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COMMON LAW PUNITIVE DAMAGES: SOMETHING FOR EVERYONE?

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Common law punitive damages have some feature that will get everyone's goat: a civil court meting out quasi-criminal punishment; a sanction, punishment, imposed after mere civil procedure; a civil jury stretching imprecise instructions into Robin Hood justice; a private plaintiff receiving a windfall that exceeds any reasonable estimate of loss; and, finally, the Supreme Court wielding the discredited doctrine of substantive due process.

This article will examine the preceding fault lines and the countervailing considerations, devoting more attention to substantive due process than the others. It will then turn to *Exxon Shipping Co. v. Baker*,[1] and include some modest conclusions of my own.

I. PROBLEMS WITH PUNITIVE DAMAGES, GENERALLY

How has the controversial common law doctrine of punitive damages been developed, maintained, and kept within sensible bounds? The United States has no single private law court. The federal courts and the United States Supreme Court focus on the public law of the Constitution and federal statutes, not on common law reasoning and decision-making. The fifty states and the District of Columbia have fifty-one common law torts systems. All but five have common law or court-made punitive damages, developed and maintained by the state's judiciary with legislative oversight and within federal and state constitutional limits. The states' punitive damages doctrines are broadly similar, but they diverge in detail.

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1. Exxon Shipping Co. v. Baker, 128 S.Ct. 2605 (2008).

Civil Punishment

The first fault line is civil punishment, which punitive damages opponents maintain is a contradiction in terms. A bright line, a clear division in the law, separates civil law and criminal law. The civil-criminal division runs through lawyers' practices, legal codes, law libraries, and the law school curriculum. Civil punitive damages breach this division because they implement criminal law purposes—punishment and deterrence. Punitive damages are misplaced, or at best incongruous, on the legal system's civil side, which—in contrast to the criminal side—is devoted to compensation and restoration. A European court will give this as a reason to refuse to recognize a United States punitive damages verdict.[2] Implementation of this abolitionist argument would end civil punitive damages.

The Maine Supreme Court, a pragmatic common law court, responded that the criminal-civil line in United States law is neither clear nor straight. Civil courts and the civil law play a role in defining and punishing defendants' misconduct. Some things, the court continued, are wrong but not crimes. Some crimes are not prosecuted. Some criminal statutes are not enforced. Some criminal penalties are too low to deter a miscreant's breaches. Thus, the Maine court held, courts' administration of common law punitive damages plays an important role in maintaining social order.[3]

Inadequate Procedural Protections

The critics' second fault line is that civil courts build punitive damages on a civil procedure foundation. Before a court may impose punishment, a defendant is entitled to a formidable array of procedural protections, based on the Constitution and statutes which are intended to protect the defendant against an incorrect criminal conviction. Punitive damages advance criminal purposes and punish a defendant, but without according him that protective criminal procedure. A punitive damages defendant should be entitled to criminal procedure protections like the requirement of proof beyond a reasonable doubt and protection against self-incrimination and double jeopardy. Fully implemented, this second point would move punitive damages across the civil-criminal watershed. Partially implemented, it would create hybrid procedure.

The Maine court responded that a common law civil court can protect a punitive damages defendant satisfactorily.[4] This court created a hybrid procedure by exercising its common law power, rejecting proof by a preponderance of the evidence, and requiring a punitive damages plaintiff to prove the prerequisites for imposing punitive damages by clear and con-

2. John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507, 510–11 (2007).

3. Tuttle v. Raymond, 494 A.2d 1353, 1355–57 (Me. 1985).

4. *Id.* at 1356–57.

vincing evidence.[5] Requiring clear and convincing evidence for punitive damages has been established by statute or decision in more than half the states.[6]

A civil litigant may claim the privilege against self-incrimination; but unlike a criminal defendant, the civil litigant may be summoned as a witness, questioned, and required to claim the privilege in response to each question; the opponent may then refer to the witness's silence in closing argument. A punitive damages defendant may also be charged with a crime. For example, a drunken driver may be both charged with criminal manslaughter for a fatal accident and sued in civil court for wrongful death. This double defendant is usually protected from self-incrimination by a stay that requires the civil plaintiff to wait until after criminal proceedings are completely wrapped up.

The defendant may be both convicted of a crime and held responsible for punitive damages. Civil punitive damages are not double jeopardy.[7] Moreover a trial judge may protect a punitive damages defendant who has been punished criminally from double punishment by telling the civil punitive damages jury about the defendant's criminal conviction.[8]

Runaway Juries

The jury is punitive damages' third fault line. Critics of punitive damages recount horror stories about runaway civil juries acting on emotion rather than reason, and marring the legal landscape with eye-popping, redistributionist punitive damages verdicts. As Justice O'Connor wrote in dissent:

> The jury system has long been a guarantor of fairness, a bulwark against tyranny, and a source of civic values. . . . But jurors are not infallible guardians of the public good. . . . Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking. Modern judicial systems therefore incorporate safeguards against such influences. . . . Courts long have recognized that jurors may view large corporations with great disfavor. . . . [J]uries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.[9]

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5. *Id*. at 1362–63.

6. DOUG RENDLEMAN, REMEDIES 130 (7th ed. 2006).

7. *Tuttle*, 494 A.2d at 1357.

8. *Id.* at 1356. A punitive damages defendant may, however, perceive this so-called protection as inviting the jury to view it (i.e. the defendant) as a proved offender and to pile on civil punishment.

9. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 473, 474, 490, 491 (1993) (O'Connor, J., dissenting).

Criticism of the civil jury is central to tort reformers' portrayal of juries shoveling defendants' hard-earned money at greedy plaintiffs and their trial lawyers in tasseled loafers.[10]

State and federal civil juries are, of course, constitutional features in the United States legal environment.[11] A populistic civil jury will articulate and implement the community conscience and sentiment. The jury serves as an equalizer for the common person against those defendants who abuse power.

Jury discretion is built into the punitive damages process providing the jury flexible responses to defendants and their misdeeds. There are two stages of jury discretion: first, whether to grant punitive damages, and second, in what amount. Following the judge's flexible and general jury instruction, the punitive damages jury, in effect, defines the qualifying misconduct and sets the amount of punishment. Protecting the jury's verdict is part of the deference judges owe to that constitutional institution.[12]

Among other nations, the United States civil jury is an anomaly, for most other countries lack the civil jury.[13] In the common law nations with punitive damages—United Kingdom, Canada, New Zealand, and Australia—punitive damages are low and infrequent, perhaps because the United States' jury-trial tradition is absent.[14]

The United States' legal system is, however, ambivalent about the jury. Litigants can opt out. Merely three percent of filed civil lawsuits reach trial, and many of these are tried without a jury.[15] All or nearly all of the punitive damages lawsuits we are studying are jury trials. After placing the jury on a constitutional pedestal, courts and legislatures hedge its freedom with pretrial motions, evidence rules, the judge's instructions, and post-verdict judicial review.[16]

An explanation of post-verdict judicial review will be useful here because of its importance to punitive damages below. After a jury's punitive damages verdict for the plaintiff, the defendant files its motion for a new trial arguing, among other things, an excessive verdict. The defendant will ask the trial judge to grant a conditional new trial or remittitur—that is, to tell the plaintiff to either accept lower damages or submit to a new trial on damages.[17] The common law standards that the trial judge will apply to the

10. *See* American Tort Reform Association, *About ATRA*, http://www.atra.org/about (last visited March 19, 2010).

