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The Exxon Valdez Litigation Marathon: A Window on Punitive Damages

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ARTICLE

THE *EXXON VALDEZ* LITIGATION MARATHON: A WINDOW ON PUNITIVE DAMAGES

CATHERINE M. SHARKEY*

I. U.S. SUPREME COURT RESPONSE TO OUTLIER PUNITIVE DAMAGES AWARDS 27
A. *Constitutional Excessiveness Review* 27
B. *Common Law Excessiveness Review* 31
II. PUNITIVE DAMAGES AS A COMMON LAW REMEDY 35
A. *Background: "Audible Criticisms"* 35
B. *Diagnosis: Unpredictability* 38
C. *Solution: 1:1 Ratio* 42
III. LOOMING ISSUES 44
A. *Unpredictability* 44
B. *Punitive Damages and Class Actions* 46
C. *Federalization of Punitive Damages* 51
CONCLUSION 53

The *Exxon Valdez* litigation marathon—a protracted, two-decade-long battle over the propriety and constitutionality of the jury's $5 billion punitive damages award—provides a window into the past, present, and future of punitive damages. *Exxon Shipping Co. v. Baker*[1] provides an apt vantage point from which to analyze the U.S. Supreme Court's intervention in response to outlier punitive damages awards. The litigation spans the period of the U.S. Supreme Court's interventionist course to reverse punitive damages judgments in lower state and federal courts, from the trio

* Professor of Law, New York University School of Law. This article is a substantially expanded version of the keynote address I delivered for the "*Exxon Valdez* Revisited: Rights and Remedies" symposium at the University of St. Thomas School of Law on October 1, 2009. I am grateful to Michael Allen, Thomas Colby, Jeffrey Fisher, Samuel Issacharoff, Richard Nagareda, and Robert Rabin for their thoughtful comments. Michael Schachter provided excellent research assistance.

1. 128 S. Ct. 2605 (2008).

of constitutional due process cases (*BMW v. Gore*,[2] *State Farm v. Campbell*,[3] and *Philip Morris USA v. Williams*[4]), to the shift in gears to federal admiralty for final resolution in *Exxon Shipping*.

Exxon Shipping also provides a lens through which to examine the common law remedy of punitive damages. The Court is looking for a coherent national solution to what it sees as the punitive damages problem. There is the risk of outlier judgments given the soft standards of jury determinations. Unstated but assumed is that the prospect of punitive damages may coerce settlements or overdeter in ways that we cannot effectively measure empirically. There is also the havoc wreaked by punitive damages on international enforceability of judgments, way beyond the amount and frequency of actual punitive damages.

The Court's aim is an admirable one: to bring predictability to punitive damages. The Court saw the case as an opportunity to address what it perceives as the major problem with punitive damages cases: that similar conduct between cases does not at all necessarily translate into comparable damages awards. But the Court's single-minded focus on unpredictability almost inexorably drives it to embrace and reinforce an exclusively retributive rationale for punitive damages. The Court invokes the analogy of the sentencing guidelines as a model for achieving greater predictability; once enamored with this model, the linkage between the guidelines and criminal retribution spills over to punitive damages as civil retribution. Sitting as a common law court of last resort—as opposed to its review posture in the due process trilogy cases, where it was guided and constrained by constitutional considerations—the Court is up front about its preoccupation with the negative side effects of the punitive damages remedy, without much focus on identifying its curative aspirations.

Finally, *Exxon Shipping* provides an opportunity to hypothesize about the future of punitive damages doctrine and policy. Three issues loom large. First, the Court's fixation on unpredictability can be linked with a broader trend in the Court's jurisprudence of circumscribing the role of the civil jury in the name of certainty, predictability, and efficiency. More specifically, the Court's concerns about the indeterminate and unmoored nature of the jury's determination of punitive damages would seem to apply full stop to the jury's determination of noneconomic, pain-and-suffering damages.

Second, the Court had before it a case in a unique procedural posture: the plaintiffs were part of a "limited fund," mandatory, non-opt out class action for resolution of punitive damages only. Because that element of the case was not appealed to the Court, the Court left for another day resolution

2. 517 U.S. 559 (1996).
3. 538 U.S. 408 (2003).
4. 549 U.S. 346 (2007).

of the classwide determination of punitive damages. Here, cross-currents of U.S. Supreme Court jurisprudence point in opposite directions. On the one hand, the punitive damages class provides protection for the defendant against "overkill"—or being subjected to multiple punitive damages judgments in successive cases for the same course of misconduct. On the other hand, the Court has sharply limited the scope of the mandatory, non-opt out class action and likewise has relentlessly pushed an individual-oriented conception of punitive damages. Here, there is an unresolved tension between a viable public-policy solution to the multiple punitive damages problem and the Court's constitutional jurisprudence.

Third, the Court's quest for a national solution to the punitive damages problem and its equation of punitive damages and criminal fines presage impending federalism battles. By elevating a single punitive damages goal—that of retributive punishment—the Court sets the stage for a clash between state courts and legislatures that might be inspired to define their legitimate state interests in punitive damages differently.

I. U.S. Supreme Court Response to Outlier Punitive Damages Awards

A. *Constitutional Excessiveness Review*

Over the past fifteen years, the U.S. Supreme Court has erected an edifice of federal constitutional due process review of punitive damages, characterized disparagingly by Justice Ruth Bader Ginsburg as "recent forays into the domain of state tort law under the banner of substantive due process."[5] The Court's constitutional excessiveness trio—*BMW v. Gore*, *State Farm v. Campbell*, and *Philip Morris USA v. Williams*—set forth constitutional due process standards that every punitive damages award must withstand. The Court provided three "guideposts" to direct state and federal court review of punitive damages awards: the reprehensibility of defendant's conduct; the ratio of punitive damages to compensatory damages (where compensatory damages serve as a proxy of the harm inflicted by the defendant); and comparable civil and criminal statutory penalties.[6]

Notwithstanding the Court's oft-repeated statement that the reprehensibility guidepost is the most significant,[7] the ratio factor has ascended the

5. *Exxon Shipping*, 128 S. Ct. at 2639 (Ginsburg, J., dissenting).

6. *Gore*, 517 U.S. at 574–85; *Campbell*, 538 U.S. at 419–28; *Williams*, 549 U.S. at 353.

7. *See Gore*, 517 U.S. at 575 ("[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."); *Campbell*, 538 U.S. at 419. Reprehensibility—more so than the other factors—is very much in the eye of the beholder. Consider, for example, the range of views with respect to the reprehensibility of Exxon's conduct in *Exxon Shipping*. *Compare, e.g.*, *Exxon Shipping*, 128 S. Ct. at 2631 n.23 ("We thus treat this case categorically as one of recklessness, for that was the jury's finding."), *with, e.g.*, *id.* at 2640 (Breyer, J., concurring in part and dissenting in part) ("[T]his was no mine-run case of reckless behavior. The jury could reasonably have believed that Exxon knowingly allowed

priority scale because it provides the most definitive guidance to lower courts.[8] Lower courts take comfort in the prospect of a safe harbor provided by single-digit ratios, stemming from the Court's proclamation that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[9] The Court has hemmed and hawed a bit. In *BMW v. Gore*, the Court suggested ratios in the 3:1 or 4:1 range as reasonable.[10] The Court reiterated the single-digit multiplier preference in *State Farm v. Campbell*, where it in fact emphasized that, where compensatory damages are "substantial," a ratio on the order of 1:1 would seem justified.[11] All the while, the Court has protested (too much, perhaps) that it is not establishing anything akin to a "simple mathematical formula,"[12] even as it has prodded lower courts in the direction of single-digit ratios.

The Court itself has fueled this heightened attention to ratios. According to the majority in *Exxon Shipping*, "The potential relevance of the ratio between compensatory and punitive damages is *indisputable*, being a central feature in our due process analysis."[13] The tautology certainly holds: since the U.S. Supreme Court announced the ratio guidepost as part of its constitutional review edifice in 1996 in *BMW v. Gore*, it has repeated it thereafter in each of its constitutional due process punitive damages cases.[14] But repeated invocation of the ratio guidepost is not tantamount to an analytic justification. To my mind, the ratio guidepost—though undoubtedly providing a definitive metric by which to judge the size of punitive damages awards—is theoretically bankrupt.[15] The Court has never even tried to

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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.").

8. *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. Rev. 1353, 1420–28 (2006) (explaining that the Court was "building an increasingly elaborate constitutional edifice around state-law awards of punitive damages," and that while the Court cautiously refused "to establish a 'bright-line' test for the ratio between punitive and compensatory damages, many state courts now seem to apply a de facto constitutional cap").

9. *Campbell*, 538 U.S. at 425.

10. *Gore*, 517 U.S. at 580–81.

11. *Campbell*, 538 U.S. at 425 ("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.").

12. *Id.* at 424–25; *Gore*, 517 U.S. at 582.

13. *Exxon Shipping*, 128 S. Ct. at 2629 (emphasis added).

14. *See, e.g.*, *Campbell*, 538 U.S. at 424–28; Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007).

15. Cass Sunstein and collaborators have labeled the ratio test "a crude test, because on no theory of punitive awards is that ratio a good way to test the validity of the punitive award." Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2118 (1998); *see also* Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 Geo. L.J. 421, 454 (1998) (arguing that the "presumption that the punitive award must stand in some reasonable numerical ratio to the compensatory award . . . has been harmful"). *But see* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 606–08 (2003) (arguing that if the goal is to allow the victim to punish the defendant

relate the ratio factor to any underlying justification for punitive damages, be it retributive punishment or economic deterrence. With respect to the punishment goal, the absence of a correlation between the mens rea or culpable state of mind of the wrongdoer and measure of the actual harm inflicted should surprise no one.[16] If, instead, the law-and-economics deterrence mantle is taken up, the relevant relationship between punitive and compensatory damages focuses on the likelihood of detection, *not* the relative size of the compensatory damages. To the economist, the punitive damages "multiplier" should be the inverse of the probability of detection. In other words, if a wrongdoer's activities would likely escape detection half of the time, compensatory damages alone would not sufficiently deter the actor's wrongdoing, and a multiplier of 2 (the inverse of ½) would have to be applied.[17] The ratio guidepost then would seem to distinguish itself as having attained supreme relevance in the constitutional due process review scheme, notwithstanding its complete lack of justifiability.

The ratio factor, moreover, may simply deflect attention from the fact that the constitutional edifice is, in effect, a house of cards. The U.S. Supreme Court's "recent forays into the domain of state tort law under the banner of substantive due process" have been subject to withering attack, not only from within the Court, but also from without, by the academy.[18]

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for having inflicted a personal insult, then it makes sense to calibrate the size of the punishment to the extent of the insult, which is measured, roughly, by the amount of compensatory damages).

16. *See, e.g.*, Carol Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 781 (2005) ("The culpability of the individual agent bringing about the harm bears no essential relationship to the harm itself . . . .").

