) (a fact decided by a jury may be re-examined when a reviewing court can say affirmatively that there is no evidence to support the jury's decision).

Moreover, appellate review is available to test the sufficiency of the jury instructions. See ORCP 59 H (prescribing method of preserving alleged instructional error for appeal). Thus, defendants in Oregon can obtain post-verdict review to ensure that the jury was instructed properly and that there was evidence to support the jury's award of punitive damages. See also Honeywell v. Sterling Furniture Co., supra, 310 Or at 210-14 (holding that it was prejudicial error to instruct a jury that a portion of any punitive damages award would be used to pay the plaintiff's attorney fees and a portion would go to the Criminal Injuries Compensation Account, [*40] and reversing award of punitive damages).

Those procedural protections, in turn, ensure that an award of punitive damages in a product liability action bears a rational relationship to a defendant's conduct and to the need for punishment and deterrence. As the Fifth Circuit Court of Appeals noted in Eichenseer v. Reserve Life Ins. Co., 934 F2d 1377, 1382 (5th Cir 1991):

"Under Haslip, an award of punitive damages does not meet constitutional requirements unless the circumstances of the case indicate that the award is reasonable. This condition, contrary to the assertion of [the defendant], is not a vehicle for expansive appellate review of punitive damages awards. * * *

[*286] * * * Accordingly, in reviewing the constitutionality of an award of punitive damages, a court may not explicitly or implicitly recalculate the award of damages; moreover, it may not express an opinion whether the award is too high or too low. Rather, the court may only consider whether the circumstances of the case offer some support for the amount of the award. If there are any circumstances of probative value that support the amount of the award, then that [*41] award meets the 'reasonableness' prong of the due process test in Haslip." (Footnote omitted; emphasis in original.) The court added that:

"the procedural protection adequate to support the constitutionality of a punitive damages award varies with the circumstances. * * * As long as there is some meaningful procedural assurance that the amount of the award is not an impulsive reaction to the wrongful conduct of the defendant, the award survives the procedural protection aspect of the due process analysis in Haslip." Id. at 1385 The court concluded that the award of punitive damages in that case "did not lack support in the record." Id. at 1382. See also Morgan v. Woessner, 975 F2d 629, 641 n 8 (9th Cir 1992) (stating, in the context of the defendant's claim that the award of punitive damages violated due process, that the trial court's instructions to the jury -- that the jury must find by clear and convincing evidence that the defendant was culpable, must consider the relationship between the award and the harm suffered by the plaintiff, must consider deterrence and retribution, [*42] must not make an award out of passion or prejudice, and must consider the defendant's financial worth -- "appear to meet all the concerns of the Haslip court"); Herman v. Sunshine Chemical, 257 NJ Super 533, 608 A2d 978, 983 (1992) ("[w]hether to award punitive damages and their amount is within the discretion of the trier of fact").

We also note that the relatively narrow scope of appellate review of punitive damages awards in Oregon is similar to

14 In Haslip, the Court stated that the award of punitive damaees, which was unheld, was more than 4 times the amount of compensatory damages and more than 200 times the amount of out-of-pocket expenses of the plaintiff, 111 S Ct at 1046. The
that available to federal appellate courts reviewing [*287] [*1098] awards of punitive damages made in federal district courts applying state law in cases involving diversity jurisdiction. See Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 109 S Ct 2909, 2922-23, 106 L Ed 2d 219 (1989) (noting the limited scope of review of punitive damage awards by federal appellate courts in cases involving diversity jurisdiction). In Mattison v. Dallas Carrier Corp., 947 F2d 95 (4th Cir 1991), the Fourth Circuit Court of Appeals reviewed an award of punitive damages made by a federal district court applying South Carolina law. The court noted that its scope of review was restricted in part by the Seventh Amendment to the Constitution of the United States, which applies only to federal courts and which provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

[*44] Id. at 99 and 99 n 1.

The court examined the United States Supreme Court's approval of the Alabama system of determining punitive damages:

"[Haslip's] unusual approach of emphasizing postverdict review to the extent of perhaps slighting a review of the pre-verdict process raises significant questions when federal courts, sitting in diversity cases, are confronted with the proper application of state punitive damages. The legitimizing constraints provided by the quasi de novo review process practiced under Alabama state law cannot be applied by a federal district court. * * *

"* * *

"The law of South Carolina permits a jury to award punitive damages to punish, deter, and vindicate the rights of the plaintiff whenever the conduct of the defendant is willful, wanton or reckless. The plaintiff must prove by clear and convincing evidence that the conduct included a 'consciousness of wrongdoing' at the time of the conduct. Punitive damages may be awarded only if actual damages are awarded."

"The amount of the penalty is committed to the discretion of the jury. The Supreme Court of South Carolina has repeatedly announced that no formula applies [*45] in awarding [*288] punitive damages and [that] their award and amount are 'peculiarly within the judgment and discretion of the jury * * *. Thus, * * * there is no appropriate ratio between actual damages and punitive damages * * *. Similarly, there is no requirement that punitive damages bear any specified relationship to the wealth of the defendant. * * * Moreover, punitive damages awards would apparently be upheld in the absence of any evidence of the worth of the defendant.

"The only constraint on the award by the jury is provided by the discretion given to the trial court to review the award for excessiveness. The review by the appellate court is under an abuse-of-discretion standard. The appellate court will reverse a trial court's refusal to set aside an award only when the award is "so shockingly excessive as manifestly to show" that the jury was actuated by caprice, passion or prejudice."

"When the verdict is returned in a federal court * * *, no significantly greater restraint is provided.

"* * *

"Since the argument in this case, the Supreme Court of South Carolina [has] adopted * * * a more elaborate post-trial review to be conducted in the future by state trial [*106] courts in an attempt to avoid due process challenges. * * * [T]he court announced new factors to be considered * * *. Id. at 99-100, 106. The factors announced by the South Carolina Supreme Court included the defendant's degree of culpability, the duration of the culpable conduct, the defendant's awareness or concealment of it, the existence of similar past conduct, the determination whether the award is reasonably related to the harm likely to result from the conduct, the defendant's [*1099] ability to pay, and "other factors" deemed appropriate. Id. at 106.

The Fourth Circuit concluded that the defendant in the diversity jurisdiction case before it was denied due
process, because the jury making the award exercised the unconstrained discretion permitted to it by South Carolina law and because the state's newly elaborated substantive post-verdict constraints could not be applied by the federal appellate court. The court directed that, on remand, the federal district court "incorporate" those newly elaborated standards into [*289] its instructions to the jury. Id. at 105-10.

[*289] The Fourth Circuit later reached a similar result in its review of an award of punitive damages made in federal district court under Virginia law. Johnson v. Hugo's Skateway, 974 F2d 1408 (4th Cir 1992). Virginia law, like South Carolina law, provided minimal constraints on the discretion of juries in the determination of awards of punitive damages. Id. at 1415. The Fourth Circuit again concluded that the substantive criteria applied in Virginia's post-verdict review process in state court must be applied in federal court by the factfinder. Id. at 1418.

ORS 30.925 provides essentially the same protection to defendants as the Fourth Circuit granted to the defendants on remand in Mattison and Johnson. In contrast to the unconstrained discretion allowed to factfinders by South Carolina and Virginia law in those cases, the criteria established by ORS 30.925 are detailed and objective, resulting in their also being constitutionally sufficient. The criteria need not be applied in post-verdict or [***48] appellate review, but are permissibly -- even preferably -- applied by juries in the initial determination of punitive damages awards.

The jury in this product liability action was instructed properly about the substantive criteria to be applied in considering punitive damages. There was evidence to support its determination. Accordingly, the punitive damages award in this case did not violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

Dissent by: PETERSON

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PETERSON, J., dissenting.

I disagree with the majority on two points. I would hold that the trial court erred in admitting the Consumer Product Safety Commission documents. Second, I believe that due process requires post-verdict review beyond that which the majority finds sufficient (which, essentially, is no post-verdict review).
product codes, related to stairs and roller skates, or so on down the line. As you can imagine the range. And the data is collected by product category, that is roller skates are a category, stair steps are a category. Light bulbs, [*291] incandescent are a category [***51] as opposed to light bulbs fluorescent, and so on down the line.

"And there are 850 categories that are monitored. And the CPSC coder collects that information daily and transmits that information electronically to the Consumer Products Safety Commission in Washington. That's why it's the National Electronic Injury Surveillance System. The function of that system and the reason it is a daily entry is it is the hope and the design of the system that if for instance a sudden -- there was a sudden importation of toys from some Third World country that had tainted, say stuffed toy that had poisonous fur, it would be the hope of the system to begin to catch a sudden unanticipated rise in the poisonings associated with stuffed toys or child admissions to emergency rooms and would cause -- it wouldn't be this monthly stuff that the emergency rooms would treat patients all month and then next month the paper would go to Washington.

"The next month they'd look at the paper and you would be three months into these toys before you figured out there was a problem. By transmitting that information electronically daily to the CPSC headquarters, they would hope to see a blip if it happened in [***52] one of their 850 categories, and take action.

"* * *

"Q. Does the NEISS data in any way attempt to explain how accidents occurred or why?

"A. No. I mean basically what I've described to you is just about all the information you can put in a report. Even the product type itself is not described. In other words, you don't get a description of a Schwinn Bicycle, you get product code through something, it will be a four digit code for bicycles, two-wheel. 1

[*292] ** **

[**1101] "Q. Dr. McCarthy, is there another level or layer of data collection utilized by the CPSC?

"A. There are several.

"Q. What's the next layer?

"A. Occasionally there will be what's called the term for it is an IDI, an In-Depth Investigation, IDI. And most of the time that's

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1 This testimony is similar to the summary of the NEISS system described in Edward J. Heiden, Alan R. Pittaway, and Rosalind S. O'Connor, Utility of the U.S. Consumer Product Safety Commission's Injury Data System as a Basis for Product Hazard Assessment, 5 J Prod Liab 295, 295 and 295 n 1 (1982):

"The U.S. Consumer Product Safety Commission (CPSC) has jurisdiction over approximately 10,000 products, with the power to recall, ban, regulate safety characteristics, or provide product safety information. The basis for all CPSC action is its system of health and safety data. The precision, accuracy, and reliability of these data are a critical issue for CPSC, consumers, and the business community dealing with liability considerations for CPSC-regulated products.

"One of the principal bases for CPSC's actions is the National Electronic Injury Surveillance System (NEISS), a reporting system based on product-associated injuries that occur in a national sample of emergency rooms within approximately seventy-five hospitals. NEISS is used as a basis to obtain estimates of the total of all national medically attended injuries associated with the great majority of consumer products.<1> The national estimates consist of three methodological elements: (1) recording of injury data, in terms of product(s) associated with that injury, from the sample of emergency room visits (ERVs); (2) projection of sample data upward to an estimate for the total universe of all emergency room product-related injury visits; and (3) projection of total national emergency room injuries from (2) to a total for all medically attended injuries.

"1. Injuries associated with consumer products are reported via teletype either by in-house hospital personnel or contractor personnel to a central computer on a frequent basis -- usually daily -- for several hundred general product codes. Each injury report indicates a product, the type of injury involved, and provides information about the victim and the injury -- age, sex, injury diagnosis, body part involved, locale, date of treatment, whether the victim was treated and released, was hospitalized, or was dead on arrival at the emergency room. A subset of these cases is selected for in-depth follow-up investigation for products of special interest to CPSC staff or Commissioners."
A phone call. I mean it's called an In-Depth Investigation, but overwhelmingly that's a phone call.

"Q. Would you describe in a little greater detail what kinds of data and how it's collected in the IDI process?

"A. Well, IDIs can occur for any number of reasons and take any number of forms, but most of the time they will be an injury and something will look interesting, or [*293] for some reason the product category will be flagged that month for IDIs, and one will make a follow-up phone call to the residence of the individual who was treated at the hospital, because when you get admitted to a hospital, especially when the NEISS coder is there, they've got your phone number, right? So they can call your home. Now, there's no real requirement, and indeed it's not uncommon for a quarter or a third of these In-Depth Investigations not even to talk to a witness. Someone does have to answer the phone. And they talk to them about the nature of the injury, the accident, they may or may not be a witness, just generally what happened, if someone knows; if [*293] they don't know or won't talk to them, that may be it. Most of the time that is it. After the phone call, that's the end of the investigation."

The NEISS statistics included information about all ATVs, irrespective of who the manufacturer was or how the accident happened.

[***54] At the end of plaintiff's case-in-chief, copies of nine CPSC documents were received in evidence, over the objections of defendants. Copies of the exhibits are set forth in the Appendix. The exhibits include three kinds of information:

1. Interoffice memoranda containing information about ATV accidents reported to CPSC.
2. Interoffice memoranda containing opinions of CPSC personnel concerning the safety or design of ATVs.
3. CPSC notices concerning ATVs. The majority holds that all the documents were relevant and admissible. I disagree.

OEC 801(3) provides:

"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. "Plaintiff asserts that these exhibits were "offered to prove notice to Defendants of [their] contents, not for the truth of the matter asserted, and therefore [were] not hearsay." Plaintiff read the nine exhibits -- Exhibits 20, 23, 25, 28, 31, 37, 120, 121, and 122 -- to the jury. Before the exhibits were read to the jury, the trial judge told the jury:

"Jurors, I am now going to permit plaintiff's counsel to read to you excerpts from some [***55] documents of the federal agency. The documents that I will allow plaintiff's counsel to read to you are not admitted for the purpose of establishing the truth of the statements contained in those documents. That means that you should not assume that the statements in those documents are true.

[***1102] "These documents are admitted for the limited purpose of notice. Plaintiff has alleged that these documents gave defendants notice before the date of the Oberg's [sic] accident that the ATVs could overturn.

[***294] "I will not suggest to you that these documents constitute adequate notice. The adequacy of the notice is an issue for you to decide. The statements contained in these documents, the ones that will be read to you, may or may not be true. But we are not going to resolve their truth in this courtroom. In other words, they are coming in for a limited purpose on the basis that the plaintiff has alleged that Honda had notice, and this is the evidence that's submitted to you and you will make that ultimate determination."

The trial judge's decision on the "other accidents" evidence was made after days of discussions between the trial judge and the lawyers on the [***56] subject. On April 3, 1990, after an extensive discussion between the trial judge and counsel, the court stated:

"Now, we're going to have to have a subdivision because I recognize that there is going to be controversy on the word 'stability,' so the first criterion is that before a document will be considered by the Court, it has to deal with lack of stability.

"Then that will be divided into two components, instability, which relates to rearward -- what do you call that?
"[DEFENDANTS' LAWYER]: Rearward turnover.

"[PLAINTIFF'S LAWYER]: Flips, Your Honor.

"THE COURT: -- which reasonably is similar to the normal test of similarity of our accident. And then the other criteria are those things which the Plaintiff is saying that this report deals with instability in general.

'I'm signaling the Plaintiff's team that you are going to have difficulty in convincing me that general instability will be adequate, but I'll certainly look at every document you want me to look at."Seven of the nine exhibits are internal office memoranda, one (Exhibit 122) is a CPSC press release, and one (Exhibit 37) is a notice of proposed rulemaking published in the Federal Register.

There actually are [***57] two issues concerning the admissibility of the CPSC documents. One concerns the admissibility of the CPSC documents in light of the evidentiary rule that limits evidence of other accidents. The second issue concerns the admissibility of opinions contained in a public [*295] agency's records. I first discuss the evidence of other accidents.

Both parties appear to agree as to the rule applicable to evidence of other accidents. Rader v. Gibbons and Reed Co., 261 Or 354, 359, 494 P2d 412 (1972), states the rule as follows:

"Evidence of prior similar occurrences is admissible under some circumstances in a negligence action. As a general rule, evidence of prior accidents or acts of negligence is not admissible to prove a specific act of negligence. Such evidence is, however, admissible to prove the existence of a continuing defect or a continuing course of negligent conduct, and that the condition or course of conduct is in fact dangerous, or that the defendant had notice of its dangerous character. The admissibility of such evidence for these purposes is, however, subject to the requirement that the prior accidents must have [***58] occurred under similar conditions and circumstances." (Emphasis added; citations omitted.)

This court, in a long line of cases, has held that, in a negligence case, evidence of prior accidents is not admissible "to prove a specific act of negligence." Such evidence may be admissible, however, as notice to a defendant of, among other things, a dangerous condition. In Rader, the plaintiff's decedent was killed when the windshield in the car in which the decedent was riding was struck by a falling rock. A policeman who regularly patrolled the area testified that, on previous occasions, large trucks carried rock on the haul road. There was evidence that shows that rocks had fallen onto the highway from the haul road, and [***1103] that the defendant was aware of this. The court upheld the ruling admitting the evidence, saying that "the evidence objected to tended to show both the existence of a dangerous condition and that defendant had notice of the dangers. The real question is whether the circumstances were sufficiently similar in each instance." 261 Or at 360.

Rader is a pre-evidence code decision, and the Oregon Evidence [***59] Code does not itself touch on this relevancy issue. Plaintiff states that "[t]he 'similarity' issue * * * is no more than a question of relevance" and that the rule stated in Rader is the rule to be applied. I agree.

[***296] The "other accident" evidence in the exhibits is very general. 2 References are made to many different types of accidents and to machines manufactured by other companies. There is no evidence in this record concerning other accidents that provides any detail concerning the manner in which the accidents occurred. When this court has upheld the admission of evidence of other accidents, the record contained evidence of the manner in which those other accidents occurred. See Rader v. Gibbons and Reed Co., supra, 261 Or at 361 (testimony concerning rocks falling on earlier occasions on very highway where accident occurred held admissible because it "tends to prove that the movement of equipment on the haul road created a danger of accidents like that suffered by [plaintiff]"); Clary v. Polk County, 231 Or 148, 152, 372 P2d 524 (1962) (evidence showing prior accidents [***60] at the same place "is some evidence that the condition was dangerous"); Saunders v. Williams & Co., 155 Or 1, 7, 62 P2d 260 (1936) (evidence that witness had slipped in oil on the floor of the defendant's store on two prior occasions held admissible to show a continuing defect or condition). This is necessary in order to

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2 The information that CPSC obtained concerning other accidents was received from hospitals. All of the reports are "double hearsay" or "hearsay within hearsay" in the sense that some person told a care-giver about the accident, and the care-giver reported the information to CPSC. Unless otherwise stated, for purposes of this discussion, concerning "other accidents," I assume that the evidence is not subject to a valid hearsay objection.
determine whether the other accidents occurred under similar conditions and circumstances.

Unquestionably, the evidence received is replete with prejudicial information about ATVs. But aside from some general comments that there were [*61] a lot of ATV accidents involving tipping over backward, there was no specific evidence of even one accident that "must have occurred under similar conditions and circumstances." Rader v. Gibbons and Reed Co., supra, 261 Or at 359. The documents received show that the reported accidents may have had a number of different causes, such as "loss of control" or hitting a bump, ditch, or other terrain feature.

In the decisions from other courts involving product claims where evidence of other accidents was offered, the courts have adhered to the requirement that the evidence of the other accidents be more specific, more detailed, than is the [*297] case here. The Tenth Circuit Court of Appeals recently considered the very issue here before us. Kloepfer v. Honda Motor Co., Ltd., 898 F2d 1452 (10th Cir 1990), arose out of a rearward overturn accident of a three-wheeled Honda ATV on a steep hill and involved claims that the ATV was defective in its design and warnings. Unlike this case, however, the federal district court excluded evidence of the CPSC study of ATVs. The Tenth Circuit Court of Appeals affirmed, [*62] noting that "the proffered reports were not limited to three-wheeled vehicles, did not relate to an investigation into this accident or to the Honda model involved herein, but rather accidents, injuries and statistics involving all-terrain vehicles manufactured by over twenty manufacturers." Id. at 1458. The court also observed that there was "a real possibility that the jury would give undue deference to such evidence." Ibid.

Other courts have excluded CPSC-generated reports as inadmissible hearsay. For example, in McKinnon v. Skil Corp., 638 F2d 270, 278-80 (1st Cir 1981), the court considered the admissibility of several [*1104] CPSC reports concerning circular saw guards. Like this case, the plaintiff claimed that CPSC reports gave the defendant "notice" of prior accidents, established a defect, and undermined the credibility of one of defendant's witnesses. The First Circuit Court of Appeals noted that the proffered CPSC reports contained multiple levels of hearsay and held that they were properly excluded.

Similarly, in Henkel v. R and S Bottling Co., 323 NW2d 185, 192-93 (Iowa 1981), [*63] the Iowa Supreme Court held that the trial court properly excluded evidence of a CPSC "hazard analysis" similar to plaintiff's Exhibit 28. The plaintiff contended that a CPSC report titled "Hazard Analysis of Carbonated Soft Drink Bottles" was admissible under the public records exception to the hearsay rule. The court concluded that the CPSC report lacked the indicia of trustworthiness necessary for admissibility and that the report would have misled the jury.

Accord: Prashker v. Beech Aircraft Corporation, 258 F2d 602, 608-09 (3d Cir 1958) (trial court refused to admit 38 of 45 other accidents involving Bonanza aircraft. "To hold the aircraft responsible on such evidence would be utterly to disregard the factor of human fallibility known inevitably to occur in such circumstances and would be patently unjustified."); Johnson v. Amerco, Inc., 87 Ill App 3d 827, [*298] 42 Ill Dec 684, 409 NE2d 299, 315-16 (1980) (The plaintiff attempted to introduce reports of 1,000 prior accidents involving U-Haul trailers overturning. "The complexity of factors bearing upon the issue of whether a trailer [*64] is unreasonably dangerous under a certain set of conditions made it impossible to ascertain from the sketchy information provided in the reports which of the prior occurrences was sufficiently comparable to the Johnson accident. In addition, an examination of individual reports commonly reveals * * * either silence or dissimilarity concerning essential factors such as how the trailer was loaded, the size and nature of the tow vehicle, the type of hitch, as well as other factors.").

Exhibit 31 refers to other accidents and states:

"After reviewing 169 cases, two main problems seen in the majority of ATV accidents seem to continue to be 1) instability -- as documented in flipover, turnover, rollover on uphill or when hitting a rut, bumps, etc., and 2) difficulty of controlling the 3 wheel design -- as seen in rollover when attempting to turn quickly on a flat or hilly surface, and or a paved or gravel surface. These patterns have repeatedly occurred in accidents and deaths, whether alcohol, riding double or speeding were present or not, and for all ages of drivers. Also, although some victims were first time ATV users, half had ATV experience, and also were experienced with motorcycles [*65] or minibikes."

It was error to receive any part of Exhibit 31. The references to the accidents referred to therein contain no information concerning any specific accident. For the same reasons, the evidence of other accidents contained in Exhibits 20 and 21 should not have been received. Neither exhibit meets the relevance requirement that the other accidents be substantially similar.

The majority concludes:

"Second, defendants contend that the accidents that were referred to or described in
the CPSC documents were not 'substantially similar' to the accident that caused plaintiff's injury here. Again, we disagree with defendants' contention. One of the excerpts at issue concerned reports of the instability of ATVs as a class. Another concerned reports showing a 'pattern of loss of control' specifically associated [*299] with ATVs manufactured by Honda. Three excerpts concerned reported incidents in which ATVs overturned backward, and three others more specifically concerned incidents in which ATVs overturned backward while climbing hills. As noted, the ninth excerpt concerned the similarity in configuration among all brands of ATVs. The trial court was entitled to [[**1104]] find that the prior occurrences that were described in those excerpts were sufficiently similar to the accident at issue in this case to make those occurrences relevant." 316 Or at 268.

[[**1105]] The CPSC documents provide no details concerning the prior accidents. The most that can be said is that some involve "rearward flips." That is not enough.

Beyond this, I maintain that the exhibits offered to establish that prior similar accidents had occurred are hearsay. The party offering evidence of other accidents has the burden of establishing that the other accidents "occurred under similar conditions and circumstances." Rader v. Gibbons and Reed Co., supra, 261 Or at 359. The "other accidents" rule rests on the premise that the other accidents happened. The theory is that the happening of other accidents of which defendant is aware is admissible to prove notice to defendant. In truth, this evidence was offered to prove that the other accidents had happened. The jury, in weighing this evidence, would consider how the other accidents had occurred. How similar were the other accidents?

[[***66]] That brings me to the second category of evidence contained within these nine exhibits -- opinions of various CPSC personnel concerning the design or safety of ATVs. Exhibit 28 is the most prejudicial. It is a memorandum from a person named Harvey Tzuker to Nick Marchica, neither of whom are otherwise identified in the record, either as to their job or responsibilities, their education or training, or as to their qualifications. The memorandum states:

"The front end of the vehicle is relatively light and acceleration on hills can cause the front wheel to lift, tipping the machine over backwards onto the operator." * * *

"Conclusion, the more than tripling of projected nation-wide ATV associated injuries, their relative severity, the rate [*300] at which accidents are occurring and the ever widening knowledge of fatal incidents are all alarming and ominous.

[[**1106]] "It is the opinion of this directorate, based on the data in our files, as well as information from other sources, that three-wheeled all-terrain vehicles may present one of the most significant and explosively growing product hazards ever considered by this agency."

Exhibit 23 is a similar document, [[***68]] a memorandum from Victoria R. Brown and Roy W. Deppa to Elizabeth Haught. As with Exhibit 28, the record is silent concerning their responsibilities or qualifications. The exhibit reads:

"Based upon our examination of the incidents and the machines, Engineering Sciences is of the opinion that the dynamic stability characteristics of the ATV comprise the single most prominent factor identifiable as a cause of loss of control."

There were extensive on-the-record discussions concerning documents such as these. Specifically concerning Exhibit 28, these discussions occurred:

"THE COURT: * * * This conclusion is rather potent language, and I'm sure the defendants are concerned about it. Now, we're talking about notice, and we're trying to say the plaintiffs argue that this comment is notice of the problems this plaintiff has alleged existed in their complaint. It doesn't relate to any plaintiff's allegation. It's a broad conclusion re type of observation about ATV-associated injuries."

"THE COURT: It would be my view * * * that the probative value on notice, if any, of that comment, could only relate to your claim for punitive damages, because I would think that its [[***69]] only value it has, it doesn't give notice in the context of the court's analysis or rulings, but it may be a basis to argue to the jury, after receiving this notice, they continued to or did nothing, continued to put these things on the market, et cetera, et cetera.
"I'm having real difficulty with that conclusionary comment. You know, you never -- I'm just kind of thinking out loud -- you'd never under certain circumstances, for example, well I'm too strong, but I think it would be very difficult to get that kind of testimony from any kind of witness under any circumstances, and my letting it in through kind of a back door approach -- and next level of consideration is, you [*301] know, this is -- if there ever was anything inflammatory, this is it, but it may be relevant to punitives.

"* * *

"THE COURT: * * * You know, how do you -- how does one really know that this writer is making that damning conclusion that emotional indictment, based on lack of stability, which is your whole theme?

"Now, I grant you, and I acknowledged earlier that you do have the paragraph which refers to stability, and that's why I'm just not outright saying no, I'm agonizing over that tenuous connection, [***70] and it is tenuous.

"[PLAINTIFF'S LAWYER]: I don't think I understood your concern until just now.

"THE COURT: All right.

"This writer, the man or woman who made this statement is making a harsh opinionated indictment. Just follow me step by step, and let [defense counsel] take care of his own problems.

"How does a person, a jury who's going to hear you read this, know that this person is referring to lack of stability as distinguished from possibly a defective gas tank?

"[PLAINTIFF'S LAWYER]: My first thought in response to that is the context of this document. The second thought is the context of all the documents, and all we know from all the documents about the nature of the investigation CPSC conducted.

"THE COURT: I just don't accept that argument. You just can't say: Judge, you have to look at all these documents. This document has to stand on its own four feet, or two feet, or how many feet it's got. My similes get twisted here after a while.

"[PLAINTIFF'S LAWYER]: May I refer the court back to the earlier portions of the documents which admittedly aren't highlighted or proposed for submission to the jury at this point, but this is a document which spends three pages talking [***71] about hospital data and evidence, epidemiological evidence of accidents involving ATVs, and then specifies some preliminary findings about the nature of those accidents, one of which we highlight, and then draws this conclusion. It's -- I don't think there can be two interpretations to the general source of this conclusion. It is clearly related to the stability issue of ATVs. They refer to the rate at which accidents are occurring in this paragraph.

[*302] "THE COURT: Well, I'm going to waffle, at least until I tell you to the contrary, and I'm sorry if it disrupts your case, it's going to have to disrupt your case.

"At this stage of the trial, and I'm not indicating any concept in my mind, I'm simply saying I want to think and sleep on this last paragraph, so you can use the paragraph on three, but until I instruct you to the contrary, the language in the paragraph conclusion will not be brought to the jury's attention."

The trial judge later made this comment concerning the conclusions in Exhibit 28:

"About Plaintiff's 28, that one-page conclusion that I have under advisement, [plaintiff's lawyer], if you are telling me now, Judge, it's critical to our case that we include [***72] that ruling, that comment to the jury at this time,' I'm going to admit it. It's your lawsuit.

"I think sometimes you have to share -- although I have the ultimate responsibility, I would feel more comfortable if we could defer disclosing that to the jury.

"I think it's that category of evidence which has to be labeled as a real close call. So you have -- I'm not going to interfere with a trial lawyer's tactical decisions. If you think it's critical, you can do so. But I would much prefer this matter be looked at."Plaintiff opted to include Exhibit 28, and it was received.

The majority concludes that this opinion evidence is not within the hearsay definition of OEC 801(3), because it
was not offered "to prove the truth of the matter asserted." The evidence ostensibly was offered to show that defendants had notice that the writers of the memoranda had [*1107] expressed opinions such as (I quote from Exhibit 28) "three-wheeled all-terrain vehicles may present one of the most significant and explosively growing product hazards ever considered by this agency." The question is: Are opinions of persons contained in government records concerning the safety of a product admissible[***73] in evidence to establish that the manufacturer of a product is on notice of the dangerousness of the product? I would hold that such opinions, offered under the circumstances in this case, are not admissible.

I begin with an elementary but important proposition. All evidence must rest on a foundation. The most [*303] common foundation is the direct knowledge of the witness who is testifying, knowledge based on actual experience -- "I saw the accident." An expert's basis for knowledge, whether expert testimony or other testimony, whether offered as direct evidence, as impeachment, or otherwise, must rest on a foundation of reliability.

The foundation of reliability for eyewitness testimony is, "I perceived it." "There is a rule, more ancient than the hearsay rule, * * * that a witness is qualified to testify to a fact susceptible of observation, only if it appears that he had a reasonable opportunity to observe the facts." 2 McCormick, Evidence 99, § 247 (1992). True, some evidence reposes on other foundations of reliability. Business records are a good example.

"Unusual reliability is furnished by the fact that regularly kept records typically have a high degree of accuracy. [***74] The very regularity and continuity of the records are calculated to train the recordkeeper in habits of precision * * *. "The common law exception had four elements: (1) the entries must be original entries made in the routine of a business, (2) the entries must have been made upon the personal knowledge of the recorder or of someone reporting the information, (3) the entries must have been made at or near the time of the transaction recorded, and (4) the recorder and the informant must be shown to be unavailable. If these conditions were met, the business entry was admissible to prove the facts recited in it." 2 McCormick, supra, at 264-65, § 286 (footnote omitted).

The admissibility of government records similarly rests on a foundation of reliability. See United States v. Meyer, 113 F2d 387 (7th Cir) (a map was properly received into evidence because it was compiled from records of the U.S. Corps of Engineers, the witness was in charge of that office, and the men who furnished the information were working under the witness' control), cert den 311 U.S. 706 (1940).

These CPSC records ostensibly were not offered[***75] under OEC 801(3) to prove the truth of the matters asserted in the record. Plaintiff disclaims reliance on OEC 803(8). What, then, is the foundation for the receipt into evidence of the opinions contained in these records? There has to be some foundation for all evidence.

[*304] Even though the majority disclaims reliance on OEC 803(8), it is relevant to our inquiry for reasons that follow. OEC 803(8) provides:

"The following are not excluded by OEC 802, even though the declarant is available as a witness:
 ** *
(8) Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth:
(a) The activities of the office or agency:
(b) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding however, in criminal cases matters observed by police officers and other law enforcement personnel; or
(c) In civil actions and proceedings and against the government in criminal cases, factual findings, resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

Plaintiff claims, and[***76] the majority concludes, that OEC 803(8) does not apply because the records were not offered to [*1108] establish the truth of the matter asserted. But all of the documents are government records. I look to OEC 803(8) for its policy concerning limitations on the use of government records. The public policy of Oregon is clear concerning opinions in government records: Opinions of government employees contained in government records are not admissible.

3 But as will be discussed below, there is another hearsay aspect of this evidence that the majority has not considered.
The commentary to OEC 803(8) states in part:

"The Legislative Assembly intends that this paragraph not provide a sweeping exception for public records containing evaluations or opinions. 'Factual findings' is to be strictly construed to allow as evidence only those reports, otherwise in accord with the rule, which are based on firsthand observation by the public official making the report."

The commentary makes two things clear. One is that the factual findings must be "based on firsthand observation by the public official making the report." The second is that there is no "sweeping exception for public records containing evaluations or opinions."

The reasons for this conclusion of the drafters of the Oregon Evidence Code are these:

"The first danger posed by Rule 803(8)(C) is the use of a fact finding in a public report without an opportunity for the opponent to cross-examine the reporter to determine the basis for the finding. One justification for the use of such fact findings is that public officials are objective and sufficiently responsible to include fact findings in their reports only if based on reliable information. In our adversary system, however, this assertion should be tested. For example, it is reasonable to expect that jurors could more effectively assess the reliability of a fact finding if they knew the background, training, and experience of the fact finder. Such information is unlikely to appear in a public report and would certainly not be revealed to the extent that it could be through cross-examination. Juries are likely to benefit even more from knowing specifically how the public reporter arrived at the finding. Even if such an explanation appears in the report, without cross-examination the opponent would have little or no opportunity to demonstrate weaknesses in the fact finder's methodology or to suggest better procedures that could have been employed.

"An even greater problem arises when reports are admitted containing conclusions based in whole or in part upon the observation or information of third parties. Such information may not possess any guarantees of trustworthiness that customarily underlie the hearsay exceptions, yet still form the basis for a fact finding admitted under Rule 803(8)(C)." Grossman & Shapiro, The Admission of Government Fact Findings Under Federal Rule of Evidence 803(8)(C); Limiting the Dangers of Unreliable Hearsay, 38 U Kan L Rev 767, 771-72 (1990) (footnotes omitted).

Those reasons are applicable, as well, to opinions in government records offered to prove notice. Cross-examination is no less important concerning evidence to prove notice.

The majority confidently states that "[d]efendants' hearsay objections were not well taken, because the excerpts from the CPSC documents were not offered to prove the truth of the matters asserted therein." 316 Or at 269. There is a problem with this conclusion, because the documents that contain the opinions of CPSC personnel, like the documents concerning other accidents, have a hearsay aspect that renders them inadmissible.

Exhibit 28 is illustrative. The effect of admitting Exhibit 28 is to say: CPSC is an agency of the United States. Nick Marchica works for CPSC. 4 Nick Marchica has an opinion concerning ATVs. He wrote to another CPSC employee, "three-wheeled all-terrain vehicles present one of the most significant and explosively growing product hazards ever considered by this agency." The jury was instructed that this statement was admissible only for the purpose of giving notice to the defendants "that the ATVs could overturn."

It may be true that Exhibit 28 was not offered to prove that "three-wheeled all-terrain vehicles present one of the most significant and explosively growing product hazards ever considered by this agency." But the document offered was the opinion of a CPSC employee, Nick Marchica, and it was received as the opinion of a CPSC employee having knowledge of ATVs, received with no opportunity for cross-examination concerning the basis for the opinion. No one could deny that this document, even as limited by the trial court's instructions, had immensely more weight than would an opinion from some unidentified third person. Why does it have more weight? Because it is an opinion of one having knowledge of ATVs, a CPSC employee. I concede that the document, as offered and received, had but one nonhearsay aspect -- to prove that defendants were on notice that a person had told them that ATVs were dangerous. The document has several hearsay aspects: that Nick Marchica had knowledge on which to base his opinion, that Nick

4 Exhibit 20 refers to Mr. Marchica as "Program Manager for Product Safety."
Marchica was a CPSC employee, and that this was Nick Marchica's opinion.

In order for the jury to consider whether the CPSC documents did provide "notice" to defendants, the jury must evaluate the reliability of the statements in those documents. [***81] In determining reliability, the jury implicitly will consider two things: (1) Does the out-of-court declarant have knowledge about the subject; and (2) is the statement of the out-of-court [***307] declarant likely to be viewed by defendants as truthful? In considering this second step, the jury must necessarily inquire into the "truth of the matter asserted."

The opinion in Exhibit 28 was addressed to the very question that the jury was required to decide: Were defendants' ATV's unreasonably dangerous? The trial judge opined that "it would be very difficult to get that kind of testimony from any kind of witness under any circumstances * * *, this is -- if there ever was anything inflammatory, this is it * * *." 2

Professor Wigmore states that cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth. * * * [C]ross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure." 5 Wigmore, Evidence in Trials at Common Law 32, § 1367 (1979). Jones states that "the real basis of weakness [of hearsay] lies in the fact that the absent person, whose assertion [***82] is offered to prove the facts he asserts, is not subject to the testing process of cross-examination to reveal weaknesses in his perception, his memory and his integrity." 2 Jones on Evidence 166, § 8:2 (1972). Mr. Tzuker was not available for cross-examination concerning his basis of knowledge, his employment, and his experience and training.

The public policy stated in the commentary to the Evidence Code is clear -- opinions of government employees contained in government records are not admissible. It may be that an expert would be permitted to express an opinion such as is contained in this exhibit, if the expert were available for cross-examination. See OEC 704 (expert testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact). However, those opinions are patently untrustworthy and thus their relevance, even for the purpose of notice, is greatly reduced. I would hold that such records are not admissible for any purpose.

To the best of my knowledge, no court has upheld the admissibility of opinion evidence like that contained in

Exhibits 28 and 23 when offered as [***83] part of a government record. OEC 602 provides:

[*308] "Subject to the provisions of OEC 703, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness [***1110] has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness." The effect of admitting Exhibit 28 was to permit Nick Marchica to testify without being present, and with no opportunity to cross-examine.

My decision on the remaining five exhibits is:

Exhibit 25 is a memorandum from William Walton to the commission. It raises "questions about CPSC-investigated (IDI's) death and injury incidents." However, the memorandum provided no details of those incidents. Nor does it contain any admissible factual findings.

Exhibit 120 refers to previous ATV accidents, without providing any details regarding the circumstances under which those accidents occurred. As is the case with all the exhibits mentioned above, this is the very type of evidence to be excluded by the rule in Rader. Absent any showing of the circumstances surrounding the accidents referred to in these exhibits, evidence [***84] of those accidents is not relevant. Nor do these exhibits contain any admissible factual findings.

Exhibit 122 does not refer to any prior accidents. Because it was offered to prove defendants' knowledge that ATV's could overturn backwards, and was not offered to prove the truth of the matter asserted, it is admissible. 5

Most of the exhibits set forth in the Appendix are not admissible for any purpose, either as evidence of relevant "other accidents" or otherwise.

On the punitive damages question, I disagree with the majority. I read the Supreme Court decision in Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S Ct 1032, 113 L Ed 2d 1 (1991), to require three due process procedural protections:

1. At trial, the jury must have adequate guidance by instructions, so that its award is reasonable, [***85] and not [*309] a

5 Portions of Exhibit 37 may be admissible. Exhibit 121 appears to refer to some other report ("The ARTECH report"). It should not have been received.
product of "unlimited jury discretion." *III S Ct at 1044.* "As long as [the jury's] discretion is exercised within reasonable constraints, due process is satisfied." *Ibid.*


3. The state must establish post-trial appellate review procedures. "This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition."

*IId. at 1045.* It also ensures "that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Ibid.* The majority appears to require no post-verdict review procedures.

I would reverse the trial court and the Court of Appeals. I therefore dissent.

[*310*] APPENDIX

Plaintiff's lawyer read the following exhibit excerpts to the jury:

EXHIBIT 20

"United States Government Memorandum" Washington, D.C. 20207 Date: 09 JUL 1984

"TO: The Commission

**
**

"FROM: Nick Marchica, Program Manager for Product Safety Commission, Office of Program Management

"SUBJECT: All-Terrain Vehicles (ATVs)

"Stability is of concern. The handling characteristics are peculiar to the ATV and are distinctly different compared to a [**1111**] two-wheeled vehicle. Considerable practice is required to master 'all-terrain' use. However, a beginner may readily ride the ATV on gentle terrain, due to the static stability of the tricycle configuration.

"In reviewing 40 in-depth investigations of ATV accidents from January 1981 through March 1984, several hazard patterns were identified:

*, Flipover or Rollover -- Thirty-four cases resulted from rollover or tipover of the vehicle. In 13 of the rollover cases the injuries were serious and included concussions, eye injuries and fractured shoulders. Contact with the handlebars during rollover contributed to several cases of fractured skull, face, or jaw.

"Medical Opinion

"The Medical Director's opinion is that there is a lack of comprehension of the complexity of the vehicle's actual performance characteristics and the consequent inherent dangers. [***87] This is due to two factors: the deceptive impression of stability given by a tricycle type vehicle with a wide tread and broad wheels, and the agility of the vehicle which is advertised frequently as showing the vehicle in flight, operating at high speeds and performing complex maneuvers."

[*311*] EXHIBIT 23

"United States Government Memorandum" Washington, D.C. 20207 Date: 11 FEB 1985

"TO: Elizabeth Haught, CACA

**
**

"FROM: Victoria R. Brown, ESHF and Roy W. Deppa, ESES
"SUBJECT: Assessment of the Specialty Vehicle Institute of America Proposed Rider Training Program for All Terrain Vehicles

"* * *

"* * * Based upon our examination of the incidents and the machines, Engineering Sciences is of the opinion that the dynamic stability characteristics of the ATV comprise the single most prominent factor identifiable as a cause of loss of control."

EXHIBIT 25

"United States Government Memorandum
Washington, D.C. 20207
Date: 29 MAR 1985

"TO: The Commission
"* * *
"FROM: William W. Walton, AED, ES
"SUBJECT: Forwarding of ATV Meeting Log.
"* * *
"SUBJECT: Design and Development of the Honda ATC[*]

"* * *

"* Note that ATC (All Terrain Cycle) is the Honda trademark name of the device more generally referred to as the All Terrain Vehicle (ATV).

"* * *

"Discussion of ATV Safety

"The dialogue dealt at some length on safety consideration in the design of the ATC, with specific question raised as to the extent of those considerations encompassed in the [*312] development process. Specifically, we raised questions about CPSC-investigated (IDI's) death and injury incidents. The emerging awareness by the Engineering Sciences staff that a common pattern of loss of control due to the dynamic characteristics of the ATV was described."

EXHIBIT 28

"United States Government Memorandum
Date: MAR 20 1985

"TO: Nick Marchica, EX-P
"* * *
"FROM: Harvey Tzuker, EPHA
"SUBJECT: Further Information on All Terrain Vehicles (ATVs)

"* * *

"Conclusion, the more than tripling of projected nationwide ATV associated injuries, their relative [*312] severity, the rate at which accidents are occurring and the ever widening knowledge of fatal incidents are all alarming and ominous.

"It is the opinion of this directorate, based on the data in our files, as well as information from other sources, that three-wheeled all-terrain vehicles may present one of the most significant and explosively growing product hazards ever considered by this agency."

EXHIBIT 31
"FROM: George Rutherford, EPHA
Jean Kennedy, EPHA

"SUBJECT: Updated Injury Data on All Terrain Vehicles

"* * *

"DISCUSSION

[*313] "After reviewing 169 cases, two main problems seen in the majority of ATV accidents seem to continue to be 1) instability - as documented in flipover, turnover, rollover on uphill or when hitting a rut, bumps, etc., and 2) difficulty of controlling the 3 wheel design - as seen in rollover when attempting to turn quickly on a flat or hilly surface, and or a paved or gravel surface. These patterns have repeatedly occurred in accidents and deaths, whether alcohol, riding double or speeding were present or not, and for all ages of drivers. Also, although some victims were first time ATV users, half had ATV experience, and also were experienced with motorcycles or minibikes."

EXHIBIT 37

"Federal Register/Vol. 50, No. 105/
Friday, May 31, 1985/Proposed Rules

"CONSUMER PRODUCT SAFETY COMMISSION

"* * *

"All-Terrain Vehicles; Advance Notice of Proposed Rulemaking; Request for Comments and Data

"Agency: Consumer Product Safety Commission

"Summary: Based on available data, the Commission has preliminarily determined that there may be an unreasonable risk of injury associated with the use of all-terrain vehicles (ATVs) which may be sufficiently severe to require regulatory action by the Commission. The commission is aware of at least 161 deaths associated with ATVs occurring between January 1982 and April 1985. Estimates on the number of hospital emergency room treated injuries associated with ATVs in 1984 was 68,956. This is almost two and one-half times the number of injuries in 1983 and more than seven times the number in 1982. An estimated 28,000 ATV related injuries were treated in hospital emergency rooms nation-wide in the first four months of 1985. [*314] This is approximately 80 percent higher than the estimated injuries treated during the same time period in 1984. The Commission is primarily concerned about accidents which result from (1) loss of control of the vehicle; (2) the vehicle overturning, such as flipping over backward, tipping over forward, or rolling over sideways; and (3) the rider being thrown from the ATV after it hits bumps, ditches, and other terrain features. [Footnote omitted.]

"* * *

[*314] "* * * [**1113] The Commission is concerned about whether the performance characteristics of three and four wheel ATVs, including their dynamic stability and handling, are reasonably safe. The Commission's technical staff has not determined the feasibility, practicality, appropriateness, or cost of performance or other modifications, which would adequately reduce or eliminate the risk of injury associated with ATVs. However, based on available data, the Commission staff believes that the performance characteristics of ATVs, including their dynamic stability and handling, are a significant factor in ATV related accidents.

"* * *

"* * * Overturning and loss of control were documented in the majority of reported ATV deaths.

[***92]

"D. Engineering Information

"The basic configuration of the ATV and its unique performance characteristics, including dynamic stability and handling, appear to play a major role in accidents involving ATVs. Many of the serious-injuries and deaths reported in the in-depth investigations resulted from loss of control of the ATV and were observed regardless of whether alcohol, riding double, or speeding were also observed. These incidents involved drivers of all ages. Also, although some victims were first time ATV users, many had previous experience riding ATVs, and experience riding motorcycles or minibikes."

EXHIBIT 120

"United States U.S. Consumer Product
Government Safety Commission
Memorandum Date: 5/1/84
"TO: Nick Marchica, Program Management
* * *
"FROM: Albert F. Esch, M.D.
Medical Director
"SUBJECT: All Terrain Vehicles, (ATVs)
* * *

"As indicated in the reports prepared by Epidemiology, The common mechanisms that appear to be associated with [*315] the severe injuries are the dislodgment of the operator from the vehicle while it is in motion, and/or the overturning of the vehicle with consequent entrapment and crushing injuries to the driver. [***93] * * *

* * * [T]here appears to be common lack of understanding or comprehension of the complexity of the vehicle's actual performance characteristics; and its consequent inherent dangers. This could be due in part to the deceptive impression given by a comfortable appearing, tricycle type vehicle, with a wide tread and broad wheels which would seem to assure stability. Such confidence might be furthered by the erroneous image of the vehicle's implied agility * * *

"* * *

"The nature of the risk therefore can be characterized as circumstances in which there is a deceptively dangerous vehicle, (possibly misterned All Terrain within reasonable constraints of safe operation), requiring a high degree of skill and insight into its performance for proper control, utilized by a cross section of ages. As with aircraft, these vehicles can be unforgiving of minor errors in judgment and consequent accidents usually result in major injuries."

EXHIBIT 121

"U.S. Consumer Product
Government Safety Commission
Memorandum
Date: 3 MAY 1984

"TO: Elizabeth Haught, CACA
* * *
"FROM: Roy Deppa, ESES
Medical Director
"SUBJECT: * * * Review of Information Relating to Mechanical Characteristics of All Terrain Vehicles (ATV's)

[***94]

* * *

"[***1114] The ARTECH report reveals that the three-wheeled ATV's currently being marketed are very similar in configuration, and there is little variation either between brands or from year to year. * * *"

EXHIBIT 122

"U.S. Consumer Product Safety Commission Washington,
D.C. 20207 (202) 634-7710

[*316] RECEIVED APR 30 1985

"TO: ALL MEDIA (News Directors, Consumer Reporters, Action-Line Columnists, Editorial Page Editors)

"RE: Rising Death & Injury Toll from All-Terrain Vehicles (ATVs)

* * *

"CAUSES. At this time, Commission staff identify two underlying problems in ATV-related accidents. These involve: (1) instability of the vehicle (causing flipovers, turnovers, and rollovers when an ATV is moving uphill or hits a rut or bump); * * *. Variables which appear to have contributed to incidents, or their severity, include: riding surface, speed, alcohol involvement, additional passenger, nighttime use, and lack of helmet.