11. U.S. CONST. amend. VII; VA. CONST. art. 1 § 11; MN. CONST. art. 1 § 4.

12. *See* U.S. CONST. amend. VII.

13. John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 396–97 (2004).

14. *Id.* at 398–439, 441.

15. STEPHEN YEAZELL, CIVIL PROCEDURE 473 (7th ed. 2008).

16. FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE §§ 7.20–23 (5th ed. 2001).

17. RICHARD D. FREER, CIVIL PROCEDURE § 9.6, at 466–67 (2d ed. 2009); JAMES, *supra* note 16, at § 7.29.

defendant's remittitur motion are: whether the jury acted out of passion and prejudice, or whether the jury's verdict shocks the judge's conscience.[18] A common law appellate court reviews a judge's excessive damages decision only to determine whether it was an abuse of discretion.[19] Nevertheless, a jury's punitive damages verdict will be vulnerable to post-verdict judicial review, and is often reduced or settled during that period.[20] Empirical studies have shown that punitive damages do not menace Western Civilization as we know it.[21] There are not that many punitive damages verdicts; only six percent of plaintiffs' verdicts include punitive damages. Furthermore, punitive damages verdicts are not very high, averaging around $50,000.[22]

However, a few titanic jury verdicts for punitive damages grab headlines, capture public and professional attention, and reinforce anecdotal stereotypes of juries run amok. Like the $145 billion punitive damages jury verdict in a Florida smokers' class action, many of these verdicts are reversed.[23] Among those reduced is the $5 billion punitive damages jury verdict from the *Exxon Valdez* oil spill, which will be discussed below. Many others are settled by the parties without a judicial decision.

Unpredictability

The critics' fourth punitive damages fault line is vagueness leading to unpredictability. The rules that govern punitive damages—both whether to grant them and how much to give—are imprecise.[24] Critics maintain that a vague general instruction delegates too much discretion to the jury, in effect, to create law and apply it retroactively to punish the defendant. Plaintiff's lawyer's effective advocacy to "send them a message" leads defendants to unpredictable bet-the-company trials and to potentially crushing jury verdicts for punitive damages. Allowing the jury to punish a defendant with vague standards develops imprecise rules; the law becomes

18. FREER, *supra* note 17; JAMES, *supra* note 16, at § 7.29.

19. FREER, *supra* note 17; JAMES, *supra* note 16, at § 7.29.

20. *See* Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 EMORY L.J. 1426 (2004).

21. *See, e.g.*, Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 745 (2002); *see also* Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049, 1094–95 (2000) (interpreting research about civil trials in Georgia and concluding that punitive damages are "exceedingly rare" and that the "frequency and size of punitive damage awards belie the popular image of a system beset with runaway juries"). Rockbridge County where I live is in an apparent punitive-damages-free zone, no such verdict having been returned in living memory. Doug Rendleman, *A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform*, 39 AKRON L. REV. 1089, 1168–69 (2006).

22. *See* Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 633 (1997).

23. Engle v. Liggett Group, 945 So. 2d 1246, 1263–64 (Fla. 2006).

24. *See* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 5 n.15 (1982).

unstable and unpredictable, undermining people's ability to plan and predict.[25]

The response is that a potential wrongdoer ought to be wary instead of trying to run just inside the line. The theory behind a randomized deterrent response is that if the system cannot catch all wrongdoers, then when it does catch a wrongdoer, it should be hit hard.[26]

Windfalls

A windfall is the critics' fifth fault line. Punitive damages perforce exceed plaintiff's compensation. Plaintiff and plaintiff's lawyers receive the money. In short, critics maintain giving this much money to plaintiff and company in the form of punitive damages is wrong.

To begin with, the word "windfall" is ambiguous. In general, a windfall describes an unexpected benefit. In the most technical sense, a windfall apple is blown from my neighbor's tree, falls in my yard, and becomes my apple. On the legal side of the fence, the death intestate of a previously unknown great aunt may drop a windfall inheritance on her grand niece. A windfall is a kind of bonus, perhaps undeserved (in the South's vernacular, a lagniappe—the thirteenth donut in a dozen).

In damages, a windfall may mean to some a jury verdict or court judgment that exceeds plaintiff's compensatory damages; if so, all punitive damages are windfalls. Compensatory damages fall under imprecise headings, for example, pain and suffering. So, windfall pain and suffering damages may mean plaintiff recovered more compensatory damages than the speaker or writer thinks she deserves, which is entirely subjective. It would be technically accurate to define a plaintiff's punitive damages that exceed punitive damages' punishment-deterrence policy justification as a windfall for the plaintiff. But that decision requires a judgment that varies from person to person. "Windfall" in the legal vocabulary is, therefore, an opprobrious epithet, meaningless except to express the speaker or writer's disfavor.

Punitive damages are recovery in addition to plaintiff's compensatory damages. The critics' anti-windfall argument negates the reasons courts take a defendant's money with punitive damages: punishment and deterrence.

Looking at the plaintiff's side of the lawsuit, why would the court grant damages that exceed plaintiff's compensation? Why create what critics name a windfall by giving the defendant's punitive damages to the plaintiff? Other policies support the money's destination, the plaintiff. Pro-

25. *See* Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 151–60 (2008); Catherine M. Sharkey, *The* Exxon Valdez *Litigation Marathon: A Window on Punitive Damages*, 7 U. ST. THOMAS L.J. 25, 34 (2009).

26. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 187 (1980).

fessor Ellis's leading article ascribed multiple purposes to punitive damages.[27] In addition to the reasons to take the defendant's money—punishing the defendant, specifically deterring this defendant from repeating, and deterring other potential defendants from similar misconduct—courts have three reasons to give defendant's punitive damages money to the plaintiff. These are, first, to obviate the victim's retaliation and preserve the peace; second, to compensate plaintiff's losses not measured under compensatory damages; and third, to finance litigation, mostly to pay the plaintiff's attorney fees.[28] Stated another way, punitive damages may be a bounty to create an incentive for a victim to become a plaintiff, to encourage that plaintiff to hire a competent lawyer to bag that predator, take it to court, and finally, to finance the plaintiff's lawyer's litigation.

The law of damages is saddled with an inadequate vocabulary. In addition to the vagueness of windfall, legal speakers often say damages including punitive damages are an award. But damages are not a prize like an Academy Award for Best Picture. A plaintiff's compensatory damages are almost always a substitute for something defendant impaired. A plaintiff's punitive damages serve the substantive purposes discussed above. Punitive damages are not a prize. This article tries to refer to punitive damages as a "verdict" to focus on the jury's role in punitive damages.

Pain and suffering and emotional distress damages are often said to be non-economic. People, however, pay to avoid injury. They demand a premium for encountering risk of injury. Plaintiff's injury is not encountered in money, but her damages are measured in money as a substitute. The wiser approach is to think of these forms of damages as non-pecuniary, but still economic.[29] Because the jury must value plaintiff's loss in money when she didn't encounter the loss in money, non-pecuniary verdicts vary, sometimes widely.