17. *See* Robert Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1148 (1989) ("In general, the punitive multiple should equal the reciprocal of the enforcement error for the sake of deterrence, which I call the 'rule of the reciprocal.'"); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874 (1998) (suggesting that a "punitive damages multiplier" formula should be used to calculate punitive damages, where total damages are found by multiplying the amount lost in a particular case by the inverse of the probability that the injurer will be found liable); Joni Hersch & W. Kip Viscusi, *Punitive Damages by Numbers:* Exxon Shipping Co. v. Baker, S. CT. ECON. REV. (forthcoming 2010), *available at* http://ssrn.com/abstract=1327045 ("The efficient level of total damages from the standpoint of the economic theory of deterrence is the economic value of the harm divided by the probability of detection."); *see also* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 367–70 (2003) (describing limitations of the "punitive damages multiplier," including the fact that it fails to take into account instances where there is more "diffuse" societal harm).

18. *See, e.g.*, *Williams*, 549 U.S. at 361 (Thomas, J., dissenting) ("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 . . . . Today's opinion proves once again that this Court's punitive damages jurisprudence is 'insusceptible of principled application.'"); *Campbell*, 538 U.S. at 429 (Scalia, J., dissenting) ("I adhere to the view expressed in my dissenting opinion in [*BMW v. Gore*] that the Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages."); *see also* Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1, 10 (2004) (explaining that in the last fifteen years, the Court "has shown that it will aggressively police punitive damage awards, principally through the rubric of the Due Process Clause," and arguing that "more confusion than clarity has flowed from

Given the blistering critiques, it is worth considering alternative justifications for the Court's intervention in the domain of state tort law. One of the "roads not taken" is the Eighth Amendment's Excessive Fines Clause. Given the Court's increasing insistence that punitive damages function akin to criminal fines and penalties—and indeed are based upon the same individual retributive punishment rationale—the Eighth Amendment's proportionality limit on criminal fines might seem a natural fit. The Court, however, resisted its applicability in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, drawing a sharp divide between civil suits between private individuals and criminal suits prosecuted by the state.[19] In a footnote in the opinion, the Court emphasized that the fact that the proceeds of civil judgments do not revert to the state was germane to its distinction[20]—raising the intriguing possibility that split-recovery schemes, whereby a portion of the punitive damages award is given over to the state or a state-operated fund, might require reexamination of the issue.[21]

My own preferred "road not taken" by the Court is intervention justified by extraterritoriality concerns: namely that a state is regulating beyond its borders, exporting the costs of its punitive damages regulation onto other states, thereby infringing upon those states' legitimate interests.[22] This federalism-based justification not only has reared its head in the Court's due process trio, but it has done so steadfastly, even where its applicability to the case at hand was questionable, at best. *BMW v. Gore* squarely fit the paradigm; in that case, the Court was motivated to intervene, at least in part, to forestall Alabama's imposition of its regulatory policy upon other states,

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the Court's jurisprudence"); Michael L. Rustad, *Happy No More: Federalism Derailed by the Court that Would Be King of Punitive Damages*, 64 Md. L. Rev. 461, 467–68 (2005) ("[T]he Court should take the next exit off the substantive due process highway and leave tort reform to the states."); Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 Hastings L.J. 73, 76 (2007) (analyzing the use of measurement in the Court's jurisprudence on punitive damages, concluding that this "remedial proportionality" is a form of "judicial activism," and arguing for "a return to the traditional judicial review of remedies deferring to the initial fact finders in each case").

19. Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 263–64 (1989) ("[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.").

20. *Id.* at 276 n.21 (leaving open the issue whether a government's recovery of punitive damages in a civil action would implicate the Eighth Amendment's Excessive Fines Clause).

21. *See* Sharkey, *supra* note 17, at 434–35 (suggesting factors relevant to an Excessive Fines Clause analysis include whether the money reverts to the general state treasury (as opposed to a court-administered fund) and what role the state plays in the litigation (e.g., whether it can intervene in the proceedings at any stage)); *see also* Engquist v. Oregon Dept. of Agriculture, 478 F.3d 985, 1005–07 (9th Cir. 2007) (holding that the Eighth Amendment's Excessive Fines Clause did not apply to Oregon's split-recovery statute because it only "applies to government acts that are intended to punish, and the split-remedy scheme is not intended to punish").

22. *See* Issacharoff & Sharkey, *supra* note 8, at 1420–28 (explaining that the "extraterritorial effect of punitive damages awards" is at the heart of the "Supreme Court's federalization of the law of punitive damages").

or the nation as a whole. The Court invoked interests in "state sovereignty" and "comity"[23]—a fledgling attempt to articulate a federalism-based ground for intervention. This jurisprudential line was picked up again in *State Farm v. Campbell*, where, once again, the Court seemed prone to restrain Utah from instigating national regulatory policy, regardless of whether the alleged wrongdoing on the part of the defendant insurance company was illegal throughout the nation.[24] Finally, the Court invoked this federalism-based rationale in *Philip Morris USA v. Williams*, a case that, on its face, would seem to have little to do with cost exportation, given that it involved a single plaintiff smoker and the evidence introduced was limited to other smokers within the state.[25] It is a testament to the significance of the federalism rationale that it nonetheless rears its head in this case.[26] The Court has taken a preliminary stab at articulating a federalism-based extraterritoriality rationale, but none of its cases has rested squarely on this justification for intervention. Given the Court's signaling of a move away from the substantive-due-process justification towards procedural due process,[27] the federalism-based justification might shoulder a more significant burden in future cases.[28]

B. *Common Law Excessiveness Review*

Exxon Shipping represents a sharp break in the Court's punitive damages due process trajectory. The Court takes up the case under federal admiralty jurisdiction, declining to pursue constitutional due process review. An

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23. *Gore*, 517 U.S. at 580–81.

24. State Farm v. Campbell, 538 U.S. 408, 419–22 (2003) (finding that 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," and that 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").

25. Philip Morris USA v. Williams, 549 U.S. 346, 349–51 (2007); *id.* at 359 (Stevens, J., dissenting) (explaining that "evidence attesting to the possible harm the defendant's extensive deceitful conduct caused other Oregonians was properly presented to the jury").

26. *Id.* at 352–53 (stating that where the amounts of punitive damages are "sufficiently large," a state's punitive damages system "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").

27. *See* Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of* Philip Morris v. Williams, 46 WILLAMETTE L. REV. 449, 454–55 (2010).

28. Further development of this federalism-based justification for the Court's intervention would have to contend with the Court's concerns (articulated most vociferously by Justice David Souter) about judicial enforcement of federalism. *See, e.g.*, U.S. v. Morrison, 529 U.S. 598, 649–50 (2000) (Souter, J., dissenting) (arguing that federalism concerns arising out of the Commerce Clause should be left to Congress); Alden v. Maine, 527 U.S. 706, 761 (1999) (Souter, J., dissenting) (criticizing the Court's understanding of federalism for ignoring the "accepted authority of Congress to bind states under the [Fair Labor Standards Act] and to provide for enforcement of federal rights in state court"); *see also* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1941–48 (2008) (describing federalism and the "realist balancing that underlies its modern judicial enforcement").

immediate effect of this choice is that it allowed Justices Antonin Scalia and Clarence Thomas—repeat dissenters in the constitutional due process cases, on the ground that they do not believe that substantive due process in any way restrains common law punitive damages[29]—to advocate for the restraint of outlier punitive damages judgments. But the switch to federal admiralty has broader ramifications. As the Court emphasized, "We are acting here in the position of a common law court of last review, faced with a perceived defect in a common law remedy."[30] In this procedural posture, the Court could address head-on the common law standard of excessiveness as well as the desirability of regulating punitive damages as a common law remedy. Defensively, the Court concedes that "[s]ome will murmur that this smacks too much of policy and too little of principle."[31] But, for a "common law court of last review," policy-inflected analysis is par for the course.

In narrow doctrinal terms, the Court chooses an "admiralty-law ratio" for punitive damages, setting the default at a 1:1 ratio.[32] But, of much

29. *See* BMW v. Gore, 517 U.S. 559, 598–99 (1996) (Scalia, J., dissenting) (joined by Justice Thomas) ("I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against 'unfairness'—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an 'unreasonable' punitive award"); *Campbell*, 538 U.S. at 429 (Scalia, J., dissenting) ("[T]he Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages."); *id.* at 429 (Thomas, J., dissenting) ("I continue to believe that the Constitution does not constrain the size of punitive damages awards.") (internal quotations omitted); *Williams*, 549 U.S. at 353, 361–62 (Thomas, J., dissenting); *id.* at 362–64 (Ginsburg, J., dissenting) (joined by Justices Scalia and Thomas).

30. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2629 (2008).

31. *Id.*

32. *Id.* at 2630, 2633. Several federal and state courts have signaled a desire to limit the Court's 1:1 ratio to the realm of federal admiralty and have refused to impose a 1:1 ratio as a matter of constitutional due process. *See, e.g.*, Southern Union Co. v. Irvin, 563 F.3d 788, 791 n.1 (9th Cir. 2009) (upholding a 3:1 punitive-compensatory ratio while "noting . . . that when the Supreme Court selected a ratio for federal maritime law purposes, rather than constitutional purposes, it saw a ratio of one to one as the 'fair upper limit' "); Grosch v. Tunica County Miss., 2009 WL 161856, at *16 (N.D. Miss. Apr. 1, 2009) (rejecting claim that 6:1 ratio was excessive under *Exxon Shipping*, concluding that "the holding in *Exxon* was confined to cases arising under federal admiralty law and has no application to the case at hand"); Merrick v. Paul Revere Life Ins. Co., 594 F. Supp. 2d 1168, 1192 (D. Nev. 2008) (upholding an 8:1 ratio, "reject[ing] the notion that the Nevada Supreme Court would adopt as a rule of decision the maritime law 1:1 ratio recently announced by the Supreme Court in [*Exxon Shipping*]"); Smith v. Xerox Corp., 584 F. Supp. 2d 905, 915 n.18 (N.D. Tex. 2008) ("*Exxon Shipping* was a maritime common law case, inapplicable here.") (dictum); American Family Mut. Ins. Co. v. Miell, 569 F. Supp. 2d 841, 859 (N.D. Iowa 2008) (upholding a nearly 2:1 ratio, emphasizing that "the Court did *not* conclude that the Constitution prohibits a punitive damage award greater than the amount awarded for compensatory damages").

