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Oil Over Troubled Waters: Exxon Shipping Co. v. Baker and the Supreme Court's Determination of Punitive Damages in Maritime Law

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OIL OVER TROUBLED WATERS: *EXXON SHIPPING CO. V. BAKER* AND THE SUPREME COURT'S DETERMINATION OF PUNITIVE DAMAGES IN MARITIME LAW

I. INTRODUCTION

Although nearly three decades have elapsed since the grounding of the Exxon Valdez, one of history's most catastrophic oil spills, the environmental, economic and legal ramifications continue to echo ominously throughout the world.[1] The eleven million gallon oil spill resulted in eleven thousand miles of oil-covered shoreline, the death of approximately five hundred thousand seabirds, one thousand otters, three hundred harbor seals, and significant impairment to the reproductive and genetic systems of countless numbers of both aquatic and animal life.[2] Despite Exxon's initial expenditure of $3.4 billion in clean-up costs, local fishing businesses, recreational sporting activities, tourism and other native Alaskan subsistence practices have endured persistent harm.[3] In the wake of the spill, heavy fines were imposed, private claims were settled, legislative enactments were promulgated and lawsuits were filed.[4] The most controversial of which was a class action lawsuit brought by a group of plaintiffs whose livelihoods were destroyed by the spill.[5]

On June 25th, 2008, in *Exxon Shipping Co. v. Baker* (*Exxon Shipping Co.*)[6] the United States Supreme Court finally put an end to a fourteen year period of appellate limbo.[7] Apart from considering Exxon's vicarious liability for an intoxicated sea captain and the question of statutory preemption, the Supreme Court, for the first

1. *See* Oil, Out of Control, http://whyfiles.org/168oil_spill/index.html (last visited Mar. 8, 2009) (describing consequences of Exxon Valdez grounding); *see also* The Encyclopedia of Earth, Exxon Valdez Oil Spill, http://www.eoearth.org/article/Exxon_Valdez_oil_spill (last visited Mar. 8, 2009) (providing overview of Exxon Valdez catastrophe).

2. *See* Exxon Valdez Oil Spill Numbers, http://aroundanchorage.blogspot.com/2008/06/exxon-valdez-oil-spill-numbers.html (June 22, 2008, 20:38 PDT) (depicting environmental, economic and legal consequences of Exxon Valdez oil spill).

3. *See id.* (discussing economic repercussions of spill).

4. *See id.* (highlighting legal repercussions of spill).

5. *See id.* (noting extensive media coverage).

6. 128 S. Ct. 2605 (2008).

7. *See id.* at 2609 (concluding issues raised on appeal).

time, viewed the standard of punitive damages through the lens of federal maritime law rather than through constitutional due process.[8]

Punitive damages have a deeply anchored history in maritime law and are especially appropriate in maritime disaster cases, as these calamities often exact incalculable, wide-spread harm.[9] Additionally, existing federal maritime statutes, taken as a whole, indicate that there is no present public policy supporting the limitation of punitive damages in the corporate maritime context.[10] Despite the lack of both historical and public policy support for the limitation punitive damages, the Supreme Court decided to embark on a new law-making venture by conceptualizing and formulating a fixed ratio for determining punitive damage awards in maritime claims.[11]

The Court's revolutionary one-to-one ratio bound the punitive award determination to compensatory damages.[12] Consequently, the initial $5 billion punitive damage award against Exxon was trimmed down considerably to $500 million, which was determined to be the price of justice.[13] For Exxon Mobile, the world's largest energy company, earning $40.6 billion in profit in 2007 alone, the punitive damages represented less than a week's profit.[14] Instead of punishing Exxon and focusing on deterring similar conduct in the future, the Court reduced the punitive award to just another cost of doing business.[15] For the plaintiffs, the award reeked of injustice

8. *See id.* at 2626 (distinguishing current analysis arising under federal maritime jurisdiction from past due process review under Constitution). Typically, the Supreme Court reviews punitive damage awards under the due process clause of the Fourteenth Amendment to ensure that they are neither arbitrary nor grossly excessive. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003) (setting forth guidelines to determine appropriateness of punitive damage awards).

9. For a further discussion of the role of punitive damages in maritime law, see *infra* notes 62-73 and accompanying text.

10. For a further discussion of the legal topography of punitive damages in maritime law, see *infra* notes 74-109 and accompanying text.

11. For a further discussion of the reasoning behind *Exxon Shipping Co.*, see *infra* notes 117-43 and accompanying text.

12. For a further discussion of the reduction in punitive damages, see *infra* notes 139-43 and accompanying text.

13. For a further discussion of the holding of *Exxon Shipping Co.*, see *infra* notes 48-51 and accompanying text.

14. *See* Jonathan Heller, *Exxon Mobil: The Root of All Evil?*, SEEKING ALPHA, Apr. 13, 2008, http://seekingalpha.com/article/72027 (expressing extreme alarm at Exxon Mobile's conduct).

15. *See* Andrew C. Revkin, *What Does Exxon Owe Alaskans? 1994: $5 Billion; 2006: $2.5 Billion; Today: $0.5 Billion*, DOT EARTH, June 25, 2008, http://dotearth.blogs.nytimes.com/2008/06/25/ (discussing minimal effect of reduced award on Exxon).

and exemplified yet another example of the judicial system catering to big business.[16] The extent to which the Court's conclusions will impact future litigation and judicial decision making has yet to be seen. It is anticipated, however, that there will be far-reaching consequences.[17]

This Note analyzes the Supreme Court's decision in *Exxon Shipping Co.* Part II of this Note relays the disturbing factual scenario that gave rise to the United States' most infamous oil spill and the resulting protracted litigation.[18] Part III presents a brief overview of maritime and admiralty law and then discusses the application of punitive damages within those frameworks.[19] Part IV details the Court's analysis in reaching its decision to drastically reduce Exxon's liability by creating and implementing a one-to-one ratio.[20] Part V respectfully critiques the outcome of this case by highlighting the Court's participation in an attempted tug-of-war with legislative power while simultaneously drawing attention to the unique nature of maritime law.[21] Finally, Part VI attempts to provide some foresight, by discussing the potential impact of this monumental decision both onshore, in general common law, and offshore, in other areas of maritime law.[22]

II. FACTS

On March 23, 1989, the Exxon Valdez oil tanker, carrying fifty-three million gallons of oil, departed from the Valdez port in Alaska.[23] The ship was owned by Exxon Shipping, a subsidiary of the oil company, Exxon.[24] The ship's master, Captain Joseph Hazelwood, was an Exxon employee whose drinking habits had allegedly been monitored by Exxon for a period of four years before the

16. *See* Heller, *supra* note 14 (describing plaintiffs' emotional reactions).

17. For a further discussion of the implications of *Exxon Shipping Co.*, see *infra* notes 205-27 and accompanying text.

18. For a further discussion of the facts of *Exxon Shipping Co.*, see *infra* notes 23-51 and accompanying text.

19. For a further discussion of the legal background information, see *infra* notes 52-109 and accompanying text.

20. For a narrative analysis of the Court's decision in *Exxon Shipping Co.*, *see infra* notes 110-43 and accompanying text.

21. For a critical analysis of the Court's decision in *Exxon Shipping Co.*, see *infra* notes 144-204 and accompanying text.

22. For a further discussion concerning the potential impact of *Exxon Shipping Co.*, see *infra* notes 205-27 and accompanying text.

23. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2611-14 (2008) (describing factual details of oil spill).

24. *See id.* at 2611 (highlighting Exxon ownership).

incident.[25] At the time of the spill, Hazelwood was intoxicated and inexplicably absent from the wheel when the ship struck the Bligh Reef.[26] The Valdez ran aground, dumping eleven million gallons of oil into the then environmentally pristine Prince William Sound (the Sound).[27] The timing, conditions of the spill, and location of the grounding, coupled with the abundance of wildlife in the area, resulted in devastating environmental damage and the destruction of local businesses.[28]

Despite an extensive clean-up attempt that involved $2.1 billion in expenditure costs, Exxon paid millions of dollars in private claims and over a billion dollars in the settlement of suits brought by both the Alaskan and United States governments.[29] An additional class action suit was brought by 32,677 private parties who depended upon the Sound for their livelihood.[30] An Alaskan jury awarded the plaintiffs twenty million dollars in compensatory damages.[31] Upon finding both Exxon and Hazelwood to be careless, the jury awarded an additional five billion dollars in punitive damages against Exxon and five thousand dollars in punitive damages against Hazelwood.[32]

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25. *See id.* at 2612 (reviewing witness testimony regarding Captain Hazelwood's observed drinking prior to departure of Valdez). A testifying witness said that before the Valdez departed, Captain Hazelwood "downed at least five double vodkas in the waterfront bars of Valdez. *Id.* Based on a blood alcohol test administered eleven hours after the spill, experts testified that Hazelwood's blood alcohol level was approximately 0.241 at the time of the spill, approximately three times the legal limit for driving in most states. *Id.* at 2613.