An in-depth review of hazard patterns involved specifically in ATV-related fatalities revealed three basic scenarios: * * * (2) tipover/flipover/rollover (vehicle flipped backwards ascending a hill, tipped over frontwards, [***95] descending a hill, or rolled over sideways while turning); * * * (Emphasis in original.)
Honda Motor Co., Ltd. v. Oberg

Supreme Court of the United States
HONDA MOTOR CO., LTD., et al., Petitioners,
v.
Karl L. OBERG.
No. 93-644.

Decided June 24, 1994.

Products liability action was brought against manufacturer of all-terrain vehicle (ATV), to recover for injuries suffered in accident. The Oregon Circuit Court entered judgment on jury verdict awarding plaintiff compensatory damages and $5 million in punitive damages, and manufacturer appealed. The Oregon Court of Appeals, 108 Or. App. 43, 814 P.2d 517, affirmed, and further review was sought. The Oregon Supreme Court, 316 Or. 263, 851 P.2d 1084, affirmed, and manufacturer sought certiorari. The Supreme Court, Justice Stevens, held that amendment to the Oregon Constitution prohibiting judicial review of amount of punitive damages awarded by jury “unless the court can affirmatively say there is no evidence to support the verdict” violates the due process clause of the Fourteenth Amendment.

Reversed and remanded.

Justice Scalia filed concurring opinion.

Justice Ginsburg filed dissenting opinion which was joined by Chief Justice Rehnquist.

West Headnotes

Constitutional Law 92...4427
92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive Damages. Most Cited Cases
(Formerly 92k303)

Damages 115...94.8
115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.8 k. Constitutional Limitations on Amount in General. Most Cited Cases
(Formerly 115k94)

New Trial 275...162(1)
275 New Trial
275I Proceedings to Procure New Trial
275k162 Remission or Reduction of Excess of Recovery
275k162(1) k. In General. Most Cited Cases
Amendment to the Oregon Constitution prohibiting judicial review of the amount of punitive damages awarded by jury “unless the court can affirmatively say there is no evidence to support the verdict” violates the due process clause of the Fourteenth Amendment. Or.Const. Art. 7, § 3; U.S.C.A.

2332

the punitive damages award violated due process

affirming, both the

Fourteenth Amendment, and such decision should not

departure from traditional procedures. P. 2335.

(b) Judicial review of the size of punitive damages

awards was a safeguard against excessive awards

under the common law, see, e.g., Blunt v. Little, 3

F.Cas. 760, 761-762, and in modern practice in the

federal courts and every State, except Oregon, judges

review the size of such awards. See, e.g., Dagnello v.


2335-2338.

*416 c) There is a dramatic difference between

judicial review under the common law and the scope

of review available in Oregon. At least since the State

Supreme Court definitively constrained the 1910

amendment in Van Lom v. Schneiderman, 187 Or. 89,

210 P.2d 461, Oregon law has provided no procedure

for reducing or setting aside a punitive damages

award where the only basis for relief is the

amount awarded. No Oregon court for more than half

a century has inferred passion or prejudice from the

size of a damages award, and no court in more than a
decade has even hinted that it might possess the
power to do so. If courts had such power, the State
Supreme Court would have mentioned it in

responding to Honda's arguments in this very case.
The review that is provided ensures only that there is
evidence to support some punitive damages, not that
the evidence supports the amount actually awarded,
thus leaving the possibility that a guilty defendant
may be unjustly punished. Pp. 2338-2339.

(d) This Court has not hesitated to find proceedings

violative of due process where a party has been

deprived of a well-established common-law

protection against arbitrary and inaccurate

adjudication. See, e.g., Timney v. Ohio, 273 U.S. 510,
Punitive damages pose an acute danger of arbitrary deprivation of property, since jury instructions typically leave the jury with wide discretion in choosing amounts and since evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses. Oregon has removed one of the few procedural safeguards which the common law provided against that danger without providing any substitute procedure and without any indication that the danger has in any way subsided over time. *Hurtado v. California*, 110 U.S. 516, 538, 4 S.Ct. 111, 122, 28 L.Ed. 232; *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 distinguished. Pp. 2339-2341.

(e) The safeguards that Obergefell claims Oregon has provided-the limitation of punitive damages to the amount specified in the complaint, the clear and convincing standard of proof, preverdict determination of maximum allowable punitive damages, and detailed jury instructions—do not adequately safeguard against arbitrary awards. Nor does the fact that a jury's arbitrary decision to acquit a defendant charged with a crime is unreviewable offer a historic basis for such discretion in civil cases. The Due Process Clause says nothing about arbitrary grants of freedom, but its whole purpose is to prevent arbitrary deprivations of liberty or property. Pp. 2341-2342.

316 Or. 263, 851 P.2d 1084 (1993), reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BLACKMUN, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, J., joined. SCALIA, *417 J., filed a concurring opinion, post, p. 2342. GINSBURG, J., filed a dissenting opinion, in which REHNQUIST, C.J., joined, post, p. 2343.

Andrew L. Frey, Washington, DC, for petitioners.


**2334** *418 Justice STEVENs delivered the opinion of the Court.

An amendment to the Oregon Constitution prohibits judicial review of the amount of punitive damages awarded by a jury “unless the court can affirmatively say there is no evidence to support the verdict.” The question presented is whether that prohibition is consistent with the Due Process Clause of the Fourteenth Amendment. We hold that it is not.

I

Petitioner Honda Motor Co., Ltd., manufactured and sold the three-wheeled all-terrain vehicle that overturned while respondent was driving it, causing him severe and permanent injuries. Respondent brought suit alleging that petitioner knew or should have known that the vehicle had an inherently and unreasonably dangerous design. The jury found petitioner liable and awarded respondent $919,390.39 in compensatory damages and punitive damages of $5 million. The compensatory damages, however, were reduced by 20% to $735,512.31, because respondent's own negligence contributed to the accident. On appeal, relying on our then-recent decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), petitioner argued that the award of punitive damages violated the Due Process Clause of the Fourteenth Amendment, because the punitive damages were excessive and because Oregon courts lacked the power to correct excessive verdicts.

The Oregon Court of Appeals affirmed, as did the Oregon Supreme Court. The latter court relied heavily on the fact that the Oregon statute governing the award of punitive damages in product liability actions and the jury instructions in this case contained substantive criteria that provide *419 at least as much guidance to the factfinders as the Alabama statute and jury instructions that we upheld in *Haslip*. The Oregon Supreme Court also noted that Oregon law provides an additional protection by requiring the plaintiff to prove entitlement to punitive damages by clear and convincing evidence rather than a mere preponderance. Recognizing that other state courts had interpreted *Haslip* as including a “clear ... constitutional mandate for meaningful judicial scrutiny of punitive damage awards,” *Adams v. Murakami*, 54 Cal.3d 105, 118, 284 Cal.Rptr. 318, 326, 813 P.2d 1348, 1356 (1991); see also *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., Inc.*, 88 Md.App. 586, 596 A.2d 687 (1991), the court nevertheless declined to “interpret *Haslip* to hold that an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review that includes the possibility of remittitur.”

316 Or. 263, 284, 851 P.2d 1084, 1096 (1993). It also noted that trial and appellate courts were "not entirely powerless" because a judgment may be vacated if "there is no evidence to support the jury's decision," and because "appellate review is available to test the sufficiency of the jury instructions." Id. at 285, 851 P.2d at 1096-1097.

FN1. The jury instructions, in relevant part, read: "Punitive damages may be awarded to the plaintiff in addition to general damages to punish wrongdoers and to discourage wanton misconduct. In order for plaintiff to recover punitive damages against the defendant[s], the plaintiff must prove by clear and convincing evidence that defendant[s have] shown wanton disregard for the health, safety, and welfare of others.... If you decide this issue against the defendant[s], you may award punitive damages, although you are not required to do so, because punitive damages are discretionary. In the exercise of that discretion, you shall consider evidence, if any, of the following: First, the likelihood at the time of the sale [of the three-wheeled vehicle] that serious harm would arise from defendants' misconduct. Number two, the degree of the defendants' awareness of that likelihood. Number three, the duration of the misconduct. Number four, the attitude and conduct of the defendant[s] upon notice of the alleged condition of the vehicle. Number five, the financial condition of the defendant[s]. And the amount of punitive damages may not exceed the sum of $5 million." 316 Or. 263, 282, n. 11, 851 P.2d 1084, 1095, n. 11 (1993).

*420 We granted certiorari, 510 U.S. 1068, 114 S.Ct. 751, 127 L.Ed.2d 69 (1994), to consider whether Oregon's limited judicial review of the size of punitive damages awards is consistent with our decision in Haslip.

II

[1] Our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). Although they fail to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable," id., at 458, 111 S.Ct., at 2720; Haslip, 499 U.S., at 18, 111 S.Ct., at 1043, a majority of the Justices agreed that the Due Process Clause imposes a limit on punitive damages awards. A plurality in TXO assented to the proposition that "grossly excessive" punitive damages would violate due process, 509 U.S., at 453-455, 113 S.Ct., at 2718-2719, while Justice O'CONNOR, who dissented because she favored more rigorous standards, noted that "[i]t is thus common ground that an award may be so excessive as to violate due process," id., at 480, 113 S.Ct., at 2731. In the case before us today we are not directly concerned with the character of the standard that will identify unconstitutionally excessive awards; rather, we are confronted with the question of what procedures are necessary to ensure that punitive damages are not imposed in an arbitrary manner. More specifically, the question is whether the Due Process Clause requires judicial review of the amount of punitive damages awards.

The opinions in both Haslip and TXO strongly emphasized the importance of the procedural component of the Due Process Clause. In Haslip, the Court held that the common-law method of assessing punitive damages did not violate procedural due process. In so holding, the Court stressed the availability of both "meaningful and adequate review by the trial court" and subsequent appellate review. 499 U.S., at 20, 111 S.Ct., at 1044. Similarly, in TXO, the plurality opinion *421 found that the fact that the "[award was reviewed and upheld by the trial judge]" and unanimously affirmed on appeal gave rise "to a strong presumption of validity." 509 U.S., at 457, 113 S.Ct., at 2720. Concurring in the judgment, Justice SCALIA (joined by Justice THOMAS) considered it sufficient that traditional common-law procedures were followed. In particular, he noted that "[p]rocedural due process requires judicial review of punitive damages awards for reasonableness." Id., at 471, 113 S.Ct., at 2727.

All of those opinions suggest that our analysis in this case should focus on Oregon's departure from traditional procedures. We therefore first contrast the relevant common-law practice with Oregon's procedure, which that State's Supreme Court once described as "a system of trial by jury in which the judge is reduced to the status of a mere monitor." Van Lom v. Schneiderman, 187 Or. 89, 113, 210 P.2d ...
461, 471 (1949). We then examine the constitutional implications of Oregon's deviation from established common-law procedures.

III

Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded. One of the earliest reported cases involving exemplary damages, Huckle v. Money, 2 Wils. 205, 95 Eng.Rep. 768 (C.P.1763), arose out of King George III's attempt to punish the publishers of the allegedly seditious North Briton, No. 45. The King's agents arrested the plaintiff, a journeyman printer, in his home and detained him for six hours. Although the defendants treated the plaintiff rather well, feeding him "beef steakes and beer, so that he suffered very little or no damages," 2 Wils., at 205, 95 Eng.Rep., at 768, the jury awarded him £300, an enormous sum almost 300 times the plaintiff's weekly wage. The defendant's lawyer requested a new trial, arguing that the jury's award was excessive. Plaintiff's*422 counsel, on the other hand, argued that when the damages are too high.

Respondent calls to our attention the case of Beardmore v. Carrington, 2 Wils. 244, 95 Eng.Rep. 790 (C.P.1764), in which the court asserted that "there is not one single case, (that is law), in all the books to be found, where the court has granted a new trial for excessive damages in actions for torts." Id., at 249, 95 Eng.Rep., at 793. Respondent would infer from that statement that 18th-century common law did not provide for judicial review of damages amounts. Instead, he noted that when the damages are "outrageous" and "all mankind at first blush must think so," a court may grant a new trial "for excessive damages." Id., at 207, 95 Eng.Rep., at 769. In accord with his view that the amount of an award was relevant to the motion for a new trial, the Chief Justice noted that "[u]pon the whole I am of opinion the damages are not excessive." Ibid.

Subsequent English cases, while generally deferring to the jury's determination of damages, steadfastly upheld the court's power to order new trials solely on the basis that the damages were too high. Fabrigas v. Mostyn, 2 Black.W. 929, 96 Eng.Rep. 549 (C.P.1773) (Damages "may be so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury"); Sharpe v. Brice, 2 Black.W. 942, 96 Eng.Rep. 557 (C.P.1774) ("It has never been laid down, that the Court will not grant a new trial for excessive damages in any cases of tort"); Leith v. Pope, 2 Black.W. 1327, 1328, 96 Eng.Rep. 777, 778 (C.P.1779) ("[I]n cases of tort the Court will not interpose on account of the largeness of damages, unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality*423 of the jury"); Jones v. Sparrow, 5 T.R. 257, 101 Eng.Rep. 144 (K.B.1793) (new trial granted for excessive damages); Goldsmith v. Lord Sefton, 3 Anst. 808, 145 Eng.Rep. 1046 (Exch.1796) (same); Hewlett v. Cruchley, 5 Taunt. 277, 281, 128 Eng.Rep. 696, 698 (C.P.1813) ("[I]t is now well acknowledged in all the Courts of Westminster-hall, that whether in actions for criminal conversation, malicious prosecutions, words, or any other matter, if the damages are clearly too large, the Courts will send the inquiry to another jury").

FN2. As in many early cases, it is unclear whether this case specifically concerns punitive damages or merely ordinary compensatory damages. Since there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century, no effort has been made to separate out the two classes of cases. See Brief for Legal Historians Daniel R. Coquillette et al. as Amici Curiae 2, 3, 6-7, 15 (discussing together " punitive damages, personal injury, and other cases involving difficult-to-quantify damages").
cases are recorded in the standard reporter. 2 Wils. 208-257, 95 Eng.Rep. 769-797. Finally, the inference respondent would draw, that 18th-century English common law did not permit a judge to order new trials for excessive damages, is explicitly rejected by Beardmore itself. *424* which cautioned against that very inference: "We desired to be understood that this court does not say, or lay down any rule that there can never happen a case of such excessive damages in tort where the court may not grant a new trial." 2 Wils., at 250, 95 Eng.Rep., at 793.

Common-law courts in the United States followed their English predecessors in providing,**2337 judicial review of the size of damages awards. They too emphasized the deference ordinarily afforded jury verdicts, but they recognized that juries sometimes awarded damages so high as to require correction. Thus, in 1822, Justice Story, sitting as Circuit Justice, ordered a new trial unless the plaintiff agreed to a reduction in his damages. FN3 In explaining his ruling, he noted:

FN3. While Justice Story's grant of a new trial was clearly in accord with established common-law procedure, the remittitur-withdrawal of new trial if the plaintiff agreed to a specific reduction of damages-may have been an innovation. See Dimick v. Schiedt, 293 U.S. 474, 482-485, 55 S.Ct. 296, 299-300, 79 L.Ed. 603 (1935). On the other hand, remittitur may have a better historical pedigree than previously thought. See King v. Watson, 2 T.R. 199-200, 100 Eng.Rep. 108 (K.B.1788) (" [O]n a motion in the Common Pleas to set aside the verdict for excessive damages ... the Court recommended a compromise, and on Hurry's agreeing to accept 1500 [pounds] they discharged the rule").

"As to the question of excessive damages, I agree, that the court may grant a new trial for excessive damages. It is indeed an exercise of discretion full of delicacy and difficulty. But if it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case." Blunt v. Little, 3 F.Cas. 760, 761-762 (No. 1,578) (CC Mass.1822) See also Whipple v. Cumberland Mfg. Co., 29 F.Cas. 934, 937-938 (No. 17,516) (CC Me.1843).

*425 In the 19th century, both before and after the ratification of the Fourteenth Amendment, many American courts reviewed damages for "partiality" or "passion and prejudice." Nevertheless, because of the difficulty of probing juror reasoning, passion and prejudice review was, in fact, review of the amount of awards. Judges would infer passion, prejudice, or partiality from the size of the award.FN4 Coffin v. Coffin, 4 Mass. 1, 41 (1808) (In cases of personal injury, "a verdict may be set aside for excessive damages" when "from the exorbitancy of them the court must conclude that the jury acted from passion, partiality, or corruption"); Taylor v. Giger, 3 Ky. 586, 587 (1808) (" In actions of tort ... a new trial ought not to be granted for excessiveness of damages, unless the damages found are so enormous as to shew that the jury were under some improper influence, or were led astray by the violence of prejudice or passion"); McConnell v. Hampton, 12 Johns. 234, 235 (N.Y.1815) (granting new trial for excessive damages and noting: " That Courts have a legal right to grant new trials, for excessive damages in actions for torts, is no where denied ..."); Belknap v. Boston & Maine R. Co., 49 N.H. 358, 374 (1870) (setting aside both compensatory and punitive damages, because " [w]e think it evident that the jury were affected by some partiality or prejudice").


Nineteenth-century treatises similarly recognized judges' authority to award new trials on the basis of the size of damages awards. 1 D. Graham, A Treatise on the Law of New Trials 442 (2d ed. 1855) ("[E]ven in personal torts, where the jury find outrageous damages, clearly evincing partiality, prejudice and passion, the court will interfere for the
relief "*426 of the defendant, and order a new trial"; T. Sedgwick, A Treatise on the Measure of Damages 707 (5th ed. 1869) ("The court again holds itself at liberty to set aside verdicts and grant new trials ... whenever the damages are so excessive as to create the belief that the jury have been misled either by passion, prejudice, or ignorance"); 3 J. Sutherland, A Treatise on the Law of Damages 469 (1883) (When punitive damages are submitted to the jury, "the amount which **2338 they may think proper to allow will be accepted by the court, unless so exorbitant as to indicate that they have been influenced by passion, prejudice or a perverted judgment").


[2] There is a dramatic difference between the judicial review of punitive damages awards under the common law and the scope of review available in Oregon. An Oregon trial judge, or an Oregon appellate court, may order a new trial if the jury was not properly instructed, if error occurred during the trial, or if there is no evidence to support any punitive damages at all. But if the defendant's only basis for relief is the amount of punitive damages the jury awarded, Oregon *427 provides no procedure for reducing or setting aside that award. This has been the law in Oregon at least since 1949 when the State Supreme Court announced its opinion in Van Lom v. Schneiderman, 187 Or. 89, 210 P.2d 461 (1949), definitively construing the 1910 amendment to the Oregon Constitution.

**2339 The court is of the opinion that the verdict of $10,000.00 is excessive. Some members of the court think that only the award of punitive damages is excessive; others that both the awards of compensatory and punitive damages are excessive. Since a majority are of the opinion that this court has no power to disturb the verdict, it is not deemed necessary to discuss the grounds for these divergent views." Van Lom v. Schneiderman, 187 Or., at 93, 210 P.2d, at 462 (1949).

**2339 The guaranty of the right to jury trial in suits at common law, incorporated in the Bill of Rights as one of the first ten amendments of the Constitution of the United States, was interpreted by the Supreme Court of the United States to refer to jury trial as it had been theretofore known

Oregon Constitution provides:
"In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict."

In that case the court held that it had no power to reduce or set aside the award of both compensatory and punitive damages that was admittedly excessive. **2339 It recognized that the constitutional amendment placing a limitation on its power was a departure from the traditional common-law approach. The opinion's characterization of Oregon's "lonely eminence" in this regard, id., at 113, 210 P.2d., at 471, is still an accurate portrayal of its unique position. Every other State in the Union affords postverdict judicial review of the *428 amount of a punitive damages award, see supra, at 2338, and subsequent decisions have reaffirmed Oregon judges' lack of authority to order new trials or other relief to remedy excessive damages. Fowler v. Courtmanche, 202 Or. 413, 448, 274 P.2d 258, 275 (1954) ("If this court were authorized to exercise its common law powers, we would unhesitatingly hold that the award of $35,000 as punitive damages was excessive ... "); Tenold v. Weyerhaeuser Co., 127 Or.App. 511, 873 P.2d 413 (1994) (Oregon court cannot examine jury award to ensure compliance with $500,000 statutory limit on noneconomic damages).

FN6. "The court is of the opinion that the verdict of $10,000.00 is excessive. Some members of the court think that only the award of punitive damages is excessive; others that both the awards of compensatory and punitive damages are excessive. Since a majority are of the opinion that this court has no power to disturb the verdict, it is not deemed necessary to discuss the grounds for these divergent views." Van Lom v. Schneiderman, 187 Or., at 93, 210 P.2d, at 462 (1949).

FN7. "The guaranty of the right to jury trial in suits at common law, incorporated in the Bill of Rights as one of the first ten amendments of the Constitution of the United States, was interpreted by the Supreme Court of the United States to refer to jury trial as it had been theretofore known..."
in England; and so it is that the federal judges, like the English judges, have always exercised the prerogative of granting a new trial when the verdict was clearly against the weight of the evidence, whether it be because excessive damages were awarded or for any other reason. The state courts were conceded similar powers.... [U]p to 1910, when the people adopted Art. VII, § 3, of our Constitution, there was no state in the union, so far as we are advised, where this method of control of the jury did not prevail.” Id., at 112-113, 210 P.2d, at 471.

Respondent argues that Oregon's procedures do not deviate from common-law practice, because Oregon judges have the power to examine the size of the award to determine whether the jury was influenced by passion and prejudice. This is simply incorrect. The earliest Oregon cases interpreting the 1910 amendment squarely held that Oregon courts lack precisely that power. Timmins v. Hale, 122 Or. 24, 43-44, 256 P. 770, 776 (1927); McCulley v. Homestead Bakery, Inc., 141 Or. 460, 465-466, 18 P.2d 226, 228 (1933). Although dicta in later cases have suggested that the issue might eventually be revisited, see Van Lom, 187 Or., at 106, 210 P.2d, at 468, the earlier holdings remain Oregon law. No Oregon court for more than half a century has inferred passion and prejudice from the size of a damages award, and no court in more than a decade has even hinted that courts might possess the power to do so. Finally, if Oregon courts could evaluate the excessiveness of punitive damages awards through passion and prejudice review, the Oregon Supreme Court would have mentioned that power in this very case. Petitioners argued that Oregon procedures were unconstitutional precisely because they failed to provide judicial review of the size of punitive damages awards. The Oregon Supreme Court responded by rejecting the idea that judicial review of the size of punitive damages awards was required by Hostip, 216 Or., at 263, 851 P.2d, at 1084. As the Court noted, two state appellate courts, including the California Supreme Court, had reached the opposite conclusion. Id., at 284, n. 13, 851 P.2d, at 1096, n. 13. If, as respondent claims, Oregon law provides passion and prejudice review of excessive verdicts, the Oregon Supreme Court would have had a more obvious response to petitioners' argument.

FN8. The last reported decision to suggest that a new trial might be ordered because the size of the award suggested passion and prejudice was Trenery v. Score, 45 Or.App. 611, 615, 609 P.2d 388, 389 (1980) (noting that “[i]t is doubtful” that passion and prejudice review continues to be available); see also Foley v. Pittenger, 264 Or. 310, 503 P.2d 476 (1972). More recent decisions suggest that the type of passion and prejudice review envisioned by the common law and former Ore.Rev.Stat. § 17.610 (repealed by 1979 Ore. Laws, ch. 284, § 199) is no longer available. See Ternold v. Weyerhaeuser Co., 127 Or.App. 511, 873 P.2d 413 (1994).

Respondent also argues that Oregon provides adequate review, because the trial judge can overturn a punitive damages award if there is no substantial evidence to support an award of punitive damages. See Fowler v. Courtemanche, 202 Or., at 448-449, 274 P.2d, at 275. This argument is unconvincing, because the review provided by Oregon courts ensures only that there is evidence to support some punitive damages, not that there is evidence to support the amount actually awarded. While Oregon's judicial review ensures that punitive damages are not awarded against defendants entirely innocent of conduct warranting exemplary damages, Oregon, unlike the common law, provides no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts. What we are concerned with is the possibility that a culpable defendant may be unjustly punished; evidence of culpability warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing.

*430 V

Oregon's abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause. As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis. Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 15 L.Ed. 372 (1856); Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936); In re Winship, 397
the case before us is unlike those in which
U.S. Brown Hurtado. 273 U.S. 278, 56 L.Ed. 682 (1936); the same protection as the abrogated common-law procedures would have provided proceedings violative of due process.

The party has been deprived of liberty or property without due process or improvement. " 110 U.S. at 122. A review of the cases, however, suggests that the case before us is unlike those in which abrogations of common-law procedures have been upheld.

In Hurtado, for example, examination by a neutral magistrate provided criminal defendants with nearly the same protection as the abrogated common-law grand jury procedure. Id. at 538, 4 S.Ct. at 122. Oregon, by contrast, has provided no similar substitute for the protection provided by judicial review of the amount awarded by the jury in punitive damages. Similarly, in International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), this Court upheld the extension of state-court jurisdiction over persons not physically present, in spite of contrary well-established prior practice. That change, however, was necessitated by the growth of a new business entity, the corporation, whose ability to conduct business without physical presence had created new problems not envisioned by rules developed in another era. See Burnham, 495 U.S. at 617, 110 S.Ct. at 2114. In addition, the dramatic improvements in communication and transportation made litigation in a distant forum less onerous. No similar social changes suggest the need for Oregon's abrogation of judicial review, nor do improvements in technology render unchecked punitive damages any less onerous. If anything, the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries. FN9

FN9. Respondent cites as support for his argument Chicago, R.I. & P.R. Co. v. Cole, 251 U.S. 54, 55, 40 S.Ct. 68, 64 L.Ed. 133 (1919) (Holmes, J.). In that case, the Court upheld a provision of the Oklahoma Constitution providing that " 'the defense of contributory negligence ... shall ... be left to the jury.' " Chicago, R.I. provides little support for respondent's case. Justice Holmes' reasoning relied on the fact that a State could completely abolish the defense of contributory negligence. This case, however, is different, because the TXO and Haslip opinions establish that States cannot abolish limits on the award of punitive damages.

*432 Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger. Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary
awards has in any way subsided over time. For these reasons, we hold that Oregon's denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment. FN10

FN10. This case does not pose the more difficult question of what standard of review is constitutionally required. Although courts adopting a more deferential approach use different verbal formulations, there may not be much practical difference between review that focuses on "passion and prejudice," "gross excessiveness," or whether the verdict was "against the great weight of the evidence." All of these may be rough equivalents of the standard this Court articulated in Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-2792, 61 L.Ed.2d 560 (1979) (whether "no rational trier of fact could have" reached the same verdict).

VI

Respondent argues that Oregon has provided other safeguards against arbitrary awards and that, in any event, the exercise of this unreviewable power by the jury is consistent with the jury's historic role in our judicial system.

Respondent points to four safeguards provided in the Oregon courts: the limitation of punitive damages to the amount specified in the complaint, the clear and convincing standard of proof, preverdict determination of maximum allowable punitive damages, and detailed jury instructions. The first, limitation of punitive damages to the amount specified, is hardly a constraint at all, because there is no limit to the amount the plaintiff can request, and it is unclear whether an award exceeding the amount requested could be set aside. See Tenold v. Weyerhaeuser Co., 127 Or.App. 511, 873 P.2d 413 (1994) (Oregon Constitution bars court from examining jury award to ensure compliance with $500,000 statutory limit on noneconomic damages). The second safeguard, the clear and convincing standard of proof, is an important check against unwarranted imposition of punitive damages, but, like the "no substantial evidence" review discussed, supra, at 2339, it provides no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts. Regarding the third purported constraint, respondent cites no cases to support the idea that Oregon courts do or can set maximum punitive damages awards in advance of the verdict. Nor are we aware of any court which implements that procedure. Respondent's final safeguard, proper jury instruction, is a well-established and, of course, important check against excessive awards. The problem that concerns us, however, is the possibility that a jury will not follow those instructions and may return a lawless, biased, or arbitrary verdict. FN11

FN11. Respondent also argues that empirical evidence supports the effectiveness of these safeguards. It points to the analysis of an amicus showing that the average punitive damages award in a products liability case in Oregon is less than the national average. Brief for Trial Lawyers for Public Justice as Amicus Curiae. While we welcome respondent's introduction of empirical evidence on the effectiveness of Oregon's legal rules, its statistics are undermined by the fact that the Oregon average is computed from only two punitive damages awards. It is well known that one cannot draw valid statistical inferences from such a small number of observations.

Empirical evidence, in fact, supports the importance of judicial review of the size of punitive damages awards. The most exhaustive study of punitive damages establishes that over half of punitive damages awards were appealed, and that more than half of those appealed resulted in reductions or reversals of the punitive damages. In over 10% of the cases appealed, the judge found the damages to be excessive. Rustad, In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L.Rev. 1, 57 (1992). The above statistics underline the importance of judicial review, because they consider only appellate review, rather than review by the trial court, which may be even more significant, and because they ignore the fact that plaintiffs often settle for less than the amount awarded because they fear appellate reduction of damages. See ibid.
of the amount of punitive damages, respondent calls our attention to early civil and criminal cases in which the jury was allowed to judge the law as well as the facts. See Johnson v. Louisiana, 406 U.S. 356, 374, n. 11, 92 S.Ct. 1620, 1639-1640, n. 11, 32 L.Ed.2d 152 (1972) (Powell, J., concurring). As we have already explained, in civil cases, the jury's discretion to determine the amount of damages was constrained by judicial review. FN12 The criminal cases do establish as does our practice today that a jury's arbitrary decision to acquit a defendant charged with a crime is completely unreviewable. There is, however, a vast difference between arbitrary grants of freedom and arbitrary deprivations of liberty or property. The Due Process Clause has nothing to say about the former, but its whole purpose is to prevent the latter. A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the procedures of judicial review, In re Remmelt, 114 U.S. 604, 611, 610, 8 S.Ct. 13, 210 P.2d, 461 (1949). The 1910 amendment, by its terms, did not eliminate those substantive standards but altered the procedures of judicial review: "[N]o fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict" (emphasis added). The Oregon courts appear to believe that a state-law "reasonableness" limit upon the amount of punitive damages subsists, but cannot be enforced through the process of judicial review. In Van Lorn, for example, the Oregon Supreme Court had no trouble concluding that the damages award was excessive, see *436 436187 Or., at 91-93, 210 P.2d, at 462, but held that the amendment had removed its "power to correct a miscarriage of justice by ordering a new trial," id., at 112-113, 210 P.2d, at 471.

The Court's opinion establishes that the right of review eliminated by the amendment was a procedure traditionally accorded at common law. The deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure**2343 for enforcing state-prescribed limits upon such deprivation violates the Due Process Clause.

Justice GINSBURG, with whom THE CHIEF JUSTICE joins, dissenting.

In product liability cases, Oregon guides and limits the factfinder's discretion on the availability and amount of punitive damages. The plaintiff must


The judgment is reversed, and the case is remanded to the Oregon Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SCALIA, concurring.

I join the opinion of the Court, but a full explanation of why requires that I supplement briefly the description of what has occurred here.

Before the 1910 amendment to Article VII, § 3, of the Oregon Constitution, Oregon courts had developed and were applying common-law standards that limited the size of damages awards. See, e.g., Adcock v. Oregon R. Co., 45 Or. 173, 179-182, 77 P. 78, 80 (1904) (approving trial court's decision to grant a remittitur because the jury's damages award was excessive); see also Van Lorn v. Schneiderman, 187 Or. 89, 96-98, 112-113, 210 P.2d 461, 464, 471 (1949). The 1910 amendment, by its terms, did not eliminate those substantive standards but altered the procedures of judicial review: "[N]o fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict" (emphasis added). The Oregon courts appear to believe that a state-law "reasonableness" limit upon the amount of punitive damages subsists, but cannot be enforced through the process of judicial review. In Van Lorn, for example, the Oregon Supreme Court had no trouble concluding that the damages award was excessive, see *436 436187 Or., at 91-93, 210 P.2d, at 462, but held that the amendment had removed its "power to correct a miscarriage of justice by ordering a new trial," id., at 112-113, 210 P.2d, at 471.

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In product liability cases, Oregon guides and limits the factfinder's discretion on the availability and amount of punitive damages. The plaintiff must
establish entitlement to punitive damages, under specific substantive criteria, by clear and convincing evidence. Where the factfinder is a jury, its decision is subject to judicial review to this extent: The trial court, or an appellate court, may nullify the verdict if reversible error occurred during the trial, if the jury was improperly or inadequately instructed, or if there is no evidence to support the verdict. Absent trial error, and if there is evidence to support the award of punitive damages, however, Oregon's Constitution, Article VII, § 3, provides that a properly instructed jury's verdict shall not be reexamined. In Oregon's procedures, I conclude, are adequate to pass the Constitution's due process threshold. I therefore dissent from the Court's judgment upsetting Oregon's disposition in this case.

FN1. Article VII, § 3, of the Oregon Constitution reads: "In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

And in TXO, a majority agreed that a punitive damage award may be so grossly excessive as to violate the Due Process Clause. 509 U.S., at 453-454, 458, 113 S.Ct., at 2718, 2720 (plurality opinion); id., at 466, 467, 113 S.Ct., at 2724, 2725 (KENNEDY, J., concurring in part and concurring in judgment); id., at 479-480, 113 S.Ct., at 2731 (O'CONNOR, J., dissenting). In the plurality's view, however, " a judgment that is a product" of "fair procedures ... is entitled to a strong presumption of validity"; this presumption, "persuasive reasons" indicated, "should be irrebuttable, ... or virtually so." Id., at 457, 113 S.Ct., at 2720 citing Haslip, 499 U.S., at 24-40, 111 S.Ct., at 1046-1054 (SCALIA, J., concurring in judgment), and id., at 40-42, 111 S.Ct., at 1054-1056 (KENNEDY, J., concurring in judgment). The opinion stating the plurality position recalled Haslip's touchstone: A " 'concern [for] reasonableness' " is what due process essentially requires. *438509 U.S., at 458, 113 S.Ct., at 2720, quoting Haslip, 499 U.S., at 18, 111 S.Ct., at 1043. Writing for the plurality, Justice STEVENS explained: "[W]e do not suggest that a defendant has a substantive due process right to a correct determination of the 'reasonableness' of a punitive damages award. As Justice O'CONNOR points out, state law generally imposes a requirement that punitive damages be 'reasonable.' A violation of a state **2344 law 'reasonableness' requirement would not, however, necessarily establish that the award is so 'grossly excessive' as to violate the Federal Constitution." 509 U.S., at 458, n. 24, 113 S.Ct., at 2720-2721, n. 24 (citation omitted).

B

The procedures Oregon's courts followed in this case satisfy the due process limits indicated in Haslip and TXO: the jurors were adequately guided by the trial court's instructions, and Honda has not maintained, in its full presentation to this Court, that the award in question was "so 'grossly excessive' as to violate the Federal Constitution." TXO, 509 U.S., at 458, n. 24, 113 S.Ct., at 2770-2771, n. 24. FN2. The Supreme Court of Oregon noted that "procedural due process in the context of an award of punitive damages relates to the requirement that the procedure employed in making that award be fundamentally fair," while the substantive limit declared
Several preverdict mechanisms channeled the jury's discretion more tightly in this case than in either Haslip or TXO. First, providing at least some protection against unguided, utterly arbitrary jury awards, respondent Karl Oberg was permitted to recover no more than the amounts specified in the complaint, $919,390.39 in compensatory damages and $5 million in punitive damages. See Ore. Rule Civ.Proc. 18B (1994); Wiebe v. Steely, 215 Or. 331, 355-358, 335 P.2d 379, 391 (1959); Lovett Specialty Hosp. v. Advocates for Life, Inc., 121 Or.App. 160, 167, 855 P.2d 159, 163 (1993). The trial court properly instructed the jury on this damage cap. See 316 Or. 263, 282, n. 11, 851 P.2d 1084, 1095, n. 11 (1993). No provision of Oregon law appears to preclude the defendant from seeking an instruction setting a lower cap, if the evidence at trial cannot support an award in the amount demanded. Additionally, if the trial judge relates the incorrect maximum amount, a defendant who timely objects may gain modification or nullification of the verdict. See Timber Access Industries Co. v. U.S. Plywood-Champion Papers, Inc., 263 Or. 509, 525-528, 503 P.2d 482, 490-491 (1972).FN3

FN3. The Court's contrary suggestion, ante, at 2341, is based on Tenold v. Weyerhaeuser Co., 127 Or.App. 511, 873 P.2d 413 (1994), a decision by an intermediate appellate court, in which the defendant does not appear to have objected to the trial court's instructions as inaccurate, incomplete, or insufficient, for failure to inform the jury concerning a statutorily mandated $500,000 cap on noneconomic damages.

Second, Oberg was not allowed to introduce evidence regarding Honda's wealth until he "presented evidence sufficient to justify to the court a prima facie claim of punitive damages." Ore.Rev.Stat. § 41.315(2) (1991); see also § 30.925(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 [punitive damages]."). This evidentiary rule is designed to lessen the risk "that juries will use their verdicts to express biases against big businesses." Ante, at 2341; see also Ore.Rev.Stat. § 30.925(3)(e) (1991) (requiring factfinder to take into account "[t]he deterrent effect of other punishment imposed upon the defendant as a result of the misconduct"). Third, and more significant, as the trial court instructed the jury, Honda could not be found liable for punitive damages unless Oberg established by "clear and convincing evidence" that Honda's "show[ed] wanton disregard for the health, safety and welfare of others." § 30.925 (governing product liability actions); see also § 41.315(1) ("Except as otherwise specifically provided by law, a claim for punitive damages shall be established by clear and convincing evidence."). *440 "[T]he clear-and-convincing evidence requirement," which is considerably more rigorous than the standards applied by Alabama in Haslip and West Virginia in TXO, constrains the jury's discretion, limiting punitive damages to the more egregious cases. Haslip, 499 U.S., at 58, 111 S.Ct., at 1064 (O'CONNOR, J., dissenting). Nothing in Oregon law appears to preclude a new trial order if the trial judge, informed by the jury's verdict, determines that his charge did not adequately explain what the "clear and convincing" standard means. See Ore.Rule Civ.Proc. 64 G (1994) (authorizing court to grant new trial "on its own initiative").

Fourth, and perhaps most important, in product liability cases, Oregon requires that punitive damages, if any, be awarded based on seven substantive criteria, set forth in Ore.Rev.Stat. § 30.925(3) (1991):

"(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, punitive damage 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.”

These substantive criteria, and the precise instructions detailing them, gave the jurors “adequate guidance” in making their award, see Haslip, 499 U.S., at 18, 111 S.Ct., at 1043, far more guidance than their counterparts in Haslip FN7 and 2346 TXO received. In Haslip, for example, the jury was told only the purpose of punitive damages (punishment and deterrence) and that an award was discretionary, not compulsory. We deemed those instructions, notable for their generality, constitutionally sufficient. 499 U.S., at 19-20, 111 S.Ct., at 1044.

FN6. The trial court instructed the jury:
“ Punitive damages: If you have found that plaintiff is entitled to general damages, you must then consider whether to award punitive damages. Punitive damages may be awarded to the plaintiff in addition to general damages to punish wrongdoers and to discourage wanton misconduct.
“ In order for plaintiff to recover punitive damages against the defendant [s], the plaintiff must prove by clear and convincing evidence that defendant[s] have shown wanton disregard for the health, safety, and welfare of others....
“ If you decide this issue against the defendant[s], you may award punitive damages, although you are not required to do so, because punitive damages are discretionary.
“ In the exercise of that discretion, you shall consider evidence, if any, of the following:
“ First, the likelihood at the time of the sale [of the all-terrain vehicle] that serious harm would arise from defendants' misconduct.
“ ' Number two, the degree of the defendants' awareness of that likelihood.
“ ' Number three, the duration of the misconduct.
“ ' Number four, the attitude and conduct of the defendant[s] upon notice of the alleged condition of the vehicle.
“ ' Number five, the financial condition of the defendant[s].’ ” 316 Or., at 282, n. 11, 851 P.2d, at 1095, n. 11.
The trial judge did not instruct the jury on § 30.925(3)(e), “profitability of [Honda's] misconduct,” or § 30.925(3)(g), the “total deterrent effect of other punishment” to which Honda was subject. Honda objected to an instruction on factor (3)(e), which it argued was phrased “to assume the existence of misconduct,” and expressly waived an instruction on factor (3)(g), on the ground that it had not previously been subject to punitive damages. App. to Brief for Plaintiff-Respondent in Opposition in No. S38436 (Ore.), p. 2. In its argument before the Supreme Court of Oregon, Honda did not contend that the trial court failed to instruct the jury concerning the “[§ 30.925(3)] criteria,” or “that the jury did not properly apply those criteria.” 316 Or., at 282, n. 11, 851 P.2d, at 1095, n. 11.

FN7. The trial judge in Haslip instructed the jury:
“ Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.
“ This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the defendant[s] ... ha[ve] had a fraud perpetrated upon them and as a direct result they were
injured [then] in addition to compensatory damages you may in your discretion award punitive damages.

"Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, ... by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so.

"Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." 499 U.S., at 6, n. 1, 111 S.Ct., at 1037, n. 1 (internal quotation marks omitted).

FN8. The jury instruction in TXO read:

"'In addition to actual or compensatory damages, the law permits the jury, under certain circumstances, to make an award of punitive damages, in order to punish the wrongdoer for his misconduct, to serve as an example or warning to others not to engage in such conduct and to provide additional compensation for the conduct to which the injured parties have been subjected.

"If you find from a preponderance of the evidence that TXO Production Corp. is guilty of wanton, wilful, malicious or reckless conduct which shows an indifference to the right of others, then you may make an award of punitive damages in this case.

"In assessing punitive damages, if any, you should take into consideration all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages. The object of such punishment is to deter TXO Production Corp. and others from committing like offenses in the future. Therefore the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.' " 509 U.S., at 463, n. 29, 113 S.Ct., at 2723, n. 29.

The Court's opinion in Haslip went on to describe the checks Alabama places on the jury's discretion postverdict-through excessiveness review by the trial court, and appellate review, which tests the award against specific substantive criteria. Id., at 20-23, 111 S.Ct., at 1044-1046. While postverdict review of that character is not available in Oregon, the seven factors against which Alabama's Supreme Court tests punitive awards strongly resemble the statutory criteria Oregon's juries are instructed to apply. 316 Or., at 283, and n. 12, 851 P.2d, at 1095-1096, and n. 12. And this Court has often acknowledged, and generally respected, the presumption that juries follow the instructions they are given. See, e.g., *444 Shannon v. United States, 512 U.S. 573, 584-585, 114 S.Ct. 2419, 2427, 129 L.Ed.2d 459 (1994); Richardson v. Marsh, 481 U.S. 200, 206, 107 S.Ct. 1702, 1706-1707, 95 L.Ed.2d 176 (1987).

FN9. The Alabama factors are:

"(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 frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation." 499 U.S., at 21-22, 111 S.Ct., at 1045, citing Green Oil Co. v. Horshby, 539 So.2d 218, 223-224 (Ala.1989), and Central Alabama Elec. Cooperative v. Tapley, 546 So.2d 371, 376-377 (Ala.1989).

As the Supreme Court of Oregon observed, Haslip "determined only that the Alabama procedure, as a
whole and in its net **2347 effect, did not violate the Due Process Clause.” 316 Or., at 284, 851 P.2d, at 1096. The Oregon court also observed, correctly, that the Due Process Clause does not require States to subject punitive damage awards to a form of postverdict review “that includes the possibility of remittitur.” FN10 Ibid. Because Oregon requires the factfinder to apply § 30.925's objective criteria, moreover, its procedures are perhaps more likely to prompt rational and fair punitive damage decisions than are the post hoc checks employed in jurisdictions following Alabama's pattern. See Haslip, 499 U.S., at 52, 111 S.Ct., at 1061 (O'CONNOR, J., dissenting) (“[T]he standards [applied by the Alabama Supreme Court] could assist juries to make fair, rational decisions. Unfortunately, Alabama courts do not give the[se] factors to the jury. Instead, the jury has standardless discretion to impose punitive damages whenever and in whatever amount it wants.”). As the Oregon court concluded, “application of objective criteria ensures that sufficiently definite and meaningful constraints are imposed on the finder of fact.” 316 Or., at 283, 851 P.2d, at 1096. The Oregon court also concluded that the statutory criteria, by adequately guiding the jury, worked to “ensure that the resulting award is not disproportionate to a defendant's conduct and to the need to punish and deter.” Ibid.FN11

FN10. Indeed, the compatibility of the remittitur with the Seventh Amendment was not settled until Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935).

FN11. Oregon juries, reported decisions indicate, rarely award punitive damages. Between 1965 and the present, awards of punitive damages have been reported in only two product liability cases involving Oregon law, including this one. See Brief for Trial Lawyers for Public Justice as Amicus Curiae 10, and n. 7. The punitive award in this case was about 5.4 times the amount of compensatory damages and about 258 times the plaintiff's out-of-pocket expenses. This amount is not far distant from the award upheld in Haslip, which was more than 4 times the amount of compensatory damages and more than 200 times the plaintiff's out-of-pocket expenses. See 499 U.S., at 23, 111 S.Ct., at 1046. The $10 million award this Court sustained in TXO, in contrast, was more than 526 times greater than the actual damages of $19,000. 509 U.S., at 453, 113 S.Ct., at 2718.

The Supreme Court of Oregon's conclusions are buttressed by the availability of at least some postverdict judicial review of punitive damage awards. Oregon's courts ensure that there is evidence to support the verdict:

“ If there is no evidence to support the jury’s decision-in this context, no evidence that the statutory prerequisites for the award of punitive damages were met-then the trial court or the appellate courts can intervene to vacate the award. See ORCP 64B(5) (trial court may grant a new trial if the evidence is insufficient to justify the verdict or is against law); Hill v. Garner, 277 Or. 641, 643, 561 P.2d 1016 (1977) (judgment notwithstanding the verdict is to be granted when there is no evidence to support the verdict); State v. Brown, 306 Ore. 599, 604, 761 P.2d 1300 (1988) (a fact decided by a jury may be re-examined when a reviewing court can say affirmatively that there is no evidence to support the jury's decision).” Id., at 285, 851 P.2d, at 1096-1097.

The State's courts have shown no reluctance to strike punitive damage awards in cases where punitive liability is not established, so that defendant qualifies for judgment on that issue as a matter of law. See, e.g., Badger v. Paulson Investment Co., 311 Or. 14, 28-30, 803 P.2d 1178, 1186-1187 (1991); Andor v. United Airlines, 303 Or. 505, 739 P.2d 18 (1987); Schmidt v. Pine Tree Land Development Co., 291 Or. 462, 631 P.2d 1373 (1981).

In addition, punitive damage awards may be set aside because of flaws in jury instructions. 316 Or., at 285, 851 P.2d, at 1097. See, e.g., *446 Honeywell v. Sterling Furniture Co., 310 Or. 206, 210-214, 797 P.2d 1019, 1021-1023 (1990) (setting aside punitive damage award because it was prejudicial error to instruct jury that a portion of any award would be used to pay plaintiff's attorney's fees and that another portion would go to **2348 State's common injury fund). As the Court acknowledges, “ proper jury instructio[n] is a well-established and, of course, important check against excessive awards.” Ante, at 2341.
In short, Oregon has enacted legal standards confining punitive damage awards in product liability cases. These state standards are judicially enforced by means of comparatively comprehensive preverdict procedures but markedly limited postverdict review, for Oregon has elected to make factfinding, once supporting evidence is produced, the province of the jury. Cf. Leaf Creamery Co., those that generally within the structure of a state Nation, juries 715, 731-732, 66 L.Ed.2d 659 (1981) (upholding against due process challenge Oklahoma Constitution's assignment of contributory negligence and assumption of risk defenses to jury's prerogative to “confer larger powers upon a jury than those that generally prevail”); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 479, 101 S.Ct. 715, 731-732, 66 L.Ed.2d 659 (1981) (STEVENS, J., dissenting) (observing that “allocation of functions within the structure of a state government” is ordinarily “a matter for the State to determine”). The Court today invalidates this choice, largely because it concludes that English and early American courts generally provided judicial review of the size of punitive damage awards. See ante, at 2335-2338. The Court's account of the relevant history is not compelling.