State courts have been slightly more emphatic in their rejection of attempts to extend the reach of *Exxon Shipping* beyond federal maritime law. *See, e.g.*, Line v. Ventura, 2009 WL 1425993, at *11 (Ala. May 22, 2009) (upholding 5:2 ratio, rejecting argument that the U.S. Supreme Court established a new constitutionally established ratio of 0.65:1 "in light of the [*Exxon Shipping*] Court's explicit limitation of its holding to federal maritime common law"); Diversified Water Diversion, Inc. v. Standard Water Control Sys., Inc., 2008 WL 4300258, at *5 n.4 (Minn. App. Sept. 23, 2008) ("[T]he Court's decision in *Exxon* to limit a punitive-damage award to the

greater significance, the case presents a platform for the Court to provide a template for state appellate courts (and lower federal courts)—an analytic framework for punitive damages excessiveness review that could be emulated by other courts typically sitting as common law courts.[33] Seen in this guise, the Court's pronouncements were intended for a much larger audience, not limited to the federal admiralty realm. The Court took the opportunity to reiterate its plea from *State Farm v. Campbell,* that "'when compensatory damages are substantial, then a lesser ratio . . . can reach the outermost limit of the due process guarantee.'"[34] Lest lower courts miss what the Court was up to, the Court made an explicit link between its common law analysis and its due process jurisprudence, stating that "[i]n this case, then, the *constitutional outer limit* may well be 1:1."[35] And the dissent

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amount of the compensatory-damage award was based on its interpretation of the limit imposed on punitive damages by maritime law . . . . Maritime law is not at issue here."); Powell v. Bank of America, 2008 WL 6506397 (S.C. Com. Pl. Feb. 12, 2008) (upholding a 7:1 ratio, setting aside *Exxon Shipping* as "narrowly confined to federal maritime tort cases governed by federal common law where Congress has not passed any statutes on punitive damages"); Peters v. Rivers Edge Min. Inc., 680 S.E.2d 791, 825 (W. Va. 2009) (upholding ratio slightly greater than 1:1, citing *Campbell* and distinguishing *Exxon Shipping* as providing "a fair upper limit in . . . *maritime* cases").

33. Lower courts have taken the cue from the U.S. Supreme Court and have begun to cite *Exxon Shipping*, along with *Gore*, *Campbell*, and *Williams* in their constitutional due process excessiveness review—even while acknowledging that, by its terms, *Exxon Shipping* is limited to federal admiralty. *See, e.g*., Mendez-Matos v. Municipality of Guaynabo, 557 F.3d 36, 54 n.14 (1st Cir. 2009) (upholding a 1:1 ratio, mentioning *Exxon Shipping*'s 1:1 ratio, nonetheless acknowledging that "[b]y its own terms, . . . the rule does not apply here"); Leavey v. Unum Provident Corp., 295 Fed. App'x 255, 259 n.1 (9th Cir. 2008) (upholding a 1.5:1 ratio, noting that "[w]hile the Supreme Court's recent decision in [*Exxon Shipping*] 'reviewed a jury award for conformity with maritime law, rather than the outer limit allowed by due process,' the Court's statements in that case support the district court's decision to reduce the award here") (citing *Exxon Shipping* along with *Gore* and *Campbell*); Hirsh v. Lecuona, 2008 WL 2795859, at *6 (D. Neb. July 18, 2008) (upholding a ratio of less than 1:1, highlighting "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff" and citing *Gore* and *Exxon Shipping*). *See also In re* Bayside Prison Litig., 2009 WL 1653893, at **5 (3d Cir. June 15, 2009) (vacating a 4.5:1 ratio, citing approvingly *Campbell*, *Gore*, and *Exxon Shipping*).

34. *Exxon Shipping*, 128 S. Ct. at 2626 (quoting *Campbell*, 538 U.S. at 425).

35. *Id.* at 2634 n.28 (emphasis added). *See also* Jurinko v. Medical Protective Co., 305 Fed. App'x 13, 27 n.15 (3d Cir. 2008) ("The Court did not directly address constitutional limits. . . . However, the Court again said that, when compensatory damages are substantial, 'the constitutional outer limit may well be 1:1.'"). *Exxon Shipping* may exert an even greater indirect effect (more difficult to track), providing additional impetus to courts to cite *Campbell* for the constitutional 1:1 limit. *See, e.g*., Roby v. McKesson Corp., 219 P.3d 749, 798 (Cal. 2009) ("After applying the test that the high court articulated in [*Campbell*], we conclude that a one-to-one ratio between compensatory and punitive damages is the federal constitutional limit here.").

Predictably, defendants have pressed the 1:1 ratio as a constitutional limit. *See, e.g.*, Brief for Defendant-Appellant at 57, Worldwide Network Servs. v. Dyncorp Int'l, No. 08-2108(L) (4th Cir. Feb. 2, 2009) ("[T]he Court has specifically instructed that '[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.'") (citation omitted); Brief of Defendants/Appellants Residential Funding Co., LLC and Homecomings Financial, LLC at 100, Mitchell v. Residential Funding Co., No. WD70210 (Mo. Ct. App. May 20, 2009) ("The Court's recent decision in *Exxon*

forlornly asks: "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?"[36] In anticipation of this fate, a few lower courts have gravitated here, applying *Exxon Shipping*'s 1:1 ratio full stop in constitutional due process review of punitive damages.[37]

But regardless of whether lower courts get out ahead of the U.S. Supreme Court in terms of applying a resolute 1:1 ratio across the board, or instead cite (and/or distinguish) *Exxon Shipping* approvingly amidst the constitutional due process cases, the import of the Court's use of a platform from which to guide lower courts is clear. As one federal district court judge put it, "[a]lthough *Exxon* is a maritime law case, it is clear that the Supreme Court intends that its holdings have a much broader application."[38] And, a state court, remarking upon *Exxon Shipping*'s reverberations beyond federal admiralty, suggested that the Court's reasoning "is very persuasive in identifying certain factors relevant to determining the amount of a punitive damages award . . . ."[39] With that, the lower courts are off and running, taking up the gauntlet of emulating the U.S. Supreme Court's policy-inflected scrutiny of punitive damages as a common law remedy.[40] The Court's conceptualization of punitive damages—including its diagnosis and solution of defects in the remedy—takes on greater significance, given the metaphor of the lower courts waiting in the wings and watching.

Shipping confirmed that a 1:1 ratio generally is the constitutional maximum when, as here, the compensatory damages are substantial.").

36. *Exxon Shipping*, 128 S. Ct. at 2639 (Ginsburg, J., dissenting).

37. *See, e.g.*, CP Construction, LLC v. Holder, Civ. No. 3:06-1153, 2008 WL 4908866, at *3 (M.D. Tenn. Nov. 13, 2008) (upholding a 1:1 ratio, reasoning that "[t]he Supreme Court has recently upheld the proposition, albeit in a maritime case, that a ratio of 1:1 is 'a fair upper limit . . . .' Thus, the amount of punitive damages awarded to [plaintiffs] should not exceed the amount of compensatory damages awarded to each entity"); Essex Ins. Co. v. Prof. Bldg. Contractors, Inc., No. B206879, 2009 WL 2152463, at *13 (Cal. App. 2d July 21, 2009) (upholding a 1:1 ratio, relying upon the median ratio in *Exxon Shipping* as "sufficient to punish [the defendant] and deter it and other insurers from similar conduct"); Stevens v. Vons Cos., 2d. Civ. Nos. B196755, B201528, Ventura County Sup. Ct. No. SC041162, 2009 WL 117902, at *14 (Cal. App. 2d July 20, 2009) ("The reasonableness of the trial court's selection of a 1:1 ratio is supported by [*Exxon Shipping*].").

38. Hayduk v. City of Johnstown, 580 F. Supp. 2d 429, 483 n.46 (W.D. Pa. 2008).

39. Bridgeport Harbor Place I, LLC v. Ganim, No. X06CV04184523S, 2008 WL 4926925, at *12 (Conn. Super. Oct. 31, 2008).

40. *See, e.g.*, *id.* at *12 (looking to *Exxon Shipping* for guidance in terms of "the need for some reasonable predictability in the severity of punitive awards; and . . . the need that punitive awards will treat defendants with a fair probability of suffering in like degree for like damage"); *Essex Ins. Co.*, 2009 WL 2152463, at *13 ("The Supreme Court in *Exxon* . . . reviewed studies evaluating the median ratio of punitive to compensatory verdicts, which 'put the median ratio for the entire gamut of circumstances at less than 1:1, meaning that the compensatory award exceeds the punitive award in most cases.' "); *Stevens*, 2009 WL 117902, at *14 (citing empirical studies relied upon by the U.S. Supreme Court to establish the 1:1 ratio).

II. Punitive Damages as a Common Law Remedy

The debate over punitive damages as a common law remedy has reached high decibels. *Exxon Shipping* provides the Court with a ripe opportunity to dive headlong into the policy debate—an opportunity resisted in its previous constitutional due process cases, notwithstanding repeated goading from the various parties and amici in the cases.[41] The Court starts from the premise that "American punitive damages have been the target of audible criticism in recent decades . . . ."[42] It then proceeds to diagnose the underlying core of the problem generating discontent: the *unpredictable* nature of punitive damages awards. The Court follows with a proposed solution of a 1:1 ratio of punitive to compensatory damages. With the shackles of constitutional due process review removed, the Court's analysis of punitive damages as a common law remedy provides a clear, unadorned view of how the Court perceives this remedy and how it would like lower courts to follow suit when conducting excessiveness review.

A. *Background: "Audible Criticisms"*

Foreign countries view American punitive damages as an abomination.[43] The *Exxon Shipping* majority begins by noting that "[p]unitive damages overall are higher and more frequent in the United States than they are anywhere else."[44] The Court—not known for its warm embrace of foreign

41. *See, e.g.*, Brief of Law and Economics Scholars et al. as Amici Curiae Supporting Respondent at 24, BMW v. Gore, 517 U.S. 559 (1995); Brief of the American Tort Reform Association et al. as Amici Curiae Supporting Petitioner at 9, *Gore*, 517 U.S. 559; Brief of A. Mitchell Polinsky, Steven Shavell, and the Citizens for a Sound Economy Foundation as Amici Curiae Supporting Petitioner at 4, *State Farm v. Campbell*, 538 U.S. 408 (2003) (strongly supporting "the use of deterrence theory to inform decision-making in punitive damages cases"); Brief of Certain Leading Social Scientists and Legal Scholars as Amici Curiae Supporting Respondents at 3–4, 6, *Campbell*, 538 U.S. 408; Brief of A. Mitchell Polinsky, Steven Shavell, and the Cato Institute as Amici Curiae Supporting Petitioner at 6, *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (adopting a "public policy, economic approach"); Brief of Neil Vidmar et al. as Amici Curiae Supporting Respondent at 6–7, 12, *Williams*, 549 U.S. 346.

42. *Exxon Shipping*, 128 S. Ct. at 2624.

43. *Id.* at 2623–24; *see also, e.g.*, John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 Colum. J. Transnat'l L. 507, 510, 513–16 (2007) (explaining that most civil law countries "prohibit punitive damages in private actions because they consider punitive damages a form of punishment that is appropriate only in criminal proceedings," and discussing difficulties associated with enforcing an American award of punitive damages in such countries); Volker Behr, *Punitive Damages in American and German Law—Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 Chi.-Kent L. Rev. 105, 127–29 (2003) (describing the evolution of the hostile attitude towards punitive damages in Germany). Punitive damages are often linked with class actions and the contingency fee system as signposts of "American exceptionalism"—typically viewed with skepticism from abroad. *See* Adam Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, N.Y. Times, Mar. 26, 2008, at A, *available at* http://www.nytimes.com/2008/03/26/us/26punitive.html (describing the international community's hostile attitude towards punitive damages).