26. *See id.* (acknowledging Hazelwood left ship's supervision to unlicensed subordinates, third mate Gregory Cousins and helmsman Robert Kagan).

27. *See id.* (narrating acts leading up to ship's grounding).

28. *See* Katie Markey, Life After the Exxon Valdez Oil Spill: Impacts, Conflicts, and Management - Plans in Prince William Sound (2000) (unpublished student work), *available at* http://www.srnr.arizona.edu/~gimblett/Exxon_Valdez_Impacts_Conflicts_Management.pdf (investigating spill's massive environmental and economic repercussions).

29. *See Exxon Shipping Co.*, 128 S. Ct. at 2608 (describing aftermath of spill).

30. *See id.* at 2613 (classifying diverse plaintiffs consisting of Alaskan landowners, commercial fisherman and Native American groups, as Baker). Exxon's voluntary claims program had not properly accounted for the degree of economic harm suffered by these plaintiffs. *Id.*

31. *See id.* at 2614 (noting jury awarded compensatory damages in Alaskan District Court). Compensatory damages reimburse plaintiffs for calculable injury suffered. *Id.* Although this amount was originally $287 million, it was later reduced to reflect settlements and claims made by Exxon during the trial. *Id.*

32. *See id.* at 2612 (relaying jury awarded punitive damages in Alaskan District Court). Plaintiffs accused Hazelwood of failing to provide navigation watch because he was under the influence of alcohol. *Id.* Plaintiffs chastised Exxon for neglecting to supervise Hazelwood, despite having been told about Hazelwood's drinking condition previously. *Id.*

Exxon subsequently appealed to the Ninth Circuit Court of Appeals, contesting both the appropriateness and amount of the punitive damage award.[33] Although the Ninth Circuit upheld the award, it recommended a reduction in light of recent Supreme Court due process decisions.[34] The district court subsequently reduced the award to $4 billion, after which the Ninth Circuit *sua sponte* remanded the case for consideration.[35] The district judge then increased the award to $4.5 billion with interest and Exxon appealed for a third time.[36] The Ninth Circuit issued an opinion in 2006, ultimately reducing the award to $2.5 billion.[37] This was followed by Exxon's petition to the United States Supreme Court for a writ of *certiorari*, which was granted on October 29, 2007.[38]

In the ensuing litigation, only four Supreme Court Justices joined the opinion in its entirety.[39] Despite Exxon's creative arguments, which contested the constitutionality of the award, the Supreme Court limited its review to the legality of the award under U.S. maritime law.[40] First, Exxon argued that the review was unnecessary because of Congress's statutory preemption in the Clean Water Act (CWA).[41] Second, Exxon used amicus briefs from several different constituencies in an attempt to support its position that vicarious liability is inapplicable in maritime situations.[42] Third, Exxon emphasized that its $3.4 billion expenditure on clean-up efforts, fines, penalties and settlements was a sufficient punishment.[43]

The plaintiffs countered that, due to the enormity of the resulting harm, it was irrelevant that the award surpassed previous awards, and appealed to the Court's moral and ethical sympa-

33. *See id.* (describing procedural posture of case).

34. *See Exxon Shipping Co.*, 128 S. Ct. at 2614 (noting Ninth Circuit's adjustment of award amount).

35. *See id.* (identifying Ninth Circuit's slight reduction in punitive damages after factoring common law developments).

36. *See id.* (highlighting district court's increasing punitive award).

37. *See id.* (noting Ninth Circuit's opinion before Exxon petitioned for writ of certiorari).

38. *See id.* (acknowledging granting Exxon's petition for writ of certiorari).

39. *See Exxon Shipping Co.*, 128 S. Ct. 2605. Four members concurred in part and dissented in part. Justice Samuel Alito recused himself because he owned Exxon Mobil stock.

40. *See id.* at 2610, 2626 (limiting review to federal maritime law and rejecting Exxon's reliance on 1818 case).

41. *See id.* at 2618 (describing Exxon's CWA preemption argument).

42. *See id.* at 2615-17 (reviewing Exxon's attempt at taking responsibility for liability).

43. *See id.* (describing Exxon's reference to previous expenditures).

thies.[44] Plaintiffs also highlighted that a $2.5 billion award was not excessive, due to the fact that it was merely equal to a couple weeks of Exxon's 2007 net profits.[45] Plaintiffs further argued that the approach to addressing punitive damages in maritime cases should follow the standard that forty-eight states currently use and which the CWA allows.[46] The Plaintiffs also asserted that even if such an award was preempted, Exxon waived their rights under the CWA by not raising the issue until thirteen months after the verdict.[47]

In determining whether maritime law permitted corporate liability for punitive damages based on the acts of a managerial agent, the Court reached a four-to-four decision, thereby leaving the Ninth Circuit's ruling "undisturbed."[48] The Court held that the CWA's penalties for water pollution do not preempt punitive damage awards in maritime oil spill cases.[49] Additionally, the Court, acting in its capacity as an admiralty court, ruled that the punitive damage award levied against Exxon was excessive as a matter of maritime common law and thus limited the award to an amount equivalent to compensatory damages.[50] The Supreme Court's decision to create and enforce a one-to-one ratio slashed the damage award to $500 million, and in effect concluded a long volatile and vitriolic legal saga.[51]

III. BACKGROUND

A. Knowing the Ropes: A Brief Overview of Maritime Law

The United States Constitution provides "that the judicial power of the government shall extend. . . to all causes of admiralty and maritime jurisdiction."[52] Yet, while maritime law can be con-

44. *See Exxon Shipping Co.*, 128 S. Ct. at 2615 (acknowledging Exxon's reference to previous expenditures).

45. *See id.* (highlighting merits of respondents' arguments). *See also* Jan Crawford Greenburg, *Oil and Water*, ABC NEWS, Feb. 28 2008, http://blogs.abcnews.com/legalities/2008/02/oil-and-water.html (describing how one of original plaintiffs bought jar with residual oil to Washington).

46. *See Exxon Shipping Co.*, 128 S. Ct. at 2615-16 (discussing respondents' counter-arguments).

47. *See id.* at 2616 (acknowledging Exxon's untimely CWA objection).

48. *See id.* at 2609 (deciding to leave Ninth Circuit's reasoning on Exxon's vicarious liability intact).

49. For a further discussion of the Court's reasoning on the issue of CWA preemption, see *infra* notes 112-16 and accompanying text.

50. For a further discussion of the Court's reasoning on the issue of punitive damages, see *infra* notes 117-43 and accompanying text.

51. For a further discussion of the Court's newly created mathematical formula, see *infra* notes 127-43 and accompanying text.

52. U.S. CONST. art. III, § 2, cl. 3 (delegating maritime authority to judiciary).

sidered "judge-made law to a great extent," it is also largely statutory law.[53] Maritime tort law, in particular, is dominated by federal statutes such as the Jones Act, Clean Water Act, Oil Pollution Act, Death on the High Seas Act and Trans-Atlantic Pipeline Association Act.[54] If a congressional statute covers a cause of action, the statute, and not judicially-created law, will prevail.[55] Moreover, in enacting statutes, the legislature does not merely enact general policies, but also "indicates its conception of the sphere within which the policy is to have effect."[56] In this era, therefore, it is firmly established that, for policy guidance, an admiralty court should rely primarily on existing legislative enactments.[57]

Nevertheless, when Congress has not addressed a question directly, courts are not free to supplement the answer to such an extent that existing statutes or acts become meaningless.[58] Only in the rare situation where a statutory scheme prescribes a "comprehensive tort recovery regime to be uniformly applied," may a plaintiff be deprived of tort remedies beyond what that scheme provides.[59] In the absence of any relevant statute, courts may be able, albeit rarely, to justify the conceptualization and formulation of new rules upon a showing of special circumstances.[60] Absent such a showing, when federal courts develop common law in admiralty, it should be developed in tandem with the existing legislative enactments of Congress.[61]

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53. Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 259 (1979) (holding admiralty law is judge-made law to great extent). *But see Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (emphasizing Congressional superiority).

54. *See generally Miles*, 498 U.S. at 36 (describing proliferation of federal statutes in maritime law).