The damages branch of remedies is a science of the second best because the court substitutes defendant's money for the harm defendant's misconduct caused to plaintiff. Suppose a tortfeasor injured Clara's foot so seriously that she can't continue her running regimen. She sues the tortfeasor and recovers damages for pain and suffering, the lost enjoyment of life.[30] Should Clara take the money and buy a wide-screen television to watch other people run? Punitive damages, a little harder to perceive as a substitute, serve policies the law considers to be worthwhile. But if Clara

27. Ellis, *supra* note 24, at 3; *see also* Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1014–15 (2007) (discussing punitive damages for compensation and private retribution); Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 163 (2003).

28. Ellis, *supra* note 24.

29. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW § 6.12 (7th ed. 2007).

30. *See, e.g.*, Yosuf v. United States, 642 F. Supp. 432, 439 (M.D.Pa. 1986) (recovering for an injured hand); Payton v. City of New Orleans, 679 So. 2d 446, 452 (La. App. 1996) (recovering for an injured knee).

recovers punitive damages for the defendant's aggravated misconduct, although she may have punished the tortfeasor, she still has lost her ability to run.

Environmental harm raises similar issues of value and substitution. Professor Alexandra Klass wrote that plaintiffs' harm leading to compensatory damages comprises only part of an environmental tortfeasor's total wrongdoing. She began with the idea that environmental laws are underenforced. Moreover, harm to natural resources is difficult to monetize, because like pain and suffering, it is not encountered as pecuniary. Compensatory damages fail to recognize many kinds of environmental harm; measuring compensatory damages by the cost to restore or diminution in value omits public harm. For example, Native Alaskans could not recover for losing their subsistence culture to the *Exxon Valdez* oil spill.[31]

Valuing environmental harm raises even more nettlesome issues. Suppose Clara has watched and banded migrating Monarch butterflies for over a decade. Then, suppose that a tortfeasor does harm to the migrating Monarchs so that they no longer land at Clara's rural Minnesota home. What is the value of visits by migrating butterflies?

Butterflies do not have "use" value. What is the non-use value of a butterfly to Clara, a butterfly-watcher? It is practically impossible to quantify. Another approach is to estimate the butterflies' "legacy" value. That is, will the butterflies be there for Clara's grandchildren? A little farther afield, what is the value to me of Clara's butterflies? Finally, an extinct type of butterfly or a destroyed eco-system may have had contained something with medical value.

Other possible ways of valuing environmental injury fall under the heads of willingness-to-pay ("WTP"), and willingness-to-accept ("WTA") surveys. What would Clara pay for the butterflies? What would Clara charge for losing them? In the form of a public opinion poll, WTP and WTA may provide some guidance about a resource's value.[32] Examining the uncertainty above, Professor Dale Thompson, in contrast to Professor Klass, favors the restoration approach, in part because the foregoing methods of setting value are indirect and artificial.[33]

Professor Klass asked courts to recognize punitive damages policies beyond punishment and deterrence, to consider potential harm and harm that cannot be monetized. Defendant's harm to the environment, Klass argued, should encompass harm beyond plaintiff's compensatory damages when a court calculates the amount of punitive damages. Writing prior to

31. Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 118–26 (2007). *See* Leo M. Romero, *Punishment for Ecological Disasters: Punitive Damages and/or Criminal Sanctions*, 7 U. ST. THOMAS L.J. 154, 158 (2009).

32. RENDLEMAN, *supra* note 6, at 791–94.

33. Dale Thompson, *Valuing the Environment: Courts' Struggles with Natural Resource Damages*, 32 ENVTL. L. 57, 76–78 (2002).

the Supreme Court's *Exxon* decision, she asked courts adjudicating environmental torts to impose punitive damages that exceed the single-digit, 9:1 ratio of punitive damages to compensatory damages.[34] As we will examine below, the Court's decision dashed her hopes.

Another response to the ambivalence or antipathy critics express about giving plaintiffs punitive damages that far exceed compensation is a split-recovery system to divert a percentage of a plaintiff's punitive damages judgment for public-use by the state or local government. Responding to concerns about plaintiffs' windfalls, Professor Catherine Sharkey advocated what she named societal compensation that would reduce plaintiffs' excessive punitive damages recoveries by spreading the wealth in consumer-protection punitive damages.[35]

Professor Klass applied Professor Sharkey's idea to environmental defendants.[36] However, as we will examine below, the Supreme Court has circumscribed a tort plaintiff's recovery of punitive damages for defendant's harm to non-parties.[37] This erodes the professors' cogent arguments for punitive damages and split-recovery systems.

II. Punitive Damages and Substantive Due Process

Our final fault line in punitive damages is substantive due process. This subject requires some background because it is a fault line de-emphasized by critics of punitive damages.

Courts began to mete out punitive damages for an individual defendant's misconduct when someone committed an intentional, malicious tort, fraud, libel, or battery. For example, a dance instructor told his pre-adolescent students that having sex with him would reduce their inhibitions.[38]

During the middle part of the twentieth century, plaintiffs' litigation developed what I call "consumer-protection punitive damages." The plaintiff is a wronged consumer; the defendant is not an individual human, but a large business corporation. Examples of consumer-protection punitive damages from the Supreme Court's punitive damages decisions include insurance bad faith[39] and tobacco products liability.[40]

A consumer suing a corporation for punitive damages can lead to the large verdict that raises previously discussed issues about punitive damages. To punish the malefactor defendant, punitive damages should "sting". To

34. Klass, *supra* note 31, at 90.

35. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347, 352 (2003–2004).

36. Klass, *supra* note 31, at 154–55.

37. *See* discussion *infra* Part II; Alexandra B. Klass, *Punitive Damages After* Exxon Shipping Company v. Baker: *The Quest for Predictability and the Role of Juries*, 7 U. St. Thomas L.J. 182, 185–86 (2009).

38. Micari v. Mann, 126 Misc. 2d 422, 422–23, 481 N.Y.S.2d 967, 968 (N.Y. Sup. Ct. 1984).

39. State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

40. Philip Morris USA v. Williams, 549 U.S. 346 (2007).

that end, the jury needs to consider evidence of defendant's wealth.[41] The plaintiff's lawyer can then argue that this rich corporation has only one nerve, the one that runs to its wallet. This cry to "send them a message" resonates with populistic juries.

In addition to huge jury verdicts for punitive damages, consumer-protection punitive damages led to a reaction: tort reform. Tort reform occurs in both legislatures and courts, and takes the form of both statutes and judicial decisions. Punitive damages law is state common law; the state courts make, apply, and change it, with legislative oversight. The tort reform judicial decisions are part of the court's common law technique.

An example of judicial tort reform is the opinion cited and discussed above, the Maine Supreme Court's decision in *Tuttle v. Raymond*.[42] The court based its decision on its common law power and the premise that punitive damages serve valuable purposes but are subject to abuse. It initiated two principles of containment: (1) the plaintiff must support the elements leading to punitive damages with clear and convincing evidence; (2) the defendant's misconduct threshold for punitive damages will be malice-intent, not reckless disregard.[43]

Statutory caps on defendants' appeal bonds are an example of legislative tort reform that benefit mostly punitive damages defendants.[44] Other legislative tort reform of punitive damages that includes caps and ratios will be discussed below.