44. *Exxon Shipping*, 128 S. Ct. at 2623.

countries' judicial authority[45]—surveys the international landscape of punitive damages. In England and Wales, punitive damages are reserved for narrow classes of cases—involving (i) oppressive, arbitrary, or unconstitutional action by government servants;[46] (ii) actions where the ill-gotten gains were likely to exceed compensatory damages; and (iii) actions specifically authorized by statute—and are subject to judicially imposed guidelines.[47] Canada and Australia cabin the award of punitive damages to outrageous conduct.[48] Civil code countries, including France, Germany, Austria, and Switzerland, eschew punitive damages altogether.[49] Germany goes even further, joining Japan and Italy, among other foreign countries, in refusing to enforce punitive damages judgments entered in the United States as anathema to public policy.[50] The Court's international review may simplify the picture of foreign rejection of punitive damages,[51] but it cannot be gainsaid that there is a strong distaste abroad for the American system's seeming incorporation of criminal punishment into private civil law by way of punitive damages.

The attack on punitive damages from within the United States has been even more unrelenting, fueled by myriad organizations representing corporate and business interests. Charges of "runaway jury verdicts" and "blockbuster awards" have led to successful enactment of a variety of legislative tort reform measures at the state level, including caps or limits on punitive damages.[52] Mounting academic literature addresses every aspect of the pu-

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45. The Court has been especially critical of the use of foreign judicial authority to interpret constitutional provisions. *See, e.g.*, Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari) (explaining that the "Court's Eighth Amendment jurisprudence should not impose foreign moods, fads or fashions on Americans"); Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.) ("[C]omparative analysis [is] inappropriate to the task of interpreting a constitution.").

46. Indeed, the very first punitive damages case involved such an abuse of governmental power. Huckle v. Money, (1763) 95 Eng. Rep. 768, 768–69 (K.B.) (upholding a jury's award of three hundred pounds against a government officer).

47. *Exxon Shipping*, 128 S. Ct. at 2623.

48. *Id.*

49. *Id.*

50. *Id.* at 2623–24 (citing Gotanda, *supra* note 43, at 514, 518, 528). As the Court notes, foreign resistance to enforcement of U.S. punitive damages judgments may be waning. *Id.*

51. For example, there appears to be a countervailing trend of increasing experimentation with supracompensatory damages (purposely not termed "punitive") such as compensatory damage multipliers in proposed and recently enacted consumer protection statutes. *See, e.g.*, Mark A. Behrens, Gregory L. Fowler & Silvia Kim, *Global Litigation Trends*, 17 MICH. ST. J. INT'L L. 165, 192–93 (2009) (explaining that recent developments in some civil code nations, including Germany, France, Italy, Argentina, and Thailand, indicate increasing receptivity toward punitive damages).

52. *See, e.g.*, Jonathan Klick & Catherine M. Sharkey, *What Drives the Passage of Damage Caps?*, *in* EMPIRICAL STUDIES OF JUDICIAL SYSTEMS AROUND THE WORLD 299, 301–10 (Institutum Jurisprudentiae, Academia Sinica 2008) (providing evidence that state legislatures enact caps in response to perceptions of runaway juries and blockbuster awards); *see also* Judge Louis Guirola & Thomas L. Carpenter, Jr., *Punitive Damages in Mississippi: What Has Happened, What Is Happening and What Is Coming Next*, 73 MISS. L.J. 135, 171–172 (2003) (calling attention to

nitive damages debate, from the theoretical underpinnings of awarding supracompensatory damages and the doctrinal evolution and expansion of grounds of punitive damages,[53] to the empirical reality of the size, frequency, and characteristics of judge- and jury-awarded punitive damages.[54] Two dueling camps have emerged on the empirical front. One champions the view that punitive damages are, in fact, out of control, characterized by unmoored juries' (and to a lesser extent, judges') granting of unbridled awards.[55] A deep skepticism of the role of the jury, and its capacity to

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the size and frequency of jury verdicts in Mississippi prior to the enactment of punitive damages caps in the state); Chad E. Stewart, *Damages in Alabama's Civil Justice System: An Uncivil War Within the State*, 29 CUMB. L. REV. 201, 213 (1998) (complaining that jury awards in Alabama were out of control in advance of tort reform in 1999).

53. *See, e.g.*, Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 395–96, 414–64 (2008) (explaining that historically, "punitive damages were generally treated as punishment for private wrongs to individuals, not public wrongs to society," and arguing that "punitive damages are constitutional if they fulfill their historical role of punishing the defendant for the private wrong committed upon the individual plaintiff, but they are unconstitutional in their (pre-*Williams*) recent incarnation as punishment for the public wrong visited on society"); Keith N. Hylton, *Due Process and Punitive Damages: An Economic Approach*, 2 CHARLESTON L. REV. 345, 347 (2008) (setting out an economic model of due process analysis and applying it to the punitive damages issue); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 105 (2005) (arguing that punitive damages have a "double aspect," including a "criminal aspect" "[i]nsofar as they pertain to the state's goal of imposing a punishment upon a defendant who merits deterrence or retribution," and a "civil aspect" "[i]nsofar as they pertain to the plaintiff's 'right to be punitive' "). *See generally* Anthony J. Sebok, *What Did Punitive Damages Do?*, 78 CHI.-KENT L. REV. 163 (2003) (describing the history of early punitive damage awards); Note, *Developments in the Law – The Paths of Civil Litigation*, 113 HARV. L. REV. 1783 (2000) (analyzing the evolution of punitive damages, examining recent court decisions, and providing a survey of criticism aimed at punitive damages).

54. *See, e.g.*, Erik Moller et al., *Punitive Damages in Financial Injury Jury Verdicts: Executive Summary*, RAND MR-889-IJC (1997), *available at* 1997 WL MR-888-IJC (describing the number of punitive damage awards in financial injury cases in selected jurisdictions during the period 1985 to 1994, examining patterns in these awards, and estimating the "percentage of the financial injury punitive awards . . . that would have been affected by caps of various sizes and how the caps would have affected the total amount of punitive damages awarded in such cases"); Deborah R. Hensler & Erik Moller, *Trends in Punitive Damages: Preliminary Data from Cook County, Illinois and San Francisco, California*, RAND DRU-1014-IJC (Mar. 1995), *available at* http://www.rand.org/pubs/drafts/2008/DRU1014.pdf (analyzing the sizes of median punitive damages awards in Cook County, Illinois and San Francisco, California for the period 1960–94); Erik Moller, *Trends in Punitive Damages: Preliminary Data from California*, RAND DRU-1059 (Apr. 1995), *available at* http://www.rand.org/pubs/drafts/2008/DRU1014.pdf (analyzing jury awards from California Superior Court jurisdictions, finding that the number of punitive damages awards in each jurisdiction was "quite modest," and observing that punitive damages were awarded more frequently in some types of cases, such as intentional tort cases and business and contract disputes).

55. *See, e.g.*, Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1 (2004) (finding through empirical analysis that juries differ from judges in awarding punitive damages, and that "juries are significantly more likely to award punitive damages than are judges and award higher levels of punitive damages"); W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 EMORY L.J. 1405 (2004) (analyzing sixty-four punitive damages awards of at least $100 million, and finding that these awards (1) have increased over time, with the majority taking place in 1999; (2) have rarely been reversed; and (3) would be

transform its expression of moral outrage into a dollar value—characterized as "scaling without a modulus"—pervades criticisms of punitive damages.[56] The defensive camp, on the other hand, claims that the withering attack on the jury and punitive damages is all sound and fury—the rhetoric is belied by the underlying empirical evidence, which reveals a picture of relatively predictable, stable, not to mention rare, punitive damages awards, characterized by a steady relationship to the size of compensatory damages.[57]

B. Diagnosis: Unpredictability

The Court steeps itself in the empirical literature and dives headlong into the debate.[58] The Court deals a decisive blow to the tort reformers' claim of out-of-control jury awards: "A survey of the literature reveals that

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affected by the ratio limits outlined in *State Farm v. Campbell* if a ratio of 1:1 became the upper limit on punitive damages awards).

56. Daniel Kahneman, David A. Schkade & Cass R. Sunstein, *Shared Outrage, Erratic Awards*, *in* PUNITIVE DAMAGES: HOW JURIES DECIDE 31, 41–42 (Cass Sunstein et al. eds., 2002) (explaining that "[m]agnitude scaling without a modulus produces extremely large variability in judgments of any particular stimulus because of arbitrary individual differences in the selection of moduli," and concluding that "[t]he assignment of punitive damages satisfies the definition of magnitude scaling without a modulus"); *see also* Catherine M. Sharkey, *Punitive Damages: Should Juries Decide?*, 82 TEX. L. REV. 381 (2003) (reviewing SUNSTEIN ET AL. PUNITIVE DAMAGES: HOW JURIES DECIDE (2002) and criticizing the leap from empirical analysis to policy prescription of removing the jury from decisionmaking).

57. *See, e.g.*, 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, 166 J. INSTITUTIONAL & THEORETICAL ECONOMICS 5 (2010) (arguing that punitive damages are not unpredictable) [hereinafter Eisenberg et al., Exxon]; Theodore Eisenberg et al., *The Relation Between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards*, *in* CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 105 (Brian H. Bornstein et al. eds., 2008) (arguing that punitive damages awards have not increased over time and concluding that there is a significant relationship between punitive awards and compensatory damages, even for extreme awards); Theodore Eisenberg & Martin T. Wells, *The Significant Association Between Punitive and Compensatory Damages in Blockbuster Cases: A Methodological Primer*, 3 J. EMPIRICAL LEGAL STUD. 175 (2006) (arguing that a strong association exists even between blockbuster awards and compensatory damages); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996 and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263, 269 (2006) (analyzing thousands of trials from several populous counties in three major data sets and finding steady ratios of punitive damages to compensatory damages in jury trials and bench trials in 1992, 1996, and 2001) [hereinafter Eisenberg et al., *Juries, Judges*]; Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997) (challenging the claim that punitive damages awards are out of control by demonstrating a "strong and statistically significant correlation between compensatory and punitive damages" in 45 populous counties); Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 HARV. J. LEGIS. 487, 492 (2001) (finding a steady ratio of punitive damages to compensatory damages in Florida between 1989 and 1998).

58. It is worth mentioning that, with respect to its empirical analysis, the Court pursued its own tack—one not urged to it by any of the parties or amici in the case. One downside to this approach is that the Court was not privy to debate on the empirical evidence presented in the various studies upon which it relied.

discretion to award punitive damages *has not mass-produced runaway awards*."[59] Canvassing the universe of empirical studies of punitive damages, the Court concludes that "[b]y most accounts the median ratio of punitive to compensatory awards has remained less than 1:1."[60] And the general picture that emerges is one of "an overall restraint" on the part of juries.[61] But this music to the ears of plaintiffs' attorneys and consumer group representatives is fleeting.

For, having laid out a picture of relative stability and restraint, the Court then delivers its diagnosis: "The real problem, it seems, is the *stark unpredictability* of punitive awards."[62] The Court is primarily motivated by a rule-of-law concern with ensuring "fairness as consistency."[63] According to the Court, "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."[64] In the end, the Court is motivated by "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 . . . ."[65]

With that overriding aim, the Court searches in vain for empirical evidence that like cases are being treated alike in terms of the award of punitive damages. Finding no empirical study of actual punitive damages awards to shed light on this core question[66]—and refusing to rely upon existing mock jury studies that nonetheless suggest inconsistency across similar factual situations, on the ground that the research was funded by Exxon, a party in the case[67]—the Court sticks with its intuition that such

59. *Exxon Shipping*, 128 S. Ct. at 2624 (emphasis added).