55. *See* Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1496 (5th Cir. 1995) (determining when Jones Act was enacted Congress incorporated Federal Employment Liability Act (FELA) unaltered into Jones Act and must have intended to incorporate FELA pecuniary limitation on damages as well).

56. Moragne v. State Marine Lines, 398 U.S. 375, 392 (1970) (recognizing policies behind legislative enactments).

57. *See Miles*, 498 U.S. at 27 (highlighting importance of incorporating legislative enactments into judicial decision making).

58. *See id.* at 31 (holding "courts are not free to supplement Congress' answer so thoroughly that the Act becomes meaningless.") (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

59. *See* Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 215 (1996) (describing when and why enlargement of statutory provisions is inappropriate).

60. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2635 (2008) (Stevens, J., dissenting) (emphasizing rare occasion when Courts may perform Congress' function and enforce entirely judicial concept).

61. *See* Am. Dredging Co. v. Miller, 510 U.S. 443, 455 (1994) (emphasizing despite continued and established tradition of federal common lawmaking in admiralty, law is to be developed according to existing legislative enactments).

B. The Devil to Pay: Punitive Damages in Maritime Law

There is a long history of punitive damage awards in maritime and admiralty claims.[62] In 1818, the United States Supreme Court in *The Amiable Nancy*[63] acknowledged that punitive damages could be a proper penalty for the plundering of a vessel and the assault of its crew without provocation.[64] Although punitive damages were denied against the owner of the vessel because of his lack of privity and knowledge, the concept of punitive damages was officially anchored in maritime law.[65] Considering the unique potential of maritime disasters to cause incalculable, widespread harm and the "concomitant role of punitive damages in helping prevent the repetition of such disasters," subsequent admiralty decisions emphasized the necessity of punitive damages in maritime law.[66]

Thereafter, in *The Yankee v. Gallagher* (*The Yankee*),[67] the first admiralty case to assess punitive damages, the captain of a vessel, who breached his duty by deporting the plaintiff, for a "wanton contempt and violation of the law, was penalized." [68] It was not until 1981, however, that courts started to award punitive damages for willful, wanton, grossly negligent, or unconscionable conduct; "a callous disregard for the rights of others."[69] Currently, in maritime litigation, punitive damage issues arise most frequently in cases involving ship employers who willfully fail to pay maintenance or cover expenses for sick or injured crew members.[70] The Supreme

62. *See* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 77 (1997) (outlining history of punitive damages in admiralty).

63. 16 U.S. (3 Wheat.) 546 (1818).

64. *See id.* at 558-59 (acknowledging appropriateness of punitive damage awards).

65. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 170 (Thompson West 2004) (1987) (outlining emergence of punitive awards in maritime and *Amiable Nancy's* historical relevance).

66. *See Ralston v. The State Rights*, 20 F. Cas. 201, 210 (E.D. Pa. 1836) (No. 11,540) (holding it is determination and duty of not only courts, but of every good citizen to keep Delaware River exempt from maritime disasters). *See also* John W. DeGravelles, *Uncertain Seas for Maritime Punitive Damages*, TRIAL, Jan. 2004, at 50, 50 (discussing punitive damages' concomitant role in maritime law).

67. 30 Fed. Cas. 781, 781 (C.C.N.D. Cal. 1859) (No. 18,124).

68. *See id.* (awarding punitive damages against vessel master who illegally transported plaintiff to Sandwich Islands).

69. *See* Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc., 767 F.2d 1379, 1385 (9th Cir. 1985) (holding punitive damages may be imposed for conduct which manifests reckless or callous disregard for rights of others or which shows gross negligence or actual malice or criminal indifference).

70. *See* Paul S. Edelman & James E. Mercante, *Exxon Valdez: Oil Spill, Punitives and Secret Deals*, N.Y.L.J., Sept. 19, 2008, *available at* http://www.kreindler.com/publications/html_pubs/NYLJ-admiralty-law-9-19-08.html (highlighting frequency of punitive damage awards in maritime). *See also Warren v. United States*, 340 U.S.

Court has also held that punitive damages, under state law, may be awarded in admiralty as a supplemental remedy.[71] Additionally, punitive damages may be awarded in cases of intentional tort in admiralty and bad faith denial of insurance benefits.[72] Courts have been particularly generous with punitive damages in certain areas such as purely emotional injuries which are compensable under maritime law when plaintiffs "satisfy the physical injury or impact rule."[73] Generally, punitive damages have been accepted and awarded in a wide range of situations in maritime law.

In federal common law, non-maritime Supreme Court decisions have imposed limitations on punitive damage awards in order to meet the constitutional requirements of due process.[74] Simultaneously, under admiralty law, certain statutes imposed qualifications in situations where unrestrained punitive damages would be inappropriate.[75] For instance, in *Miles v. Apex Marine Corp. (Miles)*,[76] the Supreme Court held that societal damages were not recoverable for the wrongful death of a seaman because of the limitations imposed by the Jones Act,[77] which specifically precludes punitive damages and applies to claims made by seamen under general maritime law.[78] The Court's holding was based on the principle that Congress retains superior authority in maritime matters,

523, 526 (1951) (describing action for maintenance and cure may also be brought under general maritime law).

71. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215-16 (1996) (holding in case of non-seafarer killed in state territorial waters, state law damages may be awarded).

72. *See* Gauthier v. Crosby Marine Serv., Inc., 590 F. Supp. 171, 176 (E.D. La. 1984) (stating employer did not act "in bad faith, vexatiously, wantonly or for oppressive reasons"); *see also Daughdrill v. Ocean Drilling & Exploration Co.*, 665 F. Supp. 477, 486 (E.D. La. 1987) (holding that allowing insurance coverage for punitive damages frustrates purpose of awarding punitive damages under maritime law).

73. *See* Gough v. Natural Gas Pipeline Co. of Am., 996 F.2d 763, 765 (5th Cir. 1993) (awarding punitive damages due to satisfaction of impact rule).

74. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991) (outlining factors to be considered). These factors are as follows: (1) degree of reprehensibility of misconduct; (2) disparity between compensatory damages and punitive award; and (3) comparability of punitive award and court penalties in similar cases. *Id.*

75. *See Robertson, supra* note 62, at 80-85 (discussing statutes defining punitive damages in maritime law).

76. 498 U.S. 19 (1990).

77. *See id.* at 29 (yielding to limitation imposed by Jones Act). Congress enacted the Jones Act to provide protection to persons who are members of the crew of a ship or vessel. *Id.* at 23.

78. *See* 46 U.S.C. § 688 (2006) (governing liability of vessel operators and marine employers for work-related injury or death of an employee).

and that admiralty courts must "be vigilant not to overstep the well-considered boundaries imposed by federal legislation."[79]

Yet, the extent to which the holding in *Miles* precludes punitive damage awards in admiralty law generally remains unsettled;[80] the Third Circuit has even refused to decide the question.[81] Although few courts have followed "the curse of *Miles*," other courts have taken a more restrictive view, supporting the availability of punitive damages to non-seafarer plaintiffs or in cases where statutory law and general maritime law do not overlap.[82] In the *Complaint of Merry Shipping, Inc.* (*Merry*),[83] the Fifth Circuit Court held that punitive damages should be available when a ship-owner has willfully violated the duty to furnish and maintain a seaworthy vessel.[84] Following *Merry*, some courts have taken the position that the Jones Act may not permit recovery for non-pecuniary losses, but that punitive damages may be awarded in different circumstances.[85]

Additionally, another statute, the Death on the High Seas Act (DOHSA), explicitly precludes recovery of punitive damages in

79. *See* Miles, 498 U.S. at 36 (emphasizing congressional limitations imposed on admiralty courts).

80. *See DeGravelles*, *supra* note 66, at 51-57 (describing vastly different interpretations of *Miles* holding).

81. *See Phillip v. U.S. Lines Co.*, 355 F.2d 25, 25 (3d Cir. 1966) (expressly choosing not to decide whether in other cases punitive damages are recoverable under Jones Act).

82. *See* Wahlstrom v. Kawaski Heavy Indus., 4 F.3d 1084, 1094 (2d Cir. 1993) (restricting availability of punitive damages); *see also* Bridgett v. Odeco, Inc., 646 So. 2d 1249, 1252-54 (La. Ct. App. 1994) (rejecting award of punitive damages); *but see Abogado v. Int'l Marine Carriers*, 890 F. Supp. 626, 632-33 (S.D. Tex. 1995) (emphasizing availability of punitive damages when not explicitly obstructed by statutes). *See* Robert Force, *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 745, 791 n.174 (1995) (highlighting forty-three states recognize punitive damages); John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 HOUS. J. INT'L L. 249, 249 (2003) (emphasizing appropriateness of punitive awards in admiralty).