A

I am not as confident as the Court about either the clarity of early American common law or its import. Tellingly, the Court barely acknowledges the large authority exercised by American juries in the 18th and 19th centuries. In the early *447 years of our Nation, juries “usually possessed the power to determine both law and fact.” Nelson, The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence, 76 Mich.L.Rev. 893, 905 (1978); see, e.g., Georgia v. Brailsford, 3 Dall. 1, 4, 1 L.Ed. 483 (1794) (Chief Justice John Jay, trying case in which State was party, instructed jury it had authority “to determine the law as well as the fact in controversy”). And at the time trial by jury was recognized as the constitutional right of parties “[i]n [s]uits at common law,” U.S. Const., Amdt. 7, the assessment of “uncertain damages” was regarded, generally, as exclusively a jury function. See Note, Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power, 91 Colum.L.Rev. 142, 156, and n. 69 (1991); see also id., at 156-158, 163, and n. 112.


More revealing, the Court notably contracts the scope of its inquiry. It asks: Did common-law judges claim the power to overturn jury verdicts they viewed as excessive? But full and fair historical inquiry ought to be wider. The Court should inspect, comprehensively and comparatively, the procedures employed-at trial and on appeal-to fix the amount of punitive damages. FN13 Evaluated in this manner, Oregon's scheme affords defendants like Honda more procedural safeguards than 19th-century law provided.

FN13. An inquiry of this order is akin to the one made in Haslip. See supra, at 2346.

As detailed supra, at 2345, Oregon instructs juries to decide punitive damage issues based on seven substantive factors and a clear and convincing evidence standard. When the Fourteenth Amendment was adopted in 1868, in contrast, “no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of [punitive] damages, or their amount.” Haslip, 499 U.S., at 27. 111 S.Ct., at 1048 (SCALIA, J., concurring in judgment).*2349 The responsibility entrusted to the jury surely was not guided by instructions of the kind Oregon has enacted. Compare 1 J. Sutherland, Law of Damages 720 (1892) (“If, in committing the wrong complained of, [the defendant] acted recklessly, or wilfully and maliciously, with a design to oppress and injure the plaintiff, the jury in fixing the damages may disregard the rule of compensation; and, beyond that, may, as a punishment of the defendant, and as a protection to society against a violation of personal rights and social order, award such additional damages as in their discretion they may deem proper.”), with Ore.Rev.Stat. § 30-925 (1991) (requiring jury to consider, inter alia, “likelihood at the time that serious harm would arise from the defendant's misconduct”; “degree of the defendant's awareness of that likelihood”; “profitability of the defendant's misconduct”; “duration of the misconduct and any concealment of it”).

Furthermore, common-law courts reviewed punitive
damage verdicts extremely deferentially, if at all. See, e.g., Day v. Woodworth, 13 How. 363, 371, 14 L.Ed. 181 (1852) (assessment of "exemplary, punitive, or vindictive damages ... has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case"); Missouri Pacific R. Co. v. Humes, 115 U.S. 512, 521, 6 S.Ct. 110, 113, 29 L.Ed. 463 (1885) ("[t]he discretion of the jury in such cases is not controlled by any very definite rules"); Barry v. Edmunds, 116 U.S. 450, 565, 6 S.Ct. 501, 509, 29 L.Ed. 729 (1886) (in "actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict"). True, 19th-century judges occasionally asserted that they had authority to overturn damage awards upon concluding, from the size of an award, that the jury's decision must have been based on "partiality" or "passion and prejudice." Ante, at 2337. But courts rarely exercised this authority. See T. Sedgwick, Measure of Damages 707 (5th ed. 1869) ("power very sparingly used").

B

Because Oregon's procedures assure "adequate guidance from the court when the case is tried to a jury," Haslip, 499 U.S. at 18, 111 S.Ct. at 1043, this Court has no cause to disturb the judgment in this instance, for Honda presses here only a "procedural due process claim. True, in a footnote to its petition for certiorari, not repeated in its briefs, Honda attributed to this Court an "assumption that procedural due process requires [judicial] review of both federal substantive due process and state-law excessiveness challenges to the size of an award." Pet. for Cert. 16, n. 10 (emphasis in original). But the assertion regarding "state-law excessiveness challenges" is extraordinary, for this Court has never held that the Due Process Clause requires a State's courts to police jury factfindings to ensure their conformity with state law. See Chicago, R.I. & P.R. Co. v. Cole, 251 U.S. at 56, 40 S.Ct. at 69. And, as earlier observed, see supra, at 2343-2344, the plurality opinion in TXO disavowed the suggestion that a defendant has a federal due process right to a correct determination under state law of the "reasonableness" of a punitive damages award. 509 U.S. at 458, n. 24, 113 S.Ct. at 2720-2721, n. 24.

Honda further asserted in its certiorari petition footnote:

"Surely ... due process (not to mention Supremacy Clause principles) requires, at a minimum, that state courts entertain and pass on the federal-law contention that a particular punitive verdict is so grossly excessive as to violate substantive due process. Oregon's refusal to provide even that limited form of review is particularly indefensible." Pet. for Cert. 16, n. 10.

But Honda points to no definitive Oregon pronouncement postdating this Court's precedent-setting decisions in Haslip and TXO demonstrating the hypothesized refusal to pass on a federal-law contention. FN14

FN14. In its 1949 decision in Van Lom v. Schneiderman, 187 Or. 89, 210 P.2d 461, the Supreme Court of Oregon merely held that it lacked authority to order a new trial even though an award of damages was excessive under state law. See ante, at 2342 (SCALIA, J., concurring). No federal limit had yet been recognized, and the Van Lom court had no occasion to consider its obligation to check jury verdicts deemed excessive under federal law.

**2350 It may be that Oregon's procedures guide juries so well that the "grossly excessive" verdict Honda projects in its certiorari petition footnote never materializes. Cf. supra, at 2347, n. 11 (between 1965 and the present, awards of punitive damages in Oregon have been reported in only two product liability cases, including this one). If, however, in some future case, a plea is plausibly made that a particular punitive damage award is not merely excessive, but "so grossly excessive" as to violate the Federal Constitution," TXO, 509 U.S. at 458, n. 24, 113 S.Ct. at 2720-2721, n. 24, and Oregon's judiciary nevertheless insists that it is powerless to consider the plea, this Court might have cause to grant review. Cf. Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947) (ruling on obligation of state courts to enforce federal law). No such case is before us today, nor does Honda, in this Court, maintain otherwise. See 316 Or., at 286, n. 14, 851 P.2d, at 1097, n. 14; supra, at 2347, n. 11 (size of award against Honda does not appear to be out of line with awards upheld in Haslip and TXO).

To summarize: Oregon's procedures adequately guide the jury charged with the responsibility to determine...
a plaintiff's qualification for, and the amount of, punitive damages, and on that account do not deny defendants procedural due process; Oregon's Supreme Court correctly refused to rule that "an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review" for excessiveness, *451316 Or., at 284, 851 P.2d, at 1096 (emphasis added); the verdict in this particular case, considered in light of this Court's decisions in *Haslip* and *TXO*, hardly appears "so 'grossly excessive' as to violate the substantive component of the Due Process Clause," *TXO*, 509 U.S., at 458, 113 S.Ct., at 2720. Accordingly, the Court's procedural directive to the state court is neither necessary nor proper. The Supreme Court of Oregon has not refused to enforce federal law, and I would affirm its judgment.


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BMW of North America, Inc. v. Gore

Supreme Court of the United States
BMW OF NORTH AMERICA, INC., Petitioner,
v.
Ira GORE, Jr.
No. 94-896.

Decided May 20, 1996.

Automobile purchaser brought action against foreign automobile manufacturer, American distributor, and dealer based on distributor's failure to disclose that automobile had been repainted after being damaged prior to delivery. The Alabama Circuit Court, Jefferson County, P. Wayne Thorn, J., entered judgment on jury verdict awarding buyer compensatory damages of $4,000 and punitive damages of $4,000,000. Distributor and manufacturer appealed. After determining that court lacked jurisdiction over manufacturer, the Alabama Supreme Court, 646 So.2d 619, conditionally affirmed punitive damage award after reducing award to $2,000,000. Certiorari was granted, and the Supreme Court, Justice Stevens, held that: (1) lawful conduct by distributor outside state of Alabama could not be considered by Alabama court in making award of punitive damages, and (2) award of $2,000,000 punitive damages was grossly excessive in light of low level of reprehensibility of conduct and 500 to 1 ratio between award and actual harm to purchaser.

Reversed and remanded.

Justice Breyer filed a concurring opinion in which Justices O'Connor and Souter joined.

Justice Scalia filed a dissenting opinion in which Justice Thomas joined.

Justice Ginsburg filed a dissenting opinion in which Chief Justice Rehnquist joined.

West Headnotes

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities 92kk4426 k. Penalties, Fines, and Sanctions in General. Most Cited Cases
(Formerly 92kk303, 115k94)

[2] Damages 115 ex=87(1)
115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) k. In General. Most Cited Cases
Punitive damages may properly be imposed to further state's legitimate interests in punishing unlawful conduct and deterring its repetition.

[3] Constitutional Law 92 ex=4427
92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities 92kk4427 k. Punitive Damages. Most Cited Cases
(Formerly 92kk303, 115k94)
In our federal system, states necessarily have considerable flexibility in determining level of punitive damages that they will allow in different classes of cases and in any particular case, and only when award can fairly be categorized as "grossly excessive" in relation to these interests does it enter zone of arbitrariness that violates due process clause of Fourteenth Amendment; for that reason, federal excessiveness inquiry appropriately begins with identification of state interests that punitive award is designed to serve. U.S.C.A. Const.Amend. 14.

[4] States 360 ex=5(1)
360 States
State may not impose economic sanctions on violators of its laws with intent of changing tortfeasors' lawful conduct in other states.

**Fraud 184**

Lawful conduct of automobile manufacturer outside of state of Alabama could not be considered by Alabama court in determining appropriate level of punitive damages to be assessed against manufacturer, in fraud action brought by purchaser of automobile based on failure of manufacturer to inform him that automobile had been repainted after prior shipment and prior to its initial sale; any penalties imposed on manufacturer by Alabama could only be supported by Alabama's interest in protecting its own consumers and its own economy.
184 Fraud
184II Actions
184II(E) Damages
184k62 k. Amount Awarded. Most Cited Cases
Award of $2 million in punitive damages against automobile manufacturer in purchaser's fraud action, which award was based on manufacturer's policy of repairing automobiles which were damaged prior to delivery, and not advising dealers or purchasers of predelivery repairs costing less than 3% of automobile's suggested retail price, was grossly excessive and violated due process clause; none of the aggravating factors associated with particularly reprehensible conduct was present, 500 to 1 ratio existed between punitive damages award and jury's assessment of actual damages of $4,000, and award was substantially greater than statutory fines available for similar malfeasance under laws of the several states. U.S.C.A. Const.Amend. 14.

121 Constitutional Law 92 ☞4426
92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4426 k. Penalties, Fines, and Sanctions in General. Most Cited Cases
(Formerly 92k303)
Elementary notions of fairness dictate that person receive fair notice not only of conduct that will subject him to punishment but also of severity of penalty that state may impose, and while strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, basic protection against judgments without notice afforded by due process clause is implicated by civil penalties. U.S.C.A. Const.Amend. 14.

110 Constitutional Law 92 ☞4427
92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive Damages. Most Cited Cases
(Formerly 92k303)

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.2 k. Nature of Act or Conduct. Most Cited Cases
(Formerly 115k94)
Degree of reprehensibility of defendant's conduct is perhaps most important indicium of reasonableness of punitive damages award under due process clause; damages imposed should reflect enormity of defendant's offense, and may not be grossly out of proportion to severity of offense. U.S.C.A. Const.Amend. 14.

111 Courts 106 ☞489(2)
106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k489 Exclusive or Concurrent Jurisdiction
106k489(2) k. Suits Involving Validity or Construction of State Statutes. Most Cited Cases
Only state courts may authoritatively construe state statutes.

112 Constitutional Law 92 ☞4427
92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive Damages. Most Cited Cases
(Formerly 92k303, 115k94)
That conduct is sufficiently reprehensible to give rise to tort liability, and even modest award of exemplary damages, does not establish high degree of culpability that warrants substantial punitive damages award and will justify such an award under due process clause. U.S.C.A. Const.Amend. 14.

113 Constitutional Law 92 ☞4427
92 Constitutional Law
92XXVII Due Process
Damages 115 ➔ 94.8

115 Damages

115V Exemplary Damages

115k94 Measure and Amount of Exemplary Damages

115k94.8 k. Constitutional Limitations on Amount in General. Most Cited Cases

(Formerly 115k94)

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)19 Tort or Financial Liabilities

92k4427 k. Punitive Damages. Most Cited Cases

(Formerly 92k303)

After respondent Gore purchased a new BMW automobile from an authorized Alabama dealer, he discovered that the car had been repainted. He brought this suit for compensatory and punitive damages against petitioner, the American distributor of BMW's, alleging, inter alia, that the failure to disclose the repainting constituted fraud under Alabama law. At trial, BMW acknowledged that it
followed a nationwide policy of not advising its dealers, and hence their customers, of predelivery damage to new cars when the cost of repair did not exceed 3 percent of the car's suggested retail price. Gore's vehicle fell into that category. The jury returned a verdict finding BMW liable for compensatory damages of $4,000, and assessing $4 million in punitive damages. The trial judge denied BMW's post-trial motion to set aside the punitive damages award, holding, among other things, that the award was not "grossly excessive" and thus did not violate the Due Process Clause of the Fourteenth Amendment. See, e.g., TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 454, 113 S.Ct. 2711, 2718, 125 L.Ed.2d 366. The Alabama Supreme Court agreed, but reduced the award to $2 million on the ground that, in computing the amount, the jury had improperly multiplied Gore's compensatory damages by the number of similar sales in all States, not just those in Alabama.

Held: The $2 million punitive damages award is grossly excessive and therefore exceeds the constitutional limit. Pp. 1595-1604.

(a) Because such an award violates due process only when it can fairly be categorized as "grossly excessive" in relation to the State's legitimate interests in punishing unlawful conduct and deterring its repetition, cf. TXO, 509 U.S., at 456, 113 S.Ct., at 2719-2720, the federal excessiveness inquiry appropriately begins with an identification of the state interests that such an award is designed to serve. Principles of state sovereignty and comity forbid a State to enact policies for the entire Nation, or to impose its own policy choice on neighboring States. See, e.g., Healy v. Beer Institute, 491 U.S. 324, 335-336, 109 S.Ct. 2491, 2498-2499, 105 L.Ed.2d 275. Accordingly, the economic penalties that a State inflicts on those who transgress its laws, whether the penalties are legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and economy, rather than those of other States or the entire Nation. Gore's award must therefore be analyzed in the light of conduct that occurred solely within Alabama, with consideration being given only to the interests of Alabama consumers. Pp. 1595-1598.

(b) Elementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose, lead to the conclusion that the $2 million award is grossly excessive. Pp. 1598-1599.

(c) None of the aggravating factors associated with the first (and perhaps most important) indicium of a punitive damages award's excessiveness-the degree of reprehensibility of the defendant's conduct, see, **1592 e.g., Day v. Woodworth, 13 How. 363, 371, 14 L.Ed. 181-is present here. The harm BMW inflicted on Gore was purely economic; the presale repainting had no effect on the car's performance, safety features, or appearance; and BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others. Gore's contention that BMW's nondisclosure was particularly reprehensible because it formed part of a nationwide pattern of tortious conduct is rejected, because a corporate executive could reasonably have interpreted the relevant state statutes as establishing safe harbors for nondisclosure of presumptively minor repairs, and because there is no evidence either that BMW acted in bad faith when it sought to establish the appropriate line between minor damage and damage requiring disclosure to purchasers, or that it persisted in its course of conduct after it had been adjudged unlawful. Finally, there is no evidence that BMW engaged in deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive. Pp. 1599-1601.

(d) The second (and perhaps most commonly cited) indicium of excessiveness-the ratio between the plaintiff's compensatory damages and the amount of the punitive damages, see, e.g., TXO, 509 U.S., at 459, 113 S.Ct., at 2721—also weighs against Gore, because his $2 million award is 500 times the amount of his actual harm as determined by the jury, and there is no suggestion that he or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy. Although it is not possible to draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case, see, e.g., id., at 458, 113 S.Ct., at 2720, the ratio here is clearly outside the acceptable range. Pp. 1601-1603.

(e) Gore's punitive damages award is not saved by the
third relevant indicium of excessiveness—the difference between it and the civil or criminal sanctions that could be imposed for comparable misconduct, see, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23, 111 S.Ct. 1032, 1046, 113 L.Ed.2d 1—because $2 million is substantially greater than Alabama's applicable $2,000 fine and the penalties imposed in other States for similar malfeasance, and because none of the pertinent statutes or interpretive decisions would have put an out-of-state distributor on notice that it might be subject to a multimillion dollar sanction. Moreover, in the absence of a BMW history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient. Pp. 1602-1603.

(f) Thus, BMW's conduct was not sufficiently egregious to justify the severe punitive sanction imposed against it. Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate Alabama consumers' economic interests is a matter for that court to address in the first instance. Pp. 1603-1604.

646 So.2d 619 (Ala.1994), reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which O'CONNOR and SOUTER, JJ., joined, post, p. 1604. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, post, p. 1610. GINSBURG, J., filed a dissenting opinion, in which REHNQUIST, C.J., joined, post, p. 1614.

Andrew L. Frey, Washington, DC, for petitioner. Michael Gottesman, Washington, DC, for respondent.

*562 Justice STEVENS delivered the opinion of the Court.

I

In January 1990, Dr. Ira Gore, Jr. (respondent), purchased a black BMW sports sedan for $40,750.88 from an authorized BMW dealer in Birmingham, Alabama. After driving the car for approximately nine months, and without noticing any flaws in its appearance, Dr. Gore took the car to "Slick Finish," an independent detailer, to make it look "'snazzier than it normally would appear.' " 646 So.2d 619, 621 (Ala.1994). Mr. Slick, the proprietor, detected evidence that the car had been repainted. Convinced that he had been cheated, Dr. Gore brought suit against petitioner BMW of North America (BMW), the American distributor of BMW automobiles. Dr. Gore alleged, inter alia, that the failure to disclose that the car had been repainted constituted suppression of a material fact. The complaint prayed for $500,000 in compensatory and punitive damages, and costs.

FN1. The top, hood, trunk, and quarter panels of Dr. Gore's car were repainted at BMW's vehicle preparation center in Brunswick, Georgia. The parties presumed that the damage was caused by exposure to acid rain during transit between the manufacturing plant in Germany and the preparation center.

FN2. Dr. Gore also named the German manufacturer and the Birmingham dealership as defendants.

FN3. Alabama codified its common-law cause of action for fraud in a 1907 statute that is still in effect. Hackmeyer v. Hackmeyer, 268 Ala. 329, 333, 106 So.2d 245, 249 (1958). The statute provides: "Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." Ala.Code § 6-5-102 (1993); see Ala.Code § 4299 (1907).
At trial, BMW acknowledged that it had adopted a nationwide policy in 1983 concerning cars that were damaged in the course of manufacture or transportation. If the cost of repairing the damage exceeded 3 percent of the car's suggested retail price, the car was placed in company service for a period of time and then sold as used. If the repair cost did not exceed 3 percent of the suggested retail price, however, the car was sold as new without advising the dealer that any repairs had been made. Because the $601.37 cost of repainting Dr. Gore's car was only about 1.5 percent of its suggested retail price, BMW did not disclose the damage or repair to the Birmingham dealer.

Dr. Gore asserted that his repainted car was worth less than a car that had not been refinished. To prove his actual damages of $4,000, he relied on the testimony of a former BMW dealer, who estimated that the value of a repainted BMW was approximately 10 percent less than the value of a new car that had not been damaged and repaired. To support his claim for punitive damages, Dr. Gore introduced evidence that since 1983 BMW had sold 983 refinished cars as new, including 14 in Alabama, without disclosing that the cars had been repainted before sale at a cost of more than $300 per vehicle. Using the actual damage estimate of $4,000 per vehicle, Dr. Gore argued that a punitive award of $4 million would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth.

FN4. The dealer who testified to the reduction in value is the former owner of the Birmingham dealership sued in this action. He sold the dealership approximately one year before the trial.

FN5. Dr. Gore did not explain the significance of the $300 cutoff.

In defense of its disclosure policy, BMW argued that it was under no obligation to disclose repairs of minor damage to new cars and that Dr. Gore's car was as good as a car with the original factory finish. It disputed Dr. Gore's assertion that the value of the car was impaired by the repainting and argued that this good-faith belief made a punitive award inappropriate. BMW also maintained that transactions in jurisdictions other than Alabama had no relevance to Dr. Gore's claim.

*565 The jury returned a verdict finding BMW liable for compensatory damages of $1,594,000. In addition, the jury assessed $4 million in punitive damages, based on a determination that the nondisclosure policy constituted "gross, oppressive or malicious" fraud. See Ala.Code §§ 6-11-20, 6-11-21 (1993).

FN6. The jury also found the Birmingham dealership liable for Dr. Gore's compensatory damages and the German manufacturer liable for both the compensatory and punitive damages. The dealership did not appeal the judgment against it. The Alabama Supreme Court held that the trial court did not have jurisdiction over the German manufacturer and therefore reversed the judgment against that defendant.

BMW filed a post-trial motion to set aside the punitive damages award. The company introduced evidence to establish that its nondisclosure policy was consistent with the laws of roughly 25 States defining the disclosure obligations of automobile manufacturers, distributors, and dealers. The most stringent of these statutes required disclosure of repairs costing more than 3 percent of the suggested retail price; none mandated disclosure of less costly repairs. Relying on these statutes, BMW contended that its conduct was lawful in these States and therefore could not provide the basis for an award of punitive damages.

FN7. BMW acknowledged that a Georgia statute enacted after Dr. Gore purchased his car would require disclosure of similar repairs to a car before it was sold in Georgia. Ga.Code Ann. §§ 40-1-5(b)-(e) (1994).

BMW also drew the court's attention to the fact that its nondisclosure policy had never been adjudged unlawful before this action was filed. Just months before Dr. Gore's case went to trial, the jury in a similar lawsuit filed by another Alabama BMW purchaser found that BMW's failure to disclose paint repair constituted fraud. Yates v. BMW of North America, Inc., 642 So.2d 937 (Ala.1993). Before the *566 judgment in this case, BMW changed its policy by taking steps to avoid the sale of any refinished vehicles in Alabama and two other States. When the $4 million verdict was returned in this case, BMW promptly instituted a nationwide policy...
of full disclosure of all repairs, no matter how minor.

FN8. While awarding a comparable amount of compensatory damages, the Yates jury awarded no punitive damages at all. In _Yates_, the plaintiff also relied on the 1983 nondisclosure policy, but instead of offering evidence of 983 repairs costing more than $300 each, he introduced a bulk exhibit containing 5,856 repair bills to show that petitioner had sold over 5,800 new BMW vehicles without disclosing that they had been repaired.

In response to BMW's arguments, Dr. Gore asserted that the policy change demonstrated the efficacy of the punitive damages award. He noted that while no jury had held the policy unlawful, BMW had received a number of customer complaints relating to undisclosed repairs and had settled some lawsuits. Finally, he maintained that the disclosure statutes of other States were irrelevant because BMW had failed to offer any evidence that the disclosure statutes supplanted, rather than supplemented, existing causes of action for common-law fraud.

FN9. Prior to the lawsuits filed by Dr. Yates and Dr. Gore, BMW and various BMW dealers had been sued 14 times concerning presale paint or damage repair. According to the testimony of BMW's in-house counsel at the postjudgment hearing on damages, only one of the suits concerned a car repainted by BMW.

The trial judge denied BMW's post-trial motion, holding, _inter alia_, that the award was not excessive. On appeal, the Alabama Supreme Court also rejected BMW's claim that the award exceeded the constitutionally permissible amount. _646 So.2d 619_ (1994). The court's excessiveness inquiry applied the factors articulated in _Green Oil Co. v. Hornsby_, 539 So.2d 218, 222-224 (Ala.1989), and approved in _Pacific Mut. Life Ins. Co. v. Haslip_, 499 U.S. 1, 21-22, 111 S.Ct. 1032, 1045-1046, 113 L.Ed.2d 1 (1991). _646 So.2d_, at 624-625. Based on its analysis, the court concluded that BMW's conduct was "reprehensible"; the nondisclosure was profitable for the company; the judgment "would not have a substantial impact upon [BMW's] financial position"; the litigation had been expensive; no criminal sanctions had been imposed on BMW for the same conduct; the award of no punitive$567 damages in _Yates_ reflected "the inherent uncertainty of the trial process"; and the punitive award bore a "reasonable relationship" to "the harm that **1595 was likely to occur from [BMW's] conduct as well as ... the harm that actually occurred." _646 So.2d_, at 625-627.

The Alabama Supreme Court did, however, rule in BMW's favor on one critical point: The court found that the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of similar sales in other jurisdictions. _Id._, at 627. Having found the verdict tainted, the court held that "a constitutionally reasonable punitive damages award in this case is $2,000,000," _id._, at 629, and therefore ordered a remittitur in that amount. FN10 The court's discussion of the amount of its remitted award expressly disclaimed any reliance on "acts that occurred in other jurisdictions"; instead, the court explained that it had used a "comparative analysis" that considered Alabama cases, "along with cases from other jurisdictions, involving the sale of an automobile where the seller misrepresented the condition of the vehicle and the jury awarded punitive damages to the purchaser." _FN11 Id._, at 628.

FN10. The Alabama Supreme Court did not indicate whether the $2 million figure represented the court's independent assessment of the appropriate level of punitive damages, or its determination of the maximum amount that the jury could have awarded consistent with the Due Process Clause.

FN11. Other than _Yates v. BMW of North America, Inc._, 642 So.2d 977 (Ala.1993), in which no punitive damages were awarded, the Alabama Supreme Court cited no such cases. In another portion of its opinion, _646 So.2d_, at 629, the court did cite five Alabama cases, none of which involved either a dispute arising out of the purchase of an automobile or an award of punitive damages. _G.M. Mosley Contractors, Inc. v. Phillips_, 487 So.2d 876, 879 (1986); _Hollis v. Wyrosdick_, 508 So.2d 704 (1987); _Campbell v. Burns_, 512 So.2d 1341, 1343 (1987); _Ashbee v. Brock_, 510 So.2d 214 (1987); and _Jawad v. Granade_, 497 So.2d 471 (1986). All of these cases support the proposition that appellate courts in Alabama...
presume that jury verdicts are correct. In light of the Alabama Supreme Court's conclusion that (1) the jury had computed its award by multiplying $4,000 by the number of refinished vehicles sold in the United States and (2) that the award should have been based on Alabama conduct, respect for the error-free portion of the jury verdict would seem to produce an award of $56,000 ($4,000 multiplied by 14, the number of repainted vehicles sold in Alabama).

*568 Because we believed that a review of this case would help to illuminate "the character of the standard that will identify unconstitutionally excessive awards" of punitive damages, see Honda Motor Co. v. Oberg, 512 U.S. 415, 420, 114 S.Ct. 2331, 2335, 120 L.Ed.2d 336 (1994), we granted certiorari, 513 U.S. 1125, 115 S.Ct. 932, 130 L.Ed.2d 879 (1995).

II

[2][3] Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974); Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-267, 101 S.Ct. 2748, 2759-2760, 69 L.Ed.2d 616 (1981); Haslip, 499 U.S., at 22, 115 S.Ct., at 1045-1046. In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. See TXO, 509 U.S., at 456, 113 S.Ct., at 2719; Haslip, 499 U.S., at 21, 22, 111 S.Ct., at 1045, 1045-1046. Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. Cf. TXO, 509 U.S., at 456, 113 S.Ct., at 2719. For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve. We therefore focus our attention first on the scope of Alabama's legitimate interests in punishing BMW and deterring it from future misconduct.

No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile*569 distributors to disclose presale repairs that affect the **1596 value of a new car. But the States need not, and in fact do not, provide such protection in a uniform manner. Some States rely on the judicial process to formulate and enforce an appropriate disclosure requirement by applying principles of contract and tort law. FN12 Other States have enacted various forms of legislation that define the disclosure obligations of automobile manufacturers, distributors, and dealers.FN13 FN13 *570 The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.


That diversity demonstrates that reasonable people may disagree about the value of a full disclosure requirement. Some legislatures may conclude that affirmative disclosure requirements are unnecessary because the self-interest of those involved in the automobile trade in developing and maintaining the goodwill of their customers will motivate them to make voluntary disclosures or to refrain from selling cars that do not comply with self-imposed standards. Those legislatures that do adopt affirmative disclosure obligations may take into account the cost of government regulation, choosing to draw a line exempting minor repairs from such a requirement. In formulating a disclosure standard, States may also consider other goals, such as providing a "safe harbor" for automobile manufacturers, distributors, and dealers against lawsuits over minor repairs. FN14

FN14. Also, a state legislature might plausibly conclude that the administrative costs associated with full disclosure would have the effect of raising car prices to the State's residents.

We may assume, arguendo, that it would be wise for every State to adopt Dr. Gore's preferred rule, requiring full disclosure of every presale repair to a car, no matter how trivial and regardless of its actual impact on the value of the car. 571 But while we do not doubt that Congress has ample authority to enact such a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States. See Bonaparte v. Tax Court, 104 U.S. 592, 594, 26 L.Ed. 845 (1881) ("No State can legislate except with reference to its own jurisdiction.... Each State is independent of all the others in this particular"). FN15 Similarly, one State's power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce, Gibbons v. Ogden, 9 Wheat. 1, 194-196, 6 L.Ed. 23 (1824), but is also constrained by the need to respect the interests of other States, see, e.g., Healy v. Beer Institute, 491 U.S. 324, 335-336, 109 S.Ct. 2491, 2498-2499, 105 L.Ed.2d 275 (1989) (the Constitution has a "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres") (footnote omitted); Edgar v. MITE Corp., 457 U.S. 624, 643, 102 S.Ct. 2629, 2641, 73 L.Ed.2d 269 (1982).
was necessary to induce BMW to change the nationwide policy that it adopted in 1983. 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, 64 USLW 4335, 96 Cal. Daily Op. Serv. 3490, 96 Daily Journal D.A.R. 5747

(Cite as: 517 U.S. 559, 116 S.Ct. 1589)


FN15. We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States. FN19. Before this Court Dr. Gore argued that the large punitive damages award was necessary to induce BMW to change the nationwide policy that it adopted in 1983.FN18 But by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy. Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. FN19 **1598 Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.

FN16. See also Bigelow v. Virginia, 421 U.S. 809, 824, 95 S.Ct. 2222, 2234, 44 L.Ed.2d 600 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); New York Life Ins. Co. v. Head, 234 U.S. 46, 34 S.Ct. 879, 882, 58 L.Ed. 1259 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound"); Huntington v. Attrill, 146 U.S. 657, 669, 13 S.Ct. 224, 228, 36 L.Ed. 1123 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States").

FN17. State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute. See New York Times Co. v. Sullivan, 376 U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"); San Diego Building Trades Council v. Garmon, 359 U.S. 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief").

FN18. Brief for Respondent 11-12, 23, 27-28; Tr. of Oral Arg. 50-54. Dr. Gore's interest in altering the nationwide policy stems from his concern that BMW would not (or could not) discontinue the policy in Alabama alone. Brief for Respondent at 11. If Alabama were limited to imposing punitive damages based only on BMW's gain from fraudulent sales in Alabama, the resulting award would have no prospect of protecting Alabama consumers from fraud, as it would provide no incentive for BMW to alter the unitary, national policy of nondisclosure which yielded BMW millions of dollars in profits." Id., at 23. The record discloses no basis for Dr. Gore's contention that BMW could not comply with Alabama's law without changing its nationwide policy.

FN19. See Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"). Our cases concerning recidivist statutes are not to the contrary. Habitual offender statutes permit the sentencing court to enhance a defendant's punishment for a crime in light of prior convictions, including convictions in foreign jurisdictions. See e.g., Ala.Code § 13A-5-9 (1994); Cal.Penal Code Annot. §§ 667.5(d), 668 (West Supp.1996); Ill. Comp. Stat., ch. 720, § 5/33B-1 (1994); N.Y. Penal Law §§ 70.04, 70.06, 70.08, 70.10

Jurisdictions."

In this case, we accept the Alabama Supreme Court's interpretation of the jury verdict as reflecting a computation of the amount of punitive damages "based in large part on conduct that happened in other jurisdictions." 646 So.2d, at 627. As the Alabama Supreme Court noted, neither the jury nor the trial court was presented with evidence that any of BMW's out-of-state conduct was unlawful. "The only testimony touching the issue showed that approximately 60% of the vehicles that were refinished were sold in states where failure to disclose the repair was not an unfair trade practice." Id., at 627, n. 6. The Alabama Supreme Court therefore properly eschewed reliance on BMW's out-of-state conduct, id., at 628, and based its remitted award solely on "574 conduct that occurred within Alabama." FN21 The award must be analyzed in the light of the same conduct, with consideration given only to the interests of Alabama consumers, rather than those of the entire Nation. When the scope of the interest in punishment and deterrence that an Alabama court may appropriately consider is properly limited, it is apparent-for reasons that we shall now address-that this award is grossly excessive.

FN20. Given that the verdict was based in part on out-of-state conduct that was lawful where it occurred, we need not consider whether one State may properly attempt to change a tortfeasor's unlawful conduct in another State.

FN21. Of course, the fact that the Alabama Supreme Court correctly concluded that it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanction does not mean that evidence describing out-of-state transactions is irrelevant in a case of this kind. To the contrary, as we stated in TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 462, n. 28, 113 S.Ct. 2711, 2722, n. 28, 125 L.Ed.2d 366 (1993), such evidence may be relevant to the determination of the degree of reprehensibility of the defendant's conduct.

III

[8][9] Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. FN22 Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that *575 the $2 million award against BMW is grossly excessive; the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized **1599 or imposed in comparable cases. We discuss these considerations in turn.

FN22. See Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987) (Ex Post Facto Clause violated by retroactive imposition of revised sentencing guidelines that provided longer sentence for defendant's crime); Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) (retroactive application of new construction of statute violated due process); id., at 350-355, 84 S.Ct., at 1701-1703 (citing cases); Lankford v. Idaho, 500 U.S. 110, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991) (due process violated because defendant and his counsel did not have adequate notice that judge might impose death sentence). The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against "judgments without notice" afforded by the Due Process Clause, Shaffer v. Heitner, 433 U.S. 186, 217, 97 S.Ct. 2569, 2587, 53 L.Ed.2d 683 (1977) (STEVENS, J., concurring in judgment), is implicated by...
part) (reviewing Justices of this Court placed special emphasis on the blameworthy than negligence. In TXO, 509 U.S., at 462, 113 S.Ct., at 2733, the defendant's intentional malice was the decisive element in a "close and difficult" case. Id., at 468, 113 S.Ct., at 2725. FN25

FN25. “The fragrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages.” Owen, A Punitve Damages Overview: Functions, Problems and Reform, 39 Vill. L.Rev. 363, 387 (1994).

FN24. The principle that punishment should fit the crime “is deeply rooted and frequently repeated in common-law jurisprudence.” Solem v. Helm, 463 U.S. 277, 284, 103 S.Ct. 3001, 3006, 77 L.Ed.2d 637 (1983). See Burkett v. Lanata, 15 La. Ann. 337, 339 (1860) (punitive damages should be "commensurate to the nature of the offence"). Blanchard v. Morris, 15 Ill. 35, 36 (1852) (“[W]e cannot say [the exemplary damages are excessive under the circumstances; for the proofs show that threats, violence, and imprisonment, were accompanied by mental fear, torture, and agony of mind”); Louisiana & Northern R. Co. v. Brown, 127 Ky. 732, 749, 106 S.W. 795, 799 (1908) (“We are not aware of any case in which the court has sustained a verdict as large as this one unless the injuries were permanent”).

In this case, none of the aggravating factors associated with particularly reprehensible conduct is present. The harm BMW inflicted on Dr. Gore was purely economic in nature. The resale refinishing of the car had no effect on its performance or safety features, or even its appearance for at least nine months after his purchase. BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others. To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, id., at 453, 113 S.Ct., at 2717-2718, or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.

Dr. Gore contends that BMW's conduct was particularly reprehensible because nondisclosure of the repairs to his car formed part of a nationwide pattern of tortious conduct. Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument*577 that strong medicine is required to cure the defendant's disrespect for the law. See id., at 462, n. 28, 113 S.Ct., at 2722, n. 28. Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is
In support of his thesis, Dr. Gore advances two arguments. First, he asserts that the state disclosure statutes supplement, rather than supplant, existing remedies for breach of contract and common-law fraud. Thus, according to Dr. Gore, the statutes may not properly be viewed as immunizing from liability the nondisclosure of repairs costing less than the applicable statutory threshold. Brief for Respondent 18-19. Second, Dr. Gore maintains that BMW should have anticipated that its failure to disclose similar repair work could expose it to liability for fraud. Id., at 4-5.

We recognize, of course, that only state courts may authoritatively construe state statutes. As far as we are aware, at the time this action was commenced no state court had explicitly addressed whether its State's disclosure statute provides a safe harbor for nondisclosure of presumptively minor repairs or should be construed instead as supplementing common-law duties. A review of the text of the statutes, however, persuades us that in the absence of a state-court determination to the contrary, a corporate executive could reasonably interpret the disclosure requirements as establishing safe harbors. In California, for example, the disclosure statute defines "material" damage to a motor vehicle as damage requiring repairs costing in excess of 3 percent of the suggested retail price or $500, whichever is greater. Cal. Veh.Code Ann. § 9990 (West Supp.1996). The Illinois statute states that in cases in which disclosure is not required, "nondisclosure does not constitute a misrepresentation or omission of fact." Ill. Comp. Stat., ch. 815, § 710/5 (1994). Perhaps the statutes may also be interpreted in another way. We simply emphasize that the record contains no evidence that BMW's decision to follow a disclosure policy that coincided with the strictest extant state statute was sufficiently reprehensible to justify a $2 million award of punitive damages.

FN27. In Jeter v. M & M Dodge, Inc., 634 So.2d 1383 (La.App.1994), a Louisiana Court of Appeals suggested that the Louisiana disclosure statute functions as a safe harbor. Finding that the cost of repairing presale damage to the plaintiff's car exceeded the statutory disclosure threshold, the court held that the disclosure statute did not provide a defense to the action. Id., at 1384.

During the pendency of this litigation, Alabama enacted a disclosure statute which defines "material" damage to a new car as damage requiring repairs costing in excess of 3 percent of suggested retail price or $300, whichever is greater. Ala.Code § 8-19-5(22) (1993). After its decision in this case, the Alabama Supreme Court stated in dicta that the remedies available under this section of its Deceptive Trade Practices Act did not displace or alter pre-existing remedies available under either the common law or other statutes. Hines v. Riverside Chevrolet-Olds, Inc., 655 So.2d 909, 917, n. 2 (1994). It refused, however, to "recognize, or impose on automobile manufacturers, a general duty to disclose every repair of damage, however slight, incurred during the manufacturing process." Id., at 921. Instead, it held that whether a defendant has a duty to disclose is a question of fact "for the jury to determine." Id., at 918. In reaching that conclusion it overruled two earlier decisions that seemed to indicate that as a matter of law there was no disclosure obligation in cases comparable to this one. Id., at 920 (overruling Century 21-Reeves Realty, Inc. v. McConnell Cadillac, Inc., 626 So.2d 1273 (1993), and Cobb v. Southeast Toyota Distributors, Inc., 569 So.2d 395 (1990)).

FN28. See also Ariz.Rev.Stat. Ann. § 28-1304.03 (1989) ("If disclosure is not required under this section, a purchaser may not revoke or rescind a sales contract due solely to the fact that the new motor vehicle was damaged and repaired prior to completion of the sale"); Ind.Code § 9-23-4.5 (1993) (providing that "[r]epaired damage to a customer-ordered new motor vehicle not exceeding four percent (4%) of the manufacturer's suggested retail price does not need to be disclosed at the time of sale"); N.C. Gen.Stat. § 20-305.16(e) (1993) (requiring disclosure of repairs costing more than 5 percent of suggested retail price and prohibiting revocation or rescission of sales contract on the basis of less costly repairs);
The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff. See TXO, 509 U.S., at 459, 113 S.Ct., at 2721; Haslip, 499 U.S., at 23, 111 S.Ct., at 1046.

The ratio that exemplary damages must bear a "reasonable relationship" to compensatory damages has a long pedigree. Scholars have identified a number of early English statutes authorizing the *581 award of multiple damages for particular wrongs. Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages. Our **1602 decisions in both Haslip and TXO endorsed the proposition that a comparison between the compensatory award and the punitive award is significant.

Finally, the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in Haslip and TXO. Haslip, 499 U.S., at 5, 111 S.Ct., at 1036; TXO, 509 U.S., at 455, 113 S.Ct., at 2717-2718. We accept, of course, the jury's finding that BMW suppressed *580 a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State. But the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists.

**579** Dr. Gore's second argument for treating BMW as a recidivist is that the company should have anticipated that its actions would be considered fraudulent in some, if not all, jurisdictions. This contention overlooks the fact that actionable fraud requires a material misrepresentation or omission. This qualifier invites line-drawing of just the sort engaged in by States with disclosure statutes and by BMW. We do not think it can be disputed that there may exist minor imperfections in the finish of a new car that can be repaired (or indeed, left unrepaired) without materially affecting the car's value. There is no evidence that BMW acted in bad faith when it suppressed information about minor cosmetic flaws. Wilburn v. Larry Savage Chevrolet, Inc., 477 So.2d 384 (Ala. 1985). We note also that at trial respondent only introduced evidence of undisclosed paint damage to new cars repaired at a cost of $300 or more. This decision suggests that respondent believed that the jury might consider some repairs too de minimis to warrant disclosure.

**FN31** Before the verdict in this case, BMW had changed its policy with respect to Alabama and two other States. Five days after the jury award, BMW altered its nationwide policy to one of full disclosure.


**FN30** The Alabama Supreme Court has held that a car may be considered "new" as a matter of law even if its finish contains minor cosmetic flaws. Wilburn v. Larry Savage Chevrolet, Inc., 477 So.2d 384 (Ala. 1985). We note also that at trial respondent only introduced evidence of undisclosed paint damage to new cars repaired at a cost of $300 or more. This decision suggests that respondent believed that the jury might consider some repairs too de minimis to warrant disclosure.

**FN31** Before the verdict in this case, BMW had changed its policy with respect to Alabama and two other States. Five days after the jury award, BMW altered its nationwide policy to one of full disclosure.

In constitutional compensatory relationship between the punitive damages award and as well as the harm that actually has occurred.' That figure and the harm to the victim that would have ensued if the tortious plan had succeeded. That difference suggested that the relevant ratio was not more than 10 to 1.\footnote{34}

\footnote{34} While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme. Thus, even if the actual value of the 'potential harm' to respondents is not between $5 million and $8.3 million, but is closer to $4 million, or $2 million, or even $1 million, the disparity between the punitive award and the potential harm does not, in our view, 'jar one's constitutional sensibilities.' \textit{TXO}, 509 U.S., at 462, 113 S.Ct., at 2722, quoting \textit{Haslip}, 499 U.S., at 18, 111 S.Ct., at 1043.

\footnote{35} Even assuming each repainted BMW suffers a diminution in value of approximately $4,000, the award is 35 times greater than the total damages of all 14 Alabama consumers who purchased repainted BMWs.

\footnote{36} The ratio here is also dramatically greater than any award that would be permissible under the statutes and proposed statutes summarized in the appendix to Justice GINSBURG's dissenting opinion. \textit{Post}, at 1618-1620.\textsuperscript{[13]}

\footnote{13} Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. \textit{TXO}, 509 U.S., at 458, 113 S.Ct., at 2720.\footnote{37} Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small

\footnote{37} The ratio here is also dramatically greater than any award that would be permissible under the statutes and proposed statutes summarized in the appendix to Justice GINSBURG's dissenting opinion. \textit{Post}, at 1618-1620.
amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorial approach. Once again, "we return to what we said ... in Haslip": "We need not, and *583 indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concen[tration] of reasonableness ... properly enter[s] into the constitutional calculus." *499 U.S., at 18, 111 S.Ct., at 1043). In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely "raise a suspicious judicial eyebrow." TXO. 509 U.S., at 481, 113 S.Ct., at 2732 (o'CONNOR, J., dissenting).

FN37. Conceivably the Alabama Supreme Court's selection of a 500-to-1 ratio was an application of Justice SCALIA's identification of one possible reading of the plurality opinion in TXO: Any future due process challenge to a punitive damages award could be disposed of with the simple observation that "this is no worse than TXO." *509 U.S., at 472, 113 S.Ct., at 2727 (scALIA, J., concurring in judgment). As we explain in the text, this award is significantly worse than the award in TXO.

Sanctions for Comparable Misconduct

[14] Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness. As Justice O'CONNOR has correctly observed, a reviewing court engaged in determining whether an award of punitive damages is excessive should "accord substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue." Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc. 492 U.S., at 301, 109 S.Ct., at 2934 (opinion concurring in part and dissenting in part). In Haslip. 499 U.S., at 23, 111 S.Ct., at 1046, the Court noted that although the exemplary award was "much in excess of the fine that could be imposed," imprisonment was also authorized in the criminal context. In this *584 case the $2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance.

FN38. Although the Court did not address the size of the punitive damages award in Silkwood v. Kerr-McGee Corp. 464 U.S. 354, 104 S.Ct. 2348, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), the dissenters commented on its excessive character, noting that the "$10 million punitive damages award that the jury imposed is 100 times greater than the maximum fine that may be imposed ... for a single violation of federal standards" and "more than 10 times greater than the largest single fine that the Commission has ever imposed." Id., at 263, 104 S.Ct., at 629 (bLACKMUN, J., dissenting). In New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Court, observed that the punitive award for libel was "one thousand times greater than the maximum fine provided by the Alabama criminal statute," and concluded that the "fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute." Id., at 277, 84 S.Ct., at 724.

The maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is $2,000. FN39 Other States authorize more severe sanctions, with the maxima ranging from $5,000 to $10,000. FN40 Significantly, some statutes draw a distinction between first offenders and recidivists; thus, in New York the penalty is $50 for a first offense and $250 for subsequent offenses. None of these statutes would provide an out-of-state distributor with fair notice that it might be subject to a multimillion dollar penalty. Moreover, at the time BMW's policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe punishment.


FN40. See, e.g., Ark.Code Ann. § 23-112-309(b) (1992) (up to $5,000 for violation of
The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers. In *585 the absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed**1604 by the Alabama Supreme Court in this case.

IV

We assume, as the juries in this case and in the Yates case found, that the undisclosed damage to the new BMW's affected their actual value. Notwithstanding the evidence adduced by BMW in an effort to prove that the repainted cars conformed to the same quality standards as its other cars, we also assume that it knew, or should have known, that as time passed the repainted cars would lose their attractive appearance more rapidly than other BMW's. Moreover, we of course accept the Alabama courts' view that the state interest in protecting its citizens from deceptive trade practices justifies a sanction in addition to the recovery of compensatory damages. We cannot, however, accept the conclusion of the Alabama Supreme Court that BMW's conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty.

[15][16] The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce. While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.

As in Haslip, we are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award. Unlike that case, however, we are fully convinced that the grossly excessive award imposed in this *586 case transcends the constitutional limit. Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate the economic interests of Alabama consumers is a matter that should be addressed by the state court in the first instance.

FN41. Justice GINSBURG expresses concern that we are "the only federal court policing" this limit. Post, at 1617. The small number of punitive damages questions that we have reviewed in recent years, together with the fact that this is the first case in decades in which we have found that a punitive damages award exceeds the constitutional limit, indicates that this concern is at best premature. In any event, this consideration surely does not justify an abdication of our responsibility to enforce constitutional protections in an extraordinary case such as this one.

The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice BREYER, with whom Justice O'CONNOR and Justice SOUTER join, concurring.

The Alabama state courts have assessed the defendant $2 million in "punitive damages" for having knowingly failed to tell a BMW automobile buyer that, at a cost of $600, it had repainted portions of his new $40,000 car, thereby lowering its potential resale value by about 10%. The Court's opinion, which I join, explains why we have concluded that this award, in this case, was "grossly excessive" in relation to legitimate punitive damages objectives, and hence an arbitrary deprivation of life, liberty, or
property in violation of the Due Process Clause. See
TXO Production Corp. v. Alliance Production Corp.,
509 U.S. 443, 453, 454, 113 S.Ct. 2711, 2718, 125
L.Ed.2d 366 (1993) (A “grossly excessive” punitive
award amounts to an “arbitrary deprivation of
property without due process of law” ) (plurality
opinion). Members of this Court have generally
thought, however, that if “fair procedures were
followed, a judgment that is a product of that process
is entitled to a strong presumption*587 of validity.”
Id., at 457, 113 S.Ct., at 2770. See also Pacific Mut.
1032, 1054-1056, 113 L.Ed.2d I (1991) (KENNEDY,
J., concurring in judgment). And the Court also has
found that punitive damages procedures very similar
to those followed here were not, by themselves,
fundamentally unfair. Id., at 15-24, 111 S.Ct., at
1041-1047. Thus, I believe it important to explain
why this presumption of validity is overcome in this
instance.