In 2009, the United States seemed to be exiting its third wave of legislative tort reform, at least on the national level. Plaintiffs' trial lawyers supported Democrats. Big business supported Republicans. The Democrats' victories in the national elections of 2006 and 2008 slowed the momentum for tort reform without ending it altogether. President Obama's health reform package included malpractice screening panels, but the Republican health reform bill would reach much further and cap a malpractice plaintiff's pain and suffering damages.[45]

This background brings us to substantive due process. That doctrine has been controversial since the *Lochner* Court found substantive standards in the Due Process Clause of the Fourteenth Amendment and applied the standards to hold that protective labor legislation violated an employee's

41. RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (1979). For pro and con, respectively, see Jennifer H. Arlen, *Should Defendants' Wealth Matter?*, 21 J. LEGAL STUD. 413, 428–29 (1992); Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and The Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 415 (1989).

42. Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985).

43. *Id.* at 1354.

44. Rendleman, *supra* note 21, at 1092.

45. Anne Zieger, *Republicans Unsatisfied with Obama Malpractice Reform Stand*, FIERCE HEALTH CARE, Sept. 14, 2009, http://www.fiercehealthcare.com/story/republicans-unsatisfied-obama-malpractice-reform-stand/2009-09-14; Robert Pear & David M. Herszenhorn, *G.O.P. Counters with a Health Plan of Its Own*, N.Y. TIMES, Nov. 4, 2009, at A20.

right to form a contract.[46] Liberals and conservatives alike have excoriated substantive due process as injuring both democracy and federalism. The Supreme Court retreated from economic substantive due process beginning in the 1930s.[47]

The Supreme Court rejected the argument that punitive damages were an Eighth Amendment Excessive Fine.[48] However, beginning in 1991, the Supreme Court imposed substantive due process limits on punitive damages in a line of decisions.[49] Majority opinions have cloaked the quest for substantive standards to limit punitive damages in procedural terms: Unless the 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 the state may impose.[50] The Supreme Court's due process punitive-damages decisions that required the judge to instruct the jury and to conduct post-verdict judicial review are based on procedural due process.[51] However, the Court's related idea that a state court cannot impose grossly excessive punitive damages rests on principles of substantive due process.[52]

In *Gore*, refined in *Campbell* and *Williams*, the Supreme Court articulated post-verdict judicial review standards for gross excessiveness of punitive damages as guideposts. These guideposts are: (1) the reprehensibility of defendant's conduct; (2) the ratio of punitive damages to compensatory damages; and (3) the comparable civil penalty.[53] In *Campbell*, the Court, after saying in dicta that 9:1 is usually the top punitive-compensatory ratio, also mentioned a punitive-compensatory ratio of 1:1.[54]

With federal courts forbidding state courts' punitive damages verdicts as tort reform through substantive due process, state common law became a federal constitutional issue. The Supreme Court's punitive damages deci-

46. Lochner v. New York, 198 U.S. 45, 56, 58–60 (1905).

47. Ferguson v. Skrupa, 372 U.S. 726, 730–32 (1963); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

48. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 267–68 (1989).

49. For cases in this line, see Philip Morris USA v. Williams, 549 U.S. 346 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

50. *Campbell*, 538 U.S. at 416–17.

51. *Haslip*, 499 U.S. at 18–23 (discussing jury instructions and post-verdict judicial review); *Oberg*, 512 U.S. at 432 (declaring an Oregon statute, which essentially forbade post-verdict judicial review of punitive damages, unconstitutional under the Due Process Clause of the Fourteenth Amendment); *Cooper Indus., Inc.*, 512 U.S. at 436 (stating that the court's post-verdict judicial review of punitive damages is de novo).

52. A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S.CAL. L. REV. 1085, 1124 (2006).

53. *Gore*, 517 U.S. at 575, 580, 583; *Campbell*, 538 U.S. at 418–28; *Williams*, 549 U.S. at 353.

54. *Campbell*, 538 U.S. at 525.

sions went from being hands-off in the 1980s to suggesting a 9:1 or even 1:1 ratio less than a decade later—a triumph of effective appellate advocacy. The defendants' lawyers were convincing a willing audience, the Supreme Court, to federalize and curb the state law of punitive damages. The Supreme Court's decisions are themselves examples of judicial tort reform, an accomplishment of conservative activism, favoring business defendants over consumer plaintiffs.[55]

Justices Scalia and Thomas, on the conservative side of the Court, and Justice Ginsburg, on the moderate side, have dissented from the majorities' use of substantive due process to limit punitive damages.[56] These justices are correct in their analysis of the discredited doctrine. My colleague, Professor Ben Spencer, has demonstrated how slender, perhaps evanescent, the majorities' doctrine's legitimacy and pedigree are.[57] The advice I gave to other common law countries at the Second International Conference on Remedies in Auckland in 2007 was to eschew the substantive due process approach.[58] For reasons that will emerge below, Professor Spencer and I lost that argument for now and for the foreseeable future.

A second thread runs through the Supreme Court's substantive due process punitive damages decisions. *Gore*, *Campbell*, and *Williams* were consumer-protection punitive damages because the defendants' misconduct had caused widespread public harm. One question for the Supreme Court was whether a jury may take harm to others into account when setting the amount of punitive damages for a particular plaintiff.[59] When there are multiple in-state victims, there is a possibility of overlapping and duplicative punishment if another in-state plaintiff sues the same defendant later for punitive damages. When there are out-of-state victims, in addition to a potential for duplication, the punitive-damages state may intrude on another state's bailiwick, eroding federalism values and impinging on the second state's law and sovereignty.

Beginning with *Gore*, the Court has expressed concern that a state court could punish a defendant with punitive damages for the defendant's misconduct that occurred out of the court's state or that injured non-parties to the punitive-damages litigation.[60] *Gore* began with rigid federalism; *Campbell* continued it. In *Williams*, which we return to below, the majority

55. Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 423, 432 (2007) (arguing that the Supreme Court has a business-oriented conservative majority).

56. *Williams*, 549 U.S. at 361–64; *Campbell*, 538 U.S. at 429–39; *Gore*, 517 U.S. at 598–614.

57. Spencer, *supra* note 52, at 1118–46.

58. Doug Rendleman, *A Plea to Reject the United States Supreme Court's Due-Process Review of Punitive Damages*, *in* THE LAW OF REMEDIES: NEW DIRECTIONS IN THE COMMON LAW (Jeff Berryman & Rick Bigwood eds.) (forthcoming 2010).

59. *Williams*, 549 U.S. at 353–54.

60. *Id.*; *Campbell*, 538 U.S. at 422–24; *Gore*, 517 U.S. at 572–73.

insisted that punitive damages could punish a defendant only for harm to the lawsuit's discrete plaintiff, not for harm to other victims.

But are the guideposts workable? They may point a traveler in different and contradictory directions. Suppose, for example, a tortfeasor shoots a gun at plaintiff. He intends to kill her, but his bullet only hits her MP3 player, destroying it. When defendant's serious misconduct causes plaintiff a small amount of compensatory damages, the second guidepost, ratio, which supports lower punitive damages, is inconsistent with the first guidepost, reprehensibility, which supports higher punitive damages.[61]

As a safety valve, courts qualify ratio. The Supreme Court denies having rigid benchmarks and examines potential harm, not actual compensatory damages.[62] The enormity of defendant's wrongdoing, that is the reprehensibility guidepost, overcomes ratio, the second guidepost.