60. *Id.* n.14 (citing Eisenberg et al., *Juries, Judges*, *supra* note 57, at 269; Vidmar & Rose, *supra* note 57, at 492).

61. *Id.* at 2624–25.

62. *Id.* at 2625 (emphasis added).

63. *Id.* The Court explained that "[w]hatever 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." *Id.* at 2627.

64. *Id.*

65. *Id.* at 2633.

66. *Id.* at 2626 ("We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances.").

67. *Id.* at 2626 n.17. The Court explains that "[b]ecause this research was funded in part by Exxon, we decline to rely on it." *Id.* "Footnote 17" provoked a range of responses. Those critical of industry-funded research held it out as evidence that the Court looked askance at such interest-group funded research. Others suggested this was an exaggeration of the narrower concern of the Court, namely that an actual party to the litigation (Exxon) had provided the funding. *See* Adam Liptak, *From One Footnote, a Debate over the Tangles of Law, Science and Money*, N.Y. TIMES, Nov. 15, 2008, at A16, *available at* http://www.nytimes.com/2008/11/25/washington/25bar.html (describing Exxon's funding of research and punitive damages and discussing the range of responses to "Footnote 17"); Shireen A. Barday, Note, *Punitive Damages, Remunerated Research,*

inconsistency is the root of the punitive damages problem. A salient anecdotal example, moreover, backs the Court's suspicions: in *BMW v. Gore*—the very first case in which the Court intervened to overturn a punitive damages award—the jury had awarded $4 million in punitive damages; whereas, in a companion state case raising a nearly identical claim of fraud in the nondisclosure of the repainting of a car—"strikingly similar facts" according to the Court—another jury had rejected the claim for punitive damages altogether.[68]

But the Court is not content to rest on its intuition or this single piece of anecdotal evidence; instead, for inspiration, the Court turns to the existing empirical studies of actual punitive damages verdicts throughout the country. The Court draws heavily from the Civil Justice Surveys of State Courts, conducted by the Bureau of Justice Statistics of the U.S. Department of Justice and the National Center for State Courts in 1991–92, 1996, and 2001.[69] These data include information from state court trials of tort, contract, and property cases, drawn from forty-five counties, chosen to be representative of the seventy-five most populous counties in the United States.[70]

The Court homes in on three representative statistics in the aggregate data of the ratio of punitive damages to compensatory damages: the median, mean, and standard deviation. The average median, or midpoint, ratio (i.e., the point at which half of the punitive-compensatory ratios lie above and half lie below) is 0.62:1—meaning that, on average, punitive damages are smaller than compensatory damages, such that the ratio is less than 1:1.[71] The mean, or arithmetic average, punitive-compensatory ratio is 2.90:1. Finally, the standard deviation—which measures variation from the mean and median ratio—is 13.81.[72] Scrutinizing these statistics, the Court asks "whether the spread between high and low individual awards is acceptable"

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and the Legal Profession, 61 STAN. L. REV. 711, 712–13 (2008) (examining and criticizing industry-funded research, including in the *Exxon Shipping* case, and proposing two reforms: mandatory disclosure of funding sources for articles and creation of a database categorizing articles by funding source).

Past practice would seem to bolster the narrower interpretation of the Court's concern. The Court relied on the Exxon-funded studies in previous punitive damages decisions. *See, e.g.*, Cooper Industries v. Leatherman Tool Group, 532 U.S. 424, 432 n.5 (2001) (citing Cass Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2074 (1998)). What seems to distinguish this case, then, is the fact that Exxon is a party to the litigation.

68. *Exxon Shipping*, 128 S. Ct. at 2626.

69. For a detailed description of these data, see Eric Helland et al., *Data Watch: Tort-uring the Data*, 19 J. ECON. PERSP. 207, 214 (2005).

70. *Id.* In larger counties, the data represents a random sample; in other counties, the data covers all trials taking place during the time period. *Id.*

71. *Exxon Shipping*, 128 S. Ct. at 2625.

72. *Id.* The Court also points to the corresponding numbers for judge-awarded punitive damages: where the median punitive-compensatory ratio is 0.66:1; mean is 1.60; and standard deviation is 4.54. *Id.*

and concludes, on the basis of these figures, that the answer is "no."[73] The Court is confident that "[e]ven 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."[74]

What is fairly astounding at this juncture is the fact that, with this statistical analysis, the Court managed to provoke vehement criticisms from *both* camps in the punitive damages empirical debate. Indeed, amidst a raging debate regarding premises, relevant data sources, methodologies, and conclusions in the empirical scholarship, the single point of agreement seems to be that the Court erred.[75] First, there is an unsettling circularity in the Court's reasoning. The Court begins from the premise that the punitive damages remedy is plagued by inherent unpredictability. But if that is so, then it is strange that the Court would rely on data of aggregate actual punitive damages (by assumption, tainted by unpredictability) to set benchmarks for the award of future punitive damages. In other words, having questioned the soundness of the existing schemes for awarding punitive damages, the Court then uses data drawn from these awards to set guidelines for future punitive damages awards.[76] This circularity problem has received quite a bit of attention in the literature, as it impacts upon the feasibility of establishing damages "schedules" to guide the jury in awarding damages—which have been proposed to rein in both punitive damages and noneconomic compensatory damages.[77]

The Court, moreover, draws questionable statistical inferences from the aggregate jury data. The Court made no attempt to disaggregate the underlying factors leading to what it deemed unacceptable variability and spread in the data (as evidenced by a large mean and standard deviation, as compared to the median).[78] In fact, it turns out that the spread in the ratio of

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73. *Id.*

74. *Id.*

75. *See* Hersch & Viscusi, *supra* note 17 (critiquing the Court's use of median ratios of punitive to compensatory damages as a basis for setting an upper bound for punitive damages awards); Eisenberg et al., Exxon, *supra* note 57 (arguing that the authors' empirical findings do not support the Court's concern about unpredictability).

76. Hersch & Viscusi, *supra* note 17, at 2 ("The rationale for setting any specific value or range of values for the relationship between punitive awards and compensatory awards follows a rather baffling circular reasoning in that it questions the soundness of current punitive damages awards while at the same time using statistics drawn from these awards to set guidelines for future punitive damages awards.").

77. *See* Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 Nw. U. L. Rev. 908, 938 (1989) (proposing "comprehensive scheduling" as a reform for valuing noneconomic compensatory damages); Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 Cal. L. Rev. 773, 791–93 (1995) (criticizing reliance on schedules for pain-and-suffering damages).

78. There is a separate methodological critique here. Hersch and Viscusi argue that the Court's conclusion about unpredictability "ignores the quite legitimate reasons for why the mean

punitive to compensatory damages is a function of the size of the compensatory damages. Ted Eisenberg reanalyzed the same data used by the Court. He stratified punitive damages by the size of the accompanying compensatory damage award: (1) $0 to $999; (2) $1,000 to $9,999; (3) $10,000 to $99,999; (4) $100,000 to $999,999; (5) $1,000,000 to $9,999,999; (6) $10,000,000 to $99,999,999; and (7) $100,000,000 or more.[79] Eisenberg's statistical analysis demonstrates that *all* of the high-mean, high-standard deviation contribution to the mean and standard deviation statistics used by the Court is attributable to cases in which the compensatory damages were less than $10,000.[80] In other words, this category of cases, with very low compensatory damages, is responsible for the entirety of the variability and spread in the aggregate data that the Court picks up. But this is an extremely troubling finding given that the low compensatory damages cases are precisely those in which the Court has recognized that larger ratios may be entirely appropriate.[81] If the unpredictability in the data is cabined to these low compensatory damages cases, then the Court's diagnosis of the general unpredictability in the punitive-compensatory ratio is off-base.[82]

C. Solution: 1:1 Ratio

Undeterred by its rudimentary understanding of statistics, and with undue confidence in its diagnosis of the root unpredictability problem infecting punitive damages awards, the Court proceeds to outline a solution to the problem. En route, the Court canvases "three basic approaches," one verbal and two quantitative. The Court is pessimistic about the prospects of any verbal approach. States have outlined different factors for courts to use when conducting appellate review of punitive damages verdicts, such as culpability, likelihood of detection, and financial gain.[83] And, at the trial

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might exceed the median," explaining that it is not surprising that the mean ratio is greater than the median ratio, given that "[t]he distribution of possible ratios is truncated from below at zero so that one would expect a relatively longer upper tail of the distribution." Hersch & Viscusi, *supra* note 17, at 10.

79. Eisenberg et al., Exxon, *supra* note 57, at 15.

80. *Id.* at 16.

81. BMW v. Gore, 517 U.S. 559, 582 (1996); State Farm v. Campbell, 538 U.S. 408, 425 (2003).

82. Nor does this mean that unpredictability may not be at the root of a different issue. Hersch and Viscusi argue that "blockbuster" awards—that is, awards of at least $100 million—are poorly represented within the Civil Justice Survey datasets, and that if "the Court used the blockbuster cases as the reference point, it would have reached a quite different assessment of the ratio of punitive damages to compensatory damages." Hersch & Viscusi, *supra* note 17, at 13–14; *see also* Viscusi, *The Blockbuster Punitive Damages Awards*, *supra* note 55 (reporting the list of all blockbuster cases through 2003). *But see* Eisenberg & Wells, *supra* note 57 (arguing that a strong association exists between blockbuster punitive damages awards and compensatory damages awards).

83. *See, e.g.*, Bowden v. Caldor, Inc., 710 A.2d 267, 277–84 (Md. 1998) (stating nine review factors including "degree of heinousness" and "the deterrence value of the amount awarded"); Green Oil Co. v. Hornsby, 539 So. 2d 218, 223–24 (Ala. 1989) (stating seven general criteria,

level, states provide pattern jury instructions. But, as the Court notes, jury instructions typically provide scant specific guidance.[84] In the end, the Court concludes that "[i]nstructions 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)."[85]

The Court then turns to consider quantitative approaches. States have experimented with two basic types of limits on punitive damages—hard dollar caps and punitive-compensatory ratios or maximum multipliers.[86] The Court is less sanguine about the former approach, given the need for ongoing adjustments due to inflation and changing circumstances—tasks far better suited for a legislature than for a court.[87] The Court settles on the ratio approach.[88] At this point, alchemy seems to guide the Court towards the precise 1:1 ratio. Whereas most states adopt either a 3:1 or 2:1 ratio, the Court is worried that such ratios include the most egregious cases as well as the "run of the mill" punitive damages cases.[89] Given the Court's view that Exxon's conduct was reprehensible, but not willful and wanton, the Court is hesitant to adopt such a range.[90] Coincidentally, it settles on the same 1:1 ratio to which it was attracted in its earlier constitutional due process cases.[91] The choice also rests heavily on the Court's (misguided) statistical analysis—thus blurring the divide between the Court's policy-driven analysis and its constitutional review of punitive damages.[92]

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including "the degree of reprehensibility of the defendant's conduct," whether "the wrongful conduct was profitable to the defendant," and the "financial position of the defendant"); *see also* Neil Vidmar & Matthew W. Wolfe, *Fairness Through Guidance: Jury Instruction on Punitive Damages After* Philip Morris v. Williams, 2 CHARLESTON L. REV. 307, 316–24 (2008) (explaining that jury instructions after *Williams* "offered only the most general guidelines" for awarding punitive damages, and proposing model written instructions for punitive damages).