83. 650 F.2d 622 (1981).

84. *See id.* at 623 (recognizing availability of punitive damages in general maritime law).

85. *See* U.S. Steel Corp. v. Fuhrman, 407 F.2d 1143, 1146 (6th Cir. 1969) (reversing punitive damage award under Jones Act, but holding punitive damages might be recoverable under different circumstances); *see Duplantis v. Texaco, Inc.*, 771 F. Supp. 787, 788-89 (E.D. La. 1991) (holding when injured seaman did not claim injuries from unseaworthiness, he could recover punitive damages against oil company for failing to mark submerged obstructions); *Spangler v. N. Star Drilling Co.*, 552 So. 2d 673, 683 (La. Ct. App. 1989) (holding punitive damages are not recoverable under Jones Act but are available under general maritime law).

wrongful death actions arising on the high seas.[86] The legislative history of DOHSA, however, is bereft of any indication that Congress meant to change the law of punitive damages in any other respect.[87] The statute, therefore, is not intended to preclude the availability of general maritime law remedies in situations not covered by the Act.[88] Furthermore, under the Limitation of the Shipowner's Liability Act (The Limitation Act), punitive damages are limited in cases of imputed fault.[89] This statute operates to shield from liability ship-owners charged with wrongdoing committed without their privity or knowledge.[90] The Limitation Act's protections thus render large punitive damage awards functionally unavailable in a wide range of admiralty cases. [91] Throughout history, there have been a vast array of federal statutes which govern liability in maritime law.[92] Where punitive damages have been limited or excluded, it has been explicitly set forth in legislative enactments.[93]

Although there are maritime statutes which both prohibit certain remedies and remain silent on the availability of punitive damages, restrictions on certain remedies do not carry any implication of similar intent in the realm of punitive awards.[94] This lack of intention can be discerned from the area of maritime disasters caused

86. *See* Death on the High Seas Act, 46 U.S.C. §§ 761-768 (2006) (attempting to make it easier for widows of seamen to recover damages for future earnings when death occurs in international waters).

87. *See* Robertson, *supra* note 62, at 164 (recognizing punitive damages still applicable in areas not explicitly addressed).

88. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 396 n.12 (1970) (highlighting Congress intended to insure continued availability of remedy, historically provided by state, for death in territorial waters).

89. *See* 46 U.S.C. § 183 (2006) (stating ship-owners are entitled to limit liability if negligence or unseaworthy condition which caused loss occurred without privity and knowledge of owner).

90. *See id.* (providing certain factual prerequisites must be met).

91. *See Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2635 (U.S. 2008) (Stevens, J., dissenting) (referring to wide applicability of Limitation Act).

92. *See* Robertson, *supra* note 62, at 134-35 (describing statutory landscape of maritime law).

93. *See Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1387 (9th Cir. 1985) (holding punitive awards are appropriate for employer for acts of managerial employees). *But see* Miller v. Am. President Lines, Ltd., 989 F.2d 1450, 1455 (6th Cir. 1993) (holding punitive damages were prohibited by Jones Act and therefore barred).

94. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 n.16 (1970) (holding congressional decision to place such areas as national parks, which are carved from existing state territories and are subject to no other general body of law, under state laws "carries no implication of similar intent in vastly different realm of admiralty").

primarily by the discharge of oil.[95] Presently, no federal statutes comprehensively deal with punitive damages for injuries to private parties caused by the discharge of oil into navigable waters.[96] Nevertheless, certain federal statutes are pertinent in connection with actions to recover damages resulting from such injuries.[97] These statutes "establish[ ] not only the attitude with which courts should approach a case in which damages are claimed for injuries resulting from oil pollution. . . [but also] set[ ] forth Congress' goals and policy with respect to restoring and preserving the nation's waters through federal action."[98]

In recent years, this area of the law has attracted a torrent of legislative and judicial attention, resulting in the imposition of civil liability upon vessel operators for oil-related damages.[99] For example, after the infamous Valdez spill, Congress enacted the Oil Pollution Act of 1990 (OPA) to govern oil spills and establish private remedies.[100] The OPA is intentionally silent on the availability of punitive damages, however it forces additional responsibility on oil spillers for clean-ups by providing tougher penalties and greater liability.[101] Oil and other pollutants are also regulated by other statutes such as the Clean Water Act (CWA) and the Trans-Alaska Pipeline Authorization Act (TAPAA).[102] These Acts may preempt certain maritime tort remedies, but do not forestall or restrict punitive awards.[103]

Furthermore, the CWA is intentionally silent on punitive damages and chooses "not to alter the existing full range of private com-

95. *See* Jean F. Rydstrom, ANNOTATION, *Damages Compensable Under Federal Maritime Law for Injuries Caused by Discharge of Oil into Navigable Waters*, 26 A.L.R. FED. 346, 346 (1976) (highlighting lack of legislative specificity).

96. *See id.* at 350 (describing pertinent existing statutory provisions).

97. *See id.* at 351 (explaining relevance of statutes despite lack of addressing issues specifically).

98. *Id.* at 351-55 (internal citation omitted) (discussing statutory signals and guidance).

99. *See id.* at 351 (noting proliferation of legislative acts in recent years).

100. *See* The Oil Pollution Act, 33 U.S.C. §§ 2701-2762 (2006) (establishing new requirements to provide enhanced capabilities for oil spill response and natural resource damage assessment).

101. *See id.* § 2701 (highlighting OPA gave rise to fear of unlimited damages in maritime industry and renders uninsurable punitive damages limitless).

102. *See* Clean Water Act, 33 U.S.C. §§ 1251-1387 (2006) (governing water pollution by establishing goals and setting forth standards); Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1656 (2006) (governing water pollution by establishing goals and setting forth standards).

103. *See* United States v. Locke, 529 U.S. 89, 115-16 (2000) (holding maritime casualty reporting is preempted by comprehensive federal regulatory scheme governing oil tankers).

mon law tort remedies for harm to private economic and quasi-economic resources."[104] Additionally, with the passage of TAPAA, Congress altered the liability regime governing certain types of Alaskan oil spills by imposing strict liability and capping financial recovery.[105] TAPAA was passed only after securing the oil industry's assurance that their tankers would employ extensive safety measures in order to protect the Sound's pristine and resource-rich waters.[106] Notably, again, Congress did not restrict the availability of punitive damages.[107]

Admiralty courts have a duty to adhere to legislative signals and policy guidelines.[108] By not specifically prohibiting or limiting punitive damages in these Acts, Congress most likely intended to ensure the continued and unrestrained availability of punitive awards as an appropriate remedy for oil-related maritime disasters.[109]

IV. NARRATIVE ANALYSIS

In *Exxon Shipping Co.*, the United States Supreme Court began its decision by asserting jurisdiction over all maritime matters.[110] After briefly addressing a ship-owner's derivative liability, the Court was equally divided and chose to leave the lower court's decision on Exxon's vicarious responsibility intact.[111] The second issue the Court addressed was the question of preemption.[112] Despite criticizing the Ninth Circuit for exceeding its discretion, the Court did not agree with Exxon's argument that the CWA preempted punitive damages, but not compensatory damages, for economic loss.[113] The CWA's explicit interest in protecting water, shorelines and natural resources was interpreted broadly by the Court to encompass

104. 33 U.S.C. § 1251 (expressing scope of applicability).

105. *See* 43 U.S.C. § 1651 (elaborating on effects of statutory provisions).

106. *See id.* (discussing goals and standards of TAPAA). At the time that TAPAA was passed, several federal agencies had conducted studies on the social, environmental, and economic impacts of a trans-Alaskan pipeline. *Id.*

107. *See id.* (lacking any punitive damage restriction).

108. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 24 (1990) (reiterating legislative signals and judiciary guidelines).

109. *See Moragne v. State Marine Lines Inc.*, 398 U.S. 375, 397-98 (1970) (holding when Congress does not explicitly preclude availability of remedy, it should be available).

110. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008) (asserting jurisdiction over matter).

111. *See id.* at 2616 (declining to interfere with lower court's ruling concerning Exxon's vicarious liability); Neil v. Biggers, 409 U.S. 188, 192 (1972) (noting when holding has no precedential value).

112. *See Exxon Shipping Co.*, 128 S. Ct. at 2616 (stating second issue to be addressed).