The third guidepost, the comparable civil penalty, became a makeweight. Indeed, if the state's policy is to use punitive damages instead of business regulation for consumer protection, a low civil penalty may support high punitive damages.[63]

Do the *Gore-Campbell* guideposts, as Justice Scalia quipped, set courts on the road to nowhere?[64] The guideposts turn out to be potentially contradictory, to lack bright lines, and to point in no particular direction. Their "fuzzy line" test either does not work or is difficult and time consuming to administer.[65] Creative courts find ways to distinguish them.[66] Inconsistency and abstruse, recondite distinctions ensure future decisions.

The Supreme Court's five-to-four decision in 2007 in *Phillip Morris USA v. Williams* complicated the Supreme Court's punitive damages jurisprudence in two ways.[67] First, the Court's tort reform due process majority emerged more clearly. Before *Williams* (and leaving moderate Justice Ginsburg out of the calculation), the conservative justices had split into two groups: a business-oriented tort reform group that favored due process review, and a states' rights, anti-due process pair, Justices Scalia and Thomas, along with Justice Ginsburg. The business-oriented tort-reform conservatives had prevailed over the states' rights conservatives. The two new Justices, Chief Justice Roberts and Justice Alito, whose views on substantive due process review of punitive damages were unknown, might have joined

61. Caprice L. Roberts, *Ratios, (Ir)rationality & Civil Rights Punitive Awards*, 39 AKRON L. REV. 1019, 1020–21 (2006); RENDLEMAN, *supra* note 6, at 144.

62. *Campbell*, 538 U.S. at 424–25.

63. Life Ins. Co. of Ga. v. Johnson, 701 So. 2d 524, 531 (Ala. 1997); Victor E. Schwartz, *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. REV. 881, 892–93 (2009).

64. *Gore*, 517 U.S. at 605 (Scalia, J., dissenting).

65. Romero, *supra* note 25, at 139.

66. *See, e.g.*, Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 676–78 (7th Cir. 2003); Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co., 399 F.3d 224, 231, 233–38 (3d Cir. 2005).

67. 549 U.S. 346 (2007).

the three dissenters to form a five-justice majority to repudiate the whole line of due process decisions. Instead, Justices Roberts and Alito allied with the tort reform majority in finding a substantive due process limit on a plaintiff's punitive damages judgment; they did not agree with Justices Scalia, Thomas, and Ginsburg's view that the Due Process Clause does not restrict the amount of punitive damages.[68]

The second way the *Williams* decision affected the Supreme Court's punitive damages jurisprudence was by muddling the issue of whether the defendant could be punished for harm to nonparties. The Oregon state court's jury had given the plaintiff $79.5 million punitive damages to punish Philip Morris for its negligence and deceit that had led to the lung-cancer death of Jesse Williams, a smoker of three packages of Marlboro cigarettes a day for forty-seven years.[69] The cigarette company persuaded five members of the Supreme Court that a jury instruction may have led the jury to punish it for other smokers who were not parties before the court.

The Supreme Court majority made a distinction about when a punitive damages jury may consider the defendant's harm to persons who are not plaintiffs. The jury, the majority wrote, may not assess punitive damages "to punish a defendant for injury that it inflicts upon nonparties, . . . those who are essentially strangers to the litigation."[70]

But three paragraphs later, the majority added the refinement that the plaintiff may adduce evidence that defendant harmed nonparties to aid the jury in assessing how reprehensible defendant's misconduct was: "evidence of actual harm to nonparties can help to show that the [defendant's] conduct that harmed the plaintiff also posed a substantial risk to the general public, and was particularly reprehensible."[71]

Will this distinction be difficult to understand and administer? Dissenting Justice Stevens understated his point when he said, "this nuance eludes me."[72] "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."[73]

The Supreme Court remanded the plaintiff's punitive damages to the Oregon courts. The Oregon Supreme Court found a state law reason not to review Philip Morris's instruction: the defendant had not objected properly

68. *Id.* at 346.

69. *Id.* at 350.

70. *Id.* at 353.

71. *Id.* at 355.

72. *Id.* at 360; *see also* Michael P. Allen, *Of Remedy, Juries, and State Regulation of Punitive Damages: The Significance of* Philip Morris v. Williams, 63 N.Y.U. ANN. SURV. AM. L. 343, 380 (2008).

73. *Williams*, 549 U.S. at 360.

at trial.[74] The U.S. Supreme Court declined Philip Morris's request for further review, leaving Plaintiff Williams' punitive damages judgment in place.[75]

The attributes of the Supreme Court's punitive damages decisions before *Exxon* were puzzling and consisted of potentially contradictory substantive due process guideposts that a lower court could either avoid or deploy. While the guideposts might allow lower courts to suppress aberrations and outliers, the observer could speculate that the federal constitutional standards could stunt state legislative and judicial development of tort law.

III: Further Developments in Punitive Damages—*Exxon Shipping Co. v. Baker*

With the fault lines in common law punitive damages and the Supreme Court's substantive due process decisions in place, we turn to the Supreme Court's 2008 decision in *Exxon Shipping Co. v. Baker*.[76] Professor Lempert compared the *Exxon Valdez*'s oil spill to hurricane Katrina in New Orleans, the 9-11 attacks, and the Three-Mile Island nuclear power plant.[77] We might add the Minnesota interstate bridge collapse at rush hour. In retrospect, these low-probability, high-harm events were, in effect, waiting to happen because of precautions, safeguards, and oversight missed, ignored, or left undone. For example, a double-hulled ship—which is now required—would have prevented the *Exxon Valdez*'s Prince William Sound oil spill. We deal with but one small piece of the tragic oil spill: punitive damages.

What legal events transpired after the *Exxon Valdez*'s massive March 1989 oil spill at Prince William Sound washed into the shoals of punitive damages? A two-decade-long pavane that involved an angry Alaska jury, a sympathetic federal trial judge, a court of appeals trying to interpret and apply the unfolding series of Supreme Court due process punitive damages decisions, and, the denouement under study, the Supreme Court imposing its solution, which ended the protracted litigation without satisfying anyone.[78]

The ship's pilot, Joseph Hazelwood, was a not-rehabilitated relapsed alcoholic. The plaintiffs presented evidence that his supervisors knew about

74. Williams v. Philip Morris, Inc., 176 P.3d 1255, 1260, 1264 (Or. 2008), *cert. granted sub. nom.* Philip Morris USA, Inc., v. Williams, 129 S. Ct. 2904 (2008), *cert. dismissed*, 129 S. Ct. 1436 (2009).

75. Philip Morris USA, Inc., v. Williams, 129 S. Ct. 2904 (2008), *cert. dismissed*, 129 S. Ct. 1436 (2009).

76. 128 S. Ct. 2605 (2008).

77. Richard Lempert, *Low Probability/High Consequence Events: Dilemmas of Damages Compensation*, 58 DePaul L. Rev. 357, 357–58 (2009).

78. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).

his condition. Hazelwood was drunk at the time of the collision, having consumed 15 ounces of vodka, leading to a probable .241 blood alcohol reading. He left the bridge before the *Exxon Valdez* ran aground. The unfortunate third mate—who was not licensed for the crossing—apparently missed a turn, leading to the collision.[79]

The consolidated civil cases were brought as maritime torts against Exxon and Hazelwood by Prince William Sound fishermen to recover their lost income as compensatory damages. The litigation fell under federal admiralty jurisdiction, which stems from the United States Constitution, federal statutes, and in the absence of constitutional or statutory direction, court-made federal common law.[80] The third mate was negligent in hitting the reef. His negligence, which would qualify plaintiffs for compensatory damages, was not serious enough for the fishermen to recover punitive damages. Exxon stipulated to negligence, leaving punitive damages to be adjudicated. At Exxon's request—an unusual request for a defendant—the court aggregated 32,000 victims into a mandatory punitive damages class.[81]

The judge bifurcated (really trifurcated) the trial. Normally, bifurcation occurs in punitive damages litigation to keep evidence of defendant's wealth from the first-stage liability jury, but this was unnecessary because Exxon had stipulated to its agent's negligence.

The first stage was to try Exxon's liability for punitive damages. The jury instruction on the defendants' misconduct threshold called for it to find reckless indifference. The jury found the corporation liable for its managerial agent's torts and sufficiently reckless to qualify for punitive damages. Stage two was compensatory damages, which were set at $508 million. Third was the amount of plaintiffs' punitive damages. The jury instruction required the jury to consider defendant's reprehensibility and wealth, the magnitude of the harm, and any mitigating factors. The jury's punitive damages verdict was against Exxon for $5 billion and against co-defendant Hazelwood for $5000.

The litigation took two trips to the court of appeals to consider the Supreme Court's unfolding constitutional due process guideposts. Both appeals led to remands to the trial judge, ostensibly to reduce the amount of punitive damages to a satisfactory amount. In the end, trial Judge Holland's decisions setting punitive damages at $4.5 billion and $4 billion did not reduce the defendant's punitive damages enough to satisfy the appellate

79. *Id.* at 2612–13.

80. John P. Jones, *The Sky Has Not Fallen Yet on Punitive Damages in Admiralty Cases*, 83 TUL. L. REV. 1289, 1294 (2009).

81. Linda S. Mullenix, *Nine Lives: The Punitive Damage Class*, U. KAN. L. REV. (forthcoming 2010) (manuscript at 25–29) (manuscript for the October 2009 University of Kansas Law Review Symposium *Aggregate Litigation Since* Ortiz v. Fibreboard).

court, so the court of appeals lost patience with him and itself remitted Exxon's $5 billion punitive damages jury verdict to $2.5 billion.[82]

The cliché, "delay is the defendant's friend," proved more than usually true for Exxon. During the protracted post-verdict delay period, the U.S. Supreme Court's due process decisions turned down the screws on punitive damages and set the stage for that Court to circumscribe the *Exxon Valdez* plaintiffs' punitive damages.

At the Supreme Court, Exxon made three arguments. First, that the Court should reject punitive damages against a defendant corporation, Exxon, for the recklessness of its managerial agent, Hazelwood. On Exxon's vicarious liability for punitive damages, the Supreme Court divided four-four, with Justice Alito not participating. That result upheld the court of appeals's decision, which had approved corporate liability. When it divides evenly, the Court does not record the vote count; the smart money speculates that Justice Souter joined the dissenters— Justices Stevens, Ginsburg, and Breyer—in voting for vicarious liability. As a consequence, maritime respondeat superior or vicarious liability remains an open question for two reasons: first, because the Court divided evenly without reaching a precedential decision; and second, because the Court may have found the company vicariously liable on the ground that Hazelwood, the ship's master, was a part of management, and not an ordinary employee.[83]

Exxon's second argument was that the Clean Water Act preempted the plaintiffs' tort "claim" and prevented plaintiffs from recovering punitive damages. In short, since Congress didn't allow punitive damages, it forbade them. The court of appeals had found no waiver and no preemption. The Supreme Court also rejected preemption—Congress's silence did not override maritime common law.[84]

Exxon's third argument is our principal concern—that, as a matter of federal maritime common law, the court of appeals's $2.5 billion punitive damages judgment was excessive because it exceeded punitive damages' policy base of punishment and deterrence.

Maritime doctrines are a federal common law issue under the Constitution and federal statutes. In the absence of a statute, the federal courts have common law power to develop and refine maritime doctrines.[85] The Court's earlier punitive damages decisions were state common law with federal constitutional oversight based on substantive due process post-verdict judicial review. In contrast, *Exxon* is a common law decision based on federal maritime common law in the absence of a statutory or constitutional standard.

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82. *In re* The Exxon Valdez, 472 F.3d 600, 602 (9th Cir. 2006).

83. Jones, *supra* note 80, at 1298.

84. *Id.* at 1295.

85. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 3-1 (4th ed. 2010).

The Supreme Court's substantive due process opinions had recognized that a state may empower its civil jury to punish a defendant for aggravated misconduct and to deter that defendant as well as other potential wrongdoers.[86] Whether a maritime tort plaintiff could recover punitive damages had not been clear earlier, but the Court's *Exxon* decision resolved those doubts in favor of punitive damages.[87]

The Supreme Court's tort reform majority prevailed in *Exxon*. When federalism issues were absent and the United States courts were exercising federal common law making power, the states' rights conservatives, Justices Scalia and Thomas, joined the business-oriented conservatives.

For a decision about the narrow field of maritime punitive damages, Justice Souter's majority opinion involved a broad and sweeping examination of punitive damages. The majority opinion briefly surveyed punitive damages' common law beginnings. The survey mentioned the five states that bar common law punitive damages, which included New Hampshire, Souter's home and retirement state.

The majority stated that punitive damages' policy base was punishment and deterrence. A former policy, to compensate plaintiffs' intangible injury not then available as damages, had been, the majority said, "eclipsed."[88] The majority's discussion of the reasons to take punitive damages from the defendant thus omits the reasons plaintiff should receive the money. As discussed above, the reasons to give defendant's punitive damages money to the plaintiff are to preserve the peace, to compensate plaintiff's losses not measured under compensatory damages, and to finance litigation.[89] The majority, however, viewed punitive damages entirely from the defendant's side. Dissenting Justice Stevens identified compensating uncompensated maritime injuries as supporting punitive damages in principle.[90]

Citing a 2004 empirical study by Cornell scholars, the majority opinion noted that the actual world of punitive damages belied their most severe critics. In fact, punitive damages were infrequent, and when they did occur they had a low compensatory-punitive ratio.[91] Having come this far, the majority might have dismissed Exxon's excessiveness argument as a solution in search of a problem.