**1605 The reason flows from the Court's emphasis
in Haslip upon the constitutional importance of legal
standards that provide “reasonable constraints”
within which “discretion is exercised,” that assure “
meaningful and adequate review by the trial court
whenever a jury has fixed the punitive damages,”
and permit “appealable review [that] makes certain
that the punitive damages are reasonable in their
amount and rational in light of their purpose to
punish what has occurred and to deter its repetition.”
Id., at 20-21, 111 S.Ct., at 1045. See also id., at 18,
111 S.Ct., at 1043 (“[Un]limited jury discretion—or
unlimited judicial discretion for that matter—in the
fixing of punitive damages may invite extreme results
that jar one's constitutional sensibilities”).

This constitutional concern, itself harping back to
the Magna Carta, arises out of the basic unfairness of
depriving of depriving of depriving of depriving or life, liberty,
or property, through
the application, not of law and legal processes, but of
arbitrary coercion. Daniels v. Williams, 474 U.S. 327,
331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986);
231, 233-234, 32 L.Ed. 623 (1889). Requiring the
application of law, rather than a decisionmaker's
caprice, does more than simply provide citizens
notice of what actions may subject them to
punishment; it also helps to assure the uniform
general treatment of similarly situated persons that is
the essence of law itself. See Railway Express
S.Ct. 463, 466-467, 93 L.Ed. 533 (1949) (Jackson, J.,
concurring) (“[T]here is no more effective practical
 guaranty against arbitrary and unreasonable
government than to require that the principles of law
which officials would impose upon a minority must
be imposed generally”).

*588 Legal standards need not be precise in order
to satisfy this constitutional concern. See Haslip, supra,
at 20, 111 S.Ct., at 1044 (comparing punitive
damages standards to such legal standards as “
reasonable care,” “due diligence,” and “best
interests of the child”) (internal quotation marks
omitted). But they must offer some kind of constraint
upon a jury or court's discretion, and thus protection
against purely arbitrary behavior. The standards the
Alabama courts applied here are vague and open
ended to the point where they risk arbitrary results.
In my view, although the vagueness of those standards
does not, by itself, violate due process, see Haslip, supra,
it does invite the kind of scrutiny the Court has
given the particular verdict before us. See id., at 18,
111 S.Ct., at 1043 (“[C]oncerns of ... adequate
guidance from the court when the case is tried to a
jury properly enter into the constitutional calculus”);
TXO, supra, at 475, 113 S.Ct., at 2729 (“[I]t cannot
be denied that the lack of clear guidance heightens
the risk that arbitrariness, passion, or bias will replace
dispassionate deliberation as the basis for the jury's
verdict”) (O'CONNOR, J., dissenting). This is
because the standards, as the Alabama Supreme
Court authoritatively interpreted them here, provided
no significant constraints or protection against
arbitrary results.

First, the Alabama statute that permits punitive
damages does not itself contain a standard that
readily distinguishes between conduct warranting
very small, and conduct warranting very large,
punitive damages awards. That statute permits
punitive damages in cases of “oppression, fraud,
wantonness, or malice.” Ala.Code § 6-11-20(a)
(1993). But the statute goes on to define those terms
broadly, to encompass far more than the egregious
conduct that those terms, at first reading, might seem
to imply. An intentional misrepresentation, made
through a statement or silence, can easily amount to
“fraud” sufficient to warrant punitive damages. See §
6-11-20(b)(1) (“Fraud” includes “intentional ...
concealment of a material fact the concealing party
had a *589 duty to disclose, which was gross, oppressive, or malicious and committed with the intention ...
of thereby depriving a person or entity of
property”) (emphasis added); § 6-11-20(b)(2) (“

Malice” includes any “wrongful act without just cause or excuse ... [with an intent to injure the ... property of another]” (emphasis added); § 6-11-20(b)(3) (“Oppression” includes “[s]ubjecting a person to ... unjust hardship in conscious disregard of that person's rights”). The statute thereby authorizes punitive damages for the most **1606 serious kinds of misrepresentations, say, tricking the elderly out of their life savings, for much less serious conduct, such as the failure to disclose repainting a car, at issue here, and for a vast range of conduct in between.

Second, the Alabama courts, in this case, have applied the “factors” intended to constrain punitive damages awards in a way that belies that purpose. *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala.1989), sets forth seven factors that appellate courts use to determine whether or not a jury award was “grossly excessive” and which, in principle, might make up for the lack of significant constraint in the statute. But, as the Alabama courts have authoritatively interpreted them, and as their application in this case illustrates, they impose little actual constraint.

(a) *Green Oil* requires that a punitive damages award “bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred.” *Id.* at 223. But this standard does little to guide a determination of what counts as a “reasonable” relationship, as this case illustrates. The record evidence of past, present, or likely future harm consists of (a) $4,000 of harm to Dr. Gore’s BMW; (b) 13 other similar Alabama instances; and (c) references to about 1,000 similar instances in other States. The Alabama Supreme Court, disregarding BMW’s failure to make relevant objection to the out-of-state instances at trial (as was the court’s right), held that the last mentioned, out-of-state instances did not *590 count as relevant harm. It went on to find “a reasonable relationship” between the harm and the $2 million punitive damages award without “consider[ing] those acts that occurred in other jurisdictions.” 646 So.2d 619, 628 (1994) (emphasis added). For reasons explored by the majority in greater depth, see *ante*, at 1598-1604, the relationship between this award and the underlying conduct seems well beyond the bounds of the “reasonable.” To find a “reasonable relationship” between purely economic harm totaling $56,000, without significant evidence of future repetition, and a punitive award of $2 million is to empty the “reasonable relationship” test of meaningful content. As thus construed, it does not set forth a legal standard that could have significantly constrained the discretion of Alabama factfinders.

(b) *Green Oil*’s second factor is the “degree of reprehensibility” of the defendant’s conduct. *Green Oil, supra*, at 223. Like the “reasonable relationship” test, this factor provides little guidance on how to relate culpability to the size of an award. The Alabama court, in considering this factor, found “reprehensible” that BMW followed a conscious policy of not disclosing repairs to new cars when the cost of repairs amounted to less than 3% of the car’s value. Of course, any conscious policy of not disclosing a repair—where one knows the nondisclosure might cost the customer resale value—is “reprehensible” to some degree. But, for the reasons discussed by the majority, *ante*, at 1599-1601, I do not see how the Alabama courts could find conduct that (they assumed) caused $56,000 of relevant economic harm especially or unusually reprehensible enough to warrant $2 million in punitive damages, or a significant portion of that award. To find to the contrary, as the Alabama courts did, is not simply unreasonable; it is to make “reprehensibility” a concept without constraining force, i.e., to deprive the concept of its constraining power to protect against serious and capricious deprivations.

*591 c) Green Oil*’s third factor requires “punitive damages” to “remove the profit” of the illegal activity and “be in excess of the profit, so that the defendant recognizes a loss.” *Green Oil, 539 So.2d*, at 223. This factor has the ability to limit awards to a fixed, rational amount. But as applied, that concept’s potential was not realized, for the court did not limit the award to anywhere near the $56,000 in profits evidenced in the record. Given the record’s description of the conduct and its prevalence, this factor could not justify much of the $2 million award.

(d) *Green Oil*’s fourth factor is the “financial position” of the defendant. *Ibid.* Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the State’s **1607 interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant’s wealth and its responses to economic incentives). See TXO, 509 U.S., at 462, and n. 28, 113 S.Ct., at 2722, and n. 28 (plurality opinion); *id.*, at 469, 113 S.Ct., at 2726 (KENNEDY, J., concurring in part and concurring in judgment); *Haslip*, 499 U.S., at 21-22, 111 S.Ct., at
the standard—the need to bring wrongdoers to
standard provides meaningful constraint to the extent especially when unsupported by evidence of a
courts here did not mention). Thus, the first, second, and third

Thus, the first, second, and third Green Oil factors, in
principle, might sometimes act as constraints on arbitrary behavior. But as the Alabama courts interpreted those standards in this case, even taking those three factors together, they could not have significantly constrained the court system's ability to impose "grossly excessive" awards.

Third, the state courts neither referred to, nor made any effort to find, nor enunciated any other standard that either directly, or indirectly as background, might have supplied the constraining legal force that the statute and Green Oil standards (as interpreted here) lack. Dr. Gore did argue to the jury an economic theory based on the need to offset the totality of the harm that the defendant's conduct caused. Some theory of that general kind might have provided a significant constraint on arbitrary awards (at least where confined to the relevant harm-causing conduct, see ante, at 1596-1598). Some economists, for example, have argued for a standard that would deter illegal activity causing solely economic harm through the use of punitive damages awards that, as a whole, would take from a wrongdoer the total cost of the $593 harm caused. See, e.g., S. Shavell, Economic Analysis of Accident Law 162 (1987) ("If liability equals losses caused multiplied by ... the inverse of the probability of suit, injurers will act optimally under liability rules despite the chance that they will escape suit"); Cooter, Punitive Damages for Deterrence: When and How Much, 40 Ala. L.Rev. 1143, 1146-1148 (1989). My understanding of the intuitive essence of some of those theories, which I put in crude form (leaving out various qualifications), is that they could permit juries to calculate punitive damages by making a rough estimate of global harm, dividing that estimate by a similarly rough estimate of the number of successful lawsuits that would likely be brought, and adding generous attorney's fees and other costs. Smaller damages would not sufficiently discourage firms from engaging in the harmful conduct, while larger damages would "over-deter" by leading potential defendants to spend more to prevent the activity that causes the economic harm, say, through employee training, than the cost of the harm itself. See Galligan, Augmented Awards: The Efficient Evolution of Punitive Damages, 51 La. L.Rev. 3, 17-20, 28-30 (1990). Larger damages might also "double count" by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover.

The record before us, however, contains nothing suggesting that the Alabama Supreme Court, when determining the allowable award, applied any "economic" theory that might explain the $2 million recovery. Cf. Browning-Ferris, supra, at 300, 109 S.Ct. at 2933 (noting that the Constitution "does not incorporate the views of the Law and Economics School," nor does it "require the States to subscribe to any particular economic theory") (o'CONNOR, J., concurring in part and dissenting in part).
part) (quotingCTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 92, 107 S.Ct. 1637, 1651, 95 L.Ed.2d 67 (1987)). And courts properly tend to judge the rationality of judicial actions in terms of the reasons that were given, and the facts that were before the court, cf. *5947TOO, 509 U.S., at 468, 113 S.Ct., at 2725 (KENNEDY, J., concurring in part and concurring in judgment), not those that might have been given on the basis of some conceivable set of facts (unlike the rationality of economic statutes enacted by legislatures subject to the public's control through the ballot box, see, e.g., FCC v. Beach Communications, Inc., 508 U.S. 307, 315, 113 S.Ct. 2096, 2102, 124 L.Ed.2d 211 (1993)). Therefore, reference to a constraining "economic" theory, which might have counseled more deferential review by this Court, is lacking in this case.

Fourth, I cannot find any community understanding or historic practice that this award might exemplify or historic practice that this award might exemplify. A punitive damages award of $2 million for intentional misrepresentation causing no harm is extraordinary by historical standards, and, as far as I am aware, finds no analogue until relatively recent times. Amici for Dr. Gore attempt to show that this is not true, pointing to various historical cases which, according to their calculations, represented roughly equivalent punitive awards for similarly culpable conduct. See Brief for James D.A. Boyle et al. as Amici Curiae 4-5 (hereinafter Legal Historians' Brief). Among others, they cite Wilkes v. Wood, Lofft 1, 98 Eng. Rep. 489 (C.P. 1763) (£ 1,000 said to be equivalent of $1.5 million, for warrantless search of papers); Huckle v. Money, 2 Wills, 205, 95 Eng. Rep. 768 (K.B.1763) (£30, said to be $450,000, for 6-hour false imprisonment); Hewlett v. Cruchley, 5 Taunt. 277, 128 Eng. Rep. 696 (C.P. 1813) (£2,000, said to be $680,000, for malicious prosecution); Merest v. Harvey, 5 Taunt. 442, 128 Eng. Rep. 761 (C.P. 1814) (£500, said to be $165,000, for poaching). But amici apparently base their conversions on a mathematical assumption, namely, that inflation has progressed at a constant 3% rate of inflation. See Legal Historians' Brief 4. In fact, consistent, cumulative inflation is a modern phenomenon. See McCusker, How Much Is That in Real Money? A Historical Price Index for Use as a Deflator *595 of Money Values in the Economy of the United States, 101 Proceedings of American Antiquarian Society 297, 310, 323-332 (1992). Estimates based on historical rates of valuation, while highly approximate, suggest that the ancient extraordinary awards are small compared to the $2 million here at issue, or other modern punitive damages figures. See Appendix to this opinion, infra, at 1609-1610, suggesting that the modern equivalent of the awards in the above cases is something like $150,000, $45,000, $100,000, and $25,000, respectively. And, as the majority opinion makes clear, the record contains nothing to suggest that the extraordinary size of the award in this case is explained by the extraordinary wrongfulness of the defendant's behavior, measured by historical or community standards, rather than arbitrariness or caprice.

Fifth, there are no other legislative enactments here that classify awards and impose quantitative limits that would significantly cabin the fairly unbounded discretion created by the absence of constraining legal standards. Cf., e.g., *1609Tex. Civ. Prac. & Rem.Code Ann. § 41.008 (Supp.1996) (punitive damages generally limited to greater of double damages, or $200,000, except cap does not apply to suits arising from certain serious criminal acts enumerated in the statute); Conn. Gen.Stat. § 52-240b (1995) (punitive damages may not exceed double compensatory damages in product liability cases); Fla. Stat. § 768.73(1) (Supp.1993) (punitive damages in certain actions limited to treble compensatory damages); Ga.Code Ann. § 51-12-5.1(a) (Supp.1995) ($250,000 cap in certain actions).

The upshot is that the rules that purport to channel discretion in this kind of case, here did not do so in fact. That means that the award in this case was both (a) the product of a system of standards that did not significantly constrain a court's, and hence a jury's, discretion in making that award; and (b) grossly excessive in light of the State's legitimate punitive damages objectives.

*596 The first of these reasons has special importance where courts review a jury-determined punitive damages award. That is because one cannot expect to direct jurors like legislators through the ballot box; nor can one expect those jurors to interpret law like judges, who work within a discipline and hierarchical organization that normally promotes roughly uniform interpretation and application of the law. Yet here Alabama expects jurors to act, at least a little, like legislators or judges, for it permits them, to a certain extent, to create public policy and to apply that policy, not to

compensate a victim, but to achieve a policy-related objective outside the confines of the particular case.

To the extent that neither clear legal principles nor fairly obvious historical or community-based standards (defining, say, especially egregious behavior) significantly constrain punitive damages awards, is there not a substantial risk of outcomes so arbitrary that they become difficult to square with the Constitution’s assurance, to every citizen, of the law’s protection? The standards here, as authoritatively interpreted, in my view, make this threat real and not theoretical. And, in these unusual circumstances, where legal standards offer virtually no constraint, I believe that this lack of constraining standards warrants this Court’s detailed examination of the award.

The second reason—the severe disproportionality between the award and the legitimate punitive damages objectives—reflects a judgment about a matter of degree. I recognize that it is often difficult to determine just when a punitive award exceeds an amount reasonably related to a State’s legitimate interests, or when that excess is so great as to amount to a matter of constitutional concern. Yet whatever the difficulties of drawing a precise line, once we examine the award in this case, it is not difficult to say that this award lies on the line’s far side. The severe lack of proportionality between the size of the award and the underlying punitive damages objectives shows that the award falls into the category*597 of “gross excessiveness” set forth in this Court’s prior cases.

These two reasons taken together overcome what would otherwise amount to a “strong presumption of validity.” TXO. 509 U.S., at 457, 113 S.Ct., at 2720. And, for those two reasons, I conclude that the award in this unusual case violates the basic guarantee of nonarbitrary governmental behavior that the Due Process Clause provides.

APPENDIX TO OPINION OF BREYER, J.

Although I recognize that all estimates of historic rates of inflation are subject to dispute, including, I assume, the sources below, those sources suggest that the value of the 18th and 19th century judgments cited by amici is much less than the figures amici arrived at under their presumption of a constant 3% rate of inflation.


Thus, the above sources suggest that the £1,000 award in Wilkes in 1763 roughly amounts to between $89,110 and $144,440 today, not $1.5 million. And the £300 award in Huckle that same year would seem to be worth between $26,733 and $43,320 today, not $450,000.


*598 Thus, the £2,000 and £500 awards in Hewlett and Merest would seem to be closer to $100,320 and $25,080, respectively, than to amici’s estimates of $680,000 and $165,000.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

Today we see the latest manifestation of this Court’s recent and increasingly insistent “concern about punitive damages that ‘run wild.’” Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18, 111 S.Ct. 1032, 1043, 111 L.Ed.2d 1 (1991). Since the Constitution does not make that concern any of our
business, the Court's activities in this area are an unjustified incursion into the province of state governments.

In earlier cases that were the prelude to this decision, I set forth my view that a state trial procedure that commits the decision whether to impose punitive damages, and the amount, to the discretion of the jury, subject to some judicial review for "reasonableness," furnishes a defendant with all the process that is "due." See TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 470, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (SCALIA, J., concurring in judgment); cf. Honda Motor Co. v. Oberg, 512 U.S. 415, 435-436, 114 S.Ct. 2331, 2342, 129 L.Ed.2d 336 (1994) (SCALIA, J., concurring). I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against *599 "unfairness" - neither the unfairness of an excessive civil compensatory award, nor the unfairness of an "unreasonable" punitive award. What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually be reasonable. See TXO, supra, at 471, 113 S.Ct., at 2727 (SCALIA, J., concurring in judgment).

This view, which adheres to the text of the Due Process Clause, has not prevailed in our punitive damages cases. See TPXO, 509 U.S., at 453-462, 113 S.Ct., at 2720-2722 (plurality opinion); id., at 478-481, 113 S.Ct., at 2730-2732 (O'CONNOR, J., dissenting); Haslip, supra, at 18, 111 S.Ct., at 1043. When, however, a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I do not feel bound to give it "stare decisis" effect - indeed, I do not feel justified in doing so. See, e.g., Witte v. United States, 515 U.S. 389, 406, 115 S.Ct. 2199, 2209, 132 L.Ed.2d 351 (1995) (SCALIA, J., concurring in judgment); Walton v. Arizona, 497 U.S. 639, 673, 110 S.Ct. 3047, 3067-3068, 111 L.Ed.2d 511 (1990) (SCALIA, J., concurring in judgment in part and dissenting in part). Our punitive damages jurisprudence compels such a response. The Constitution provides no warrant for federalizing yet another aspect of our Nation's legal culture (no matter **1611 how much in need of correction it may be), and the application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the "reasonableness" of the award in relation to the conduct for which it was assessed.

Because today's judgment represents the first instance of this Court's invalidation of a state-court punitive assessment as simply unreasonably large, I think it a proper occasion to discuss these points at some length.

I

The most significant aspects of today's decision - the identification of a "substantive due process" right against a "grossly excessive" award, and the concomitant assumption *600 of ultimate authority to decide anew a matter of "reasonableness" resolved in lower court proceedings - are of course not new. Haslip and TXO revived the notion, moribund since its appearance in the first years of this century, that the measure of civil punishment poses a question of constitutional dimension to be answered by this Court. Neither of those cases, however, nor any of the precedents upon which they relied, actually took the step of declaring a punitive award unconstitutional simply because it was "too big."

At the time of adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved. See, e.g., Barry v. Edmunds, 116 U.S. 550, 565, 6 S.Ct. 501, 509, 29 L.Ed. 729 (1886); Missouri Pacific R Co. v. Humes, 113 U.S. 512, 521, 6 S.Ct. 110, 113, 29 L.Ed. 463 (1885); Day v. Woodworth, 13 How. 363, 371, 14 L.Ed. 181 (1852). See generally Haslip, supra, at 25-27, 111 S.Ct., at 1047-1048 (SCALIA, J., concurring in judgment). Today's decision, though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court. It reflects not merely, as the concurrence candidly acknowledges, "a judgment about a matter of degree," ante, at 1609; but a judgment about the appropriate degree of indignation or outrage, which is hardly an analytical determination.

There is no precedential warrant for giving our judgment priority over the judgment of state courts and juries on this matter. The only support for the Court's position is to be found in a handful of errant
federal cases, bunched within a few years of one other, which invented the notion that an unfairly severe civil sanction amounts to a violation of constitutional liberties. These were the decisions upon which the *TXO* plurality relied in pronouncing that the Due Process Clause "imposes substantive limits 'beyond which penalties may not go,'" 509 U.S., at 454, 113 S.Ct., at 2718 (quoting *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78, 28 S.Ct. 28, 30, 52 L.Ed. 108 (1907)); see also *601*509 U.S., at 478-481, 113 S.Ct., at 2730-2732 (O'CONNOR, J., dissenting); *Haslip*, supra, 499 U.S. at 18, 111 S.Ct., at 1043. Although they are our precedents, they are themselves too shallowly rooted to justify the Court's recent undertaking. The only case relied upon in which the Court actually invalidated a civil sanction does not even support constitutional review for excessiveness, since it really concerned the validity, as a matter of *procedural* due process, of state legislation that imposed a significant penalty on a common carrier which lacked the means of determining the legality of its actions before the penalty was imposed. See *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 489-491, 35 S.Ct. 886, 887-888, 59 L.Ed. 1419 (1915). The amount of the penalty was not a subject of independent scrutiny. As for the remaining cases, while the opinions do consider arguments that statutory penalties can, by reason of their excessiveness, violate due process, not a single one of these judgments invalidates a damages award. See *Seaboard*, supra, at 78-79, 28 S.Ct., at 30; *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 111-112, 29 S.Ct. 220, 227, 53 L.Ed. 417 (1909); *Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270, 286, 290, 32 S.Ct. 406, 411, 412, 56 L.Ed. 769 (1912); **1612*St. Louis, I.M. & S.R Co. v. Williams*, 251 U.S. 63, 66-67, 40 S.Ct. 71, 73, 64 L.Ed. 139 (1919).

More importantly, this latter group of cases—which again are the *sole* precedential foundation put forward for the rule of constitutional law espoused by today's Court—simply fabricated the "substantive due process" right at issue. *Seaboard* assigned no precedent to its bald assertion that the Constitution imposes "limits beyond which penalties may not go," 207 U.S., at 78, 28 S.Ct., at 30. *Waters-Pierce* cited only *Coffey v. County of Harlan*, 204 U.S. 659, 27 S.Ct. 305, 51 L.Ed. 666 (1907), a case which inquired into the constitutionality of state *procedure*, *id.* at 662-663, 27 S.Ct., at 305-306. *Standard Oil* simply cited *Waters-Pierce*, and *St. Louis, I.M. & S. R. Co.* offered in addition to these cases only *Collins v. Johnston*, 237 U.S. 502, 35 S.Ct. 649, 59 L.Ed. 1071 (1915), which said nothing to support the notion of a "substantive due process" right against excessive civil penalties, but to the contrary asserted that the prescribing and imposing of criminal punishment were "functions peculiarly belonging to the several States," *id.* at 509-510, 35 S.Ct., at 652-653. Thus, the only authority for the Court's position is simply not authoritative. These cases fall far short of what is needed to supplant this country's longstanding practice regarding exemplary awards, see, e.g., *Haslip*, 499 U.S., at 15-18, 111 S.Ct., at 1041-1043; *id.*, at 25-28, 111 S.Ct., at 1047-1048 (SCALIA, J., concurring in judgment).

II

One might understand the Court's eagerness to enter this field, rather than leave it with the state legislatures, if it had something useful to say. In fact, however, its opinion provides virtually no guidance to legislatures, and to state and federal courts, as to what a "constitutorally proper" level of punitive damages might be.

We are instructed at the outset of Part II of the Court's opinion—the beginning of its substantive analysis—that "the federal excessiveness inquiry ... begins with an identification of the state interests that a punitive award is designed to serve." *Ante*, at 1595. On first reading this, one is faced with the prospect that federal punitive damages law (the new field created by today's decision) will be beset by the sort of "interest analysis" that has laid waste the formerly comprehensible field of conflict of laws. The thought that each assessment of punitive damages, as to each offense, must be examined to determine the precise "state interests" pursued, is most unsettling. Moreover, if those "interests" are the most fundamental determinant of an award, one would think that due process would require the assessing jury to be *instructed* about them.

It appears, however (and I certainly hope), that all this is a false alarm. As Part II of the Court's opinion unfolds, it turns out to be directed, not to the question "How much punishment is too much?" but rather to the question "Which acts can be punished?" "Alabama does not have the power," the Court says, "to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents." *Ante*, at 1597. That may be true, though

*603 only in the narrow sense that a person cannot be held liable to be punished on the basis of a lawful act. But if a person has been held subject to punishment properly the basis of any other conduct of his that displays his wickedness, unlawful or not. Criminal sentences can be computed, we have said, on the basis of "information concerning every aspect of a defendant's life," *Williams v. New York*, 337 U.S. 241, 250-252, 69 S.Ct. 1079, 1085, 93 L.Ed. 1337 (1949). The Court at one point seems to acknowledge this, observing that, although a sentencing court "[cannot] properly punish lawful conduct," it may in assessing the penalty "consider ... lawful conduct that bears on the defendant's character." *Ante*, at 1598, n. 19. That concession is quite incompatible, however, with the later assertion that, since "neither the jury nor the trial court was presented with evidence that any of BMW's out-of-state conduct was unlawful," the Alabama Supreme Court "therefore properly eschewed reliance on BMW's out-of-state conduct, ... and based its remitted award solely on conduct that occurred within Alabama." *Ante*, at 1598. Why could the Supreme Court of Alabama not consider lawful (but disreputable) conduct, both inside **1613 and outside Alabama, for the purpose of assessing just how bad an actor BMW was? The Court follows up its statement that "Alabama does not have the power ... to punish BMW for conduct that was lawful where it occurred" with the statement: "Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." *Ante*, at 1597-1598. The Court provides us no citation of authority to support this proposition—other than the barely analogous cases cited earlier in the opinion, see *ante*, at 1596-1597—and I know of none.

These significant issues pronounced upon by the Court are not remotely presented for resolution in the present case. There is no basis for believing that Alabama has sought to control conduct elsewhere. The statutes at issue merely *604 permit civil juries to treat conduct such as petitioner's as fraud, and authorize an award of appropriate punitive damages in the event the fraud is found to be "gross, oppressive, or malicious," Ala.Code § 6-11-20(b)(1) (1993). To be sure, respondent did invite the jury to consider out-of-state conduct in its calculation of damages, but any increase in the jury's initial award based on that consideration is not a component of the remitted judgment before us. As the Court several times recognizes, in computing the amount of the remitted award the Alabama Supreme Court—whether it was constitutionally required to or not—expressly disclaimed any reliance on acts that occurred in other jurisdictions. *Ante*, at 1595 (internal quotation marks omitted); see also *ante*, at 1598.FN* Thus, the only question presented by this case is whether that award, limited to petitioner's Alabama conduct and viewed in light of the factors identified as properly informing the inquiry, is excessive. The Court's sweeping (and largely unsupported) statements regarding the relationship of punitive awards to lawful or unlawful out-of-state conduct are the purest dicta.

FN* The Alabama Supreme Court said: "[W]e must conclude that the award of punitive damages was based in large part on conduct that happened in other jurisdictions.... Although evidence of similar acts in other jurisdictions is admissible as to the issue of 'pattern and practice' of such acts, ... this jury could not use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the dollar amount of a punitive damages award. Such evidence may not be considered in setting the size of the civil penalty, because neither the jury nor the trial court had evidence before it showing in which states the conduct was wrongful." 646 So.2d 619, 627 (1994).

In Part III of its opinion, the Court identifies "[t]hree guideposts" that lead it to the conclusion that the award in this case is excessive: degree of reprehensibility, ratio between punitive award and plaintiff's actual harm, and legislative*605 sanctions provided for comparable misconduct. *Ante*, at 1598-1604. The legal significance of these "guideposts" is nowhere explored, but their necessary effect is to establish federal standards governing the hitherto exclusively state law of damages. Apparently (though it is by no means clear) all three federal "guideposts" can be overridden if "necessary to deter future misconduct," *ante*, at 1603-1604—a loophole that will encourage state reviewing courts to uphold awards as necessary for the "adequate[ ] protection[ ]" of state consumers, *ibid*. By effectively requiring state reviewing courts to concoct rationalizations—whether
within the “guideposts” or through the loophole—to justify the intuitive punitive reactions of state juries, the Court accords neither category of institution the respect it deserves.

Of course it will not be easy for the States to comply with this new federal law of damages, no matter how willing they are to do so. In truth, the “guideposts” mark a road to nowhere: they provide no real guidance at all. As to “degree of reprehensibility” of the defendant's conduct, we learn that “nonviolent crimes are less serious than crimes marked by violence or the threat of violence,” ante, at 1599 (quoting Solem v. Helm, 463 U.S. 277, 292-293, 103 S.Ct. 3001, 3011, 77 L.Ed.2d 637 (1983)), and that “trickery and deceit” are “more reprehensible than negligence,” ante, at 1599. As to the ratio of punitive to compensatory damages, we are told that a “general concern[n] of reasonableness ... enter[s] into the constitutional*1614 calculus,” ante, at 1602 (quoting Texas v. Hart, 509 U.S. at 458, 113 S.Ct. at 2720)—though even a “breathtaking” rule will not necessarily do anything more than “raise a suspicious judicial eyebrow,” ante, at 1603 (quoting Texas v. Hart, supra, at 481, 113 S.Ct. at 2732 (O'Connor, J., dissenting), an opinion which, when confronted with that “breathtaking” ratio, approved it). And as to legislative sanctions provided for comparable misconduct, they should be accorded “substantial deference,” ante, at 1603 (quoting Browning-Ferris Industries of Vt. Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301, 109 S.Ct. 2909, 2934, 106 L.Ed.2d 219 (1989) (O'Connor, J., concurring in part and dissenting *606 in part)). One expects the Court to conclude: “To thine own self be true.”

These crisscrossing platitudes yield no real answers in no real cases. And it must be noted that the Court nowhere says that these three “guideposts” are the only guideposts; indeed, it makes very clear that they are not explaining away the earlier opinions that do not really follow these “guideposts” on the basis of additional factors, thereby “reiterat[ing] our rejection of a categorical approach.” Ante, at 1602. In other words, even these utter platitudes, if they should ever happen to produce an answer, may be overridden by other unnamed considerations. The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not “fair.” The Court distinguishes today's result from Haslip and TXO partly on the ground that “the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in Haslip and TXO.” Ante, at 1601. This seemingly rejects the findings necessarily made by the jury—that petitioner had committed a fraud that was “gross, oppressive, or malicious,” Ala.Code § 6-11-20(b)(1) (1993). Perhaps that rejection is intentional; the Court does not say.

The relationship between judicial application of the new “guideposts” and jury findings poses a real problem for the Court, since as a matter of logic there is no more justification for ignoring the jury's determination as to how reprehensible petitioner's conduct was (i.e., how much it deserves to be punished), than there is for ignoring its determination that it was reprehensible at all (i.e., that the wrong was willful and punitive damages are therefore recoverable). That the issue has been framed in terms of a constitutional right against unreasonably excessive awards should not obscure the fact that the logical and necessary consequence of the Court's approach is the recognition of a constitutional right against unreasonably imposed awards as well. The elevation of “fairness” in punishment to a principle of “substantive due process” means that every punitive award unreasonably imposed is unconstitutional; such an award is by definition excessive, since it attaches a penalty to conduct undeserving of punishment. Indeed, if the Court is correct, it must be that every claim that a state jury's award of compensatory damages is “unreasonable” (because not supported by the evidence) amounts to an assertion of constitutional injury. See Texas v. Hart, supra, at 471, 113 S.Ct., at 2727 (Scalia, J., concurring in judgment). And the same would be true for determinations of liability. By today's logic, every dispute as to evidentiary sufficiency in a state civil suit poses a question of constitutional moment, subject to review in this Court. That is a stupefying proposition.

For the foregoing reasons, I respectfully dissent.

Justice Ginsburg, with whom The Chief Justice joins, dissenting.

The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within

The respect due the Alabama Supreme Court requires this Court's prior instructions; and, more recently, that we strip from this case a false issue: No Court ultimately so recognizes, see consideration in legislative arenas. The Alabama award is the sole issue genuinely presented. The controls on awards of punitive damages (see court's judgment undisturbed, and resist unnecessary intrusion into an area dominantly of state concern.

I

The respect due the Alabama Supreme Court requires that we strip from this case a false issue: No impermissible "extraterritoriality" infects the judgment before us; the excessiveness*608 of the award is the sole issue genuinely presented. The Court ultimately so recognizes, see ante, at 1597-1598, but further clarification is in order.

Dr. Gore's experience was not unprecedented among customers who bought BMW vehicles sold as flawless and brand-new. In addition to his own encounter, Gore showed, through paint repair orders introduced at trial, that on 983 other occasions since 1983, BMW had shipped new vehicles to dealers without disclosing paint repairs costing at least $300, Tr. 585-586; at least 14 of the repainted vehicles, the evidence also showed, were sold as new and undamaged to consumers in Alabama. 646 So.2d 619, 623 (Ala.1994). Sales nationwide, Alabama's Supreme Court said, were admissible "as to the issue of a 'pattern and practice' of such acts." Id., at 627. There was "no error," the court reiterated, "in the admission of the evidence that showed how pervasive the nondisclosure policy was and the intent behind BMW NA's adoption of it." Id., at 628. That determination comports with this Court's expositions. See TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 462, and n. 28, 113 S.Ct. 2711, 2722, and n. 28, 125 L.Ed.2d 366 (1993) (characterizing as "well-settled" the admissibility of "evidence of [defendant's] alleged wrongdoing in other parts of the country" and of defendant's "wealth"); see also Brief for Petitioner 22 (recognizing that similar acts, out-of-state, traditionally have been considered relevant "for the limited purpose of determining that the conduct before the [court] was reprehensible because it was part of a pattern rather than an isolated incident").

Alabama's highest court next declared that the jury could not use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the dollar amount of a punitive damages award. Such evidence may not be considered in setting the size of the civil penalty, because neither the jury nor the trial court had evidence before it showing in which states the conduct was wrongful.*609 646 So.2d, at 627 (emphasis in original) (footnote omitted).

Because the Alabama Supreme Court provided this clear statement of the State's law, the multiplier problem encountered in Gore's case is not likely to occur again. Now, as a matter of Alabama law, it is plainly impermissible to assess punitive damages by multiplication based on out-of-state events not shown to be unlawful. See, e.g., Independent Life and Accident Ins. Co. v. Harrington, 658 So.2d 892, 902-903 (Ala.1994) (under BMW v. Gore, trial court erred in relying on defendant insurance company's out-of-state insurance policies in determining harm caused by defendant's unlawful actions).

No Alabama authority, it bears emphasis-no statute, judicial decision, or trial judge instruction-ever countenanced the jury's multiplication of the $4,000 diminution in value estimated for each refininished car by the number of such cars (approximately 1,000) shown to have been sold nationwide. The sole prompt to the jury to use nationwide sales as a multiplier came from Gore's lawyer during summation. App. 31, Tr. 812-813. Notably, counsel for BMW failed to object to Gore's multiplication suggestion, even though BMW's counsel interrupted to make unrelated objections four other times during Gore's closing statement. Tr. 810-811, 834-855, 858, 870-871. Nor did BMW's counsel request a charge instructing the jury not to consider out-of-state sales in calculating the punitive damages award. See Record 513-529 (listing all charges requested by counsel).

Following the verdict, BMW's counsel challenged the admission of the paint repair orders, but not, alternately, the jury's apparent use of the orders in a multiplication exercise. Curiously, during postverdict argument, BMW's counsel urged that if the **1616 repair orders were indeed admissible, then Gore would have a "full right" to suggest a multiplier-based disgorgement. Tr. 932.

\*610 In brief, Gore's case is idiosyncratic. The jury's improper multiplication, tardily featured by petitioner, is unlikely to recur in Alabama and does
not call for error correction by this Court.

Because the jury apparently (and erroneously) had used acts in other States as a multiplier to arrive at a $4 million sum for punitive damages, the Alabama Supreme Court itself determined "the maximum amount that a properly functioning jury could have awarded." S.2d 628 (emphasis in original). As this Court recognizes, the Alabama high court "properly eschewed reliance on BMW's out-of-state conduct and based its remitted award solely on conduct that occurred within Alabama." Ante, at 1598 (citation omitted). In sum, the Alabama Supreme Court left standing the jury's decision that the facts warranted an award of punitive damages—a determination not contested in this Court—and the state court concluded that, considering only acts in Alabama, $2 million was "a constitutionally reasonable punitive damages award." S.2d at 629.

II

A

Alabama's Supreme Court reports that it "thoroughly and painstakingly" reviewed the jury's award, ibid., according to principles set out in its own pathmarking decisions and in this Court's opinions in TXO and Pacific Mut. Life Ins. Co v. Haslip, 599 U.S. 1, 21, 111 S.Ct. 1032, 1045, 113 L.Ed.2d 1 (1991). S.2d at 621. The Alabama court said it gave weight to several factors, including BMW's deliberate ("reprehensible") presentation of refinished cars as new and undamaged, without disclosing that the value of those cars had been reduced by an estimated $410 10%, the financial position of the defendant, and the costs of litigation. Id. at 625-626. These standards, we previously held, "impose[e] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." Haslip, 599 U.S. at 22, 111 S.Ct. at 1045; see also TXO, 509 U.S. at 462, n. 28, 113 S.Ct. at 2722, n. 28. Alabama's highest court could have displayed its labor pains more visibly, but its judgment is nonetheless entitled to a presumption of legitimacy. See Rowan v. Runnels, 5

How. 134, 139, 12 L.Ed. 85 (1847). ("[T]his court will always feel it bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws.").

FN1. According to trial testimony, in late May 1992, BMW began redirecting refinished cars out of Alabama and two other States. Tr. 964. The jury returned its verdict in favor of Gore on June 12, 1992. Five days later, BMW changed its national policy to one of full disclosure. Id., at 1026.

FN2. See, e.g, Brief for Law and Economics Scholars et al. as Amici Curiae 6-26 (economic analysis demonstrates that Alabama Supreme Court's judgment was not unreasonable); W. Landes & R. Posner, Economic Structure of Tort Law 160-163 (1987) (economic model for assessing propriety of punitive damages in certain tort cases).

We accept, of course, that Alabama's Supreme Court applied the State's own law correctly. Under that law, the State's objectives—"punishment and deterrence"—guide punitive damages awards. See Birmingham v. Benson, 631 S.2d 902, 904 (Ala.1993). Nor should we be quick to find a constitutional infirmity when the highest state court endeavored a corrective for one counsel's slip and the other's oversight-counsel for plaintiff's excess in summation, unobjected to by one counsel's slip and the other's oversight—counsel for defendant, see supra, at 1615-and when the state court did so intending to follow the process approved in our Haslip and TXO decisions.

B

The Court finds Alabama's $2 million award not simply excessive, but grossly so, and therefore unconstitutional. S.2d 621. The decision*1617 further into territory traditionally within the States' domain, FN9 and commits the Court, now and again, to correct "misapplication of a properly stated rule of law." But cf. this Court's Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). FN10 The Court is not well equipped *613 for this mission. Tellingly, the Court repeats that it brings to the task no "mathematical formula," ante, at 1602, no "categorical approach," ibid., no "bright line," ante,
at 1604. It has only a vague concept of substantive
due process, a "raised eyebrow" test, see ante, at 1603, as its ultimate guide.\textsuperscript{FN3}

\textsuperscript{FN3} See ante, at 1595 ("In our federal
system, States necessarily have considerable
flexibility in determining the level of
punitive damages that they will allow in
different classes of cases and in any
particular case."); \textit{Browning-Ferris
Industries of Vt., Inc. v. Kelco
Disposal, Inc.}, 492 U.S. 257, 278, 109 S.Ct. 2909,
2921-2922, 106 L.Ed.2d 219 (1989) (In any
"lawsuit where state law provides the basis
of decision, the propriety of an award of
punitive damages for the conduct in
question, and the factors the jury may
consider in determining their amount, are
questions of state law."); \textit{Silkwood v. Kerr-
McGee Corp.}, 464 U.S. 238, 255, 104 S.Ct. 615,
625, 78 L.Ed.2d 443 (1984). ("Punitive
damages have long been a part of traditional
state tort law.").

\textsuperscript{FN4} Petitioner invites the Court to address
the question of multiple punitive damages
awards stemming from the same alleged
misconduct. The Court does not take up the
invitation, and rightly so, in my judgment,
for this case does not present the issue. For
three reasons, the question of multiple
awards is hypothetical, not real, in Gore's
case. First, the punitive damages award in
favor of Gore is the only such award yet
entered against BMW on account of its
non-disclosure policy.

Second, BMW did not raise the issue of
multiple punitive below. Indeed, in its reply
brief before the Alabama Supreme Court,
BMW stated: "Gore confused our point
about fairness among plaintiffs. He treats
this point as a premature 'multiple punitive
damages' argument. But, contrary to Gore's
contention, we are not asking this Court to
hold, as a matter of law, that a 'constitutional
violation occurs when a defendant is subjected to punitive
damages in two separate cases.' " Reply Brief for
Appellant in Nos. 1920324, 1920325
(Ala.Sup.Ct.), p. 48 (internal citations
omitted).

Third, if BMW had already suffered a
punitive damages judgment in connection
with its non-disclosure policy, Alabama's
highest court presumably would have taken
that fact into consideration. In reviewing
punitive damages awards attacked as
excessive, the Alabama Supreme Court
considers whether "there have been other
civil actions against the same defendant,
based on the same conduct." 646 So.2d 619,
624 (1994) (quoting \textit{Green Oil Co. v. Hornsby}, 559 So.2d 218, 224 (Ala.1989)). If
so, "this should be taken into account in
mitigation of the punitive damages award." 646 So.2d, at 624. The Alabama court
accordingly observed that Gore's counsel
had filed 24 other actions against BMW in
Alabama and Georgia, but that no other
punitive damages award had so far resulted. \textit{id.}, at 626.

\textsuperscript{FN5} Justice BREYER's concurring opinion
offers nothing more solid. Under \textit{Pacific
S.Ct. 1032, 113 L.Ed.2d 1 (1991), he
acknowledges, Alabama's standards for
punitive damages, standing alone, do not
violate due process. \textit{Ante}, at 1605. But they
"invite[e] the kind of scrutiny the Court has
given the particular verdict before us." \textit{Ibid.}
Pursuing that invitation, Justice BREYER
concludes that, matching the particular facts
of this case to Alabama's "legitimate
punitive damages objectives," \textit{ante}, at 1609,
the award was "'gross[ly] excessive[,]'", \textit{Ibid.}
The exercise is engaging, but
ultimately tells us only this: too big will be
judged unfair. What is the Court's measure
of too big? Not a cap of the kind a
legislature could order, or a mathematical
test this Court can divine and impose. Too
big is, in the end, the amount at which five
Members of the Court bridle.

In contrast to habeas corpus review under \textit{28 U.S.C.}
\textsection{2254}, the Court will work at this business alone. It
will not be aided by the federal district courts and
courts of appeals. It will be the only federal court
policing the area. The Court's readiness to
superintend state-court punitive damages awards is
all the more puzzling in view of the Court's
longstanding reluctance to countenance review, even
by courts of appeals, of the size of verdicts returned
by juries in federal district court proceedings. See
generally 11 C. Wright, A. Miller, & M. Kane,
For the reasons stated, I dissent from this Court's disturbance of the judgment the Alabama Supreme Court has made.

APPENDIX TO DISSenting OPINION OF GINSBURG, J.

Federal Practice and Procedure § 2820 (2d ed.1995). And the reexamination prominent in state courts and in legislative arenas, see Appendix. **1618 *614 infra, this page serves to underscore why the Court's enterprise is undue.


In Life Ins. Co. of Georgia v. Johnson, No. 390357 (Nov. 17, 1995), the Alabama Supreme Court revised the State's regime for assessments of punitive damages. Henceforth, trials will be bifurcated. Initially, juries will be instructed to determine liability and the amount of compensatory damages, if any; also, the jury is to return a special verdict on the question whether a punitive damages award is warranted. If the jury answers yes to the punitive damages question, the trial will be resumed for the presentation of evidence and instructions relevant to the amount appropriate to award as punitive damages. After postverdict trial court review and subsequent appellate review, the amount of the final punitive damages judgment will be paid into the trial court. The trial court will then order payment of litigation expenses, including the plaintiff's attorney's fees, and instruct the clerk to divide the remainder equally between the plaintiff and the State General Fund. The provision for payment to the State General Fund is applicable to all judgments not yet satisfied, and therefore would apply to the judgment in Gore's case.

For the reasons stated, I dissent from this Court's disturbance of the judgment the Alabama Supreme Court has made.

State legislatures have in the hopper or have enacted a variety of measures to curtail awards of punitive damages. At least one state legislature has prohibited punitive damages altogether, unless explicitly provided by statute. See N.H.Rev.Stat. Ann. § 507:16 (1994). We set out in this appendix some of the several controls enacted or under consideration in the States. The measures surveyed are: (1) caps on awards; (2) provisions for payment of sums to state agencies rather than to plaintiffs; and (3) mandatory bifurcated trials with separate proceedings for punitive damages determinations.

*615 i. Caps on Punitive Damages Awards

· Colorado-Colo. Rev. Stat. §§ 13-21-102(1)(a) and (3) (1987) (as a main rule, caps punitive damages at amount of actual damages).


· Delaware-H. R. 237, 138th Gen. Ass. (introduced May 17, 1995) (would cap punitive damages at greater of three times compensatory damages, or $250,000).

· Florida-Fla. Stat. §§ 768.731(a) and (b) (Supp.1992) (in general, caps punitive damages at three times compensatory damages).

· Georgia-Ga. Code Ann. § 51-12-5.1 (Supp.1995) (caps punitive damages at $250,000 in some tort actions; prohibits multiple awards stemming from the same predicate conduct in products liability actions).


Nevada-Nev.Rev.Stat. § 42.005(1) (1993) (caps punitive damages at three times compensatory damages if compensatory damages equal $100,000 or more, and at $300,000 if the compensatory damages are less than $100,000).


North Dakota-N. D. Cent. Code § 32-03.2-11(d) (Supp.1995) (caps punitive damages at greater of two times compensatory damages, or $250,000).

Oklahoma-Okla. Stat., Tit. 23, §§ 9.1(B)-D (Supp.1996) (caps punitive damages at greater of $100,000, or actual damages, if jury finds defendant guilty of reckless disregard; and at greatest of $500,000, twice actual damages, or the benefit accruing to defendant from the injury-causing conduct, if jury finds that defendant has acted intentionally and maliciously).

Texas-S. 25, 74th Reg. Sess. (enacted Apr. 20, 1995) (caps punitive damages at twice economic damages, plus up to $750,000 additional noneconomic damages).


ii. Allocation of Punitive Damages to State Agencies


New Mexico-H. 1017, 42d Leg., 1st Sess. (introduced Feb. 16, 1995) (would allocate punitive...
damages to Low-Income Attorney Services Fund).


*618 - Utah-Utah Code Ann. § 78-18-1(3) (1992) (allocates 50% of punitive damages in excess of $20,000 to state treasury).

III. Mandatory Bifurcation of Liability and punitive Damages Determinations


- Georgia-Ga. Code Ann. § 51-12-5.1(d) (Supp.1995) (in all cases in which punitive damages are claimed, liability for punitive damages is tried first, then amount of punitive damages).


- Kansas-Kan. Stat. Ann. §§ 60-3701(a) and (b) (1994) (trier of fact determines defendant's liability for punitive damages, then court determines amount of such damages).

- Missouri-Mo. Rev. Stat. §§ 510.263(1) and (3) (1994) (mandates bifurcated proceedings, on request of any party, for jury to determine first whether defendant is liable for punitive damages, then amount of punitive damages).


- Nevada-Nev. Rev. Stat. § 42.005(3) (1993) (if jury determines that punitive damages will be awarded, jury then determines amount in separate proceeding).


*619 - North Dakota-N. D. Cent. Code § 32-03.2-11(2) (Supp.1995) (upon request of either party, trier of fact determines whether compensatory damages will be awarded before determining punitive damages liability and amount).