113. *See id.* at 2618 (acknowledging Ninth Circuit's procedural oversight).

requirements imposed on sub-*silentio* oil companies.[114] The Court also appropriately determined that in passing the CWA, Congress did not displace, or in any way diminish, the availability of common law punitive damage remedies.[115] The CWA's remedial scheme would, therefore, not be hindered by holding Exxon liable for violating its common law duty to refrain from harming the livelihoods of private individuals.[116]

The final and pivotal question before the Court was whether the lower court's $2.5 billion punitive damages award fell within the limits prescribed by federal maritime law.[117] Since the case came under the jurisdiction of federal maritime law, the Court did not undertake a constitutional analysis or consider due process violations.[118] The Court acknowledged that its analysis was a significant departure from previous decisions addressing punitive damages, and focused on its deep concern for "the stark unpredictability of punitive awards."[119] Justice Souter repeatedly stated that the ruling was in the context of maritime law; the Court's reasoning, however, was less about maritime law and more about the perceived general need for predictable and consistent punitive damage awards.

In seeking to justify a lower punitive award, the Court conducted an overview of the history of punitive damages and their dual purpose of both punishment and deterrence.[120] Furthermore, the Court considered the different treatment of punitive damages among various states as well as the United States' punitive awards relative to the international community.[121] The Court determined that a lower award was appropriate because Exxon's conduct was

114. *See id.* at 2619 (addressing scope of CWA).

115. *See id.* (finding CWA preempts neither compensatory nor punitive damages for maritime cases).

116. *See id.* (determining Congressional intent and concluding punitive damages would not interfere with CWA provisions).

117. *See Exxon Shipping Co.*, 128 S. Ct. at 2619 (stating final issue to be considered in case).

118. *See id.* at 2626 (discussing boundaries of review).

119. *See id.* at 2625 (referring to need for consistency and predictability).

120. *See id.* at 2620-22 (conducting overview of punitive damage history in common law).

121. *See id.* at 2622-24 (acknowledging treatment and determination of punitive damages in various states and different countries); *see also* John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 394-95 (2004) (noting despite controversy over appropriateness, punitive damages are widely available in countries such as England, Australia, New Zealand and Canada). *See generally* John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507, 508 (2007) (analyzing landscape of punitive damages in common law).

"worse than negligent but less than malicious."[122] Attempting to produce systemic consistency in "the analogous business of criminal sentencing," the Supreme Court concluded that only a quantified approach to punitive damages would produce the desired uniformity.[123] The Court, therefore, eschewed reliance on "verbal formulations" typically required in jury instructions.[124] Instead, the Court favored using a maximum multiple or ratio to correlate punitive damages to compensatory damages instead of placing a "hard dollar cap" on punitive damages.[125] In doing so, great emphasis was given to empirical studies revealing that the median punitive damage award in common law decisions was approximately sixty-five percent of the compensatory awards.[126]

In weighing this data, the Court recognized a great disparity between high and low punitive damage awards,[127] and believed that if allowed to stand, the $2.5 billion award would be an outlier.[128] A one-to-one ratio, which was above the median award, was therefore considered a fair upper limit in maritime cases, regardless of the resulting harm.[129] Yet, the Court chose not to decide whether the same outer limit applied as a matter of due process mandated by the Constitution.[130] In addition, the Court also left unanswered the question of whether interest should be awarded.[131] Instead, the

122. *Exxon Shipping Co.*, 128 S. Ct. at 2631-34 (relaying data used to reach one-to-one ratio).

123. *See id.* at 2628-29 (finding parallels between punitive damage determination and criminal sentencing practices).

124. *See id.* at 2628 (considering available statistical and analytical methods).

125. *See id.* at 2629 (rejecting option of setting a hard-dollar punitive cap); *see, e.g.*, Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 546-547 (1983) (declining to adopt fixed formula to account for inflation in discounting future wages to present value in light of unpredictability of inflation rates and variation among lost-earnings cases). It would be difficult to settle upon a particular dollar figure as appropriate across the board due to the lack of certain standard injuries and a judicially selected dollar cap would carry the serious drawback that the issue might not return to the docket before there was a need to revisit the figure selected. *Exxon Shipping Co.*, 128 S. Ct. at 2929.

126. *See Exxon Shipping Co.*, 128 S. Ct. at 2625-33 (referring to statistical studies).

127. *See id.* at 2625 (asserting thrust of empirical figures indicated spread is great and outlier cases subject defendants to punitive damages that dwarf corresponding compensatories).

128. *See id.* (discussing why reduced award was appropriate).

129. *See id.* (justifying creation of newly imposed ratio).

130. *See id.* (attempting to limit scope of review).

131. *See Exxon Shipping Co.*, 128 S. Ct. at 2627 (deciding to leave awarding of interest unanswered).

Court "declined to rule in the first instance" and claimed that the question should be answered by the Ninth Circuit.[132]

In reaching its conclusions, the members of the Court differed on a variety of points and there was a major divergence between the majority and dissent.[133] Justice Stevens, in particular, raised compelling objections.[134] In light of the many federal statutes that already govern admiralty law, Justice Stevens castigated the majority's decision to limit punitive damages in the maritime context.[135] Justice Stevens' dissent highlighted the absence of statutes which expressly restrict punitive damages, indicating a lack of congressional intent to protect wrongdoers such as Exxon.[136] Justice Stevens also pointed to maritime law's "less generous remedial scheme" and the compensatory function of punitive damages as reasons for not adopting a fixed ratio to limit such awards.[137] The imposition of caps and ratios, Justice Stevens insisted, was meant to be handled by the legislature, not the Court.[138]

Yet, despite the dissent's objections that the adoption of a limit would usurp Congress' legislative function, the majority concluded that the absence of statutorily imposed limitations did not imply a congressional intent favoring unconstrained punitive damages.[139]

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132. *See id.* at 2635 (concluding without addressing all matters).

133. *See id.* at 2639-40 (Ginsburg, J., concurring) (questioning impacts of one-to-one ratio). Justice Breyer's concurrence observes that while he has no jurisprudential problem with a court-mandated mathematical ratio, he believes that the $2.5 billion award was justified here, and should be allowed as a limited exception to the rule the Court just created. *Id.* at 2640-41 (Breyer, J., concurring). Justices Scalia and Justice Thomas wrote a two-sentence concurrence, observing that while the Court's decision was correct as based on its prior holdings, they continue to believe that those prior holdings were decided incorrectly. *Id.* at 2634 (Scalia, J., concurring).

134. *See id.* at 2634 (Stevens, J., dissenting) (advocating objections to majority's reasoning).

135. *See id.* at 2635 (acknowledging large number of federal maritime statutes insufficiently addressed by majority).

136. *See Exxon Shipping Co.*, 128 S. Ct. at 2635 (Stevens, J., dissenting) (noting Congress has not expressed interest to protect business giants who cause cascading harm).

137. *See id.* at 2636 (spotlighting maritime law's unique remedial scheme).

138. *See id.* (differentiating congressional power from judicial power).

139. *See Exxon Shipping Co.*, 128 S. Ct. at 2630-32 (majority opinion) (refuting dissents' objections by citing to responsibilities for common law remedies when Congress has not made first move); *see also* Rapanos v. United States, 547 U.S. 715, 749 (2006) (plurality opinion) (noting Court's "oft-expressed skepticism towards reading the tea leaves of congressional inaction") *and United States v. Reliable Transfer Co.*, 421 U.S. 397, 397 (1975) (holding when there is need for new remedial maritime rule, past precedent argues for setting judicially derived standard subject to congressional revision). *But see Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (emphasizing Congress retains superior authority in maritime matters).

The Court asserted that, in the absence of explicit statutory language, the responsibility of addressing the "desirability of regulating punitive damages as a common law remedy" lay with the judiciary.[140] The Court, therefore, embarked on a new law-making venture by creating a mathematical formula for determining punitive damage awards,[141] and held that a one-to-one ratio between punitive and compensatory damages was a fair upper limit.[142] In setting a rigid ratio and considerably reducing the $2.5 billon award to $500 million, the Supreme Court claimed to take a neutral stance and vacated the lower court's judgment.[143]

V. CRITICAL ANALYSIS

At first blush, the Supreme Court's decision appears to be insensitive, overly rigid and an unjust refuge for corporate giants.[144] Upon further scrutiny, however, the Court's reasoning reveals fundamental incongruities and a number of insufficiently addressed questions.