84. In Alabama, for example, the jury is told to consider "the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs." *Exxon Shipping*, 128 S. Ct. at 2627–28 (citing 1 ALA. PATTERN JURY INSTR., CIVIL, NO. § 23.21 (Supp. 2007)). In Maryland, juries are told that a punitive damages award should be: "[i]n an amount that will deter the defendant and others from similar conduct," and "[p]roportionate to the wrongfulness of the defendant's conduct and the defendant's ability to pay," but not "designed to bankrupt or financially destroy a defendant." *Id.* at 2627 (citing MD. CIVIL PATTERN JURY INSTR., Civil, No. 10:13 (4th ed. 2007)).

85. *Id*. at 2628. Notwithstanding the Court's pessimism, some commentators remain steadfast in their conviction that detailed written jury instructions could solve the unpredictability problem. *See, e.g*., Vidmar & Wolfe, *supra* note 83, at 318–24.

86. *See* Catherine M. Sharkey & Jonathan Klick, *The Fungibility of Damage Awards: Punitive Damage Caps and Substitution* 31–33 (Columbia Law and Economics Working Paper No. 298, 2007), *available at* http://ssrn.com/abstract=912256 (providing comprehensive lists of both types of state punitive damages limitations).

87. *Exxon Shipping*, 128 S. Ct. at 2629.

88. *Id.*

89. *Id.* at 2631.

90. *Id.* at 2631–32.

91. *Id.* at 2633; *see supra* note 11 and accompanying text.

92. *See Exxon Shipping*, 128 S. Ct. at 2632–33.

In reaching its solution, the Court evokes a comparison with criminal sentencing guidelines. According to the Court, "[t]he points of similarity [with criminal sentencing] are obvious."[93] The Court lauds the move over the past twenty-five years from an "indeterminate" system to a "system of detailed guidelines tied to exactly quantified sentencing results" and seems to encourage states in that direction.[94] To the Court's mind, little separates punitive damages from criminal fines and penalties; so the guidelines solution for restraining discretion in the criminal context would seem to apply full force in the civil context. Leaving to one side the myriad questions and criticisms regarding the efficacy of the guidelines solution in the criminal sentencing context,[95] what is perhaps most astonishing (although less readily perceptible) is how the Court seizes the reins to define *the* legitimate state interest in punitive damages: retributive punishment.

III. Looming Issues

In making its pronouncements regarding punitive damages as a common law remedy, the Court raised more questions than it answered. How far would its zeal to control unpredictability in the civil justice system be taken? What to make of the seemingly unique procedural feature of the *Exxon Shipping* case, where the plaintiffs were bound together in a mandatory punitive damages class action? And, finally, what are the implications for the Court's having elevated a singular goal (retributive punishment) of punitive damages, by equating punitive damages and criminal sentencing, for future state judicial and legislative responses?

A. *Unpredictability*

The U.S. Supreme Court's diagnosis of the core ill of punitive damages as inherent unpredictability can be linked to the Court's broader project of reining in the vagaries of jury decisionmaking via procedural reform

93. *Id.* at 2628.

94. *Id.*; *see also* Jeffrey L. Fisher, *The Exxon Valdez Case and Regularizing Punishment*, 26 Alaska L. Rev. 1, 39–43 (2009) (explaining that states may set up such guidelines which, in the end, would allow state courts to uphold larger ratios of punitive damages to compensatory damages); Leo M. Romero, *Punishment for Ecological Disasters: Punitive Damages and/or Criminal Sanctions*, 7 U. St. Thomas L.J. 154, 170–73 (2009).

95. *See, e.g.*, Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 Stan. L. Rev. 277, 280–85, 288–91 (2005) (lamenting that the Federal Sentencing Guidelines limited judges' opportunity to consider offender characteristics in sentencing, and proposing reforms that would decrease the Guidelines' emphasis on "offense conduct"); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1683–84 (1992) (criticizing the Federal Sentencing Guidelines for not providing discretion to "judges, prosecutors, defense attorneys, and probation officers, [who] find themselves torn between allegiance to rigid rules and an urge to do justice in individual cases").

in civil litigation.[96] The unpredictability diagnosis has profound implications, if taken to its logical end. Surely, the same unpredictability that taints the jury's punitive damages decision-making process would surface in the jury's determination of noneconomic compensatory damages, such as pain-and-suffering damages. Indeed, in one case before the Washington Court of Appeals, a party attempted (ultimately unsuccessfully) to cite *Exxon Shipping* to call into question general damages, as opposed to specific damages.[97] Such challenges to noneconomic damages may proliferate. These "soft" damages have long been the target of various reforms, such as refined jury instructions and damages schedules, aimed at tempering wide variation in similar cases.[98] But recall the U.S. Supreme Court's skepticism towards jury instructions in realms where award amounts are not tied to specifically proven damages, such as the medical costs and lost wages components of economic compensatory damages.[99] Is the Court giving a tacit endorsement of damages schedules in the realm of noneconomic compensatory damages? How far would the Court push its encouragement of the sentencing guidelines model? One could draw a sharp criminal-civil distinction, with punitive damages falling on the criminal side of the line, and noneconomic compensatory damages remaining firmly on the civil.[100] Of course, in the constitutional due process cases, the domain of the Court's intervention is limited to what it perceives as the quasi-criminal realm of punitive damages.

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96. Notably, Justice Souter, author of the majority opinion in *Exxon Shipping*, also penned the majority opinions in two seminal opinions that likewise had the effect of removing decision-making authority from the jury in particular areas of the law. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 372, 388 (1996) (holding that the construction of a patent claim is "exclusively within the province of the court" on the ground that "judges, not juries, are the better suited to find the acquired meaning of patent terms"); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555–58 (2007) (articulating a heightened "plausibility" standard for antitrust conspiracy claims to withstand dismissal). *See also* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982 (2003) (arguing that "invocations of complexity or uniformity exceptions or assumptions as to efficiency and policy preferences, let alone resort to the 'litigation explosion' and 'liability crisis' bromides, as rationales for limiting access to trial and jury adjudication must be cabined").

97. Rosander v. Nightrunners, 196 P.3d 711, 719 (Wash. Ct. App. 2008). The court did not accept this argument, however, explaining that because *Exxon Shipping* ruled only "on limits of punitive damages only under *maritime* law" it was inapposite. *Id.*

98. *See, e.g.*, Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. Rev. 391, 396–417 (2005) (providing a survey of medical malpractice damages caps); Geistfeld, *supra* note 77 (recommending that juries assess damages for pain and suffering through an ex ante perspective, asking how much they would pay to eliminate the risk that caused the injury); Bovbjerg et al., *supra* note 77 (proposing "alternative frameworks to perfect the valuation of non-economic damages," including "comprehensive scheduling").

99. *See supra* notes 84–85 and accompanying text.

100. Or, alternatively, the Court could recognize the retributive-nonretributive distinction emphasized by my account of punitive damages. *See* Sharkey, *supra* note 17, at 356–72; Sharkey, *supra* note 27, at 470–71; *see also* Colby, *supra* note 53, at 455 n.281.

But, unpredictability cuts across both spheres and would suggest a far wider damages reform agenda.[101] Moreover, as a policy matter, the prospects of combating unpredictability with a single-minded focus on a single category of damages (punitive damages) are dim, particularly in light of the fungibility of damages categories. Emerging empirical (and anecdotal) evidence confirms a substitution effect—efforts to restrain punitive damages via caps and limits lead to increases in compensatory damages (primarily in the noneconomic, pain-and-suffering categories).[102] This substitution effect would predict that, given the Court's heightened attention to the ratio of punitive to compensatory damages, plaintiffs and their attorneys would devote additional resources and effort to bolstering the compensatory denominator.[103]

B. Punitive Damages and Class Actions

Exxon Shipping provided the U.S. Supreme Court with a unique platform to address the issue of punitive damages as a common law remedy given the jurisdictional posture as a federal admiralty case. *Exxon Shipping* was unique on another dimension as well: unlike the previous constitutional due process cases, each of which in essence involved a single plaintiff raising an individual claim against the defendant, in *Exxon Shipping*, the plaintiffs were part of a mandatory, non-opt-out punitive damages class.[104] The issue of the classwide award of punitive damages was not front and center before the Court, but it lurks in the background as a reminder of the unaddressed link between punitive damages and class actions.[105]

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101. *See* Mark Geistfeld, *Constitutional Tort Reform*, 38 Loy. L.A. L. Rev. 1093, 1094 (2005) (arguing that while constitutional tort reform has been limited to punitive damages, "[o]ther important tort practices raise the same sort of due process concerns," which means that "[t]he Court's punitive damages jurisprudence may . . . provide the foundation for a new type of broad-based tort reform"); Sharkey, *supra* note 56, at 398–407 (critiquing the broad reform agenda embraced by Sunstein et al. in *How Juries Decide*, which included "the expulsion of the jury from the punitive damages determination," and suggesting that the authors' empirical findings about the jury's inability to "translate" retribution into punitive damages would seem to raise similar concerns about noneconomic compensatory damages).

102. *See* Catherine M. Sharkey, *Crossing the Punitive-Compensatory Divide*, *in* Civil Juries and Civil Justice: Psychological and Legal Perspectives 79 (Brian Bornstein et al. ed., 2008); Sharkey & Klick, *supra* note 86.

103. *See* Sharkey, *supra* note 102, at 80–104 (uncovering judicial recognition of "substitution" and describing experimental mock jury studies that provide empirical evidence about the phenomenon); Sharkey & Klick, *supra* note 86, at 5–20 (finding that existence of caps on punitive damages are associated with increases in compensatory damage awards).

104. Judge Jack Weinstein was an innovator with respect to certifying a mandatory punitive damages class under Federal Rule of Civil Procedure 23(b)(1)(B) in the Agent Orange litigation. *See In re* Agent Orange Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."), *mandamus denied sub nom. In re* Diamond Shamrock Chem. Co., 725 F.2d 858 (2d Cir. 1984).

105. Sharkey, *supra* note 17, at 402–14; Elizabeth Cabraser & Robert Nelson, *Class Action Treatment of Punitive Damages Issues After* Philip Morris v. Williams*: We Can Get There from*

In *Exxon Shipping*, defendant Exxon specifically requested certification of a mandatory, non-opt-out class of more than 32,000 commercial fisherman, Native Alaskan, and landowner plaintiffs for the purpose of determining punitive damages.[106] Exxon argued that the proposed class satisfied Federal Rule of Civil Procedure 23(b)(1)(B), which is premised upon the existence of a "limited fund" out of which all claims must be satisfied, such that the resolution of individual class members' claims would inevitably affect the disposition of other members' claims.[107] Exxon premised its argument on the "limited punishment" theory—namely, that constitutional due process imposes an upper limit on the total aggregate amount of punitive damages Exxon faces for a single act, such that "if one jury has made an award of punitive damages in an amount such that . . . it equals the amount necessary to accomplish the goals of punishment and deterrence, then subsequent juries may not make additional awards of punitive damages without infringing the substantive limitations on punitive damages set by the due process clause."[108] Notwithstanding plaintiffs' opposition,[109] the federal district court approved the mandatory punitive damages class, accepting Exxon's argument that "due process places a limit on punitive dam-

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Here, 2 CHARLESTON L. REV. 407, 409 (2008) (arguing that in cases where there are many victims, the punitive and deterrent purposes of punitive damages may be achieved through class actions).