- Oklahoma-Okla. Stat., Tit. 23, §§ 9.1(B)-(D) (Supp.1995-1996) (requires separate jury proceedings for punitive damages); S. 443, 45th Leg., 1st Reg. Sess. (introduced Jan. 31, 1995) (would require courts to strike requests for punitive damages before trial, unless plaintiff presents prima facie evidence at least 30 days before trial to sustain such damages; provide for bifurcated jury trial on request of defendant; and permit punitive damages only if compensatory damages are awarded).


U.S.A.1996.
BMW of North America, Inc. v. Gore

END OF DOCUMENT
Cooper Industries, Inc. v. Leatherman Tool Group, Inc.

Supreme Court of the United States
COOPER INDUSTRIES, INC., Petitioner,
v.
LEATHERMAN TOOL GROUP, INC.
No. 99-2035.


Manufacturer of multifunction hand tool sued competitor for, inter alia, false advertising. The jury awarded $50,000 in compensatory damages and $4.5 million in punitive damages. The United States District Court for the District of Oregon, Marsh, J., rejected competitor's claim that punitive damage award was unconstitutionally excessive. The United States Court of Appeals for the Ninth Circuit, 205 F.3d 1351, affirmed punitive damage award, concluding that district court's refusal to reduce award was not abuse of discretion. Certiorari was granted. The Supreme Court, Justice Stevens, held that Court of Appeals should apply de novo standard when reviewing district court's determination of constitutionality of punitive damage award.

Vacated and remanded.

Justice Thomas concurred and filed opinion.

Justice Scalia concurred in judgment and filed opinion.

Justice Ginsburg dissented and filed opinion.

West Headnotes

[1] Federal Courts 170B $460.1

170B Federal Courts
  170BVII Supreme Court
  170BVII(B) Review of Decisions of Courts of Appeals
  170Bk460 Review on Certiorari
  170Bk460.1 k. In General. Most Cited Cases

When no constitutional issue is raised, federal appellate court reviews trial court's punitive damages determination under abuse-of-discretion standard.


92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4426 k. Penalties, Fines, and Sanctions in General. Most Cited Cases
(Formerly 92k303, 115k94)

Fourteenth Amendment's Due Process Clause imposes substantive limits on states' discretion to punish, making Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to states and prohibiting them from imposing grossly excessive punishments on tortfeasors. U.S.C.A. Const.Amends. 8, 14.

[3] Constitutional Law 92 $4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive Damages. Most Cited Cases
(Formerly 92k303, 115k94)

Factors court considers in determining whether punitive damage award against tortfeasor is grossly disproportional to gravity of offense, and thus violative of due process, are: (1) degree of defendant's reprehensibility or culpability; (2) relationship between penalty and harm to victim caused by defendant's actions; and (3) sanctions imposed in other cases for comparable misconduct. U.S.C.A. Const.Amends. 8, 14.


170B Federal Courts
170BVII Courts of Appeals
170BVII(K) Scope, Standards, and Extent
170BVII(K)11 In General
170Bk776 k. Trial De Novo. Most Cited Cases
ill jury trial.

230 Jury

230k30 Denial or Infringement of Right

230k37 k. Re-Examination or Other Review of Questions of Fact Tried by Jury. Most Cited Cases

Jury's award of punitive damages is not finding of fact, but rather is expression of moral condemnation, and thus de novo appellate review of district court's determination that award is consistent with due process does not impair prevailing party's right to jury trial. U.S.C.A. Const.Amends. 7, 14.

**1678 Syllabus**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

*424 Respondent Leatherman Tool Group, Inc., manufactures a multifunction tool which improves on the classic Swiss army **1679 knife. When petitioner Cooper Industries, Inc., used photographs of a modified version of Leatherman's tool in posters, packaging, and advertising materials introducing a competing tool, Leatherman filed this action asserting, inter alia, violations of the Trademark Act of 1946 (Lanham Act). Ultimately, a trial jury awarded Leatherman $50,000 in compensatory damages and $4.5 million in punitive damages. Rejecting Cooper's arguments that the punitive damages were grossly excessive under BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, the District Court entered judgment. As relevant here, the Ninth Circuit affirmed the punitive damages award, concluding that the District Court did not abuse its discretion in declining to reduce that award.

Held: Courts of Appeals should apply a de novo standard when reviewing district court determinations of the constitutionality of punitive damages awards. The Ninth Circuit erred in applying the less demanding abuse-of-discretion standard in this case. Pp. 1683-1689.

(a) Compensatory damages redress the concrete loss that a plaintiff has suffered by reason of the defendant's wrongful conduct, but punitive damages are private fines intended to punish the defendant and deter future wrongdoing. A jury's assessment of the former is essentially a factual determination, but its imposition of the latter is an expression of its moral condemnation. States have broad discretion in imposing criminal penalties and punitive damages. Thus, when no constitutional issue is raised, a federal appellate court reviews the trial court's determination under an abuse-of-discretion standard. Browning-Ferris Industries of platinum v. Kelco Disposal, Inc., 492 U.S. 257, 279, 109 S.Ct. 2909, 106 L.Ed.2d 219. However, the Fourteenth Amendment's Due Process Clause imposes substantive limits on the States' discretion, making the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States, Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, and prohibiting States from imposing "grossly excessive" punishments on tortfeasors, e.g., Gore, 517 U.S., at 562, 116 S.Ct. 1589. The cases in which such limits *425 were enforced involved constitutional violations predicated on judicial determinations that the punishments were grossly disproportional to the gravity of the offense. E.g., United States v. Bajakajian, 524 U.S. 311, 334, 118 S.Ct. 2028, 141 L.Ed.2d 314. The relevant constitutional line is inherently imprecise, id., at 336, 118 S.Ct. 2028, but, in deciding whether that line has been crossed, this Court has focused on the same three criteria: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct. See, e.g., Gore, 517 U.S., at 575-585, 116 S.Ct. 1589; Bajakajian, 524 U.S., at 337, 339, 340-343, 118 S.Ct. 2028. Moreover, and of greatest relevance for the instant issue, in each case the Court has engaged in an independent examination of the
relevant criteria. See, e.g., id., at 337-344, 118 S.Ct. 2028; Gore, 517 U.S., at 575-586, 116 S.Ct. 1589. The reasons supporting the Court's holding in *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911, that trial judges' reasonable suspicion and probable cause determinations should be reviewed de novo—that "reasonable suspicion" and "probable cause" are fluid concepts that take their substantive content from the particular contexts in which the standards are being expressed; that, because such concepts acquire content only through case-by-case application, independent review is necessary if appellate courts are to maintain control of, and clarify, legal principles; and that de novo review tends to unify precedent and stabilize the law-

**1680** are equally applicable when passing on district court determinations of the constitutionality of punitive damages awards. Pp. 1683-1686.

(b) Because a jury's award of punitive damages is not a finding of "fact," appellate review of the District Court's determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by Leatherman and its *amici*. Pp. 1683-1688.

(c) It seems likely in this case that a thorough, independent review of the District Court's rejection of Cooper's due process objections to the punitive damages award might have led the Ninth Circuit to reach a different result. In fact, this Court's own consideration of the three *Gore* factors reveals questionable conclusions by the District Court that may not survive de novo review and illustrates why the Ninth Circuit's answer to the constitutional question may depend on the standard of review. Pp. 1688-1689.

205 F.3d 1351, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. THOMAS, J., filed a concurring opinion, post, p. 1689. SCALIA, J., *426 filed an opinion concurring in the judgment, post, p. 1689. GINSBURG, J., filed a dissenting opinion, post, p. 1690.

William Bradford Reynolds, Howrey Simon Arnold & White, Washington, DC, for petitioner.

Justice STEVENS delivered the opinion of the court. A jury found petitioner guilty of unfair competition and awarded respondent $50,000 in compensatory damages and $4.5 million in punitive damages. The District Court held that the punitive damages award did not violate the Federal Constitution. The Court of Appeals concluded that "the district court did not abuse its discretion in declining to reduce the amount of punitive damages." App. to Pet. for Cert. 4a. The issue in this case is whether the Court of Appeals applied the wrong standard of review in considering the constitutionality of the punitive damages award.

*427 I

The parties are competing tool manufacturers. In the 1980's, Leatherman Tool Group, Inc. (Leatherman or respondent), introduced its Pocket Survival Tool (PST). The Court of Appeals described the PST as an "ingenious multi-function pocket tool which improves on the classic 'Swiss army knife' in a number of respects. Not the least of the improvements was the inclusion of pliers, which, when unfolded, are nearly equivalent to regular full-sized pliers.... Leatherman apparently largely created and undisputedly now dominates the market for multi-function pocket tools which generally resemble the PST." *Leatherman Tool Group, Inc. v. Cooper Industries*, 199 F.3d 1009, 1010 (C.A.9 1999).

In 1995, Cooper Industries, Inc. (Cooper or petitioner), decided to design and market a competing multifunction tool. Cooper planned to copy the basic features of the PST, add a few features of its own, and sell the new tool under the name "ToolZall." Cooper hoped to capture about 5% of the multifunction tool market. The first ToolZall was designed to be virtually identical to the PST,FN1 but the design was ultimately**1681 modified in response to this litigation. The controversy to be resolved in this case involves Cooper's improper advertising of its original ToolZall design.

FN1 The ToolZall was marked with a different name than the PST, was held together with different fasteners, and, in the words of the Court of Appeals, "included a serrated blade and certain other small but not particularly visible differences." *Leatherman Tool Group, Inc. v. Cooper Industries*, 199 F.3d 1009, 1010 (C.A.9
Cooper introduced the original ToolZall in August 1996 at the National Hardware Show in Chicago. At that show, it used photographs in its posters, packaging, and advertising materials that purported to be of a ToolZall but were actually of a modified PST. When those materials were prepared, the first of the ToolZalls had not yet been manufactured. A Cooper employee created a ToolZall "mock-up" by grinding the Leatherman trademark from handles and pliers of a PST and substituting the unique fastenings that were to be used on the ToolZall. At least one of the photographs was retouched to remove a curved indentation where the Leatherman trademark had been. The photographs were used, not only at the trade show, which normally draws an audience of over 70,000 people, but also in the marketing materials and catalogs used by Cooper's sales force throughout the United States. Cooper also distributed a touched-up line drawing of a PST to its international sales representatives.

Shortly after the trade show, Leatherman filed this action asserting claims of trade-dress infringement, unfair competition, and false advertising under § 43(a) of the Trademark Act of 1946 (Lanham Act), 60 Stat. 441, as amended, 15 U.S.C. § 1125(a) (1994 ed. and Supp. V), and a common-law claim of unfair competition for advertising and selling an "imitation" of the PST. In December 1996, the District Court entered a preliminary injunction prohibiting Cooper from marketing the ToolZall and from using pictures of the modified PST in its advertising. Cooper withdrew the original ToolZall from the market and developed a new model with plastic coated handles that differed from the PST. In November 1996, it had anticipatorily sent a notice to its sales personnel ordering a recall of all promotional materials containing pictures of the PST, but it did not attempt to retrieve the materials it had sent to its customers until the following April. As a result, the offending promotional materials continued to appear in catalogs and advertisements well into 1997.

After a trial conducted in October 1997, the jury returned a verdict that answered several special interrogatories. With respect to the Lanham Act infringement claims, the jury found that Leatherman had trademark rights in the overall appearance of the PST and that the original ToolZall infringed those rights but that the infringement had not damaged Leatherman. It then found that the modified ToolZall did not infringe Leatherman's trademark rights in the PST. With respect to the advertising claims, it found Cooper guilty of passing off, false advertising, and unfair competition and assessed aggregate damages of $50,000 on those claims. It then answered "Yes" to the following interrogatory:

"Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?" App. 18.

Because it answered this question in the affirmative, the jury was instructed to determine the "amount of punitive damages [that] should be awarded to Leatherman." Ibid. The jury awarded $4.5 million. Ibid.

After the jury returned its verdict, the District Court considered, and rejected, arguments that the punitive damages were "grossly excessive" under our decision in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). See App. to Pet. for Cert. 24a. It then entered its judgment, which provided that 60% of the punitive damages would be paid to the Criminal Injuries Compensation Account of the State of Oregon. The judgment also permanently enjoined Cooper from marketing its original ToolZall in the United States or in 22 designated foreign countries.

On appeal, Cooper challenged both the District Court's injunction against copying the PST and the punitive damages award. The Court of Appeals issued two opinions. In its published opinion it set aside the injunction. Leatherman Tool Group, Inc. v. Cooper Industries, Inc., supra. It held that the overall appearance of the PST was not protected under the trademark laws because its distinguishing features, and the combination of those features, were functional. Accordingly, even though Cooper had deliberately copied the PST, it acted lawfully in doing so.

Because this holding removed the
showed to reduce the amount of punitive damages, the photographs of the customer who bought based on what the photographs showed would have received essentially that for which he or she paid. "Ibid. Thus, Cooper's use of the photographs of the PST did not involve "the same sort of potential harm to Leathernan or to customers as that which may arise from traditional passing off." Id., at 4a. The Court of Appeals made clear, however, that it did not condone the passing off. "[A]t a minimum," it observed, "[the passing off] gave Cooper an unfair advantage" by allowing it to use Leathernan's work product "to obtain a 'mock-up' more cheaply, easily, and quickly" than if it had waited until its own product was ready. "Ibid. Accordingly, the Court of Appeals concluded, "the district court did not abuse its discretion in declining to reduce the amount of punitive damages." Ibid.

Cooper's petition for a writ of certiorari asked us to decide whether the Court of Appeals reviewed the constitutionality of the punitive damages award under the correct standard and also whether the award violated the criteria we articulated in Gore. We granted the petition to resolve confusion among the Courts of Appeals on the first question.**, supra, 1683531 U.S. 923, 121 S.Ct. 297, 148 L.Ed.2d 238 (2000). We now conclude that the constitutional issue merits de novo review. Because the Court of Appeals applied an "abuse of discretion" standard, we remand the case for determination of the second question under the proper standard.

In its unpublished opinion, the Court of Appeals affirmed the punitive damages award. It first rejected Cooper's argument that the Oregon Constitution, which has been interpreted to prohibit awards of punitive damages for torts that impose liability for speech, precluded the jury's award of such damages in this case. It then reviewed the District Court's finding that the award "was proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence to an entity of Cooper's size" and concluded "that the award did not violate Cooper's due process rights" under the Federal Constitution. App. to Pet. for Cert. 3a. The latter, which have been described as "heightened scrutiny" of punitive damages awards, see id., at 456, 113 S.Ct. 2711, is not only wholly consistent with our decision today, it is irrelevant to our resolution of the question presented.

Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. See Restatement (Second) of Torts § 903, pp. 453-454 (1979); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54, 112 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (O'CONNOR, J., dissenting). The latter, which have been described as

**FN4:** Respondent and its amicus at times appear to conflate the question of the proper standard for reviewing the District Court's due process determination with the question of the substantive standard for determining the jury award's conformity with due process in the first instance. See Brief for Arthur F. McEvoy as Amicus Curiae 13 ("[O]n appeal the litigant's objection to the substance of the jury's holding—whether on liability or damages—should be evaluated under a 'rational factfinder' standard ... "); Brief for Respondent 13. The former is the question we agreed to review. The latter question has already been answered in **BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996).** Thus, our rejection in **TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993),** of "heightened scrutiny" of punitive damages awards, see id., at 456, 113 S.Ct. 2711, is not only wholly consistent with our decision today, it is irrelevant to our resolution of the question presented.

*432 II
juries to punish reprehensible conduct and to deter its future occurrence); Haslip, 499 U.S., at 54, 111 S.Ct. 1032 (O'CONNOR, J., dissenting) ("[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible").

FN5. See also Sunstein, Kahneman, & Schkade, Assessing Punitive Damages (With Notes on Cognition and Valuation in Law), 107 Yale L.J. 2071, 2074 (1998) ("[P]unitive damages may have a retributive or expressive function, designed to embody social outrage at the action of serious wrongdoers").

Legislatures have extremely broad discretion in defining criminal offenses, Schall v. Martin, 467 U.S. 253, 268-269, n. 18, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984), and in setting the range of permissible punishments for each offense, ibid.; Solem v. Helm, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Judicial decisions that operate within these legislatively enacted guidelines are typically reviewed for abuse of discretion. See, e.g., Koon v. United States, 518 U.S. 19, 99-100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996); cf. Apprendi v. New Jersey, 530 U.S. 466, 481, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (it is permissible "for judges to exercise discretion... in imposing a judgment within the range prescribed by statute").

[1] As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards. Cf. Gore, 517 U.S., at 568, 116 S.Ct. 1589 ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case"). A good many States have enacted statutes that place limits on the permissible size of punitive damages awards.\fn6\n
When juries make particular **1684 awards within those limits, the role of the trial judge is "to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered." Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's "determination under an abuse-of-discretion standard." Ibid.\fn7


FN7. In Browning-Ferris, the petitioner did argue that the award violated the Excessive Fines Clause of the Eighth Amendment, but we held the Clause inapplicable to punitive damages. The petitioner's reliance on the Due Process Clause of the Fourteenth Amendment was unavailing because that argument had not been raised in the District Court, the Court of Appeals, or the certiorari petition. See 492 U.S., at 276-277, 109 S.Ct. 2909.


The Court has enforced those limits in cases
involving deprivations of life, *Enmund v. Florida*, 458 U.S. 782, 787, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (death is not “a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life”); *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (sentence of death is “grossly disproportionate” and excessive punishment for the crime of rape); *Solem v. Helm*, 463 U.S. at 279, 303, 103 S.Ct. 3001 (life imprisonment without the possibility of parole for nonviolent felonies is “significantly disproportionate”); and deprivations of property, *United States v. Bajakajian*, 524 U.S. 321, 324, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (punitive forfeiture of $357,144 for violating reporting requirement was “grossly disproportional” to the gravity of the offense); *Gore*, 517 U.S. at 585-586, 116 S.Ct. 1589 ($2 million punitive damages award for failing to advise customers of minor predelivery repairs to new automobiles was “grossly excessive” and therefore unconstitutional).

FN8. Although disagreeing with the specific holding in *Coker*, Chief Justice Burger and then-Justice REHNQUIST accepted the proposition that the “concept of disproportionality bars the death penalty for minor crimes.” *Coker*, 524 U.S. at 604, 97 S.Ct. 2861 (Burger, C. J., dissenting).

[3] In these cases, the constitutional violations were predicated on judicial determinations that the punishments were “grossly disproportional to the gravity of ... defendant[s'] offense[s].” *Bajakajian*, 524 U.S. at 334, 118 S.Ct. 2028; see also *Gore*, 517 U.S. at 585-586, 116 S.Ct. 1589; *Solem*, 463 U.S. at 303, 103 S.Ct. 3001; *Coker*, 433 U.S. at 592, 97 S.Ct. 2861 (opinion of White, J.). We have recognized that the relevant constitutional line is “inherently imprecise,” *Bajakajian*, 524 U.S. at 336, 118 S.Ct. 2028, rather than one “marked by a simple mathematical formula,” *Gore*, 517 U.S. at 582, 116 S.Ct. 1589. But in deciding whether that line has been crossed, we have focused on the same general criteria: the degree of reprehensibility or culpability, see, e.g., *Bajakajian*, 524 U.S. at 337, 118 S.Ct. 2028; *Gore*, 517 U.S. at 575-580, 116 S.Ct. 1589; *Solem*, 463 U.S. at 290-291, 103 S.Ct. 3001; *Enmund*, 458 U.S. at 798, 102 S.Ct. 3368; *Coker*, 433 U.S. at 598, 97 S.Ct. 2861 (opinion of White, J.); the relationship between the penalty and the harm to the victim caused by the defendant’s actions, see, e.g., *Bajakajian*, 524 U.S. at 339, 118 S.Ct. 2028; *Gore*, 517 U.S. at 580-583, 116 S.Ct. 1589; *Solem*, 463 U.S. at 293, 103 S.Ct. 3001; *Enmund*, 458 U.S. at 798, 102 S.Ct. 3368; *Coker*, 433 U.S. at 598, 97 S.Ct. 2861 (opinion of White, J.); and the sanctions imposed in other cases for comparable misconduct, see, e.g., *Bajakajian*, 524 U.S. at 340-343, 118 S.Ct. 2028; *Gore*, 517 U.S. at 583-585, 116 S.Ct. 1589; *Solem*, 463 U.S. at 291, 103 S.Ct. 3001; *Enmund*, 458 U.S. at 789-796, 102 S.Ct. 3368; *Coker*, 433 U.S. at 593-597, 97 S.Ct. 2861 (opinion of White, J.). Moreover, and of greatest relevance for the issue we address today, in each of these cases we have engaged in an independent examination of the relevant criteria. See, e.g., *Bajakajian*, 524 U.S. at 337-344, 118 S.Ct. 2028; *Gore*, 517 U.S. at 575-586, 116 S.Ct. 1589; *Solem*, 463 U.S. at 295-300, 103 S.Ct. 3001; *Enmund*, 458 U.S. at 788-801, 102 S.Ct. 3368; *Coker*, 433 U.S. at 592-600, 97 S.Ct. 2861 (opinion of White, J.).

In *Bajakajian*, we expressly noted that the courts of appeals must review the proportionality determination “de novo” and specifically rejected the suggestion of the respondent, who had prevailed in the District Court, that the trial judge’s determination of excessiveness should be reviewed only for an abuse of discretion. “The factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous.... But the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context de novo review of that question is appropriate.” *Bajakajian*, 524 U.S. at 336-337, n. 10, 118 S.Ct. 2028 (citing *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)).

[4] *436 Likewise, in *Ornelas*, we held that trial judges’ determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. The reasons we gave in support of that holding are equally applicable in this case. First, as we observed in *Ornelas*, the precise meaning of concepts like “reasonable suspicion” and “probable cause” cannot be articulated with precision; they are “fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.” *Id.*, at 696, 116 S.Ct. 1657. That is, of course, also a characteristic of the concept of “
Because the jury's award of punitive damages does not constitute a finding of "fact," appellate review of the district court's determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by respondent and its amicus. See Brief for Respondent 18-24; Brief for the Amici Curiae 17-20. Our decision in _Gasperini and Hetzel v. Prince William County_, 523 U.S. 208, 118 S.Ct. 1710, 140 L.Ed.2d 336 (1998) (per curiam), both of which concerned compensatory damages, are not to the contrary.

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**FN9.** Contrary to respondent's assertion, Brief for Respondent 12-13, our decision today is supported by our reasoning in _Pacific Mut. Life Ins. Co. v. Haslip_, 499 U.S. 1, 20-21, 111 S.Ct. 1032 (1991). In that case, we emphasized the importance of appellate review to ensuring that a jury's award of punitive damages comports with due process. See _id._, at 20-21, 111 S.Ct. 1032 ("[A]ppellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition").

not, however, indicate that the amount of punitive damages imposed by the jury is itself a "fact" within the meaning of the Seventh Amendment's Examinations Clause. See Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 432, 116 S.Ct. 2211 (1996) (distinguishing between the "Trial by Jury" Clause, which "bears ... on the allocation of trial functions between judge and jury," and the "Reexamination" Clause, which "controls the allocation of authority to review verdicts"); see also id., at 447-448, 116 S.Ct. 2211 (STEvens, J., dissenting) (same).

In any event, punitive damages have evolved somewhat since the time of respondent's sources. Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time. See Haslip, 499 U.S., at 61, 111 S.Ct. 1032 (O'CONNOR, J., dissenting); see also Note, Exemplary Damages in the Law of Torts, 70 Harv. L.Rev. 517, 520 (1957) (observing a "vacillation" in the 19th-century cases between "'compensatory' and 'punitive' theories of 'exemplary damages'"). As the types of compensatory damages available to plaintiffs have broadened, see, e.g., 1 J. Nates, C. Kimball, D. Axelrod, & R. Goldstein, Damages in Tort Actions § 3.01[3][a] (2000) (pain and suffering are generally available as species of compensatory damages), the theory behind punitive damages has shifted toward a more purely punitive (and therefore less factual) understanding. Cf. Note, 70 Harv. L.Rev., at 520 (noting a historical shift away from a compensatory-and towards a more purely punitive-conception of punitive damages).

**1687 *438 It might be argued that the deterrent function of punitive damages suggests that the amount of such damages awarded is indeed a "fact" found by the jury and that, as a result, the Seventh Amendment is implicated in appellate review of that award. Some scholars, for example, assert that punitive damages should be used to compensate for the underdeterrence of unlawful behavior that will result from a defendant's evasion of liability. See Polinsky & Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L.Rev. 869, 890-891 *439 (1998) (in order to obtain optimal deterrence, "punitive damages should equal the harm multiplied by ... the ratio of the injurer's chance of escaping liability to his chance of being found liable"); see also Cirapo v. New York, 216 F.3d 236, 244-245 (C.A.2 2000) (Calabresi, J., concurring). "The efficient deterrence theory thus regards punitive damages as merely an augmentation of compensatory damages designed to achieve economic efficiency," Galanter & Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 Am. U.L. Rev. 1393, 1449 (1993).

However attractive such an approach to punitive damages might be as an abstract policy matter, it is clear that juries do not normally engage in such a finely tuned exercise of deterrence calibration when awarding punitive damages. See Sunstein, Schkade, & Kahneman, Do People Want Optimal Deterrence?, 29 J. Legal Studies 237, 240 (2000). After all, deterrence is not the only purpose served by punitive damages. See supra, at 1683. And there is no dispute that, in this case, deterrence was but one of four concerns the jury was instructed to consider when setting the amount of punitive damages. FN12 Moreover, it is not at all obvious that even the deterrent function of punitive damages can be served only by economically "optimal deterrence." "Citizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct, albeit cost-beneficial.*440 morally offensive conduct; efficiency is just one consideration among many," Galanter & Luban, 42 Am. U.L. Rev., at 1450.

FN12. The jury was instructed to consider the following factors: (1) "The character of the defendant's conduct that is the subject of Leatherman's unfair competition claims"; (2) "The defendant's motive"; (3) "The sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future"; and (4) "The defendant's income and assets." App. 14. Although the jury's application of these instructions may have depended on specific findings of fact, nothing in our decision today suggests that the Seventh Amendment would permit a court, in

reviewing a punitive damages award, to disregard such jury findings. See, e.g., 

FN13. We express no opinion on the question whether \textit{Gasperini} would govern and \textit{de novo} review would be inappropriate if a State were to adopt a scheme that tied the award of punitive damages more tightly to the jury's finding of compensatory damages. This might be the case, for example, if the State's scheme constrained a jury to award only the exact amount of punitive damages it determined was necessary to obtain economically optimal deterrence or if it defined punitive damages as a multiple of compensatory damages (e.g., treble damages).

Differences in the institutional competence of trial judges and appellate judges are consistent with our conclusion. In \textit{Gore}, we instructed courts evaluating a punitive damages award's consistency with due process to consider three criteria: (1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages authorized or imposed in comparable cases. 517 U.S., at 574-575, 116 S.Ct. 1589. Only with respect\textsuperscript{*1688} to the first \textit{Gore} inquiry do the district courts have a somewhat superior vantage over courts of appeals, and even then the advantage exists primarily with respect to issues turning on witness credibility and demeanor.FN14 Trial courts and appellate courts seem equally capable of analyzing the second factor. And the third \textit{Gore} criterion, which calls for a broad legal comparison, seems more suited to the expertise of appellate courts. Considerations of institutional competence therefore fail to tip the balance in favor of deferential appellate review.

FN14. While we have determined that the Court of Appeals must review the District Court's application of the \textit{Gore} test \textit{de novo}, it of course remains true that the Court of Appeals should defer to the District Court's findings of fact unless they are clearly erroneous. See \textit{United States v. Bajakajian}, 524 U.S. 321, 336-337, n. 10, 118 S.Ct. 2028 (1998).

\textbf{It is possible that the standard of review applied by the Court of Appeals will affect the result of the \textit{Gore} analysis in only a relatively small number of cases. See Brief for Respondent 46-48; Brief for Association of American Railroads as \textit{Amicus Curiae} 18; see also \textit{Gasperini}, 518 U.S., at 448, 116 S.Ct. 2211 (STEVENS, J., dissenting). Nonetheless, it does seem likely that in this case a thorough, independent review of the District Court's rejection of petitioner's due process objections to the punitive damages award might well have led the Court of Appeals to reach a different result. Indeed, our own consideration of each of the three \textit{Gore} factors reveals a series of questionable conclusions by the District Court that may not survive \textit{de novo} review.}

When the jury assessed the reprehensibility of Cooper's misconduct, it was guided by instructions that characterized the deliberate copying of the PST as wrongful. The jury's selection of a penalty to deter wrongful conduct may, therefore, have been influenced by an intent to deter Cooper from engaging in such copying in the future. Similarly, the District Court's belief that Cooper acted unlawfully in deliberately copying the PST design might have influenced its consideration of the first \textit{Gore} factor. See App. to Pet. for Cert. 23a. But, as the Court of Appeals correctly held, such copying of the functional features of an unpatented product is lawful. See \textit{TrafFix Devices, Inc. v. Marketing Displays, Inc.}, 532 U.S. 23, 121 S.Ct. 1255. The Court of Appeals recognized that the District Court's award of attorney's fees could not be supported if based on the premise that the copying was unlawful, but it did not consider whether that improper predicate might also have undermined the basis for the jury's large punitive damages award.

In evaluating the second \textit{Gore} factor, the ratio between the size of the award of punitive damages and the harm caused by Cooper's tortious conduct, the District Court\textsuperscript{*442} might have been influenced by respondent's submission that it was not the actual injury—which the jury assessed at $50,000—that was relevant, but rather "the potential harm Leatherman would have suffered had Cooper succeeded in its wrongful conduct." See Brief for Respondent 7; see also Record Doc. No. 323, p. 23. Respondent calculated that "potential harm" by referring to the fact that Cooper had anticipated "gross profits of
approximately $3 million during the first five years of sales.” Brief for Respondent 7; see also Record Doc. No. 323, at 23. Even if that estimate were correct, however, it would be unrealistic to assume that all of Cooper's sales of the ToolZall would have been attributable to its misconduct in using a photograph of a modified PST in its initial advertising materials. As the Court of Appeals pointed out, the picture of the PST did not misrepresent the features of the original ToolZall and could not have deceived potential customers in any significant way. Its use was wrongful because it enabled Cooper to expedite the promotion of its tool, but that wrongdoing surely **1689 could not be treated as the principal cause of Cooper's entire sales volume for a 5-year period.

With respect to the third Gore factor, respondent argues that Cooper would have been subject to a comparable sanction under Oregon's Unlawful Trade Practices Act. Brief for Respondent 49. In a suit brought by a State under that Act, a civil penalty of up to $25,000 per violation may be assessed. Ore. Rev. Stat. § 646.642(3) (1997). In respondent's view, each of the thousands of pieces of promotional material containing a picture of the PST that Cooper distributed warranted the maximum fine. Brief for Respondent 49. Petitioner, on the other hand, argues that its preparation of a "mock-up" for use in a single distribution would have been viewed as a single violation under the state statute. Reply Brief for Petitioner 2-3. The Court of Appeals expressed no opinion on this dispute. It did, however, observe that the unfairness in Cooper's use of the picture *443 apparently had nothing to do with misleading customers but was related to its inability to obtain a "mock-up" quickly and cheaply. App. to Pet. for Cert. 3a. This observation is more consistent with the single-violation theory than with the notion that the statutory violation would have been sanctioned with a multimillion dollar fine.

We have made these comments on issues raised by application of the three Gore guidelines to the facts of this case, not to prejudice the answer to the constitutional question, but rather to illustrate why we are persuaded that the Court of Appeals' answer to that question may depend upon the standard of review. The de novo standard should govern its decision. Because the Court of Appeals applied a less demanding standard in this case, we vacate the judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

I continue to believe that the Constitution does not constrain the size of punitive damages awards. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 599, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (SCALIA, J., joined by THOMAS, J., dissenting). For this reason, given the opportunity, I would vote to overrule BMW. This case, however, does not present such an opportunity. The only issue before us today is what standard should be used to review a trial court's ruling on a BMW challenge. Because I agree with the Court's resolution of that issue, I join the opinion of the Court.

Justice SCALIA, concurring in the judgment.

I was (and remain) of the view that excessive punitive damages do not violate the Due Process Clause; but the Court held otherwise. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); id. at 598, 116 S.Ct. 1589 (SCALIA, J., dissenting). And I was of the view that we should review for abuse *444 of discretion (rather than de novo) fact-bound constitutional issues which, in their resistance to meaningful generalization, resemble the question of excessiveness of punitive damages-namely, whether there exists reasonable suspicion for a stop and probable cause for a search; but the Court held otherwise. See Oregon v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); id. at 700, 116 S.Ct. 1657 (SCALIA, J., dissenting). Finally, in a case in which I joined a dissent that made it unnecessary for me to reach the issue, the Court categorically stated that "the question whether a fine is constitutionally excessive calls for ... de novo review." United States v. Bajakajian, 524 U.S. 331, 336-337, n. 10, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998); see id., at 344, 118 S.Ct. 2028 (KENNEDY, J., joined by REHNQUIST, C. J., and O'CONNOR and SCALIA, JJ., dissenting). Given these precedents, I **1690 agree that de novo review of the question of excessive punitive damages best accords with our jurisprudence. Accordingly, I concur in the judgment of the Court.

Justice GINSBURG, dissenting.

In Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996), we held that appellate review of a federal trial court's refusal to set aside a jury verdict as excessive is reconcilable with the Seventh Amendment if “
appellate control is limited to review for abuse of discretion." Id. at 419, 116 S.Ct. 2211. *445Gasperini was a diversity action in which the defendant had challenged a compensatory damages award as excessive under New York law. The reasoning of that case applies as well to an action challenging a punitive damages award as excessive under the Constitution. I would hold, therefore, that the proper standard of appellate oversight is not de novo review, as the Court today concludes, but review for abuse of discretion.

"An essential characteristic of [the federal court] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence-if not the command-of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." Id. at 432, 116 S.Ct. 2211 (citing Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525, 537, 78 S.Ct. 983, 2 L.Ed.2d 953 (1958)). The Seventh Amendment provides: "In Suits at common law ... the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." In Gasperini, we observed that although trial courts traditionally had broad authority at common law to set aside jury verdicts and to grant new trials, 518 U.S. at 432-433, 116 S.Ct. 2211, "appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development," id. at 434, 116 S.Ct. 2211. We ultimately concluded that the Seventh Amendment does not preclude such appellate review, id. at 436, 116 S.Ct. 2211, but explained that "[w]ithin the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of an excessiveness standard." Id. at 438, 116 S.Ct. 2211. "Trial judges have the unique opportunity to consider the evidence in the living courtroom context," we said, "while appellate judges see only the cold paper record." Ibid. (citations and internal quotation marks omitted). "If [courts of appeals] reverse, it must be because of an abuse of discretion.... The very nature of the problem counsels restraint.... Appellate courts must give the benefit of every doubt to the judgment of the trial judge." Id. at 439-439, 116 S.Ct. 2211 (internal quotation marks omitted) (citing Dagnello v. Long Island R. Co., 289 F.2d 797, 806 (CA2 1961)).

Although Gasperini involved compensatory damages, I see no reason why its logic should be abandoned when punitive damages are alleged to be excessive. At common law, as our longstanding decisions reiterate, the task of determining the amount of punitive damages has [always been] left to the discretion of the jury." Day v. Woodworth, 13 How. 363, 371, 14 L.Ed. 181 (1851); see Barry v. Edmunds, 116 U.S. 550, 556, 6 S.Ct. 501, 29 L.Ed. 729 (1886) *446 "Nothing is better settled than that ... it is the peculiar function of the jury to determine the amount [of punitive damages] by their verdict."

The commitment of this function to the jury, we have explained, reflects the historical understanding that "the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." Day, 13 How., at 371. The relevant factors include "the conduct and motives of the defendant" and whether, "in committing the wrong complained of, he acted recklessly, or willfully and maliciously, with a design *1691 to oppress and injure the plaintiff." 1 J. Sutherland, Law of Damages 720 (1882). Such inquiry, the Court acknowledges, "is a fact-sensitive undertaking." Ante, at 1686, n. 11.

The Court nevertheless today asserts that a jury's award of punitive damages does not constitute a finding of "fact" within the meaning of the Seventh Amendment. Ante, at 1686. An ultimate award of punitive damages, it is true, involves more than the resolution of matters of historical or predictive fact. See ibid. (citing Gasperini, 518 U.S., at 459, 116 S.Ct. 2211 (SCALIA, J., dissenting)). But there can be no question that a jury's verdict on punitive damages is fundamentally dependent on determinations we characterize as factfindings-e.g., the extent of harm or potential harm caused by the defendant's misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, whether the defendant behaved negligently, recklessly, or maliciously. Punitive damages are thus not "[u]nlike the measure of actual damages suffered," ante, at 1686 (citation and internal quotation marks omitted), in cases of intangible, noneconomic injury. One million dollars' worth of pain and suffering does not exist as a "fact" in the world any more or less than one million dollars' worth of moral outrage. Both derive their meaning from a set of underlying facts as determined by a jury. If one exercise in quantification is properly regarded as factfinding, see *447St. Louis, I.M. &
S.R. Co v. Craft, 237 U.S. 648, 661, 35 S.Ct. 704, 59 L.Ed. 1160 (1915) (compensation for pain and suffering “involves only a question of fact”); it seems to me the other should be so regarded as well.

In *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909 (1989), we approved application of an abuse-of-discretion standard for appellate review of a district court’s ruling on a motion to set aside a punitive damages award as excessive. See id., at 279, 109 S.Ct. 2909. *Browning-Ferris* reserved the question whether even such deferential appellate review might run afoul of the Seventh Amendment. At that time (i.e., pre-*Gasperini*), the Court “ha[d] never held expressly that the Seventh Amendment allows appellate review of a district court’s denial of a motion to set aside an award as excessive.” 492 U.S., at 279, n. 25, 109 S.Ct. 2909. We found it unnecessary to reach the Seventh Amendment question in *Browning-Ferris* because the jury verdict there survived lower court review intact. Id., at 279, n. 25, 280, 109 S.Ct. 2909.

*Browning-Ferris*, in short, signaled our recognition that appellate review of punitive damages, if permissible at all, would involve at most abuse-of-discretion review. “Particularly ... because the federal courts operate under the strictures of the Seventh Amendment,” we were “reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury.” Id., at 280, n. 26, 109 S.Ct. 2909.

The Court finds no incompatibility between this case and *Browning-Ferris*, observing that *Browning-Ferris* presented for our review an excessiveness challenge resting solely on state law, not on the Constitution. See ante, at 1683-1684, and n. 7. It is unclear to me why this distinction should make a difference. Of the three guideposts *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996), established for assessing constitutional excessiveness, two were derived from common-law standards that typically inform state law. See id., at 575, n. 24, 116 S.Ct. 1589 (“The principle that punishment should fit the crime is deeply rooted and frequently repeated in §448 common-law jurisprudence.” (citation and internal quotation marks omitted)); id., at 580, 116 S.Ct. 1589 (“The principle that exemplary damages must bear a ‘reasonable relationship’ to compensatory damages has a long pedigree.”). The third guidepost—comparability of sanctions for comparable misconduct—is not similarly rooted in common law, nor is it similarly factbound. As the Court states, “the third *Gore* criterion ... calls for a broad legal comparison.” *Ante*, at 1688. But to the extent the inquiry is “legal” in character, there is little difference between review *de novo* and review for abuse of discretion. Cf. *Gasperini*, 518 U.S., at 448, 116 S.Ct. 2211 (STEvens, J., dissenting) (“It is a familiar ... maxim that deems an error of law an abuse of discretion.”)FN1


Apart from “Seventh Amendment constraints,” an abuse-of-discretion standard also makes sense for “practical reasons.” *Id.*, at 438, 116 S.Ct. 2211. With respect to the first *Gore* inquiry (i.e., reprehensibility of the defendant’s conduct), district courts have an undeniable advantage vantage over courts of appeals. As earlier noted, *supra*, at 1690, district courts view the evidence not on a “cold paper record,” but “in the living courtroom context,” *Gasperini*, 518 U.S., at 438, 116 S.Ct. 2211. They can assess from the best seats the vital matter of witness credibility. And it of course remains true that [a] *449* Court of Appeals should defer to the District Court’s findings of fact unless they are clearly erroneous.” *Ante*, at 1688, n. 14.FN2

FN2. An appellate court might be at a loss to accord such deference to jury findings of fact absent trial court employment of either a special verdict or a general verdict accompanied by written interrogatories. See Fed. Rule Civ. Proc. 49.

The Court recognizes that district courts have the edge on the first Gore factor, ante, at 1688, but goes on to say that “[t]rial courts and appellate courts seem equally capable of analyzing the second [Gore] factor” (i.e., whether punitive damages bear a reasonable relationship to the actual harm inflicted), ibid. Only “the third Gore criterion [i.e., intrajurisdictional and interjurisdictional comparisons] ... seems more suited to the expertise of appellate courts.” Ibid.

To the extent the second factor requires a determination of “the actual harm inflicted on the plaintiff,” Gore, 517 U.S. at 580, 116 S.Ct. 1589, district courts may be better positioned to conduct the inquiry, especially in cases of intangible injury. I can demur to the Court's assessment of relative institutional strengths, however, for even accepting that assessment, I would disagree with the Court's conclusion that “[c]onsiderations of institutional competence ... fail to tip the balance in favor of deferential appellate review,” ante, at 1688. Gore itself assigned particular importance to the first inquiry, characterizing “degree of reprehensibility” as “[p]erhaps the most important indicum of the reasonableness of a punitive damages award.” 517 U.S. at 575, 116 S.Ct. 1589. District courts, as just noted, supra this page, have a superior vantage over courts of appeals in conducting that fact-intensive inquiry. Therefore, in the typical case envisioned by Gore, where reasonableness is primarily tied to reprehensibility, an appellate court should have infrequent occasion to reverse.

This observation, I readily acknowledge, suggests that the practical difference between the Court's approach and my own **1693 is not large. An abuse-of-discretion standard, as I see it, hews more closely to “the strictures of the Seventh Amendment,” Browning-Ferris, 492 U.S. at 280, n. 26, 109 S.Ct. 2909. The Court's de novo standard is more complex. It requires lower courts to distinguish between ordinary common-law excessiveness and constitutional excessiveness, ante, at 1683-1684, and to separate out factfindings that qualify for “clearly erroneous” review, ante, at 1688, n. 14. See also ante, at 1687, n. 13 (suggesting abuse-of-discretion review might be in order “if a State were to adopt a scheme that tied the award of punitive damages more tightly to the jury's finding of compensatory damages”). The Court's approach will be challenging to administer. Complex as it is, I suspect that approach and mine will yield different outcomes in few cases.

The Ninth Circuit, I conclude, properly identified abuse of discretion as the appropriate standard in reviewing the District Court's determination that the punitive damages awarded against Cooper were not grossly excessive. For the Seventh Amendment and practical reasons stated, I would affirm the judgment of the Court of Appeals.


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Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. Restatement (Second) of Torts § 903.

115 Damages 15

115V Exemplary Damages 87

115k87 Nature and Theory of Damages Additional to Compensation 88

115k87(1) k. In General. Most Cited Cases

Punitive damages are aimed at deterrence and retribution.

115 Damages 94

115V Exemplary Damages 94.8

115k94 Measure and Amount of Exemplary Damages 4426

115k94.8 k. Constitutional Limitations on Amount in General. Most Cited Cases

(Formerly 115k94)

While States possess discretion over the imposition of punitive damages, there are procedural and substantive constitutional limitations on these awards.

141 Constitutional Law 92 4426

92 Constitutional Law 4426

92XXVII Due Process 4426

92XXVII(G) Particular Issues and Applications 4426

92XXVII(G)19 Tort or Financial Liabilities 4426

92k4426 k. Penalties, Fines, and
Sanctions in General. Most Cited Cases
(Formerly 92k303)
The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor; the reason is that elementary notions of fairness enshrined in constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose.


To the extent an award of punitive damages is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.

Federal Courts 170B

170B Federal Courts
170BVI Supreme Court
170BVI(E) Review of Decisions of State Courts
170Bk504 Nature of Decisions or Questions Involved
170Bk504.1 k. In General. Most Cited Cases
Exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice.

Constitutional Law 92

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive Damages. Most Cited Cases
(Formerly 92k303)

Insurance 217

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3373 Amount and Items Recoverable
217k3376 k. Punitive Damages. Most Cited Cases
A jury's punitive damage award of $145 million for an automobile liability insurer's bad-faith failure to settle for the policy limits, where the compensatory damages were $1 million, was neither reasonable nor proportionate to the wrong committed and, therefore, violated the due process clause; harm was economic rather than physical, jury was allowed to award punitive damages to punish and deter conduct that occurred out-of-state and bore no relation to the insureds' harm, and punitive damages, to extent that they were for distress caused by outrage and humiliation, were duplicative of compensatory damages. U.S.C.A. Const.Amend. 14.

Damages 115

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.8 k. Constitutional Limitations on Amount in General. Most Cited Cases
(Formerly 115k94)

115k94.8 To the extent an award of punitive damages is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.

Federal Courts 170B

170B Federal Courts
170BVI Supreme Court
170BVI(E) Review of Decisions of State Courts
170Bk504 Nature of Decisions or Questions Involved
170Bk504.1 k. In General. Most Cited Cases
Exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice.

Constitutional Law 92

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive Damages. Most Cited Cases
(Formerly 92k303)

Insurance 217

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3373 Amount and Items Recoverable
217k3376 k. Punitive Damages. Most Cited Cases
A jury's punitive damage award of $145 million for an automobile liability insurer's bad-faith failure to settle for the policy limits, where the compensatory damages were $1 million, was neither reasonable nor proportionate to the wrong committed and, therefore, violated the due process clause; harm was economic rather than physical, jury was allowed to award punitive damages to punish and deter conduct that occurred out-of-state and bore no relation to the insureds' harm, and punitive damages, to extent that they were for distress caused by outrage and humiliation, were duplicative of compensatory damages. U.S.C.A. Const.Amend. 14.

Damages 115

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.2 k. Nature of Act or Conduct. Most Cited Cases
(Formerly 115k94)

It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.
360 States

360I Political Status and Relations

360I(A) In General

360k5 Relations Among States Under Constitution of United States

360k5(1) k. In General. Most Cited

A State cannot punish a defendant for conduct that may have been lawful where it occurred.

[111] Damages 115 ☰= 90

115 Damages

115V Exemplary Damages

115k88 Injuries for Which Exemplary Damages May Be Awarded

115k90 k. Acts Punishable as Crimes. Most Cited Cases

As a general rule, a State does not have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction.

[112] Damages 115 ☰= 179

115 Damages

115IX Evidence

115k164 Admissibility

115k179 k. Intent, Malice, or Motive of Defendant. Most Cited Cases

Lawful out-of-state conduct may be probative in a civil action when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff.

[113] Damages 115 ☰= 215(1)

115 Damages

115X Proceedings for Assessment

115k209 Instructions

115k215 Exemplary Damages

115k215(1) k. In General. Most Cited Cases

A jury in a civil tort action must be instructed that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.

[114] States 360 ☰= 5(1)

360 States

360I Political Status and Relations

360I(A) In General

360k5 Relations Among States Under Constitution of United States

360k5(1) k. In General. Most Cited

Cases

A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.

[115] Damages 115 ☰= 91.5(1)

115 Damages

115V Exemplary Damages

115k91.5 Grounds for Exemplary Damages

115k91.5(1) k. In General. Most Cited Cases

(Formerly 115k91(1))

A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.

[116] Damages 115 ☰= 91.5(1)

115 Damages

115V Exemplary Damages

115k91.5 Grounds for Exemplary Damages

115k91.5(1) k. In General. Most Cited Cases

(Formerly 115k91(1))

Although a recidivist may be punished more severely than a first offender, in the context of civil actions, courts must ensure that the conduct in question replicates the prior transgressions.

[117] Constitutional Law 92 ☰= 4427

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)19 Tort or Financial Liabilities

92k4427 k. Punitive Damages. Most Cited Cases

(Formerly 92k303)

For purposes of determining whether an award of punitive damages is excessive, an award that exceeds a single-digit ratio between punitive and
compensatory damages may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages. U.S.C.A. Const. Amend. 14.

[18] Damages 115 94.1

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.1 k. In General. Most Cited Cases
(Formerly 115k94)

Damages 115 94.6

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.6 k. Actual Damage or Compensatory Damages; Relationship and Ratio. Most Cited Cases
(Formerly 115k94)

In awarding punitive damages, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.

[19] Damages 115 94.3

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.3 k. Wealth of Defendant. Most Cited Cases
(Formerly 115k94)

Damages 115 94.8

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.8 k. Constitutional Limitations on Amount in General. Most Cited Cases
(Formerly 115k94)
The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.