A. Towing the Line: A Legislative-Judicial Tug of War

It is undisputed that general maritime law applies in an admiralty case such as *Exxon Shipping Co.*[145] The Court's illustration of the judge-made nature of federal maritime law also remains uncontested.[146] The Court, however, was hasty in justifying the use of a free-hand in dealing with this entirely remedial matter.[147] Although partly judicial in nature, maritime law is dominated by federal statutes.[148] The Court's cursory approach to existing federal maritime statutes resulted in a failure to recognize that statutes, even when covering only particular cases, may imply a broader pol-

140. *Exxon Shipping Co.*, 128 S. Ct. at 2630 (asserting complete control over maritime law making).

141. *See id.* (relaying departure from prior precedent).

142. *See id.* at 2632 (holding judicially imposed one-to-one ratio would be just and reasonable).

143. *See id.* (reducing punitive award and implementing fixed ratio for future punitive award determination).

144. *See* Adam H. Charnes & James J. Hefferan Jr., *Mostly Pro-Corporation*, NAT'L L.J., Aug. 15, 2008, at 9, 11 (suggesting corporate favoritism in judiciary).

145. *See Exxon Shipping Co.*, 128 S. Ct. at 2611 (asserting jurisdiction over case).

146. *See* E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 860 (1986) (describing judicial decision making relevance in maritime law creation).

147. *See Exxon Shipping Co.*, 128 S. Ct. at 2618 (claiming unrestricted authority in creating maritime law).

148. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (reiterating primary authority of legislative enactments).

icy excluding judicial action.[149] Courts are not free to direct and restrict remedies at will simply because of a lack of congressional specificity.[150] Despite this check on judicial action, the Court insisted that congressional silence and inaction prompted judicial initiative and created the need for a quantified rule.[151]

The Court determined that Congress handed the judiciary complete responsibility for formulating flexible and fair maritime remedies, referring to its decision in *U.S. v. Reliable Transfer Co.* (*Reliable Transfer*).[152] In that case, however, there was no statutory or judicial precept that precluded changing the rule of divided damages.[153] In fact, evidence supported by subsequent history eroded the rule's foundation resulting in manifestly unfair results.[154] Additionally, the Court's decision to abrogate the old rule in favor of proportional liability in *Reliable Transfer* finally brought the case in line with historic congressionally-enacted rules established for personal injury cases in admiralty law.[155] Further, the holding in *Reliable Transfer* was supported by a consensus among the world's maritime nations and the views of respected scholars and judges advocating a need for international harmonization.[156]

Unlike *Reliable Transfer*, no comparable consensus has developed with respect to a need for the creation of a rigid ratio for punitive damages in admiralty law.[157] In *Exxon Shipping Co.*, the Court was not "in familiar waters" because the need for similar punitive awards against corporate giants, such as Exxon, has rarely

149. *See Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 392 (1970) (emphasizing legislature's broader messages).

150. *See id.* at 378 (bringing attention to judicial limitations).

151. *See Exxon Shipping Co.*, 128 S. Ct. at 2635 (Stevens, J., dissenting) (stating Court must exercise judicial restraint when Congress is silent unless Court offers special justification).

152. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975) (rejecting respondent's argument that it is up to Congress, not Court, to determine new rule of damages in maritime collision cases).

153. *See id.* (holding admiralty rule of divided damages should be replaced by rule requiring, when possible, allocation of liability for damages in proportion to relative fault of each party).

154. *See id.* at 411 (overturning decision which established rule of divided damages). The Court adopted a rule of proportional liability in maritime tort cases, an illustrative example of the Court's power to craft flexible and fair remedies in the law maritime. *Id.*

155. *See id.* (referring to 46 U.S.C. § 688 (2006)).

156. *See id.* at 403-04 (pointing out United States is now virtually alone among world's major maritime nations in not adhering to Brussels Collision Liability Convention with rule of proportional fault).

157. *See* Robertson, *supra* note 62, at 160-65 (referring to absence of consensus with respect to need to create fixed mathematical determination of punitive awards).

arisen in the maritime context.[158] Although the case did not involve a typical maritime punitive claim, the Court nevertheless failed to comprehensively discuss the general backdrop of federal legislation relevant to punitive damages in maritime law.[159] Existing statutes such as the CWA, OPA and TAPAA do not specifically address the issue of punitive damages in this situation, and Congress has given no firm indication of its intent to limit the judicial allowance of punitive damages in admiralty.[160] With respect to the CWA, the Court acknowledged the lack of congressional intent to occupy the entire field of pollution remedies, but failed to give due consideration to the lack of congressional intent to set a fixed punitive damage ratio.[161] Congress, in the exercise of its legislative powers, is free to say "this much and no more,"[162] and the Supreme Court, acting in its capacity as an admiralty court, is not free to go beyond these expressed or implied limits.[163]

The Limitation Act is relatively more explicit on the issue, as it specifically authorizes the limitation of punitive awards in cases of imputed fault.[164] Exxon, however, evidentl y did not invoke the Act's protection because it recognized the futility of attempting to establish that it lacked privity or knowledge of Captain Hazelwood's drinking.[165] Even if Exxon had been successful in using the Act's protection, there is evidence that in passing TAPAA, Congress intended to prevent the application of the Limitation Act to the trans-

158. *See* Christopher Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law*, 87 NEB. L. REV. 197, 269 (2008) (noting despite signs of corporate favoritism, corporations have not put themselves in situations warranting massive punitive awards being levied against them).

159. *See* Robertson, *supra* note 62, at 161-65 (discussing varied application of punitive damages in maritime law).

160. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2636 (2008) (Stevens, J., dissenting) (pointing to dearth of congressional intent indicating punitive damage restrictions).

161. *See* Clean Water Act, 33 U.S.C. §§ 1251-1397 (1972) (preempting certain remedies, but not addressing punitive damages).

162. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 24 (1990) (bringing attention to legislative discretion).

163. *See id.* (highlighting judicial limitations).

164. *See* 46 U.S.C. § 30505 (2006) (stating shipowners are entitled to limit liability if negligence or unseaworthy condition which caused loss occurred without privity and knowledge of owner).

165. *See Exxon Shipping Co.*, 128 S. Ct. at 2636 (Stevens, J., dissenting) (pointing to Exxon being unable to seek protection under Limitation Act). Exxon's Chairman publicly acknowledged that executives had known about Hazelwood's alcoholism and that it had been a "gross error" to assign him to the safety-sensitive position of ship master. *Id.* He called the assignment a "bad judgment . . . on a going in basis." *Id.*

Alaskan transportation of oil in order to promote heightened care in that region.[166]

TAPAA is another statute that specifically caps strict liability, yet does not restrict or limit the availability of punitive damages.[167] Notwithstanding the inability of the Limitation Act to resolve the case at bar, the fact that Congress chose to withhold corporate giants such as Exxon from the Act's generous protection, provides evidence against the Court extending such a benefit.[168] These federal statutes, taken as a whole, make it clear that there is no present public policy that supports the limiting of punitive damages in the corporate maritime context.[169]

As explained in Justice Stevens' dissent, evidence that Congress has affirmatively chosen not to restrict the availability of punitive damages favors judicial restraint, absent special justification.[170] Although Exxon made a considerable clean-up effort and the Exxon Valdez ship is prohibited from entering The Sound, there is no special justification which mandates limiting punitive damages to such an extent that the very purpose of such damages would be called into question.[171] A $500 million award for what the appeals court called "egregious" conduct, against a company that earned more than $40 billion in 2007, is unlikely to either deter or punish the company.[172]

Instead of "embarking on a new law-making venture," the majority should have approved the application of the abuse-of-discretion standard and affirmed the lower court's ruling.[173] As no constitutional issue was raised in this case, the role of the appellate

166. *See* TAPAA, 43 U.S.C. § 1651-1656 (2006) (elaborating on restricted application concerning Limitation Act).

167. *See id.* (lacking reference to prohibitions or limitations on punitive damage awards).

168. *See Exxon Shipping Co.*, 128 S. Ct. at 2636 (Stevens, J., dissenting) (referencing Limitation Act's lack of corporate protection provision).

169. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 390 (1970) (emphasizing existing statutes make clear that there is no present public policy against allowing recovery for wrongful death).

170. *See Exxon Shipping Co.*, 128 S. Ct. at 2636 (Stevens, J., dissenting) (advocating judicial restraint).

171. *See* Lewis Goldshore & Marsha Wolf, *The Mother of All Oil Spills: U.S. Supreme Court Clarifies Punitive Damages*, 193 N.J. L.J. 473, 473, Aug. 13, 2008 (noting despite catastrophic repercussions, Exxon was minimally and negligibly affected).

172. *See id.* (contrasting punitive awards with Exxon's net profits to reveal insignificant relevance).

173. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001) (defining abuse of discretion standard). *See also Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) (discussing determination of reasonableness under abuse of discretion approach).

system was merely to review the initial award under an abuse-of-discretion standard.[174] Under that approach, a $2.5 billion punitive award against Exxon does not appear to be "unreasonable," considering the gravity of the wrong and the need to deter similar wrongful conduct.[175] Moreover, since there is an absence of Congressional intent and no special justification for limiting the damages, the Court should not have taken matters into its own hands by adopting a judicially imposed fixed ratio. By presuming a need for action, the Court in *Exxon Shipping Co.* appeared unaware of the constitutional relationship between the judiciary and Congress.[176]

B. Mayday: Maritime Law's Unique Composition

Although governed by federal common law, maritime law has always been distinct from, and has developed principles unknown to, the common law.[177] Despite not undertaking a constitutional analysis, the Court relied heavily on its prior due process pronouncements regarding punitive damages, and concluded, as a matter of maritime law, that high ratios are problematic.[178] In an attempt to justify creating a low ratio, the Court emphasized the need to reduce "the stark unpredictability of punitive awards."[179] The Court, however, has previously sacrificed its interest in certainty and simplicity for the greater interest of promoting fairness and justice.[180] Additionally, the law of admiralty does not seek to

174. *See Cooper Indus.*, 532 U.S. at 424 (holding when "no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's determination [concerning the size of the award] under an abuse of discretion standard").

175. *See* In re Exxon Valdez, 236 F. Supp. 2d 1043, 1045 (D. Alaska 2002) (explaining district court's holding). The district court, after overseeing the government's criminal prosecution of Exxon and later presiding over lengthy trial, concluded that the jury reasonably could have determined that a multi-billion dollar punitive award was necessary to achieve punishment and deterrence. *Id.*

176. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 24-27 (1990) (outlining fundamental relationship between Congress and judiciary).

177. *See* WILLIAM TETLEY, *Maritime Law as a Mixed Legal System*, 23 TUL. MAR. L.J. 317, 317 (1999) (describing maritime law's unique approach to proportionate fault, attachment, ship-owner's liability, etc.).

178. *See* Lester Sotsky & Daniel J. Stuart, *Toxic Tort Litigation: Punitive Post-"Exxon"?*, NAT'L L.J., Sept. 29, 2008, at 12, 12 (discussing faulty reasoning in *Exxon Shipping Co.* and possible impacts).

179. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008) (attempting to advocate need for predictability).

180. *See* McDermott, Inc. v. AmClyde, 511 U.S. 202, 202 (1994) (concluding promotion of justice was of primary importance). Thus the interest in certainty and simplicity served by the old rule was outweighed by the interest in fairness promoted by the proportionate fault rule. *Id.*

achieve uniformity of process beyond the rudimentary elements of procedural fairness.[181]

Yet, the perceived need for predictability in common law punitive damage assessments does not generally translate into a parallel need in maritime law.[182] Moreover, the Court failed to provide even one example of a judicially-imposed precise ratio because no previous court sitting in admiralty has recognized the need for more stringent standards.[183] The Court, therefore, did not discern an adequate reason for extending a need to limit common law punitive damages to admiralty; a system of law that is, in many ways, different from common law.[184]

Additionally, as Justice Stevens' dissent points out, the majority failed to give full credence to maritime law's less generous scheme of compensatory damages.[185] Unlike land-based tort cases, general maritime law limits the availability of compensatory damages by recognizing certain injuries as only partially compensable, if at all.[186] For example, maritime law forbids recovery for many economic injuries, but all emotional injuries.[187] This unique feature of maritime law supports the contention that maritime compensatory awards may require supplementation.[188] Although primarily aimed at deterrence and punishment, the doctrine of punitive damages has its foundation in recognizing a need to compensate injuries

181. *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 (1994) (outlining goals of admiralty law).

182. *See* TETLEY, *supra* note 177, at 319 (discussing distinctive nature of American maritime law, which adopts benefits from both civil and common law heritages but is generally different in nature).

183. *See Exxon Shipping Co.*, 128 S. Ct. at 2636 (Stevens, J., dissenting) (bringing attention to majority's lack of support). *See also* Robertson, *supra* note 62, at 88-115, 128-38 (describing maritime decisions upholding punitive damage awards).

184. *See generally Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 375-90 (1970) (distinguishing between admiralty law and common law).

185. *See Exxon Shipping Co.*, 128 S. Ct. at 2635 (Stevens, J., dissenting) (drawing necessary attention to maritime law's composition).

186. *See id.* (highlighting insufficiently compensated harms). *See also* Paul S. Edelman, *Evolving Issues of Compensatory Damages in Maritime Law*, 2003 ASS'N OF TRIAL LAW. OF AM. 35 (providing overview of injuries not accounted for by compensatory damages in maritime law).

187. *See* Getty Ref. & Mktg. Co. v. MT FADI B, 766 F.2d 829, 833 (3d Cir. 1985) (holding injuries not compensable); *see also* Robins Dry Dock & Repair v. Flint, 275 U.S. 303, 303 (1927) (disallowing awarding of damages). *See* Louisiana ex rel. Guste v. M/V TESTBANK, 752 F.2d 1019, 1035 (5th Cir. 1985) (Wisdom, J., dissenting) (noting maritime law restricts reach of foreseeability and proximate cause).

188. *See* Edelman, *supra* note 186, at 11 (discussing various instances of maritime compensatory regime ignoring injuries).

which ought to be redressed.[189] The Court's quantified limit on punitive awards, therefore, prevents the ability of punitive damages to compensate for those injuries that even compensatory damages fail to address.[190]

More importantly, the Court failed to acknowledge that reckless oil spills exact a human toll; one that may take years to measure and even longer to litigate.[191] Consequently, a fixed ratio might not be compatible with injuries of this nature.[192] The Exxon Valdez oil spill permanently "disrupted the lives and livelihood of thousands of people in the region."[193] Commercial fishermen were unable to recover anything for the profound emotional impact the spill had on them and their families.[194] Local Native Americans were also left uncompensated for the impact on their subsistence cultures, as the spill destroyed their traditional way of life.[195] Furthermore, maritime law did not allow any compensatory damages for the "price diminishment in fisheries that were not oiled, diminished value of limited entry fishing permits, damages to un-oiled land, or diminution of market value owing to fear or stigma."[196] The initial $2.5 billion punitive award, therefore, may have better reflected not only these real and foreseeable effects, but also the more remote and intangible effects of Exxon's conduct.[197]

The Court's contention that the award was "excessive" and larger than previous maritime awards simply ignores the unprecedented scope of harm that Exxon's highly reprehensible conduct inflicted.[198] The overall figure also appears large because this case, at Exxon's request, proceeded as a mandatory class action, which

189. *See* Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 421 (1998) (elaborating on theory of punitive damages).

190. *See Exxon Shipping Co.*, 128 S. Ct. at 2635 (Stevens, J., dissenting) (objecting to majority's reduction in punitive award).

191. *See* Rydstrom, *supra* note 95, at 346 (highlighting unique nature of oil pollution disasters).

192. *See id.* (relaying various approaches to calculating potential remedies).

193. For a description of the economic ramifications of the Exxon Valdez Oil Spill, see *supra* note 28 and accompanying text.

194. *See* Markey, *supra* note 28 (empathizing with oil spill victims whose livelihood was destroyed).

195. *See id.* (noting devastating harm Native Alaskans suffered in aftermath of spill).

196. Exxon Shipping Co. v. Airport Depot Diner, 120 F.3d 166, 167 n.3 (9th Cir. 1997) (stating maritime law's compensatory scheme did not account for certain juries caused in wake of spill).

197. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2635 (2008) (Stevens, J., dissenting) (objecting to reduction in punitive award).

198. *See* Goldshore & Wolf, *supra* note 171, at 510 (discounting *Exxon Shipping Co.* reasoning).

brought together the claims of more than thirty-two thousand claimants.[199] Contrary to the Court's assertion, the average amount of compensated economic harm per class member was not "substantial," and averaged less than $15,500.[200] The common law has long recognized, however, that "punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved."[201] Even among the states with statutory limitations on punitive awards, most do not apply to awards under one hundred thousand dollars per victim; several others even suspend existing limitations in cases involving grave harm.[202]

The Supreme Court is responsible for vindicating the unique policies of maritime law, but that responsibility should not be executed at the cost of ceding to the inconveniences and rigidity created by a fixed ratio.[203] A court's lawmaking authority, as Justice Holmes famously explained, is only "interstitial in nature. . . [i]t does not license judges, as a legislature might do, to undertake major reallocations of costs and risks."[204] Consequently, the Court should not have immunized Exxon, imposed a permanent ratio that is not conducive to maritime law's unique nature, or underestimated the ability of punitive damages to prevent and deter future maritime disasters that result in cascading harm.