106. *See* Class Action Counterclaim for Declaratory Relief, *In re* the Exxon Valdez, No. A89-095-CV (D. Alaska Jan. 28, 1994).

107. *See* Fed. R. Civ. P. 23(b)(1)(B) (justifying class action in situations where alternative individual actions present a risk of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests").

108. Class Action Counterclaim for Declaratory Relief, *supra* note 106, at 9. Exxon elaborated:

> Multiple punitive damages trials thus mean that the action of one jury (in the first case to go to judgment) will necessarily affect the amount of the award that can be made to class members in all subsequent trials, and (if the award by the first jury is sufficiently large) may prevent subsequent juries from awarding any punitive damages at all. All or most of the constitutionally permissible punitive damages would be awarded to class members who were parties to the first trial, while class members who are participants in subsequent trials will receive either a reduced amount, or nothing.

Id. at 9–10.

109. *See, e.g.*, Plaintiffs' Joint Memorandum in Opposition to "Motion of Defendants Exxon Corporation (D-1) and Exxon Shipping Company (D-2) for Leave to File Class Action Counterclaim" and in Opposition to "Motion by Defendants and Counterclaimants Exxon Corporation (D-1) and Exxon Shipping Company (D-2) to Certify Mandatory Punitive Damage Class Pursuant to Fed. R. Civ. P. 23(b)(1)(B)" at 2, *In re* the Exxon Valdez, No. A-89-095-CV (D. Alaska, Feb. 11, 1994) (arguing that the court did not have discretion to certify a Rule 23(b)(1)(B) punitive damages class because Exxon's "limited punishment" theory was "contrary to settled law, and application of it here would violate the Anti-Injunction Act"); State Court Plaintiffs' Amicus Curiae Brief in Opposition to Exxon Corporation's and Exxon Shipping Company's Motion to Certify Mandatory Punitive Damage Class Pursuant to Fed. R. Civ. P. 23(b)(1)(B) at 5–6, *In re* the Exxon Valdez, No. A-89-095-CV (D. Alaska, Feb. 11, 1994) ("Subjecting Exxon to a punitive damages trial in state court as well as in federal court does not violate due process, because both courts have in place procedures to ensure the awards are not excessive.").

ages and, in substance creates a limited fund from which punitive damages may be awarded."[110]

Classwide determination of punitive damages is a controversial notion, albeit one typically staunchly resisted by defendants. Plaintiffs tried such a maneuver in the tobacco context, arguing that the existence of a due process limit on total punitive damages created a limited fund, thus fitting the model of the mandatory, non-opt-out class action.[111] But, in *In re Simon II*, the Second Circuit rejected the creative attempt, suggesting that certifying a punitive damages class was "putting the cart before the horse," and inappropriate given the necessity of determining individualized compensatory damages as an initial matter.[112]

Defendant's strategy in *Exxon Shipping* was quite distinct from that of the tobacco defendants—or any of the defendants involved in the single-plaintiff cases previously before the U.S. Supreme Court. *Exxon Shipping* represents the paradigm of the single-event mass disaster affecting myriad potential plaintiffs. The "singular nature of the spill" created a "unique and compelling" case for mandatory certification of a punitive damages class.[113] As the federal district court reasoned, "[t]hese cases are not spread all over the country where the different laws of many states would apply—as in a product liability situation. In the case at bar, the logistics of compliance with the requirements of Rule 23(b)(1)(B) are much simpler because of the singular nature of the spill."[114] In sharp contrast, the paradigm of the previous constitutional due process trilogy of cases before the U.S. Supreme Court was that of a single products liability plaintiff raising, in essence, a claim for classwide punitive damages, with the threat that future individual plaintiffs could seek punitive damages for similar wrongful conduct.[115]

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110. Order No. 180 Supplement (Decision Regarding Certification of Mandatory Punitive Damages Class) at 9, *In re* the Exxon Valdez, No. A-89-095-CV (D. Alaska, Mar. 8, 1994) (explaining the court's reasons for granting conditional preliminary approval for certification of a mandatory punitive damages class); *see also* Order No. 204 Supplement (Final Certification of Mandatory Punitive Damage Class) at 6, *In re* the Exxon Valdez, No. A-89-095-CV (D. Alaska, Apr. 15, 1994) (explaining the court's reasons for granting final approval of the mandatory punitive damages class, and stating that "the due process clause of the Fourteenth Amendment also imposes substantive limits on punitive damages"). In Order No. 204 Supplement, the court added that "[t]he objectors [to the court's preliminary approval for certification] have failed to convince the court that a mandatory punitive damages class is not the surest and most direct means of limiting punitive damages to those necessary to punish and deter and to limit punitive damages to those which are constitutionally permissible." *Id.*

111. *In re* Simon II, 407 F.3d 125, 127 (2d Cir. 2005).

112. *Id.* at 138.

113. Decision Regarding Certification of Mandatory Punitive Damages Class, *supra* note 110, at 10 ("The reasons for certifying a punitive damages class under a 'limited punishment' theory are, perhaps, more unique and compelling in this case than in any other. Unlike the majority of mass tort class actions, this case involves an unusual convergence of identity of occurrence, law, and fact.").

114. *Id.* at 10–11.

115. *See* Sharkey, *supra* note 17, at 350 ("*State Farm* represents an emerging paradigm in punitive damages cases: a single or multiplaintiff case in which, in effect, 'classwide' punitive

The Court has yet to address the link between punitive damages and class actions.[116] In its trilogy of due process cases, the Court has been concerned about the "multiple punitive damages problem"—namely that a single defendant would be called upon to pay punitive damages over and over for the same wrongdoing.[117] The Court responded by trying to limit the punitive damages in each case to the specific harm directed to the particular plaintiff in the case.[118] The Court, moreover, has cautioned lower courts to be on guard against allowing juries to award punitive damages on account of harms to others.[119]

But this particular problem could have been addressed if the Court recognized and endorsed the "limited punishment" punitive damages class action, whereby all the affected individuals would be before the Court as absent class members.[120] In other words, if the problem is that of awarding classwide damages in a single-plaintiff case, then the solution of the punitive damages class presents itself. The class action solution, moreover, would mitigate the Court's concern about unpredictability. Treating similarly-situated plaintiffs as a class eliminates the possibility of inconsistent verdicts across those similarly-situated plaintiffs.

But, as Francis McGovern reminds, "[b]y most conventional wisdom, there is little future for plaintiffs or defendants who desire to resolve punitive damages claims globally using the procedural vehicle of a class action."[121] The U.S. Supreme Court's decision in *Ortiz v. Fibreboard*[122]

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damages are assessed on a statewide or nationwide scale."); *see also* Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. (forthcoming Sept. 2010), draft at 5–6, 22–40, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1506460 (analyzing *Williams* as an example of "embedded aggregation," a case where an individual litigation implicates the rights of nonparties).

116. *See, e.g.*, Sharkey, *supra* note 17, at 430, 431–32 ("The Supreme Court, while demonstrating grave fear of the extraterritorial scope of punishment, has not expressed similar misgivings about the scope of remediation with respect to class action lawsuits extending to citizens of more than one state, at least so long as the requirements of Rule 23 are met. . . . Moreover, lower federal courts may increasingly push the Court toward reconciling its principles of extraterritoriality in the punitive damages and class action spheres.").

117. *See, e.g.*, State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003) (explaining that punishment based on "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised . . . . 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"); BMW v. Gore, 517 U.S. 559, 593 (1996) (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.").

118. *See Gore*, 517 U.S. at 582, 585; *Campbell*, 538 U.S. at 423–24.

119. *See* Philip Morris USA v. Williams, 549 U.S. 346, 357–58 (2007).

120. This doctrinal choice, moreover, would require the Court to construe Rule 23(b)(1)(B) as capacious enough to embrace the punitive-damages class action. *See infra* text accompanying notes 121–23.

121. Francis E. McGovern, *Punitive Damages and Class Actions*, 70 LA. L. REV. 435, 435 (2010); *see also* Colby, *supra* note 15, at 662–63 (arguing that "there are a number of significant impediments to the use of the class action device to resolve punitive damages claims arising out of a single course of conduct," including the fact that "even where the defendant's conduct was

clamps down significantly on adventuresome applications of Rule 23(b)(1)(B), and signals strong bias against class certification and in favor of individual litigation in future mass torts.[123]

The ability to certify a punitive damages class going forward rests upon a distinctly societal notion of punitive damages.[124] There is much to recommend such a characterization: individual plaintiffs have no vested entitlement or right to punitive damages, as opposed to compensatory damages.[125] Indeed, the state can take away a portion of the punitive damages award for use in the treasury or a specified fund; punitive damages, moreover, are taxed, whereas compensatory damages are not.[126]

But, in its due process punitive damages jurisprudence, the Court has insisted upon the individual retributive nature of punitive damages, with its most emphatic statement in *Williams*.[127] Richard Nagareda, among others, has argued that *Williams* is at fundamental odds with certification of classwide punitive damages.[128] The Court did not have to confront this tension

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identical with respect to all victims (which is often not the case), individual issues (including causation and the amount of both compensatory and punitive damages) will tend to predominate, again making a class action unworkable").

122. 527 U.S. 815 (1999).

123. *See* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 73–94 (2007); McGovern, *supra* note 121, at 449 ("The opponents of class action treatment of the asbestos personal injury cases were drawn from both the left and right of the political spectrum, and they joined in promoting a more deontological approach with the fundamental principle that personal injury lawsuits were, indeed, personal and that the individual aspects of lawsuits were not fungible.").

124. *See, e.g.*, *In re* Simon II, 211 F.R.D. 86, 104 (E.D.N.Y. 2002), *rev'd* 407 F.3d 125 (2d Cir. 2005) ("[T]he punitive award can be said to constitute a punishment on behalf of society . . . ."); *see also* Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST L. REV. 979, 980–81 (2001) ("Punitive damages stand as a civil penalty for transgression of the social compact . . . . to penalize conduct that violates the social contract and injures society."); Sharkey, *supra* note 17, at 413 ("We might consider whether a class of plaintiffs can itself serve as a proxy for society, or at least for a wider societal group."); McGovern, *supra* note 121, at 462 ("[A]nother possible role for a class action in punitive damages cases could materialize if a court adopted a separate rationale for punitive damages based upon economic arguments that damages for tortious conduct should be fully borne by the tortfeasor in order to achieve optimal societal deterrence.").