Although investigators and witnesses concluded that Curtis Campbell caused an **1515 accident in which one person was killed and another permanently disabled, his insurer, petitioner State Farm Mutual Automobile Insurance Company (State Farm), contested liability, declined to settle the ensuing claims for the $50,000 policy limit, ignored its own investigators' advice, and took the case to trial, assuring Campbell and his wife that they had no liability for the accident, that State Farm would represent their interests, and that they did not need separate counsel. In fact, a Utah jury returned a judgment for over three times the policy limit, and State Farm refused to appeal. The Utah Supreme Court denied Campbell's own appeal, and State Farm paid the entire judgment. The Campbells then sued State Farm for bad faith, fraud, and intentional infliction of emotional distress. The trial court's initial ruling granting State Farm summary judgment was reversed on appeal. On remand, the court denied State Farm's motion to exclude evidence of dissimilar out-of-state conduct. In the first phase of a bifurcated trial, the jury found unreasonable State Farm's decision not to settle. Before the second phase, this Court refused, in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, to sustain a $2 million punitive damages award which accompanied a $4,000 compensatory damages award. The trial court denied State Farm's renewed motion to exclude dissimilar out-of-state conduct evidence. In the second phase, which addressed, inter
alia, compensatory and punitive damages, evidence was introduced that pertained to State Farm's business practices in numerous States but bore no relation to the type of claims underlying the Campbells' complaint. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million respectively. Applying Gore, the Utah Supreme Court reinstated the $145 million punitive damages award.

Held: A punitive damages award of $145 million, where full compensatory damages are $1 million, is excessive and violates the Due Process Clause of the Fourteenth Amendment. Pp. 1519-1526.

(a) Compensatory damages are intended to redress a plaintiff's concrete loss, while punitive damages are aimed at the different purposes of deterrence and retribution. The Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. E.g., Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433, 121 S.Ct. 1678, 149 L.Ed.2d 674. Punitive damages awards serve the same purpose as criminal penalties. However, because civil defendants are not accorded the protections afforded criminal defendants, punitive damages pose an acute danger of arbitrary deprivation of property, which is heightened when the decisionmaker is presented with evidence having little bearing on the amount that should be awarded. Thus, this Court has instructed courts reviewing punitive damages to consider (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Gore, supra, at 575, 116 S.Ct. 1589. A trial court's application of these guideposts is subject to de novo review. Cooper Industries, supra, at 424, 121 S.Ct. 1678. Pp. 1519-1521.

(b) Under Gore's guideposts, this case is neither close nor difficult. Pp. 1521-1526.

(1) To determine a defendant's reprehensibility—the most important indicium of a punitive damages award's reasonableness—a court must consider whether: the harm was physical rather than economic; **1516 the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the conduct involved repeated actions or was an isolated incident; and the harm resulted from intentional malice, trickery, or deceit, or mere accident. Gore, 517 U.S., at 576-577, 116 S.Ct. 1589. It should be presumed that a plaintiff has been made whole by compensatory damages, so punitive damages should be awarded only if the defendant's culpability is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence. Id., at 575, 116 S.Ct. 1589.

In this case, State Farm's handling of the claims against the Campbells merits no praise, but a more modest punishment could have satisfied the State's legitimate objectives. Instead, this case was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. However, a State cannot punish a defendant for conduct that may have been lawful where it occurred, id., at 572, 116 S.Ct. 1589. Nor does the State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of its jurisdiction. The Campbells argue that such evidence was used merely to demonstrate, generally, State Farm's motives against its insured. Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. More fundamentally, in relying on such evidence, the Utah courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. Due process does not permit courts to adjudicate the merits of other parties' hypothetical claims under the guise of the reprehensibility analysis. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct, for nonparties are not normally bound by another plaintiff's judgment. For the same reasons, the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist. To justify punishment based upon recidivism, courts must ensure the conduct in question replicates the prior transgressions. There is scant evidence of repeated misconduct of the sort that injured the Campbells, and a review of the decisions below does not convince this Court that State Farm was only punished for its actions toward the Campbells. Because the Campbells have shown no conduct similar to that which harmed them, the only
relevant conduct to the reprehensibility analysis is that which harmed them. Pp. 1521-1524.

(2) With regard to the second *Gore* guidepost, the Court has been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award; but, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. See, e.g., 517 U.S., at 581. 116 S.Ct. 1589. Single-digit multipliers are more likely to comport with due process, while still achieving the State's deterrence and retribution goals, than are awards with 145-to-1 ratios, as in this case. Because there are no rigid benchmarks, ratios greater than those that this Court has previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages, *id.* at 582, 116 S.Ct. 1589, but when compensatory damages are substantial, then an even lesser ratio can reach the outermost limit of the due process guarantee. Here, there is a presumption against an award with a 145-to-1 ratio; the $1 million compensatory award for a year and a half of emotional distress was substantial; and the distress caused by outrage and humiliation the Campbells suffered is likely a component of both the compensatory and punitive damages awards. The Utah Supreme Court sought to justify the massive award based on premises bearing no relation to the award's reasonableness or proportionality to the harm. Pp. 1524-1526.

(3) The Court need not dwell on the third guidepost. The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of grand fraud, which is dwarfed by the $145 million punitive damages award. The Utah Supreme Court's references to a broad fraudulent scheme drawn from out-of-state and dissimilar conduct evidence were insufficient to justify this amount. P. 1526.

(c) Applying *Gore's* guideposts to the facts here, especially in light of the substantial compensatory damages award, likely would justify a punitive damages award at or near the compensatory damages amount. The Utah courts should resolve in the first instance the proper punitive damages calculation under the principles discussed here. P. 1526.

was rendered permanently disabled. The Campbells escaped unscathed.

In the ensuing wrongful death and tort action, Campbell insisted he was not at fault. Early investigations did support differing conclusions as to who caused the accident, but "a consensus was reached early on by the investigators and witnesses that Mr. Campbell's unsafe pass had indeed caused the crash." **151865 P.3d 1134, 1141 (Utah 2001). Campbell's insurance company, petitioner State Farm Mutual Automobile Insurance Company (State Farm), nonetheless decided to contest liability and declined offers by Slusher and Ospital's estate (Ospital) to settle the claims for the policy limit of $50,000 ($25,000 per claimant). State Farm also ignored the advice of one of its own investigators and took the case to trial, assuring the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel." *Id.* at 1142. To the contrary, a jury determined that Campbell was 100 percent at fault, and a judgment was returned for $185,849, far more than the amount offered in settlement.

At first State Farm refused to cover the $135,849 in excess liability. Its counsel made this clear to the Campbells: "'You may want to put for sale signs on your property to get things moving.' " *Id.* Nor was State Farm willing to post a supersedeas bond to allow Campbell to appeal the judgment against him. Campbell obtained his own counsel to appeal the verdict. During the pendency of the appeal, in late 1984, Slusher, Ospital, and the Campbells reached an agreement whereby Slusher and Ospital agreed not to seek satisfaction of their claims against the Campbells. In exchange the Campbells agreed to pursue a bad faith action against State Farm and to be represented by Slusher's and Ospital's attorneys. The Campbells also agreed that Slusher and Ospital would have a right to play a part in all major decisions concerning the bad-faith action. No settlement could be concluded without Slusher's and Ospital's approval, and Slusher and Ospital would receive 90 percent of any verdict against State Farm.

In 1989, the Utah Supreme Court denied Campbell's appeal in the wrongful-death and tort actions. *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989). State Farm then paid the entire judgment, including the amounts in excess of the policy limits. The Campbells nonetheless filed a complaint against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress. The trial court initially granted State Farm's motion for summary judgment because State Farm had paid the excess verdict, but that ruling was reversed on appeal. 840 P.2d 130 (Utah App.1992). On remand State Farm moved in limine to exclude evidence of alleged conduct that occurred in unrelated cases outside of Utah, but the trial court denied the motion. At State Farm's request the trial court bifurcated the trial into two phases conducted before different juries. In the first phase the jury determined that State Farm's decision not to settle was unreasonable because there was a substantial likelihood of an excess verdict.

Before the second phase of the action against State Farm we decided *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and refused to sustain a $2 million punitive damages award which accompanied a verdict of only $4,000 in compensatory damages. Based on that decision, State Farm again moved for the exclusion of evidence of dissimilar out-of-state conduct. App. to Pet. for Cert. 168a-172a. The trial court denied State Farm's motion. *Id.*, at 189a.

The second phase addressed State Farm's liability for fraud and intentional infliction of emotional distress, as well as compensatory and punitive damages. The Utah Supreme Court aptly characterized this phase of the trial: "State Farm argued during phase II that its decision to take the case to trial was an 'honest mistake' that did not warrant punitive damages. In contrast, the Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide. This scheme was referred to as State Farm's 'Performance, Planning and Review,' or PP & R, policy. To prove the existence of this scheme, the trial court allowed the Campbells to introduce extensive expert testimony regarding fraudulent practices by State Farm in its nation-wide operations. Although State Farm moved prior to phase II of the trial for the exclusion of such evidence and continued to object to it at trial, the trial court ruled that such evidence was admissible to determine whether State Farm's conduct in the Campbell case was indeed intentional and sufficiently egregious to warrant punitive damages." 65 P.3d, at 1143.
Evidence pertaining to the PP & R policy concerned State Farm's business practices for over 20 years in numerous States. Most of these practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells' complaint against the company. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million respectively. Both parties appealed.

The Utah Supreme Court sought to apply the three guideposts we identified in Gore, supra, at 574-575, 116 S.Ct. 1589, and it reinstated the $145 million punitive damages award. Relying in large part on the extensive evidence concerning the PP & R policy, the court concluded State Farm's conduct was reprehensible. The court also relied upon State Farm's "massive wealth" and on testimony indicating that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability," 65 P.3d at 1153, and concluded that the ratio *416 between punitive and compensatory damages was not unwarranted. Finally, the court noted that the punitive damages award was not excessive when compared to various civil and criminal penalties State Farm could have faced, including $10,000 for each act of fraud, the suspension of its license to conduct business in Utah, the disgorgement of profits, and imprisonment. Id., at 1154-1155. We granted certiorari. 535 U.S. 1111, 122 S.Ct. 2236, 153 L.Ed.2d 158 (2002).

II

[1][2] We recognized in Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), that in our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. Id., at 432, 121 S.Ct. 1678. Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." Ibid. (citing Restatement (Second) of Torts § 903, pp. 453-454 (1979)). By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution. Cooper Industries, supra, at 432, 121 S.Ct. 1678; see also Gore, supra, at 568, 116 S.Ct. 1589 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence").

[3][4][5] While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. Cooper Industries, supra; Gore, supra, at 559, 116 S.Ct. 1589; Honda Motor Co. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); Haslip, supra. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of *1520 grossly excessive or arbitrary punishments on a tortfeasor. Cooper Industries, supra, at 433, 121 S.Ct. 1678; Gore, 517 U.S., at 562, 116 S.Ct. 1589; see also id., at 587, 116 S.Ct. 1589 (BREYER, J., concurring) ("This constitutional concern, itself *417 harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion" ). The reason is that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." Id., at 574, 116 S.Ct. 1589; Cooper Industries, supra, at 433, 121 S.Ct. 1678 ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion" ). To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property. Haslip, supra, at 42, 111 S.Ct. 1032 (O'CONNOR, J., dissenting) ("Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category").

Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the
In light of these concerns, in Gore, supra, we instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Id., at 575, 116 S.Ct. 1589. We reiterated the importance of these three guideposts in Cooper Industries and mandated appellate courts to conduct de novo review of a trial court's application of them to the jury's award. 532 U.S. 424, 121 S.Ct. 1678. Exacting appellate review ensures that an award of punitive damages is based upon an "application of law, rather than a decisionmaker's whim." Id., at 436, 121 S.Ct. 1678 (quoting Gore, supra, at 587, 116 S.Ct. 1589 (BREYER, J., concurring)).

[7] Under the principles outlined in BMW of North America, Inc. v. Gore, this case is neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award. We address each guidepost of Gore in some detail.

*419 A

[8][9] "[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." Gore, 517 U.S., at 575, 116 S.Ct. 1589. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. Id., at 576-577, 116 S.Ct. 1589. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. Id., at 575, 116 S.Ct. 1589.

Applying these factors in the instant case, we must acknowledge that State Farm's handling of the claims against the Campbells merits no praise. The trial court found that State Farm's employees altered the company's records to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded. State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house. While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this *420 reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.
This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells. 65 P.3d. at 1143 ("[T]he Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide"). This was, as well, an explicit rationale of the trial court's decision in approving the award, though reduced from $145 million to $25 million. App. to Pet. for Cert. 120a ("[T]he Campbells demonstrated, through the testimony of State Farm employees who had worked outside of Utah, and through expert testimony, that this pattern of claims adjustment under the PP & R program was not a local anomaly, but was a consistent, nationwide feature of State Farm's business operations, orchestrated from the highest levels of corporate management").

The Campbells contend that State Farm has only itself to blame for the reliance upon dissimilar and out-of-state conduct evidence. The record does not support **1522 this contention. From their opening statements onward the Campbells framed this case as consistent, nationwide feature of business operations, orchestrated from the highest levels of corporate management.

[10][11] A State cannot punish a defendant for conduct that may have been lawful where it occurred. Gore, supra, at 572, 116 S.Ct. 1589; Bigelow v. Virginia, 421 U.S. 809, 824, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); New York Life Ins. Co. v. Head, 234 U.S. 149, 161, 34 S.Ct. 879, 58 L.Ed. 1259 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State ... without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound"); Huntington v. Attrill, 146 U.S. 657, 669, 13 S.Ct. 224, 36 L.Ed. 1123 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States"). Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need *422 to apply the laws of their relevant jurisdiction. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-822, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985).

[12][13][14] Here, the Campbells do not dispute that much of the out-of-state conduct was lawful where it occurred. They argue, however, that such evidence was not the primary basis for the punitive damages award and was relevant to the extent it demonstrated, in a general sense, State Farm's motive against its insured. Brief for Respondents 46-47 ("[E]ven if the practices described by State Farm were not malum in se or malum prohibitum, they became relevant to punitive damages to the extent they were used as tools to implement State Farm's wrongful PP & R policy"). This argument misses the mark. Lawful out-of-state conduct may be probative when it
demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred. Gore, 517 U.S., at 572-573, 116 S.Ct. 1589 (noting that a State "does not have the power ... to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [the State] or its residents"). A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction. Id., at 569, 116 S.Ct. 1589 ("[T]he States need not, and in fact do not, provide such protection in a uniform manner").

For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. 65 P.3d, at 1149 ("Even if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: 'The harm is minor to the individual but massive in the aggregate.' "). Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. Gore, supra, at 593, 116 S.Ct. 1589 (Breyer, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover").

The same reasons lead us to conclude the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist. Although "[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance," Gore, supra, at 577, 116 S.Ct. 1589, in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions. TXO, 509 U.S., at 462, n. 28, 113 S.Ct. 2711 (noting that courts should look to "the existence and frequency of similar past conduct" (quoting Hastlip, 499 U.S., at 21-22, 111 S.Ct. 1032)).

The Campbells have identified scant evidence of repeated misconduct of the sort that injured them. Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the Campbells. Although evidence of other acts need not be identical to have relevance in the calculation of punitive damages, the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length. Other evidence concerning reprehensibility was even more tangential. For example, the Utah Supreme Court criticized State Farm's investigation into the personal life of one of its employees and, in a broader approach, the manner in which State Farm's policies corrupted its employees. 65 P.3d, at 1148, 1150. The Campbells attempt to justify the courts' reliance upon this unrelated testimony on the theory that each dollar of profit made by underpaying a third-party claimant is the same as a dollar made by underpaying a first-party one. Brief for Respondents 45; see also 65 P.3d at 1150 ("State Farm's continuing illicit practice created market disadvantages for other honest insurance companies" because these practices increased profits. As plaintiffs' expert witnesses established, such wrongfully obtained competitive advantages have the potential to pressure other companies to adopt similar fraudulent tactics, or to force them out of business. Thus, such actions cause distortions throughout the insurance market and ultimately hurt all consumers"). For the reasons already stated, this argument is unconvincing. The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the

(Cite as: 538 U.S. 408, 123 S.Ct. 1513)
reprehensibility analysis.

Turning to the second Gore guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. 517 U.S., at 582. 116 S.Ct. 1589 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive *425 award"); TXO supra., at 458. 113 S.Ct. 2711. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In Haslip, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S., at 23-24. 111 S.Ct. 1032. We cited that 4-to-1 ratio again in Gore, 517 U.S., at 581. 116 S.Ct. 1589. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. Id., at 581, and n. 33. 116 S.Ct. 1589. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, id., at 582. 116 S.Ct. 1589, or, in this case, of 145 to 1.

[17] Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." Ibid.; see also ibid. (positing that a higher ratio might be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

[18] *426 In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio. The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic**1525 realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them. The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element. See Restatement (Second) of Torts § 908, Comment c, p. 466 (1977) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both").

The Utah Supreme Court sought to justify the massive award by pointing to State Farm's purported failure to report a prior $100 million punitive damages award in Texas to its corporate headquarters; the fact that State Farm's policies have affected numerous Utah consumers; the fact that State Farm will only be punished in one out of every 50,000 cases as a matter of statistical probability; and State Farm's enormous wealth. 65 P.3d, at 1153. Since the Supreme *427 Court of Utah discussed the Texas award when applying the ratio guidepost, we discuss it here. The Texas award, however, should have been analyzed in the context of the reprehensibility guidepost only. The failure of the
company to report the Texas award is out-of-state conduct that, if the conduct were similar, might have had some bearing on the degree of reprehensibility, subject to the limitations we have described. Here, it was dissimilar, and of such marginal relevance that it should have been accorded little or no weight. The award was rendered in a first-party lawsuit; no judgment was entered in the case; and it was later settled for a fraction of the verdict. With respect to the Utah Supreme Court's second justification, the Campbells' inability to direct us to testimony demonstrating harm to the people of Utah (other than those directly involved in this case) indicates that the adverse effect on the State's general population was in fact minor.

[19] The remaining premises for the Utah Supreme Court's decision bear no relation to the award's reasonableness or proportionality to the harm. They are, rather, arguments that seek to defend a departure from well-established constraints on punitive damages. While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *428 *Gore. Here the argument that State Farm will be punished in only the rare case, coupled with reference to its assets (which, of course, are what other insured parties in Utah and other States must rely upon for payment of claims) had little to do with the actual harm sustained by the Campbells. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. *Gore, 517 U.S. at 585, 116 S.Ct. 1589 *("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business"); see also *id., at 591,* 116 S.Ct. 1589 (Breyer, J., concurring) (*"[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy ... That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct" *). The principles set forth in *Gore* **1526 must be implemented with care, to ensure both reasonableness and proportionality.

C

[20] The third guidepost in *Gore* is the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases." *Id., at 575,* 116 S.Ct. 1589. We note that, in the past, we have also looked to criminal penalties that could be imposed. *Id., at 583,* 116 S.Ct. 1589; *Haslip, 499 U.S. at 23,* 111 S.Ct. 1032. The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Here, we need not dwell long on this guidepost. The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud, 65 P.3d, at 1154, an amount dwarfed by the $145 million punitive damages award. The Supreme Court of Utah speculated about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment, but here again its references were to the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct. This analysis was insufficient to justify the award.

*429 IV

An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages. The punitive award of $145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant. The proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts.

The judgment of the Utah Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SCALIA, dissenting.
I adhere to the view expressed in my dissenting opinion in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 598-99, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), that the Due Process Clause provides no substantive protections against "excessive" or "unreasonable" awards of punitive damages. I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is insusceptible of principled application; accordingly, I do not feel justified in giving the case stare decisis effect. See *id.*, at 599, 116 S.Ct. 1589. I would affirm the judgment of the Utah Supreme Court.

Justice THOMAS, dissenting.

**1527** Justice GINSBURG, dissenting.
Not long ago, this Court was hesitant to impose a federal check on state-court judgments awarding punitive damages. In *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), the Court held that neither the Excessive Fines Clause of the Eighth Amendment nor federal common law circumscribed awards of punitive damages in civil cases between private parties. *id.*, at 262-276, 277-280, 109 S.Ct. 2909. Two years later, in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), the Court observed that "unlimited jury [or judicial] discretion ... in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities," *id.*, at 18, 111 S.Ct. 1032; the Due Process Clause, the Court suggested, would attend to those sensibilities and guard against unreasonable awards, *id.*, at 17-24, 111 S.Ct. 1032. Nevertheless, the Court upheld a punitive damages award in *Haslip* "more than 4 times the amount of compensatory damages, ... more than 200 times [the plaintiffs'] out-of-pocket expenses," and "much in excess of the fine that could be imposed." *id.*, at 23, 111 S.Ct. 1032. And in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), the Court affirmed a state-court award "526 times greater than the actual damages awarded by the jury." *Id.*, at 453, 113 S.Ct. 2711. *En v. cf. Browning-Ferris, 492 U.S. at 262, 109 S.Ct. 2909 (ratio of punitive to compensatory damages over 100 to 1).

*FN1* By switching the focus from the ratio of punitive to compensatory damages to the potential loss to the plaintiffs had the defendant succeeded in its illicit scheme, the Court could describe the relevant ratio in *TXO* as 10 to 1. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 581, and n. 34, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

It was not until 1996, in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, that the Court, for the first time, invalidated a state-court punitive damages assessment as unreasonably large. See *id.*, at 599, 116 S.Ct. 1589 (SCALIA, J., dissenting). If our activity in this domain is now "well established," see *ante*, at 1519, 1525, it takes place on ground not long held.

In *Gore*, I stated why I resisted the Court's foray into punitive damages "territory traditionally within the States' domain." 517 U.S., at 612, 116 S.Ct. 1589 (dissenting opinion). I adhere to those views, and note again that, unlike federal habeas corpus review of state-court convictions under 28 U.S.C. § 2254, the Court "work[s] at this business [of checking state courts] alone," unaided by the participation of federal district courts and courts of appeals. 517 U.S., at 613, 116 S.Ct. 1589. It was once recognized that "the laws of the particular State must suffice [to superintend punitive damages awards] until judges or legislators authorized to do so initiate system-wide change." *Haslip*, 499 U.S. at 42, 111 S.Ct. 1032 (KENNEDY, J., concurring in judgment). I would adhere to that traditional view.

The large size of the award upheld by the Utah Supreme Court in this case indicates why damages-escaping legislation may be altogether fitting and proper. Neither the amount of the award nor the trial record, however, justifies this Court's substitution of its judgment for that of Utah's competent

decisionmakers. In this regard, I count it significant that, on the key criterion "reprehensibility," there is a good deal more to the story than the Court's abbreviated account tells.

Ample evidence allowed the jury to find that State Farm's treatment of the Campbells typified its "Performance, Planning and Review" (PP & R) program; implemented by top management in 1979, the program had "the explicit objective of using the claims-adjustment process as a **1528 profit center." App. to Pet. for Cert. 116a. "[T]he Campbells presented considerable evidence," the trial court noted, documenting "that the PP & R program ... has functioned, and continues to function, as an unlawful scheme ... to deny benefits owed consumers by paying out less than fair value in order to meet *432 preset, arbitrary payout targets designed to enhance corporate profits." Id., at 118a-119a. That policy, the trial court observed, was encompassing in scope; it "applied equally to the handling of both third-party and first-party claims." Id., at 119a. But cf. ante, at 1523-1524, 1525 (suggesting that State Farm's handling of first-party claims has "nothing to do with a third-party lawsuit").

Evidence the jury could credit demonstrated that the PP & R program regularly and adversely affected Utah residents. Ray Summers, "the adjuster who handled the Campbell case and who was a State Farm employee in Utah for almost twenty years," described several methods used by State Farm to deny claimants fair benefits, for example, "falsifying or withholding of evidence in claim files." App. to Pet. for Cert. 121a. A common tactic, Summers recounted, was to "unjustly attack[k] the character, reputation and credibility of a claimant and make[e] notations to that effect in the claim file to create prejudice in the event the claim ever came before a jury." Id., at 130a (internal quotation marks omitted). State Farm manager Bob Noxon, Summers testified, resorted to a tactic of this order in the Campbell case when he "instruct[ed] Summers to write in the file that Todd Ospital (who was killed in the accident) was speeding because he was on his way to see a pregnant girlfriend." Ibid. In truth, "[t]here was no pregnant girlfriend." Ibid. Expert testimony noted by the trial court described these tactics as "completely improper." Ibid.

The trial court also noted the testimony of two Utah State Farm employees, Felix Jensen and Samantha Bird, both of whom recalled "intolerable" and "recurrent" pressure to reduce payouts below fair value. Id., at 119a (internal quotation marks omitted). When Jensen complained to top managers, he was told to "get out of the kitchen" if he could not take the heat; Bird was told she should be "more of a team player." Ibid. (internal quotation marks omitted). At times, Bird said, she "was forced to commit dishonest acts *433 and to knowingly underpay claims." Id., at 120a. Eventually, Bird quit. Ibid. Utah managers superior to Bird, the evidence indicated, were improperly influenced by the PP & R program to encourage insurance underpayments. For example, several documents evaluating the performance of managers Noxon and Brown contained explicit preset average payout goals." Ibid.

Regarding liability for verdicts in excess of policy limits, the trial court referred to a State Farm document titled the "Excess Liability Handbook"; written before the Campbell accident, the handbook instructed adjusters to pad files with "self-serving" documents, and to leave critical items out of files, for example, evaluations of the insured's exposure. Id., at 127a-128a (internal quotation marks omitted). Divisional superintendent Bill Brown used the handbook to train Utah employees. Id., at 134a. While overseeing the Campbell case, Brown ordered adjuster Summers to change the portions of his report indicating that Mr. Campbell was likely at fault and that the settlement cost was correspondingly high. Id., at 3a. The Campbells' case, according to expert testimony the trial court recited, "was a classic example of State Farm's application of the improper practices taught in the Excess Liability Handbook." Id., at 128a.

The trial court further determined that the jury could find State Farm's policy "deliberately crafted" to prey on consumers who would be unlikely to defend themselves. Id., at 122a. In this regard, the trial court noted the testimony of several former State Farm employees affirming that they were trained to "prey on consumers who would be unlikely to defend themselves." Id., at 122a.
New Trial Regarding Intentional Infliction of Emotional Distress). At the time of wrongful conduct, Mr. Campbell had residual effects from a stroke and Parkinson's disease. *Id., at 3360a.

To further insulate itself from liability, trial evidence indicated, State Farm made "systematic" efforts to destroy internal company documents that might reveal its scheme, App. to Pet. for Cert. 123a, efforts that directly affected the Campbells, *Id., at 124a. For example, State Farm had "a special historical department that contained a copy of all past manuals on claim-handling practices and the dates on which each section of each manual was changed." *Id. Yet in discovery proceedings, State Farm failed to produce any claim-handling practice manuals for the years relevant to the Campbells' bad-faith case. *Id., at 124a-125a.

State Farm's inability to produce the manuals, it appeared from the evidence, was not accidental. Documents retained by former State Farm employee Samantha Bird, as well as Bird's testimony, showed that while the Campbells' case was pending, Janet Cammack, "an in-house attorney sent by top State Farm management, conducted a meeting ... in Utah during which she instructed Utah claims management to search their offices and destroy a wide range of material of the sort that had proved damaging in bad-faith litigation in the past-in particular, old claim-handling manuals, memos, claim school notes, procedure guides and other similar documents." *Id., at 125a. "These orders were followed even though at least one meeting participant, Paul Short, was personally aware that these kinds of materials had been requested by the Campbells in this very case." *Id.

Consistent with Bird's testimony, State Farm admitted that it destroyed every single copy of claim-handling manuals on file in its historical department as of 1988, even though these documents could have been preserved at minimal expense. *Id. Fortuitously, the Campbells obtained a copy of the 1979 PP & R manual by subpoena from a former employee. *Id., at 132a. Although that manual has been requested in other cases, State Farm has never itself produced the document. *Id.

"As a final, related tactic," the trial court stated, the jury could reasonably find that "in recent years State Farm has gone to extraordinary lengths to stop damaging documents from being created in the first place." *Id., at 126a. State Farm kept no records at all on excess verdicts in third-party cases, or on bad-faith claims or attendant verdicts. *Id. State Farm alleged "that it has no record of its punitive damage payments, even though such payments must be reported to the [Internal Revenue Service] and in some states may not be used to justify rate increases." *Id. Regional Vice President Buck Moskalski testified that "he would not report a punitive damage verdict in [the Campbells'] case to higher management, as such reporting was not set out as part of State Farm's management practices." *Id.

State Farm's "wrongful profit and evasion schemes," the trial court underscored, were directly relevant to the Campbells' case, *Id., at 132a: "The record fully supports the conclusion that the bad-faith claim handling that exposed the Campbells to an excess verdict in 1983, and resulted in severe **1530 damages to them, was a product of the unlawful profit scheme that had been put in place by top management at State Farm years earlier. The Campbells presented substantial evidence showing how State Farm's improper insistence on claims-handling employees' reducing their claim payouts ... regardless of the merits of each claim, manifested itself ... in the Utah claims operations during the period when the decisions were made not to offer to settle the Campbell case for the $50,000 policy limits- *436 indeed, not to make any offer to settle at a lower amount. This evidence established that high-level manager Bill Brown was under heavy pressure from the PP & R scheme to control indemnity payouts during the time period in question. In particular, when Brown declined to pay the excess verdict against Curtis Campbell, or even post a bond, he had a special need to keep his year-end numbers down, since the State Farm incentive scheme meant that keeping those numbers down was important to helping Brown get a much-desired transfer to Colorado.... There was ample evidence that the concepts taught in the Excess Liability Handbook, including the dishonest alteration and manipulation of claim files and the policy against posting any supersedeas bond for the full amount of an excess
verdict, were dutifully carried out in this case.... There was ample basis for the jury to find that everything that had happened to the Campbells—when State Farm repeatedly refused in bad-faith to settle for the $50,000 policy limits and went to trial, and then failed to pay the 'excess' verdict, or at least post a bond, after trial—was a direct application of State Farm's overall profit scheme, operating through Brown and others.” *Id.* at 133a-134a.

State Farm's “policies and practices,” the trial evidence thus bore out, were “responsible for the injuries suffered by the Campbells,” and the means used to implement those policies could be found “callous, clandestine, fraudulent, and dishonest.” *Id.*, at 136a; see *id.*, at 113a (finding “ample evidence” that State Farm's reprehensible corporate policies were responsible for injuring “many other Utah consumers during the past two decades”). The Utah Supreme Court, relying on the trial court's record-based recitations, understandably characterized State Farm's behavior as “egregious and malicious.” *Id.*, at 18a.

*437 II*

The Court dismisses the evidence describing and documenting State Farm's PP & R policy and practices as essentially irrelevant, bearing “no relation to the Campbells' harm.” *Ante*, at 1523; see *ante*, at 1524 ("conduct that harmed [the Campbells] is the only conduct relevant to the reprehensibility analysis"). It is hardly apparent why that should be so. What is infirm about the Campbells' theory that their experience with State Farm exemplifies and reflects an overarching underpayment scheme, one that caused “repeated misconduct of the sort that injured them,” *ante*, at 1523? The Court's silence on that score is revealing: Once one recognizes that the Campbells did show "conduct by State Farm similar to that which harmed them,” *ante*, at 1524, it becomes impossible to shrink the reprehensibility analysis to this sole case, or to maintain, at odds with the determination of the trial court, see App. to Pet. for Cert. 113a, that “the adverse effect on the State's general population was in fact minor,” *ante*, at 1525.

Evidence of out-of-state conduct, the Court acknowledges, may be “probative [even if the conduct is lawful in the State where it occurred] when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious....” *Ante*, at 1522; cf. *ante*, at 1521 (reiterating this Court's instruction that trial courts assess whether "the harm was the result of intentional malice, trickery," **1531 or deceit, or mere accident"). "Other acts” evidence concerning practices both in and out of State was introduced in this case to show just such “deliberateness” and “culpability.” The evidence was admissible, the trial court ruled: (1) to document State Farm's "reprehensible" PP & R program; and (2) to "rebut [State Farm's] assertion that [its] actions toward the Campbells were inadvertent errors or mistakes in judgment.” App. 3329a (Order Denying Various Motions of State Farm to Exclude Plaintiffs' Evidence). Viewed in this light, there surely was "a nexus" between much of the "other *438 acts" evidence and "the specific harm suffered by [the Campbells]." *Ante*, at 1522.

III

When the Court first ventured to override state-court punitive damages awards, it did so moderately. The Court recalled that “in our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case.” *Gore*, 517 U.S., 568, 116 S.Ct. 1589. Today's decision exhibits no such respect and restraint. No longer content to accord state-court judgments "a strong presumption of validity," *TXO*, 509 U.S., at 547, 113 S.Ct. 2711, the Court announces that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *Ante*, at 1524. Moreover, the Court adds, when compensatory damages are substantial, doubling those damages "can reach the outermost limit of the due process guarantee.” *Ibid.*; see *ante*, at 1526 ("facts of this case ... likely would justify a punitive damages award at or near the amount of compensatory damages"). In a legislative scheme or a state high court's design to cap punitive damages, the hardiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned; in a judicial decree imposed on the States by this Court under the banner of substantive due process, the numerical controls today's decision installs seem to me boldly out of order.

*FN2. TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 462, n. 8.*
I remain of the view that this Court has no warrant to reform state law governing awards of punitive damages. *439 Gore, 517 U.S., at 607, 116 S.Ct. 1589 (GINSBURG, J., dissenting). Even if I were prepared to accept the flexible guides prescribed in Gore, I would not join the Court's swift conversion of those guides into instructions that begin to resemble marching orders. For the reasons stated, I would leave the judgment of the Utah Supreme Court undisturbed.

State Farm Mut. Auto. Ins. Co. v. Campbell

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Philip Morris USA v. Williams
U.S.Or.,2007.

Supreme Court of the United States
PHILIP MORRIS USA, Petitioner,
v.
Mayola WILLIAMS, Personal Representative of
Estate of Jesse D. Williams, Deceased.
No. 05-1256.


Background: Heavy cigarette smoker's widow brought state lawsuit against cigarette manufacturer for negligence and deceit and seeking compensatory and punitive damages for smoking-related lung cancer death of her husband. After jury found in widow's favor, the Circuit Court, Multnomah County, Anna J. Brown, J., reduced punitive damages award from $79.5 million to $32 million, and award of noneconomic damages from $800,000 to $500,000. Widow appealed, and manufacturer cross-appealed. The Court of Appeals of Oregon reinstated jury's verdict and affirmed on cross-appeal, 182 Or.App. 44, 48 P.3d 824, and adhered to its ruling on reconsideration, 183 Or.App. 192, 51 P.3d 670, but the United States Supreme Court granted certiorari, vacated Court of Appeals decision, and remanded for reconsideration in light of intervening opinion, 540 U.S. 801, 124 S.Ct. 56, 157 L.Ed.2d 12. On remand, the Court of Appeals reversed and remanded and affirmed on cross-appeal, 193 Or.App. 527, 92 P.3d 126, and after allowing review the Supreme Court of Oregon, W. Michael Gillette, J., 340 Or. 35, 127 P.3d 1165, affirmed. Certiorari was granted in part.

Holdings: The Supreme Court, Justice Breyer, held that:

(1) punitive damages award based in part on jury's desire to punish defendant for harming nonparties amounted to a taking of property from defendant without due process, and

(2) because Oregon Supreme Court's application of the correct legal standard might lead to new trial or change in level of punitive damages award, United States Supreme Court would not consider question of whether the existing award was constitutionally "grossly excessive."

Vacated and remanded.

Justice Stevens filed dissenting opinion.

Justice Thomas filed dissenting opinion.

Justice Ginsburg filed dissenting opinion in which Justices Scalia and Thomas joined.

West Headnotes

II Constitutional Law 92 4427

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive Damages. Most Cited Cases
(Formerly 92k303)

II1 Damages 115 487(1)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) k. In General. Most Cited Cases
Punitive damages may properly be imposed to further State's legitimate interests in punishing unlawful conduct and deterring its repetition.

II3 Damages 115 494.1

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.1 k. In General. Most Cited Cases
Unless State insists upon proper standards that will cabin jury's discretionary authority, its punitive damages system may deprive defendant of fair notice of severity of penalty that State may impose, may threaten arbitrary punishments, and, where amounts are sufficiently large, may impose one State's or one jury's policy choice upon neighboring States with different public policies.

[4] Damages 115 C=94.1

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.1 k. In General. Most Cited Cases
Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as grossly excessive.


92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4427 k. Punitive Damages. Most Cited Cases
(Formerly 92k303)
Due Process Clause forbids state's use of punitive damages award to punish defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are essentially strangers to the litigation; defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, and permitting punishment for injuring nonparty victim would add near standardless dimension to the punitive damages equation and magnify fundamental due process concerns of arbitrariness, uncertainty and lack of notice. U.S.C.A. Const.Amend. 14.

[6] Damages 115 C=87(1)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) k. In General. Most Cited Cases
Punitive damages awards may not be used for the purpose of punishing a defendant for harming others.

[7] Damages 115 C=94.2

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.2 k. Nature of Act or Conduct. Most Cited Cases

Damages 115 C=94.6

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.6 k. Actual Damage or Compensatory Damages; Relationship and Ratio. Most Cited Cases
While evidence of actual harm to nonparties can help to show that conduct that harmed plaintiff also posed a substantial risk of harm to general public and so was particularly reprehensible, jury may not go further and use punitive damages verdict to punish defendant directly on account of harms it is alleged to have visited on nonparties.

[8] Damages 115 C=94.1

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.1 k. In General. Most Cited Cases
Given risks of unfairness, it is constitutionally important for court to provide assurance that jury awarding punitive damages will ask the right question, and given the risks of arbitrariness, concern for adequate notice, and risk that punitive damages awards can in practice impose one State's or one jury's policies upon other States, it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance.

[9] Damages 115 C=94.2

115 Damages
115V Exemplary Damages
115k94 Measure and Amount of Exemplary Damages
115k94.2 k. Nature of Act or Conduct. Most
Because Oregon Supreme Court's application of correct legal standard in state negligence and deceit lawsuit might lead to new trial or change in level of punitive damages award, United States Supreme Court would not consider question of whether the existing award was constitutionally "grossly excessive."

The State Supreme Court rejected Philip Morris' arguments that the trial court should have instructed the jury that it could not punish Philip Morris for injury to persons not before the court, and that the roughly 100-to-1 ratio the $79.5 million award bore to *1059 the compensatory damages amount indicated a "grossly excessive" punitive award.

Held:

1. A punitive damages award based in part on a jury's desire to punish a defendant for harming nonparties amounts to a taking of property from the defendant without due process. Pp. 1060-1065.

(a) While "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition," BMW of North America, Inc. v. Gore, 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809, unless a State insists upon proper standards to cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of "fair notice ... of the severity of the penalty that a State may impose," id. at 574, 116 S.Ct. 1589; may threaten "arbitrary punishments," State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585; and, where the amounts are sufficiently large, may impose one State's (or one jury's) "policy choice" upon "neighboring States" with different public policies, BMW, supra, at 571-572, 116 S.Ct. 1589. Thus, the Constitution imposes limits on both the procedures for awarding punitive damages and amounts forbidden as "grossly excessive." See Honda Motor Co. v. Oberg, 512 U.S. 415, 432, 114 S.Ct. 2331, 129 L.Ed.2d 336. The Constitution's procedural limitations are considered here. Pp. 1062-1063.

(b) The Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury inflicted on strangers to the litigation. For one thing, a defendant threatened with punishment for such injury has no opportunity to defend against the charge. See Lindsey v. Normet, 405 U.S. 56, 66, 92 S.Ct. 814, 31 L.Ed.2d 25. For another, permitting such punishment would add a near standardless dimension to the punitive damages equation and magnify the fundamental due process concerns of this Court's pertinent cases-arbitrariness, uncertainty, and lack of notice. Finally, the Court finds no authority to support using punitive damages awards to punish a
defendant for harming others. *BMW*, supra, at 568, n. 11, 116 S.Ct. 1582, distinguished. Respondent argues that showing harm to others is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. While evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk to the general public, and so was particularly reprehensible, a jury may not go further and use a punitive damages verdict to punish a defendant directly for harms to those nonparties. Given the risks of unfairness, it is constitutionally important for a court to provide assurance that a jury is asking the right question; and given the risks of arbitrariness, inadequate notice, and imposing one State's policies on other States, it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. Pp. 1062-1064.

(c) The Oregon Supreme Court's opinion focused on more than reprehensibility. In rejecting Philip Morris' claim that the Constitution prohibits using punitive damages to punish a defendant for harm to nonparties, it made three statements. The first-that this Court held in *State Farm* only that a jury could not base an award on dissimilar acts of a defendant-was correct, but this Court now explicitly holds that a jury may not punish for harm to others. This Court disagrees with the second statement-that if a jury cannot punish for the conduct, there is no reason to consider it-since the Due Process Clause prohibits a State's inflicting *1060* punishment for harm to nonparties, but permits a jury to consider such harm in determining reprehensibility. The third statement-that it is unclear how a jury could consider harm to nonparties and then withhold that consideration from the punishment calculus-raises the practical problem of how to know whether a jury punished the defendant for causing injury to others rather than just took such injury into account under the rubric of reprehensibility. The answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. Although States have some flexibility in determining what kind of procedures to implement to protect against that risk, federal constitutional law obligates them to provide some form of protection where the risk of misunderstanding is a significant one. Pp. 1064-1065.

2. Because the Oregon Supreme Court's application of the correct standard may lead to a new trial, or a change in the level of the punitive damages award, this Court will not consider the question whether the award is constitutionally " grossly excessive." P. 1065.

340 Or. 35, 127 P.3d 1165, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, SOUTER, and ALITO, JJ., joined. STEVENS, J., and THOMAS, J., filed dissenting opinions. GINSBURG, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

Andrew L. Frey, New York, NY, for Petitioner.
Robert S. Peek, Washington, DC, for Respondent.
Justice BREYER delivered the opinion of the Court.
[I] The question we address today concerns a large state-court punitive damages award. We are asked whether the Constitution's Due Process Clause permits a jury to base that award in part upon its desire to *punish* the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent). We hold that such an award would amount to a taking of "property" from the defendant without due process.

I

This lawsuit arises out of the death of Jesse Williams, a heavy cigarette smoker. Respondent, Williams' widow, represents his estate in this state lawsuit for negligence and deceit against Philip Morris, the
manufacturer of Marlboro, the brand that Williams favored. A jury found that *1061 Williams' death was caused by smoking; that Williams smoked in significant part because he thought it was safe to do so; and that Philip Morris knowingly and falsely led him to believe that this was so. The jury ultimately found that Philip Morris was negligent (as was Williams) and that Philip Morris had engaged in deceit. In respect to deceit, the claim at issue here, it awarded compensatory damages of about $821,000 (about $21,000 economic and $800,000 noneconomic) along with $79.5 million in punitive damages.

The trial judge subsequently found the $79.5 million punitive damages award "excessive," see, e.g., BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and reduced it to $32 million. Both sides appealed. The Oregon Court of Appeals rejected Philip Morris' arguments and restored the $79.5 million jury award. Subsequently, Philip Morris sought review in the Oregon Supreme Court (which denied review) and then here. We remanded the case in light of State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003); 540 U.S. 801, 123 S.Ct. 56, 157 L.Ed.2d 12 (2003). The Oregon Court of Appeals adhered to its original views. And Philip Morris sought, and this time obtained, review in the Oregon Supreme Court.

Philip Morris then made two arguments relevant here. First, it said that the trial court should have accepted, but did not accept, a proposed "punitive damages" instruction that specified the jury could not seek to punish Philip Morris for injury to other persons not before the court. In particular, Philip Morris pointed out that the plaintiff's attorney had told the jury to "think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. ... In Oregon, how many people do we see outside, driving home ... smoking cigarettes? ... [C]igarettes ... are going to kill ten [of every hundred], [A]nd the market share of Marlboros [i.e., Philip Morris is one-third [i.e., one of every three killed]]." App. 197a, 199a. In light of this argument, Philip Morris asked the trial court to tell the jury that "you may consider the extent of harm suffered by others in determining what [the] reasonable relationship is" between any punitive award and "the harm caused to Jesse Williams" by Philip Morris' misconduct, "[b]ut you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims ...." Id., at 280a. The judge rejected this proposal and instead told the jury that "[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct." Id., at 283a. In Philip Morris' view, the result was a significant likelihood that a portion of the $79.5 million award represented punishment for its having harmed others, a punishment that the Due Process Clause would here forbid.

Second, Philip Morris pointed to the roughly 100-to-1 ratio the $79.5 million punitive damages award bears to $821,000 in compensatory damages. Philip Morris noted that this Court in BMW emphasized the constitutional need for punitive damages awards to reflect (1) the "reprehensibility" of the defendant's conduct, (2) a "reasonable relationship" to the harm the plaintiff (or related victim) suffered, and (3) the presence (or absence) of "sanctions," e.g., criminal penalties, that state law provided for comparable conduct, 517 U.S., at 575-585, 116 S.Ct. 1589. And in State Farm, this Court said that the longstanding historical practice of setting punitive damages at two, three, or four times *1062 the size of compensatory damages, while "not binding," is "instructive," and that "[s]ingle-digit multipliers are more likely to comport with due process." 538 U.S., at 425, 123 S.Ct. 1513. Philip Morris claimed that, in light of this case law, the punitive award was "grossly excessive." See TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 458, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (plurality opinion); BMW, supra, at 574-575, 116 S.Ct. 1589; State Farm, supra, at 416-417, 123 S.Ct. 1513.

The Oregon Supreme Court rejected these and other Philip Morris arguments. In particular, it rejected Philip Morris' claim that the Constitution prohibits a state jury "from using punitive damages to punish a defendant for harm to nonparties." 340 Or. 51-52, 127 P.3d 1165, 1175 (2006). And in light of Philip Morris' reprehensible conduct, it found that the $79.5 million award was not "grossly excessive." Id., at 63-64, 127 P.3d, at 1181-1182.

Philip Morris then sought certiorari. It asked us to consider, among other things, (1) its claim that Oregon had unconstitutionally permitted it to be punished for harming nonparty victims; and (2)
whether Oregon had in effect disregarded "the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm." Pet. for Cert. (I). We granted certiorari limited to these two questions.

For reasons we shall set forth, we consider only the first of these questions. We vacate the Oregon Supreme Court's judgment, and we remand the case for further proceedings.

II

[2][3] This Court has long made clear that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." BMW, supra, at 568, 116 S.Ct. 1589; See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 350, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-267, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 11, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). At the same time, we have emphasized the need to avoid an arbitrary determination of an award's amount. Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of "fair notice ... of the severity of the penalty that a State may impose," BMW, supra, at 574, 116 S.Ct. 1589; it may threaten "arbitrary punishments," i.e., punishments that reflect not an "application of law" but "a decisionmaker's caprice," State Farm, supra, at 416, 116 S.Ct. 1513 (internal quotation marks omitted); and, where the amounts are sufficiently large, it may impose one State's (or one jury's) "policy choice," say as to the conditions under which (or even whether) certain products can be sold, upon "neighboring States" with different public policies, BMW, supra, at 571-572, 116 S.Ct. 1589.

[4] For these and similar reasons, this Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as "grossly excessive." See Honda Motor Co. v. Oberg, 512 U.S. 415, 432, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994) (requiring judicial review of the size of punitive awards); Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 443, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (review must be de novo); BMW, supra, at 574-585, 116 S.Ct. 1589 (excessiveness decision depends upon the reprehensibility of the defendant's conduct, whether the award bears a reasonable relationship to the actual and potential harm caused by the defendant to the plaintiff, and the difference between the award and sanctions "authorized or imposed in comparable cases"); State Farm, supra, at 425, 123 S.Ct. 1513 (excessiveness more likely where ratio exceeds single digits). Because we shall not decide whether the award here at issue is "grossly excessive," we need now only consider the Constitution's procedural limitations.

III

[5] In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with "an opportunity to present every available defense." Lindsey v. Normet, 405 U.S. 56, 66, 92 S.Ct. 862, 871, 31 L.Ed.2d 36 (1972) (internal quotation marks omitted). Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.

For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified. State Farm, 538 U.S., at 416, 418, 123 S.Ct. 1513; BMW, 517 U.S., at 574, 116 S.Ct. 1589.

[6] Finally, we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the potential harm the defendant's conduct could
have caused. But we have made clear that the potential harm at issue was harm potentially caused the plaintiff. See State Farm, supra, at 424, 123 S.Ct. 1513 ("[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award" (emphasis added)). See also TXO, 509 U.S. at 460-462, 113 S.Ct. 2711 (plurality opinion) (using same kind of comparison as basis for finding a punitive award not unconstitutionally excessive). We did use the term "error-free" (in BMW) to describe a lower court punitive damages calculation that likely included harm to others in the equation, 517 U.S. at 568, n. 11, 116 S.Ct. 1589. But context makes clear that the term "error-free" in the BMW footnote referred to errors relevant to the case at hand. Although elsewhere in BMW we noted that there was no suggestion that the plaintiff "or any other BMW purchaser was threatened with any additional potential harm" by the defendant's conduct, we did not purport to decide the question of harm to others. Id. at 582, 116 S.Ct. 1589. Rather, the opinion appears to have left the question open.