VI. IMPACT

The Supreme Court, acting in its capacity as an admiralty court, has a duty to perceive the impact and potential consequences of new rulemaking.[205] This "something for everyone" decision has the potential to greatly impact future cases in both maritime law

199. *See* Elizabeth J. Cabraser & Robert J. Nelson, *Class Action Treatment of Punitive Damages Issues*, 2 CHARLESTON L. REV. 407, 408-20 (2008) (elaborating on procedural and substantive differences in punitive award deliberations when involving class action suits).

200. *See Exxon Shipping Co.*, 128 S. Ct. at 2626 (deeming reduced award to be sufficient and reasonable).

201. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting) (noting punitive awards represent integral jury opinions).

202. *See, e.g.*, MISS. CODE ANN. § 11-1-65(3)(d) (West 2004) (suspending limitation when intoxicated harm results).

203. *See* Brown, *supra* note 82, at 249 (discussing inappropriateness of mathematical formula in certain situations).

204. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 220 (1917) (Holmes, J., dissenting) (commenting on court's lawmaking authority).

205. *See Moragne v. State Marine Lines*, 398 U.S. 375, 392 (1970) (drawing focus to Supreme Court's duty when acting in admiralty capacity).

and general common law.[206] If viewed in isolation, the Court's decision can be narrowly construed as a maritime decision, which is inapplicable outside the boundaries of admiralty law.[207] It is more likely, however, that the decision will have far-reaching consequences.[208] Although the extent to which this decision may apply to federal cases remains to be seen, it is anticipated that the Court's reasoning will be persuasive outside the maritime context.[209]

Defendants will likely argue that because the Court's reasoning relied heavily upon its prior due process pronouncements, its conclusion should apply to a broad range of cases.[210] The Court's embrace of a one-to-one ratio as an acceptable norm, affords lower courts a solid, new platform in support of reducing larger awards on constitutional or other grounds.[211] State judges, who find the Supreme Court's reasoning instructive and influential, may make their own common law assessments of reasonableness, thereby overstepping the boundaries created by the Constitution.[212] Many environmental law scholars also wonder whether the Court's decision to be a "harbinger of shrinking punitive awards," will dampen judicial approval of punitive awards in environmental, toxic tort and other actions, where unrestrained damages are both appropriate and justified.[213]

This case may also have an effect outside the courtroom by shaping which cases are settled and which go forward to litiga-

206. *See* Sotsky & Stuart, *supra* note 178, at 12 (noting Justice Souter's "something for everyone" opinion will have lasting and far-reaching effects).

207. *See id.* (discussing various potential interpretations of *Exxon Shipping Co.* decision).

208. *See* Tony Mauro, *At Issue in "Exxon" Case: How Decisive Is Stare Decisis?*, LEGAL TIMES, Mar. 4, 2008, *available at* http://www.law.com/jsp/article.jsp?id=1204544927227 (noting decision can be applied to other areas of federal common law where punitive damage awards are allowed).

209. *See* RICHARD L. BLATT, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE 1.3.B. (2006) (claiming that Court's finding will extend beyond current maritime law). Specifically, commentators note that "punitive damages may be contrasted with compensatory damages, special damages, contract damages, restitution, or equitable damages, which, in contrast to punitive damages, are measured by difference in the position of the party after the wrong as compared to that party's position before the wrong." *Id.*

210. *See* Sotsky & Stuart, *supra* note 178, at 2 (deliberating impact of *Exxon Shipping Co.* in federal common law).

211. *See id.* (discussing potential reliance by lower courts).

212. *See, e.g.*, Hayduk v. City of Johnstown, 580 F. Supp. 2d. 429, 484 (W.D. Pa. 2008) (citing reasoning in *Exxon Shipping Co.*); *see also* Leavey v. Unum Provident Corp., 295 F. App'x 255, 259 (9th Cir. 2008) (discussing reasoning in *Exxon Shipping Co.*).

213. *See* Sotsky & Stuart, *supra* note 178, at 1 (speculating about impact of *Exxon Shipping Co.* in other maritime matters).

tion.[214] With punitive awards being determined on the basis of compensatory damages, plaintiffs will tend to only bring punitive claims involving substantial and quantifiable compensatory damages.[215] Without the prospect of unrestrained punitive damages, it will not make economic sense for plaintiffs' lawyers to invest in modest compensatory damage cases.[216] Additionally, the "diminishing prospect of large awards" may discourage future class action plaintiffs from availing themselves of the advantages of the appellate system.[217] As *Exxon Shipping Co.* significantly decreased the initial jury award, public faith in the judiciary may have also been shaken.

On the other hand, conventional wisdom holds that defendants are more likely to settle when facing potential runaway verdicts, such as massive punitive damage awards.[218] The hope of avoiding trial through settling will certainly dictate future defendants' decisions "whether to litigate and how vigorously."[219] Big corporations such as Exxon, may also be encouraged to elongate suits brought against them so that damages can be eventually reduced to merely another cost of doing business. Unlike the Alaskan fishermen and their families, who had to put their lives on hold only to end up with an additional fifteen thousand dollars in punitive damages, Exxon's situation actually improved over time.[220] If the Supreme Court had affirmed the Ninth Circuit's award, each claimant would have received approximately seventy-six thousand dollars; a figure totaling only about three weeks of Exxon's 2007 net profits.[221] The potential, or lack thereof, for punitive damages, may, therefore, become the driving factor in upcoming litigation strategies.[222]

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214. *See id.* (providing foresight as to implications of *Exxon Shipping Co.* in litigation in general).

215. *See* Hylton, *supra* note 189, at 421 (elaborating on theory of punitive damages).

216. *See id.* at 429 (discussing influence of ratios on litigation options).

217. *See* Sotsky & Stuart, *supra* note 178, at 1 (considering impact of *Exxon Shipping Co.* on adversarial system).

218. *See id.* (referencing defendants' motivations behind settling).

219. *See id.* (providing overview of defendants' possible consideration post-*Exxon Shipping Co.*).

220. *See* Joel Connelly, *Exxon's slap on the wrist*, SEATTLE POST-INTELLIGENCER, June 25, 2008, *available at* http://blog.seattlepi.nwsource.com/seattlepolitics/archives/142017.asp (describing Exxon's changing liability).

221. *See* Exxon Valdez Oil Spill Numbers, *supra* note 2 (providing statistical data for Exxon Valdez oil spill).

222. *See* Sotsky & Stuart, *supra* note 178, at 1 (foreseeing punitive damages dictating major portions of litigation system).

By constructing a rigid ratio, the Supreme Court ignored the widespread harm that typically accompanies maritime disasters and further underestimated the vital role punitive damages play in preventing the repetition of such disasters.[223] The Court's decision prevents future tortfeasors from having to internalize the complete consequences of their conduct, no matter how egregious.[224] Since the reach of this decision is uncertain, however, the Court's attempt to promote systemic consistency may be futile. Only time will tell whether or not the Supreme Court's decision will have these and other far-reaching consequences.

While these issues continue to be debated amongst environmental activists, Supreme Court reporters and the public at large, twenty-six thousand gallons of oil still remain at the bottom of the Sound.[225] Yet, one fact that is beyond debate is that the Exxon Valdez oil spill is the United States' worst anthropogenically-caused environmental tragedy.[226] Although the Court's conclusion in this volatile legal saga certainly has its merits, the penultimate principle that, "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy," if followed in spirit, would have found a welcome echo in the world's collective conscience.[227] For now, the Supreme Court's verdict continues to be a low-tide mark in judicial history.

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223. *See* DeGravelles, *supra* note 66, at 50 (discussing punitive damages' concomitant role in maritime law).

224. *See* Sotsky & Stuart, *supra* note 178, at 12 (elaborating on serious consequence of *Exxon Shipping Co.* decision).

225. *See* Encyclopedia of Earth, Exxon Valdez Oil Spill, http://www.eoearth.org/article/Exxon_Valdez_oil_spill (last visited Mar. 14, 2009) (highlighting present reminder of Exxon disaster).

226. *See* Markey, *supra* note 28 (highlighting point of agreement concerning spill).

227. *Moragne v. State Marine Lines*, 398 U.S. 375, 387 (1970) (appealing to core principles in admiralty law).

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