125. *See, e.g.*, Sharkey, *supra* note 17, at 437 ("The fact that plaintiffs have no vested right to punitive damages—which, after all (at least in most states), are assessed to punish and to deter the defendant, not to compensate the plaintiff in any fashion—remains a formidable barrier to any takings challenge."); Dunn v. Hovic, 1 F.3d 1371, 1402 (3d Cir. 1993) ("[P]unitive awards are windfalls and not compensation [and] courts should place less emphasis on plaintiffs' rights when evaluating due process arguments. Plaintiffs' entitlements are, after all, met by compensatory damages.").

126. *See* Sharkey, *supra* note 17, at 375–80 (describing split-recovery statutes, where the state takes away a portion of the punitive damages award).

127. Philip Morris USA v. Williams, 549 U.S. 346, 353–55 (2007); State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 422–23 (2003).

128. *See, e.g.*, Nagareda, *supra* note 115, draft at 31–32 ("By casting punitive damages ultimately as punishment vis-à-vis the plaintiff — not anyone else — the [*Williams*] Court effectively constitutionalizes a kind of divisible characterization for that remedy. As such, punitive damages

in *Exxon Shipping*, given that the issue of classwide determination of punitive damages was not before it on appeal.[129] And, in fact, the Court steered clear of even mentioning this unique dimension of the case.[130] Here is an example where the Court's constitutional jurisprudence potentially clashes with a public-policy inflected solution. The Court's insistence upon the individual nature of punitive damages blurs the distinction—and leads us to the final looming issue: the increasing federalization of punitive damages by the U.S. Supreme Court.

C. Federalization of Punitive Damages

A distinctive feature of U.S. Supreme Court due process review of punitive damages is the extent to which the Court provides the sole avenue of federal court review of state court judgments. In this vein, Justice Ginsburg has remarked 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."[131] The Court's inherent limited ability to police voluminous state court punitive damages judgments is an animating force behind the Court's seizure of *Exxon Shipping* as a template for lower courts to follow. Acting in the unique (for the U.S. Supreme Court) posture of a common law court, the Court provides a generalized model for lower courts, hoping to persuade by example.

By presenting a template to be emulated by the lower courts, the Court plays a harmonization role, in effect smoothing out state-by-state differ-

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are no more amenable to class treatment than demands for the prototypical divisible remedy of compensatory damages.").

129. Because the procedural issue was not before the Court, *Exxon Shipping* cannot be taken as any kind of endorsement of classwide treatment of punitive damages. The district court's class certification, moreover, predates the U.S. Supreme Court's decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), which presents formidable obstacles to certification. *But see* McGovern, *supra* note 121, at 445 ("[*Exxon Shipping*] provides at least one scenario in which there can be a punitive damages class action. . . . Looking to the future, there may be scenarios like *Exxon* that will occur.").

130. The Court's opinion, in fact, reads as if there is no appreciable difference between the mandatory punitive class of plaintiffs and a single-plaintiff case. Given the Court's previous interest in the "multiple punitive damages" conundrum, coupled with the Court's broad foray into policy-laden analysis of punitive damages as a common law remedy, the lack of attention is disconcerting.

During oral argument, there was only a single colloquy regarding the topic. Justice Ginsburg asked counsel for respondents: "[A]re there other cases against Exxon seeking compensation and punitive damages based on this oil spill that are still awaiting trial or decision? Or is this it?" Transcript of Oral Argument at 77, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (No. 07-219). When counsel replied that "[b]y definition, this is a mandatory punitive class, so this is the one and only time Exxon will face . . . punitive damages," *id.*, Justice Ginsburg alluded to the multiple punishments problem: "So you don't have the problem of litigant A getting these punitive damages and then B, C and D all wanting to [bring additional actions]." *Id.*

131. *Campbell*, 538 U.S. at 431 (Ginsburg, J., dissenting) (quoting BMW v. Gore, 517 U.S. 559, 613 (1996)) (alteration in original).

ences. But the Court's federalization project goes even further. *Exxon Shipping* represents the culmination of the Court's process of reflection upon the core purpose of punitive damages. The Court provides its most fulsome equation of punitive damages and individual retributive punishment.[132] Whereas in its previous due process cases, the Court equivocated between economic deterrence goals and retributive punishment goals,[133] in *Exxon Shipping*, the Court sets out its task as defining "the place of punishment in modern civil law."[134] The Court is clearer than it has been in the past that the goal of punitive damages is *punishment*, with only an incidental aim of deterrence. According to the Court: "We have tied [the constitutional due process] limit to a conception of punitive damages awarded entirely for a punitive, not quasi-compensatory purpose."[135] The facts of *Exxon Shipping* lend themselves to the Court's characterization. Given the myriad government enforcers and private parties involved, punitive damages are not necessary to serve as an incentive to sue.[136] Nor, given the open and notorious nature of the oil spill, is underdetection—the primary focus of the economic deterrence rational—a plausible concern.[137] But, the Court's shaping of punitive damages doctrine extends beyond the boundaries of *Exxon Shipping*.

It is worth highlighting that, at the same time the Court has pressed the single-minded retributive characterization of punitive damages, the Court has been careful to acknowledge in its due process cases that it begins with the *state*'s own articulation of its legitimate *state interest* in punitive damages. Thus, in *Exxon Shipping*, the Court acknowledges that "[s]tate regulation of punitive damages varies."[138] The Court's single-minded focus on the retributive punishment goal of punitive damages then sets the stage for a federalism clash, to the extent that it treads upon alternative legitimate state

132. Sharkey, *supra* note 17, at 359–63, 389–414 (explaining that "[t]he prevailing justification for punitive damages is individually oriented, retributive punishment" and describing an alternative justification based on a societal notion of punitive damages).

133. *Gore*, 517 U.S. at 568; *Campbell*, 538 U.S. at 416; Philip Morris USA v. Williams, 549 U.S. 346, 352 (2007).

134. *Exxon Shipping*, 128 S. Ct. at 2620.

135. *Id.* at 2633.

136. *See* Sharkey, *supra* note 17, at 442 ("[I]n addition to the vast amount of compensatory damages to the numerous parties directly harmed by its actions, Exxon faced the possibility of paying more than $5 billion in criminal and civil penalties for the spill. Exxon pleaded guilty to five criminal counts, potentially subjecting it to $5.1 billion in fines. And the company could have been assessed civil fines of about $64 million by the state and federal governments for its spilled oil. Instead, in a settlement with the federal and state governments, Exxon paid a $25 million criminal fine, plus $100 million in restitution.").

137. Lower courts have seized on this distinction, finding larger than 1:1 punitive-compensatory ratios to be warranted in instances where either compensatory damages are too low to provide enough incentive to sue or where wrongdoing is difficult to detect, and citing *Exxon Shipping* approvingly. *See, e.g.*, Kunz v. DeFelice, 538 F.3d 667, 679 (7th Cir. 2008); Valarie v. Michigan Dept. of Corr., 2008 WL 4939951, at *8–9 (W.D. Mich. Nov. 17, 2008); Green v. Denny's Corp., 2008 WL 4328221, at *2 (S.D. Ill. Sept. 8, 2008); Hayduk v. City of Johnstown, 580 F. Supp. 2d 429, 483 n.46 (W.D. Pa. 2008).

138. *Exxon Shipping*, 128 S. Ct. at 2622.

interests in punitive damages. Consider in this regard states that define a legitimate non-retributive purpose for punitive damages: Michigan provides "exemplary damages" for compensatory purposes; Connecticut allows punitive damages to stand in for attorneys' fees.[139] I have also raised the issue whether split-recovery statutes, which direct a portion of punitive damages judgments to the state or state-run fund, could be reformulated to embody a non-retributive, societal purpose for punitive damages.[140]

Such non-retributive state interests in punitive damages certainly go against the grain of the U.S. Supreme Court's individual retributive punishment drumbeat. But, given the Court's acknowledgement of the federalism interests at stake, I do not think the Court would trample upon them lightly should it be faced with a direct clash. As I elaborate in a separate article, two potential avenues for state legislative articulation of nonretributive purposes for punitive damages are split-recovery statutes and statutory multiple damages.[141] The extent to which states force the Court to confront this looming federalism issue remains to be seen.

Conclusion

Exxon Shipping brought a two-decade long litigation to rest.[142] With its decision in *Exxon Shipping*, the U.S. Supreme Court broke free of the mold of its past constitutional due process review cases and charted a different path of common law excessiveness review under federal admiralty law. The Court's present punitive damages strategy is embodied in the decision: acting akin to a common law court, the Court provided a template for lower courts to follow. Free of constitutional constraints, the Court conceives of punitive damages as a common law remedy. The Court proceeds

139. B&B Inv. Group v. Gitler, 581 N.W.2d 17, 20 (Mich. App. 1998) ("[E]xemplary damage awards in intentional tort cases have been considered proper if they compensate a plaintiff for the humiliation, sense of outrage, and indignity resulting from injuries maliciously, willfully and wantonly inflicted by the defendant."); Harty v. Cantor Fitzgerald & Co., 881 A.2d 139, 153 (Conn. 2005) (explaining that punitive damages "are restricted to cost of litigation less taxable costs of the action being tried and not that of any former trial").

140. *See* Sharkey, *supra* note 17, at 375–88 (providing a description of split-recovery statutes and exploring "the idea—implicit in them—that punitive damages vindicate societal, as opposed to individual, interests").

141. *See* Sharkey, *supra* note 27.

142. Well, not entirely. The U.S. Supreme Court remanded the *Exxon Shipping* case to the Ninth Circuit "to decide issues related to interest and appellate costs." *Exxon Valdez v. Exxon Mobil*, 568 F.3d 1077, 1079 (9th Cir. 2009). The Ninth Circuit concluded that because the plaintiffs' entitlement to punitive damages was "meaningfully ascertained" at the time of the original judgment in 1996, the plaintiffs were entitled to interest from that date (as opposed to 2008, when judgment was entered following *Exxon Shipping*). *Id.* at 1080. And the court required each party to bear its own costs, in keeping with the Ninth Circuit's "usual practice when each side wins something and loses something." *Id.* Exxon acquiesced and paid the court-ordered interest on the judgment, but challenged the costs determination, filing a petition for rehearing en banc with the Ninth Circuit, which was rejected. After contemplating a further petition to the U.S. Supreme Court, Exxon relented and paid the costs. *See* Exxon Qualified Settlement Fund, www.exspill.com.

to diagnose a problem—unpredictability—and propose a solution: a 1:1 ratio of punitive to compensatory damages. The flaws in the Court's statistical analysis provide a reminder that those "unsophisticated in statistics" should proceed with caution. Moreover, there is an uncanny coincidence between the Court's common law, policy-laden analysis, and the heavy-handed direction its constitutional excessiveness decisions had been taking.

There are inevitable tensions between the Court's constitutional due process jurisprudence and its policy analysis of punitive damages as a common law remedy. Future punitive damages issues loom large. How far will the Court go in terms of policing unpredictable civil awards? Will the Court countenance certification of a mandatory punitive damages class under Rule 23(b)(1)(B)? And, finally, how far will the Court press its federalization of the punitive damages remedy, especially if states step forward as antagonistic players?

Exxon Shipping encapsulates the previous two decades' developments in punitive damages jurisprudence. What is even more remarkable is that the decision may also contain the seeds of the salient issues in punitive damages for the next two decades.