However, punitive damages outliers were what concerned Justice Souter—the stark unpredictability of huge punitive damages judgments and the inconsistency between like situations. The majority opinion discussed the incongruity between Dr. Gore's $4 million jury verdict and a similar plain-

86. *See*, *e.g.*, Philip Morris USA, Inc., v. Williams, 129 S. Ct. 1436 (2009).
87. Jones, *supra* note 80, at 1295–96.
88. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2620–21 (2008).
89. Ellis, *supra* note 24, at 3.
90. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2637 (Stevens, J., dissenting in part).
91. *Id.* at 2624.

tiff with a repainted BMW who received a zero punitive damages verdict from another Alabama jury. An eccentrically high punitive damages award is unfair, Souter wrote, because a penalty should be predictable; there should be a like penalty for like damages.[92] However, as mentioned above, the possibility of a large but randomized sanction may also deter a potential miscreant.[93]

As the majority searched for principles of confinement, it examined state jury instruction practices and post-verdict judicial review of punitive damages by reviewing examples from Maryland and Alabama. It concluded that verbal statements in instructions and abuse of discretion post-verdict judicial review under passion-prejudice and shock-the-conscience standards, however elaborated, would not curb outlier juries' punitive-damages verdicts satisfactorily. In his dissent, however, Justice Stevens insisted that abuse-of-discretion review would suffice and that the court of appeals's $2.5 billion judgment should stand because of Exxon's aggravated misconduct and the momentum of the trial and appellate courts' decisions.[94]

As mentioned above, the Court's due process standards from *Gore* and *Campbell,* which suggested a 9:1 or even a 1:1 ratio, while declining to set an absolute ratio, had proved to be difficult to administer because they left discretion to the jury and to lower courts. In a flight from that discretion, the *Exxon* Court's majority analogized punitive damages to criminal sentencing under detailed, but not mandatory, sentencing guidelines.[95] More precise standards than *Gore-Campbell* due process were needed. Only a quantified approach, the opinion continued, will work.

The majority turned to quantified approaches: caps, multiples, and ratios. A dollar cap on punitive damages—for example, Virginia's $350,000 cap—should be rejected, the majority reasoned, because there is no standard tort and no standard tort defendant. A dollar cap like Virginia's that would crush a mere professor would be a trifle for a large and profitable business corporation like Exxon, which earned $19.3 billion in 2009.[96]

The best approach is, the majority wrote, to peg punitive damages to compensatory damages and to leave adjustments for later inflation to the judge or jury.[97] The majority turned to state and federal multiples and examples.

This raised the question of whether the Court had the common law power to set a multiple or ratio. Justice Souter referred to that subject as

92. *Id.* at 2625–26.

93. SCHELLING, *supra* note 26, at 200.

94. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2638.

95. *Id.* at 2627–29.

96. Steven Mufson, *$19.3 Billion Profit is a 57% Drop for Exxon Mobil*, WASH. POST, Feb. 2, 2010, at A12.

97. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2629.

possibly, "too much . . . policy, too little . . . principle."[98] But, analogizing to other precise common law cutoffs such as the court-created Rule Against Perpetuities, the majority affirmed its ability as a common law court to adjudicate a precise line.[99] Since courts make maritime common law, the majority reasoned, the Supreme Court has a free hand to mold that maritime common law, subject to the Constitution and legislative oversight.[100]

The dissenters agreed that the Court had the common law authority or ability to create a precise cutoff, but they disagreed with the way the majority exercised its authority. Congress ought to be the branch that draws a specific line, the dissenters argued, because a legislature is better able to gather and evaluate the evidence than the Court. Moreover, an elected legislature is a more legitimate and appropriate forum in which to set a precise cap. Justice Stevens maintained that Congress should make the empirical judgments, and since it hasn't, a specific cap was unwarranted. He added that state courts had not imposed numerical ratios.[101]

A quantified punitive damages cap is out of place in maritime common law, Justice Stevens wrote, because of low compensatory damages in maritime law. He mentioned two specifically under-compensatory maritime damages rules: the lack of recovery for defendant's negligent infliction of emotional distress and, more important here, the economic loss rule.[102] Generally, a maritime plaintiff may not recover compensatory damages for a defendant's negligently inflicted economic loss—lost income for example—unless that plaintiff also has an injury to person or property. The fisher plaintiffs in *Exxon* could, however, recover compensatory damages for their lost business income because they sued under a special maritime exception to the economic loss rule for commercial fishermen.[103] The majority dealt with this point by dismissing the idea that punitive damages were a surrogate for plaintiffs' losses that were uncompensated under compensatory damages measures. However, this ignored the under-compensatory economic loss rule and its narrow exceptions.

Having discovered its ability to quantify, the majority turned to state ratios. It rejected the frequent legislative ratio of 3:1 because it thought that an across-the-board cap wouldn't work where, as here, the defendant's misconduct was reckless (not intentional), the result was profitless to the defendant, and the defendant had already encountered large non-punitive

98. *Id.* at 2629.

99. *Id.* at 2629–30.

100. *Id.*

101. This is an interesting contrast with Sharkey and Klass's argument that a state court has common law power to establish a split-recovery system to divert punitive damages from the winning plaintiff to a public purpose. *See supra* text accompanying notes 35–37.

102. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2636–37.

103. *See id.* at 2630 n.21.

consequences. Nor did the need to extend punitive damages to encourage private enforcement apply to the catastrophic consequences here.[104]

Citing the Cornell scholars' empirical study, the *Exxon* majority pointed out that judges' and juries' actual punitive to compensatory ratio was less than 1:1—in fact, 0.65:1. So, the *Campbell* Court's suggested 1:1 ratio, the *Exxon* majority said, was "a fair upper limit in such maritime cases."[105]

After the decision, however, the Cornell scholars criticized the majority's reasoning. The majority had taken their study's summary figures to support its conclusions about the unpredictability of punitive damages because of the high mean, or average. The Cornell scholars pointed out that the high mean disappears when cases with low compensatory damages and high punitive damages cases are removed. The ratio, although stable for high compensatory damages, is more variable in low damages verdicts. The majority's use of summary figures in this way was, the Cornell scholars concluded, an "unsupportable" use of statistics.[106]

The majority justified its 1:1 cap by lining up its considerations. The plaintiffs sued under the commercial fishermen exception to the economic loss rule. They lacked physical damages to persons or property. A plaintiff class aggregated the plaintiffs into an economically viable litigation unit, which facilitated their lawsuit.[107] The total of plaintiffs' compensatory damages was high and not inadequate. Finally, Exxon's misconduct, albeit reckless, was neither greedy nor intentional.

Maritime common law, the majority concluded, capped these plaintiffs' punitive damages against this defendant at $508 million, the amount of the plaintiffs' compensatory damages. The common law cap, it added, might also be the substantive due process cap.[108] Justices Scalia and Thomas, who disagree with due process guideposts for state-court decisions, agreed with this result under the Court's common law maritime power.[109]

In his dissent, Justice Breyer argued in favor of upholding the court of appeals's $2.5 billion punitive damages judgment. He maintained that a 1:1

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104. *See id.* at 2634 n.28.

105. *Id.* at 2633.

106. Theodore Eisenberg et al., *Variability in Punitive Damages: An Empirical Assessment of the U.S. Supreme Court's Decision in* Exxon Shipping Co. v. Baker 2 (Cornell Legal Studies Research Paper Series, Working Paper No. 09-011, 2009), *available at* http://ssrn.com/abstract=1392438.

107. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2618 n.6. The leading mass tort scholar, Linda Mullenix, hopes there won't be any more punitive damages class actions. Mullenix, *supra* note 81. *But see* James M. Underwood, *Road to Nowhere or Jurisprudential U-turn? The Intersection of Punitive Damage Class Actions and the Due Process Clause*, 66 WASH. & LEE L. REV. 763, 796–806 (2009) (favoring Rule 23(b)(3) punitive damages class actions).