[7] Respondent argues that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.

[8] Given the risks of unfairness that we have mentioned, it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies (e.g., banning cigarettes) upon other States—all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries, see id., at 594-595, 116 S.Ct. 1589 (BREYER, J., concurring)—it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.

IV

Respondent suggests as well that the Oregon Supreme Court, in essence, agreed with us, that it did not authorize punitive damages awards based upon punishment for harm caused to nonparties. We concede that one might read some portions of the Oregon Supreme Court's opinion as focusing only upon reprehensibility. See, e.g., 340 Ore., at 51, 127 P.3d, at 1175 ("[The] jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large"). But the Oregon court's opinion elsewhere makes clear that that court held more than these few phrases might suggest.

The instruction that Philip Morris said the trial court should have given distinguishes between using harm to others as part of the "reasonable relationship" equation (which it would allow) and using it directly as a basis for punishment. The instruction asked the trial court to tell the jury that "you may consider the extent of harm suffered by others in determining what [the] reasonable relationship is" between Philip Morris' punishable misconduct and harm caused to Jesse Williams, "[b]ut you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims...." App. 280a (emphasis added). And as the Oregon Supreme Court explicitly recognized, Philip Morris argued that the Constitution "prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties." 340 Ore., at 51-52, 127 P.3d, at 1175.

The court rejected that claim. In doing so, it pointed out (1) that this Court in State Farm had held only that a jury could not base its award upon "dissimilar" acts of a defendant, 340 Ore., at 52-53, 127 P.3d, at 1175-1176. It added (2) that "[i]f *1065 a jury cannot punish for the conduct, then it is difficult to
The Oregon court's first statement is correct. We did not previously hold explicitly that a jury may not punish for harm caused others. But we do so hold now. We do not agree with the Oregon court's second statement. We have explained why we believe the Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation. At the same time we recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility. Cf., e.g., Witte v. United States, 515 U.S. 389, 400, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995) (recidivism statutes taking into account a criminal defendant's other misconduct do not impose an "additional penalty for the earlier crimes," but instead "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one") (quoting Gryger v. Burke, 334 U.S. 728, 732, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948)).

[9] The Oregon court's third statement raises a practical problem. How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to "punish" the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk. Although the States have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide some form of protection in appropriate cases.

V

[10] As the preceding discussion makes clear, we believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris' appeal. We remand this case so that the Oregon Supreme Court can apply the standard we have set forth. Because the application of this standard may lead to the need for a new trial, or a change in the level of the punitive damages award, we shall not consider whether the award is constitutionally "grossly excessive." We vacate the Oregon Supreme Court's judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice STEVENS, dissenting.

The Due Process Clause of the Fourteenth Amendment imposes both substantive and procedural constraints on the power of the States to impose punitive damages on tortfeasors. See State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003); Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001); BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); *1066TXD Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). I remain firmly convinced that the cases announcing those constraints were correctly decided. In my view the Oregon Supreme Court faithfully applied the reasoning in those opinions to the egregious facts disclosed by this record. I agree with Justice GINSBURG's explanation of why no procedural error even arguably justifying reversal occurred at the trial in this case. See post, p. 1068-1069.

Of greater importance to me, however, is the Court's imposition of a novel limit on the State's power to impose punishment in civil litigation. Unlike the Court, I see no reason why an interest in punishing a wrongdoer "for harming persons who are not before the court," ante, at 1060, should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct.

Whereas compensatory damages are measured by the harm the defendant has caused the plaintiff, punitive damages are a sanction for the public harm the defendant's conduct has caused or threatened. There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages. See Cooper Industries, 532 U.S., at 432, 121 S.Ct.
In our early history either type of sanction might have been imposed in litigation prosecuted by a private citizen. See Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 127-128, 118 S.Ct. 1063, 140 L.Ed.2d 210 (1998) (STEVENS, J., concurring in judgment). And while in neither context would the sanction typically include a pecuniary award measured by the harm that the conduct had caused to any third parties, in both contexts the harm to third parties would surely be a relevant factor to consider in evaluating the reprehensibility of the defendant's wrongdoing. We have never held otherwise.

In the case before us, evidence attesting to the possible harm the defendant's extensive deceitful conduct caused other Oregonians was properly presented to the jury. No evidence was offered to establish an appropriate measure of damages to compensate such third parties for their injuries, and no one argued that the punitive damages award would serve any such purpose. To award compensatory damages to remedy such third-party harm might well constitute a taking of property from the plaintiff. The Court endorses a contrary conclusion because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant-directly-for third-party harm. FN3 A murderer who kills his victim by throwing a bomb that injures dozens of bystanders should be punished more severely than one who harms no one other than his intended victim. Similarly, there is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers statewide should not include consideration of the harm to those "bystanders" as well as the harm to the individual plaintiff. The Court endorses a contrary conclusion without providing us with any reasoned justification.

FN2. It is no answer to refer, as the majority does, to recidivism statutes. Ante, at 1065. In that context, we have distinguished between taking prior crimes into account as an aggravating factor in penalizing the conduct before the court versus doing so to punish for the earlier crimes. Ibid. But if enhancing a penalty for a present crime because of prior conduct that has already been punished is permissible, it is certainly proper to enhance a penalty because the conduct before the court, which has never been punished, injured multiple victims.

FN1. The Court's holding in Browning-Ferris Industries of Pu., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), distinguished, for the purposes of appellate review under the Excessive Fines Clause of the Eighth Amendment, between criminal sanctions and civil fines awarded entirely to the plaintiff. The fact that part of the award in this case is payable in whole or in part to the State rather than to the private litigantFN1. Nevertheless, the Court has held that a private citizen, in a private lawsuit, should be treated as the functional equivalent of a criminal sanction. See id., at 263-264, 109 S.Ct. 2909, I continue to agree with Justice O'Connor and those scholars who have concluded that the Excessive Fines Clause is applicable to punitive damages awards regardless of who receives the ultimate payout. See id., at 286-299, 109 S.Ct. 2909. (O'Connor, J., concurring in part and dissenting in part).

While apparently recognizing the novelty of its holding, ante, at 1065, the majority relies on a distinction between taking *1067 third-party harm into account in order to assess the reprehensibility of the defendant's conduct-which is permitted-from doing so in order to punish the defendant "directly"-which is forbidden. Ante, at 1064. This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant-directly-for third-party harm. FN3 A murderer who kills his victim by throwing a bomb that injures dozens of bystanders should be punished more severely than one who harms no one other than his intended victim. Similarly, there is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers statewide should not include consideration of the harm to those "bystanders" as well as the harm to the individual plaintiff. The Court endorses a contrary conclusion without providing us with any reasoned justification.

concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Judicial restraint counsels us to "exercise the utmost care whenever we are asked to break new ground in this field." *Ibid.* Today the majority ignores that sound advice when it announces its new rule of substantive law.

Essentially for the reasons stated in the opinion of the Supreme Court of Oregon, I would affirm its judgment.

Justice THOMAS, dissenting.

I join Justice GINSBURG's dissent in full. I write separately to reiterate my view that "the Constitution does not constrain the size of punitive damages awards." *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 429-430, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (THOMAS, J., dissenting) (quoting *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 532 U.S. 424, 443, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (THOMAS, J., concurring)). It matters not that the Court styles today's holding as "procedural" because the "procedural" rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 26-27, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (SCALIA, J., concurring in judgment) ("In 1868 ... punitive damages were undoubtedly an established part of the American common law of torts. It is ... clear that *1068* no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount") . Today's opinion proves once again that this Court's punitive damages jurisprudence is "insusceptible of principled application." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 599, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), and have "deprived[d] no jury of proper legal guidance," *ante*, at 1064. Vacation of the Oregon Supreme Court's judgment, I am convinced, is unwarranted.

The right question regarding reprehensibility, the Court acknowledges, *ante*, at ----, would train on "the harm that Philip Morris was prepared to inflict on the smoking public at large." *Ibid.* (quoting 340 Or. 35, 51, 127 P.3d 1165, 1175 (2006)). See also 340 Or., at 55, 127 P.3d, at 1177 ("[T]he jury, in assessing the reprehensibility of Philip Morris's actions, could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct." (emphasis added)). The Court identifies no evidence introduced and no charge delivered inconsistent with that inquiry.

The Court's order vacating the Oregon Supreme Court's judgment is all the more inexplicable considering that Philip Morris did not preserve any objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel's argument. The sole objection Philip Morris preserved was to the trial court's refusal to give defendant's requested charge number 34. See *id.* at 54, 127 P.3d, at 1176. The proposed instruction read in pertinent part:

"If you determine that some amount of punitive damages should be imposed on the defendant, it will then be your task to set an amount that is appropriate. This should be such amount as you believe is necessary to achieve the objectives of deterrence and punishment. While there is no set formula to be applied in reaching an appropriate amount, I will now advise you of some of the factors that you may wish to consider in this connection.

"(1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that
reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

" (2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant's conduct—that is, how far the defendant has departed from accepted societal norms of conduct." App. 280a.

Under that charge, just what use could the jury properly make of "the extent of harm suffered by others"? The answer slips from my grasp. A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge.

The Court ventures no opinion on the propriety of the charge proposed by Philip Morris, though Philip Morris preserved no other objection to the trial proceedings. Rather than addressing the one objection Philip Morris properly preserved, the Court reaches outside the bounds of the case as postured when the trial court entered its judgment. I would accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent.

***

For the reasons stated, and in light of the abundant evidence of "the potential harm [Philip Morris'] conduct could have caused," ante, at 1063 (emphasis deleted), I would affirm the decision of the Oregon Supreme Court.

U.S. Or., 2007.
Philip Morris USA v. Williams

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After third remand for reconsideration of punitive damages in a suit arising from the 1989 grounding of an oil supertanker in Alaska, the United States District Court for the District of Alaska, H. Russel Holland, Chief Judge, 296 F Supp 2d 1071, entered a $4.5 billion award of punitive damages against oil company, and parties filed cross-appeals. The United States Court of Appeals for the Ninth Circuit, 490 F.3d 1066, vacated and remanded for reduction of the punitive damages award to $2.5 billion, and certiorari was granted.

Holdings: The Supreme Court, Justice Souter, held that:
(1) for an equally divided court, defendant could be liable in punitive damages for reckless acts of its managerial employees;
(2) Clean Water Act's (CWA) penalties for water pollution did not preempt maritime common law on punitive damages; and
(3) maximum award of punitive damages allowed under maritime law was equal to jury's award of $507.5 million in compensatory damages.

Vacated and Remanded.

Justice Alito took no part in the consideration or decision of the case.

Justice Scalia filed a concurring opinion in which Justice Thomas joined.

Justice Stevens filed an opinion concurring in part and dissenting in part.

Justice Ginsburg filed an opinion concurring in part and dissenting in part.

Justice Breyer filed an opinion concurring in part and dissenting in part.

West Headnotes

Corporations 101 \(\rightarrow 498\)

101 Corporations
101 XI Corporate Powers and Liabilities
101 XI (E) Torts
101 k498 k. Exemplary Damages. Most Cited Cases
Corporation could be liable in punitive damages for reckless acts of its managerial employees. (Per opinion of Justice Souter, for an equally divided court.) Restatement (Second) of Torts § 909(c).

Courts 106 \(\rightarrow 102(2)\)

106 Courts
106 II Establishment, Organization, and Procedure
106 II (I) Concurrence in Adjudication
106k102 In General
106k102(2) k. Opinion by Divided Court. Most Cited Cases
If the judges of the Supreme Court are divided, reversal cannot be had, for no order can be made.

Federal Courts 170 B \(\rightarrow 617\)

170 B Federal Courts
170 BVIII Courts of Appeals
170 BVIII (D) Presentation and Reservation in Lower Court of Grounds of Review
170 BVIII (D) I Issues and Questions in Lower Court
170 Bk617 k. Sufficiency of Presentation of Questions. Most Cited Cases

Federal Courts 170 B \(\rightarrow 634\)

170 B Federal Courts
170 BVIII Courts of Appeals
Oil company's argument at outset of trial that other statutes preempted punitive damages claim in action arising from grounding of supertanker and resulting oil spill in Alaska did not permit it to raise issue of whether Clean Water Act (CWA) preempted maritime common law on punitive damages in motion filed 13 months after stipulated motions deadline; "statutory preemption" was not a sufficient claim to give oil company license to rely on newly cited statutes anytime it wished. Federal Water Pollution Control Act, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

Oil company's argument at outset of trial that other statutes preempted punitive damages claim in action arising from grounding of supertanker and resulting oil spill in Alaska did not permit it to raise issue of whether Clean Water Act (CWA) preempted maritime common law on punitive damages in motion filed 13 months after stipulated motions deadline; "statutory preemption" was not a sufficient claim to give oil company license to rely on newly cited statutes anytime it wished. Federal Water Pollution Control Act, § 101 et seq., 33 U.S.C.A. § 1251 et seq.
It is the general rule that a federal appellate court does not consider an issue not passed upon below, when to deviate from this rule being a matter left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.

[10] Damages 115 \( \rightarrow \) 87(1)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages
Additional to Compensation
115k87(1) k. In General. Most Cited Cases

States 360 \( \rightarrow \) 18.31

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.31 k. Particular Cases, Preemption or Supersession. Most Cited Cases

Clean Water Act’s (CWA) penalties for water pollution did not preempt maritime common law on punitive damages in action arising from grounding of supertanker and resulting oil spill in Alaska. Federal Water Pollution Control Act, § 311, 33 U.S.C.A. § 1321.


149E Environmental Law
149EV Water Pollution
149Ek169 Concurrent and Conflicting Statutes or Regulations
149Ek171 k. Federal Preemption. Most Cited Cases

States 360 \( \rightarrow \) 18.31

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.31 k. Environment; Nuclear Projects. Most Cited Cases

Clean Water Act’s (CWA) penalties for water pollution were not intended to occupy the entire field of pollution remedies. Federal Water Pollution Control Act, § 311, 33 U.S.C.A. § 1321.

[12] Damages 115 \( \rightarrow \) 87(1)

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages
Additional to Compensation
115k87(1) k. In General. Most Cited Cases

States 360 \( \rightarrow \) 18.31

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.31 k. Environment; Nuclear Projects. Most Cited Cases

Punitive damages for private harms would not have any frustrating effect on the Clean Water Act (CWA) remedial scheme, which would point to preemption. Federal Water Pollution Control Act, § 311, 33 U.S.C.A. § 1321.

[13] Admiralty 16 \( \rightarrow \) 1.20(1)

16 Admiralty
161 Jurisdiction
16k1.10 What Law Governs
Effect of State Laws

In General. Most Cited Cases
Maritime law falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Damages 115 87(1)

Nature and Theory of Damages Additional to Compensation

Consensus today is that punitive damages are aimed not at compensation but principally at retribution and deterring harmful conduct.

Damages 115 91.5(1)

Action taken or omitted in order to augment profit represents an enhanced degree of punishable culpability, as does willful or malicious action, taken with a purpose to injure. Restatement (Second) of Torts § 908.

Damages 115 94.2

Regardless of culpability, heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect.

Constitutional Law 92 4427

Few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process; when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. U.S.C.A. Const. Amend. 14.
115 Damages

115V Exemplary Damages

115k94 Measure and Amount of Exemplary Damages

115k94.1 k. In General. Most Cited Cases

A penalty should be reasonably predictable in its severity.

[211] Damages 115 C 87(1)

115 Damages

115V Exemplary Damages

115k87 Nature and Theory of Damages Additional to Compensation

115k87(1) k. In General. Most Cited Cases

Punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law. Restatement (Second) of Torts § 908, Comment.

[221] Fines 174 C 1.3

174 Fines

174k1.3 k. Excessive Fines. Most Cited Cases

Excessive Fines Clause of the Eighth Amendment does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded. U.S.C.A. Const.Amend. 8.

[231] Damages 115 C 36

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k35 Pecuniary Losses

115k36 k. In General. Most Cited Cases

The common law traditionally did not compensate purely economic harms, unaccompanied by injury to person or property.

[241] Admiralty 16 C 1.5

16 Admiralty

161 Jurisdiction

16k1.5 k. Nature and Source of Maritime Law. Most Cited Cases

Admiralty 16 C 1.6

16 Admiralty

161 Jurisdiction

16k1.6 k. Effect of United States Constitution; Powers of Congress. Most Cited Cases

Congress retains superior authority in maritime matters, and an admiralty court should look primarily to these legislative enactments for policy guidance.

[251] Admiralty 16 C 1.5

16 Admiralty

161 Jurisdiction

16k1.5 k. Nature and Source of Maritime Law. Most Cited Cases

The absence of federal legislation constraining punitive damages in maritime cases does not imply a congressional decision that there should be no quantified rule.

[261] Damages 115 C 87(1)

115 Damages

115V Exemplary Damages

115k87 Nature and Theory of Damages Additional to Compensation

115k87(1) k. In General. Most Cited Cases

Punitive damages by definition are not intended to compensate the injured party but, rather, to punish the tortfeasor and to deter him and others from similar extreme conduct.

[271] Damages 115 C 94.6

115 Damages

115V Exemplary Damages

115k94 Measure and Amount of Exemplary Damages

115k94.6 k. Actual Damage or Compensatory Damages; Relationship and Ratio. Most Cited Cases

A 1:1 ratio of punitive to compensatory damages, which is above the median award, is a fair upper limit in maritime cases with no earmarks of exceptional blameworthiness, such as intentional or malicious conduct, or behavior driven primarily by desire for gain.
In 1989, petitioners' (collectively, Exxon) supertanker grounded on a reef off Alaska, spilling millions of gallons of crude oil into Prince William Sound. The accident occurred after the tanker's captain, Joseph Hazelwood—who had a history of alcohol abuse and whose blood still had a high alcohol level 11 hours after the spill-inexplicably exited the bridge, leaving a tricky course correction to unlicensed subordinates. Exxon spent some $2.1 billion in cleanup efforts, pleaded guilty to criminal violations occasioning fines, settled a civil action by the United States and Alaska for at least $900 million, and paid another $303 million in voluntary payments to private parties. Other civil cases were consolidated into this one, brought against Exxon, Hazelwood, and others to recover economic losses suffered by respondents (hereinafter Baker), who depend on Prince William Sound for their livelihoods. At Phase I of the trial, the jury found Exxon and Hazelwood reckless (and thus potentially liable for punitive damages) under instructions providing that a corporation is responsible for the reckless acts of employees acting in a managerial capacity in the scope of their employment. In Phase II, the jury awarded $287 million in compensatory damages to some of the plaintiffs; others had settled their compensatory claims for $22.6 million. In Phase III, the jury awarded $5,000 in punitive damages against Hazelwood and $5 billion against Exxon. The Ninth Circuit upheld the Phase I jury instruction on corporate liability and ultimately remitted the punitive damages award against Exxon to $2.5 billion.

Held:

1. Because the Court is equally divided on whether maritime law allows corporate liability for punitive damages based on the acts of managerial agents, it leaves the Ninth Circuit's opinion undisturbed in this respect. Of course, this disposition is not precedent on the derivative liability question. See, e.g., Neil v. Biggers, 409 U.S. 188, 192, 93 S.Ct. 375, 34 L.Ed.2d 401, Pp. 2614 - 2616.

2. The Clean Water Act's water pollution penalties, 33 U.S.C. § 1321, do not preempt punitive-damages awards in maritime spill cases. Section 1321(b) protects "navigable waters ... adjoining shorelines, ... [and] natural resources," subject to a saving clause reserving "obligations ... under any ... law for damages to any ... privately owned property resulting from [an oil] discharge," § 1321(a). Exxon's admission that the CWA does not displace compensatory remedies for the consequences of water pollution, even those for economic harms, leaves the company with the untenable claim that the CWA somehow preempts punitive damages, but not compensatory damages, for economic loss. Nothing in the statute points to that result, and the Court has rejected similar attempts to sever remedies from their causes of action, see Silkwood v. Kerr-McGee Corp.
464 U.S. 238, 255-256, 104 S.Ct. 615, 78 L.Ed.2d 585. In contrast, today's enquiry arises under federal maritime jurisdiction and requires review of a jury award at the level of judge-made federal common law that precedes and should obviate any application of the constitutional standard. In this context, the unpredictability of high punitive awards is in tension with their punitive function because of the implication of unfairness that an eccentrically high punitive verdict carries. A penalty should be reasonably predictable in its severity, 'so that even Holmer's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another. And a penalty scheme ought to threaten defendants with a fair probability of suffering in like degree for like damage. Cf. Koon v. United States, 518 U.S. 81, 113, 116 S.Ct. 2035, 135 L.Ed.2d 392, Pp. 2626 - 2627.

(f) The Court considers three approaches, one verbal and two quantitative, to arrive at a standard for assessing maritime punitive damages. Pp. 2627 - 2634.

(i) The Court is skeptical that verbal formulations are the best insurance against unpredictable outlier punitive awards, in light of its experience with attempts to produce consistency in the analogous business of criminal sentencing. Pp. 2627 - 2629.

(ii) Thus, the Court looks to quantified limits. The option of setting a hard-dollar punitive cap, however,
is rejected because there is no "standard" tort or contract injury, making it difficult to settle upon a particular dollar figure as appropriate across the board; and because a judicially selected dollar cap would carry the serious drawback that the issue might not return to the docket before there was a need to revisit the figure selected. Pp. 2629 - 2632.

(iii) The more promising alternative is to peg punitive awards to compensatory damages using a ratio or maximum multiple. This is the model in many States and in analogous federal statutes allowing multiple damages. The question is what ratio is most appropriate. An acceptable standard can be found in the studies showing the median ratio of punitive to compensatory awards. Those studies reflect the judgments of juries and judges in thousands of cases as to what punitive awards were appropriate in circumstances reflecting the most down to the least blameworthy conduct, from malice and avarice to recklessness to gross negligence. The data in question put the median ratio for the entire gamut at less than 1:1, meaning that the compensatory award exceeds the punitive award in most cases. In a well-functioning system, awards at or below the median would roughly express jurors' sense of reasonable penalties in cases like this one that have no earmarks of exceptional blameworthiness. Accordingly, the Court finds that a 1:1 ratio is a fair upper limit in such maritime cases. Pp. 2632 - 2634.

(iv) Applying this standard to the present case, the Court takes for granted the District Court's calculation of the total relevant compensatory damages at $507.5 million. A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount. P. 2634.

472 F.3d 600 and 490 F.3d 1066, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined, and in which STEVENS, GINSBURG, and BREYER, JJ., joined, as to Parts I, II, and III. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined. STEVENS, J., GINSBURG, J., and BREYER, J., filed opinions concurring in part and dissenting in part. ALITO, J., took no part in the consideration or decision of the case.

Walter Dellinger, Washington, DC, for petitioners. Jeffrey L. Fisher, for respondents.


Justice SOUTER delivered the opinion of the Court.

There are three questions of maritime law before us: whether a shipowner may be liable for punitive damages without acquiescence in the actions causing harm, whether punitive damages have been barred implicitly by federal statutory law making no provision for them, and whether the award of $2.5 billion in this case is greater than maritime law should allow in the circumstances. We are equally divided on the owner's derivative liability, and hold that the federal statutory law does not bar a punitive award on top of damages for economic loss, but that the award here should be limited to an amount equal to compensatory damages.

On March 24, 1989, the supertanker Exxon Valdez grounded on Bligh Reef off the Alaskan coast, fracturing its hull and spilling millions of gallons of crude oil into Prince William Sound. The owner, petitioner Exxon Shipping Co. (now SeaRiver Maritime, Inc.), and its owner, petitioner Exxon Mobil Corp. (collectively, Exxon), have settled state and federal claims for environmental damage, with payments exceeding $1 billion, and this action by respondent Baker and others, including commercial fishermen and native Alaskans, was brought for economic losses to individuals dependent on Prince William Sound for their livelihoods.

*2612 A

The tanker was over 900 feet long and was used by
Exxon to carry crude oil from the end of the Trans-Alaska Pipeline in Valdez, Alaska, to the lower 48 States. On the night of the spill it was carrying 53 million gallons of crude oil, or over a million barrels. Its captain was one Joseph Hazelwood, who had completed a 28-day alcohol treatment program while employed by Exxon, as his superiors knew, but dropped out of a prescribed follow-up program and stopped going to Alcoholics Anonymous meetings. According to the District Court, "[i]n this evidence was presented to the jury that after Hazelwood was released from [residential treatment], he drank in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers.” In re Exxon Valdez, No. A89-0095-CV, Order No. 265 (D.Alaska, Jan. 27, 1995), p. 5, App. F to Pet. for Cert. 255a-256a (hereinafter Order 265). The jury also heard contested testimony that Hazelwood drank with Exxon officials and that members of the Exxon management knew of his relapse. See ibid. Although Exxon had a clear policy prohibiting employees from serving onboard within four hours of consuming alcohol, see In re Exxon Valdez, 270 F.3d 1215, 1238 (C.A.9 2001), Exxon presented no evidence that it monitored Hazelwood after his return to duty or considered giving him a shoreside assignment, see Order 265, p. 5, supra, at 256a. Witnesses testified that before the Valdez left port on the night of the disaster, Hazelwood downed at least five double vodkas in the waterfront bars of Valdez, an intake of about 15 ounces of 80-proof alcohol, enough “that a non-alcoholic would have passed out.” 270 F.3d, at 1236.

The ship sailed at 9:12 p.m. on March 23, 1989, guided by a state-licensed pilot for the first leg out, through the Valdez Narrows. At 11:20 p.m., Hazelwood took active control and, owing to poor conditions in the outbound shipping lane, radioed the Coast Guard for permission to move east across the inbound lane to a less icy path. Under the conditions, this was a standard move, which the last outbound tanker had also taken, and the Coast Guard cleared the Valdez to cross the inbound lane. The tanker accordingly steered east toward clearer waters, but the move put it in the path of an underwater reef off Bligh Island, thus requiring a turn back west into the shipping lane around Busby Light, north of the reef.

Two minutes before the required turn, however, Hazelwood left the bridge and went down to his cabin in order, he said, to do paperwork. This decision was inexplicable. There was expert testimony that, even if their presence is not strictly necessary, captains simply do not quit the bridge during maneuvers like this, and no paperwork could have justified it. And in fact the evidence was that Hazelwood's presence was required, both because there should have been two officers on the bridge at all times and his departure left only one, and because he was the only person on the entire ship licensed to navigate this part of Prince William Sound. To make matters worse, before going below Hazelwood put the tanker on autopilot, speeding it up, making the turn trickier, and any mistake harder to correct.

As Hazelwood left, he instructed the remaining officer, third mate Joseph Cousins, to move the tanker back into the shipping lane once it came abreast of Busby Light. Cousins, unlicensed to navigate in those waters, was left alone with helmsman Robert Kagan, a nonofficer. For reasons that remain a mystery, they failed to make the turn at Busby Light, and a later emergency maneuver attempted by Cousins came too late. The tanker ran aground on Bligh Reef, tearing the hull open and spilling 11 million gallons of crude oil into Prince William Sound.

After Hazelwood returned to the bridge and reported the grounding to the Coast Guard, he tried but failed to rock the Valdez off the reef, a maneuver which could have spilled more oil and caused the ship to founder. As the Coast Guard's nearly immediate response included a blood test of Hazelwood (the validity of which Exxon disputes) showing a blood-alcohol level of .061 eleven hours after the spill. Supp.App. 307a. Experts testified that to have this much alcohol in his bloodstream so long after the accident, Hazelwood at the time of the spill must have had a blood-alcohol level of around .241, Order 265, p. 5, supra, at 256a, three times the legal limit for driving in most States.

Fn1. As it turned out, the tanker survived the accident and remained in Exxon's fleet, which it subsequently transferred to a wholly owned subsidiary, SeaRiver Maritime, Inc. The Valdez was renamed several times, finally to the SeaRiver Mediterranea, [and] carried oil between the Persian Gulf and Japan, Singapore, and
In the aftermath of the disaster, Exxon spent around $2.1 billion in cleanup efforts. The United States charged the company with criminal violations of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(g)(1); the Refuse Act of 1899, 33 U.S.C. §§ 407 and 411; the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a); the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1); and the Dangerous Cargo Act, 46 U.S.C. § 3718(b). Exxon pleaded guilty to violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act and agreed to pay a $150 million fine, later reduced to $25 million plus restitution of $100 million. A civil action by the United States and the State of Alaska for environmental harms ended with a consent decree for Exxon to pay at least $900 million toward restoring natural resources, and it paid another $303 million in voluntary settlements with fishermen, property owners, and other private parties.

B

The remaining civil cases were consolidated into this one against Exxon, Hazelwood, and others. The District Court for the District of Alaska divided the plaintiffs seeking compensatory damages into three classes: commercial fishermen, Native Alaskans, and landowners. At Exxon's behest, the court also certified a mandatory class of all plaintiffs seeking punitive damages, whose number topped 32,000. Respondents here, to whom we will refer as Baker for convenience, are members of that class.

For the purposes of the case, Exxon stipulated to its negligence in the Valdez disaster and its ensuing liability for compensatory damages. The court designed the trial accordingly: Phase I considered Exxon and Hazelwood's recklessness and thus their potential for punitive liability; Phase II set compensatory damages for commercial fishermen and Native Alaskans; and Phase III determined the amount of punitive damages for which Hazelwood and Exxon were each liable. (A contemplated Phase IV, setting compensation for still other plaintiffs, was obviated by settlement.)

In Phase I, the jury heard extensive testimony about Hazelwood's alcoholism and his conduct on the night of the spill, as well as conflicting testimony about Exxon officials' knowledge of Hazelwood's backslide. At the close of Phase I, the Court instructed the jury in part that

"[a] corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation." App. K to Pet. for Cert. 301a.

The Court went on that "[a]n employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business." Ibid. Exxon did not dispute that Hazelwood was a managerial employee under this definition, see App. G, id., at 264a, n. 8, and the jury found both Hazelwood and Exxon reckless and thus potentially liable for punitive damages, App. L, id., at 303a. FN2

FN2. The jury was not asked to consider the possibility of any degree of fault beyond the range of reckless conduct. The record sent up to us shows that some thought was given to a trial plan that would have authorized jury findings as to greater degrees of culpability, see App. 164, but that plan was not adopted, whatever the reason; Baker does not argue this was error.

In Phase II the jury awarded $287 million in compensatory damages to the commercial fishermen. After the Court deducted released claims, settlements, and other payments, the balance outstanding was $19,590,257. Meanwhile, most of the Native Alaskan class had settled their compensatory claims for $20 million, and those who opted out of that settlement ultimately settled for a
Ill.

Exxon in this case were excessive as a matter of maritime common law. *2615552

on the basis of the acts of managerial agents, whether company relies primarily on two cases, The Amiable Nancy, 3 Wheat. 546, 4 L.Ed. 456 (1818), and Lake Shore & Michigan Southern R. Co. v. Prentice, 147 U.S. 101, 13 S.Ct. 261, 37 L.Ed. 97 (1893), to argue that this Court's precedents are clear that punitive damages are not available against a shipowner for a shipmaster's recklessness. The former was a suit in admiralty against the owners of The Scourge, a privateer whose officers and crew boarded and plundered a neutral ship, The Amiable Nancy, in upholding an award of compensatory damages, Justice Story observed that,

On appeal, the Court of Appeals for the Ninth Circuit upheld the Phase I jury instruction on corporate liability for acts of managerial agents under Circuit precedent. See In re Exxon Valdez, 270 F.3d, at 1236 (citing Protectus Alpha Nav. Co. v. North Pacific Grain Growers, Inc., 767 F.2d 1379 (C.A.9 1985)).

With respect to the size of the punitive damages award, however, the Circuit remanded twice for adjustments in light of this Court's due process cases before ultimately itself remitting the award to $2.5 billion. See 270 F.3d, at 1246-1247, 472 F.3d 600, 691, 625 (2006) (per curiam), and 490 F.3d 1066, 1068 (2007).

We granted certiorari to consider whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents, whether the Clean Water Act (CWA), 86 Stat. 816, 33 U.S.C. § 1251 et seq. (2000 ed. and Supp. V), forecloses the award of punitive damages in maritime spill cases, and whether the punitive damages awarded against Exxon in this case were excessive as a matter of maritime common law. *2615552 U.S. ----, 128 S.Ct. 492, 169 L.Ed.2d 337 (2007). We now vacate and remand.

II

[1] On the first question, Exxon says that it was error to instruct the jury that a corporation "is responsible for the reckless acts of ... employees ... in a managerial capacity while acting in the scope of their employment." FN3 App. K to Pet. for Cert. 301a. The Courts of Appeals have split on this issue, FN4 and the company relies primarily on two cases, The Amiable Nancy, 3 Wheat. 546, 4 L.Ed. 456 (1818), and Lake Shore & Michigan Southern R. Co. v. Prentice, 147 U.S. 101, 13 S.Ct. 261, 37 L.Ed. 97 (1893), to argue that this Court's precedents are clear that punitive damages are not available against a shipowner for a shipmaster's recklessness. The former was a suit in admiralty against the owners of The Scourge, a privateer whose officers and crew boarded and plundered a neutral ship, The Amiable Nancy, in upholding an award of compensatory damages, Justice Story observed that,

The fact remains, however, that the jury was not required to state the basis of Exxon's recklessness, and the basis for the finding could have been Exxon's own recklessness or just Hazelwood's. Any error in instructing on the latter ground cannot be overlooked, because "when it is impossible to know, in view of the general verdict returned whether the jury imposed liability on a permissible or an impermissible ground, the judgment must be reversed and the case remanded." Greenbelt Cooperative Publishing Assn. v. Bresler, 398 U.S. 6, 11, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970) (internal quotation marks omitted).

FN3. Baker emphasizes that the Phase I jury instructions also allowed the jury to find Exxon independently reckless, and that the evidence for fixing Exxon's punitive liability at Phase III revolved around the recklessness of company officials in supervising Hazelwood and enforcing Exxon's alcohol policies. Thus, Baker argues, it is entirely possible that the jury found Exxon reckless in its own right, and in no way predicated its liability for punitive damages on Exxon's responsibility for Hazelwood's conduct. Brief for Respondents 36-39.


"if this were a suit against the original wrongdoers, it might be proper to ... visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion, that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages." The Amiable Nancy, supra, at 558-559 (emphasis in original).

Exxon takes this statement as a rule barring punitive liability against shipowners for actions by underlings not "directed," "countenanced," or "participated in" by the owners.

Exxon further claims that the Court confirmed this rule in Lake Shore, supra, a railway case in which the Court relied on The Amiable Nancy to announce, as a matter of pre-2616Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), general common law, that "[i]f though a principal is liable to make compensation for [intentional torts] by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate." 147 U.S., at 110, 13 S.Ct. 261. Because maritime law remains federal common law, and because the Court has never revisited the issue, Exxon argues that Lake Shore endures as sound evidence of maritime law. And even if the rule of Amiable Nancy and Lake Shore does not control, Exxon urges the Court to fall back to a modern-day variant adopted in the context of Title VII of the Civil Rights Act of 1964 in Kolstad v. American Dental Assn., 527 U.S. 526, 544, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999), that employers are not subject to punitive damages for discriminatory conduct by their managerial employees if they can show that they maintained and enforced good-faith antidiscrimination policies.

Exxon next says that, whatever the availability of maritime punitive damages at common law, the CWA preempts them. Baker responds with both procedural and merits arguments, and although we do not dispose of the issue on procedure, a short foray into its history is worthwhile as a cautionary tale.

At the pretrial stage, the District Court controlled a flood of motions by an order staying them for any purpose except discovery. The court ultimately adopted a case-management plan allowing receipt of

seven specific summary judgment motions already scheduled, and requiring a party with additional motions to obtain the court's leave. One of the motions scheduled sought summary judgment for Exxon on the ground that the Trans-Alaska Pipeline Authorization Act, 87 Stat. 584, 43 U.S.C. §§ 1651-1656, displaced maritime common law and foreclosed the availability of punitive damages. The District Court denied the motion.

[4][5] After the jury returned the Phase III punitive-damages verdict on September 16, 1994, the parties stipulated that all post-trial Federal Rules of Civil Procedure 50 and 59 motions would be filed by September 30, and the court so ordered. App. 1410-1411. Exxon filed 11 of them, including several seeking a new trial or judgment as a matter of law on one group or another going to the punitive damages award, all of which were denied along with the rest. On October 23, 1995, almost 13 months after the stipulated motions deadline, Exxon moved for the District Court to suspend the motions stay. App. to Brief in Opposition 28a-29a, to allow it to file a "Motion and Renewed Motion ... for Judgment on Punitive Damages Claims" under Rules 49(a) and 58(2) and, "to the extent they may be applicable, pursuant to Rules 50(b), 56(d), 59(a), and 59(e)." App. to Brief in Opposition 30a-31a. Exxon's accompanying memorandum asserted that two recent cases, Glynn v. Roy At Boat Management Corp., 57 F.3d 1495 (C.A.9 1995), and Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (C.A.5 1995), suggested that the rule of maritime punitive damages was displaced by federal statutes, including the CWA. On November 2, 1995, the District Court summarily denied Exxon's request to file the motion, App. to Brief in Opposition 35a, and in January 1996 (following the settlement of the Phase IV compensatory claims) the court entered final judgment.

FN5. Most of the rules under which Exxon sought relief are inapplicable on their face. See Fed. Rules Civ. Proc. 49(a), 56(b), (d), and 58(2). Rules 50 and 59 are less inapt: they allow, respectively, entry of judgment as a matter of law and alteration or amendment of the judgment. (At oral argument, counsel for Exxon ultimately characterized the motion as one under Rule 50. Tr. of Oral Arg. 25.) But to say that Rules 50 and 59 are less inapt than the other Rules is a long way from saying they are apt. A motion under Rule 50(b) is not allowed unless the movant sought relief on similar grounds under Rule 50(a) before the case was submitted to the jury. See Rule 50(b); see also, e.g., Zachar v. Lee, 363 F.3d 70, 73-74 (C.A.1 2004); 9B C. Wright & A. Miller, Federal Practice and Procedure § 2537, pp. 603-604 (3d ed.2008). Rule 59(e) permits a court to alter or amend a judgment, but it "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." 11 C. Wright & A. Miller, Federal Practice and Procedure § 2810.1, pp. 127-128 (2d ed.1995) (footnotes omitted). Where Exxon has been unable to demonstrate that any rule supported the motion, we need not choose the best of the worst, and risk implying that this last-minute motion was appropriate under any rule. Suffice it to say that, whatever type of motion it was supposed to be, it was very, very late.

Exxon renewed the CWA preemption argument before the Ninth Circuit. The Court of Appeals recognized that Exxon had raised the CWA argument for the first time 13 months after the Phase III verdict, but decided that the claim "should not be treated as waived," because Exxon had "consistently argued statutory preemption" throughout the litigation, and the question was of "massive ... significance" given the "ambiguous circumstances" of the case. 270 F.3d, at 1229. On the merits, the Circuit held that the CWA did not preempt maritime common law on punitive damages. Id., at 1230.

[6][7] Although we agree with the Ninth Circuit's conclusion, its reasons for reaching it do not hold up. First, the reason the court thought that the CWA issue was not in fact waived was that Exxon had alleged other statutory grounds for preemption from the outset of the trial. But that is not enough. It is true that "[o]nce a federal claim is properly presented," 2618 a party can make any argument in support of that claim; parties are not limited to the
precise arguments they made below." Yee v. Escondido, 503 U.S. 519, 534, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). But this principle stops well short of legitimizing Exxon's untimely motion. If "statutory preemption" were a sufficient claim to give Exxon license to rely on newly cited statutes anytime it wished, a litigant could add new constitutional claims as he went along, simply because he had "consistently argued" that a challenged regulation was unconstitutional. See id., at 533, 112 S.Ct. 1522 (rejecting substantive due process claim by takings petitioners who failed to preserve it below); Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 277, n. 23, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989) (rejecting due process claim by Eighth-Amendment petitioners).

[8] That said, the motion still addressed the Circuit's discretion, to which the "massive" significance of the question and the "ambiguous circumstances" of the case were said to be relevant. 270 F.3d, at 1229. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below," Singleton v. Wulff, 428 U.S. 106, 120, 96 S.Ct. 2868, 2874, 49 L.Ed.2d 826 (1976), when to deviate from this rule being a matter "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," id., at 121, 96 S.Ct. 2868. We have previously stopped short of stating a general principle to contain appellate courts' discretion, see ibid., and we exercise the same restraint today.298

FN6. We do have to say, though, that the Court of Appeals gave short shrift to the District Court's commendable management of this gargantuan litigation, and if the case turned on the propriety of the Circuit's decision to reach the preemption issue we would take up the claim that it exceeded its discretion. Instead, we will only say that to the extent the Ninth Circuit implied that the unusual circumstances of this case called for an exception to regular practice, we think the record points the other way.

Of course the Court of Appeals was correct that the case was complex and significant, so much so, in fact, that the District Court was fairly required to divide it into four phases, to oversee a punitive-damages class of 32,000 people, and to manage a motions industry that threatened to halt progress completely. But the complexity of a case does not eliminate the value of waiver and forfeiture rules, which ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression. "The reason for the rules is not that litigation is a game, like golf, with arbitrary rules to test the skill of the players. Rather, litigation is a 'winnowing process,' and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided." Poliquin v. Garden Way, Inc., 989 F.2d 527, 531 (C.A.1 1993) (Boudin, J.) (citation omitted). The District Court's sensible efforts to impose order upon the issues in play and the progress of the trial deserve our respect.

[9][10] As to the merits, we agree with the Ninth Circuit that Exxon's late-raised CWA claim should fail. There are two ways to construe Exxon's argument that the CWA's penalties for water pollution, see 33 U.S.C. § 1321 (2000 ed. and Supp. V), preempt the common law punitive-damages remedies at issue here. The company could be saying that any tort action predicated on an oil spill is preempted unless § 1321 expressly preserves it. Section 1321(b) protects "the navigable waters of the United States, adjoining shorelines, ... [and] natural resources" of the United States, subject to a saving clause reserving "obligations ... under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil," § 1321(b). Exxon could be arguing that, because the *2619 saving clause makes no mention of preserving punitive damages for economic loss, they are preempted. But so, of course, would a number of other categories of damages awards that Exxon did not claim were preempted. If Exxon were correct here, there would be preemption of provisions for compensatory damages for thwarting economic activity or, for that matter, compensatory damages for physical, personal injury from oil spills or other water pollution. But we find it too hard to conclude that a statute expressly geared to protecting "water," "shorelines," and "natural resources" was intended to
eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals.

[11][12] Perhaps on account of its overbreadth, Exxon disclaims taking this position, admitting that the CWA does not displace compensatory remedies for consequences of water pollution, even those for economic harms. See, e.g., Reply Brief for Petitioners 15-16. This concession, however, leaves Exxon with the equally untenable claim that the CWA somehow preempts punitive damages, but not compensatory damages, for economic loss. But nothing in the statutory text points to fragmenting the recovery scheme this way, and we have rejected similar attempts to sever remedies from their causes of action. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-256, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). All in all, we see no clear indication of congressional intent to occupy the entire field of pollution remedies, see, e.g., *United States v. Texas*, 507 U.S. 529, 534, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993) (“In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law” (internal quotation marks omitted)); nor for that matter do we perceive that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme, which would point to preemption.\(^\text{FN7}\)

FN7. In this respect, this case differs from two invoked by Exxon, *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), and *Milwaukee v. Illinois*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981), where plaintiffs' common law nuisance claims amounted to arguments for effluent-discharge standards different from those provided by the CWA. Here, Baker's private claims for economic injury do not threaten similar interference with federal regulatory goals with respect to "water," "shorelines," or "natural resources."

IV

[13] Finally, Exxon raises an issue of first impression about punitive damages in maritime law, which falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result. See U.S. Const., Art. III, § 2, cl. 1; see, e.g., *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979) (“Admiralty law is judge-made law to a great extent”); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-361, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959) (constitutional grant "empowered the federal courts ... to continue the development of [maritime] law"). In addition to its resistance to derivative liability for punitive damages and its preemption claim already disposed of, Exxon challenges the size of the remaining $2.5 billion punitive damages award. Other than its preemption argument, it does not offer a legal ground for concluding that maritime law should never award punitive damages, or that none should be awarded in this case, but it does argue that this award exceeds the bounds justified by the punitive damages *2620* goal of deterring reckless (or worse) behavior and the consequently heightened threat of harm. The claim goes to our understanding of the place of punishment in modern civil law and reasonable standards of process in administering punitive law, subjects that call for starting with a brief account of the history behind today's punitive damages.

A

The modern Anglo-American doctrine of punitive damages dates back at least to 1763, when a pair of decisions by the Court of Common Pleas recognized the availability of damages "for more than the injury received." *Wilkes v. Wood*, 100 Eng. Rep. 489, 498 (1763) (Lord Chief Justice Pratt). In *Wilkes v. Wood*, one of the foundations of the Fourth Amendment, exemplary damages awarded against the Secretary of State, responsible for an unlawful search of John Wilkes's papers, were a spectacular £4,000. See generally *Bovd v. United States*, 116 U.S. 616, 626, 6 S.Ct. 524, 29 L.Ed. 746 (1886). And in *Huckle v. Money*, 2 Wils. 205, 206-207, 95 Eng. Rep. 768, 768-769 (K.B.1763), the same judge who is recorded in *Wilkes* gave an opinion upholding a jury's award of £300 (against a government officer again) although "if the jury had been confined by their oath to consider the mere personal injury only, perhaps £20 damages would have been thought damages sufficient."

Awarding damages beyond the compensatory was not, however, a wholly novel idea even then, legal codes from ancient times through the Middle Ages having called for multiple damages for certain especially harmful acts. See, e.g., Code of Hammurabi § 8 (R. Harper ed.1904) (tenfold penalty for stealing the goat of a freed man); Statute of Gloucester, 1278, 6 Edw. I, ch. 5, 1 Stat. at Large 66 (treble damages for waste). But punitive damages were a common law innovation untethered to strict numerical multipliers, and the doctrine promptly crossed the Atlantic, see, e.g., Day v. Woodworth. Early common law cases offered various rationales for punitive-damages awards, which were then generally dubbed "exemplary," implying that these verdicts were justified as punishment for extraordinary wrongdoing, as in Wilke's case. Sometimes, though, the extraordinary element emphasized was the damages award itself, the punishment being "for example's sake," Tullidge v. Wade, 3 Wils. 18, 19, 95 Eng. Rep. 909 (K.B.1769) (Lord Chief Justice Wilmot), "to deter from any such proceeding for the future," Wilkes, supra, at 19, 98 Eng. Rep., at 498-499. See also Corwll, supra, at 77 (instructing the jury "to give damages for example's sake, to prevent such offences in [the] future").

A third historical justification, which showed up in some of the early cases, has been noted by recent commentators, and that was the need "to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437-438, n. 11, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (citing, inter alia, Note, Exemplary Damages in the Law of Torts, 70 Harv. L.Rev. 517 (1957)). But see Sebok, What Did Punitive Damages Do? 78 Chi.-Kent L.Rev. 163, 204 (2003) (arguing that "punitive damages have never served the compensatory function attributed to them by the Court in Cooper"). As the century progressed, and "the types of compensatory damages available to plaintiffs ... broadened," Cooper Industries, supra, at 1678, the consequence was that American courts tended to speak of punitive damages as separate and distinct from compensatory damages, see, e.g., Day, supra, at 371 (punitive damages "hav[e] in view the enormity of [the] offence rather than the measure of compensation to the plaintiff"). See generally 1 L. Schlueter, Punitive Damages §§ 1.3(C)-(D), 1.4(A) (5th ed.2005) (hereinafter Schlueter) (describing the "almost total eclipse of the compensatory function" in the decades following the 1830s).

FN8. Indeed, at least one 19th-century treatise writer asserted that there was "no doctrine of authentically 'punitive' damages" and that "judgments that ostensibly included punitive damages [were] in reality no more than full compensation." Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 25, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (SCALIA, J., concurring in judgment) (citing 2 S. Greenleaf, Law of Evidence 235, n. 2 (13th ed. 1876)). "This view," however, "was not widely shared." Haslip, supra, at 25, 111 S.Ct. 1032 (SCALIA, J., concurring in judgment) (citing other prominent 19th-century treatises). Whatever the actual importance of the subterfuge for compensation may have been, it declined.

[14][15] Regardless of the alternative rationales over the years, the consensus today is that punitive are aimed not at compensation but principally at retribution and deterring harmful conduct. This consensus informs the doctrine in most modern American jurisdictions, where juries are customarily instructed on twin goals of punitive awards. See, e.g., Cal. Jury Instr., Civ. No. 14.72.2 (2008) ("You must now determine whether you should award punitive damages against defendant[s] ... for the sake of example and by way of punishment"); N.Y. Pattern Jury Instr., Civil, No. 2:278 (2007) ("The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant ... and thereby to discourage the defendant ... from acting in a similar way in the future"). The prevailing rule in American courts also limits punitive damages to cases of what the Court in Day, supra, at 371, spoke of as
enormity," where a defendant's conduct is "outrageous," 4 Restatement § 908(2), owing to "gross negligence," "willful, wanton, and reckless indifference for the rights of others," or behavior even more deplorable, 1 Schlueter § 9.3(A),[footnote]


FN10. These standards are from the torts context; different standards apply to other causes of action.

[16][17] Under the umbrellas of punishment and its aim of deterrence, degrees of relative blameworthiness are apparent. Reckless conduct is not intentional or malicious, nor is it necessarily callous toward the risk of harming others, as opposed to unheedful of it. See, e.g., 2 Restatement § 2622§ 500, Comment a, pp. 587-588 (1964) ("Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know, of facts which create a high degree of risk of ... harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so"). Action taken or omitted in order to augment profit represents an enhanced degree of punishable culpability, as of course does willful or malicious action, taken with a purpose to injure. See 4 id., § 908, Comment e, p. 466 (1979) ("In determining the amount of punitive damages, ... the trier of fact can properly consider not merely the act itself but all the circumstances including the motives of the wrongdoer ... "); cf. Alaska Stat. § 09.17.020(e) (2006) (higher statutory limit applies where conduct was motivated by financial gain and its adverse consequences were known to the defendant); Ark.Code Ann. § 16-55-208(b) (2005) (statutory limit does not apply where the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage).

[18] Regardless of culpability, however, heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect (increasing chances of getting away with it), see, e.g., BMW of North America, Inc. v. Gore, 517 U.S. 559, 582, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) ("A higher ratio may also be justified in cases in which the injury is hard to detect"); or when the value of injury and the corresponding compensatory award are small (providing low incentives to sue), see, e.g., ibid. ("[L]ow awards of compensatory damages may properly support a higher ratio ... if, for example, a particularly egregious act has resulted in only a small amount of economic damages"); 4 Restatement § 908, Comment c, p. 465 ("Thus an award of nominal damages ... is enough to support a further award of punitive damages, when a tort, ... is committed for an outrageous purpose, but no significant harm has resulted"). And, with a broadly analogous object, some regulatory schemes provide by statute for multiple recovery in order to induce private litigation to supplement official enforcement that might fall short if unaided. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) (discussing antitrust treble damages).

C

State regulation of punitive damages varies. A few States award them rarely, or not at all. Nebraska bars punitive damages entirely, on state constitutional grounds. See, e.g., Distinctive Printing and Packaging Co. v. Cox, 232 Neb. 846, 857, 443

As for procedure, in most American jurisdictions the amount of the punitive award is generally determined by a jury in the first instance, and that “determination is then reviewed by trial and appellate courts to ensure that it is reasonable.” Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); see also Honda Motor Co. v. Oberg, 512 U.S. 415, 421-426, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). Many States have gone further by imposing statutory limits on punitive awards, in the form of absolute monetary caps, see, e.g., Va.Code Ann. § 8.01-38.1 (Lexis 2007) ($350,000 cap), a maximum ratio of punitive to compensatory damages, see, e.g., Ohio Rev.Code Ann. § 2315.21(D)2(a) (Lexis 2001) (2:1 ratio in most tort cases), or, frequently, some combination of the two, see, e.g., Alaska Stat. § 09.17.020(f) (2006) (greater of 3:1 ratio or $300,000 in most actions). The States that rely on a multiplier have adopted a variety of ratios, ranging from 5:1 to 1:1.\footnote{FN12}

Despite these limitations, punitive damages overall are higher and more frequent in the United States than anywhere else. See, e.g., Gotanda, Punitive Damages: A Comparative Analysis, 42 Colum. J. Transnatl’l L. 391, 421 (2004); 2 Schlueter § 22.0. In England and Wales, punitive, or exemplary, damages are available only for oppressive, arbitrary, or unconstitutional action by government servants; injuries designed by the defendant to yield a larger profit than the likely cost of compensatory damages; and conduct for which punitive damages are expressly authorized by statute. Rookees v. Barnard, [1964] 1 All E.R. 367, 410-411 (H.L.). Even in the circumstances where punitive damages are allowed, they are subject to strict, judicially imposed guidelines. The Court of Appeal in Thompson v. Commissioner of Police of Metropolis, [1998] Q.B. 498, 518, said that a ratio of more than three times the amount of compensatory damages will rarely be appropriate; awards of less than £5,000 are likely unnecessary; awards of £25,000 should be exceptional; and £50,000 should be considered the top. \footnote{FN11} A like procedure was followed in this case, without objection.

For further contrast with American practice, Canada and Australia allow exemplary damages for outrageous conduct, but awards are considered extraordinary and rarely issue. See 2 Schlueter §§ 22.1(B), (D). Noncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries as France, Germany, Austria, and Switzerland. See id., §§ 22.2(A)-(C), (E). And some

legal systems not only decline to recognize punitive damages themselves but refuse to enforce foreign punitive judgments as contrary to public policy. See, *2624 e.g., Gotanda, Charting Developments Concerning Punitive Damages: Is the Tide Changing? 45 Colum. J. Transnat'l L. 507, 514, 518, 528 (2007) (noting refusals to enforce judgments by Japanese, Italian, and German courts, positing that such refusals may be on the decline, but concluding, “American parties should not anticipate smooth sailing when seeking to have a domestic punitive damages award recognized and enforced in other countries”).

D

American punitive damages have been the target of audible criticism in recent decades, see, e.g., Note, Developments, The Paths of Civil Litigation, 113 Harv. L.Rev. 1783, 1784-1788 (2000) (surveying criticism), but the most recent studies tend to undercut much of it, see id., at 1787-1788. A survey of the literature reveals that discretion to award punitive damages has not mass-produced runaway awards, and although some studies show the dollar amounts of punitive-damages awards growing over time, even in real terms, FN14 by most accounts the median ratio of punitive to compensatory awards has remained less than 1:1. FN15 Nor do the data substantiate a marked increase in the percentage of cases with punitive awards over the past several decades. FN16 The figures thus show an overall*2625 restraint and suggest that in many instances a high ratio of punitive to compensatory damages is substantially greater than necessary to punish or deter.


FN15. See, e.g., Cohen 8 (compiling data from the Nation’s 75 most populous counties, and finding that in jury trials where the plaintiff prevailed, the percentage of cases involving punitive awards was 6.1% in 1992 and 5.6% in 2001); Financial Injury Jury Verdicts 307 (finding a statistically significant decrease in the percentage of
verdicts in “financial injury” cases that include a punitive damage award, from 15.8% in the early 1980s to 12.7% in the early 1990s). But see Punitive Damages: Empirical Findings 9 (finding an increase in the percentage of civil trials resulting in punitive damage awards in San Francisco and Cook Counties between 1960 and 1984).

One might posit that ill effects of punitive damages are clearest not in actual awards but in the shadow that the punitive regime casts on settlement negotiations and other litigation decisions. See, e.g., Financial Injury Jury Verdicts 287; Polinsky, Are Punitive Damages Really Insignificant, Predictable, and Rational? 26 J. Legal Studies 663, 664-671 (1997). But here again the data have not established a clear correlation. See, e.g., Eaton, Mustard, & Talarico, The Effects of Seeking Punitive Damages on the Processing of Tort Claims, 34 J. Legal Studies 343, 357-353, 354, 365 (2005) (studying data from six Georgia counties and concluding that “the decision to seek punitive damages has no statistically significant impact” on “whether a case that was disposed was done so by trial or by some other procedure, including settlement,” or “whether a case that was disposed by means other than a trial was more likely to have been settled”); Kritzer & Zemans, The Shadow of Punitives, 1998 Wis. L. Rev. 157, 160 (1998) (noting the theory that punitive damages cast a large shadow over settlement negotiations, but finding that “with perhaps one exception, what little systematic evidence we could find does not support the notion” (emphasis deleted)).

The real problem, it seems, is the stark unpredictability of punitive awards. Courts of law are concerned with fairness as consistency, and evidence that the median ratio of punitive to compensatory awards falls within a reasonable zone, or that punitive awards are infrequent, fails to tell us whether the spread between high and low individual awards is acceptable. The available data suggest it is not. A recent comprehensive study of punitive damages awarded by juries in state civil trials found a median ratio of punitive to compensatory awards of just $0.62:1$, but a mean ratio of $2.90:1$ and a standard deviation of $13.81$. Juries, Judges, and Punitive Damages 269. Even to those of us unsophisticated in statistics, the thrust of these figures is clear: the spread is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories. The distribution of awards is narrower, but still remarkable, among punitive damages assessed by judges: the median ratio is $0.66:1$, the mean ratio is $1.60:1$, and the standard deviation is $4.54$. Ibid. Other studies of some of the same data show that fully $14\%$ of punitive awards in 2001 were greater than four times the compensatory damages, see Cohen 5, with $18\%$ of punitives in the 1990s more than trebling the compensatory damages, see Ostrom, Rottman, & Goedt, A Step Above Anecdote: A Profile of the Civil Jury in the 1990s, 79 Judicature 233, 240 (1996). And a study of “financial injury” cases using a different data set found that $34\%$ of the punitive awards were greater than three times the corresponding compensatory damages. Financial Injury Jury Verdicts 333.

FN16. This study examined “the most representative sample of state court trials in the United States,” involving “tort, contract, and property cases disposed of by trial in fiscal year 1991-1992 and then calendar years 1996 and 2001. The three separate data sets cover state courts of general jurisdiction in a random sample of 46 of the 75 most populous counties in the United States.” Juries, Judges, and Punitive Damages 267. The information was “gathered directly” from state-court clerks’ offices and the study did “not rely on litigants or third parties to report.” Ibid.

Starting with the premise of a punitive-damages regime, these ranges of variation might be acceptable or even desirable if they resulted from judges’ and juries’ refining their judgments to reach a generally accepted optimal level of penalty and deterrence in cases involving a wide range of circumstances, while producing fairly consistent results in cases with similar facts. Cf. TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 457-458, 113 S.Ct.
2711, 125 L.Ed.2d 366 (1993) (plurality opinion). But anecdotal evidence suggests*2626 that nothing of that sort is going on. One of our own leading cases on punitive damages, with $4 million verdict by an Alabama jury, noted that a second Alabama case with strikingly similar facts produced “a comparable amount of compensatory damages” but “no punitive damages at all.” See Gore, 517 U.S., at 565, n. 8, 116 S.Ct. 1589. As the Supreme Court of Alabama candidly explained, “the disparity between the two jury verdicts ... [w]as a reflection of the inherent uncertainty of the trial process.” BMW of North America, Inc. v. Gore, 619 So.2d 619, 626 (1994) (per curiam). We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances. FN17

FN17. The Court is aware of a body of literature running parallel to anecdotal reports, examining the predictability of punitive awards by conducting numerous “mock juries,” where different “juries” are confronted with the same hypothetical case. See, e.g., C. Sunstein, R. Hastie, J. Payne, D. Schkade, W. Viscusi, Punitive Damages: How Juries Decide (2002); Schkade, Sunstein, & Kahneman, Deliberating About Dollars: The Severity Shift, 100 Colum. L.Rev. 1140 (2000); Hastie, Schkade, & Payne, Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards, 23 Law & Hum. Behav. 445 (1999); Sunstein, Kahneman, & Schkade, Assessing Punitive Damages (with Notes on Cognition and Valuation in Law), 107 Yale L.J. 2071 (1998). Because this research was funded in part by Exxon, we decline to rely on it.

Today's enquiry differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process; we are examining the verdict in the exercise of federal maritime common law authority, which precedes and should obviate any application of the constitutional standard. Our due process cases, on the contrary, have all involved awards subject in the first instance to state law. See, e.g., id., at 414, 123 S.Ct. 1513 (fraud and intentional infliction of emotional distress under Utah law); Gore, supra, at 563, and n. 3, 116 S.Ct. 1589 (fraud under Alabama law); TXO, supra, at 452, 113 S.Ct. 2711 (plurality opinion) (slandering of title under West Virginia law); Haslip, 499 U.S., at 7, 111 S.Ct. 1032 (fraud under Alabama law). These, as state-law cases, could provide no occasion to consider a “common-law standard of excessiveness,” Browning-Ferris Industries, 492 U.S., at 279, 109 S.Ct. 2909, and the only matter of federal law within our appellate authority was the constitutional due process issue.

[20] Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law*2627 remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute. Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another. Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes's “bad man” can look ahead with some ability to know what the stakes are in choosing one course of action or another. See The Path of the Law, 10 Harv. L.Rev. 457, 459 (1897). And when the bad man's counterparts turn up

from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage. Cf. Koon v. United States, 518 U.S. 81, 113, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) (noting the need “to reduce unjustified disparities in criminal sentencing “and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice”). The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances.

F

With that aim ourselves, we have three basic approaches to consider, one verbal and two quantitative. As mentioned before, a number of state courts have settled on criteria for judicial review of punitive-damages awards that go well beyond traditional “shock the conscience” or “passion and prejudice” tests. Maryland, for example, has set forth a nonexclusive list of nine review factors under state common law that include “degree of heinousness,” “the deterrence value of [the award],” and “[w]hether [the punitive award] bears a reasonable relationship to the compensatory damages awarded.” Bowden v. Calдор, Inc., 350 Md. 4, 25-39, 710 A.2d 267, 277-284 (1998). Alabama has seven general criteria, such as “actual or likely harm [from the defendant's conduct],” “degree of reprehensibility,” and “[i]f the wrongful conduct was profitable to the defendant.” Green Oil Co. v. Hornsbv, 539 So.2d 218, 223-224 (1989) (internal quotation marks omitted). But see McClain v. Metabolife Int'l, Inc., 259 F.Supp.2d 1225, 1236 (N.D.Ala.2003) (noting but not deciding claim that post-trial review under Green Oil “is unconstitutionally vague and inadequate”).

These judicial review criteria are brought to bear after juries render verdicts under instructions offering, at best, guidance no more specific for reaching an appropriate penalty. In Maryland, for example, which allows punitive damages for intentional torts and conduct characterized by “actual malice,” U.S. Gypsum Co. v. Mayor and City Council of Baltimore, 336 Md. 145, 185, 647 A.2d 405, 424-425 (1994), juries may be instructed that

"An award for punitive damages should be:

“(1) In an amount that will deter the defendant and others from similar conduct.

“(2) Proportionate to the wrongfulness of the defendant's conduct and the defendant's ability to pay.

“(3) But not designed to bankrupt or financially destroy a defendant.” Md. Pattern Jury Instr., Civil, No. 10:13 (4th ed.2007).

In Alabama, juries are instructed to fix an amount after considering “the character *2628 and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs.” 1 Ala. Pattern Jury Instr., Civil, No. § 23.21 (Supp.2007).

These examples leave us skeptical that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers. Instructions can go just so far in promoting systemic consistency when awards are not tied to specifically proven items of damage (the cost of medical treatment, say), and although judges in the States that take this approach may well produce just results by dint of valiant effort, our experience with attempts to produce consistency in the analogous business of criminal sentencing leaves us doubtful that anything but a quantified approach will work. A glance at the experience there will explain our skepticism.

[21][22] The points of similarity are obvious. “[P]unitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law.” Browning-Ferris Industries, 492 U.S., at 275, 109 S.Ct. 2909. See also 1977 Restatement § 208, Comment a, at 464 (purposes of punitive damages are “the same” as “that of a fine imposed after a conviction of a crime”); 18 U.S.C. § 3553(a)(2) (requiring sentencing courts to consider, inter alia, “the need for the sentence imposed ... to provide just punishment for the offense” and “to afford adequate deterrence to criminal conduct”); United States Sentencing Commission, Guidelines Manual § 1A1.1, comment. (Nov.2007).
The importance of this for us is that in the old federal system, situated offenders were sentenced to, and did within a wide range, under which sentencing system of general standards the cohort of instead it became a system of detailed guidelines tied to the criminal law, rather like setting a maximum term of years. The trouble is, though, that there is no "standard" tort or contract injury, making it difficult to settle upon a particular dollar figure as appropriate across the board. And of course a judicial selection of a dollar cap would carry a serious drawback; a legislature can pick a figure, index it for inflation, and revisit its provision whenever there seems to be a need for further tinkering, but a court cannot say when an issue will show up on the docket again. See, e.g., *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 546-547, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983) (declining to adopt a fixed formula to account for inflation in discounting future wages to present value, in light of the unpredictability of inflation rates and variation among lost-earnings cases).

The more promising alternative is to leave the effects of inflation to the jury or judge who assesses the value of actual loss, by pegging punitive to compensatory damages using a ratio or maximum multiple. See, e.g., 2 ALI Enterprise Responsibility for Personal Injury: Reporters' Study 258 (1991) (hereinafter ALI Reporters' Study) ("[T]he compensatory award in a successful case should be the starting point in calculating the punitive award"); ABA, Report of Special Comm. on Punitive Damages, Section of Litigation, Punitive Damages: A Constructive Examination 64-66 (1986) (recommending a presumptive punitive-to-compensatory damages ratio). As the earlier canvass...
of state experience showed, this is the model many States have adopted, see supra, at 2623, and n. 12, and Congress has passed analogous legislation from time to time, as for example in providing treble damages in antitrust, racketeering, patent, and trademark actions, see 15 U.S.C. §§ 15, 1117 (2000 ed. and Supp. V); 18 U.S.C. § 1964(c); 35 U.S.C. § 284 FN20 And of course the potential relevance of the ratio between compensatory and punitive damages is indisputable, being a central feature in our due process analysis. See, e.g., State Farm, 538 U.S., at 425, 123 S.Ct. 1513; Gore, 517 U.S., at 580, 116 S.Ct. 1589.

FN20. There are State counterparts of these federal statutes. See, e.g., Conn. Gen.Stat. § 52-560 (2007) (cutting or destroying a tree intended for use as a Christmas tree punishable by a payment to the injured party of five times the tree's value); Mass. Gen. Laws, ch. 91, § 59A (West 2006) (discharging crude oil into a lake, river, tidal water, or flats subjects a defendant to double damages in tort).

Still, some will murmur that this smacks too much of policy and too little of principle. Cf. Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (C.A.2 1961). But the answer rests on the fact that we are acting here in the position of a common law court of last resort, faced with a perceived defect in a common law remedy. Traditionally, courts have accepted primary responsibility for reviewing punitive damages and thus for their evolution, and if, in the absence of legislation, judicially derived standards leave the door open to outlier punitive-damages awards, it is hard to see how the judiciary can wash its hands of a problem it created, simply by calling quantified standards legislative. See State Farm, supra, at 438, 123 S.Ct. 1513 (GINSBURG, J., dissenting) ("In a legislative scheme or a state high court's design to cap punitive damages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned"); 2 ALI Reporters' Study 257 (recommending adoption of ratio, "probably legislatively, although possibly judicially").

FN21. To the extent that Justice STEVENS suggests that the very subject of remedies should be treated as congressional in light of the number of statutes dealing with remedies, see post, at 2634 - 2636 (opinion concurring in part and dissenting in part), we think modern-day maritime cases are to the contrary and support judicial action to modify a common law landscape largely of our own making. The character of maritime law as a mixture of statutes and judicial standards, "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules," East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 865, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986), accounts for the large part we have taken in working out the governing maritime tort principles. See, e.g., ibid. ("recognizing products liability ... as part of the general maritime law"); American Export Lines, Inc. v. Alvare, 446 U.S. 274, 100 S.Ct. 1673, 64 L.Ed.2d 284 (1980) (recognizing cause of action for loss of consortium); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) (recognizing cause of action for wrongful death). And for the very reason that our exercise of maritime jurisdiction has reached to creating new causes of action on more than one occasion, it follows that we have a free hand in dealing with an issue that is "entirely a remedial matter." Id., at 382, 90 S.Ct. 1772. The general observation we made in United States v. Reliable Transfer Co., 421 U.S.
Fla. 1. Weekly Fed. (Cite as: 128 S.Ct. 2605 FOR Sofec, Inc. defendants' compensatory liability).

McDermott, Inc. (adopting proportionate-fault rule for defendants proximately causing an injury); calculation of nonsettling maritime tort.

Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and Congress has largely left to this Court the responsibility for policy. But the formulating flexible and fair remedies in maritime collision cases is a task for Congress and not for this Court. But the absence of federal legislation constraining punitive damages does not imply a congressional decision that there should be no quantified rule, cf. Rapanos v. United States, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (plurality opinion) (noting the Court's "oft-expressed skepticism towards reading the tea leaves of congressional inaction"). Where there is a need for a new remedial maritime rule, past precedent argues for setting a judicially derived standard, subject of course to congressional revision. See, e.g., Reliable Transfer, supra, at 409, 95 S.Ct. 1708.

Indeed, the compensatory remedy sought in this case is itself entirely a judicial creation. The common law traditionally did not compensate purely economic harms, unaccompanied by injury to person or property. See K. Abraham, Forms and Functions of Tort Law 247-248 (3d ed.2007); see, e.g., Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449, 45 S.Ct. 157, 69 L.Ed. 372 (1925) (imposing rule in maritime context). But "[t]he courts have ... occasionally created exceptions to the rule. Perhaps the most noteworthy involve cases in which there has been natural-resource damage for which no party seems to have a cause of action." Abraham, supra, at 249 (discussing Union Oil Co. v. Oppen, 501 F.2d 558 (C.A.9 1974) (recognizing exception for commercial fishermen). We raise the point not to express agreement or disagreement with the Ninth Circuit rule but to illustrate the entirely judge-made nature of the landscape we are surveying.

To be sure, "Congress retains superior authority in these matters," and "[i]n this era, an admiralty court should look primarily to these legislative enactments for policy guidance.” Miles v. Apex Marine Corp., 498 U.S. 19, 27, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). But we may not slough off our responsibilities for common law remedies because Congress has not made a first move, and the absence of federal legislation constraining punitive damages does not imply a congressional decision that there should be no quantified rule, cf. Rapanos v. United States, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (plurality opinion) (noting the Court's "oft-expressed skepticism towards reading the tea leaves of congressional inaction"). Where there is a need for a new remedial maritime rule, past precedent argues for setting a judicially derived standard, subject of course to congressional revision. See, e.g., Reliable Transfer, supra, at 409, 95 S.Ct. 1708.

*2631 Although the legal landscape is well populated with examples of ratios and multipliers expressing policies of retribution and deterrence, most of them suffer from features that stand in the way of borrowing them as paradigms of reasonable limitations suited for application to this case. While a slim majority of the States with a ratio have adopted 3:1, others see fit to apply a lower one, see, e.g., Colo.Rev.Stat. Ann. § 13-21-102(1)(a) (2007) (1:1); Ohio Rev.Code Ann. § 2315.21(D)(2)(a) (Lexis 2005) (2:1), and a few have gone higher, see, e.g., Mo. Ann. Stat. § 510.265(1) (Supp.2008) (5:1). Judgments may differ about the weight to be given to the slight majority of 3:1 States, but one feature of the 3:1 schemes dissuades us from selecting it here. With a few statutory exceptions, generally for intentional infliction of physical injury or other harm, see, e.g., Ala.Code § 6-11-21(i) (2005); Ark.Code Ann. § 16-55-208(b) (2005), the States with 3:1 ratios apply them across the board (as do other States using different fixed multipliers). That is, the upper limit is not directed to cases like this one, where the tortious action was worse than negligent but less than malicious, exposing the tortfeasor to certain regulatory sanctions and inevitable damage actions; exposing the tortfeasor to certain regulatory sanctions and inevitable damage actions; the 3:1 ratio in these States also applies to awards in quite different cases involving some of the most egregious conduct, including malicious behavior and
dangerous activity carried on for the purpose of increasing a tortfeasor's financial gain.\footnote{22} We confront, *2632 instead, a case of reckless action, profitless to the tortfeasor, resulting in substantial recovery for substantial injury. Thus, a legislative judgment that 3:1 is a reasonable limit overall is not a judgment that 3:1 is a reasonable limit in this particular type of case.

\footnote{22} Although the jury heard evidence that Exxon may have felt constrained not to give Hazelwood a shoreside assignment because of a concern that such a course might open it to liabilities in personnel litigation the employee might initiate, see, e.g., App. F to Pet. for Cert. 256a, such a consideration, if indeed it existed, hardly constitutes action taken with a specific purpose to cause harm at the expense of an established duty.

\footnote{23} We thus treat this case categorically as one of recklessness, for that was the jury's finding. But by making a point of its contrast with cases falling within categories of even greater fault we do not mean to suggest that Exxon's and Hazelwood's failings were less than reprehensible.

\footnote{24} Two of the States with 3:1 ratios do provide for slightly larger awards in actions involving this type of strategic financial wrongdoing, but the exceptions seem to apply to only a subset of those cases. See Alaska Stat. § 09.17.020(e) (2006) (where the defendant's conduct was motivated by financial gain and the adverse consequences of the conduct were actually known by the defendant or the person responsible for making policy decisions on behalf of the defendant, the normal limit is replaced by the greater of four times the compensatory damages, four times the aggregate financial gain the defendant received as a result of its misconduct, or $7 million); Fla. Stat. §§ 768.73(1)(b), (c) (2007) (normal limit replaced by greater of 4:1 or $2 million where defendant's wrongful conduct was motivated solely by unreasonable financial gain and the unreasonably dangerous nature of the conduct, together with the high likelihood of injury, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant).

For somewhat different reasons, the pertinence of the 2:1 ratio adopted by treble-damages statutes (offering compensatory damages plus a bounty of double that amount) is open to question. Federal treble-damages statutes govern areas far afield from maritime concerns (not to mention each other); \footnote{22} the relevance of the governing rules in patent or trademark cases, say, is doubtful at best. And in some instances, we know that the considerations that went into making a rule have no application here. We know, for example, that Congress devised the treble damages remedy for private antitrust actions with an eye to supplementing official enforcement by inducing private litigation, which might otherwise have been too rare if nothing but compensatory damages were available at the end of the day. See, e.g., \textit{Reiter}, 442 U.S., at 344, 99 S.Ct. 2326. That concern has no traction here, in this case of staggering damage inevitably provoking governmental enforcers to indict and any number of private parties to sue. To take another example, although \textit{18 U.S.C. § 3571(d)} provides for a criminal penalty of up to twice a crime victim's loss, this penalty is an alternative to other specific fine amounts which courts may impose at their option, see §§ 3571(a)-(e), a fact that makes us wary of reading too much into Congress's choice of ratio in one provision. State environmental treble-damages schemes offer little more support: for one thing, insofar as some appear to punish even negligence, see, e.g., \textit{Mass. Gen. Laws}, ch. 130, § 27, while others target only willful conduct, see, e.g., \textit{Del.Code Ann.}, Tit. 25, § 1401 (1989), some undershoot and others may overshoot the target here. For another, while some States have chosen treble damages, others punish environmental harms at other multiples. See, e.g., \textit{N.H.Rev.Stat. Ann. § 146-A:10} (2005) (damages of one-and-a-half times the harm caused to private property by oil discharge); \textit{Minn.Stat. Ann. § 115A.99} (2005) (civil penalty of 2 to 5 times the costs of removing unlawful solid waste). All in all, the legislative signposts do not point the way clearly to 2:1 as a sound indication of a reasonable limit.
There is better evidence of an accepted limit of reasonable civil penalty, however, in several studies mentioned before, showing the median ratio of punitive to compensatory verdicts, reflecting what juries and judges have considered reasonable across many hundreds of punitive awards. See supra, at 2624 - 2625, and n. 14. We think it is fair to assume that the greater share of the verdicts studied in these comprehensive collections reflect reasonable judgments about the economic penalties appropriate in their particular cases.

[26][27] These studies cover cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions. The data put the median ratio for the entire gamut of circumstances at less than 1:1, see supra, at 2624 - 2625, and n. 14, meaning that the compensatory award exceeds the punitive award in most cases. In a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum (cases like this one, without intentional or malicious conduct, and without behavior driven primarily by desire for gain, for example) and cases (again like this one) without the modest economic harm or odds of detection that have opened the door to higher awards. It also seems fair to suppose that most of the unpredictable outlier cases that call the fairness of the system into question are above the median; in theory a factfinder's deliberation could go awry to produce a very low ratio, but we have no basis to assume that such a case would be more than a sport, and the cases with serious constitutional issues coming to us have naturally been on the high side, see, e.g., State Farm, 538 U.S., at 425 - 426; 123 S.Ct. 1513 (ratio of 145:1); Gore, 517 U.S., at 582, 116 S.Ct. 1589 (ratio of 500:1). On these assumptions, a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped. Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases FN26. See supra, at 2624, n. 14, for the spread among studies.

FN26. See supra, at 2624, n. 14, for the spread among studies.

FN27. The reasons for this conclusion answer Justice STEVENS's suggestion, post, at 2638, that there is an adequate restraint in appellate abuse-of-discretion review of a trial judge's own review of a punitive jury award (or of a judge's own award in nonjury cases). We cannot see much promise of a practical solution to the outlier problem in this possibility. Justice STEVENS would find no abuse of discretion in allowing the $2.5 billion balance of the jury's punitive verdict here, and yet that is about five times the size of the award that jury practice and our judgment would signal as reasonable in a case of this sort.

The dissent also suggests that maritime tort law needs a quantified limit on punitive awards less than tort law generally because punitives may mitigate maritime law's less generous scheme of compensatory damages. Post, at 2636 - 2637. But the instructions in this case did not allow the jury to set punitives on the basis of any such consideration, see Jury Instruction No. 21, App. to Brief in Opposition 12a (“The purposes for which punitive damages are awarded are: (1) to punish a wrongdoer for extraordinary misconduct; and (2) to warn defendants and others and deter them from doing the same”), and the size of the underlying compensatory damages does not bespeak economic inadequacy; the case, then, does not support an argument that maritime compensatory awards need supplementing.

And this Court has long held that "p]unitive damages by definition are not
intended to compensate the injured party, but rather to punish the tortfeasor ... and to deter him and others from similar extreme conduct," *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981); see *supra*, at 2620 - 2621. Indeed, any argument for more generous punitive damages in maritime cases would call into question the maritime applicability of the constitutional limit on punitive damages as now understood, for we have tied that limit to a conception of punitive damages awarded entirely for a punitive, not quasi-compensatory, purpose. See, e.g., *Philip Morris USA v. Williams*, 549 U.S. 346, 352, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007) ("This Court has long made clear that ‘[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition’ " (quoting *Gore*, 517 U.S. at 568, 116 S.Ct. 1589)); *State Farm*, 538 U.S. at 416, 123 S.Ct. 1513 ("Punitive damages ... are aimed at deterrence and retribution"); *Cooper Industries*, 532 U.S. at 432, 121 S.Ct. 1678 ("Compensatory damages and punitive damages ... serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered .... The latter ... operate as ‘private fines’ intended to punish the defendant and to deter future wrongdoing").

*2634 The provision of the CWA respecting daily fines confirms our judgment that anything greater would be excessive here and in cases of this type. Congress set criminal penalties of up to $25,000 per day for negligent violations of pollution restrictions, and up to $50,000 per day for knowing ones. 33 U.S.C. §§ 1319(c)(1), (2). Discretion to double the penalty for knowing action compares to discretion to double the civil liability on conduct going beyond negligence and meriting punitive treatment. And our explanation of the constitutional upper limit confirms that the 1:1 ratio is not too low. In *State Farm*, we said that a single-digit maximum is appropriate in all but the most exceptional of cases, and "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *538 U.S.*, at 425, 123 S.Ct. 1513 FN28

FN28. The criterion of "substantial" takes into account the role of punitive damages to induce legal action when pure compensation may not be enough to encourage suit, a concern addressed by the opportunity for a class action when large numbers of potential plaintiffs are involved: in such cases, individual awards are not the touchstone, for it is the class option that facilitates suit, and a class recovery of $500 million is substantial. In this case, then, the constitutional outer limit may well be 1:1.

V

[28] Applying this standard to the present case, we take for granted the District Court's calculation of the total relevant compensatory damages at $507.5 million. See *In re Exxon Valdez*, 236 F.Supp.2d 1043, 1063 (D.Alaska 2002). A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount.

We therefore vacate the judgment and remand the case for the Court of Appeals to remit the punitive damages award accordingly.

*It is so ordered.*

Justice ALITO took no part in the consideration or decision of this case.
Justice SCALIA, with whom Justice THOMAS joins, concurring.
I concur in the Court's opinion, which I join.

I agree with the argumentation based upon those prior holdings, I continue to believe the holdings were in error. See *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 429, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (SCALIA, J., dissenting).

Justice STEVENS, concurring in part and dissenting in part.
While I join Parts I, II, and III of the Court's opinion, I believe that Congress, rather than this Court, should make the empirical judgments expressed in Part IV.
While maritime law “is judge-made law to a great extent,” ante, at 2619 (quoting Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 259, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979)), it is also statutory law to a great extent; indeed, “[m]aritime tort law is now dominated by federal statute.” Miles v. Apex Marine Corp., 498 U.S. 19, 36, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). For that reason, when we are faced with a choice between performing the traditional task of appellate judges reviewing the acceptability of an award of punitive damages, on the one hand, and embarking on a new lawmaking venture, on the other, we “should carefully consider whether [we], or a legislative body, are better equipped to perform the task at hand.” Boyle v. United Technologies Corp., 487 U.S. 500, 531, 108 S.Ct. 2510; 101 L.Ed.2d 521 (1988) (STEVENS, J., dissenting).

Evidence that Congress has affirmatively chosen not to restrict the availability of a particular remedy favors adherence to a policy of judicial restraint in the absence of some special justification. The Court not only fails to offer any such justification, but also ignores the particular features of maritime law that may counsel against imposing the sort of limitation the Court announces today. Applying the traditional abuse-of-discretion standard that is well grounded in the common law, I would affirm the judgment of the Court of Appeals.

I

As we explained in Miles v. Apex Marine Corp., 498 U.S., at 27, 111 S.Ct. 317, “an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.” In light of the many statutes governing liability under admiralty law, the absence of any limitation on an award of the sort at issue in this case suggests that Congress would not wish us to create a new rule restricting the liability of a wrongdoer like Exxon.

For example, the Limitation of Shipowners’ Liability Act (Limitation Act), 46 U.S.C.App. § 183[,] a statute that has been part of the fabric of our law since 1851, provides in relevant part:


“The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put onboard of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.” § 183(a) (emphasis added).

This statute operates to shield from liability shipowners charged with wrongdoing committed without their privity or knowledge; the Limitation Act’s protections thus render large punitive damages awards functionally unavailable in a wide swath of admiralty cases. Exxon evidently did not invoke the protection of the Limitation Act because it recognized the futility of attempting to establish that it lacked “privity or knowledge” of Captain Hazelwood’s drinking. Although the existence of the Limitation Act does not resolve this case, the fact that Congress chose to provide such generous protection against liability without including a party like Exxon within that protection counsels against extending a similar benefit here.

FN2. See Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 446, 121 S.Ct. 993, 148 L.Ed.2d 931 (2001) (“Admiralty and maritime law includes a host of special rights, duties, rules, and procedures .... Among these provisions is the Limitation Act .... The Act allows a vessel owner to limit liability for damage or injury, occasioned without the owner's privity or knowledge, to the value of the vessel or the owner's interest in the vessel”); Coryell v. Phipps, 317 U.S. 406, 412, 63 S.Ct. 291, 87 L.Ed. 363 (1943) (“One who selects competent men to store and inspect a vessel and who is not on notice as to the existence of any defect cannot be denied the benefit of the limitation as respects a loss incurred by an explosion during the period of storage, unless 'privity' or 'knowledge' are to become empty words”).

FN3. Testimony at an early phase of this protracted litigation confirmed as much. In a hearing before the District Court, one of Exxon's attorneys explained that his firm advised Exxon in 1989 that Exxon "never be able to sustain its burden to show lack of privity or knowledge with the use of alcohol by Captain Hazelwood." App. to Brief in Opposition 43a.

The Limitation Act is only one of several statutes that point to this conclusion. In the Trans-Alaska Pipeline Authorization Act (TAPAA), 87 Stat. 584, 43 U.S.C. § 1651 et seq., Congress altered the liability regime governing certain types of Alaskan oil spills, imposing strict liability but also capping recovery; notably, it did not restrict the availability of punitive damages. Exxon unsuccessfully argued that the TAPAA precluded punitive damages at an earlier stage of this litigation, see App. 101-107.) And the Court today rightly decides that in passing the Clean Water Act, Congress did not displace or in any way diminish the availability of common-law punitive damages remedies. Ante, at 2618 - 2619.

FN4. Although the issue has not been resolved by this Court, there is evidence that in passing TAPAA, Congress meant to prevent application of the Limitation Act to the trans-Alaskan transportation of oil. The House Conference Report includes the following passage:

"Under the Limitation of Liability Act of 1851 (46 U.S.C. 183), the owner of a vessel is entitled to limit his liability for property damage caused by the vessel ... The Conferences concluded that existing maritime law would not provide adequate compensation to all victims ... in the event of the kind of catastrophe which might occur. Consequently, the Conferences established a rule of strict liability for damages from discharges of the oil transported through the trans-Alaska Pipeline up to $100,000,000." H.R. Conf. Rep. No. 93-624, p. 28 (1973), U.S.Code Cong. & Admin. News 1973, p. 2523, 2530.

FN5. Schoenbaum explains that "[n]either the general maritime law nor the Jones Act recognizes a right to recover damages for negligent infliction of emotional distress unaccompanied by physical injury." § 5-15, p. 239. See also Gough v. Natural Gas Pipeline Co. of Am., 996 F.2d 763, 765 (C.A.5 1993) (purely emotional injuries are compensable under maritime law when maritime plaintiffs "satisfy the 'physical injury or impact rule' ").


See also In re Glacier Bay, 944 F.2d 577, 583 (C.A.9 1991) ("[W]e hold that TAPAA implicitly repealed the Limitation Act with regard to the transportation of trans-Alaska oil").

The congressional choice not to limit the availability of punitive damages under maritime law should not be viewed as an invitation to make policy judgments on the basis of evidence in the public domain that Congress is better able to evaluate than is this Court.

II

The Court's analysis of the empirical data it has assembled is problematic for several reasons. First, I believe that the Court fails to recognize a unique feature of maritime law that may counsel against uncritical reliance on data from land-based tort cases: General maritime law limits the availability of compensatory damages. Some maritime courts bar recovery for negligent infliction of purely emotional distress, see 1 T. Schoenbaum, Admiralty and Maritime Law § 5-15 (4th ed. 2004), and, on the view of many courts, maritime law precludes recovery for purely "economic losses ... absent direct physical damage to property or a proprietary interest," 2 id., § 14-7, at 124. Under maritime law, then, more than in the land-tort context, punitive damages may serve to compensate for certain sorts of intangible injuries not recoverable under the rubric of compensation.

various ways to limit punitive damages, it is telling this sphere than there would be in any other. 

there may be less reason to compensable, or not compensable at all. Accordingly, largely a species of great deal of evidence that States have acted in 

We observed in Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437-438, n. 11, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001):

"Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time .... As the types of compensatory damages available to plaintiffs have broadened, see, e.g., 1 J. Nate's, C. Kimball, D. Axelrod, & R. Goldstein, Damages in Tort Actions § 3.01[3](a)(2000) (pain and suffering are generally available as species of compensatory damages), the theory behind punitive damages has shifted toward a more purely punitive ... understanding."

Although these sorts of intangible injuries are now largely a species of ordinary compensatory damages under general tort law, it appears that maritime law continues to treat such injuries as less than fully compensable, or not compensable at all. Accordingly, there may be less reason to limit punitive damages in this sphere than would be in any other.

Second, both caps and ratios of the sort the Court relies upon in its discussion are typically imposed by legislatures, not courts. Although the Court offers a great deal of evidence that States have acted in various ways to limit punitive damages, it is telling that the Court fails to identify a single state court that has imposed a precise ratio, as the Court does today, under its common-law authority. State legislatures have done so, of course; and indeed Congress would encounter no obstacle to doing the same as a matter of federal law. But Congress is far better situated than is this Court to assess the empirical data, and to balance competing policy interests, before making such a choice. FN7

The Court points to United States v. Reliable Transfer Co., 421 U.S. 397, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975), a case in which the Court adopted a rule of proportional liability in maritime tort cases, as an illustrative example of the Court's power to craft "flexible and fair remedies in the law maritime." Id. at 409, 95 S. Ct. 1708. In that case, however, the Court noted that not only was the new proportional liability rule not barred by any "statutory or judicial precept," but also that its adoption would "simply bring recovery for property damage in maritime collision cases into line with the rule of admiralty law long since established by Congress for personal injury cases." Ibid. By contrast, the Court in this case has failed to demonstrate that adoption of the rule it announces brings the maritime law into line with expressions of congressional intent in this (or any other) context.

2638 The Court concedes that although "American punitive damages have been the target of audible criticism in recent decades," "most recent studies tend to undercut much of [that criticism]." Ante, at 2624. It further acknowledges that "[a] survey of the literature reveals that discretion to award punitive damages has not mass-produced runaway awards."
Ibid. The Court concludes that the real problem is large outlier awards, and the data seem to bear this out. But the Court never explains why abuse-of-discretion review is not the precise antidote to the unfairness inherent in such excessive awards.

Until Congress orders us to impose a rigid formula to govern the award of punitive damages in maritime cases, I would employ our familiar abuse-of-discretion standard: "If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's 'determination under an abuse-of-discretion standard,' " Cooper Industries, Inc., 532 U.S., at 433, 121 S.Ct. 1678; see also Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) ( "Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable”).

On an abuse-of-discretion standard, I am persuaded that a reviewing court should not invalidate this award FN8 In light of Exxon's decision to permit a lapsed alcoholic to command a supertanker carrying tens of millions of gallons of crude oil through the treacherous waters of Prince William Sound, thereby endangering all of the individuals who depended upon the sound for their livelihoods, the jury could reasonably have given expression to its "moral condemnation" of Exxon's conduct in the form of this award. Cooper Industries, Inc., 532 U.S., at 432, 121 S.Ct. 1678.

FN8. The idiosyncratic posture of this case makes true abuse-of-discretion appellate review something of a counterfactual, since the $5 billion award returned by the jury was, after several intervening steps, ultimately remitted to $2.5 billion by the Ninth Circuit in order to conform with this Court's Due Process cases. 472 F.3d 600 (2006)(per curiam). Suffice it to say, for now, that although the constitutional limits and the abuse-of-discretion standard are not identical, in this case the $2.5 billion the Ninth Circuit believed survived de novo constitutional scrutiny would, in my judgment, also satisfy abuse-of-discretion review.

I would adhere to the principle that " 'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.' " Moragne v. States Marine Lines, Inc., 398 U.S. 375, 387, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) (quoting Chief Justice Chase in The Sea Gull, 21 F. Cas. 909, 910 (CC Md. 1865)).  

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While I do not question that the Court possesses the power to craft the rule it announces today, in my judgment it errs in doing so. Accordingly, I respectfully dissent from Parts IV and V of the Court's opinion, and from its judgment.

*2639 Justice GINSBURG, concurring in part and dissenting in part.
I join Parts I, II, and III of the Court's opinion, and dissent from Parts IV and V.

This case is unlike the Court's recent forays into the domain of state tort law under the banner of substantive due process. See State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 418-428, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (reining in state-court awards of punitive damages); BMW of North America, Inc. v. Gore, 517 U.S. 559, 574-585, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (same). The controversy here presented "arises under federal maritime jurisdiction," ante, at 2626 (opinion of the Court), and, beyond question, "the Court possesses the power to craft the rule it announces today," ante, at 2638 (STEVENS, J., concurring in part and dissenting in part). The issue, therefore, is whether the Court, though competent to act, should nevertheless leave the matter to Congress. The Court has explained, in its well stated and comprehensive opinion, why it has taken the lead. While recognizing that the question is close, I share Justice STEVENS' view that Congress is the better equipped decisionmaker.

First, I question whether there is an urgent need in maritime law to break away from the "traditional common-law approach" under which punitive damages are determined by a properly instructed jury, followed by trial-court, and then appellate-court
review, to ensure that [the award] is reasonable."

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). The Court acknowledges that the traditional approach "has not mass-produced runaway awards," ante, at 2624, or endangered settlement negotiations, ante, at 2624 - 2625, n. 15. Nor has the Court asserted that outlier awards, insufficiently checked by abuse-of-discretion review, occur more often or are more problematic in maritime cases than in other areas governed by federal law.

Second, assuming a problem in need of solution, the Court's lawmaking prompts many questions. The 1:1 ratio is good for this case, the Court believes, because Exxon's conduct ranked on the low end of the blameworthiness scale: Exxon was not seeking "to augment profit," nor did it act "with a purpose to injure," ante, at 2622. What ratio will the Court set for defendants who acted maliciously or in pursuit of financial gain? See ante, at 2631 - 2632. Should the magnitude of the risk increase the ratio and, if so, by how much? Horrendous as the spill from the Valdez was, millions of gallons more might have spilled as a result of Captain Hazelwood's attempt to rock the boat off the reef. See ante, at 2613 (opinion of the Court); cf. TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 460-462, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (plurality opinion) (using potential loss to plaintiff as a guide in determining whether jury verdict was excessive). In the end, is the Court holding only that 1:1 is the maritime-law ceiling, or is it also signaling that any ratio higher than 1:1 will be held to exceed "the constitutional outer limit"? See ante, at 2634, n. 28. On next opportunity, will the Court rule, definitively, that 1:1 is the ceiling due process requires in all of the States, and for all federal claims?

Heightening my reservations about the 1:1 solution is Justice STEVENS' comment on the venturesome character of the Court's decision. In the States, he observes, fixed ratios and caps have been adopted by legislatures; this Court has not identified "[any] state court that has imposed a precise ratio" in lieu of looking to the legislature as the appropriate source of a numerical damage limitation. Ante, at 2637.

*2640* * * *

For the reasons stated, I agree with Justice STEVENS that the new law made by the Court should have been left to Congress. I would therefore affirm the judgment of the Court of Appeals.

Justice BREYER, concurring in part and dissenting in part.

I join Parts I, II, and III of the Court's opinion. But I disagree with its conclusion in Parts IV and V that the punitive damages award in this case must be reduced.

Like the Court, I believe there is a need, grounded in the rule of law itself, to assure that punitive damages are awarded according to meaningful standards that will provide notice of how harshly certain acts will be punished and that will help to assure the uniform treatment of similarly situated persons. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 587, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (BREYER, J., concurring). Legal standards, however, can secure these objectives without the rigidity that an absolute fixed numerical ratio demands. In setting forth constitutional due process limits on the size of punitive damages awards, for example, we said that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 587, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (emphasis added). We thus foresaw exceptions to the numerical constraint.

In my view, a limited exception to the Court's 1:1 ratio is warranted here. As the facts set forth in Part I of the Court's opinion make clear, this was no mine-run case of reckless behavior. The jury could reasonably have believed that Exxon knowingly allowed a relapsed alcoholic repeatedly to pilot a vessel filled with millions of gallons of oil through waters that provided the livelihood for the many plaintiffs in this case. Given that conduct, it was only a matter of time before a crash and spill like this occurred. And as Justice GINSBURG points out, the damage easily could have been much worse. See ante, at 2639.

The jury thought that the facts here justified punitive damages of $5 billion. See ante, at 2614 (opinion of the Court). The District Court agreed. It "engaged in an exacting review" of that award "not once or twice, but three times, with a more penetrating inquiry each time," the case having twice been remanded for
reconsideration in light of Supreme Court due process cases that the District Court had not previously had a chance to consider. 296 F.Supp.2d 1071, 1110 (D.Alaska 2004). And each time it concluded "that a $5 billion award was justified by the facts of this case," based in large part on the fact that "Exxon's conduct was highly reprehensible," and it reduced the award (slightly) only when the Court of Appeals specifically demanded that it do so. Ibid.; see also id., at 1075.

When the Court of Appeals finally took matters into its own hands, it concluded that the facts justified an award of $2.5 billion. See 472 F.3d 600, 625 (C.A.9 2006)(per curiam). It specifically noted the "egregious" nature of Exxon's conduct. Ibid. And, apparently for that reason, it believed that the facts of the case "justified[d] a considerably higher ratio" than the 1:1 ratio we had applied in our most recent due process case and that the Court adopts here. Ibid.

I can find no reasoned basis to disagree with the Court of Appeals' conclusion that this is a special case, justifying an exception from strict application of the majority's numerical rule. The punitive damages award before us already represents a 50% reduction from the amount that the District Court strongly believed was appropriate. I would uphold it.

Exxon Shipping Co. v. Baker