108. Exxon Shipping Co. v. Baker, 128 S. Ct. at 2634 n.28.

109. *Id.* at 2634 (Scalia, J., concurring).

ratio should have a safety valve for the exceptional case and that this was the exceptional case.[110]

In her separate dissent, Justice Ginsburg identified the problem as the outlier punitive damages verdict. She argued that the traditional approach to post-verdict judicial review works satisfactorily to suppress those exceptions. She also speculated that the majority's next move in its tort reform campaign against punitive damages might be a 1:1 punitive damages-compensatory damages ratio in due process post-verdict judicial review.

IV: Conclusions

What does our crystal ball portend for punitive damages after *Exxon*? What future developments will define the *Exxon* decision's influence?

By negative inference from the majority's reasoning, a 1:1 ratio or cap may not be imposed under all circumstances. These include when defendant's misconduct is intentional, malicious, greedy, or unlikely to be discovered. Nor should the cap govern when plaintiff's harm is either hard to detect or difficult to sue for because a plaintiff with small compensatory damages lacks economic incentive to sue.[111]

Professor Jones asked whether the *Exxon* court's decision for a 1:1 cap on punitive damages only applied to plaintiffs suing under the commercial fishermen exception to the maritime economic loss rule.[112] However, others will argue that *Exxon*'s 1:1 ratio ought to be applied to federal constitutional, common, and statutory law. As Justice Ginsburg feared, *Exxon* may portend a new strictness in due process post-verdict judicial review of state punitive damages.

Is *Exxon* a signal to state courts as a common law precedent? In contending with the problem of the outlier punitive damages verdict, tort reformers adduced the solution of capping punitive damages at the level of plaintiff's compensatory damages. A state supreme court should, they argued, follow *Exxon* as a sound common law precedent in developing a "more predictable civil justice system."[113]

Use of *Exxon* as common law precedent would be awkward because the decision itself stretches the common law technique. A court following common law reasoning normally develops rules in the course of applying them. The court will modify, even overrule, existing rules to adopt the law to changing social and economic conditions. So far, so good for the *Exxon* Court if it assumed that social and economic conditions supported its conclusion. When, however, the particular dispute is unrepresentative, an "out-

110. *Id.* at 2640.

111. *Id.* at 2622.

112. Jones, *supra* note 80, at 1297.

113. Schwartz, *supra* note 63, at 914. *But see* Klass, *supra* note 37, at 201 ("Regardless of whether these limitations on punitive damages are a good idea, the Court's approach is unfortunate for many reasons.").

rider" like *Exxon*, then a court's common law reasoning may be a suboptimal technique to develop a rule in that particular dispute to govern future disputes.[114] Focusing its reasoning as it does on its statutory and constitutional docket, the Supreme Court, not used to incremental common law change, took giant steps where baby steps would have been wiser. Quantified standards, even qualified ones, are scarce in common law decision-making.

In addition to suboptimal common law technique, the *Exxon* court downgraded common law post-verdict judicial review, ignored reasons to give punitive damages to plaintiffs, neglected to examine the special attributes of environmental and economic loss rule damages, and misused statistics. Too anxious to reverse a well-litigated and well-reviewed judgment, it imposed a rigid solution that will be problematic in future application.

The Court's *Exxon* decision is reality for now. In dealing with it, courts and legislatures should pay attention to Professors Leo Romero, Catherine Sharkey, and Alexandra Klass.

Professor Romero compared the Supreme Court's review of punitive damages to its review of criminal sentencing. Legislatures, he advised, should establish guidelines and limits on punitive damages because an elected legislature is more democratic and better fitted than a court to make policy judgments. The legislature, he argued, should define the qualifying misconduct for punitive damages and set the minimum and maximum punishment. A punitive damages statute would mean that courts might honor the imprimatur from both the legislature and the jury.[115]

The Supreme Court is deferential to legislatures in weighing whether statutory criminal sentences are cruel and unusual punishment. For example, in *Ewing v. California*, a court sentenced a recidivist criminal under a state "three strikes" statute to twenty-five years to life for stealing golf clubs. Citing the state legislature's decision in a statute, the Supreme Court refused to reverse.[116] The punitive damages equivalent of twenty-five years to life for stealing golf clubs is a ratio of punishment to harm that exceeds 1:1.[117] In other words, we can expect the Supreme Court to defer more to a statutory punitive damages regime than we have observed for a common law regime.

An unyielding ratio is a crude and unsatisfactory technique to apply to measure the proportion between misconduct and injury. The techniques might be a cap, caps with safety valves, a multiple, or guidelines based on retribution factors like defendant's misconduct and victims' actual or potential harm. A court cannot imprison or incapacitate a corporation, only its

114. FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 111 (2009).

115. Romero, *supra* note 25; Romero, *supra* note 31, at 170–75.

116. Ewing v. California, 538 U.S. 11, 20 (2003).

117. Romero, *supra* note 25, at 142–44.

agents. To the corporation, punitive damages and a criminal fine are similar, although it probably suffers fewer stigmas from punitive damages. From the perspective of deterrence, the defendant corporation is economically indifferent to whether the private plaintiff or the government receives the money.

If a state transfers punitive damages from the exclusive business of juries and judges and develops legislative or statutory definitions, a jury's large punitive damages verdict for a defendant's exacerbated misconduct may well evade a court's excessiveness review. Legislative initiative might resuscitate Professor Klass's argument for environmental punitive damages that exceed a single-digit ratio.[118]

A legislature studying Professor Romero's argument for punitive damages legislation would be well advised to examine Professor Catherine Sharkey's proposal for societal compensation. When a corporate defendant causes widespread injury, it will not always be possible to identify everyone harmed; legislative implementation of her proposal for compensatory societal damages would assure defendant pays enough to structure its incentives to correct its deficiencies. What I have called "consumer-protection punitive damages" for widespread harm accords, in effect, class action recovery in the form of damages exceeding plaintiff's compensation, but without the class action's protection for the defendant. Her proposal would be fairer to defendants and compensate other victims not before the court.[119] Professor Sharkey's article, based on sexual harassment in the workplace and improper police strip searches, advocated a split-recovery system. Professor Klass adopted this split-recovery proposal for defendants' under-valued and under-compensated environmental harm, a proposal that has a salutary potential for environmental torts.[120]

A Washington and Lee Law School classroom is usually a reliable place to take the temperature of conservative America. The *Exxon* court's 1:1 ratio did not, however, have many friends in my fall 2009 Remedies class. Why? For reasons examined above, in 2010, the Supreme Court is a lagging indicator, not only more conservative than the country as a whole; it is more conservative than most conservatives. One response is for other courts to confine the Court's rigid result to the situation before it, the maritime tort. Legislatures, moreover, might consider the Court's questionable solution to be an invitation to the revisions that Professors Romero, Sharkey, and Klass suggest.

118. Klass, *supra* note 31, at 87; *see* Romero, *supra* note 31, at 173–75.
119. Sharkey, *supra* note 35, at 391; *see* Sharkey, *supra* note 25, at 51–53.
120. Klass, *supra* note 31, at 153–59.